

Tax Update – May 2022

Inside

From Government	2
The election and the Federal budget	2
From the Regulators	2
GST fraud warning	2
Section 100A update.....	3
Donations of cryptocurrency.....	3
GST issues for buy-now, pay-later providers	4
Change to SG rate	5
Resumption of offsetting refunds against old tax debts	5
ATO priority areas	5
Rulings, determinations & guidance	6
Floods, fire, COVID-19 and business losses	6
Cases	6
Cash flow boost integrity rules	6
Legislation	7
Lapsed legislation.....	7

What now post-election? What happens to the Budget initiatives yet to be enacted and the future of tax reform?

And, after an ‘interesting’ few years for business - floods, fire, COVID-19 - we look at how the ATO is making it easier to utilise business losses.

Plus, heading into the new tax season, the ATO has released its 2022 guidance. We take you through the important bits.

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From Government

The election and the Federal budget

The outcome of the Federal election leaves some question marks over certain tax measures that were announced in the recent 2022-23 Federal Budget, including the:

- skills and training boost for small business
- technology investment boost for small businesses and
- proposed expansion of the patent box system.

It is important for practitioners to remember that no legislation has been passed in relation to these measures and it isn't yet clear whether these measures will become law. We are still waiting on confirmation of whether the Australian Labor Party will proceed with these measures.

The new Treasurer, the Hon Jim Chalmers MP, has indicated that an updated Budget for the 2022-23 year will be provided in October 2022. Hopefully we will receive some clarity on the measures referred to above before October.

From the Regulators

GST fraud warning

The ATO has issued several warnings and media releases concerning large scale GST fraud schemes exceeding \$850 million. The schemes involving taxpayers setting up an ABN without operating a business and then submitting a fictitious BAS to obtain a GST refund.

The schemes are often promoted through online ads (e.g., on social media platforms), that attempt to draw people in with the promise of easy GST refunds.

The ATO is encouraging tax agents to be on the lookout for unusual transactions or requests for unusual advice from clients. This may include being contacted by clients who want you to help them out of a sticky situation, or clients who think they've had their identity compromised.

If you have a client who thinks they've been involved in these arrangements (potentially inadvertently), they are encouraged to come forward and advise the ATO before being contacted. A dedicated phone number has been setup for this purpose - **1300 130 017**. This can potentially reduce the negative impact for any client who may be at risk. Voluntary disclosures can result in reduced penalties.

The ATO has also stated that backdating a business registration so that you can apply for a refund will flag the client as high risk in ATO systems. This could be relevant for clients who may not have realised they were required to register for GST from an earlier point in time.

More information

- [Help your clients to rectify GST fraud](#)
- [GST refund fraud attempts](#)

Section 100A update

The ATO has released some further comments in relation to the controversial draft guidance on section 100A. In seeking to provide reassurance to tax agents and taxpayers, the ATO has stated that:

“The vast majority of small businesses operating through a trust are not operating in a way that will attract section 100A. A distribution to an adult child who has a low marginal tax rate will not attract section 100A where they simply receive or enjoy the benefit of their distribution”.

Further, the ATO has indicated that it is not concerned when profits from the family business are appointed to members of the family who work in the management of the business, with the family member choosing to reinvest the profits back in the business.

The ATO reiterates that section 100A can only apply when income is appointed to a beneficiary, but this relates to an agreement under which a payment or other benefit relating to this income will be provided to another individual or entity (who will typically be subject to a higher tax rate than the beneficiary) and where a purpose of that agreement is that someone will pay less income tax.

Addressing concerns about retrospective application of the draft guidance, the ATO confirms that it will not be pursuing taxpayers who entered into arrangements between 1 July 2014 and 30 June 2022 and who concluded in good faith that section 100A would not apply to them based on the ATO’s earlier 2014 guidance. Having said that, the earlier guidance is similar in some respects to the ATO’s more recent guidance so it is important to carefully consider

whether the earlier guidance would provide any real protection to specific client scenarios.

Despite the ATO’s comments, practitioners will still need to ensure that clients are aware of the risks associated with section 100A and the scenarios that are likely to attract more attention from the ATO.

More information

- [Update on draft guidance on trust reimbursement agreements and unpaid present entitlements](#)

Donations of cryptocurrency

The ATO has released some guidance on key issues to keep in mind when clients seek to claim deductions for donating cryptocurrency assets to charities. The starting point in these cases is to confirm that the entity receiving the assets is endorsed as a deductible gift recipient (DGR) and to establish whether the not-for-profit organisation is set up to accept cryptocurrency assets.

As cryptocurrency is treated as a type of property for the purpose of the deduction rules for gifts this makes the process more complicated compared with situations where clients are making cash donations.

In addition to considering whether clients can claim a deduction for a donation of cryptocurrency assets, it is important for clients to recognise that the donation might trigger CGT implications. If the client is transferring the assets to another party for no consideration then the market value substitution rules will need to be considered in calculating the capital gain or loss on disposal.

More information

- [Donating crypto assets](#)

GST issues for buy-now, pay-later providers

Specific guidance on the GST implications for buy-now, pay-later providers has been published on the ATO legal database. The key issue in this area is determining the nature of the supplies made by these businesses and the impact this might have on claiming input tax credits.

The ATO indicates that buy-now, pay-later providers would typically make two common types of supplies:

- Input taxed supplies of credit when a customer initiates the provider's provision of payment to the merchant in exchange for the customer's obligation to repay the provider at a later date.
- Taxable supplies of services to merchants in enabling them to accept payment using the provider's facilities, with the provider then becoming liable to make payment to the merchant (and the customer's obligation to pay the merchant being discharged). These supplies are made in exchange for merchant fees, charged on a purchase transaction-by-transaction basis.

Input tax credits are generally not available on acquisitions to the extent that they relate to the making of input taxed supplies. The main exception to this is where the taxpayer does not exceed the Financial Acquisitions Threshold or where an acquisition relating to financial supplies qualifies for a reduced input tax credit.

The guidance includes examples of common expenses incurred by businesses in this area:

Only relating to input taxed supplies

- Debt collection costs
- Advertising to originate new credit contracts
- Customer service for customers
- Merchant fees and processing costs for recovering payments from customers

- Customer credit checks / authorisation and fraud tools

Acquisitions that relate only to taxable supplies

- Advertising to originate new merchant agreements
- Customer service for merchants
- Costs for integration with merchant systems

Acquisitions that relate to both supplies

- Processing costs for payments to merchants when customers initiate the provision of credit

In cases involving businesses that make input taxed financial supplies, the critical issue for acquisitions that relate to both input taxed and taxable or GST-free supplies is determining an apportionment method that provides a fair and reasonable reflection of the extent of the relationships between those acquisitions and supplies.

On this point, the ATO considers that the use of a revenue-based apportionment methodology gives rise to a significant risk that input tax credits may be overclaimed. Due to the nature of the business where complying customers are not charged interest, there is typically limited input taxed revenue to reflect the extent to which acquisitions relate to input taxed supplies of credit. However, the ATO doesn't really provide an example of a low-risk approach.

Tax practitioners with clients in the buy-now, pay-later space should review the guidance in detail to confirm whether their clients are accounting for GST correctly and to assess the likelihood of the ATO seeking to query or challenge the existing GST treatment.

More information

- [GST considerations for buy-now, pay-later providers](#)

Change to SG rate

The ATO has provided a reminder that the superannuation guarantee rate will increase from 10% to 10.5% on 1 July 2022. Employers will need to use the new rate to calculate superannuation guarantee contribution amounts on payments they make to employees on or after 1 July, even if some or all of the pay period is for work performed before 1 July.

It should also be noted that from 1 July 2022 employees can be eligible for superannuation guarantee contributions regardless of how much they earn.

More information

- [Get ready for super changes from 1 July](#)

Resumption of offsetting refunds against old tax debts

The ATO has indicated that from June 2022 it will recommence offsetting client tax refunds or credits against tax debts that are on hold.

Debts on hold are previous tax debt amounts that the ATO has not undertaken any recent action to collect. These debts don't show up as an outstanding balance on the client's account as they have been made 'inactive'.

In these cases the ATO has the ability to use a tax refund or credit from one account to pay off an outstanding debt on the same or another account. In some cases, the ATO can also use credits that clients receive from other government agencies to pay off a tax debt.

To check if your clients have a non-pursued debt, follow the steps outlined in [debts on hold](#).

More information

- [Resuming offsetting of debts on hold](#)

ATO priority areas

The priority areas for the ATO for the upcoming "Tax Time" 2022 have been announced. The ATO will be focusing on:

- Record-keeping
- Work-related expenses
- Rental property income and deductions, and
- Capital gains from crypto assets, property and shares.

Not many surprises there.

When it comes to the ATO's focus on record keeping and work-related expenses the ATO provides a reminder on the three 'golden rules' for claiming deductions:

- The taxpayer must have spent the money and not been reimbursed.
- If the expense is for a mix of income producing and private use, taxpayers can only claim the portion that relates to producing income.
- They must have a record to prove it.

Tax practitioners should also be aware that the 'shortcut' method for claiming home office running costs is still available for the 2022 year. While this method can potentially reduce the compliance burden for clients and practitioners, it won't necessarily provide the best outcome for clients.

More information

- [Four priorities for the ATO this tax time](#)

Rulings, determinations & guidance

Floods, fire, COVID-19 and business losses

PCG 2022/D2

When an individual makes a loss from a business that is carried on as a sole trader or in partnership with others, it is necessary to consider whether the loss can be applied against income from other sources. The non-commercial loss rules are used for this purpose. In situations where the taxpayer is not able to pass the 'normal' tests to utilise their business losses against other income there is an opportunity to seek the Commissioner's discretion to enable the losses to be used.

One of the situations where an individual can seek the Commissioner's discretion on the use of their tax losses is where the business activity was affected by special circumstances that were outside the control of the operators of the business.

In recent years, special circumstances such as flood, bushfire and COVID-19 may have led to individuals generating losses from their business activities and might have made it difficult for the individual to pass the non-commercial loss rules. The draft PCG sets out a safe harbour position which allows taxpayers to utilise the losses as if the Commissioner had exercised discretion without needing to apply for this. The ATO intends that the safe harbour approach will apply for the 2020, 2021 and 2022 income years.

To qualify for the safe harbour, a business must meet all of the following conditions:

- Satisfy the \$250,000 adjustable income test;
- Make a loss from the business activity;
- The business activity was affected by one or more of the following events
 - i. flood (including where receiving ATO flood support);
 - ii. bushfire (including where the business qualified for an ATO bushfire lodgment and payment deferral); or
 - iii. a government-imposed lockdown, business closure and/or restriction due to COVID-19;
- The relevant event meant that the taxpayer was not able to carry on the business activity, or unable to carry it on to the same scale as was usual, or some or all of the business' customers were not able to access the business activity, or access it in the same way as usual;
- Have not applied for a private ruling requesting the Commissioner exercise the 'special circumstances' discretion in relation to your business activity in the relevant income year; and
- The taxpayer has evidence to support that they are eligible for the safe harbour.

If the taxpayer is not able to rely on the safe harbour approach they can still potentially apply to the Commissioner to seek discretion in connection with the use of business losses against other income.

Cases

Cash flow boost integrity rules

Twin Rivers Developments Pty Ltd v FC of T [2022] AATA 887

This case considered the operation of the integrity provisions relating to the cash flow boost payments that were made to many entities during 2020 in connection with COVID-19. Ultimately, the AAT found that the integrity provisions did not apply to the taxpayer in relation to the March 2020 quarter (meaning the

company was eligible for the cash flow boost payments), but the integrity provisions applied to deny the cash flow boost payments for the company for the June 2020 quarter.

For around five years prior to the commencement of the cash flow boost program the company paid no wages to its employees. Following the announcement of the cash flow boost program the company disclosed that it had paid wages to the director of the company and his wife in the March 2020 and June 2020 quarters. No further wages were paid by the company after the June 2020 quarter.

This unusual pattern of wage payments led the ATO to review the situation. The Commissioner took the view that no wages had actually been paid in the relevant quarters. Alternatively, if wages had been paid then the Commissioner argued that the integrity provisions contained within the cash flow boost program were triggered to deny access to cash flow boost payments.

The Tribunal considered the evidence that was presented and was convinced that wages were in fact paid by the company in the March 2020 quarter. This included evidence of payslips being issued by the company, the recording of the payments as wages in the company's accounting records and the consistent treatment adopted by the employees in their personal tax returns. The AAT also accepted the director's explanation for the timing of the wage payments and that they were made before the Government announced the cash flow boost program.

However, the AAT was not convinced that the company was entitled to cash flow boost payments for the June 2020 quarter. The evidence relating to the wages paid in this quarter was less convincing, especially given that it seemed like the wages were paid as part of a

round robin arrangement involving the employees transferring funds into the company around the same time they received the wages from the company. As these payments were made after the announcement of the cash flow boost measure and there was little to explain the quantum and timing of the payments the Tribunal agreed with the Commissioner that the payments were made with the dominant purpose of obtaining cash flow boost payments and that the integrity rules were triggered.

As with many other disputes that end up before the AAT or Courts, a lack of clear and contemporaneous documentation made it difficult for the taxpayer to support the position they were taking. While this case deals specifically with the integrity provisions contained within the cash flow boost rules, it is important to remember that unusual transactions can lead to unwanted ATO attention when clients are seeking access to other concessions within the tax system, such as the small business CGT concessions.

Legislation

Lapsed legislation

As a result of the 2022 federal election, legislation which was before the Parliament at that time has lapsed and will not proceed unless it is subsequently re-introduced by the newly formed government. It seems that the only notable tax Bill which lapsed was the [Treasury Laws Amendment \(Enhancing Tax Integrity and Supporting Business Investment\) Bill](#) – which contained the changes which proposed to allow taxpayers to self-assess the effective life of certain intangible depreciating assets rather than using the statutory effective life determined by the Commissioner.