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T AX UPDATE – OCTOBER 2023

What did I miss?

The Bendel case (*Bendel and Commissioner of Taxation* [2023] AATA 3074) caused a stir when the AAT decided that unpaid trust distributions owed to a private company beneficiary should not be treated as a loan for Division 7A purposes.

As expected, the Commissioner has since lodged an appeal with the Federal Court – see Cases.

Also of interest this month was the release of the 'payday' super consultation that, if enacted, will require employers to pay their employees' superannuation guarantee entitlements on the same day that they pay salary and wages. Beyond the payday super consultation, underpayment of superannuation guarantee is an area of intense focus with the ATO about to datamatch STP data alongside data from super funds.

Regards,
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INSIDE

From Government

30% tax on super earnings on balances above $3 million

Following the release of a consultation paper in March 2023, Treasury has released draft legislation to impose an overall 30% tax on future superannuation fund earnings on member balances over $3 million.

Currently, all superannuation fund income is taxed at either 15% or 10% on gains on capital assets that have been held by the fund for more than 12 months. The draft legislation, if enacted will introduce an additional tax of 15% on superannuation earnings but only for those individuals with a total superannuation balance (TSB) over $3 million at the end of a financial year.
These changes are proposed to apply from 1 July 2025, with the first tax liabilities to be sent to affected members sometime in 2026-27.

It is important to note that this additional 15% tax will apply to unrealised gains, which means a tax liability could arise where the value of fund assets increases, even if the assets are retained. Currently, unrealised gains that represent changes in the fund's asset value (that is, gains on paper) are not taxed.

To achieve this, the proposed changes aim to capture growth in the TSB over the financial year while allowing for contributions and withdrawals. Very broadly, this additional tax liability will be calculated using the following formula:

> *Earnings = (TSB Current Financial Year + Withdrawals - Net Contributions) – TSB Previous Financial Year*
>
> *Proportion of Earnings above $3m = (TSB Current Financial Year - $3 million) / TSB Current Financial Year*

Tax Liability = 15 per cent x Earnings x Proportion of Earnings above $3m

The TSB current year figure will be based on the TSB at the end of that financial year. Negative earnings can be carried forward to be offset against earnings in any future years.

Individuals will have the choice of paying this additional tax personally or from their superannuation fund. As with Division 293 tax, the ATO will perform the calculation for this additional 15% tax.

More information
Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023

'Payday' superannuation

Treasury has issued a discussion paper for consultation in relation to the proposed amendments that would require employers to pay superannuation guarantee entitlements on the same day that salary and wages are paid to employees. This measure was previously announced by the Government in the 2023-24 Federal Budget.

As context, the Government considers that the current design of the superannuation guarantee system, including the frequency with which employers are required to pay superannuation guarantee, results in many superannuation guarantee obligations remaining unpaid for extended periods of time. It can be difficult for the ATO to recover unpaid superannuation guarantee amounts, especially where the employer enters liquidation or bankruptcy before the underpayment is identified.

The first aspect of the Government's attempts to strength the superannuation guarantee system is to require employers to pay their superannuation guarantee contributions at the same time they pay wages and salaries. This measure is intended to apply from 1 July 2026.

The Government is also increasing its investment in the ATO's data matching capabilities so that the ATO is better placed to identify instances of underpayment or non-payment of SG obligations.

The consultation is intended to seek feedback on implementing the payday superannuation reforms and redesigning the compliance framework in light of the proposed payday superannuation changes.

More information
Securing Australians' superannuation

Further consultation on thin capitalisation changes

A Bill is currently before Parliament to amend the thin capitalisation rules. In very broad terms, the thin capitalisation rules are designed to limit the debt deductions (e.g., interest expenses) that an entity can claim for tax purposes based on the amount of debt used to finance its operations compared with its level of equity.

The most significant proposed change to the rules is the replacement of existing asset-based rules with earnings-based rules which are more in line with those recommended by the OECD.

Importantly, the Government is planning to retain the existing $2m de minimis threshold, so many smaller businesses should continue to be unaffected by the rules.

Even though these measures have already been subject to an earlier consultation process, the Bill was referred to the Senate Economics Legislation Committee. In response to the report issued by the Senate Committee last month, Treasury has now released draft amendments to the bill for further consultation.

More information
Multinational Tax Integrity – strengthening Australia's interest limitation (thin capitalisation) rules

From the Regulators

Correcting GST and fuel tax errors

Rather than amending an earlier business activity statement, clients may be entitled to correct GST or fuel tax errors from earlier tax periods by including these as an adjustment in their next business activity statement.

This is subject to certain conditions being met. Where the error involves a debit error (e.g., an error that resulted in the GST liability being understated or fuel tax credit being overstated), one of these conditions requires the net sum of the debit errors to be less than the debit error value limit.

The ATO has increased this debit error value limit for entities with an annual GST turnover of less than $20 million.

For these entities, single or multiple debit errors up to the value of $12,500 can now be corrected in a later business activity statement, subject to some other basic conditions being met.

More information
Fixing GST or fuel tax errors

GST for content creators

The ATO has been focused on providing guidance for content creators. Back in April 2023 the ATO issued a guide warning taxpayers that income received in connection with creating content may need to be declared for income tax purposes. Following this warning, the ATO has released new guidance specifically targeting compliance with the GST system.

The key message from the ATO is that content creators making $75,000 in any 12 month period will normally need to register for GST.

When determining whether the $75,000 turnover threshold is met, the ATO considers that this will include payments received in cash, as well as the value of any payments received in the form of services or goods.

If the content creator is registered or required to be registered for GST, this means that they will be liable for GST on their taxable supplies. This is even if the payments are received in the form of goods or services. The upshot is that they will also be entitled to claim back GST credits on expenses incurred in connection with this activity.

If the entity receives payments from recipients outside Australia, the GST treatment becomes more complex. While the ATO suggests that these payments could be GST-free, practitioners and clients are encouraged to approach this area carefully. This is because the rules dealing with exports can be complex and need to be looked at in detail.

If the payments received by an entity are GST-free then the entity shouldn't have a GST liability relating to those payments. However, just remember that these GST-free amounts are still included in the entity's GST turnover calculations, which would be used to determine whether they are required to be registered for GST.

More information
Making $75 000 or more from content creation?

Super guarantee data to sit side by side with STP

The ATO is warning employers that it will expand the use of single touch payroll data by comparing this with information reported from superannuation funds through the Member Account Transaction Service. Cross checking these data points will allow the ATO to determine whether an employer has paid their employees' superannuation guarantee amounts on time.

While this may change in the future with the proposals in relation to payday superannuation (see the item above), the rules currently require superannuation guarantee amounts to be paid by 28 days after the end of each quarter to avoid the superannuation guarantee charge.

Clients with superannuation guarantee obligations should be informed of the ATO's increased activities in this area. Practitioners should encourage these clients to ensure that robust systems and processes are in place to ensure superannuation guarantee obligations are paid in full and on time to avoid significant penalties under the SGC provisions.

More information
Our data can help you keep your super guarantee on track

Rulings, Determinations & Guidance

Single or multiple depreciating assets

TR 2023/D2 is the ATO's new revised draft ruling that deals with how to determine whether an item is a single depreciating asset or whether its components are separate depreciating assets in their own right.

This issue can often arise in the context of whether the cost of multiple items or components need to be grouped when determining if the asset's cost is less than a specific instant asset write off threshold.

This distinction has become more important again given the end of the temporary full expensing rules on 30 June 2023. While this measure is currently before Parliament and is not yet law, the Government is planning to apply a small business instant asset write-off threshold of $20,000 for the 2024 income year.

Originally a draft ruling was issued by the ATO in January 2017 dealing with this issue. Due to the time that has passed since its original release, the ATO has reissued the draft ruling with some changes.

While the ATO has incorporated some of the earlier feedback received, many of the principles in the original draft ruling remain largely unchanged. Some of the key principles are set out below.

For a component of a composite item to be considered a depreciating asset in its own right, the ATO considers that the component must be capable of being separately identified or recognised as having commercial and economic value.

Purpose or function is generally a useful guide to the identification of an item. In this regard, the ATO provides the following principles:

- The depreciating asset will tend to be the item that performs a separate identifiable function, with regard to the purpose or function it serves in the business;
- An item may be identified as having a discrete function, and therefore as a depreciating asset, without necessarily being self-contained or used on a stand-alone basis;
- The greater the degree of physical or functional integration of an item with other component parts, the more likely the depreciating asset will be the composite larger item;
- When the effect of attaching an item to another item (which itself has its own independent function) varies the function or operational performance of that other item, the attachment is more likely to be a separate depreciating asset; and
- When various components are purchased (whether via one or multiple transactions) to function together as a system and are necessarily connected in their operation, the depreciating asset is usually the system (the composite item).

Importantly, the fact that an item cannot operate on its own and has no commercial utility unless linked or connected to another item does not necessarily prevent it from being a separate depreciating asset. Where the items are designed to be used in a range of settings, in conjunction with a wide range of equipment or systems and are not acquired with other items as part of system, this might indicate they are separate depreciating assets.

More information
TR 2023/D2

Alternative records for FBT record keeping

Legislation was passed in June 2023 which was aimed at reducing FBT compliance costs by simplifying the record keeping requirements.

Instead of being required to obtain specific documents such as employee declarations, there is sometimes now an option for employers to rely on alternative records to comply with FBT record keeping requirements.

The ATO was given powers to issue legislative instruments to determine the kind of alternative records that can be kept and retained by employers. The ATO has now issued some draft legislative instruments for consultation to cover alternative records for the following types of fringe benefits:

- Temporary accommodation relating to relocation (LI 2023/D18);
- Otherwise deductible benefits (LI 2023/D19);
- Living away from home allowances (LI 2023/D20 and LI 2023/D21); and
- Private use of vehicles other than cars (LI 2023/D22).

Each of these draft legislative instruments are intended to commence for the FBT year starting from 1 April 2024 onwards.

More information
- LI 2023/D18
- LI 2023/D19
- LI 2023/D20
- LI 2023/D21
- LI 2023/D22

GST and combination foods

The ATO has issued draft determination GSTD 2023/D1 which considers when food is considered a "combination food".

Very broadly, food is denied GST-free treatment where it is considered a combination of one or more foods where at least one of the foods is a taxable food (i.e., that is, of a kind specified in Schedule 1 of the GST Act). This is referred to as "combination food".

Recently, the AAT in Chobani Pty Ltd and Commissioner of Taxation [2023] AATA 1664 considered this issue in relation to a flip yoghurt containing both GST-free yoghurt and taxable dry ingredients (i.e., chocolate and biscuit pieces) in separate compartments.

The AAT decided the flip yoghurt was a combination food and therefore not GST-free. This was largely because the AAT considered the taxable dry ingredients were not insignificant, they remained identifiable and they were not subsumed into a separate product.

In coming to this decision, the AAT considered the fact that the dry ingredients were physically separated from the yoghurt when sold, their relative weight, their cost and how the product was marketed and consumed.

In light of the decision in the Chobani case, the ATO in GSTD 2023/D1 sets out the following three principles to determine when a combination food is being supplied:

- There must be at least one separately identifiable taxable food.
- The separately identifiable taxable food must be sufficiently joined together with the overall product.
- The separately identifiable taxable food must not be so integrated into the overall product, or be so insignificant within that product, that it has no effect on the essential character of that product.

More information
GSTD 2023/D1

Cases

Unpaid trust distributions are not Division 7A loans?

In *Bendel and Commissioner of Taxation* [2023] AATA 3074 the taxpayer successfully challenged the ATO's long held position that unpaid distributions owed to a private company can be treated as a loan for Division 7A purposes. While the case was a win for the taxpayer, the ATO is contesting the decision before the Federal Court.

The ATO's position since December 2009 is that an unpaid trust distribution owed to a private company beneficiary can be treated as a loan, that attracts the operation of Division 7A.

The definition of a loan in section 109D(3) ITAA36 specifically includes financial accommodation. When a corporate beneficiary fails to call for the payment of its trust distribution and allows the trustee to use these funds, the ATO's view is that this amounts to the provision of financial accommodation and therefore, the company has provided a loan to the trust for Division 7A purposes.

This view was originally set out in TR 2010/3. More recently, this ruling has been withdrawn and was replaced with TD 2022/11, but the ATO's approach on this key issue has basically remained the same.

While this has been the ATO's view since 16 December 2009, a recent AAT decision in *Bendel and Commissioner of Taxation* [2023] AATA 3074 challenges the ATO's position.

Very briefly, the AAT case dealt with a private company which was a discretionary beneficiary of a trust that became entitled to a share of the trust's income between the 2013 to 2017 income years. Some of those trust entitlements remained unpaid by the lodgement day of the year after the trust entitlements arose.

The ATO assessed those unpaid trust entitlements as loans under section 109D(3) ITAA36, with the result that this triggered assessable Division 7A deemed dividends.

The taxpayer decided to challenge the ATO's view and took the matter to the AAT. The AAT disagreed with the ATO's position and came to the decision that a Division 7A loan does not extend to unpaid trust entitlements owed to a private company beneficiary.

One of AAT's primary concerns was that if the unpaid trust entitlement was considered a Division 7A loan, this could lead to the situation of two taxpayers being taxed on the same unpaid trust entitlement. The first taxing point arising from the initial receipt of the trust distribution under the trust distribution rules in Division 6 ITAA36, with the second taxing point as an assessable deemed dividend through the Division 7A rules if the unpaid trust entitlement was subsequently considered to be a Division 7A loan.

Also, the AAT considered that treating an unpaid trust entitlement as a Division 7A loan would be inconsistent with the operation of Subdivision EA. This was because the AAT considered Subdivision EA to be the lead specific provision dealing with unpaid trust entitlements and wasn't intended to create a second deemed dividend.

In broad terms, Subdivision EA can apply to trigger a deemed unfranked dividend in situations where:

- A trustee makes a loan to a shareholder or an associate or a shareholder of a private company; and
- There is an unpaid trust entitlement owing to the private company from the relevant trust.

This AAT decision challenges an important ATO position, with the tax outcomes being potentially significant for trust clients that currently owe (or may have owed in the past) unpaid trust entitlements to related private companies.

But this is not the end of this story. On 26 October 2023, the Commissioner lodged a notice of appeal to the Federal Court. There is no guarantee that the Federal Court will reach the same conclusion as the AAT. We will need to wait and see.

More information

- Bendel and Commissioner of Taxation [2023] AATA 3074
- Notice of appeal

Legislation

Parliament was in session between 16 October 2023 to 27 October 2023. There was no new tax or super related legislation introduced and no legislation that was previously before Parliament passed.

Both Houses of Parliament sit again on 13 November 2023.