Coster Galgut
Chartered Accountants

TAX UPDATE – JULY 2024

What did I miss?

The joint professional bodies have secured a delayed start to the Tax Practitioners Code of Conduct reforms.

Much to the relief of the profession, the changes introduced by the *Tax Agent Services (Code of Professional Conduct) Determination 2024* on 2 July 2024 with a start date of 1 August 2024, have been postponed until 1 July 2025 for practices with 100 or less employees, and 1 January 2025 for larger practices. That will certainly take the pressure off the Code changes. However, the 1 July 2024 start date for breach reporting and the rules for disqualified practitioners (1 Jan 2024) remain in place.

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

INSIDE

From Government 2
Tightening the foreign resident capital gains withholding tax regime 2
Strengthening the foreign resident CGT regime 2
Review of Tax Practitioner registration 3
4-year amendment periods for SMEs 3
From the Regulators 3
FAQ on new Code of Professional Conduct obligations applying to practitioners 3
Individuals claiming home office deductions 4
Data-matching program for eBay and Amazon sellers 5
Superannuation changes from 1 July 2024 5
Rulings, Determinations & Guidance 6
Benefits provided by non-resident trusts 6
Interaction between NALI and CGT rules 7
Recovery of disputed debts 7
Cases 7
Taxpayer unsuccessful in arguing that the deposits received were gifts and loans 7
Legislation 8
Tax Agent Services (Code of Professional Conduct) Determination 2024 8
Taxation (Multinational-Global and Domestic Minimum Tax) Bill 2024 9
Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 ... 9

From Government

Tightening the foreign resident capital gains withholding tax regime

As originally announced in the 2023–24 Mid-Year Economic and Fiscal Outlook, the Government has released draft legislation and explanatory materials for consultation on measures intended to improve the integrity of the foreign resident capital gains tax withholding regime.

Currently, this regime imposes a withholding rate of 12.5% on the sale of Australian properties with a value of $750,000 or more if the vendor is a foreign resident or hasn't obtained a clearance certificate from the ATO.

The Government proposes to modify the rules in this area as follows:

- Increase the withholding rate to 15% (from 12.5%); and
- Remove the threshold before withholding applies (i.e., currently set at less than $750,000).

More information

Improving the foreign resident capital gains withholding tax regime

Strengthening the foreign resident CGT regime

Following announcements in the 2024-25 Federal Budget, the Government has released a discussion paper for consultation on proposed measures to strengthen the foreign resident CGT regime. These measures are proposed to apply to CGT events commencing on or after 1 July 2025.

One of the key proposed reform areas in the consultation paper is to clarify and broaden the types of assets on which foreign residents are subject to CGT.

While not limited to this, foreign residents can currently be subject to CGT on the sale of Australian real property, as well as certain indirect interests in Australian real property.

Due to concerns that this does not capture a sufficiently broad range of assets, the proposal is to broadly ensure assets with a close economic connection to Australian land and natural resources will fall within the scope of the CGT rules for non-residents. Amongst other assets, this is intended to target tangible assets such as telecommunication or energy infrastructure and intangible assets such as water rights or pastoral leases.

While indirect interests (such as shares in a company) can also potentially fall within the scope of the CGT provisions applying to non-residents, one of the conditions broadly requires more than 50% of the entity's market value to be derived from taxable Australian real property.

As this is currently tested at the time of the CGT event and therefore at a specific point in time, there are concerns that non-residents can circumvent this test through inappropriate planning. The proposal is to extend the testing period to ensure that this is also tested over the prior 365 days.

The consultation paper also proposes to require foreign residents selling shares and other membership interests exceeding $20 million in value to notify the ATO prior to the transaction.

More information

Strengthening the foreign resident capital gains tax regime

Review of Tax Practitioner registration

Treasury has released a consultation paper reviewing the Tax Practitioners Board (TPB) requirements for tax practitioner registration. The consultation is a further measure to strengthen regulatory arrangements in response to the PwC tax leaks scandal.

The focus of the consultation paper is on the education, qualification and experience requirements for new entrants and existing practitioners. In particular, the Government is seeking views from stakeholders on:

- The introduction of additional requirements for registration of companies and partnerships. This would include governance requirements to ensure a registered company or partnership is complying with the Code of Conduct, specifically, supervision of staff, review of work, and training and education to provide tax practitioner services. And, a potential shift from the requirement to have a 'sufficient number' of tax practitioners to a ratio or prescribed number;
- Removal of the professional association accreditation and registration pathways for tax practitioner registration. In tandem with this is consideration of what a disciplinary body regime might look like if this function was not fulfilled by the professional bodies;
- Broadening the TPB's ability to accept alternative forms of relevant experience;
- Amending the primary qualification requirements; and
- Bringing the 'fit and proper person' test into line with ASIC and APRA tests, and the potential removal of the 5-year test period.

More information
Response to PwC - Review of Tax Practitioners Board registration

4-year amendment periods for SMEs

Treasury has released exposure draft legislation that would enable small and medium business entities up to 4 years to self-amend their tax returns. Announced in the 2023-24 Federal Budget, the changes would extend the time period from 2 to 4 years for an SME to apply to have an assessment amended.

While the relatively short 2-year statutory limitation period was intended to provide swift certainty for such taxpayers about their income tax liabilities, this has led to an increased number of objections and appeals.

The modified rules would only enable the Commissioner to amend these assessments to give effect to the decision on the taxpayer's application. The provisions would not permit the Commissioner to amend the assessment about other items that are not included in the taxpayer's application.

If enacted, the legislation would apply from 1 July 2024.

More information
Allowing small and medium businesses four years to self-amend tax assessments

From the Regulators

FAQ on new Code of Professional Conduct obligations applying to practitioners

Important
The professional bodies have secured a delayed start to the 1 August 2024 Code of Conduct reforms.

Firms with 100 employees or less have until 1 July 2025 and larger firms with 101 employees or more until 1 January 2025, to comply with the new rules.

See the letter from the Assistant Treasurer confirming the changes.

Many practitioners would be aware that the *Tax Agent Services (Code of Professional Conduct) Determination 2024* was registered earlier this month (see also Tax Agent Services (Code of Professional Conduct) Determination 2024 in the Round Up).

Applying to registered tax and BAS agents, this Determination introduces eight additional Code of Professional Conduct (Code) obligations and has generated much discussion and some concerns across the tax practitioner community.

To that end, the Tax Practitioner Board (TPB) has issued a fact sheet with responses to some frequently asked questions and concerns.

Given the relatively short lead time between the Determination being registered and the obligations coming into effect, one of the key concerns from practitioners is the TPB's approach to administration during the initial implementation period.

In that regard, the TPB acknowledges that there will be a transition phase and during that period the TPB has indicated that it will take a pragmatic approach to implementation. This includes a reasonable time for practitioners to understand their obligations, subsequently assess and implement any changes that are required to comply.

The focus during the transition phase is on providing education and support, with the TPB intending to release draft guidance materials for consultation commencing in the coming weeks.

The TPB in the meantime has also provided guidance on some specific areas of concern.

In response to the impact of these additional Code obligations on smaller practices, the TPB recognises smaller practices operate differently to larger firms. While the additional Code obligations apply to all tax practitioners, the TPB recognises that how a practitioner is able to meet these additional requirements will be assessed on a range of factors, including but not limited to the nature and size of their client base.

Another key area which has generated some concern from practitioners is the additional requirement in the updated Code to keep clients informed of all relevant matters that could significantly influence a decision to engage them.

While there is uncertainty as to what matters are within scope, the TPB expects to issue draft guidance in early September on this matter. In the interim, the TPB has indicated that physical and mental health issues that are irrelevant to providing tax agent services, as well as personal, religious and political beliefs, do not need to be disclosed to clients.

The Determination also introduces an additional obligation in relation to ensuring tax agent services being provided on a practitioner's behalf are provided competently. Some assurance has been provided by the TPB that this does not necessarily and always require staff to have formal training, but rather this needs to be considered in relation to each employee having regard to the type of services they perform.

Practitioners who are interested in a more detailed explanation of the changes can view our guide here.

More information
FAQs – Code Determination

Individuals claiming home office deductions

The ATO has issued a list of common questions and answers in relation to individuals looking to claim deductions for home office running expenses.

Many practitioners would be aware that individuals have had the choice of claiming deductions for home office running expenses either using the actual or revised rate method of 67 cents per hour since 1 July 2022. A key focus of the ATO's guidance is on the revised fixed rate method.

First, the ATO explains that there are no requirements around minimum hours worked from home before

someone is entitled to use the revised fixed rate method. This is as long as the following conditions are satisfied:

- They perform genuine work or business activities from home (rather than just carrying out minor tasks such as checking emails or taking calls);
- They personally incur additional running expenses as a result of this work; and
- They keep and retain relevant records.

In relation to record keeping, the ATO also explains that taxpayers must have records showing the total number of hours they have worked from home during the income year (including their start and finish time on relevant days). This can be recorded through a diary, spreadsheet, rosters or timesheets and must be recorded contemporaneously.

Apart from a transitional period which has now expired, estimates or a sample period of representative hours worked from home are no longer accepted.

While this is not available to individuals who use the revised fixed rate method, the ATO also clarifies that individuals using the actual method to claim home office running expenses may also be entitled to claim additional deductions for mobile phone call and data usage costs.

The challenge then becomes apportioning the deduction between work and private use. While there might be several ways to undertake such an apportionment, the ATO considers the easiest way to manage this is for individuals to keep a diary over a continuous 4-week period (e.g., of the type of calls made and time spent using the internet for work versus private use).

Finally, the ATO cautions that an employee generally can't claim deductions for occupancy expenses such as rent, insurance or interest on their mortgage. This is unless their home meets the conditions to be considered a 'place of business', which tends to be less common for employees.

More information
Your top 5 work-from-home questions

Data-matching program for eBay and Amazon sellers

The ATO will require Amazon and eBay to provide the ATO with details of taxpayers who provide an online marketplace and where annual trading activity amounts to $12,000 or more in any of the 2019 to 2026 income years.

The ATO estimates that it will receive between 20,000 and 30,000 records each year under this program. The ATO will use the data to identify taxpayers who might not be complying with all of their tax-related obligations.

More information
Online selling data-matching program protocol

Superannuation changes from 1 July 2024

The ATO is encouraging taxpayers to be aware of certain changes to the superannuation rules that take effect from 1 July 2024.

First, employers need to be aware that the SG rate has increased to 11.5% from 1 July 2024. It is important for employers to take this into account to ensure superannuation guarantee amounts are calculated correctly.

Also effective from 1 July 2024 is an increase in the concessional super contributions cap from $27,500 to $30,000 per year. Subject to any unused concessional contribution cap amounts from previous years, this is the maximum amount of before-tax contributions (including employer superannuation guarantee amounts) that can be contributed each year without contributions being subject to extra tax.

Other key changes include:
- The non-concessional super contributions cap has increased from $110,000 to $120,000; and
- The maximum super contribution base for employers has increased from $62,270 to $65,070 per quarter.

More information

Be aware of important changes to super from 1 July 2024

Rulings, Determinations & Guidance

Benefits provided by non-resident trusts

When clients receive distributions or other benefits from a non-resident trust there are a number of tax provisions that can potentially apply so that some or all of the distribution or benefit is taxed in Australia.

One of the key provisions in this area is section 99B ITAA 1936, which basically ensures that distributions made to a beneficiary who has been a resident of Australia at any time during the relevant income year are taxed in Australia, unless a specific exception applies.

The most common exception is where the distribution is sourced from the corpus of the trust, unless this relates to income or gains made by the trust that haven't been taxed in Australia but would have been taxed had they been derived by an Australian resident (i.e., a hypothetical resident taxpayer).

In TR 2024/D2, the ATO discusses the hypothetical resident taxpayer aspect of the rules and provides some practical examples explaining how the ATO would apply the rules in some reasonably common scenarios. For example, the ATO indicates that section 99B would not apply if a foreign trust sells a pre-CGT asset and distributes the capital gain to a resident taxpayer. However, the ATO confirms that the CGT discount is not available to the hypothetical taxpayer.

PCG 2024/D1 explains how the ATO will approach section 99B in a number of common scenarios, although the guidance is very high-level and focuses more on whether the taxpayer would need to consider section 99B in more detail. The PCG makes it clear that section 99B can potentially apply in a wide range of circumstances, including situations involving loans, forgiven debts, amounts received from deceased estates and when beneficiaries use assets owned by a trust.

However, the ATO sets out two common scenarios where the ATO won't seek to devote compliance resources to determine whether section 99B applies.

One of those scenarios involves distributions received from a foreign deceased estate and where the following conditions are satisfied:

- The deceased individual was a non-resident just before they died;
- The trust property (including cash or proceeds from the sale of trust assets) is distributed to the resident beneficiary within 24 months of the date of death;
- The total value of trust property received by the beneficiary doesn't exceed $2m;
- The distribution is not made from a testamentary trust;
- The beneficiary obtains appropriate documentation to prove that the conditions are met;
- There aren't any elements of a contrived nature; and
- The arrangement wasn't entered into for the purpose of enabling the beneficiary to provide a benefit to another resident beneficiary of the trust.

More information

- TD 2024/D2
- PCG 2024/D1

Interaction between NALI and CGT rules

The ATO has now finalised its guidance on the interaction between the CGT provisions and the non-arm's length income (NALI) rules applicable for superannuation funds.

Broadly, the determination explains how to calculate a fund's statutory income that is NALI (and therefore tax payable at penalty rates) where a capital gain arises as a result of non-arm's length dealings.

A capital gain made by a superannuation fund is NALI where it arises as a result of a scheme where the

parties were not dealing with each other at arm's length and one or more of the following applies:

- The amount of the capital gain is more than the amount the superannuation fund might have been expected to derive if the parties had been acting at arm's length; or
- For a SMSF (or APRA fund with no more than 6 members), in gaining or producing the capital gain, non-arm's length expenditure (NALE) is incurred (including nil expenditure) in respect of a CGT asset that is less than the amount of expenditure that the superannuation fund might have been expected to incur if those parties were dealing with each other at arm's length.

The amount that is included in NALI is determined by reference to the amount of the non-arm's length capital gain and cannot exceed the superannuation fund's net capital gain.

A non-arm's length capital gain on an asset acquired by a superannuation fund at less than market value is subject to the CGT market value substitution rules. The determination also highlights that in the case where a superannuation fund makes arm's length and non-arm's length capital gains in the same financial year, it is possible that some or all of the arm's length gain could also be taxed as NALI.

Where a superannuation fund's net capital gain for the income year is nil due to the application of capital losses, the ATO considers that the fund will have no amount of NALI referable to the non-arm's length capital gain.

More information
TD 2024/5

Recovery of disputed debts

The ATO in PS LA 2011/4 sets out its approach to the recovery of disputed debts where a taxpayer has lodged an objection, review or appeal to dispute the tax liability.

While the practice statement remains largely unchanged, the ATO has updated its guidance to clarify its expectation that large businesses and wealthy groups should either pay their disputed debts in full or enter into a 50/50 arrangement.

A 50/50 arrangement broadly involves the taxpayer paying a minimum of 50% of the disputed principal tax with the ATO deferring recovery of the remainder.

More information
PS LA 2011/4

Cases

Taxpayer unsuccessful in arguing that the deposits received were gifts and loans

The Federal Court in *Rusanov v Commissioner of Taxation* [2024] FCA 777 considered whether certain deposits into the taxpayer's bank account were genuine gifts or loans.

The taxpayers received significant deposits into their bank account over a number of years which were not disclosed as assessable income in their respective tax returns. The ATO subsequently commenced an audit leading to a default assessment, which treated these deposits as assessable.

While the taxpayers argued that the deposits were non-assessable gifts from their father or otherwise loans from a friend, they were unsuccessful at the AAT. This was mainly because the AAT considered that the taxpayers had not discharged their burden of proof that the ATO's default assessments were excessive, which ultimately requires the taxpayers to prove what their actual taxable income was in those years.

Subsequently, the taxpayer appealed to the Federal Court and argued that they had produced and relied on evidence consistent with the ATO's guidelines in relation to documenting gifts and loans from overseas parties. This seemed to include declarations and various statements from the purported lender and donor.

However, the taxpayer was unsuccessful, with the Federal Court ruling in favour of the ATO and ultimately concluding that it was correct for the AAT to come to its original conclusion. This outcome was reached having regard to a number of matters, including:

- There were no contemporaneous records to substantiate the payments, including emails or texts acknowledging receipt, which the AAT found implausible;
- There was no documentation to evidence any sort of loan agreement, including no payments of interest nor a fixed time to repay the loan; and
- The taxpayers were selective in providing evidence, including an absence of evidence regarding companies in which they were directors. It seemed at least one of the companies was related in some way to their father, such that the AAT could not be satisfied that the transfers were not renumeration for services performed by the taxpayers.

In a case like this involving default assessments, it is important to remember that the bar is generally set quite high. This is because taxpayers are required to prove what their actual taxable income was in the relevant years to demonstrate the ATO's assessments were excessive.

Also, practitioners should be aware of other potential issues when funds are received by Australian clients from overseas related parties, especially when the amounts are sourced from private companies or trusts.

Even though a non-resident company might be based overseas, Division 7A potentially can apply to loans and payments made by these companies to Australian shareholders (or associates of shareholders). This can also potentially apply when the funds pass through an interposed entity. If these rules are triggered then the client could be treated as having received a deemed unfranked dividend.

If any funds are received from a foreign trust, section 99B can potentially apply where they represent income or gains that would have been taxed in Australia had they been derived by a resident of Australia. This can potentially be an issue even where the funds represent profits accumulated from a prior year.

More information
Rusanov v Commissioner of Taxation [2024] FCA 777

Legislation

Tax Agent Services (Code of Professional Conduct) Determination 2024

The *Tax Agent Services (Code of Professional Conduct) Determination 2024* utilises new Ministerial powers to supplement the Code requirements for registered tax practitioners (tax agents/BAS agents).

The Determination introduces eight additional Code obligations that target the following key areas:

- Upholding and promoting the ethical standards of the tax profession. This includes requirements to uphold and promote the Code and not engage in conduct that may undermine public trust and confidence in the integrity of the tax profession and tax system;
- Requirements in relation to not making false or misleading statements to the ATO or the TPB, as well as other Australian government agencies. This includes obligations around undertaking certain steps to correct the error where the statement is made to the ATO or the TPB;
- Requirements in relation to taking reasonable steps to identify, document, manage, mitigate and avoid any material conflicts of interest in relation to dealings with Australian government agencies;
- Maintaining confidentiality in dealings with government, including 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. This can potentially cover work performed by the practitioner's employees, as well as other contractors and associates;
- Obligations on practitioners to establish, maintain, document and enforce a quality management system designed to provide reasonable confidence of compliance with the Code. This can include policies and procedures relating to governance and leadership, performance monitoring, adherence to the Code, client engagement, record keeping, protecting confidentiality, managing conflicts of interest and the recruitment, training and management of employees; and
- Requirements to advise all prospective and current clients on matters that could "significantly influence a decision to engage or continue to engage the practitioner", including an obligation to provide information to clients on the TPB's public register and complaints process. A relevant matter could include a prior material breach of the Tax Agents Services Act, sanctions imposed by the TPB, conditions placed on your registration etc.,

Each of the additional Code obligations take effect from 1 August 2024 although there are some transitional rules and requirements for the requirement to keep clients informed of all relevant matters. For any matters arising between 1 July 2022 and 1 August 2024, practitioners must disclose this information to clients by 30 October 2024.

More information

- Tax Agent Services (Code of Professional Conduct) Determination 2024

Taxation (Multinational-Global and Domestic Minimum Tax) Bill 2024

A Bill has been introduced to Parliament that imposes a 15% global minimum tax and domestic minimum tax rate.

The global minimum tax and domestic minimum tax rates will apply to large multinationals with annual global revenue of EUR750 million or more.

Certain aspects of the rules are intended to commence for fiscal years commencing on or after 1 January 2024.

More information

- Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024
- Taxation (Multinational—Global and Domestic Minimum Tax) Imposition Bill 2024
- Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) Bill 2024

Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024

This legislation has now received Royal Assent and introduces amendments to a number of areas, including certain measures in response to the quality of advice review, the location and producer tax offset and petroleum rent resource tax.

Quality of Advice review

The legislation implements the Government's response to certain recommendations from the Quality of Advice review.

This includes amendments to the SIS Act by clarifying the legal basis in which superannuation trustees are able to pay advice fees from a member's superannuation account at the request of the member and provides certainty that the payment of certain

personal advice fees by a superannuation trustee are deductible to the fund.

Location and producer tax offset

Relevant to the film industry, the legislation also makes the following amendments to the location tax offset:

- An increase in the rate of the location tax offset from 16.5% to 30% of the company's total qualifying Australian production expenditure on films;
- An increase of the company's minimum qualifying Australian production expenditure on a film from at least $15 million to $20 million;
- An increase to the minimum amount of total qualifying Australian production expenditure on a film per hour from $1 million to $1.5 million;
- An additional requirement to satisfy a minimum training expenditure requirement test or satisfy alternative requirements in relation to establishing and upgrading film infrastructure or providing training programs;
- Additional conditions to require some post, digital and visual effects for productions to be provided by Australian providers or through an Australian permanent establishment; and
- Enable the Arts Minister to request specific information in relation to the location tax offset.

The legislation also makes amendments to the producer tax offset by adding a new threshold category for productions spending a minimum of $35 million of qualifying Australian production expenditure for a season of a drama series.

Measures impacting the mining, quarrying, prospecting and petroleum exploration industry.

The legislation also contains the following amendments:

- To clarify the meaning of the phrase 'exploration for petroleum' in the context of Petroleum Resource Rent Tax Act;
- To ensure that mining, quarrying or prospecting rights cannot be depreciated for income tax purposes until they are used; and
- To clarify the circumstances in which the issue of new mining, quarrying or prospecting rights over areas covered by existing rights lead to income tax adjustments.

More information

Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024