Coster Galgut
Chartered Accountants

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TAX U PDATE – NOVEMBER 2022

What did I miss?

The transition period for Director ID numbers ends today. Just in time, the ABRS have stated that they will not take action against directors who have not met the 30 November deadline but have applied by **14 December 2022**. And, the Commissioner has clarified the position on Directors who resign on or before the 30 November transitional deadline in ABRS 2022/D1 and ABRS 2022/D2.

Parliament has also been busy delivery a series of past and present Budget announcements:

- FBT-free zero and low emissions vehicles (electric car discount)
- Skills & Training ' boost'
- Technology 'boost'
- Digital games offset
- Reduced tax rates for Pacific Australia Labour Mobility Scheme

Plus, a new PCG outlines the ATO expectations for work from home expenses from 1 July 2022.

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From Government

Share buy-back exposure draft

Treasury has released draft legislation relating to the changes that were announced in the recent Federal Budget on the tax treatment of off-market share buybacks.

Currently, the tax rules provide that a portion of the buyback price in an off-market share buyback can be recognised as a dividend in the hands of shareholder. Franking credits can potentially be attached to the dividend component of the share buyback.

The draft legislation alters the position so that no portion of the buyback price will be treated as a dividend for tax purposes if the buyback is undertaken by a listed public company. If the shareholder holds their shares on capital account, then the entire buyback price will be treated as capital proceeds for the cancellation of the shares. This is consistent with the current position for on-market share buybacks.

The amendments will also ensure that franking credits cannot be attached to distributions by listed public companies that represent consideration for the cancellation of shares in the company as part of a selective reduction of capital.

These changes only apply to listed public companies. When private companies undertake a share buyback it will still be necessary to determine the dividend / capital split of the buyback price.

More

Improving the integrity of off-market share buy-backs

Enabling Registrar to cancel ABN registration

Exposure draft legislation released by Treasury will enable the Registrar to cancel an entity's ABN in certain circumstances. The change is driven by findings from the Black Economy Taskforce that many ABNs are either out of date or held inappropriately, as well as concerns that many ABN holders are not complying with their income tax lodgement obligations.

The amendments, if enacted, will allow the Registrar to cancel an ABN if:

- An entity is required to lodge income tax returns, it has failed to lodge returns for 2 or more income years, and those returns remain outstanding; or
- The entity fails to confirm the accuracy of its details held by the Registrar in a 12-month period together with confirmation that the ABN is still required.

The Registrar would be required to reinstate the ABN registration if the entity takes action to rectify the position in either case (i.e., by arranging for lodgement of income tax returns, or by confirming the details and the need for the ABN).

More
Strengthening the ABN system

From the regulators

Part IVA and PSI

Following the finalisation of the ATO's new tax ruling on personal services income (PSI) - see *New PSI income ruling raises questions* - the ATO has updated its guidance on when the general anti-avoidance rules in Part IVA could potentially be triggered when taxpayers generate PSI through a company, trust or partnership.

When a client generates PSI through an entity the starting point is to determine whether the PSI tests are passed or failed. If the PSI tests are failed, then the net PSI amount is automatically attributed to the individual who performed the services for tax purposes. If the PSI tests are satisfied, then the PSI attribution rules should not apply, but it is still necessary to consider the potential application of the general anti-avoidance rules in Part IVA.

In broad terms, the ATO indicates that Part IVA could apply if there are factors indicating that the dominant purpose of the arrangement is to obtain a tax benefit by diverting, alienating or splitting PSI or retaining profits in an entity.

The ATO's general expectation is that the profits generated from someone's personal services will ultimately be taxed in their hands. The ATO is particularly concerned with situations where clients:

- Use a company, partnership or trust to retain profits from their personal services;
- Divert, alienate or split PSI with associates, reducing the individual's overall income tax liability; or
- Create an entitlement to deductions which would not be available to an individual providing the same services as an employee.

Previous guidance in this area indicated that Part IVA could potentially apply if PSI profits generated by a company or trust were split with others or were retained in a company, unless a genuine attempt was made to break even. However, the ATO indicated that profits generated in a genuine partnership could potentially be split according to the partnership agreement without attracting Part IVA.

Unfortunately, the ATO's updated guidance doesn't refer to genuine partnership arrangements and it isn't clear whether this represents a change in approach from the ATO.

More
General anti-avoidance rules and PSI

Division 7A and loan arrangements

Updated guidance on the application of Division 7A to loan arrangements explains many of the key issues that need to be considered when private companies lend funds to shareholders or other related parties.

While it doesn't seem like the ATO has changed its views or approach in this area, the guidance does provide some comments and examples that focus on aspects of the rules that are often overlooked. For example, the ATO provides guidance on the rules in section 109R, which can operate to disregard loan repayments in certain circumstances, including situations where:

- Loans are repaid shortly before the company's lodgment day, with the intention of directly or indirectly reborrowing a similar or larger amount from the same company; or
- Money or assets are directly, or indirectly, borrowed from a company in order to make payments, including minimum yearly repayments, for a loan from the same company.

A key exception to these rules is where the parties use a set-off arrangement involving a dividend that is taxed in the hands of the borrower.

The ATO's guide demonstrates how complex the rules in this area can be and uses some examples involving interposed entity arrangements that could trigger the rules in section 109R.

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Loans by private companies
Avoid surprises when borrowing from your company

14 December deadline for DGRs to register as a charity

Non-government deductible gift recipient (DGR) organisations need to be registered as a charity before 14 December 2022 or they will lose their DGR status.

Some organisations may be able to apply for a 3 year extension, however this depends on the DGR category of the organisation and the application also needs to be lodged by 14 December 2022.

Organisations that do not register as a charity, or who fail to apply for an extension, will lose their DGR status and donations to those entities may no longer be tax deductible for the donors.

More
Avoid losing deductible gift recipient status

Bidding for government contracts

The ATO has published guidance on the requirements for businesses intending to bid on large government contracts (over $4 million, including GST). Broadly, these businesses need to obtain a statement of tax record (STR) showing satisfactory engagement with the ATO to be successful in winning the tender.

The ATO advises that affected businesses should consider the following:

- Applying for an STR early to allow time for processing before tender closing dates or previous contract expiry dates.
- Ensuring that registration, lodgment and payment obligations are up to date.
- Being aware that more than one STR may need to be provided, depending on the nature of the business. For example, some business structures, like partnerships and trusts, require more than one STR.

More
Commonwealth Government contracts - what you need to know
Statement of tax record

Rulings, determinations & guidance

New PSI income ruling raises questions

TR 2022/3 personal services income and personal services businesses

The ATO has finalised a new tax ruling on the personal services income (PSI) rules. The ruling consolidates and updates a range of previous guidance on PSI issues,

including how to identify whether income is classified as PSI, how the personal services business (PSB) tests apply to individuals and other entities and the potential application of the general anti-avoidance rules in Part IVA when the PSB tests are passed.

In the draft version of the ruling, the ATO indicated that when dealing with a practice company or trust the Commissioner would refer to the guidelines set out in IT 2639 to determine whether the entity is generating income from personal services or from a business structure. In broad terms, this involves comparing the number of non-principal practitioners with principal practitioners. However, the final version of the ruling doesn't refer to these guidelines. Instead, the ATO indicates that the following factors would typically be considered in determining whether income is PSI or is derived from a business structure:

- The number of arm's length employees or others engaged by the entity to perform work and their relative contribution to the income earning activities;
- The existence of goodwill;
- The extent to which income-producing assets of the business are used to derive the income;
- The nature of the activities carried out;
- The size of the operation; and
- The extent to which the income is dependent upon a particular individual's own personal skills, efforts or expertise.

Unfortunately, it isn't entirely clear whether this represents a change of ATO approach to this area. The compendium released by the ATO with the final ruling simply indicates that IT 2639 is to assist tax officers and practitioners in applying other taxation rulings such as IT 2503, IT 2121 and IT 2330 (these rulings have not changed).

The final ruling should be a useful reference point for issues relating to PSI. In particular, it includes commentary on how to deal with situations where more than one individual derives PSI through the same entity, the interaction of modern technology with the personal services business tests and the potential application of the general anti-avoidance rules in Part IVA to situations involving PSI.

Working from home deductions from 1 July 2022

PCG 2022/D4 Claiming a deduction for additional running expenses incurred while working from home - ATO compliance approach

This draft practical compliance guideline sets out the ATO's proposed approach to individuals claiming deductions for the additional running costs incurred from 1 July 2002 when working from home, which is when the temporary 'shortcut' method relating to COVID-19 ceased to apply.

From 1 July 2022, the ATO states that taxpayers who are working from home can claim deductions based on their actual expenses or they can potentially adopt a revised fixed rate method which uses a rate of 67 cents per hour.

In order to use the revised fixed rate method, the taxpayer must meet the following basic conditions:

- They must be working from home while carrying out their employment duties or carrying on their business on or after 1 July 2022;
- They must be incurring specific additional running expenses which are deductible under section 8-1 as a result of working from home; and
- They must keep and retain relevant records in respect of the time they spend working from home and for the additional running expenses they are incurring.

The running expenses covered by this method are:

- Energy expenses (electricity and/or gas) for lighting, heating/cooling and electronic items used while working from home;
- Internet expenses;
- Mobile and/or home telephone expenses; and
- Stationery and computer consumables.

While no separate deduction can be claimed for the expenses listed above if using the revised fixed rate method, taxpayers can potentially still claim depreciation deductions for assets used while working from home (e.g., a computer, desk, office chair etc) along with any other running expenses not listed above, provided the normal deductibility requirements are satisfied.

Importantly, the taxpayer does not need to have a separate home office or dedicated work area set aside in their home in order to rely on the fixed rate method.

The ATO confirms that if more than one taxpayer in the household is working from home at the same time, each taxpayer will be able to apply the fixed rate method if they separately meet the requirements set out above.

The ATO indicates that it has high expectations when it comes to keeping records when taxpayers want to apply the revised fixed rate method.

For example, for the 2023-24 and later income years, the ATO expects the taxpayer to keep a record for the entire income year of the number of hours they worked from home during that income year. An estimate for the entire income year or an estimate based on the number of hours worked from home during a particular period will not be accepted.

Having said that, for the 2022-23 income year only, taxpayers need to keep:

- A record which is representative of the total number of hours worked from home during the period from 1 July 2022 to 31 December 2022; and
- A record of the total number of actual hours the individual worked from home for the period 1 January 2023 to 30 June 2023.

The PCG has only been issued in draft form at the moment and we will provide further updates when the PCG is issued in final form or if the ATO provides additional guidance in this area.

Clarity on director IDs for directors who have resigned

ABRS 2022/D1 (Corps Act) & ABRS 2022/D2 (CATSI Act)

There has been some confusion over the past few months as to whether an individual who was a director of a company between 4 April 2021 and 31 October 2021 but who resigned as a director by 30 November 2022, would need to obtain a director ID. To clarify, the Commissioner has issued two draft legislative instruments.

ABRS 2022/D1 confirms that individuals who have resigned as a director of a company (and who do not hold other directorships etc.) on or before 30 November 2022 (30 November 2023 for directors of Indigenous corporations) are not required to obtain a director ID.

ABRS 2022/D2 confirms that individuals who have resigned as a director of an entity that is dealt with under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 are not required to obtain a director ID if they resign on or before 30 November 2023.

However, if an individual who is impacted by this change later becomes a director of a company, they will be required to obtain a director ID **before** they are appointed.

Simplified approach to RCTIs

LI 2022/D15

This draft legislative instrument sets out the circumstances in which a taxpayer is able to issue a recipient created tax invoice (RCTI) for GST purposes. The instrument replaces 51 existing instruments and the ATO's updated approach in this area should make it easier for taxpayers to self-assess their eligibility to issue RCTIs.

Currently, RCTI's can only be issued in limited circumstances where the goods or services being supplied are of the type that ATO has determined can be invoiced using an RCTI. There are 3 broad categories (certain agricultural products, supplies to government entities, supplies to entities with GST turnover above $20m per month) and a number of ATO determinations dealing with specific industries. As a result, it can be difficult for a business to determine whether it is able to issue an RCTI.

The draft legislative instrument broadly allows any business entity to issue an RCTI where it is the recipient of a supply, and the following conditions are met at the time of issue:

- It is registered for GST;
- It confirms the supplier is registered for GST;

- The business entity determines the value of the taxable supply acquired from the supplier;
- The RCTI meets the ordinary requirements of a tax invoice for GST purposes;
- The RCTI is issued within 28 days of the date of the supply, or the date the business entity determines the value of the supply.

A copy of the RCTI needs to be kept for 5 years.

The business entity must also have a currently effective written agreement with the supplier that:

- Specifies the taxable supplies for which the RCTI's can be issued;
- Confirms both parties are registered for GST;
- Provides that the supplier will not issue tax invoices;
- States that the recipient can issue RCTIs in respect of the supplies; and
- Provides that each party must advise the other should they cease to be registered for GST.

Alternatively, the business entity can include a fixed statement in the RCTI. The wording to be used in the statement is contained in section 9 of the legislative instrument.

Cases

Is a cruise ship a permanent place of abode for residency?

Duff v FC of T [2022] AATA 3675

This case concerned the tax residency status of a taxpayer who had left Australia to work on cruise ships that travelled between several countries. The key issue was whether the taxpayer was treated as a resident of Australia under the domicile test.

The domicile test ensures that an individual who has an Australian domicile is automatically treated as a resident of Australia for tax purposes unless the Commissioner is satisfied that they have a permanent place of abode in a specific location overseas.

The AAT concluded that the individual did not establish a new domicile in another country. The AAT also found that the individual had not established a permanent place of abode outside Australia. As a result, the taxpayer was treated as a resident of Australia.

One of the main arguments put forward by the taxpayer was that by working on a cruise ship he acquired a domicile of choice being the 'flag state' of the ship – in this case Norway. However, the AAT indicated that this is not possible without residing in that country. As the taxpayer had not lived in Norway (nor had the ship spent any significant time there), the taxpayer had retained their Australian domicile. Further, there was no evidence of any intention to live in Norway.

The next issue considered was whether the taxpayer's presence on the cruise ships could constitute a permanent place of abode. The taxpayer argued that his permanent place of abode during the relevant period were the ship cabins, which he occupied during his employment. However, the AAT confirmed that this aspect of the test requires the identification of a specific country in which the taxpayer is living or residing permanently. As the ships constantly sailed between countries this could not be established. While the ships were outside Norwegian territorial waters the taxpayer could not demonstrate that he was living or residing in Norway.

This case demonstrates that breaking connections with Australia and spending a significant amount of time overseas won't necessarily mean that the individual is classified as a non-resident. Individuals who leave Australia with no intention of establishing a new home in a specific country will often find it difficult to argue that they have ceased to be a resident of Australia if they have an existing Australian domicile.

Legislation

FBT exemption for electric cars

Treasury Laws Amendment (Electric Car Discount) Bill 2022

The Bill containing the FBT exemption for electric cars passed through Parliament on 28 November 2022 and is awaiting Royal Assent.

In order to qualify for the exemption, the vehicle needs to be classified as a car (i.e., designed to carry a load of less than 1 tonne and fewer than 9 passengers). It also needs to be classified as a zero or low emissions vehicle, which would typically include:

- Battery electric vehicles;
- Hydrogen fuel cell electric vehicles; and
- Plug-in hybrid electric vehicles.

Some amendments were made to the Bill to ensure that the exemption for plug-in hybrid electric vehicles will only apply for a limited period of time – expiring on 31 March 2025.

The exemption is only intended to apply in situations where the car is first held and used on or after 1 July 2022. Provided the conditions of the exemption are met, an electric car that was ordered prior to 1 July 2022 but was not delivered until after 1 July 2022 would be eligible for the exemption (even if an employer acquired legal title to the car before 1 July 2022). However, a car delivered prior to 1 July 2022 would not qualify. A second-hand electric car may qualify for the exemption, provided that the car was first purchased new on or after 1 July 2022.

The value of the car at the first retail sale must be below the luxury car tax threshold for fuel efficient vehicles ($84,916 in 2022-23).

If an electric car qualifies for the FBT exemption, then associated benefits relating to running the car for the period the car fringe benefit is provided can also be exempt from FBT.

While the measure provides an exemption from FBT, the value of that fringe benefit is still taken into account in determining the reportable fringe benefits amount of the employee.

Legislation for the skills boost, training boost and digital games offset

Treasury Laws Amendment (2022 Measures No. 4) Bill 2022

This Bill introduces legislation to Parliament for a number of previously announced measures. These include:

- The introduction of a digital games tax offset. This is a refundable tax offset for companies equal to 30% of the company's total qualifying Australian development expenditure, which is aimed at expenditure incurred in relation to the development of a game that is made available to the general public over the internet. The offset is capped at $20 million per company (or group of companies). The offset will be available for expenditure incurred from 1 July 2022.
- The skills and training boost, which provides small businesses (with aggregated annual turnover of less than $50 million) with access to a bonus deduction equal to 20% of eligible expenditure for external training provided to their employees. The additional deduction is available for expenditure incurred from 29 March 2022 until 30 June 2024.
- The technology boost, which provides small businesses with a bonus deduction equal to 20% of their eligible expenditure on expenses and depreciating assets for the purposes of their digital operations or digitising their operations. The bonus deduction is limited to $20,000 (i.e. on eligible expenditure up to $100,000) and applies to expenditure incurred from 29 March 2022 until 30 June 2023.
- Amendments to clarify that digital currencies (such as bitcoin) are not treated as a foreign currency for

tax purposes even if they are adopted as a legal tender by a foreign country.
- The Commissioner will be given the power to make legislative instruments determining the kind of alternative records that can be kept and retained by employers to comply with FBT record keeping obligations. The aim is to reduce the compliance burden associated with gathering and retaining FBT records.

Reducing tax rates on Pacific Australia Labour Mobility scheme and other amendments

Treasury Laws Amendment (2022 Measures No. 3) Bill 2022

This Bill has now passed through Parliament and is awaiting Royal Assent.

The major change introduced by this legislation is the reduction in the marginal rates of tax applying to income derived by foreign resident workers under the Pacific Australia Labour Mobility scheme to a flat rate of 15%.

The legislation also includes provisions doubling the financial penalties for contraventions of foreign acquisition and investment provisions relating to residential land (from 1 January 2023).

The Bill also amends the *Taxation Administration Act* to allow protected information to be shared with Australian government agencies for the purpose of administering major disaster support programs.

The Bill had previously sought to create a separate test for faith based superannuation products but this was removed during the passage of the Bill through Parliament.

Additional ACT COVID-19 grant can be tax-free

LI 2022/34

The Treasurer has issued another legislative instrument dealing with the tax treatment of state and territory grants relating to COVID-19.

This instrument confirms that payments made by the ACT Government under the **COVID-19 Small Business Hardship Scheme** can be treated as non-assessable non-exempt income if the taxpayer carries on a business under general principles, has aggregated annual turnover of less than $50m and received the payment in the 2021 or 2022 income year.