Coster Galgut
Chartered Accountants

T AX UPDATE – SEPTEMBER 2024

The important details for September 2024

What did I miss?

Payday super, announced in the 2023-24 Federal Budget, will overhaul the way in which superannuation guarantee is administered.

While we don't have legislation for Payday super, which will see SG paid within 7 days of an OTE payment being made, Treasury has released a fact sheet explaining how the mechanism will work.

Also of interest is the ATO's focus on not-for profits such as social clubs and when they are income tax exempt. It seems a few are getting it wrong.

Finally, Treasury has released the detail of the proposed amendments to the two controversial additions to the practitioners code of conduct - section 15 covering false and misleading statements, and section 45, requiring practitioners to advise existing and potential clients of any misdeeds or sanctions.

Regards,
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INSIDE

From Government.......2
- Payday Super details.......2
- Amendments to controversial code of conduct sections.......3
- Luxury car tax on electric vehicles.......4
- Denying deductions for GIC and SIC.......4

From the Regulators.......4
- Taxing social clubs and associations.......4
- Record keeping and tax management in focus for 'Next 5,000' groups.......5
- ATO Phoenix Taskforce.......6

Rulings, Determinations & Guidance.......6
- Deductibility of financial advice fees.......6
- First home super saver scheme.......7

Cases.......7
- Insurance settlement sums assessable as income.......7
- Unused concessional contribution caps not subject to election.......8

Legislation.......9
- Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024.......9
- Accountants held to account by Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill.......9
- Additional time to comply with new obligations under the Code of Professional Conduct.......10
- US entertainers PAYG Withholding exemption.......10

From Government

Payday Super details

Treasury has released a fact sheet detailing the proposed *Payday Super* measure announced in the 2023-24 Federal Budget. The reforms seek to address non-payment and underpayment of superannuation by forcing employers to make Superannuation Guarantee (SG) contributions more frequently. In this case, on the payday of the employee.

Set to take effect on 1 July 2026, employers will be required to make SG contributions on the same day they pay salary or wages to employees, rather than on a quarterly basis. Each time an Ordinary Time Earnings (OTE) payment is made, there will be a new 7-day due date for contributions to arrive in the employee's superannuation fund. If the payment is not received within 7 calendar days, employers will be liable for a new SG charge, subject to some limited exceptions.

There will be an updated SG charge framework, which aims to ensure employees are fully compensated for delays in receiving SG amounts from employers. Larger penalties will be imposed on employers who repeatedly fail to comply with the requirements.

The updated SG charge will comprise of:

Outstanding SG shortfall	Calculated based on OTE, rather than total salaries and wages as it is currently.
Notional earnings	The SG shortfall will incur daily interest from the day after the due date calculated at the general interest charge (GIC) rate on a compounding basis.
Administrative uplift	An additional charge levied to reflect the cost of enforcement, and calculated as an uplift of the SG shortfall component of up to 60%, subject to reduction where employers voluntarily disclose their failure to comply.
GIC	Interest will accrue on any outstanding SG shortfall and notional earnings amounts, as well as any outstanding administrative uplift penalty.
SG charge penalty	Additional penalties of up to 50% of the outstanding unpaid SG charge, that apply where amounts are not paid in full within 28 days of the notice of assessment.

Unlike the current SG charge, the new SG charge will be tax-deductible, although penalties and interest that accrue if the SG charge amount is not paid within 28 days will not be deductible.

To support this transition, several changes will be implemented, including a reduction in the deadline for superannuation funds to allocate contributions to three business days (from 20 business days). The SuperStream data and payment standards will be revised and the Small Business Superannuation Clearing House will be retired from 1 July 2026.

The ATO will enhance its compliance measures by matching employer Single Touch Payroll data with superannuation fund reporting, allowing them to proactively identify late or missing payments.

It is anticipated that draft legislation will be released for consultation later this year.

More information

- Payday Super Fact Sheet
- Payday superannuation design details to ensure super is paid on time

Amendments to controversial code of conduct sections

An exposure draft released by Treasury seeks to amend two of the most controversial additions to the Code of Professional Conduct introduced by the *Tax Agent Services (Code of Professional Conduct) Determination 2024*:

- Section 15 (false and misleading statements); and
- Section 45 (keeping clients informed of relevant matters).

The updated subsection 15(2) sets out the obligations when practitioners become aware that a statement they prepared or made (directly or indirectly) to the Commissioner and/or the Tax Practitioners Board (TPB) is materially false or misleading. The proposed amendments to this section make it clear that obligation only applies to statements made or prepared by the practitioner or where the practitioner permitted or directed someone else to make or prepare the statement.

The amendments also clarify other aspects of the provisions such as:

- A tax practitioner will only have an obligation to take some action where they have reasonable grounds to believe that the statement was relevantly and materially false or misleading because of a failure by someone involved in preparing or making the statement to take reasonable care, or because someone involved in preparing or making the statement intentionally disregarded, or was reckless as to the operation of, a taxation law.
- Sets out the factors relevant to determining what is considered a reasonable amount of time for a tax practitioner and/or a client (or former client) to provide a defensible explanation or to take action to correct a false or misleading statement.

- Explains how to approach situations where a client does not take action to correct a false or misleading statement after being advised by the tax practitioner.

The determination also includes proposed amendments to the current section 45, which covers the types of information that clients must be advised of by tax practitioners. This includes advising clients that the TPB maintains a register of tax agents and BAS agents, how they can access and search the register and how they can make a complaint. Practitioners also need to disclose information about certain events that have occurred within the last 5 years, such as details of any convictions for serious tax offences matters relating to the solvency of the practitioner or conditions that apply to their registration.

The amended section also clarifies the timing as to when disclosures need to be made.

More information

- Amending tax practitioner code of conduct instrument

Luxury car tax on electric vehicles

Treasury has released draft legislation that proposes to amend the way the Luxury Car Tax (LCT) applies to fuel-efficient vehicles.

Proposed to take effect from 1 July 2025, the amendments encourage the uptake of electric vehicles to reduce Australia's greenhouse gas emission targets.

Under the current LCT regime, a higher threshold applies to fuel-efficient vehicles, and a lower threshold to all other luxury vehicles.

The Government is proposing to tighten the definition of a fuel-efficient vehicle so that only electric and partially electric vehicles can access the higher threshold. Under the amendments, the maximum fuel consumption for a vehicle to be considered fuel-efficient will be halved from the current 7 litres per 100 km, to 3.5 litres per 100 kilometres.

More information

- Modernising the luxury car tax for fuel-efficient vehicles

Denying deductions for GIC and SIC

Treasury has released draft legislation that will deny deductions for general interest charges (GIC) and shortfall interest charges (SIC) incurred from 1 July 2025.

Currently, entities are able to claim deductions for both GIC for late payment of tax liabilities, and SIC that arises when there is incorrect self-assessment of a tax liability which leads to a tax shortfall.

Taxpayers will continue to have the ability to apply to the ATO and request the remission of GIC and SIC amounts. Currently, when the ATO remits GIC or SIC amounts, the taxpayer is assessed on the relevant amounts under the assessable recoupment rules in Subdivision 20-A of the *Income Tax Assessment Act 1997* (ITAA 1997). However, if the amendments are passed, this will no longer be the case and deductions cannot be claimed for GIC and SIC amounts.

More information

- Deny deductions for the general interest charge and shortfall interest charge

From the Regulators

Taxing social clubs and associations

The ATO is focusing on social clubs and associations that might be genuine not-for-profit (NFP) organisations, but don't qualify as tax exempt entities.

Social clubs and associations are not income tax exempt entities unless they are either:

- A registered charity with the Australian Charities and Not-for-profit Commission (ACNC) and endorsed as tax exempt by the ATO, or
- Fall within one of the 8 specific categories of organisation eligible to self-assess under Division 50 ITAA 1997.

The categories cover the following:

- Community service organisations
- Cultural organisations
- Educational organisations
- Health organisations
- Employment organisations
- Resource development organisations
- Scientific organisations
- Sporting organisations

Organisations that are established for social or recreational purposes, or the common interests of members, would generally not be covered by these categories, and would therefore be taxable entities.

The ATO has also updated its website guidance on NFP self-review returns, which is relevant for NFPs that are not registered as charities with the ACNC. Charitable NFPs with only charitable purposes are required to register with ACNC and apply to the ATO to be endorsed as income tax exempt. If a charity does not register with the ACNC, it is not eligible to self-assess as income tax exempt, and will be taxable.

If the NFP is unsure of its tax status, it should select ‘yes’ or ‘unsure’ to the question ‘Does the organisation have any charitable purposes?’ on the NFP self-review return, and submit the return with an ‘income tax exempt’ outcome. The ATO may contact the NFP to offer guidance to determine its tax status.

More information

- How to report if your social club is not income tax exempt
- Reporting when you're unsure if you have charitable purposes

Record keeping and tax management in focus for ‘Next 5,000’ groups

The focus areas of the ‘Next 5,000’ program will be effective record keeping and tax management procedures.

The Next 5,000 program is funded by the Tax Avoidance Taskforce and is specifically aimed at Australian resident individuals who control wealth of more than $50m, together with associates. However, this program doesn’t include the Top 500 private groups which are subject to a separate ATO program.

ATO reviews have found that even sophisticated groups sometimes fail to comply with record-keeping obligations and appropriate tax management procedures, such as when related parties are dealing with each other.

The ATO plans to continue undertaking streamline assurance reviews for groups with complex structures, and risk reviews for the remaining population.

The Next 5,000 program findings report can assist advisors to understand the key issues the ATO is looking at and how clients can avoid these issues. For example, some of the key priority areas from last year include:

- Groups that are experiencing rapid growth
- Cross-border transactions
- Arrangements involving intra-group domestic transfers of wealth
- Wealth extraction by use of private equity funds
- Succession planning.

More information

- On our radar for Next 5,000 groups

ATO Phoenix Taskforce

The ATO continues to target illegal phoenix activity, with additional funding received for the Phoenix Taskforce.

The Phoenix Taskforce uses data-matching and information sharing across government organisations to identify instances of illegal phoenixing. Illegal phoenixing arises when company directors abandon or liquidate their existing company to avoid paying debts and tax, and transfer the business to a new company entity.

Where there is suspected phoenixing, the taskforce can make directors personally liable for company liabilities, and retain refunds where business fail to lodge. There are also civil and criminal offences for those who promote or engage in illegal phoenix activity.

More information

- Phoenix Taskforce

Rulings, Determinations & Guidance

Deductibility of financial advice fees

The ATO has issued final determination TD 2024/7, which covers the deductibility of financial advice fees paid by individuals who are not carrying on an investment business.

The determination is mostly consistent with the draft version of the determination (TD 2023/D4), although there are some changes in certain areas. The main change is when it comes to the tax treatment of fees that relate to advice provided by a new adviser in connection with pre-existing investments held by the client. While advice relating to existing income producing investments would normally be deductible, the ATO suggests that the fees can be capital in nature if:

- The advice is provided by a new adviser at the commencement of a new advisory engagement; and
- The advice involves considering the individual's circumstances for the first time by that adviser and making recommendations and advising on the income-earning structure.

TD 2024/7 sets out when individuals may be entitled to a deduction for fees paid to a financial adviser under section 8-1 (general deductions) or section 25-5 (tax-related expenses) of the ITAA 1997. In some cases, the deduction may need to be apportioned, because the entire fee might not be deductible.

At a high-level, individuals can claim a deduction under section 8-1 to the extent the loss or outgoing is incurred in producing assessable income, and it is not an outgoing of a capital or private nature. There must be a sufficient connection between the expense and the activities which produce the assessable income.

Fees for financial advice on a proposed investment prior to the acquisition of an asset, initial advice on pre-existing investments at the commencement of an advisory engagement, or where an individual's existing adviser provides advice on how they can invest additional funds to grow their investment portfolio, will not be deductible under section 8-1. However, fees for financial advice incurred on a regular or recurrent basis for an existing or ongoing income-producing investment are deductible under section 8-1.

The deductibility of fees for advice on insurance products will be consistent with whether the respective premiums for the insurance product are deductible to the individual. For example, if they relate to financial advice on income protection insurance, this should generally have a sufficient connection to gaining income and be deductible. However, advice on insurance products such as life insurance, TPD or trauma insurance won't normally be deductible under section 8-1.

Fees for financial advice can potentially be deductible under section 25-5 to the extent they relate to managing the client's 'tax affairs'. However, not all financial advice qualifies - advice that simply provides factual information about financial products, without

applying tax laws, is not deductible under these rules. To be deductible, the advice must be provided by a recognised tax adviser.

To claim a deduction, individuals must have sufficient evidence of the expense. The ATO indicates that an itemised invoice which contains the following details would normally be sufficient:

- The financial adviser's name
- The expense amount
- an explanation of the advice provided
- the date that the expense was incurred, and
- the date that the invoice was produced.

More information

- TD 2024/7

First home super saver scheme

The ATO has updated its guidance on the First Home Super Saver (FHSS) Scheme in light of recent amendments to the scheme which take effect from 15 September 2024 (*Treasury Laws Amendment (2023 Measures No. 3) Act 2023*).

TR 2024/4 replaces the LCR 2018/5, and discusses:

- Eligibility
- Eligible contributions
- FHSS Scheme determinations
- Requesting release of an amount under the FHSS Scheme
- Obligations following a release request
- FHSS tax, and
- Transitional rules to assist individuals who unsuccessfully attempted to use the FHSS Scheme before purchasing their first home.

GN 2024/1 replaces GN 2018/1, and discusses the following:

- Making voluntary contributions
- Eligibility to release amounts from super using the FHSS Scheme
- Requesting an FHSS Scheme determination
- Release of amounts from a superannuation fund
- Purchasing or constructing a home
- Implications if the taxpayer does not purchase or construct a home
- Tax implications of using the FHSS Scheme, and
- Unsuccessful attempts to use the FHSS Scheme before 15 September 2024.

More information

- TR 2024/4
- GN 2024/1

Cases

Insurance settlement sums assessable as income

In *Sladden v FC of T* 2024 ATC [2024] FCAFC 122, the Full Federal Court upheld the decision that a $1 million settlement payment made by an insurer under a deed of release was assessable as income to the taxpayer, a former medical practitioner.

In 1999, the taxpayer entered into two linked insurance policies with National Mutual Life Association of Australasia Limited, for life protection and income protection. After being diagnosed with breast cancer in 2013, she claimed and started receiving monthly benefits under the income protection plan. In 2019, after the insurance business of National Mutual had transferred to AMP in 2017, the taxpayer's representative negotiated a $1 million settlement to commute her benefits, which the taxpayer accepted. Following receipt of the payment, the taxpayer objected to the inclusion of the settlement payment in her assessable income for the year ending 30 June 2020, arguing it was a capital amount and not ordinary income.

In the earlier decision, the AAT held that the terms of the deed of release were not determinative, and instead, regard must be had to the facts and circumstances that led to the deed being executed to determine the true nature of the settlement sum, including whether it was income according to ordinary concepts. The AAT held that the entire settlement amount was assessable as income, and that the payment was made in consideration for commuting her

income protection benefits. That is, there was not a mix of capital and income.

In the appeal to the Federal Court the taxpayer argued that the AAT erred in law by characterising the settlement sum based on the subjective state of mind of the parties from prior negotiations, rather than an objective determination based on the terms of the deed of release.

The Full Federal Court agreed with the AAT, rejecting the taxpayer's arguments about the nature of the settlement payment and the relevance of the deed's terms. The Court referred to long-standing case law that established that the character of a receipt is to be determined by the quality of the receipt in the hands of the recipient, considering both the agreement and the surrounding circumstances such as its execution, its operation and the receipt of the money in question.

The Court agreed with the approach taken in *Sommer* v *Federal Commissioner of Taxation* (2002) 51 ATR 102, where it was established that the characterisation of a settlement amount for tax purposes should be determined with reference to the insurance policy, the taxpayer's claims under the policy, the terms of settlement and the rights the taxpayer surrenders upon cancellation of the policy. The substance and the commercial reality of the settlement was that it was a full and final settlement of a dispute between the taxpayer and the insurer in relation to past and future claims under an income protection policy. It is well established that a payment in settlement of such claims should be taxed on revenue account.

More information

- *Sladden v FC of T* 2024 ATC [2024] FCAFC 122

Unused concessional contribution caps not subject to election

In WTBW v Commissioner of Taxation [2024] AATA 3268, the AAT affirmed the Commissioner's view that the application of the carried forward unused concessional contribution cap is mandatory, and not optional at the taxpayer's election.

The taxpayer was assessed for tax of $3,315 under Division 293 ITAA 1997 for the year ended 30 June 2022, which the taxpayer objected to. The taxpayer's initial objection was disallowed and he applied to the AAT for a review.

The Commissioner argued that the taxpayer had no excess concessional contributions for 2022, as any contributions were fully offset by unused concessional caps from prior years. The taxpayer contended he did have excess contributions, claiming that the carry-forward of unused caps was optional and required his election, which he did not make. He argued that, if correct, his tax liability under Division 293 would be nil because his low tax contributions would be nil. A secondary issue was whether his excess contributions should be treated as assessable income, for which he requested discretionary allocation to a different year.

The AAT affirmed the initial review decision in favour of the Commissioner, finding that under section 291-20(3) the unused concessional contributions cap amount carried forward from previous years applies by force of law, and does not require a taxpayer to elect to apply the unused amount carried forward or permit a taxpayer to elect not to apply the carried forward amount or part of it.

The construction of section 291-20 makes it apparent that the cap is increased in accordance with subsection (4) if the conditions stated in subsection (3) apply. The AAT found that on an ordinary reading of section 291-20(3), the application of the carried forward unused concessional contributions cap is mandatory rather than optional at the taxpayer's election.

The taxpayer also referred to the wording in section 291-1, '*You can carry forward unused concessional contributions cap from the previous 5 financial years…*', however, this was taken out of context. Section 291-1 is a 'Guide' which is separate from the operative provisions, and should only be considered if the meaning of the operative provisions is ambiguous etc. Where an ordinary interpretation of section 291-20 doesn't lead to an absurd outcome, it would not be necessary to refer to the Guide.

Ultimately, the AAT upheld that the statutory language indicated no discretion existed for the taxpayer or Commissioner.

More information

- WTBW v Commissioner of Taxation [2024] AATA 3268

Legislation

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

Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024, introduced into Parliament on 12 September 2024, covers a range of amendments to the tax system, including:

- Foreign resident capital gains withholding (FRCGW) payments
- Single touch payroll declarations
- Self-amendments by small and medium businesses
- Reducing use of cheques for tax refunds.

Schedule 1 of the Bill contains significant amendments to the current FRCGW regime. Under the FRCGW regime, a non-final withholding obligation is triggered on certain transactions for land and buildings located in Australia, and indirect interests in Australian property.

First, the Bill proposes to amend the FRCGW rate from 12.5% to 15%. Second, the Bill removes the $750,000 threshold for property transactions, so all relevant property disposals will be subject to FRCGW irrespective of their market value. Currently, withholding obligations do not arise with respect to sales of Australian real property unless the market value of the property is at least $750,000.

Schedule 2 of the Bill amends the *Tax Administration Act 1953* to allow employers to make standing declarations to their agent that are valid for multiple single touch payroll (**STP**) declarations, for up to 12 months. Currently, employers are required to prepare declarations to agents for STP each lodgment. This amendment will commence from the day after the Bill receives assent.

Schedule 3 of the Bill amends the *Income Tax Administration Act 1936* to extend the amendment period for income tax assessments for small and medium businesses from two years to four years. Small and medium businesses will be able to apply to the Commissioner to amend notices of assessment within four years from the date the notice of assessment was issued, instead of the current time frame of two years. However, the provisions will not extend to amendments initiated by the Commissioner.

Schedule 4 of the Bill provides the Commissioner a discretionary power to retain certain tax refunds and credits for 90 days, to encourage taxpayers to provide valid Australian financial institution account details in an approved form to the ATO. This will reduce instances that the ATO has to pay refunds as soon as possible by cheque, as they can instead hold off until valid bank details are provided, or 90 days have passed.

More information

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

Accountants held to account by Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill

The *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024*, introduced into Parliament on 11 September 2024, proposes significant reforms to the anti-money laundering and counter-terrorism financing regime.

The reforms extend the regime to apply to certain higher risk services provided by 'gatekeeper professions' which includes accountants, lawyers and conveyancers. These professions will be subject to additional compliance and reporting obligations from 1 July 2026.

Accounting businesses that provide designated services would be required to comply with additional record-keeping, due diligence, and reporting obligations under the anti-money laundering and counter-terrorism financing regime.

The Bill also expands the current list of 'designated services', to include services such as:

- Assisting clients with buying and selling real estate and business entities
- Managing client assets or accounts when assisting with transactions
- Assisting persons with transactions involving buying and selling real estate and buying and selling of business entities
- Managing client money, securities, accounts or other assets as part of assisting persons with a transaction (exemptions apply for certain services, including for business operating trust accounts in the absence of any designated services)
- Organising contributions for the creation, operation or management of companies (e.g., debt or equity financing)
- Creation, operation or management of legal persons or arrangements
- Acting as a formation agent of legal persons
- Acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or similar position in relation to other legal persons
- Providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement
- Acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement, and
- Acting as (or arranging for another person to act as) a nominee shareholder for another person.

The Bill also provides AUSTRAC with additional information-gathering powers.

More information

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

Additional time to comply with new obligations under the Code of Professional Conduct

The Assistant Treasurer has made the *Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 1) Determination 2024* (Determination), which amends the *Tax Agent Services (Code of Professional Conduct) Determination 2024* to provide practitioners with additional time to comply with their obligations.

In line with the Government's earlier announcements, the Determination delays the original 1 August 2024 commencement date to:

- 1 July 2025 for tax agents or BAS agents with 100 employees or less as at 31 July 2024, and
- 1 January 2025, if otherwise.

Firms are expected to be compliant with the new obligations at the end of their transition period and will not be provided any additional time to meet the new obligations.

More information

- Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 1) Determination 2024
- LI 2024/24

US entertainers PAYG Withholding exemption

The ATO has implemented the *Taxation Administration (Withholding Variation for Certain Payments to US Resident Entertainers Including Athletes) Legislative Instrument 2024*, which ensures that US entertainers will continue to be exempt from PAYG withholding where gross receipts are below US $10,000.

The amount that needs to be withheld from a payment is varied to nil if:

a) The recipient is an entertainer who is a resident of the US;

(b) The payment is for activities undertaken in Australia as an entertainer; and
(c) The sum of all the payments described above does not exceed 10,000 US dollars, or its equivalent in Australian dollars, for the income year concerned.

A payer is not required to give a payment summary in respect of withholding payments to a payee in a financial year if they have not withheld any amount from those payments because of the operation of this instrument.

The new instrument commenced on 11 September 2024 and replaces a similar 2014 instrument (F2014L00379).

More information

- LI 2024/23