Coster Galgut
Chartered Accountants

OCTOBER / 2022

TAX U PDATE – OCTOBER 2022

What did I miss?

While the Budget was underwhelming from a policy perspective, shuffling funding for election commitments and existing announcements, there were a few areas of interest. These included the statement that the Government will not progress with the announcement to enable the self assessment of intangible assets, the tightening of the integrity rules for multi-nationals (thin cap and deductions for intangibles), and, the change to the taxation of off-market share buy-backs by listed companies.

Also of interest is the long-awaited draft determination on the taxation of income generated from the "fame and image" of individuals such as celebrities and sportspeople. This draft counteracts the views of the draft practical compliance guideline that was withdrawn in 2017.

Coster Galgut Pty Ltd
(03) 9561-1266

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From Government

2022-23 Budget 2.0

More

The 2022-23 Budget 2.0 was careful not to create a UK style economic crisis avoiding any policy measures that would add inflationary pressure.

Individuals

- Child Care Subsidy increase
- Paid parental leave reforms
- $4,000 credit to the 'work balance' of age and veteran pensioners
- Aged care reform to cap prices of home care providers and remove exit fees
- Additional funding for floods and natural disasters
- Lifting the income limit on Seniors Health Card
- Income support asset test extended on proceeds of sale of main residence
- One-off increase to total and permanent incapacity payments to veterans
- Community batteries for household solar

Superannuation & investors

- Change to taxation of off-market share buy-backs by listed companies
- 'Downsizer' eligibility reduced to 55
- Delayed Relaxation of SMSF residency requirements
- 3 year SMSF audit requirement scrapped
- Cryptocurrency not a foreign currency

Business & employers

- Self-assessment of intangible assets removed
- Dramatic jump in penalties for competition and consumer law breaches (from $10m to $50m)
- Energy efficiency grants for SMEs (no detail)
- Ridesharing reporting requirements by platforms delayed
- Thin cap rules introduce earnings based test
- Companies to declare their subsidiaries
- Global entities denied deductions for intangibles

And, a whole lot more money for the ATO to pursue individuals, the shadow economy, and multi-nationals and large public and private enterprises.

Digitalisation global tax challenges

Treasury has released a consultation paper dealing with the potential ways the "two-pillar global agreement" on multinational taxation could be implemented within the Australian tax system, to ensure the best outcome for Australia from entering into the agreement.

The agreement relates to the taxation of multinational companies and which jurisdiction has taxing rights. It also seeks to address concerns over the use of tax havens.

Very broadly, the two pillars can be summarised as follows:

- Pillar One reallocates some of the taxing rights over the largest and most profitable multinationals to the countries where their

goods and services are consumed. This redistribution would only apply where a multinational has global revenues exceeding EUR20 billion per annum and also has a profit-before-tax to revenue ratio exceeding 10%.
- Pillar Two essentially involves the introduction of a minimum tax rate. Technically it does not explicitly mandate that any country increase their taxes, rather it creates incentives for countries to do so. This includes creating new taxing rights over undertaxed profits of entities within a multinational group which are taxed below the globally agreed minimum tax rate.

The consultation paper is aimed to 'kick-off' discussions about these issues and whether Australia should amend the tax system to ensure that we do not lose taxing rights and/or to take advantage of any opportunities to increase our 'share' of the tax take.

While this may not have a direct impact on the operations of small to medium business clients in the short term, it is important to remain informed of changes in this area, especially for clients that form part of large multinational groups.

More
Addressing the tax challenges arising from the digitalisation of the economy

Inspector-General of Taxation report on objections

29,877 taxpayers lodged an objection in 2020-21, an increase of 34% on the previous year. Over 12,000 of those related to the COVID-19 stimulus measures.

The Inspector-General's report provides a broad overview of taxation objections made by taxpayers, including which entities are making the objections, whether they are successful, how the ATO has responded to them, the timeframe involved and the amounts of tax being disputed.

The report primarily focuses on statistics of the population making objections and trends. Of interest were the 6 clusters generally relating to specific taxpayer groups or issues where the resolution is dependent on broader issues:

- Self education expenses for specific courses
- Military superannuation following *Commissioner of Taxation v Douglas*
- GST Input Tax Credits
- Fuel Tax Credits following *Linfox Australia Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia*
- Working Holiday Maker following *Addy v Federal Commissioner of Taxation*
- Superannuation Guarantee – all related to who bore liability to pay superannuation guarantee for certain personnel within the racing industry. All objections were closed as invalid.

More
The Australian Taxation Office's Administration and Management of Objections

From the Regulators

Fuel excise rate cut ends

The temporary reduction of fuel excise duty ended on 28 September. This will mean that from 29 September 2022:

- Increased fuel tax credit rates apply. Taxpayers can only apply this increased rate to fuel acquired from that date.
- Eligible businesses that use fuel in heavy vehicles for travelling on public roads will again be able to claim fuel tax credits. These could not be claimed between 30 March to 28 September 2022 because the reduction in the fuel excise duty meant the fuel tax credit rate was nil.

It is important for advisers to ensure that clients are claiming the correct rate of fuel tax credits from 28 September 2022 onwards.

More
Important changes to fuel tax credits

Managing the tax affairs of a bankrupt individual

The ATO has released updated guidance dealing with the tax obligations for individuals who have declared bankruptcy. While the guidance is primarily aimed at the trustee in bankruptcy, this information can be useful for tax advisers who are assisting bankrupt individuals comply with their own tax obligations.

The ATO confirms that the bankrupt individual (i.e., through their tax agent) can be asked to lodge outstanding returns, activity statements or other documents relating to the period before bankruptcy commences. That is, this remains the taxpayer's responsibility.

Further, the ATO notes that the individual retains an obligation to lodge their own individual tax return during the period of bankruptcy. This is in addition to the trustee's obligation to lodge a return. Both the bankrupt individual and the trustee in bankruptcy can be validly assessed in relation to the same income, profit or gains, however the ATO can only collect the assessed amount once.

The ATO confirms that income tax for the period from the start of the year before sequestration to the end of the day of sequestration is a provable debt in bankruptcy. In these circumstances the ATO may need to issue split assessments to the bankrupt individual for both the pre- and post-sequestration portions of the relevant income year.

More
Administrative responsibilities of a bankruptcy trustee

Crypto asset investments and tax

The ATO has published another guide setting out its general expectations in connection with the tax treatment of cryptocurrency transactions. The standard position is that taxpayers will normally need to consider the CGT impact when it comes to these transactions.

The ATO indicates that taxpayers should report all disposals of crypto assets and will generally need to calculate a capital gain or loss. 'Disposals' include:

- Exchanging one crypto asset for another (see below);
- Trading, selling, gifting or donating crypto assets; and
- Converting crypto to fiat currency (e.g., Australian dollars).

However, transferring crypto assets from one digital wallet to another digital wallet is not considered a disposal provided the taxpayer maintains ownership of the assets.

While crypto assets can sometimes be treated as personal use assets and this can impact on the CGT outcome, these rules tend to apply in limited situations. Crypto assets are personal use assets if they are kept or used mainly to purchase items for personal use or consumption. Crypto assets will not be personal use assets if they are held mainly:

- As an investment;
- In a profit-making scheme; or
- In carrying on a business.

It is important that taxpayers keep records of all transactions associated with buying, holding and disposing of crypto assets. These records need to be kept for at least 5 years after disposal of the crypto assets.

More
Crypto asset investments and tax

Business lifecycle record-keeping requirements

The ATO has set out its record keeping expectations at different stages of the business lifecycle in new guidance.

The ATO provides a list of records that may assist in demonstrating that a client has started carrying on business, which can be an issue with respect to a number of small business concessions. These records can include evidence of advertising, purchasing

business cards or stationery for the business, obtaining business licences or insurance to operate, and evidence of consulting with financial, business or tax advisers.

The guidance also includes commentary on the record keeping obligations after a business has closed down, and what information should be kept in case of a later review or audit.

More
Detailed business record-keeping requirements

Rulings, determinations & guidance

When stars set up entities to manage their fame

TD 2022/D3 use of an individual's fame by related entities

After a long delay, the ATO has finally released updated guidance on the taxation of income generated from the "fame and image" of individuals such as celebrities and sportspeople.

In the past, many individuals have sought to enter arrangements where they would transfer the rights to the use of their name, image, likeness, identity, reputation etc. to a related entity such as a company or trust on the basis that the income derived from these rights could be assessed in the hands of the related entity rather than the individual. Back in 2017, the ATO issued a draft practical compliance guideline which basically set out a 10% safe harbour threshold that could potentially be adopted in situations like this.

However, the ATO withdrew its guidance in this area and we have been waiting for confirmation on how the ATO plans to approach this area.

This draft determination explains that such arrangements are not valid from a legal perspective. This is because an individual with fame has no property in that fame, so it is not possible to transfer any interest in their fame to another entity. The result is that any income derived in connection with an individual's fame should be recognised as ordinary income of the individual rather than being treated as income of a related entity. In that case, the related entity is receiving an amount that is being applied or dealt with on the individual's behalf.

The ATO indicates that the tax outcome can potentially be different in cases where the individual is engaged to provide services to the related entity. For example, an individual with fame may be engaged by a related entity to attend product launches and promotional events for a third party. In these circumstances, contractual payments by the third party to the related entity can be assessable to the related entity. However, both the PSI rules and the general anti-avoidance rules in Part IVA would still need to be considered. The ATO's general position in this area is that income relating to the personal services of an individual should ultimately be taxed in the hands of that individual.

The ATO indicates that it will not devote compliance resources to apply the views expressed in the draft determination in connection with income derived before 1 July 2023 from arrangements that are consistent with the principles outlined in PCG 2017/D11 and which were entered into before the release of the draft determination.

Consolidated guidance on individual tax residency issues

TR 2022/D2 residency tests for individuals

This comprehensive draft ruling replaces and consolidates the guidance provided in some previous tax rulings. The new draft ruling explains some of the key concepts that are relevant to Australia's domestic individual residency tests that have been the focus of recent court cases, in particular the decisions in the *Harding* and *Addy* cases.

One of the key points made in the draft ruling is that each case depends on all the circumstances of the taxpayer involved, and that similar factual circumstances will not always have the same result. Factors such as the taxpayer's intentions, motivations and life circumstances may end up producing different outcomes. The draft ruling contains a number of examples that demonstrate how the ATO is likely to apply the residency tests to common scenarios.

While there are four residency tests that need to be considered when determining an individual's residency status, the ATO indicates that certain tests will be more relevant in some instances:

a) The ordinary resides test is generally relevant when a taxpayer is physically present in Australia and considers residency according to ordinary concepts.
b) The domicile test is generally relevant if a taxpayer has been living in Australia but is not currently present in Australia, or if they are present only intermittently during the income year in issue. The domicile test considers whether your domicile is in Australian and whether your permanent place of abode is outside Australia.
c) The 183-day test is generally relevant if a taxpayer was not previously a resident and entered Australia during the income year. This test considers the length of stay in Australia, the taxpayer's usual place of abode and their intention to take up residency in Australia.

The draft ruling confirms that it is possible for an individual to be treated as a resident for only part of an income year if there is a significant change in their circumstances part-way through the year.

As international borders have largely reopened and clients have started travelling again this is an area that many practitioners will need to consider for their clients. The draft ruling should prove to be a useful resource when considering residency issues given it considers more modern work and family arrangements than the older rulings.

Impact of non-contingent liabilities on CGT cost base

TD 2022/14 If a non-contingent liability to pay a specified amount is included in the cost base of your CGT asset under either subsection 110-25(2) or section 112-35 of the Income Tax Assessment Act 1997 and you deduct or can deduct that amount, does subsection 110-45(2) of that Act apply?

This determination clarifies that liabilities incurred in connection with acquiring a CGT asset (such as incidental costs or liabilities assumed from the vendor) that have been included in the cost base should then be excluded under section 110-45(2) ITAA 1997 if the taxpayer is subsequently able to claim a deduction for the cost.

The determination confirms that these costs should be excluded from cost base upfront, even if they have not yet been paid and the deduction has not yet been claimed. The key point is that the legislation refers to whether the taxpayer "has deducted or can deduct an amount of expenditure". Where there is a non-contingent obligation to pay the expenditure the ATO considers this sufficient to indicate the taxpayer "can deduct" the expenditure (assuming the expense would qualify for a deduction).

2022-23 value of goods taken from stock for private use

TD 2022/15 value of goods taken from stock for private use for the 2022-23 income year

The amounts that can be used in determining the value of goods taken from trading stock for private use for 2022-23 and are summarised below:

Type of Business	Amount (ex GST) for adult / child over 16	Amount (ex GST) for child aged 4 to 16
Bakery	$1,360	$680
Butcher	$990	$495
Restaurant/café (licensed)	$4,830	$1,950
Restaurant/café (unlicensed)	$3,900	$1,950
Caterer	$4,120	$2,060
Delicatessen	$3,900	$1,850
Fruiterer/greengrocer	$1,010	$505
Takeaway food shop	$4,030	$2,015
Mixed business (includes milk bar, general store and convenience store)	$4,870	$2,435

Cases

Is a family home owned by a wife partially held in trust for her husband? The 'presumption of advancement'

Bosanac v Commissioner of Taxation [2022] HCA 34

The Bosanac case involved a situation where Ms Bosanac was the sole owner of the family home but the Commissioner was arguing that she held half of her interest in the trust for Mr Bosanac, who owed a tax debt to the ATO. The High Court held that Mr Bosanac did not own a share in the property, which meant that the property was not available to Mr Bosanac's creditors.

The property in question was acquired solely in the name of Ms Bosanac, although the purchase price was funded from joint funds and a joint loan account in the name of Ms Bosanac and Mr Bosanac.

The ATO was seeking payment of a judgement debt owed by Mr Bosanac and was trying to argue that Mr Bosanac had a beneficial interest in this property under the principles of equity. This would allow the ATO to recover part of the debt from the sale of the property.

The central dispute related to the operation of several equitable principles concerning dealings between parties where there are 'presumptions' that ownership interests in assets are held in a certain way, despite the legal ownership.

The Commissioner sought to take advantage of the law's presumption, known as a presumption of resulting trust, that a person (i.e., Mr Bosanac) who advances purchase monies for property, which is held in the name of another person (Ms Bosanac), intends to have a beneficial interest in the property. That is, that Mr Bosanac should be regarded as having a beneficial interest in the property, held on trust for him by the legal owner.

However, that presumption is subject to an exception that, in the case of purchases by a husband in the name of a wife (or a parent in the name of a child), there is a presumption of "advancement" or, simply, a presumption that the purchaser (the husband, Mr Bosanac) does not intend to have any ownership interest but rather to make a gift of their contribution to the wife. In that case, the wife retains the sole beneficial ownership of the property and there is no interest in the property held on trust for the husband.

The Full Federal Court held that both Ms Bosanac and Mr Bosanac had ownership interests in the property, on the basis that Mr Bosanac did not intend his contribution to the purchase to be a gift, with the result that the ATO could seek to recover the debt.

However, the High Court overturned this decision, finding that the property was solely owned by Ms Bosanac. While the High Court indicated that the presumption of advancement is still relevant, the decision in this case was reached based on the fact parties clearly intended that the property was to be held solely by Ms Bosanac.

Warning on trustee discretion in making income distributions

Owies v JJE Nominees Pty Ltd [2022] VSCA 142

This case primarily relates to trust law issues and should serve as a warning to clients who are involved in trust distribution decisions and their advisers. While the case focuses on trust law matters, situations like this could result in materially different tax outcomes.

The key issue in this case was whether the trustee had failed to give real and genuine consideration to the position of the beneficiaries of the trust, with the consequence that the distributions were made in breach of trust.

Very broadly, the trust was a family trust with 5 potential individual beneficiaries, being the parents and 3 children. The trust deed also contained a default beneficiary clause that had the effect of making each of the 3 children entitled to a fixed proportionate share of the income of the trust for a particular year in a situation where the trustee of the trust had not otherwise exercised discretion to make particular beneficiaries presently entitled to the trust income.

In this case, the trustee had made resolutions to make 3 of the potential beneficiaries (the parents and one of the children) entitled to all of the income for the relevant income years. However, the two other potential default beneficiaries (the other 2 children who were largely estranged from the family and had been excluded) sought to argue that the trustee was required to consider the circumstances of all potential beneficiaries of the trust when exercising the discretion, and that in failing to do so the resolutions were not valid. The apparent intended result then being that the default beneficiary clause should apply, and they should be entitled to a share of the trust income for those years.

The Court found in favour of the estranged children, although they were not granted a share of the income pursuant to the default beneficiary clause (this seems largely due to their failure to seek that remedy specifically).

The Court indicated that in exercising the discretion relating to the income of the trust, the trustee has an obligation to comply with the nature and purpose of the trust and this may require specific consideration of the individual circumstances of beneficiaries, including looking to obtain knowledge of those circumstances. In short, the trustee should not make decisions concerning income distributions without due consideration of the circumstances of the beneficiaries.

This decision may have significant implications for trustees in respect of the process of exercising the discretion to make distributions of the trust income, particularly in cases involving the exclusion of certain beneficiaries due to personal relationships. Having said that, the Court was at pains to note that the terms of the trust deed would be the primary consideration, and that the fact decisions may be ‘unfair’ for example is not necessarily an issue.

If distributions made by a trustee are invalid then this could potentially impact on the tax treatment of income generated by the trust. For example, if distributions are invalid then this could potentially cause the trustee or default beneficiaries to be taxed on some or all of the taxable income of the trust.

Legislation

Parliament resumed for the 2022-23 Budget.

Passed Bills

Seniors Health Card

Social Services and Other Legislation Amendment (Lifting the Income Limit for the Commonwealth Seniors Health Card) Bill 2022

This Bill received Royal Assent on 28 October 2022. The amendments increase the income test limits for the Commonwealth Seniors Health Card (CSHC) that provides subsidised pharmaceuticals and other medical benefits for self-funded retirees that have reached aged pension age.

Aged Care reforms

Aged Care Amendment (Implementing Care Reform) Bill 2022

This Bill passed both Houses of Parliament on 27 October 2022. Amongst other measures, the Bill enables the capping of prices that approved providers of home care can charge care recipients and remove the home care providers' ability to charge exit amounts.

Income and withholding tax exemption to FIFA

Treasury Laws Amendment (2022 Measures No. 1) Bill 2022

For the soccer tragics….This Bill received Royal Assent on 9 August 2022. Amongst other measures, the Bill provides an income and withholding tax exemption to FIFA and a local Australian subsidiary, confined to income in relation to the event. Other measures include an income tax exemption for qualifying grants made to primary producers and small businesses affected by Tropical Cyclone Seroja, which had a devastating impact on communities in Western Australia last year.

Introduced

India-Australia Economic Agreement

Customs Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Bill 2022

Introduced into the House of Representatives on 27 October 2022, the Bill gives effect to the preferential entry of goods under the India-Australia Economic Cooperation and Trade Agreement (the Agreement), signed on 2 April 2022.

Dramatic increase in fines for breaches of the Privacy Act

Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022

This Bill introduced into the House of Representatives on 26 October 2022, dramatically increases the fines applicable to individuals and body corporates for breaches of the Privacy Act.

Following the Optus, Medibank and MyDeal cyberattacks, the Bill significantly increase penalties under the Privacy Act for serious or repeated privacy breaches to incentivise businesses to take strong privacy and cybersecurity measures to protect the personal data they hold. The Bill will increase penalties for a serious or repeated breach of privacy from $2.22 million to not more than the greater of: $50 million; three times the value of any benefit obtained through the misuse of the information; or, if the value of the benefit obtained cannot be determined, 30 per cent of a company's domestic turnover in the relevant period.

The Bill also increases strengthens the Notifiable Data Breaches scheme and provides additional enforcement powers to the Information Commissioner.

One-off increase to total and permanent incapacity payments to veterans

Veterans' Affairs Legislation Amendment (Budget Measures) Bill 2022

As announced in the 2022-23 Budget (2.0), this Bill provides a one-off increase to the financial support to Total and Permanently Incapacitated (TPI) veterans and their families who are already in receipt of the payment, and for other potentially eligible veterans in the future. The increase to the TPI payment means it will be comparable with the National Minimum Wage and greater than the after tax National Minimum Wage a wage earner would receive. The $1,000 a year increase to the special rate of disability pension, an increase of $38.46 per fortnight, is to ensure veterans and their families are better supported financially, helping keep up with cost-of-living pressures.