client alert | explanatory memorandum

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CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 24 January 2020.

ATO backs down from controversial time limit ruling

In 2018, the ATO issued a controversial draft ruling which took a very strict stance on the four-year time limit for claiming input tax credits and fuel tax credits. The ruling had been used by the ATO to deny input tax credits and fuel tax credits where the Commissioner makes a decision on an objection or amendment request outside the four-year period. However, a recent observation by a judge ruling on a related matter has put the ATO's strict stance in doubt and as a result, the ruling has been withdrawn.

The ATO has recently withdrawn Draft Miscellaneous Taxation Ruling MT 2018/D1 on the time limit for claiming input tax credits and fuel tax credits. Generally, under s 93-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), the right to claim an input tax credit expires after four years and commences on the day on which the entity was required to lodge a return for the tax period to which the input tax credit would be attributable. Section 47-5 of the *Fuel Tax Act 2006* has a similar provision which limits claims to four years after the date on which taxpayers were required to give the ATO a return.

The withdrawn draft ruling created much controversy for its strict stance on the four-year time limit rules for claiming the credits. It stated that a tax credit would not be taken into account in an assessment when the taxpayer lodges an objection or requests an amendment, even if the objection or amendment request is made within the four-year entitlement period. Therefore, the effect of the draft ruling was that if the ATO's decision on an objection or amendment request was made outside the four-year period (but the request by the taxpayer was lodged within the four-year period), the taxpayer would not have been entitled to the tax credits even if the decision was favourable to the taxpayer.

After the draft was issued, however, the Federal Court did not quite agree with the ATO's stance (*Coles Supermarkets Australia Pty Ltd v Federal Commissioner of Taxation* [2019] FCA 1582). The Court accepted Coles' submissions that s 47-5 of the Fuel Tax Act is only intended to prevent an ongoing entitlement to claim credits in a later return where a return has not been lodged or credits have not been claimed.

The Court noted that once a return has been lodged and objected to, there is no scope for the operation of s 47-5 to disentitle a taxpayer to fuel tax credits, because the rights of the Commissioner and taxpayer are protected by various sections of the *Tax Administration Act 1953* (TAA).

In a decision impact statement following the judgment in the *Coles* case, the ATO acknowledged that the Court's observations were contrary to its own views. Subsequently, it withdrew the ruling, conceding that the views expressed in MT 2018/D1 was no longer current. While the *Coles* decision only refers to fuel tax credits, given the similarity of the provisions between fuel tax credits and the GST Act, and the Court's observations regarding the rights of the Commissioner and taxpayer being protected by the TAA, it stands to reason it would also apply to input tax credits. Thus, the ATO is planning to issue a new ruling in early 2020 that takes into account the Federal Court's observations.

In the meantime, what this means for affected taxpayers is that, where the ATO makes a decision on an objection or a request for amendment in relation to input tax credits and/or fuel tax credits outside the four-year period (with the initial objection or amendment request lodged within the time limit), the taxpayer will no longer be automatically denied the credits in situations where the decision is favourable. As a result, any taxpayer that the draft ruling has affected (ie who has had input tax credits or fuel tax credits denied because objections or amendment decisions had been made outside the four-year time limit) is encouraged to contact the ATO.

Source: www.ato.gov.au/law/view/pdf/dis/dis_coles_supermarkets_australia.pdf.

ATO extends bushfire assistance: lodgments deferred

On 20 January 2020 the ATO announced an extension of the tax assistance package for people impacted by the 2019–2020 bushfires in New South Wales, Victoria, Queensland, South Australia and Tasmania.

Commissioner of Taxation Mr Chris Jordan said the 3.5 million businesses, individuals and self managed super funds (SMSFs) in the impacted local government areas will have until 28 May 2020 to lodge and pay BASs and income tax returns. This additional time is on top of the two-month extension previously granted.

Additionally, the ATO said it will fast-track any refunds that are due to taxpayers in the impacted regions. For example, businesses expecting a refund as a result of GST credits due to large purchases to replace stock are encouraged to lodge their activity statements at the first opportunity. The ATO will also remit any interest and penalties applied to tax debts since the commencement of the bushfires. Mr Jordan said taxpayers or their agents in the affected areas do not need to apply for a deferral, a faster refund or remission of interest or penalties. This will be done by the ATO automatically (except for large PAYG withholders). Affected taxpayers are also able to vary their income tax instalments to nil without penalties. This also applies if taxpayers end up in a tax payable situation for that quarter once they have lodged their tax return.

For taxpayers with a tax debt or outstanding obligation, the ATO will not initiate debt recovery action until at least 28 May 2020. Taxpayers can also request payment arrangements for outstanding debts. The ATO will also consider releasing individuals and businesses from income tax and FBT debts if they are experiencing serious hardship. However, employers still need to meet their ongoing super guarantee (SG) obligations for their employees.

A complete list of the impacted areas is available on the ATO website at www.ato.gov.au/individuals/dealing-with-disasters. Those affected by the 2019–2020 bushfires with a postcode not currently in the identified list can contact the ATO Emergency Support Infoline for tailored help; phone: 1800 806 218.

The ATO will recognise the ongoing effects of this disaster, such as cash flow problems for business owners who have suffered reduced trade. This includes businesses that are not located in the identified regions. The ATO also recognises that there may be situations where additional support or extensions may be required on a case-by-case basis beyond the automatic deferrals announced.

Source: www.ato.gov.au/Media-centre/Media-releases/ATO-extends-tax-relief-and-assistance-for-people-impacted-by-bushfires/.

Better protection for consumers: new ASIC powers

In response to the recommendations of the Banking and Financial Services Royal Commission and the Australian Securities and Investments Commission (ASIC) Enforcement Review Taskforce Report, the government has proposed new enforcement and supervision powers for ASIC to restore consumer confidence in the financial system, particularly in relation to financial advice. These new powers include enhanced licensing, banning, warrant and phone tap powers, all designed to ensure that avoidable financial disasters uncovered during the Royal Commission are never repeated.

While the Banking and Financial Services Royal Commission seems long ago in the minds of many, the people who have been financially affected will no doubt carry the scar of mistrust for life. This is why the government has introduced new laws which will give ASIC new enforcement and supervision powers in relation to the financial services sector to weed out the “bad apples” and restore consumer confidence.

The new measures seek to strengthen ASIC’s licencing powers by replacing the current Australian financial services (AFS) licence requirement that a person be of “good fame and character” with a new ongoing requirement that they be a “fit and proper person” at both the time of application and subsequently. This applies to all officers, partners, trustees and controllers of the applicant applying for the AFS licence. The “fit and proper person” requirement will also apply to existing AFS licensees to ensure that ASIC can monitor the controllers of existing AFS licensees, request relevant information and carry out enforcement action as required.

In working out whether someone is a “fit and proper person”, ASIC will consider matters including whether the person has been convicted of an offence in the last 10 years, whether they’ve had an AFS licence or Australian credit licence suspended or cancelled, and whether a banning or disqualification order has previously been made.

ASIC’s banning powers will also be expanded to situations where they have reason to believe that a person is “not a fit and proper person” or is “not adequately trained or is not competent” to:

- provide financial services;
- perform functions as an officer of an entity that carries on a financial services business; or
- control an entity that carries on a financial services business.

In addition, under these new powers, ASIC may also make a banning order against a person that is insolvent under administration, has, at least twice, been an officer of a corporation that was unable to pay its debts, or has, at least twice, been linked to a refusal or failure to give effect to an Australian Financial Complaints Authority (AFCA) determination.

To support these enforcement functions, ASIC’s warrant and phone tap powers have been beefed up. It is no longer required to forewarn those under investigation that it may apply for a search warrant. It is also no longer required to specify the exact books or evidential material that can be searched and seized.

Interception agencies (ie police, ASIO, and anti-corruption bodies) will be able to provide ASIC with lawfully intercepted telecommunications information in some instances and ASIC staff will be able to use and record the received information as well as communicate the information to another person in investigations and prosecutions.All of this means there will be a decreased risk of evidence destruction or alteration.

If these measures become law, ASIC's ability to launch and progress investigations to protect consumers from dodgy practitioners will be greatly enhanced.

Source: https://treasury.gov.au/consultation/c2019-40503.

Expansion of Tax Avoidance Taskforce activity

The ATO has expanded its Tax Avoidance Taskforce activity to include top 500 private groups, high wealth private groups, and medium and emerging private groups. Perhaps the most interesting is the inclusion of medium and emerging private groups, covering around 97% of the total private group population. These consist of Australian resident individuals who, together with their associates, control wealth between $5 million and $50 million, and businesses with an annual turnover of more than $10 million. Business captured will be receive a notification letter of the next steps.

The Tax Avoidance Taskforce was originally conceived in 2016 to ensure that multinational enterprises, large public and private business pay the right amount of tax. The Taskforce's main role is to investigate what the ATO considers to be aggressive tax avoidance arrangements, including profit shifting, and to work with partner agencies in other jurisdictions to achieve this goal. In the 2019–2020 Federal Budget, the taskforce was provided with $1 billion over four years – this is in addition to the $679 million provided in 2016 – to extend the operation of the taskforce to the 2022–2023 income year and expand the range of entities it investigates.

As a part of the expansion, the ATO now has three "programs" for private groups under the Taskforce's umbrella: top 500 private groups, high wealth private groups, and medium and emerging private groups. The expansion that will perhaps affect the most taxpayers will be the program covering medium and emerging private groups.

Businesses or groups that are captured under these programs will be sent a notification letter detailing what needs to be done to prepare for ATO engagement. Characteristics that may attract further ATO scrutiny include tax or economic performance not comparable to similar businesses, low transparency of tax affairs, large/one-off or unusual transactions (eg shifting wealth), aggressive tax planning, lifestyle exceeding after-tax income, accessing business assets for tax-free private use, and poor governance/risk management.

Medium and emerging groups

This program includes private groups linked to Australian resident individuals who, together with their associates, control wealth between $5 million and $50 million, and businesses with an annual turnover of more than $10 million that are not public or foreign owned and are not linked to a high wealth private group. The ATO estimates this would cover around 97% of the total private group population.

The ATO will use data matching and analytic models to identify wealthy individuals and link them to associated entities, which will then be grouped and looked at as a whole. The main aim of the program is to understand the businesses and the operating environments to identify trends and specific risks that will be used to mitigate tax risks. For example, once an issue has been identified, the ATO may contact individual companies about its concerns, or it may publish public advice or guidance on the issue if it is an issue that affects a large proportion of businesses.

Aside from the general advice, the ATO has also flagged using early engagement and pre-lodgement agreements with businesses in this category for commercial deals to provide certainty on significant transactions and events. Of course, the ATO will continue to conduct risk-based reviews and audits where it deems appropriate. Initially, the ATO will focus on larger and "higher risk" private groups, those experiencing rapid growth, looking to expand offshore, or where the controlling individuals are transitioning to retirement.

High wealth private groups program

This program includes Australian resident individuals who, together with their associates, control wealth of more than $50 million. The ATO will take a one-on-one tailored engagement approach to mitigate tax risks.

Top 500 private groups

This program focuses on Australia's largest private groups and involves regular one-on-one engagements to understand the business, drivers and risk position.

Source: www.ato.gov.au/Tax-professionals/Newsroom/Your-practice/Expansion-of-the-Tax-Avoidance-Taskforce-for-private-groups/.

No-cost strategies to increase your super

With all the pandemonium of the new year, your super is probably the last thing on your mind. However, this is precisely the right time to think about implementing some strategies to increase your super for the coming year. With some simple, no-cost strategies such as finding your lost super, consolidating your super accounts and making sure you're in a fund that's performing well, you will be well on your way to a comfortable retirement.

Now is the perfect time to put some resolutions in place to increase your super for 2020. After all, it is what we'll be relying on in retirement, and even small improvements now could mean extra luxuries later.

Currently, 5.8 million individuals in Australia (36% of the population) have two or more super accounts. Every year the ATO launches its postcode "lost super" campaign to help raise community awareness of lost super. As a consequence of the 2018 campaign, more than 66,000 people consolidated over 105,000 accounts worth over $860 million. For the 2019 campaign, the ATO has created tables of lost and unclaimed super per state and postcode that anyone can access. If you think you've got lost super, you can then log into myGov to claim it and have it consolidated with your active account.

Finding and consolidating your lost super with your active account means you'll pay fewer management fees and other costs, saving you in the long term. Between 1 July 2014 and 30 June 2019, 2.6 million accounts to the value of $15 billion have been consolidated by fund members using ATO online services. The figures indicate that more and more people are taking advantage of this no-cost strategy to grow their super in the long term.

Another easy way to grow your super is to make sure the super fund that you're putting your money into is performing well. Recently, the regulator of super funds, the Australian Prudential Regulation Authority (APRA), released "heatmaps" that provide like-for-like comparisons of MySuper products across three key areas: investment performance, fees and costs, and sustainability of member outcomes. The heatmap uses a graduating colour scheme to provide clear and simple insights that unlike a sea of numbers on a spreadsheet, will send a clear and strong message to users.

For example, MySuper products delivering outcomes below the relevant benchmarks in relation to investment performance and fees and costs will be depicted from pale yellow to dark red. The sustainability measures provide an indication of a trustee's ability to provide quality member outcomes and address areas of underperformance. While the ultimate purpose of the heatmap is to have trustees with areas of underperformance take action to address it, they can also be an invaluable resource in choosing the right super fund.

Source: www.ato.gov.au/Forms/Searching-for-lost-super; www.apra.gov.au/mysuper-product-heatmap.

SMSF sole purpose test and fractional investments

Previously, it was thought that any benefit provided directly or indirectly to members or related parties of a self managed super fund (an SMSF) from an investment would contravene the sole purpose test. However, a Full Federal Court decision has reframed the sole purpose test which will provide some flexibility to trustees on certain investments. Notwithstanding this decision, investments in SMSFs remain a complex area with many pitfalls.

To be eligible for superannuation fund tax concessions, SMSFs are required to be maintained for the sole purpose of providing retirement benefits to members. This is known as the sole purpose test: s 62 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). Failing the test could expose trustees to civil and criminal penalties in addition to the SMSF losing concessional tax treatment. Therefore, it is important when making SMSF investments that the investment does not provide a benefit directly or indirectly to members or related parties.

Whether a fund's investment contravenes the sole purpose test by providing a benefit directly or indirectly to members or related parties depends entirely on the circumstances of each case. Recently, the Full Federal Court decided that an SMSF investment in a fund to acquire a fraction interest in a property to be leased at market rent to the member's daughter did not breach the sole purpose test (*Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* [2018] FCAFC 122).

The Full Court said s 62 of the SIS Act does not suggest that an SMSF will not be maintained solely for the core and/or ancillary purposes simply because the trustee enters into a transaction with a related party. It noted that the property was to be leased at market rent therefore there was no current day financial benefit to be obtained by either the member or his daughter. The only benefit would be some comfort or convenience, which was considered to be merely incidental.

However, the Full Court said if the lease was not at market rent, then an inference could readily be drawn that the fund was being maintained for a collateral purpose of providing discounted housing to a relative, which would contravene the sole purpose test.

In response to the Court's decision, the ATO noted that a trustee of an SMSF could potentially breach the sole purpose test by investing in the fund mentioned in the case if the facts and circumstances indicate that the SMSF was maintained for the collateral purpose of providing accommodation to a related party. Which will be determined by considering all the facts and circumstances surrounding the trustees' behaviour.

Nevertheless, to provide certainty for the investors in this particular fractional property investment, the ATO said it will not take compliance action if the trustee signs a declaration (the sole purpose test declaration) that avoids:

- entering into an investment based on its potential to provide related-party accommodation;
- influencing the fractional property investment fund or a relevant property manager to engage a related party as a tenant of the property; and
- influencing a related party to become a tenant of the property.

In addition, a copy of this declaration must be retained and provided to approved auditors. The ATO must also not find evidence that indicates the trustee has acted inconsistently with the terms of the signed declaration.

TIP: The takeaway from this case is that SMSFs are complicated, and investments in SMSFs even more so. Note that while the Full Court found that the SMSF had not breached the sole purpose test, it ultimately ruled against the trustee as the Court found that the investment was an in-house asset and breached the 5% limit. Crucially, the ATO warned it may still apply compliance resources to scrutinise whether an SMSF investment in fractional property investments contravenes other provisions of the SIS Act (eg in-house asset rules).

Source: www.ato.gov.au/Super/Self-managed-super-funds/Investing/Sole-purpose-test/Fractional-property-investment---ATO-guidance-on-approach/.

$10,000 cash payment limit: the facts

The government-proposed $10,000 economy-wide cash payment limit has understandably elicited some confusion. Chief among the questions is to what extent personal transactions will be included in the limit. To dispel some of the confusion, the government has released information outlining the circumstances in which the limit would not apply in relation to personal or private transactions. While this proposal is not yet law, once enacted it will be a criminal offence for certain entities to make or accept cash payments of $10,000 or more.

Among other categories, payments that will not be subject to the $10,000 limit include those relating to personal or private transactions (excluding transactions involving real property). The exemption only includes payments that satisfy one of the following:

- payments solely for supplies or acquisitions that are not made in the course of an enterprise;
- payments that are made or received by an entity in circumstances where that entity reasonably believes that the payment is solely for supplies or acquisitions that are not made in the course of an enterprise;
- payments that are made as or as part of a gift (not in the course of an enterprise); or
- payments that are made or received by an entity as a gift (or part of a gift) in circumstances where that entity reasonably believes that the payment is not made or received in the course of an enterprise.

The term "enterprise" in this context has the same broad meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), meaning that an entity will be undertaking an enterprise if, for example, it carries on a business (or in the form of a business), offers real property for rent, is a charity, political party (or candidate) or other recipient of gifts that are deductible for income tax, operates a super fund, or is the Commonwealth, a state or a territory or an entity established for public purposes under an Australian law. In essence, the only circumstance in which an entity will not be carrying on an enterprise is where the entity is acting in a wholly private or personal capacity.

Therefore, cash gifts to family members (as long as they are not donations to regulated entities such as charities) and inheritances are likely to be exempt. In other words, it is unlikely that you will be prosecuted for a criminal offence if you give your family members a lavish cash wedding gift or help your kids with a house deposit that happens to be over $10,000.

However, if you occasionally sell private assets (eg a used car) you may need to be careful and take reasonable steps to ascertain whether the other party is acting in the course of an enterprise. For example, if you sell your car to another individual and you believe the car will be acquired for private use after undertaking reasonable inquiries such as searching the Australian Business Register, then the exemption for personal/private transactions will apply.

On the other hand, if you did not undertake "reasonable inquiries", and incorrectly believe that the other party is not acting in the course of an enterprise, then it is possible you may be prosecuted for a criminal offence. In general, whether a belief is reasonable will depend on the circumstances of the transaction and the

parties. However, a reasonable belief must be a belief about the facts and does not protect those ignorant of the law or the legal implications of the facts. In other words, you cannot claim that you didn't know about the rules surrounding the cash payment limit.

Source:
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/CurrencyCashBill2019/Public_Hearings

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