Coster Galgut
Chartered Accountants

TAX UPDATE – JANUARY 2024

The important details for accountants & advisers across January 2024

What did I miss?

As many suspected, the legislated Stage 3 tax cuts will be redesigned under a proposal announced by the Government.

However, likely to be of more interest to practitioners is another decision from the AAT dealing with the sale of property – from the same Tribunal member as the Bowerman case. This time, the taxpayer is faced with a GST bill on the sale of a property that he intended to live in.

Plus, the draft determination that has disappointed many financial planners on the deductions an individual can claim for financial advice fees.

Regards,
Coster Galgut Pty Ltd
(03) 9561-1266

INSIDE

From Government 2
Redesigned Stage 3 tax cuts 2
Mid-Year Economic and Fiscal Outlook ups the tax take 3
Adviser misconduct: Increasing the power of regulators 4
Tax Treaty with Portugal 5
From the Regulators 5
Government support payments to help businesses with recent weather events 5
Warning for super funds claiming GST credits on personal advice fees 5
Data matching on the sharing economy 6
Rulings, Determinations & Guidance 6
Individuals claiming deductions for financial advice fees 6
The ATO's updated guidance on employee / contractor distinction 7
PCG 2023/2 Classifying workers as employees or independent contractors - ATO compliance approach 8
Software and intellectual property royalties 8
Single or multiple depreciating assets 9
Offshore intangibles arrangements with related parties 9
Arrangements that exploit the R&D tax offset 10
Income tax exempt entities seeking refunds of franking credits 11
Cases 11
Sale of heritage farmland subject to GST despite an intention to live on the property 11
Settlement payment classified as an ETP 12
Legislation 13
30% tax on super earnings on balances above $3 million 13

From Government

Redesigned Stage 3 tax cuts

The Government has announced that it will amend the already legislated Stage 3 tax cuts scheduled to commence on 1 July 2024. While the Government still needs to secure enough support to enable the amendments to pass through Parliament, the intent of the redesigned Stage 3 tax cuts is to benefit lower income households that have been disproportionately impacted by cost-of-living pressures.

First announced in the 2018-19 Federal Budget, the three-stage personal income tax plan was designed to address the issue of 'bracket creep'. While Stage 1 and Stage 2 have already introduced in incremental changes from 1 July 2018 and 1 July 2020 onwards, it is Stage 3 that is now the subject of the proposed redesigned.

The proposed redesign to Stage 3 will result in all resident taxpayers with taxable income under $146,486 (who would actually have an income tax liability) receiving a larger tax cut compared with the existing Stage 3 plan. For example:

- An individual with taxable income of $40,000 will receive a tax cut of $654, in contrast to receiving no tax cut under the current Stage 3 plan (but they are likely to have already benefited from the tax cuts at Stage 1 and Stage 2).
- An individual with taxable income of $100,000 would receive a tax cut of $2,179, which is $804 more than under the current Stage 3 plan.

However, an individual earning $200,000 will have the benefit of the Stage 3 plan reduced to around half of what was expected, from $9,075 to $4,529. There is still a benefit compared with current tax rates, but just not as much.

Comparing current, legislated, and redesigned Stage 3 tax rates for Australian resident taxpayers

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

There is additional relief for low-income earners with the Medicare Levy low-income thresholds expected to increase by 7.1% in line with inflation. It is expected that an individual will not start paying the Medicare Levy until their income reaches $26,000 and will not pay the full 2% until $32,500 (for singles).

More information

- Tax cuts to help with the cost of living
- Tax cut calculator
- Treasury: Advice on amending tax cuts to deliver broader cost-of-living relief
- Government: Fact sheet

Mid-Year Economic and Fiscal Outlook ups the tax take

The Government has taken the opportunity to announce some new tax-related measures together with the release of its Mid-Year Economic and Fiscal Outlook on 13 December 2023.

With the aim of providing further incentives for tax debts to be paid on time, the Government is proposing to deny deductions for general interest charge and shortfall interest charge levied by the ATO. This measure is intended to apply to interest expenses incurred in income years starting on or after 1 July 2025.

Other measures announced in the Mid-Year Economic and Fiscal Outlook include:

- An increase to the foreign resident capital gains withholding tax rate from 12.5% to 15% and a reduction of the withholding threshold from $750,000 to nil. The changes are intended to apply to property disposals for contracts entered into from 1 January 2025.
- An increase to the foreign investment fees that apply to foreign investors who apply to purchase established dwellings.
- An increase to the vacancy fees for foreign investors who have purchased residential dwellings since 9 May 2017.
- Tightening the definition of a fuel-efficient vehicle in the luxury car tax rules by reducing the maximum fuel consumption from 7 litres per 100km to 3.5 litres per 100 km from 1 July 2025.

More information

Budget 2023-24 Mid-Year Economic and Fiscal Outlook

Adviser misconduct: Increasing the power of regulators

Treasury has released some additional exposure draft legislation and papers for consultation as part of the Government's response to recent matters involving tax adviser misconduct.

While many practitioners would already be aware that the Government has already introduced some measures in response to this matter, this package of proposed reforms is specifically targeted at increasing the power of regulators.

Tax Agent Services (Code of Professional Conduct) Determination 2023

Treasury has released exposure draft materials in relation to the *Tax Agent Services (Code of Professional Conduct) Determination 2023*. This instrument is designed to supplement the Code of Professional Conduct that applies to registered tax and BAS agents.

The draft instrument imposes additional professional and ethical obligations with measures targeting the following areas:

- Upholding and promoting the ethical standards of the tax profession, which include requirements on practitioners to take reasonable steps to hold other registered tax agents and BAS agents accountable for compliance with the Code of Professional Conduct.
- Requirements to not make false or misleading statements to the ATO or Tax Practitioners Board. This requirement also extends to not making false or misleading statements to other government agencies where such statements are made in the capacity as a registered tax or BAS agent.
- Obligations to take reasonable steps to identify and avoid material conflicts of interest related to dealings with Australian government agencies, including a requirement to report such conflicts of interest if they arise.
- Maintaining confidentiality in dealings with government, including certain restrictions on using that information for personal advantage.
- Keeping proper records relating to tax agent services provided to current and former clients with such records to be retained for five years.
- Ensuring tax agent services provided on a practitioner's behalf are performed competently and under appropriate supervision.
- Requirements for tax practitioners to have sufficient internal control procedures to ensure they are compliant with the Code of Professional Conduct.
- Imposing obligations on tax practitioners to inform clients on matters that are reasonably relevant and material to their decision to engage or continue to engage the practitioner, including additional obligations to provide information to clients on the Tax Practitioner Board's public register and complaints process.

Enhancing the Tax Practitioners Board's sanctions regime

Treasury has also released a consultation paper on proposed changes aimed at providing the Tax Practitioners Board with a stronger and more agile sanctions regime.

Together with recent events, a review conducted around 2019 highlighted gaps in the enforcement tools available to the Tax Practitioners Board. The overall intent is for the Board to be given the ability to impose sanctions that escalate in severity in response to more serious contraventions.

In particular, the consultation paper canvasses the following proposals:

- Criminal penalties for practitioners that operate without a registration with the Tax Practitioners Board.
- Broader and increased civil penalties in the Tax Agent Services Act 2009.
- An infringement notice scheme attached to the civil penalty regime.
- A new power to allow the Tax Practitioners Board to enter enforceable voluntary undertakings with tax practitioners.
- A new power to allow the Tax Practitioners Board to impose interim and contingent suspensions.

More information

- Response to PwC – Tax Agent Services (Code of Professional Conduct) Determination 2023
- Response to PwC – Enhancing the Tax Practitioners Board's sanctions regime

Tax Treaty with Portugal

Australia signed a new tax treaty with Portugal on 30 November 2023, which is the first tax treaty between the two countries.

The tax treaty will come into force after both countries have ratified the treaty and instruments of ratification have been exchanged.

More information
Portugal tax treaty

From the Regulators

Government support payments to help businesses with recent weather events

Many businesses may have been adversely impacted by recent weather events with some receiving government grants and other forms of financial support to assist in their recovery.

While the tax treatment of support payments might not be the immediate priority of impacted businesses, the ATO is reminding taxpayers to consider this when it comes time to lodge tax returns.

The starting point is that government grants paid to businesses are normally taxable.

The main exception is if the specific grant has been made tax-free and certain other conditions are met. While this normally depends on the type of grant received by the business, the ATO has issued a fact sheet Disaster support grants and deductions for business with a list of common non-taxable natural disaster government grants which can assist with this area.

If a business receives a tax-free grant then it is important to remember that it wouldn't normally be possible to claim deductions for costs that directly relate to obtaining that tax-free grant. This includes any fees paid to assist with the grant application process.

However, receiving a tax-exempt grant shouldn't impact on the deductions available for other normal business expenses that would have otherwise been incurred, such as wages, rent or utilities. This should be the case even if the grant might be intended to help with those business costs.

More information

- Have you received support in difficult times?
- Government payments during COVID-19 – tax implications

Warning for super funds claiming GST credits on personal advice fees

The ATO is warning superannuation funds and investor-directed portfolio service (IDPS) investment platforms of certain arrangements that result in claiming reduced GST credits on fees for personal advice.

In broad terms, the focus is on arrangements that involve an investor or member engaging an adviser to provide them with personal advice in respect of their interest in the fund or platform. Those services are provided under an agreement between that person and the adviser.

While the person subsequently authorises the fund or platform to pay the adviser fees by deducting the fee from their interest in the fund or platforms' assets, they remain liable if the fund or platform does not pay.

The ATO describes this as an administrative payment arrangement. The fund or platform is not the actual recipient of the advice and as a result, is not eligible to claim reduced GST credits.

Recognising that private binding rulings issued by the ATO in the past may have contributed to reduced GST credits claims, the ATO's compliance approach is largely prospective. This means that the ATO will generally not devote compliance resources to reviewing reduced GST credits claimed under these arrangements for periods before 1 April 2024.

Funds and platforms engaged in these types of arrangements are still encouraged to review their entitlement to claim reduced GST credits and if unsure, seek advice or a private binding ruling from the ATO.

More information
Eligibility of super funds and investor-directed portfolio services investment platforms to claim reduced input tax credits on adviser fees

Data matching on the sharing economy

Electronic platforms operating in the sharing economy are being reminded of their obligations to report transactions made through their platform to the ATO under the sharing economy reporting regime.

With the first report due at the end of January 2024, these reporting obligations already apply to transactions from 1 July 2023 onwards for most ride-sourcing and short-term accommodation platforms.

For other impacted sharing economy platforms (such as in areas of asset sharing, food delivery, etc.), they will be required to report transactions from 1 July 2024 onwards.

Practitioners should remind clients engaged in the sharing economy that the ATO is collecting data from electronic platforms and will be matching this with disclosures in their tax returns and activity statements.

More information
Sharing economy reporting regime

Rulings, Determinations & Guidance

Individuals claiming deductions for financial advice fees

The ATO has released TD 2023/D4 that looks at when deductions can be claimed for fees paid for financial advice. The draft determination focuses on individuals who do not carry on a business and replaces TD 95/60 which was originally issued almost 30 years ago.

First, the ATO considers how the general deduction provisions in section 8-1 ITAA 1997 apply to financial advice fees.

Consistent with the ATO's original view, ongoing fees for financial advice in relation an existing or ongoing income producing investments should normally be deductible under the general deduction provisions. This would include continuing advice on the suitability or performance of an individual's income producing investments that they already own.

On the other hand, deductions typically won't be available for financial advice fees under the general deduction provisions in the following circumstances:

- Fees relating to financial advice on new proposed investments that have yet to be purchased, including advice on whether such investments are suitable for the individual. These fees are considered either to be capital in nature or preliminary to the actual earning of assessable income (i.e., relate to putting the income earning investment in place).
- Fees for once-off financial advice that can be expected to provide an enduring benefit, such as advice on estate planning or advice on starting a self-managed superannuation fund. The issue is that these fees are normally considered capital in nature.
- Financial advice fees that are considered private in nature, such as advice relating to household budgeting.

While this is largely consistent with the previous determination and doesn't represent a change in the

ATO's position, the new draft determination has been broadened to also look at when tax (financial) advice fees provided by financial advisers could be deductible under section 25-5.

In broad terms, this section allows someone to claim deductions for fees paid for advice on a Commonwealth taxation law to the extent the advice relates to managing their tax affairs. However, there are some key issues that need to be considered.

First, the advice needs to be provided by a recognised tax adviser, which normally means in this context either a qualified tax relevant provider registered with ASIC or a tax or BAS agent registered with the Tax Practitioners Board.

Second, the advice needs to relate to managing that individual's tax affairs. The expenditure also can't be capital expenditure, although expenditure is not capital expenditure merely because the tax affairs concerned relates to matters of a capital nature.

While the ATO considers that tax affairs include tax (financial) advice provided by a financial adviser under *Tax Agent Services Act 2009*, the warning is that not all advice provided by a financial adviser will qualify. Advice that won't qualify includes factual information about a financial product that does not actually involve applying or interpreting tax laws to the individual's personal circumstances.

The ATO makes the following observations when it comes to claiming deductions for financial advice fees:

- Where only part of the financial advice fee is deductible either under section 8-1 or section 25-5, a reasonable apportionment of the fee is required; *and*
- The individual should have sufficient evidence of the expenditure before claiming a deduction. For example, an invoice with the name of the financial adviser, the amount, an explanation of the advice, the date of when the expense was incurred and the date when the invoice was produced should suffice as written evidence.

Lastly, while the draft determination does not consider the situation of financial advice fees being paid by a superannuation fund, it is important to be aware that Treasury recently issued draft legislation for consultation in this area. This draft legislation includes a proposed measure that ensures deductions are available for certain personal advice in relation to members when paid for by their superannuation fund.

More information

- TD 2023/D4
- Delivering Better Financial Outcomes – reducing red tape and other measures

The ATO's updated guidance on employee / contractor distinction

TR 2023/4 Pay as You Go Withholding – who is an employee?

The ATO has now finalised its ruling TR 2023/4 that explains how to determine whether a worker should be classified as an employee for PAYG withholding purposes. The ruling focuses on determining whether someone is an employee under the ordinary meaning of the term but doesn't look at the extended definition of employee that is used in the context of the superannuation guarantee system.

The principles in the final ruling remain substantially the same as the original draft. The ATO continues to emphasize that whether an individual is an employee is a question of fact to be determined based on an assessment of the entire relationship between the parties.

In line with more recent High Court decisions in this area, if the worker and engaging entity have committed the terms of the relationship into a written contract, then the analysis needs to be performed with reference to the legal rights and obligations in that written contract.

The key focus is on the terms of the contract, rather than the labels used by the parties to describe the relationship.

Where a contract is not comprehensively committed in writing, the ATO now makes it more clear in the final ruling that the subsequent conduct of the parties can be relevant to work out the contractual terms that have been agreed to by the parties.

In determining whether a worker should be classified as an employee, there are still a range of factors that need to be considered.

The ATO indicates that the key distinction between an employee and an independent contractor is that:

- An employee serves in the business of an employer, performing their work as part of that business;
- An independent contractor provides services to a principal's business, but the contractor does so in furthering their own business enterprise; they carry out the work as principal of their own business, not as part of another.

In addition to whether the worker is serving as part of the engaging entity's business, it is also important to consider the extent to which the business has a contractual right to control how, where and when the workers perform their work.

Aside from these two key factors there are a number of other indicators that could be relevant in classifying the worker, including:

- The ability to delegate work;
- Whether the contract is on a results basis;
- Which party provides the tools and equipment;
- Risk; and
- Generation of goodwill.

Consistent with the draft ruling, the ATO considers that where a worker engages to perform work for a business as a partner of a partnership or through a company or trust then this may indicate an intention by all parties not to create an employment relationship. However, a different conclusion may be reached if a worker uses an interposed entity but is also directly a party to the contract with the engaging entity.

PCG 2023/2 Classifying workers as employees or independent contractors - ATO compliance approach

Together with the tax ruling, the ATO has also now finalised PCG 2023/2 which explains how the ATO will allocate compliance resources when it comes to classifying a worker as an employee or independent contractor.

The PCG outlines the risk framework that will be used by the ATO for worker classification issues, based on the actions taken by the parties when entering into the arrangement and their subsequent conduct. It is important to recognise that the PCG does not extend to employment law issues, state-based issues or the income tax affairs of the worker (e.g., whether they are subject to the PSI rules etc).

The PCG sets out four risk categories, which are based on whether certain conditions are met.

While the final PCG remains the same as the draft in many respects, there are some notable updates. This includes:

- Changes to the conditions that determine whether an arrangement falls within a medium-risk zone.
- A new condition that has been added for an arrangement to be considered a very-low or low-risk which requires the parties to enter into a comprehensive written agreement that governs their entire relationship.
- One of the original conditions for an arrangement to be considered very-low or low risk is that the business has obtained specific advice confirming that the classification is correct. This condition remains, but will only be satisfied if the ATO consider the advice provided is at least reasonably arguable.

More information

- TR 2023/4
- PCG 2023/2

Software and intellectual property royalties

The ATO has issued draft ruling TR 2021/D4 which considers when an amount paid under a software arrangement is considered a royalty under domestic tax law and standard international tax treaties.

This draft ruling replaces but also substantially updates the previous draft ruling in this area which was issued in 2021.

If the payments are classified as royalties under domestic tax law or a tax treaty (whichever is relevant), this can trigger non-resident withholding tax

obligations for the payer. The classification of a payment as a royalty under domestic tax law can also impact the tax rate and franking rate that applies to companies.

With the focus on software distributors, a key message from the ATO is that many contemporary distribution agreements that involve the electronic distribution of software are likely to involve royalties.

This is because they commonly now involve a software distributor paying for the use of rights that are exclusive to the copyright owner (such as to reproduce the work in a material form, to communicate the work to the public, to make an adaptation of the work, etc.).

This ruling is complex and needs to be reviewed in detail for clients involved in the software industry.

More information
TR 2021/D4

Single or multiple depreciating assets

TR 2024/1 is the ATO's final ruling on 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 with the expiry of temporary full expensing on 30 June 2023.

The guidance in the final ruling remains substantially unchanged compared with the earlier draft issued in October 2023.

The ATO explains that the following main principles are taken into account in determining whether an item consists of a single asset or multiple depreciating assets:

- 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 2024/1

Offshore intangibles arrangements with related parties

The ATO has finalised its practical compliance guideline PCG 2024/1 which sets out its approach to certain arrangements between international related parties involving intangible assets, such as intellectual property.

The two main areas of concern for the ATO are:

- Migration arrangements where there has been a restructure which impacts on the flow of the benefits from the exploitation of the intangible assets (for example, the transfer of intellectual property to an offshore related party); *and*
- Situations where Australian activities connected with the development, enhancement, maintenance, protection and exploitation of intangible assets are being mischaracterised or not recognised.

The guideline focuses on the application of the transfer pricing provisions and general anti-avoidance rules and provides a method for classifying an arrangement as lower, lower to medium risk, medium or high risk.

The risk rating influences the level of compliance resources that the ATO will dedicate to reviewing the arrangement. The ATO will not dedicate resources to reviewing or auditing lower risk arrangements, apart from verifying the risk rating is correct.

The risk assessment framework utilises a points-based system to determine the level of risk associated with the arrangement. The ATO provides a number of examples, explaining the level of risk associated with each arrangement and explains the types of evidence the ATO would expect to review when examining arrangements involving intangibles.

In response to feedback received on the draft PCG, the ATO has now included a white zone to make it clear that it won't seek to review an arrangement that is subject to a settlement agreement with the ATO, a court decision or that has previously been subject to an ATO review or audit.

Also, certain arrangements have also now been excluded from the scope of the PCG to make it easier for taxpayers to use the guide.

More information
PCG 2024/1

Arrangements that exploit the R&D tax offset

Two taxpayer alerts have been issued by the ATO which address concerns in relation to certain arrangements that are aimed at exploiting the R&D tax offset.

The ATO is concerned that these arrangements are being used to either claim a R&D tax offset in situations where it would otherwise not be available or artificially increase the amount of R&D tax offset claimed.

First, TA 2023/4 targets arrangements that involve an existing entity that has historically conducted the group's research and trading activities. The existing entity would either not have been entitled to a R&D tax offset (for example, due to not being a company) or would have been entitled to a lower R&D tax offset.

The arrangement is restructured with a new company either set up or repurposed to engage the existing related entity to conduct R&D activities, with the new company making claims for a refundable R&D tax offset.

While not all the features of these arrangements have been discussed below, some of the key features include:

- Apart from engaging the existing related entity to conduct R&D activities, the new company claiming the R&D tax offset conducts limited or no other activities;
- The refundable tax offset is the new company's only receipt;
- The new company lacks the ability to commercial exploit the intellectual property being developed; and
- Rather and in substance, the existing related entity retains control of the strategic decisions over the R&D activities and has primary rights to exploit the outcomes of R&D activities.

The second taxpayer alert TA 2023/5 targets arrangements that broadly involve a foreign entity incorporating a new Australian company to claim R&D offsets. A feature of these arrangements is also that the new Australian company itself has limited ability to commercially exploit the intellectual property being developed.

Primarily, the ATO seems to be concerned that the R&D activities are being done for the benefit of the related foreign entity and as a result, the Australian entity is not entitled to a R&D offset.

More information

- TA 2023/4
- TA 2023/5

Income tax exempt entities seeking refunds of franking credits

The ATO has issued TA 2023/3 which discusses certain arrangements that involve income tax exempt entities seeking refunds of franking credits when they receive franked distributions that are satisfied with property other than cash (e.g., shares).

The focus is on situations where terms and conditions are imposed as part of receiving the franked distributions which restrict the sale or disposal of the property (e.g., shares) by the income tax exempt entity.

The ATO's concern is that the income tax exempt entity has not received immediate custody and control of the property (e.g., shares), which then means that it is not entitled to a refund of franking credits attached to the distribution.

More information

TA 2023/3

Cases

Sale of heritage farmland subject to GST despite an intention to live on the property

In *Lance and Commissioner of Taxation* [2024] AATA 11 the AAT concluded that the sale of heritage farmland was subject to GST on the basis that the sale was made in the course of an enterprise carried on by the taxpayer. This conclusion was reached despite the AAT accepting that the taxpayer intended to live in the property at some stage.

The facts of this case are broadly summarised as follows:

- The taxpayer purchased the Sutton Farms property for approximately $1.6 million around December 2013.
- Sutton Farms had heritage features and was originally zoned 'Tourist'. The property consisted of a homestead, large barn and quarters situated on a land comprising of 1.47 hectares but the buildings were not habitable.
- Over the course of the following seven years, the taxpayer undertook a number of activities relating to the property that ultimately increased the value of the farmland.
- The activities included rezoning the property and obtaining conditional subdivision approval to subdivide the property into four lots with plans for a further subdivision into approximately 15 lots, as well as undertaking sewerage, water and electrical works.
- The taxpayer borrowed $1 million from the bank and $1.5 million from his brother-in-law to fund the original purchase and subsequent activities.
- While the property was never used for this purpose, the taxpayer's stated intention was to use the property as their home, gift some of the subdivided lots to their daughter and son for use as their own respective residences and use the last subdivided lot as a memorial dedicated to another child that had passed away.
- Without being subdivided, the property was eventually sold at a profit as a single lot around November 2020 for $4.25 million.

The taxpayer's main argument was that Sutton Farms was intended to be used as a family home and the subdivision had no commercial purpose. As a result, the taxpayer sought to argue that the sale of Sutton Farms did not occur in the course of an enterprise and therefore should not be subject to GST.

However, the AAT found inconsistencies with the taxpayer's statements including from:

- Media articles published during that time which suggested the taxpayer had an intention to commercialise the property (e.g., develop restaurants, café, undertake residential development, develop tourist accommodation, etc);
- Statements made to the ATO during the objection stage of the dispute indicating that the taxpayer intended to subdivide the property to sell some of

these lots to repay loans owed to the taxpayer's brother-in-law; *and*

- Representations from the taxpayer's accountant that GST credits on the original development costs were claimed because the intended subdivision and sale of the several lots within the property amounted to an enterprise.

While acknowledging the taxpayer might not carry on a business of property development, the AAT found that their activities still amounted to an enterprise. This was on the basis that the sale of Sutton Farms was not the mere realisation of an asset, but the transaction had the appearance or characteristics of a business activity or otherwise was an isolated commercial transaction undertaken with the intention to make a profit.

Interestingly, the AAT accepted that the taxpayer did have an intention to live on Sutton Farms at some stage, but this was insufficient because it found the taxpayer also had the intention to subdivide and sell some of the lots (e.g., to finance the development, repay his brother-in-law). This was notwithstanding the property was not subdivided and ultimately sold as a single lot.

Also, the AAT concluded that the sale of Sutton Farms couldn't qualify for input taxed treatment on sale on basis that it was classified as residential premises because none of the buildings on the property were capable of being occupied.

While in some cases properties sold with minimal development activities won't be subject to GST because this involves input taxed existing residential premises, this AAT decision still has potential flow-on implications, especially for income tax purposes.

This AAT decision demonstrates that careful consideration is required for those looking to argue that the sale of a property should be taxed on capital account, especially when they have mixed intentions that include living in the property and improving the property to ultimately sell it at a profit.

If the property is sold in a transaction that has the appearance or characteristics of a business activity or is an isolated transaction with the intention to make a profit (rather than the mere realisation of a capital asset) for GST purposes, this also makes it difficult to argue that the property is held solely on capital account through the entire ownership period.

Like the recent Bowerman case, the issue with this is that taxpayers can then potentially lose the ability to access the 50% general discount, as well as other CGT concessions including the main residence exemption.

More information

Lance and Commissioner of Taxation [2024] AATA 11

Settlement payment classified as an ETP

The Federal Court in *Stark v Commissioner of Taxation* [2023] FCA 1523 considered the tax treatment of a settlement payment received by a taxpayer from his previous employer. The Court ultimately held that the payment should be classified as an employment termination payment (ETP) for tax purposes.

In brief, the taxpayer's previous employer was alleged to have deceptively induced the taxpayer with an offer of employment that was unstable such that the taxpayer's position was ultimately terminated. This offer was claimed to have led the taxpayer to abandon another offer of prospective employment with a different employer at the time and destroyed his earning capacity.

The taxpayer sought payment for damages in relation to a breach of employment contract and also for misleading and deceptive conduct. The parties ultimately settled the dispute, with the taxpayer receiving a settlement payment.

The key issue considered by the Federal Court was whether the settlement payment made to the taxpayer should be classified as an ETP, a genuine redundancy payment or a capital payment received in respect of personal injury.

If it was classified as the latter, the amount would be tax-free under a specific CGT exemption in section 118-37 ITAA 1997.

First, the Federal Court concluded that the payment was not a capital payment in respect of personal injury.

This was largely on the basis that the settlement payment was made without any admission of liability or acknowledgement or finding of injury, so there was no more than just an allegation that an injury was suffered.

Also, the Federal Court also concluded the settlement payment could not been a genuine redundancy. This is because while the taxpayer's original role might have disappeared, it seemed that the taxpayer subsequently performed another role until he was terminated after a disagreement with his supervisor.

Instead, the Federal Court found that the settlement payment was made in consequence of the termination of the taxpayer's employment and as a result, taxable as an ETP.

More information

Stark v Commissioner of Taxation [2023] FCA 1523

Legislation

Parliament sits again from 6 Feb 2024

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

Following the release of a discussion paper and draft legislation for consultation, the Government has now introduced legislation to impose an overall 30% tax on future superannuation fund earnings on member balances over $3 million.

This is proposed to commence from 1 July 2025.

Currently, superannuation fund income is generally taxed at either 15% or 10% on gains on capital assets that have been held by the fund for more than 12 months.

In broad terms, the legislation introduces 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.

It is important to note that this additional 15% tax can 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.

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

- Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023
- Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023