Coster Galgut
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TAX UPDATE – JUNE 2024

What did I miss?

The increase to the instant asset write-off threshold from $1,000 to $20,000 for 2023-24 has (finally) passed Parliament just days before the end of the financial year.

The Bill also contained the reforms to the reforms to the SMSF non arm's length income rules.

From the regulators, we have seen a focus on employer super guarantee obligations – particularly related to a general misunderstanding about who is an employee for SG purposes.

And, family trust elections are in the spotlight. They are an effective tool when used correctly, but can become very complex when things go wrong in practice.

Regards,
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From the Regulators

Checks to comply with superannuation guarantee obligations

The ATO has set out some simple checks for practitioners to undertake to ensure their employer clients are meeting their superannuation guarantee (SG) obligations.

First, it is important to consider which workers are eligible to receive SG contributions. Workers who are classified as employees under general principles are normally eligible to receive SG contributions on their salary and wages. However, modified rules can apply to certain workers including employees under 18, private or domestic workers and employees working overseas.

Even though a worker might be a genuine contractor, just be aware this does not always mean that SG doesn't apply. For example, contractors can be entitled to SG where they perform work under a contract that is wholly or principally for their labour. Also, SG can apply to workers in the sports, entertainment and arts industry even if they aren't employees under common law.

Another area where the ATO is encouraging checks to be undertaken is around ensuring the correct amount of SG is paid on time and to the right superannuation fund.

When it comes to the right superannuation fund and depending on the circumstances, this will either normally be a superannuation fund of the employee's choice, the employee's existing stapled fund or the employer's default fund.

While the SG rate for the 2024 income year is 11%, this increases to 11.5% from 1 July 2024. It will be important to take this into account to ensure SG contributions are calculated correctly.

In terms of timing, SG contributions must be received by the fund on or before 28 days after the end of each quarter. For the June 2024 quarter, this means superannuation contributions must be received on or before 28 July 2024.

If the payment is late or has been missed, harsh penalties and other obligations will normally be triggered. In these cases, practitioners can assist employers by checking that they've lodged a superannuation guarantee charge statement and paid the superannuation guarantee charge to the ATO. Just remember that the superannuation guarantee charge is not deductible to the employer.

More information

- Simple checks for super success

Year-end reminders for small business employers

The ATO has issued some timely reminders for the end of the income year with a focus on employer obligations for small businesses.

The ATO is reminding taxpayers to finalise their single tax payroll information by 14 July. This is an important deadline to ensure employees have timely access to the information they need to lodge their personal tax returns.

Just remember that extensions can potentially apply for closely held employees (for example, family members of a family business, directors or shareholders of the company and beneficiaries of the trust).

The other key reminder is that new personal income tax rates and thresholds come into effect from 1 July 2024. This will impact on PAYG withholding amounts for the 2025 financial year, so it will be prudent for employers to check that the correct PAYG withholding tax tables are being used and their payroll software is using the new withholding rates from 1 July onwards.

More information

- Small Business – Get ready for tax time

ATO reviewing and cancelling ABNs

Practitioners should be aware that client ABNs might cancelled by the ATO if they appear to be inactive.

This can occur where clients haven't reported business activities in their returns or there are no signs of business activity in other lodgments or third-party information.

The ATO will contact clients by email, letter or SMS if they think that those clients no longer require an ABN.

Despite this, there are bound to be situations where ABNs are cancelled but the client still needs it. If so, clients can apply to have the ABN reinstated, in which

case the same ABN should be provided where the business structure has not changed.

The other thing to be aware of is that clients are required to update their ABN details for any relevant changes to their business within 28 days of becoming aware of the change. This includes cancelling their ABN where the business is no longer operating.

More information

- Do you still you need your ABN?

Expanding high certainty pre-fill information

With many practitioners looking to start the process of preparing individual tax returns soon, it is timely that the ATO has expanded the types of pre-fill data which it considers has high certainty.

From 1 July 2024, a certainty indicator may be present for the following types of additional pre-fill data:

- Interest income for joint account holders; and
- Certain Australian government benefits reported at item 5 or 6 of an individual tax return.

While it is possible to change figures even where a certainty indicator is present, clients will be required to either select or provide a reason for the change. Practitioners should be reminding clients to keep evidence that helps explain why pre-fill data has been changed which can assist in the event of an ATO review.

More information

- High certainty pre-fill data expanding to cover more fields

Avoid common errors with the SMSF return

The ATO is seeing common errors being made when completing SMSF annual returns. The SMSF annual return is more than just a tax return which means there are additional disclosures.

To avoid delays in processing returns, the ATO is encouraging clients to:

- Provide member information and TFNs as required under section F;
- Provide SMSF auditor numbers and auditor details together with the date of audit completion as required under item 6 of section A; and
- Check the SMSF's account balance equals the sum of accumulation and retirement phase account balances.

More information

- Avoid common errors when lodging your 2024 annual return

Top tips for the Top 500 and Next 5,000 private groups

The ATO has set out some tips for the largest private groups that it engages through its Top 500 and Next 5,000 program.

The ATO's observation through its review of taxpayers in the Next 5,000 group is that they are more likely to adopt the correct tax position when they seek advice for significant transactions.

Not only is it important that these taxpayers identify the sale of significant assets and material transactions that have occurred during the year, but the ATO also recommends that they communicate these transactions to their tax advisors in a timely and accurate manner.

With related party transactions remaining a focus area in the context of reviews, the ATO also suggests it would be prudent for taxpayers to seek independent valuations to support sales between related parties.

For taxpayers in the Top 500 group, there is a strong emphasis on ensuring there are effective governance procedures in place. Some of the ATO's top tips for taxpayers starting to prepare income tax returns include:

- Following a lodgment and payment calendar to ensure obligations and due dates aren't missed;
- Reviewing the roles and responsibilities of parties involved in reporting obligations and preparing financial accounts;
- Identifying key dates including for signing trust resolutions and when minimum yearly repayments on Division 7A need to be made; and
- Engaging an external auditor to verify financial statements when they are used for the basis of preparing tax returns.

More information

- EOFY tips for Top 500 private groups
- Next 5,000 – report significant transactions right

Managing family trust elections

Many practitioners would be aware that family trust elections can be an effective tool when used correctly. Some of key reasons for making a family trust election include:

- Making it simpler to pass the trust loss tests by ensuring the trust needs to pass only a modified version of the income injection test;
- Helping a company with losses to pass the continuity of ownership test if its shares are held by a discretionary trust; and
- Ensuring beneficiaries of a discretionary trust have better access to franking credits from franked dividends received by the trust by allowing them to be treated as a 'qualified person' for the purposes of the 45-day holding period rule.

However, there are some disadvantages to making family trust elections that need to be considered.

When a trust makes a family trust election, the family group is determined by reference to the individual specified in that family trust election. Any distributions made outside the family group of the specified individual are subject to family trust distribution tax. This tax is payable at the top personal marginal rate plus Medicare levy.

This is why the ATO is reminding practitioners and trustees that family trust elections (and interposed entity elections) should be kept on file and be considered carefully, especially when making distribution decisions.

For trusts that have already made an election, the ATO is also encouraging clients to consider if it is actually required, or whether the specified individual is the most suitable.

If not, consideration should be given to whether it is possible to revoke the election or vary the specified individual. Practitioners and trustees still need to approach this carefully because there are timing restrictions as well as other strict conditions that need to be met.

More information

- Know your stuff: Family trust elections and interposed entity elections

Rulings, Determinations & Guidance

Mobile phones and the revised fixed rate while working from home

The ATO has updated its guidance in PCG 2023/1 which discusses the revised fixed rate method used by individuals to claim deductions for additional home office expenses while working from home.

Individuals have had the choice of claiming deductions for home office expenses using either the actual expense method or the revised fixed rate method since 1 July 2022.

For individuals who opt to use the revised fixed rate method, this method provides a deduction at a rate of 67 cents per hour for certain home office expenses. The revised rate covers mobile phone expenses along with certain other costs.

While individuals using the revised fixed rate cannot claim additional deductions for expenses that are already covered by the rate, it is possible to claim additional depreciation deductions on home office equipment separately.

Because the revised fixed rate covers mobile phone expenses, it was not entirely clear in the past whether using the revised fixed rate method prevented taxpayers from claiming additional depreciation deductions for mobile phones.

This issue has now been clarified by the ATO. The ATO makes it clear in its updated practical compliance guideline that depreciation deductions can be claimed separately for mobile phones to the extent they are used for work purposes. This is the case even for clients who have opted to use the revised fixed rate method.

More information

- PCG 2023/1

Updated guidance on employee v contractor distinction for SG purposes

Following some recent and prominent High Court decisions in this area, many practitioners would be aware that the ATO recently finalised a ruling TR 2023/4 which explains how to determine whether a worker should be classified as an employee for PAYG withholding purposes.

While the ATO historically had a separate ruling which looks at when an individual is considered an employee for SG purposes, this previous ruling SGR 2005/1 has now been withdrawn. Instead, the guidance in this area has been consolidated into TR 2023/4 in draft form.

Importantly, the ATO uses the same approach to determine whether a worker is an employee under common law for both PAYG withholding and superannuation guarantee purposes.

While a range of factors needs to be considered, the key concept is that if the worker and engaging entity have committed to the terms of the relationship in a written contract, the analysis needs to be performed with reference to the legal rights and obligations in that written contract.

The key focus is normally on the terms of the contract. If the contract is not comprehensively committed in writing, the subsequent conduct of the parties can then become relevant to work out the contractual terms that have been agreed to by the parties.

SG obligations aren't necessarily restricted to workers who are considered common law employees. This is why the draft ruling also provides guidance on when someone could be treated as a deemed employee for SG purposes.

While there are other categories of deemed employees, it is often relevant in practice to consider whether a worker could be treated as a deemed employee under section 12(3). This becomes relevant where they are engaged under a contract which is wholly or principally for their labour.

For this to apply, the ATO in its updated draft ruling confirms the following three conditions need to be met:

- There must be a contract;
- The contract must be wholly or principally for the labour of a person; and
- The person (i.e., an individual) must work under that contract.

Consistent with the ATO's previous ruling in this area, a worker won't be considered a deemed employee under section 12(3) if any of the following apply:

- The contract is for a result and the worker is paid for that result (i.e., a results contract);
- The contract is principally for the provision of something other than labour of the person (such as the provision of equipment); or

- The contract contains the right to delegate, subcontract or assign the work to another party.

Together with the draft updated ruling, practitioners should also review PCG 2023/2 when considering whether someone is an employee or deemed employee for SG purposes. This practical compliance guideline explains the ATO's risk framework and how the ATO will allocate compliance resources when it comes to classifying a worker as an employee or independent contractor, including for SG purposes.

More information

- TR 2023/4DC1

Cents per km rate for 2024

LI 2024/19 sets out the cents per kilometre rate at 88 cents per kilometre for the 2025 income year (i.e., from 1 July 2024). This will be relevant for taxpayers who choose to apply the cents per kilometre method when calculating income tax deductions for their work-related car expenses.

More information

- LI 2024/19

Reasonable travel and overtime meal allowances

The ATO has issued TD 2024/3 which is the annual determination setting out the ATO's reasonable amounts for the purposes of the substantiation exception. These updated reasonable amounts are relevant for the 2025 income year.

These reasonable rates apply in relation to claims made by employees for:

- Overtime meal expenses for food and drink when working overtime;
- Domestic travel expenses for accommodation, food and drink, and incidentals when travelling away from home overnight for work; and
- Overseas travel expenses for food and drink, and incidentals when travelling overseas for work.

While an employee does not need to satisfy the normal strict record keeping rules if they receive a bona fide travel or overtime meal allowance and the deduction they are claiming does not exceed the ATO's reasonable rates, it is important to remember that appropriate records still need to be kept to support any deductions that are being claimed. Also, deductions can only be claimed for expenses that have actually been incurred by the employee.

More information

- TD 2024/3

Cases

Anti-avoidance provisions and eliminating Division 7A loans

The Federal Court in *Ierna v Commissioner of Taxation* [2024] FCA 592 considered various anti-avoidance provisions in the context of an internal restructure that had the effect of eliminating Division 7A loans.

By way of background, the taxpayers conducted a retail business specialising in street wear through a unit trust. Over the years, the unit trust distributed its profits indirectly through its trust unitholders to several corporate beneficiaries. This in turn ultimately necessitated amounts being put on complying Division 7A loan terms where either the distributions remained unpaid or were on-lent by the corporate beneficiaries to shareholders or their associates.

The unitholders undertook an internal restructure to transfer mostly pre-CGT units to an interposed holding company in exchange for shares in that company, using the Division 615 CGT rollover relief. The interposed company undertook a selective share capital reduction with the unitholders subsequently assigning amounts owed by the company from the capital reduction to extinguish various Division 7A loans within the group.

The ATO audited the taxpayer and issued amendments on the basis it triggered certain anti-avoidance provisions.

First, the ATO's argued that the restructure triggered the integrity rules in section 45B ITAA36. While these integrity rules are complex, they are broadly intended to target situations that enable the taxpayer to obtain a tax benefit where profits are distributed as preferentially taxed capital (e.g., via a share capital reduction) as a substitute for dividends.

The Federal Court ruled in favour of the taxpayer concluding that section 45B ITAA36 did not apply. This was broadly because the return of capital was genuinely attributable to share capital. Fundamentally, the newly formed company had no profits such that it could not be said that the capital return was a substitute for the payment of a dividend.

Second, the ATO sought to argue that that the general anti-avoidance provisions in Part IVA applied to the arrangement. The anti-avoidance provisions in Part IVA apply to schemes undertaken with the sole or dominant purpose of obtaining a tax benefit.

The ATO argued that the taxpayer obtained a tax benefit from avoiding the need for the corporate beneficiary to pay a fully franked dividend and the shareholders being assessed on such a dividend. In particular, the ATO argued that the taxpayer would have used the proceeds from the dividend to repay the outstanding Division 7A loans.

The Federal Court disagreed with the ATO since there was no past conduct that suggested that taxpayers would repay outstanding Division 7A loans in this way. Rather, the evidence suggested that the taxpayers would have just sold or used the pre-CGT assets to repay the Division 7A loans.

While the taxpayer was successful in this instance, practitioners need to be aware that these anti-avoidance and integrity rules are complex and highly dependent on the taxpayer's specific circumstances. This area needs to be approached carefully and we have seen the ATO show a stronger willingness to challenge related party transactions, especially where they appear to be tax-driven.

More information

- Ierna v Commissioner of Taxation [2024] FCA 592 (6 June 2024)

ATO unsuccessfully challenges taxpayer's valuation

In *Moloney v Commissioner of Taxation* [2024] AATA 1483, the ATO was unsuccessful in challenging the taxpayer's valuation of the shares in their trading business.

The taxpayer conducted a freight business that specialised in transporting agricultural products. As part of an internal restructure, one of the steps involved the sale of the shares in the company conducting the freight business to a related entity within the group.

Relying on a valuation undertaken by the taxpayer's advisors, the taxpayer disclosed a capital gain calculated based on capital proceeds of $3.5 million with the net capital gain subsequently reduced to nil through a combination of the general CGT discount and the small business CGT concessions.

The ATO audited the taxpayer and instead obtained its own separate valuation that valued the shares at around $7 million, which was significantly higher than the taxpayer's original valuation.

The ATO essentially ran two arguments, with both arguments being dependent on the accuracy of its valuation.

First, the ATO argued that the market value substitution rule in section 116-30 ITAA97 applied to substitute the capital proceeds from the share sale to around $7 million. This was on the basis the related parties weren't dealing at arm's length in relation to the transaction.

Also, the ATO considered the taxpayer was not eligible to access the small business CGT concessions. Essentially because the ATO valued the shares at around $7 million, the ATO's position was that the

taxpayer did not satisfy the $6m maximum net asset value test just before the CGT event.

Both the taxpayer and ATO's substantive arguments at the AAT largely dealt with their approach to valuing the business. The AAT concluded that the taxpayer's approach was more reasonable, which ultimately meant the taxpayer satisfied the $6m maximum net asset test for the purposes of being eligible to apply the small business CGT concessions.

While acknowledging that both experts were competent and qualified, the AAT favoured the taxpayer's valuation which discounted the value of an unlisted smaller company on the basis that such businesses are more difficult to sell (compared to a large listed entity). Also, the AAT considered that the taxpayer's valuation reasonably took account of cyclical factors impacting the agricultural industry which affected the business's maintainable earnings.

This case highlights that valuations can involve a degree of professional judgment and this is not an area where valuation experts will always necessarily agree on the outcome. While the $6m maximum net asset test is one area where market values are relevant, just be mindful that there are a number of different areas in the tax rules where this is also the case.

Practitioners should be aware that it can be possible to request a private ruling from the ATO to undertake a valuation or confirm a valuation that has already been undertaken by the client. While the ATO will charge the client a fee for the cost of the valuation, the benefit is that this provides a degree of certainty.

More information

- Moloney and Commissioner of Taxation (Taxation) [2024] AATA 1483

Legislation

Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023

Small business $20k instant asset write off for the 2024 year

Read the blog

While there has been considerable uncertainty over the progress of this Bill with disagreements between the House and the Senate, the amendments to increase the instant asset write-off for small business entities from less than $1,000 to less than $20,000 for the 2023-24 income year have now finally passed Parliament (25 June 2024).

This applies only to small businesses with an aggregated annual turnover of less than $10 million where they have chosen to apply the simplified depreciation rules in the 2024 income year.

The $20,000 threshold also applies in determining whether the full balance of the general small business pool is written off in the 2024 income year.

The passage of the Bill also means that the 'lock out' rules that prevent small businesses from re-entering the simplified depreciation regime for five years if they opt out of the regime continue to be suspended until 30 June 2024.

Small business energy incentive for the 2024 year

This Bill also introduces the small business energy incentive which provides a bonus tax deduction for the 2023-24 equal to 20% of the cost of eligible depreciating assets and improvements to existing depreciating assets that support electrification and more efficient energy use.

The maximum bonus deduction is $20,000 (i.e., up to $100,000 of qualifying expenditure) and applies to businesses with aggregated annual turnover of less than $50 million.

Non-arm's length expenses for SMSFs

This Bill also introduces the new rules for non-arm's length expenses for SMSFs (excluding large APRA-regulated funds, exempt public sector superannuation funds, PSTs and ADFs). The amendments apply to expenses incurred or expected to be incurred from 1 July 2018 (although the ATO has stated that they will not apply compliance resources prior to 30 June 2023).

The NALI reforms limit the amount of non-arm's length income for general expenses, these are expenses related to the fund as opposed to a particular asset. Under the reforms, general non-arm's length expenses will result in a maximum of twice the difference between the amount that would have been expected at arm's length and the amount actually incurred being treated as NALI, with no deductions applying against that amount.

More information

- Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023

Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024

Small business $20k instant asset write-off for the 2025 income year

With the $20,000 small business instant asset write-off threshold for the 2024 year only passing through Parliament in June 2024, this Bill introduces measures to extend the $20,000 instant asset write-off threshold of $20,000 for the 2025 income year.

For small businesses with an aggregated turnover of less than $10m that elect to use the simplified depreciation rules, the Bill proposes the following:

- An immediate deduction for eligible depreciating assets and eligible improvements costing less than $20,000;
- The same $20,000 threshold before the full balance of the general small business is written off; and
- An extension to suspend the 'lock out' rules until 30 June 2025 which would otherwise prevent small businesses from re-entering simplified depreciation for five years if they opt out.

Incentives for the build-to-rent sector

First announced in the 2023-24 Federal Budget, the Bill introduces amendments which are designed to encourage investment and construction in the build-to-rent sector. For eligible build-to-rent projects where construction commenced after 7:30pm AEST on 9 May 2023, the measures propose to:

- Increase the capital works deduction rate from 2.5% to 4% per year; and
- Reduce the final withholding tax rate from 1 July 2024 on payments of rental income made to foreign residents from managed investment trusts from 30% to 15%.

Medicare levy exemption for lump sum payments

This Bill introduces measures to ensure low-income earners who receive eligible lump sum payments (for example, compensation for past underpaid wages) are not subject to a higher amount of Medicare levy, subject to meeting certain eligibility requirements.

Public reporting for large multinational groups

Applying to large multinational groups, the Bill also introduces measures to require parent entities 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.).

There is a proposed exemption for parent entities where their aggregated turnover includes less than a total of $10 million of Australian-sourced income.

The measures are proposed to apply to reporting periods commencing from 1 July 2024.

More information

- Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024