Coster Galgut
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T AX UPDATE – JANUARY 2025

The important details for January 2025

What did I miss?

Welcome to 2025 and what a year it's going to be. An election, lots of promises, and in the background some fairly significant ATO focus areas.

This month, Division 7A is in the spotlight. As is foreign resident withholding and disposals of Australia property by foreign residents.

The December CPI has also triggered an increase in the superannuation Transfer Balance Cap to $2m on 1 July 2025.

In addition to the technical changes, the Tax Practitioner Code of Conduct changes have come into effect for firms with 100 employees or more, and for smaller firms from 1 July.

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INSIDE

From Government

New Code of Conduct guidance

The Tax Practitioners Board (**TPB**) has issued new practical guidance for the Code of Professional Conduct (**Code**) reforms.

The new materials explain how the eight new Code items contained in the *Tax Agent Services (Code of Professional Conduct) Determination 2024* (**Determination**) apply.

Tax practitioner firms with over 100 employees have been bound by the Determination since 1 January 2025. For smaller firms, the new obligations start on 1 July 2025.

New guidance includes:

- TPB(I) 46/2024 Managing conflicts of interest when undertaking activities for government and maintaining confidentiality in dealings with government
- TPB(I) 44/2024 Upholding and promoting the ethical standards of the tax profession
- TPB(I) 43/2024 Breach reporting under the Tax Agent Services Act 2009
- TPB(I) 48/2024 Supervision, competency and quality management under the Tax Agent Services Act 2009
- TPB(I) 47/2024 Obligation to keep proper client records of tax agent services provided
- TPB(I) 45/2024 False or misleading statements
- TPB(I) 49/2024 Keeping your clients informed

More information

- TPB guidance to support tax practitioners

Reforms to donations and philanthropic giving

The Government is proposing to remove the requirement that a gift must be at least $2 before a donor can claim a tax deduction, and reform how philanthropic funds operate.

To reflect their role in facilitating giving, ancillary funds will be renamed to 'giving funds' and the Government will consult on an increase to their annual distribution rate.

The Government also plans to allow giving funds to smooth their annual distributions over three years to provide greater flexibility to fund capital works or large projects for charities.

No draft consultation or legislation is available. It's an announcement based on recommendations by the Productivity Commission and Blueprint Expert Reference Group in its *Not-for-profit Sector Development Blueprint*.

More information

- Supporting philanthropic giving

Build to Rent affordability standards

The Government has issued the *Income Tax Assessment (Build to Rent Developments) Determination 2024*, which establishes the initial affordability standards for Build to Rent developments.

The Build to Rent tax incentives are part of the Government's broader plan to build 1.2 million well-located homes by 2029 and take housing pressures off Australians.

As part of the plan, at least 10% of dwellings in the Build to Rent development must be 'affordable dwellings'. The Determination sets out the initial standards that the dwellings must be rented at 74.9% or less of the market rate and income thresholds for eligible tenants.

More information

- Build to Rent initial affordability standards from 1 January
- Income Tax Assessment (Build to Rent Developments) Determination 2024

Digital asset regulatory regime

The Government is working with industry and regulators to develop a digital asset regulatory regime.

The Australian Securities and Investments Commission (**ASIC**) is also consulting with stakeholders to update its guidance on how current financial product definitions apply to digital assets and related products.

Feedback from ASIC's consultation will help inform exposure draft legislation for the Government's 'digital asset platform' and 'payment stablecoin' reforms, which will be released in 2025. This legislation will create a licencing regime for businesses offering customers digital assets and holding them, and clarify the appropriate regulatory framework for stablecoins.

More information

- Fostering an innovative, safe and secure digital asset industry
- ASIC invites feedback on proposed updates to digital asset guidance

Extension of charity transitional reporting

The Government has released the draft *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Regulations 2025*, which proposes to extend the reporting exemption that applies for certain entities up to the 2029 financial year.

Under the *Australian Charities and Not-for-profits Commission Act 2012*, certain not-for-profit entities are required to report each year to the Australian Charities and Not-for-profits Commission (**ACNC**). Under some existing transitional regulations, charities can be considered to have met this reporting requirement where they submit relevant documents to other Australian government agencies. The *Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Regulation 2016* set this exemption for the 2015 to 2024 financial years.

The draft regulations simply propose to extend the transitional reporting exemption up to the 2029 financial year.

More information

- Extension of charity transitional reporting

Miscellaneous amendments to legislation

The Government has issued exposure draft materials to make a series of miscellaneous and technical amendments to Treasury portfolio legislation.

The draft amendments correct technical or drafting errors, removing anomalies, and address unintended outcomes. Among the measures:

- **Notifying ASIC About authorised representatives** - the Corporations Act provides that a person authorising a representative to provide a financial service must notify ASIC within 15 business days of that authorisation. Subsection 916F(3) of the Corporations Act provides that a person that has authorised a representative to provide a financial service must notify ASIC within 10 business days if details about that representative change or their authorisation is revoked. The amendments extend the timeframes in both provisions to 30 business days.
- **GST free disability services** - updates references to the Act to ensure the supply of disability services funded under the *Disability Services and Inclusion Act 2023* is GST-free.

More information

- Miscellaneous amendments to Treasury Portfolio Laws Autumn 2025

From the Regulators

CPI triggers 1 July TBC increase

Following the release of the December 2024 CPI figures, the general transfer balance cap (TBC) will increase from $1,900,000 to $2,000,000 from 1 July 2025. For some clients, this could provide a tax effective retirement pension and non-concessional contribution opportunities for some of your clients.

Retirement income streams

Individuals who commence a retirement phase income stream for the first time after 1 July 2025 will have access to the full $2,000,000 limit. For some individuals there may be a benefit in deferring the commencement of a retirement income stream until on or after 1 July 2025.

For clients who commenced a retirement phase income stream before 1 July 2025, the proportional indexation rules mean that clients could have a personal TBC anywhere between $1,600,000 and $2,000,000. Your client's personal TBC and eligibility for indexation is in the ATO Portal under their My Gov Login – this should be checked before commuting or commencing any retirement phase pensions.

What about non-concessional contributions?

The indexation of superannuation contribution caps is based on earnings figures (AWOTE) which won't be released until late February, however total super balance (TSB), which impacts non-concessional contributions (NCCs) is linked to the general transfer balance cap.

Currently those with a TSB of over $1,900,000 on the prior 30 June cannot make any NCCs. For the 2025-26 financial year, individuals with a TSB under $2,000,000 on 30 June 2025 will be able to make a NCC of at least the annual NCC cap.

Foreign exchange rates

The ATO has now published the average foreign exchange rates for the year ended 31 December 2024,

as well as monthly foreign exchange rates to date for the financial year ending 30 June 2025.

More information

- Calendar year ending 31 December 2024
- Monthly exchange rates for 1 July 2024 to 30 June 2025

Rental bond data-matching program

The ATO has updated its website guidance on the rental bond data-matching program.

The ATO has been collecting rental bond data from various State departments that goes back to 1985 and will continue to collect data up to the 2026 financial year.

The data collected includes:

- Client identification details for individuals (tenants and landlords)
- Managing agent identification details
- Rental bond details, such as lease details, amount of rental bond, bond refunds etc.

The data-matching programs assist the ATO to identify and address tax risks, including:

- Failure to lodge
- Omitted or incorrect reporting of rental income
- Omitted or incorrect reporting of capital gains tax
- Non-compliance with foreign investment laws for foreign residents.

More information

- Rental bond data-matching program protocol

Foreign resident capital gains withholding changes

The ATO has updated its website guidance to reflect changes to the foreign resident capital gains withholding (**FRCGW**) regime that apply from 1 January 2025.

In particular, the rate of FRCGW for property sales for contracts signed on or after 1 January 2025 is now 15% (increased from 12.5%). Further, there is no longer any minimum threshold for property values for FRCGW purposes (previously $750,000).

For Australian residents disposing of Australian real property, unless they have provided the purchaser with a clearance certificate at or before settlement, the purchaser must withhold FRCGW.

While most clearance certificates take a few days to issue, they can take up to 28 days to process, which means that clients seeking to avoid cash flow implications under the withholding rules should seek a clearance certificate from the ATO as soon as possible.

More information

- Foreign resident capital gains withholding overview
- Australian residents and clearance certificates

Foreign residents disposing of property

The ATO is focusing on foreign residents who dispose of taxable Australian property (**TAP**) and fail to lodge returns that correctly advise the ATO of any gain or loss. The ATO is also looking at purchasers who fail to withhold FRCGW from foreign residents.

Foreign residents are subject to capital gains tax (**CGT**) in Australia if they dispose of TAP, which comprises:

- Taxable Australian real property (TARP) (e.g., land and buildings located in Australia).
- Indirect interests in Australian real property (e.g., shares in a company which holds land or buildings in Australia).
- Assets used in carrying on a business through a permanent establishment in Australia.
- Options, or rights, to acquire any of the above assets.

The ATO is focusing on foreign residents who:

- Hold significant direct or indirect interests in TAP assets

- Dispose of TARP or indirect interests but do not meet their CGT obligations in relation to the disposal
- Characterise or value or assets in a way to fall within the CGT exclusion
- Enter into a series of transactions such as 'staggered sell-down' arrangements to avoid paying Australian CGT
- Lodge returns that are not in accordance with new 'associate-inclusive test' in determining total participation interests
- Fail the principal asset test by inappropriately allocating significant market value to non-TARP assets
- Are unlikely to have sufficient funds or assets remaining in Australia to meet their tax obligation relating to the disposal of TARP assets.

Purchasers are generally required to collect FRCGW at 15% and remit this to the ATO, unless the foreign resident vendor has a variation notice specifying a reduced rate of withholding, before or at settlement. Foreign resident vendors can apply to the ATO (via the online form) if they believe the withholding rate should be varied, at least 28 days before settlement.

More information

- Foreign residents disposing of taxable Australian property

Build to Rent Developments

The ATO has updated its website guidance on the build to rent (**BTR**) development tax incentives.

The BTR development tax incentives give owners access to:

- An accelerated deduction rate of 4% for capital works relating to BTR developments
- A concessional final withholding tax rate of 15% on eligible fund payments (amounts referable to rental income and capital gains from the BTR development).

To access these incentives, the BTR owner must first notify the ATO to opt in by lodging the *Build to rent development – notice of events* form.

From 1 January 2025, owners or purchasers of a BTR development must notify the ATO of the development events, using the 'Build to rent development – notice of events' form.

BTR owners must notify the ATO of the following events:

- Commencing an active BTR development - The form should be provided to the ATO before the commencement date. Otherwise, the choice will be taken to have been made on the day the form is received.
- Expanding an active BTR development.
- The ownership interest in the active BTR development is acquired by another entity.
- They acquire the ownership interests in an active BTR development.
- Ceasing an active BTR development.

The form can be completed by an authorised person and must be lodged (by email) with the ATO on or before 28 days after the relevant event.

More information

- Build to rent development tax incentives
- Build to rent development notice of events form

Division 7A myths debunked

The ATO is focusing on common Division 7A mistakes and myths. Some of the common myths and misconceptions flagged include:

- Shareholders who believe they can freely use company money in any way they like. No, the company is a separate legal entity, so Division 7A may apply to any money or other benefits provided to shareholders and associates.
- Division 7A only applies to the shareholders of a private company. No, Division 7A also applies to associates of shareholders, which is broadly defined.
- Dividends can be put in a journal entry after an income year has ended, to effectively offset any minimum yearly repayment obligation for that income year. No, agreements and offsets must be made by the relevant deadline, which is usually 30 June.

- Division 7A can be avoided if payments or loans to shareholders and their associates are made through other entities. No, Division 7A may still apply where the private company's shareholder or their associate is the target entity to whom the payment or loan is ultimately directed.
- The interest rate that is applied on a Division 7A loan is the same every year. No, the benchmark interest rate generally changes each year.
- Division 7A can be circumvented if the loan is temporarily repaid before the lodgement day, using the company's money for the repayment. No, repayments may not be taken into account where taxpayers reborrow similar or larger amounts from the company after making the repayment.

More information

- Division 7A Myths debunked

Receiving payments or assets from foreign trusts

The ATO is focusing its attention on Australian residents who receive payments or assets from a foreign trust.

Under section 99B of the ITAA 1936, where foreign trust property is paid to or applied for the benefit of an Australian resident, the amount should be included in their assessable income, subject to certain exceptions. Trust property can include:

- Loans by the trustee directly or indirectly
- Amounts paid by the trustee to a third party on behalf of the Australian resident
- Amounts described as gifts from family members, but sourced from the trust
- Distributions paid to the Australian resident or trust assets transferred from the trustee.

In some cases, the amount that would be taxed under section 99B can be reduced to the extent that it has already been assessed in Australia to either the beneficiary or the trustee under another provision, or if the amount represents corpus (except where the corpus represents income or gains made by the trust that haven't been taxed in Australia but would have been had they been derived by an Australian resident).

The ATO expects taxpayers who receive money or property from overseas to make relevant queries as to the source of the funds or assets, to determine whether the amounts should be included in their assessable income.

Examples of when section 99B needs to be considered include:

- An Australian beneficiary receives money from a family member who received the funds initially from a foreign trust
- An Australian beneficiary receives a capital distribution from a foreign trust out of the trust's accumulated prior year income
- A family member provides an amount of money from their foreign family trust (or through another intermediary) and the recipient, who considers the amount a gift, is also a beneficiary of the trust
- An Australian beneficiary receives a loan from a foreign trust that is sourced from prior year income derived by the trust.

More information

- Receiving payments or assets from foreign trusts

New international tax measures affecting private groups

The ATO has updated its website guidance on recent changes to international tax measures and how they may affect private groups.

Thin capitalisation

Recent changes to the thin capitalisation rules introduce three new tests apply to income years starting on or after 1 July 2023. The amendments apply to most multinational businesses operating in Australia, privately owned Australian entities that are foreign-controlled, and to privately owned and wealthy groups with outbound operations.

Private groups with cross-border related party loans should also consider the possible application of the transfer pricing rules, which look at whether the

arrangement is consistent with an arm's length arrangement.

The new thin capitalisation rules are supported by the **debt deduction creation rules (DDCR)** that deny debt deductions (eg, interest deductions) arising from relevant related party loans to fund asset acquisitions, or prescribed payments such as distributions and returns of capital. These rules apply to income years starting on or after 1 July 2024.

Global and domestic minimum tax

As part of implementing key aspects of Pillar Two of the OECD/G20 Two-Pillar Solution in Australia, the Government has passed legislation that includes:

- A 15% global minimum tax for MNE groups.
  - Income Inclusion Rule (IIR) applying to income years starting on or after 1 January 2024.
  - Undertaxed Profits Rule (UTPR) applying to income years starting on or after 1 January 2025.
- A 15% domestic minimum tax for MNE groups applying to income years starting on or after 1 January 2024.

Foreign resident capital gains tax regime

While not law yet, the Government has announced that it will make some amendments to the non-resident CGT provisions in Division 855 of the ITAA 1997.

The changes are intended to apply to CGT events from 1 July 2025, to clarify and broaden the types of assets that foreign residents are subject to CGT on, amend the point-in-time principal asset test to a 365-day testing period, and require foreign residents disposing of shares and other membership interests exceeding $20 million in value to notify the ATO prior to the transaction being executed.

More information

- New international tax measures affecting private groups
- Global and domestic minimum tax

Multilateral instrument

The ATO has updated its website guidance on how the multilateral instrument modifies tax treaties.

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting / Multilateral Instrument (**MLI**), is a multilateral treaty that enables jurisdictions to modify the operation of their tax treaties and implement measures to address multinational tax avoidance and more effectively resolve tax disputes.

While the MLI entered into force for Australia on 1 January 2019, how it operates with existing tax treaties depends on the acceptance of each of the jurisdictions. Only where both treaty partners have signed the MLI and agreed to apply and modify that treaty, then it's operation with be modified by the MLI.

The ATO website includes further guidance such as a list of Australia's treaties that are modified by the MLI, and from what date, the main articles of the MLI etc.

More information

- Multilateral Instrument

Inbound related-party funding for property and construction

The ATO has updated its website guidance on key tax issues that need to be considered by private groups that receive inbound related-party funding for property and construction.

The guidance covers transfer pricing rules and provides guidance on what is considered arm's length funding between related parties, how to demonstrate commerciality of funding arrangements, observations of conventional funding practices in the property and construction industry, examples of such arrangements and the ATO's views on the level of tax risk.

In particular, the ATO provides some examples of funding arrangements that it is seeing in the property and construction industry and the ATO's comments on

whether the arrangement would be considered high-risk or low-risk.

More information

- Guidance on inbound related party funding for private groups
- Inbound related-party financing for private groups in property and construction

Rulings, Determinations & Guidance

Division 7A and guarantee arrangements

The ATO has issued a draft determination (TD 2024/D3) which considers the potential application of section 109U ITAA 1936 when a private company guarantees a loan made by another entity.

Under section 109U, a private company is taken to make a payment or loan to a shareholder or an associate of a shareholder (the target entity) if:

- The private company guarantees a loan made by another entity (first interposed entity);
- A reasonable person would conclude (having regard to all the circumstances) that the private company gave the guarantee solely or mainly as part of an arrangement involving a payment or loan to the target entity;
- Another private company (which may be the first interposed entity or another interposed entity) makes a loan or payment to the target entity; and
- The amount paid or loaned by the other private company to the target entity exceeds that company's distributable surplus.

In this draft determination the ATO confirms that for section 109U to apply, there is no requirement that the first interposed entity needs to be a private company. For example, section 109U could potentially apply even if the loan is provided by an unrelated public company bank or financial institution. However, the entity making the ultimate payment or loan to the 'target entity' must be a private company for these rules to apply.

The ATO has also issued a taxpayer alert (TA 2024/2) in respect of arrangements that seek to circumvent Division 7A through guarantees of third-party loans by private companies. The ATO is reviewing arrangements where:

- A private company guarantees a loan made by a financial institution to a related company that has nor or minimal distributable surplus
- The related company on-lends (or pays) some or all of the amount borrowed from the financial institution to the first company's shareholders (or their associates) on terms that do not comply with the requirements of Division 7A.

The ATO is concerned that taxpayers are entering such arrangements to circumvent Division 7A, or on the incorrect misunderstanding that section 109U (which deals with guarantee arrangements) only applies if the third-party lender is a private company. Section 109U requires the entity which makes the payment or loan to the shareholders to be a private company, but it does not require the entity to which the guarantee is given (e.g., third party financiers) to also be a private company.

The ATO indicates that the following tax implications could potentially arise in situations like this:

- Division 7A might apply to deem the private company which provided the guarantee to have paid an unfranked dividend to the shareholders or associates who received the loan or payment from the related private company.
- The Commissioner may make a determination under Part IVA to cancel any tax benefit arising under the arrangement.

More information

- TD 2024/D3
- TA 2024/2

Thin capitalisation - third party debt test

The ATO has issued updated draft guidance (PCG 2024/D3 and TR 2024/D3) which focuses on the application of the third party debt test.

The third party debt test is one of the new thin capitalisation tests which were introduced as part of the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity And Transparency) Act 2024*. The third party debt test replaced the arm's length debt test.

Draft PCG 2024/D3 sets out the Commissioner's compliance approach for restructures and thin capitalisation. The draft ruling provides guidance on the key concepts and terms under section 820-427A. Schedules 1 and 2 of the draft Guideline were released on 9 October 2024 and initial public consultation concluded on 8 November 2024.

The updated draft PCG includes Schedule 3 which outlines the ATO's targeted compliance approach in relation to certain matters arising under the third party debt test, and Schedule 4 which explains the ATO's compliance approach to certain restructures in response to the new thin capitalisation rules.

Schedule 3 and 4 should also be read in conjunction with draft TR 2024/D3.

TR 2024/D3 sets out the ATO's views on aspects of the third party debt test, in particular, the conditions in section 820-427A. These conditions are relevant to working out an entity's third party earnings limit, and therefore the amount of debt deductions (if any) disallowed under the third party debt test.

More information

- PCG 2024/D3
- TR 2024/D3

Capital raised for the purpose of funding franked distributions

The ATO has issued an updated draft PCG 2024/D4 which outlines the ATO compliance approach when applying the the integrity measure in section 207-159 of the ITAA 1997.

The draft PCG sets out the framework the ATO uses to assess the level of risk that the provision applies to deny franking credits attached to a distribution.

There are four criteria that must all be satisfied for section 207-159 to apply to make a distribution unfrankable:

1. The distribution is not consistent with an established practice of the entity making distributions of that kind on a regular basis.
2. There is an issue of equity interests by the entity making the distribution or any other entity.
3. It is reasonable to conclude having regard to all relevant circumstances that:
    a. The principal effect of the issue of any of the equity interests was the direct or indirect funding of a substantial part of the relevant distribution, and
    b. Any entity that issued or facilitated the issue of any of the equity interests did so for a purpose (other than an incidental purpose) of funding a substantial part of the relevant distribution.
4. The issue of the equity interests was not directed from the Australian Prudential Regulation Authority (**APRA**) or the Australian Securities and Investments Commission (**ASIC**).

The draft PCG sets out the features of white, green, and red zone arrangements, with examples, and the compliance approach for each zone.

More information

- PCG 2024/D4

Time limits for claiming input tax or fuel tax credits

The ATO has issued its finalised ruling MT 2024/1 which sets out the time limits that apply to input tax credit or fuel tax credit set out in:

- Subsection 93-5(1) of the A New Tax System (Goods and Services Tax) Act 1999; and
- Subsection 47-5(1) of the Fuel Tax Act 2006.

The ruling has previously been issued twice in draft form, as MT 2024/D1 and MT 2018/D1.

One of the key changes to the final version of the ruling is to clarify that the four-year period which normally applies for the purpose of claiming GST credits and fuel tax credits doesn't apply in the context of the increasing or decreasing adjustment rules.

The final ruling also makes it clear that the four-year entitlement period for claiming GST credits won't necessarily align with the amendment period that applies to the taxpayer's income tax return.

More information

- MT 2024/1

GST supply of burial rights

The ATO has issued GSTD 2024/2 which looks at whether the supply of a burial right in respect of a public cemetery is subject to GST, within Division 81 of the GST Act.

The determination explains how Division 81 (and associated regulations) operate to exempt the supply of a burial right made by an Australian Government agency from GST.

The determination also considers the GST consequences of related supplies such as supplies by Government agencies, supplies of other goods and services in relation to burial or cremation, and supplies where a funeral director arranges the supplies as an agent.

More information

- GSTD 2024/2
- GSTD 2024/2ER1 - Erratum

Financial advice fees paid from member accounts by super funds

The ATO has issued a draft PCG 2025/D1 which sets out the ATO's draft compliance approach with respect to deductions and pay as you go (**PAYG**) withholding obligations for financial advice fees paid from member accounts by superannuation funds.

Under table item 5 of subsection 295-490(1), which was enacted as part of the amendments to the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**), a fund can claim a deduction for an amount paid by the fund to the extent:

a) The amount is for a cost incurred because of the provision of personal advice to a member of the fund about the member's interest in the fund (regardless of whether that cost was incurred by the fund, the member or another entity);
b) The amount is paid at the request, or with the consent, of the member;
c) The fund has a copy of the written request or consent; and
d) The amount is not incurred in relation to gaining or producing the fund's exempt income or non-assessable non-exempt income.

Part 1 of the Guideline sets out a methodology that a trustee of a superannuation fund, other than a self-managed superannuation fund (**SMSF**), can use to determine the extent to which payments of financial advice fees satisfy paragraph (d) of table item 5 of subsection 295-490(1).

Where funds elect to the use the methodology in Part 1 of the PCG, then the ATO will not apply compliance resources to review whether paragraph (d) of table item 5 of subsection 295-490(1) is met, apart from to verify compliance with the draft PCG.

Part 1 of the draft Guideline is proposed to apply to payments made during the 2019–20 income year and later income years.

Part 2 of the Guideline sets out the ATO's proposed compliance approach in relation to a fund's PAYG withholding obligations for financial advice fees paid in the income years *prior* to 1 July 2019.

The *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024* inserted section 307-10(e) of ITAA 1997 to clarify that the payment of a financial advice fee is excluded from the definition of a superannuation benefit where the fee is paid at the direction or request of the member and relates to personal advice provided to the member about their interest in the fund. These amendments apply from the 2019–20 income year onwards.

Comments on the draft guideline can be submitted until 14 February 2025.

More information

- PCG 2025/D1

ESIC tax offsets involving circular financial arrangements

The ATO has issued a Taxpayer Alert (TA 2024/1), warning taxpayers that it is reviewing arrangements which result in individuals claiming the early stage innovation company (**ESIC**) tax offset on shares acquired through tailored financing arrangements.

The ATO has released TA 2024/1 in response to tax avoidance schemes being promoted whereby, broadly:

- An investment opportunity in a start-up company is promoted to individuals by the scheme's operators, where the company is held out to qualify as an **ESIC** under subsection 360-40 of the ITAA 1997.
- A financing arrangement is offered to fund the individual's share subscription amount, less any nominal deposit required. This enables the individual to acquire shares, typically up to an amount that qualifies for the maximum tax offset.
- The operators lend the individual money to buy shares in the start-up and then funds are moved around between the start-up, the individual investor, and the operator to access the tax offset.

The ATO is warning individual investors that the tax outcome might be different to what they are expecting. For example, the ATO indicates that in some cases:

- Individual investors won't qualify for a tax offset under Division 360 because the company isn't a qualifying ESIC.
- Individual investors won't be entitled to deduct interest expenses for their borrowings.
- Investors won't qualify for CGT exemptions on sale of the shares.
- Part IVA of ITAA 1936 could also apply to the arrangement to cancel out any benefits and deny any offsets.

More information

- TA 2024/1
- New taxpayer alert on early stage investor tax offset scheme

Simplified transfer pricing record keeping options

The ATO has updated PCG 2017/2 on simplified transfer pricing record-keeping options, to include the maximum and minimum interest rates for the 2024-25 income year for loans.

The maximum interest rate for low-level inbound loans is 5.61%. The minimum interest rate of low-level outbound loans is 5.61%.

More information

- PCG 2017/2 - Update

Application of CGT event K6

The ATO has issued a draft ruling update to TR 2004/18 in respect of the application of CGT event K6 in section 104-230 of the ITAA 1997.

Very broadly, CGT event K6 can apply and result in a capital gain if certain CGT events happen to pre-CGT shares in a company (or pre-CGT units in a trust), where the market value of its post-CGT property is at least 75% of its net value. The ruling looks at the practical application of CGT event K6 and how to work out whether there is a capital gain or not.

The draft changes reflect the view that only one capital gain may arise in circumstances where sections 104-230(2)(a) and 104-230(2)(b) are both satisfied, and clarify which property is taken into account in calculating the capital gain under subsection 104-230(6).

More information

- TR 2004/18DC

Suspected fraud involving unconnected third parties

The ATO has issued a practice statement (PS LA 2024/1) which sets out its policy on steps that should be taken where there is suspected fraud involving unconnected third parties.

For example, the ATO provides possible indicators to ATO officers that a third party may have acted without the taxpayer's authority:

- The taxpayer's personal details have been accessed or stolen and have been reported as stolen.
- Lodgement, registration or updates to financial account details appear to have been made by someone other than the taxpayer, or someone to whom the taxpayer gave system access.
- A financial institution confirms that the account receiving payment is in the name of a third party and transactions show the funds being used by that party.
- The account the refund is paid into also receives multiple refunds in respect of different taxpayers.

In a case where there may be fraud, the following needs to be done by relevant ATO staff:

- Step 1: Identify the circumstances that may indicate fraud
- Step 2: Arrange additional account protections
- Step 3: Engage Fraud and Criminal Behaviours (FCB)
- Step 4: FCB or Frontline Operations (FO) makes a finding on whether or not the case is one of suspected fraud and documents that finding.
- Step 5: If warranted, undertake corrective actions.

From 12 December 2024, the ATO has withdrawn PS LA 2008/11 (Suspected fraud by a third party or tax practitioner), as the position in the Practice Statement is no longer current.

More information

- PS LA 2024/1

ATO Interpretative Decisions

The ATO has updated PS LA 2001/8, which explains the policy of ATO Interpretative Decisions (ATO IDs).

ATO IDs are a summarised version of a decision on the application of the law to a particular situation, that set out a precedential ATO view.

The ATO will no longer prepare new ATO IDs or significantly update existing ATO IDs.

In relation to maintaining the existing ATO IDs, those which require minor updates, which do not affect the decision or reasons for decision, may be amended. However, those that require substantial updates will be withdrawn and an appropriate replacement product produced.

In limited circumstances the ATO ID may be withdrawn without any replacement. This could occur where the provision which the ATO ID discusses has been repealed but not replaced or the issue covered no longer has sufficient value to warrant the investment in producing the replacement product.

More information

- PS LA 2001/8

PAYG withholding - employees

The ATO has issued an Addendum to TR 2023/4, which addresses when an individual is considered an 'employee' for the purposes of section 12-35 of Schedule 1 of to the *Taxation Administration Act 1953* (**TAA**).

TR 2023/4A1 amends the ruling to include in Appendix 2 guidance on when a person is considered an 'employee' for the purposes of section 12 of the *Superannuation Guarantee (Administration) Act 1992* (**SGAA**).

Appendix 2 of the Ruling:

- Confirms the ATO's view in light of developments in case law in the context of the SGAA since SGR 2005/1W Superannuation guarantee: who is an employee? (withdrawn) was last updated
- Consolidates the ATO's view in respect of the common law definition of employee contained in SGR 2005/1 (withdrawn) and TR 2023/4
- Provides a holistic ATO view of the common law meaning of employee and extended meaning of the word as contained in the SGAA.

More information

- TR 2023/4A1 - Addendum

Cases

Silver items not 'precious metals' in an investment form

The Administrative Review Tribunal (**ART**) has affirmed the Commissioner's findings that silver bangles / bracelets, electrical nodes and silver foil were not 'precious metals' under section 195 of the *A New Tax System (Goods and Services Tax) Act 1999* (**GST Act**).

There are some specific provisions in the GST Act dealing with supplies of precious metals. For example, some supplies qualify for GST-free treatment while other supplies can be made on an input taxed basis. To be precious metal, the thing must be the metal gold, silver, or platinum of specified fineness, or a substance listed in the regulations. The gold, silver, platinum or other substance must also be in an investment form.

The applicant, Siltech PMR Pty Ltd (**Siltech**) purchased silver bangles / bracelets, electrical nodes and silver foil (precious metal materials/**PMM**) for their precious metal content. Siltech applied for a private ruling in relation to the question of whether the PMM purchased by Siltech would be considered 'precious metals' for the purpose of section 195-1 of the GST Act. The Commissioner decided that the PMM were not precious metals for the purposes of the GST Act (except in relation to silver coins). Siltech applied for a review of the Commissioner's decision.

Siltech submitted that the PMM met the definition in section 195-1 of 'precious metal' because it is sufficient that the PMM predominantly comprises silver. Also, the PMM is 'in an investment form' because that expression would encompass any form in which silver is held with the subjective intention of generating income or profit.

The Commissioner submitted that the PMM was not 'silver' because the PMM has been physically altered from the silver from which they were manufactured, such that they have the character of the manufactured product (ie, jewellery, electrical nodes and rolled foil). Also, the PMM was not 'in an investment form' because that requires it to be in a form capable of being traded on the international bullion market (i.e. a bar, wafer, coin etc).

The ART affirmed the Commissioner's original decision that the PMM is not 'precious metal' under the GST Act. The ART held that there was no authority or basis to support Siltech's submission that it should be sufficient that the PMM constituted an alloy predominantly comprising silver. Further, it is unrealistic to characterise bangles / bracelets as 'silver' where their obvious and most natural characterisation is as jewellery or, more specifically, bangles / bracelets.

The ART also disagreed with Siltech's argument in relation to the PMM being 'in investment form'. There is nothing in the wording of the definition that suggests an intention test, or that the 'form' requirement would

be met by the taxpayer's subjective intention.

More information

- Siltech PMR Pty Ltd v FC of T [2025] ARTA 26

R&D tax scheme - promoter penalties

The Federal Court has affirmed that the respondents contravened section 290-50(1) of Sch 1 to the TAA 1953 by engaging in conduct of promoting a tax exploitation scheme and agreed with the penalties that had been imposed.

The respondents were collectively involved in promoting research and development (**R&D**) incentive schemes which involved lodging applications for R&D tax offsets and incentives with disregard to whether the taxpayers were eligible for the claims. After the R&D claims were processed, the respondents received a percentage of the R&D offsets as their fees.

The Court ordered Mr Bakarich to pay a pecuniary penalty of $4.5 million, in addition to $9 million in penalties for his two companies. The fact that the companies were in liquidation and unlikely to pay the penalties didn't prevent the court from imposing them.

This is an example of an increased level of scrutiny on R&D tax incentive claims, with the ATO's focus extending beyond the taxpayer claiming the tax offset.

More information

- Commissioner of Taxation v Bakarich (No 2) [2024] FCA 1448

Legislation

Build to Rent Determination

The Government has issued the *Income Tax Assessment (Build to Rent Developments) Determination 2024*, which sets out the requirements for a dwelling to be considered an 'affordable dwelling' in the context of the build to rent regime.

Broadly, the requirements are:

- Rent payable under a lease for the dwelling must be 74.9% or less of the market value of the right to occupy the dwelling under the lease; and
- The dwelling must be tenanted (or available to be tenanted), where for the most recent income year for which the Commissioner has given a notice of assessment, only one or more of the following:
    - An adult living alone whose taxable income was less than 120% of average annual earnings;
    - Two or more adults living together whose combined taxable incomes was less than 130% of average annual earnings;
    - One or more adults living with one or more dependent children of the adult, the adult's (combined) taxable income was less than 140% of average annual earnings.

The determination applies from 1 January 2025.

More information

- LI 2024/28

Royal assent

Superannuation (Objective) Bill 2023

This Bill which enshrines the objective of superannuation in legislation has passed both Houses of Parliament and received Royal Assent.

The Bill requires policy makers to assess future changes to superannuation legislation for compatibility with this objective.

More information

- Superannuation (Objective) Bill 2023

Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Bill 2024

The Bill, which made amendments to the list of deductible gift recipients (DGRs), received Royal Assent with amendments commencing from 1 January 2025.

The following entities were removed from the listed DGRs:

- Don Chipp Foundation Ltd
- Ian Clunies Ross Memorial Foundation
- Ian Thorpe's Fountain for Youth Limited
- Layne Beachley — Aim for The Stars Foundation Limited
- National Congress of Australia's First Peoples Limited
- Sir William Tyree Foundation
- SouthCare Helicopter Fund, and
- Lingiari Policy Centre.

Skip Foundation Ltd has been added to the list of DGRs for 30 June 2024 up to 1 July 2029.

The Bill also made miscellaneous amendments with respect to thin capitalisation rules, Corporations Act 2001 etc.

More information

- Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Bill 2024

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

The *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024* (**Bill**) and related imposition bill, the *Capital Works (Build to Rent Misuse Tax) Bill 2024* have now received Royal Assent.

The Bill makes various amendments, including:

- Incentives for investors to support the construction of new build to rent developments by increasing the capital works deduction rate to 4% per year and reducing the final withholding tax rate on eligible fund payments from eligible managed investment trust investments to 15%
- Amends the TAA 1953 to impose a new reporting obligation on certain large multinational enterprises.
- Amends Medicare Levy Act 1986 to ensure low-income taxpayers are not denied concessional Medicare levy treatment solely as a result of receiving an eligible lump sum payment.

The Senate omitted Schedule 7 from the Bill, which contained amendments for the small business instant asset write-off threshold to be $20,000 for assets that are first used or installed ready for use between 1 July 2024 and 30 June 2025. It isn't clear what the Government plans to do with this measure at this stage, which means that the threshold will be $1,000 for the 2025 income year unless new legislation is introduced and passed in order to modify the threshold.

More information

- Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024
- Capital Works (Build to Rent Misuse Tax) Bill 2024

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

The *Help to Buy Bill 2023* and *Help to Buy (Consequential Provisions) Bill 2023* have passed both Houses of Parliament and have received Royal Assent.

The Bills establish a Commonwealth shared equity program (Help to Buy Scheme) to be administered by Housing Australia that will assist low to middle income earners to purchase new or existing homes.

More information

- Help to Buy Bill 2023
- Help to Buy (Consequential Provisions) Bill 2023

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

The *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024* has received Royal Assent.

The Bill extends the anti-money laundering and counter-terrorism financing regime to "higher-risk services" provided by real estate professionals, professional service providers including lawyers, accountants and trust and company service providers.

These designated services will be regulated under the anti-money laundering and counter-terrorism financing regime.

Amendments to the bill extend the definition of 'qualified accountant' in section 5 of the Act to also include a member of the Institute of Public Accountants.

More information

- Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

Universities Accord (Student Support and Other Measures) Bill 2024

The *Universities Accord (Student Support and Other Measures) Bill 2024* which makes amendments to the indexation of Higher Education Loan Program (**HELP**) loans, has now received Royal Assent.

The amendments include:

- Calculation of accumulated HELP debt will take into account changes in CPI and WPI, instead of just CPI
- Providing an indexation credit to people's HELP accounts to ensure the new HELP indexation cap has effect from 1 June 2023
- From 1 June 2025, changes to the timing of HELP debt indexation factor which will be determined by reference to CPI index numbers or WPI index numbers for the four quarters ending on 31 December, instead of the four quarters ending on 31 March.

More information

- Universities Accord (Student Support and Other Measures) Bill 2024

Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024

This *Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024* has received Royal Assent.

The Bill contains a number of tax-related measures, including:

- Changes to the foreign resident capital gains withholding payments regime to increase the withholding rate from 12.5% to 15% and remove the threshold before which withholding applies;
- Employers will be allowed to make single touch payroll declarations for extended periods;
- The Commissioner of Taxation is provided with a power to retain tax refunds for a 90-day period to enable the Commissioner to obtain financial institution details for the refund to be paid into; and
- The time limit for small or medium business taxpayers to apply to have a tax assessment amended is increased from 2 years to 4 years.

More information

- Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024

Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024

The Bill which amends the *Competition and Consumer Act 2010* to replace the existing framework for mergers review with a mandatory administrative system for acquisitions, with the Australian Competition and Consumer Commission as the first instance administrative decision-maker, has now received Royal Assent.

More information

- Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024

Aged Care Bill 2024

The Bills contains a series of reforms that fundamentally change the way in which aged care is funded in Australia and the contribution made by those receiving care. The Bill has now received Royal Assent.

More information

- Aged Care Bill 2024
- Aged Care (Consequential and Transitional Provisions) Bill 2024