Coster Galgut
Chartered Accountants

TAX UPDATE – FEBRUARY 2024

What did I miss?

The revised Stage 3 tax cuts have passed Parliament and will come into effect on 1 July 2024.

While some games were played (at one point there was a debate on an amendment to change the name of the Bill to *Treasury Laws Amendment (Cost of Living Tax Cuts but Not Actually Dealing with the Cost of Living) Act 2024*), the passage of the amending legislation was reasonably painless.

We also look at the Decision Impact Statement, and some of the implications, in the Wood's case. The case was a win for a taxpayer who successfully argued for a deduction for a settlement payment made to end litigation arising after his employment arrangement ended.

Regards,
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From Government

Revenue forgone for tax concessions

Treasury has issued a report that estimates the tax revenue forgone due to various measures in the tax rules, with the aim of providing an overview of the tax impact of specific Government policies. This includes specific measures such as offsets, rebates and accelerated depreciation concessions, as well as how the standard tax rules apply to certain classes of taxpayer.

The report lists measures that are estimated to result in over $500m revenue forgone in the 2023-24 year, with the top 10 measures in terms of revenue forgone being:

Concessional rates of tax on employer superannuation contributions	$28.55bn
Rental property deductions	$27.1bn
Main residence exemption (i.e., the 'notional' CGT 50% discount component)	$25bn
Main residence exemption (i.e., after the 'notional' CGT discount component)	$22.5 bn
Concessional rates of taxation on superannuation entity earnings	$20.05 bn
CGT 50% discount for individuals and trusts	$19.05 bn
Work related deductions	$10.8 bn
Exemption from income tax on benefits provided to participants under the National Disability Insurance Scheme	$10.48 bn
GST-free exemption provided on certain food items	$9.1 bn
Accelerated depreciation for business entities	$7.4 bn

Keep in mind that some affected taxpayers would change their behaviour if a concession were removed. This is why the report notes that the above estimates of revenue forgone do not reliably estimate the revenue impact of removing a specific tax concession.

More information

- 2023-24 Tax Expenditures and Insights Statements

Multi-national country-by-country disclosure

Following the Government's announcement in the October 2022-23 Budget and subsequent consultations in this area, Treasury has now released updated draft legislation and materials for consultation on the proposed public country-by-country reporting requirements for large multinational groups.

In broad terms, the draft legislation requires the parent entity of these groups to publish certain financial and tax information on an Australian Government website (e.g., number of employees, revenue from related and unrelated parties, profit or loss before income tax, income tax paid, etc.).

For Australia and certain other 'specified countries', this information is required to be broken down by country. However, for all other jurisdictions, the option is available to provide this information in an aggregated form.

Importantly, the new draft legislation includes a proposed exemption from public country-by-country for parent entities where their aggregated turnover includes less than a total of $10 million of Australian-sourced income.

The draft legislation also proposes to defer the start date for public country-by-country reporting to income years commencing on or after 1 July 2024.

More information

- Public country-by-country reporting

Changes to support the Australian screen industry

Treasury has released exposure draft legislation and materials for consultation on proposed changes to the location tax offset and the producer tax offset, with the aim of providing further support to the Australian screen industry.

These proposed measures follow announcements in this area by the Government in its 2023-24 Budget and 2023-34 Mid-Year Economic and Fiscal Outlook.

In relation to the location tax offset, the draft amendments propose the following changes:

- Increasing the rate of the tax offset from 16.5% to 30% of a company's total qualifying Australian production expenditure on the film.
- Increasing the required minimum qualifying Australian production expenditure per hour threshold for television series from $1 million to $1.5 million.
- Increasing the required total minimum qualifying Australian production threshold from $15 million to $20 million.
- Introducing additional requirements to engage Australian providers of post, digital and visual effects.
- Introducing additional requirements to satisfy a minimum training expenditure test or satisfy alternative requirements in relation to establishing and upgrading film infrastructure or providing training programs.

In relation to the producer tax offset, the draft amendments propose to introduce an alternative means to access this offset by introducing a new category for drama series that also meets the following conditions:

- Qualifying Australian production expenditure for the season of the series is $35 million or more;
- The season of the series contains two or more consecutive episodes; and
- The season of the series is completed in 12 months or less (or for a digital or other animated film series, less than 36 months).

More information

- Changes to the location and producer tax offset

From the Regulators

Deductibility of settlement payments after employment ceases

See the Round Up Highlights for Michael Carruthers overview for the implications of the Wood case (or on the portal to track your CPD).

The ATO has issued a Decision Impact Statement in response to the Federal Court decision in *Commissioner of Taxation v Wood [2023] FCA 574*.

In this case, the taxpayer successfully argued that they should be entitled to claim a deduction under section 8-1 ITAA97 for a settlement payment made to end litigation arising after his employment arrangement had ended.

The facts of this case are summarised as follows:

- The taxpayer was employed by his company, with the company providing consultancy services to another business.
- After the consultancy arrangement had come to end, the other business alleged that the taxpayer had negotiated unauthorised transactions and commenced proceedings against the taxpayer for damages, including for misleading and deceptive conduct.
- The taxpayer separately threatened to initiate proceedings against the other business on the basis that its associates had made defamatory statements about the taxpayer to his new employer.
- A settlement was ultimately reached in relation to both matters.
- In relation to the proceedings against the taxpayer for allegedly negotiating unauthorised transactions, the parties entered into a settlement deed and the taxpayer agreed to pay $200,000 to the business without admission for liability.
- In relation to threatened defamation proceedings, the parties entered a deed of release with the business agreeing to pay $180,000 to the taxpayer and also agreeing to not publish allegations concerning the taxpayer's character.
- While the settlement created mutual liabilities owed to each other by the two parties, the amounts owed under each deed were set-off with the taxpayer ultimately paying a net amount of $20,000 to the other business.

The key issue was whether the taxpayer was eligible to claim a deduction under the general deduction provisions in section 8-1 on the $200,000 settlement payment pertaining to the first matter (i.e., in relation to settling the allegations that the taxpayer negotiated unauthorised transactions while performing his role).

The ATO argued that a deduction was not available on the basis the settlement payment was not incurred in gaining or producing assessable income or alternatively, the settlement payment was capital in nature. However, the Federal Court disagreed with this.

First, the Federal Court found that the settlement payment was made to bring an end to litigation risk. This had a sufficient connection with the taxpayer's earning of assessable income because this risk arose due to the taxpayer's employment and arose due to his conduct as an employee. Also, the fact that the settlement payment was made years after the taxpayer's employment ceased didn't prevent a deduction from being available.

Second, the judge did not agree with the ATO's argument that the settlement payment was capital in

nature on the basis it was made to protect the taxpayer's reputation and ability to derive income in the future.

In particular, the court made a distinction between the settlement deed and the deed of release. While the deed of release was aimed at ensuring no further allegations were published concerning the taxpayer's character and protecting the taxpayer's reputation, the settlement agreement was entered into for a different reason (i.e., to end litigation risk of alleged actions taken during the taxpayer's employment).

Although the ATO in its decision impact statement accepts the outcome of the Federal Court decision, it also considers the decision has limited application beyond the particular facts of that case. Despite this, practitioners should be still aware that the mere fact that a payment is made after the relevant employment or other income producing activity has ceased doesn't necessarily prevent a deduction from being available.

More information

- Decision Impact Statement - Commissioner of Taxation v Wood

Pausing ATO action on older 'on hold' debts

The ATO is now pausing the collection of older debts that have been placed on hold.

As background, some clients and practitioners may have previously received letters in connection with the ATO's approach to collecting debts that have been placed on hold.

The ATO has stated it won't actively seek to collect these debts. However, if a client becomes entitled to any refunds or credits (for example, upon lodging their BAS or tax return), these will normally be used to pay down these outstanding liabilities, even if they have been placed on hold.

Debts placed on hold won't show up as an outstanding balance on the client's account. One of the issues is that some affected clients weren't aware of these tax liabilities (especially for debts that were raised many years ago).

The ATO has received some feedback from the community outlining their concerns in response to issuing these letters.

As a result, the ATO is now pausing action to recover or offset refunds against debts that were placed on hold prior to 2017. This is intended to be an interim measure while the ATO reviews its position and develops a solution.

However, it is important to be aware that this does not seem to apply to debts that were placed on hold on or after 2017. For practitioners with clients in this situation and especially if those clients are expecting tax refunds, it would be prudent to ensure those clients are made aware that their refunds can still be used offset these outstanding liabilities (even if they have been placed on hold).

More information

- Statement on debts on hold program

Rulings, Determinations & Guidance

At home electricity costs when charging an EV

The ATO has finalised PCG 2024/2 that provides a method for calculating the cost of electricity that is used in charging an electric vehicle at an individual's home.

This method is aimed at individuals who incur work-related expenses relating to vehicles as well as employers with FBT obligations who might be faced with significant compliance challenges in determining the cost of home electricity charges. The issue is that it is often difficult to separately segregate the electricity used in charging an electric vehicle from other household use.

In many respects, the final PCG is consistent with the draft version. If the employer or individual is able to satisfy some basic eligibility conditions and record keeping requirements, they can choose to calculate the electricity costs associated with charging an electric vehicle at a residential home by multiplying the total number of relevant kilometres travelled by the vehicle in the FBT year or income year by the EV home charging rate.

Consistent with the draft, the home charging rate is still initially set at 4.20 cents per kilometre.

The guideline will still apply from:

- For FBT purposes, from 1 April 2022;
- For income tax purposes, from 1 July 2022.

It is not possible to use the guideline if the vehicle is a plug-in hybrid vehicle that has an internal combustion engine.

Where the vehicle is also charged at a commercial charging station, the draft PCG originally required clients to choose either the home charging rate (but only if the costs of a commercial charging station are ignored) or include commercial charging station costs (but this meant the client could not use the home charging rate).

However, the final version of the PCG is more flexible. If the vehicle has a function that allows it to determine the total charge based on location, clients can now use the home charging rate while also separately taking into account the additional costs of the commercial charging station.

More information

- PCG 2024/2

Final word on self-education expenses for individuals

The ATO has finalised TR 2024/3 which looks at when deductions for self-education expenses are available for individuals. The new ruling effectively replaces TR 92/8 and TR 98/9 which have now been withdrawn.

While the final ruling remains substantially the same as the draft version that was released in late 2023, it is worth reiterating some of the key points which are set out below:

- While this is not always the case, one of the key challenges in claiming deductions for self-development or personal development courses is that the knowledge or skills gained are often too general.
- If someone ceases their employment or income earning activity part-way through completing a course, the expenses would be deductible only when incurred up to the point when the income producing activity ceased.
- The deductibility of course fees is not impacted by the individual borrowing money to pay for those fees. The ATO provides the example of a full-fee paying student using a FEE-HELP loan to pay for course fees. However, a deduction isn't available for repaying the principal amount borrowed or any indexation of the Government loan.
- A distinction needs to be made for course fees relating to enrolment in a full fee-paying place versus a Commonwealth supported place. This is because course fees are not deductible if they relate to a Commonwealth supported place.

The ATO also discusses the apportionment of self-education expenses.

When it comes to course fees you might find that the fees relating to the entire course aren't deductible. However, a deduction might still be available for some of the course fees where there are particular subjects or modules in that course that are sufficiently related to the individual's employment or income earning activities. The course fees may need to be apportioned.

For clients travelling overnight for a self-education course, it is also not uncommon for some clients to also enjoy some sightseeing or holiday time while they are

there. Just remember that this can also impact on the deductions available for the cost of flights and accommodation and an apportionment may be required if there is a private purpose to the travel that isn't merely incidental to the work-related purpose.

More information

- TR 2014/3

Timing of dividend from corporate limited partnership

TR 2024/2 has been finalised by the ATO and looks at the issue of when a corporate limited partnership (CLP) has credited an amount to one of its partners. This would then normally cause the partner to be treated as if they had received a dividend for income tax purposes.

A number of modifications are made under the tax law to treat partners in a corporate limited partnership (CLP) as if they were shareholders in a company for certain purposes.

One of these modifications is contained in section 94M ITAA 1936, which states that if a CLP pays or credits an amount to a partner against the profits or anticipated profits of the CLP then the amount paid or credited is taken to be a dividend paid out of profits derived by the CLP for tax purposes.

The ruling sets out the ATO's view on the scope of 'credits' for the purpose of these rules.

Consistent with the draft ruling, the ATO's view is that 'credits' does not mean paid or distributed but there must still be more than a mere entry in the CLP's accounts.

In particular, the ATO considers that a CLP credits an amount to its partners under section 94M ITAA 1936 where:

- The CLP applies or appropriates its resources to confer a benefit on a partner;
- That benefit is legally enforceable and not subject to a condition precedent; and
- That benefit conferred on the partner must be separate and distinct from the partner's existing interest in the CLP.

For practitioners with CLPs in their client groups, it might be worth reviewing the examples in the ruling where the ATO illustrates in more detail when it considers that an amount has been 'credited'.

More information

- TR 2024/2

Cases

Whether the Div 615 rollover applied to a restructure

The Federal Court in *AusNet Services Limited v Commissioner of Taxation [2024] FCA 90* considered whether the restructure of the taxpayer's group qualified for the CGT rollover dealing with interposed holding companies in Division 615 ITAA97.

In very broad terms, the restructure involved interposing a head company between a group of entities that were previously stapled and could not be traded or transferred independently to each other.

Interestingly, the taxpayer had sought to argue that Division 615 rollover did not apply. This is because if the rollover in Division 615 did not apply, it seemed that the scrip-for-scrip rollover provisions in 124-M might have provided the taxpayer with an uplifted cost base of certain assets acquired under the restructure.

The taxpayer contended that the rollover in Division 615 was aimed at situations involving the insertion of a head company with nominal value into the group. The taxpayer's main argument was that the rollover in Division 615 could not apply because at the time of arrangement the interposed head company was not a shelf company and already had substantial market value.

The Federal Court disagreed with the taxpayer and held that the Division 615 rollover was available.

While the decision itself is complex, one of the more practical points that should be taken away is that practitioners should be aware of the rules that require certain rollovers to be applied in priority to other forms of rollover relief (even if certain rollovers might be more beneficial to apply than others). One common example is that the scrip-for-scrip rollover in Subdivision 124-M cannot generally apply if the arrangement would qualify for rollover relief under Division 122 or Division 615.

More information

- AusNet Services Limited v Commissioner of Taxation [2024] FCA 90

Private use of a company's bank account treated as ordinary income

In *The Counsellor and Commissioner of Taxation [2024] AATA 220,* the AAT held that the taxpayer should be taxed on amounts withdrawn from his company's bank account and amounts paid by the company on behalf of the taxpayer.

The taxpayer was a shareholder and director of a company from which his business traded and had been making withdrawals and paying his personal private expenses out of this company's bank account. While this occurred over the course of a number of years, the taxpayer did not declare these amounts in his assessable income.

Following an audit, the ATO assessed the total withdrawals and payments of private expenses from the company's bank account as ordinary income to the taxpayer, or alternatively assessed the amounts as a deemed dividend under Division 7A ITAA36. The taxpayer objected to the decision and this objection was disallowed.

The taxpayer tried to convince the AAT that the withdrawals and amounts paid on his behalf by the company were repayments of loans originally advanced by him to the company and therefore should not be assessable as ordinary income. Alternatively, the taxpayer argued that the payments were a loan to him and there was no deemed dividend under Division 7A due to the company having no distributable surplus.

The AAT found issues in the quality of the taxpayer's evidence, with the AAT concluding that the taxpayer had failed to discharge his onus of proof that the ATO's assessments were excessive. The AAT ultimately reached this conclusion having regard to a number of matters, including the following:

- After the tax audit had commenced, the taxpayer had produced a number of different iterations of his financial affairs and tax returns;
- The taxpayer was unable to satisfactorily explain how he was able to fund the original loans to the company, especially given the taxpayer had declared tax losses in multiple years around the time when the loans were made;
- While the taxpayer had tried to explain that some of his loans to the company were sourced originally from borrowings from his brother, the AAT considered this was implausible given the brother's own tax return showed modest income; and
- Although an accountant was engaged subsequently to reconcile the company's loan accounts with the taxpayer, the AAT considered that this loan account could not be relied upon as it was based on incomplete information provided by the taxpayer.

As a result, the AAT found for the ATO and held that the amounts were assessable to the taxpayer under section 6-5 ITAA36 as ordinary income. While it was not strictly necessary to consider Division 7A because the amounts were already assessable as ordinary income, the AAT also made the observation that it would have been difficult to demonstrate that the company had no distributable surplus in any case given the company's record keeping issues.

More information

- The Counsellor and Commissioner of Taxation (Taxation) [2024] AATA 220

Legislation

Redesigned stage 3 tax cuts pass Parliament

The Bill amending the Stage 3 tax cuts has passed Parliament without amendment.

Commencing on 1 July 2024, the Bill amends the tax rates and tax brackets that apply to residents, non-residents and working holiday makers for the 2024-25 and later income years.

The legislation also increases the Medicare levy low-income thresholds in line with CPI for the 2023-24 and later income years.

Resident individual taxpayers		
Tax rate	**2023-24**	**2024-25**
0%	$0 – $18,200	$0 – $18,200
16%		$18,201 – $45,000
19%	$18,201 – $45,000	
30%		$45,001 – $135,000
32.5%	$45,001 – $120,000	
37%	$120,001 – $180,000	$135,001 – $190,000
45%	>$180,000	>$190,000

More information

- Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024
- Treasury Laws Amendment (Cost of Living—Medicare Levy) Bill 2024