Coster Galgut
Chartered Accountants

Tax Update - March 2023

What did I miss?

Why are the ATO interested in how Part IVA applies in practice? We explore the details of General Anti-avoidance Panel and why Part IVA is coming under the spotlight.

Also of interest is the new PCG 2023/D1 on **Electricity costs when charging an electric vehicle at home.** The PCG provides a method to calculate cost of electricity (4.20 cents per km).

And, the proposed changes to the thin cap rules which fundamentally change the method of calculating whether debt deductions are denied.

As change occurs, we'll keep you posted.

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INSIDE

From Government

Consultation on tax on super above $3m

Treasury has released a consultation paper on the proposed tax on superannuation fund earnings above $3m.

The paper is broadly consistent with the Treasury fact sheet released with the original announcement and confirms the $3m cap will not be indexed (consistent with Div 293 and the low income superannuation tax offset).

The paper clarifies that payment of insurance benefits under an insurance policy held by a member will be deducted (i.e., treated as contributions) for the purposes of calculating earnings.

It also changes the order of the earnings calculation from the earnings calculation in the fact sheet:

$$Earnings = TSB_{\,Current\ Financial\ Year} - TSB_{\,Previous\ Financial\ Year} + Withdrawals - Net\ Contribution$$

To the revised earnings calculation in the consultation:

$$Earnings = (TSB_{\,Current\ Financial\ Year} + Withdrawals - Net\ Contributions) - TSB_{\,Previous\ Financial\ Year}.$$

The consultation seeks input on:

- Whether the current calculation of Total Super Balance, is adequate to calculate the earnings tax liability.
- Whether modifications are required to how the proportion of earnings are calculated (or alternatives).
- Any unintended consequences of:
  - The method used to determine the tax liability; or
  - The options for paying the tax liability.
- For defined benefit funds, whether:
  - the existing valuation methods in pre-pension phase work for the calculating balances over $3m.
  - the existing valuation methods in pension phase provide the appropriate value for calculating earnings
  - Alternative methods that should be considered.

For SMSFs reporting would be part of the year-end tax return process.

If enacted, the 2025-26 financial year is likely to be reported in the first half of 2027 - first notifications for the new tax liability are expected in the second half of 2027.

More information
Better targeted superannuation concessions

Proposed changes to the thin capitalisation rules

Treasury has released for exposure draft legislation in relation to some significant proposed changes to Australia's thin capitalisation provisions. These provisions can place a limit on the 'debt deductions' (e.g., interest deductions) that can be claimed in Australia by foreign controlled resident entities and resident entities with overseas operations.

The proposed amendments are comprehensive and seek to ensure that the Australian system is aligned with the OECD's recommendations on base erosion and profit shifting (BEPS).

One of the key points to note here is that the new rules are intended to come into effect from 1 July 2023, leaving limited time for business groups to analyse the practical application of the changes and for the ATO to provide detailed guidance on the updated rules if they end up passing through Parliament. It is yet to be seen whether a transitional approach will be implemented.

It will be essential for affected taxpayers to carefully consider the proposed changes and the interaction between these new rules and other aspects of the tax law. The two key changes to the rules involve:

- Removing the current classifications of 'inward investor' and 'outward investor' with a single category relevant for all entities other than financial entities and ADI's (i.e., banks). This should simplify the early stages of working through the rules.
- A wholesale replacement of the applicable debt tests. The current methods of establishing whether debt deductions are allowable (the safe harbour

debt test, worldwide gearing ratio test, and arm's length debt test) will be replaced by a fixed ratio test, a group ratio test, and an external third-party debt test.

The new tests involve a change from an asset-based approach to using earnings-based tests. However, it appears that some existing exclusions from the rules, such as the $2m de minimis threshold, will be retained.

The exposure draft legislation also contains a previously unannounced measure that removes deductions previously available under section 25-90 and section 230-15(3) ITAA 1997 for interest expenses incurred in deriving certain foreign dividends that are non-assessable non-exempt income under section 768-5.

More information
Multinational tax integrity – strengthening Australia's interest limitation (thin capitalisation) rules

Disclosure of subsidiary information

As part of the Government's focus on multinational tax avoidance and transparency it has released exposure draft legislation requiring public companies to publicly report information concerning their subsidiary entities.

The intention is for the disclosures to be made in the company's annual financial report and on their website.

The new provisions would require Australian public companies to provide a 'consolidated entity statement' as part of their annual financial reporting obligations. This would be necessary where the accounting standards require the public company to prepare financial statements in relation to a consolidated entity.

More information
Disclosure of subsidiary information

Denial of deductions for payments relating to intangible assets

Treasury has released exposure draft legislation dealing with proposed new rules that would prevent large multinational companies from claiming tax deductions for payments made in relation to intangible assets connected with low corporate tax jurisdictions.

The rules are specifically aimed at significant global entities (SGEs) and would apply from 1 July 2023.

A new anti-avoidance provision would be introduced to prevent SGEs from claiming a deduction for payments made to an associate to the extent that the payment is attributable to a right to exploit an intangible asset.

The rules would only apply if the recipient of the payment or another associate derives income in connection with the exploitation of the asset (or a related intangible asset) in a low corporate tax jurisdiction, which is defined as a foreign country which applies a corporate income tax rate of 0% or a rate that is less than 15%. The Minister would also have the power to treat a country as a low corporate tax jurisdiction if the Minister is satisfied that the country provides a preferential patent box regime without sufficient economic substance.

More information
Multinational tax integrity – denying deductions for payments relating to intangible assets connected with low corporate tax jurisdictions

From the Regulators

Penalties for overdue TPAR

The ATO has indicated that starting from 22 March 2023 it will be imposing failure to lodge penalties on taxpayers who have not lodged a taxable payments annual report (TPAR) for the 2022 or prior years and they have received three non-lodgment letters.

The TPAR is due by 28 August each year and includes details of payments made to contractors operating in certain industries such as building and construction, cleaning and IT.

The failure to lodge penalty is based on the size of the entity and the length of time the lodgment is overdue. The maximum penalty is limited at 5 penalty units (or a multiple of the penalty unit amount). For small entities (assessable income or current GST turnover of less than $1 million) the limit would be $1,375. For medium entities (assessable income or current GST turnover of up to $20 million) the limit would be $2,750.

More information
Overdue TPAR - penalties may apply
Failure to lodge on time penalty

Payments to Indian residents for technical services

Following a recent change to the tax legislation, the ATO has released some guidance with respect to Indian residents receiving payments from Australian customers for services provided from India. The change to the law means that if a taxpayer is a resident of India for tax purposes they will not be subject to Australian tax for certain payments or credits received from Australian customers for technical services that have been provided remotely (not through a permanent establishment in Australia).

The payments or credits must be:

- For technical services covered by Article 12(3)(g) of the Double Tax Agreement between Australia and India
- Not royalties within the definition provided in the ITAA 1936
- Otherwise subject to tax in Australia prior to the law amendment, because of the operation of Article 12(3)(g) and Article 23 of the DTA.

The key point to remember is that this change applies for income years commencing on or after 29 December 2022 (e.g., usually for the 2024 income year, commencing 1 July 2023).

More information
Payments to Indian residents for technical services

The lodgment deferral process

The ATO has started to release some general guidance in connection with the upcoming changes to the method for making lodgment deferral requests. The ATO has indicated that further information will be released in April.

If a client, or you as tax agent, are in an exceptional or unforeseen situation affecting the ability to meet a lodgement obligation, then it is possible for a tax agent to lodge a deferral request directly. To be eligible the following conditions also need to be satisfied:

- The request is for an existing client
- It is the first deferral request for this obligation
- It is no more than 3 business days after the original lodgment due date
- You or your client need no more than the default timeframes

This will only be available in relation to certain lodgment obligations (such as some income tax returns, annual GST returns, FBT returns, and some activity statements). The deferral has a set timeframe – 28 days for annual lodgments and 21 days for quarterly lodgments. Payment dates are also automatically extended to the deferred lodgment due date (except for FBT returns).

Beyond this, the ATO has also provided some guidance on requesting an ATO assessed deferral, which can be available where:

- The agent assessed deferral criteria outlined above are not met
- The request exceeds the agent assessed deferral timeframes
- The application is being submitted after the lodgment due date
- This is a second or subsequent deferral request
- The client has had a lodgment prosecution resulting in a revised lodgment date

- There are exceptional or unforeseen circumstances that are outside your or your client's control, which require a full explanation.

The ATO has reiterated again this year that during peak lodgment periods, it may take up to 28 days to finalise requests submitted through Online services for agents, and that deferral requests should be lodged as early as possible.

More information
Agent assessed deferrals
ATO assessed deferrals

General anti-avoidance rules panel

The ATO has released some information on the panel which advises the ATO on the application of the general anti-avoidance rules (i.e., Part IVA). The ATO acknowledges that the application of general anti-avoidance rules is a serious matter and that the rules should only be applied after careful and full consideration of the facts.

The panel consists of senior ATO staff as well as independent business and professional people who are chosen for their ability to provide expert informed advice.

The panel is advisory in nature and does not make the decision on whether a general anti-avoidance rule will apply. However, the advice provided by the panel is considered by ATO staff when making a decision on whether the rules should be applied.

More information
General Anti-Avoidance Rules Panel

NSW assistance scheme for taxi licence owners

The ATO has released a fact sheet outlining the tax implications for NSW taxi licence owners who receive a payment under the 'NSW Point to Point Financial Assistance Scheme' from 2022. These payments generally relate to the cancellation of a taxi licence.

The fact sheet confirms that the payments are not considered ordinary income and should be included in calculating a capital gain or loss on the cancellation of the licence.

The payments are not subject to GST.

More information
New South Wales Point to Point Financial Assistance Scheme for taxi licence owners

Releasing super to pay Division 293 tax

The ATO has issued some guidance on the process involved for individuals who have a Division 293 tax liability and wish to release funds from superannuation to pay the tax.

Once an individual receives a Division 293 notice from the ATO they have 60 days to elect to release funds from superannuation to pay the debt. This does not impact on the due date for payment though.

There are two steps required for a SMSF to release amounts:

- The individual member must have made an election to release money from their super, and
- The SMSF must have received a release authority from the ATO.

The released funds are provided directly to the ATO which will apply them to pay the Division 293 liability. Any remaining amount will be offset against other debts of the taxpayer before being paid to the individual member.

More information

Has your member received a Division 293 assessment?

ATO tips on reducing study loan balances

In the current environment of rising interest rates, the ATO has taken the unusual step of publishing some basic tips on limiting the impact of indexation on study and training loans (e.g., HECS debts). This includes:

- Advising an employer if the individual has started study or has a study loan.
- Reviewing the amounts being withheld from salary and wages to ensure this is sufficient to cover the expected compulsory repayment. The withholding amounts can be varied if necessary.
- Considering a voluntary repayment. Indexation on these loans is applied on 1 June, and repayments made before that date will reduce the balance on which indexation is applied.

More information
Tips for reducing a study loan balance

Removal of deductible gift recipient status

Following a recent change in legislation requiring DGRs to be registered charities to retain their endorsement the ATO has indicated that it will now start to revoke the DGR endorsement of entities that are no longer entitled to DGR status. Taxpayers donating to these entities will no longer be eligible to claim deductions for their donations under Division 30 ITAA 1997.

If an entity has its DGR status revoked, it can re-apply for endorsement once it satisfies the eligibility requirements (i.e., registers as a charity).

More information
Deductible gift recipient revocations are commencing
ACNC registration application checklist

Residency for state tax purposes

While accountants cannot normally provide advice to clients on state tax issues, Revenue NSW has released some guidance in relation to non-resident surcharges for purchaser duty and land tax.

Towards the end of 2021 the High Court handed down its decision in the Addy case, which held that Australia's working holiday tax rates were inconsistent with the non-discrimination clause in the double tax agreement (DTA) between Australia and the UK. Similar clauses can be found in several other DTA's.

It seems like those non-discrimination clauses can have implications with respect to other tax provisions. Revenue NSW has indicated that the NSW surcharge purchaser duty and surcharge land tax provisions are also inconsistent with the clauses in these DTAs. As a result, individuals who are citizens of some specific nations (e.g., New Zealand, Finland, Germany and South Africa) will no longer be required to pay surcharge transfer duty and surcharge land tax, effective immediately. This may also impact on companies, trusts or partnerships involving those individuals. Revenue NSW also notes that refunds may be available where affected parties paid surcharge purchaser duty or surcharge land tax on or after 1 July 2021.

The guidance provides that Revenue NSW will be contacting affected payers, although if your client thinks they may be eligible they can contact Revenue NSW to discuss the position.

Unfortunately, at this stage the SRO in Victoria has indicated that they will not be following the approach adopted by Revenue NSW. Other State revenue offices have not provided any response as yet. It is also not clear whether the change could also impact on citizens of India, Japan, Switzerland and Norway, , as these countries have DTAs with similar non-discrimination clauses.

More information
International tax treaties

Rulings, determinations & guidance

Electricity costs when charging an electric vehicle at home

PCG 2023/D1

The ATO acknowledges that individuals who incur work-related expenses relating to vehicles and employers with FBT obligations might be faced with significant compliance challenges of trying to calculate the cost of electricity that is used in charging an electric vehicle at residential premises. The ATO has issued a draft PCG which is aimed at addressing this challenge.

If the employer or individual is able to satisfy some basic eligibility conditions, they can choose to calculate the electricity costs associated with charging an electric vehicle at a residential home by multiplying the total number of relevant kilometres travelled by the vehicle in the FBT year or income year by the EV home charging rate, which is initially set at 4.20 cents per kilometre.

The guideline will apply from:

- For FBT purposes, from 1 April 2022;
- For income tax purposes, from 1 July 2022.

It is not possible to use the guideline if the vehicle is a plug-in hybrid vehicle that has an internal combustion engine.

The record keeping requirements for those who want to use the EV home charging rate are summarised below:

- The taxpayer needs to keep a record of the distance travelled by the car during the relevant year, using odometer records;
- If the rate is being used for FBT purposes under the operating costs method, a valid log book is required;
- If the rate is being used by an individual to calculate deductions for a car using the logbook method, a valid log book is required and the individual needs one electricity bill for their residential premises in the relevant year to show they incurred electricity costs;
- If the rate is being used by an individual to calculate deductions for a vehicle that is not a car, the ATO recommends keeping a log book as well as an electricity bill.

A transitional approach is available if odometer records have not been maintained as at 1 April 2022 or 1 July 2022. In this case a reasonable estimate can be used based on service records, log books or other available information.

FBT: private use of motor vehicles other than cars

TD 2023/1

The cents per kilometre rates for calculating the taxable value of fringe benefits arising from the private use of motor vehicles (other than cars) from 1 April 2023 have increased slightly from the previous FBT year and are summarised below.

Engine capacity	Rate per kilometre
0 - 2500cc	62 cents
Over 2500cc	73 cents
Motorcycles	18 cents

LAFHA Reasonable rates

TD 2023/2

This determination sets out the reasonable amounts for food and drink expenses incurred by employees receiving a living away from home allowance benefit from 1 April 2022, both within Australia and overseas.

A summary of the rates for those living away from home within Australia is below:

Amounts of reasonable food and drink - within Australia	Per week ($)
One adult	316
2 adults	474
3 adults	632
One adult and one child	395
2 adults and one child	553
2 adults and 2 children	632
2 adults and 3 children	711

Amounts of reasonable food and drink - within Australia	Per week ($)
3 adults and one child	711
3 adults and 2 children	790
4 adults	790

Dealing with SMSF non-compliance

PS LA 2023/1

When a SMSF trustee contravenes superannuation law the ATO has the following options:

- Make the fund non-complying – this is generally used as a last resort for serious systemic issues;
- Disqualify a trustee;
- Issue an enforceable undertaking;
- Issue a rectification direction; or
- Issue an administration penalty.

More information is available on each of these options in the ATO publication – How we deal with non-compliance.

PS LA 2023/1 provides guidance to ATO officers when considering a rectification direction.

When considering whether to issue a rectification direction the document directs the ATO officer to consider the seriousness of the contravention, the person's behaviour and compliance history along with any financial detriment that a fund would suffer as a result of complying with a rectification direction.

The guidance also indicates that most contraventions should be rectified within 6 months, or up to 12 months for extreme cases.

Cases

Whether agistment activities are a business

DQTB & Anor v FC of T [2023] AATA 515

This is a case that could have implications for clients who carry on primary production business activities through an entity which pays a fee for use of land that is held by another party.

The case involved a company which operated a grazing business using land owned by related individuals. The company paid an 'agistment' fee to the individuals for the use of the property. The individuals incurred significant expenses in preparing the property and sought to claim deductions for these expenses in full against the agistment income.

The ATO issued amended assessments limiting the deductions claimed by the individuals to the amount of income derived from the company. The reasoning for this was not made clear in the decision, however this appears to be on the basis the expenses were not incurred solely in deriving assessable income (and as such were not fully deductible under the first limb of section 8-1). This meant that whether the deductions could be allowed in full turned on whether the individuals were carrying on a business of agistment (and providing other services such as veterinary and animal care), which meant the deductions were available under the second limb of section 8-1.

Ultimately, the AAT found that the individuals were not carrying on a business, largely due to the absence of evidence illustrating a profit-making intention by the individuals. As such, the deductions were limited.

The decision shows that while negative gearing is sometimes possible for tax purposes, this won't always be the case and we cannot assume that full deductions will be available just because the taxpayer is generating some income from the relevant activity.

Whether trucks drivers were deemed employees for SG purposes

Jamsek v ZG Operations Australia Pty Ltd (No 3) [2023] FCAFC 48

In February 2022, the High Court handed down two decisions looking at whether particular workers should be classified as employees under the ordinary meaning of the term. The High Court confirmed that when there is a comprehensive agreement between the parties it is necessary to reach a conclusion on whether the worker is an employee or contractor with reference to the terms of that agreement, rather than focusing on the subsequent conduct of the parties.

One of those decisions was in the case of *ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2* and the High Court held that two truck drivers were not employees of the company that engaged them under the ordinary meaning of the term. However, the case was remitted to the Federal Court to look at whether the truck drives could be treated as employees under the expanded definition of the term for superannuation guarantee (SG) purposes.

By way of background, the individuals were engaged as truck drivers by a business run by a company. The individuals were initially engaged as employees of the company and drove the company's trucks. However, in the mid-1980's the company offered the individuals the opportunity to become contractors and purchase their own trucks. The individuals agreed to this and set up partnerships with their respective wives. The case focused on whether the drivers were entitled to SG contributions on the basis that they were employees of the company under the ordinary meaning of the term or under the expanded definition for SG purposes.

For SG purposes someone can be treated as an employee if they are engaged under a contract which is wholly or principally for their labour and they work under that contract.

The Full Federal Court held that the truck drivers were not employees under the expanded definition of the term. While there were a number of reasons for reaching this conclusion, the two key points were:

- The individuals were not parties to the relevant contract in their individual capacities. The agreement was between the company and the relevant partnership. The work performed by the drivers under the contract was performed on behalf of the relevant partnership.
- Even if the individuals had been a party to the contract, the contracts were not wholly or principally for their labour. A substantial component of the contracts involved the provision of functional and properly maintained delivery trucks.

Legislation

Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023 introduces a series of proposed measures including:

- Icelandic convention and minor amendments
- Income tax exemption and franking credit refund for certain subsidiaries of the Future Fund Board
- DGR registers reform - transfers practical responsibility for assessing the register DGR categories and the OAGDS from Ministers (assisted by the relevant department) to the ATO.
- Aligning excise and customs reporting with other indirect taxes
- Small-scale repackaging of beer into smaller containers - amends the Excise Act so that repackaging of beer that would otherwise be considered manufacture under section 77FC of the Excise Act will not be taken to be the manufacture of beer if it meets certain requirements.