client alert | explanatory memorandum

December 2021/January 2022

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 10 December 2021.

Client Alert returns in 2022

This is the final edition of Client Alert for 2021. The next edition will be published in February 2022.

We wish you all the best for the festive season and new year.

ATO Medicare exemption data-matching continues

The ATO has announced the extension of its Medicare exemption statement data-matching program. This program has been conducted for the last 12 years, and has now been extended to collect data for the 2021 through to 2023 financial years. It is estimated that information relating to approximately 100,000 individuals will be obtained each financial year.

The Medicare exemption statement (MES) is a statement that outlines the period during a financial year that an individual was not eligible for Medicare. It can be obtained from Services Australia. Individuals who are not eligible for Medicare will then be exempt from paying the Medicare levy in their tax returns.

If you live in Australia as an Australian citizen, a New Zealand citizen, an Australian permanent resident, an individual applying for permanent residency or a temporary resident covered by a ministerial order, then you are eligible to enrol in Medicare and receive healthcare benefits. However, this also means you need to pay Medicare levy at 2% of your taxable income to partly fund the federal scheme.

Individuals not eligible for Medicare benefits can apply for the MES to claim an exemption from paying the Medicare levy (and the Medicare levy surcharge if applicable) in their tax returns. The exemption needs to be applied for in each financial year that the individual is not entitled to Medicare benefits. The following people may be eligible to apply for an MES:

- Australian permanent residents who have lived outside of Australia for 12 months or more;
- temporary visa holders who have not applied for permanent residency;
- temporary visa holders who are not eligible for Medicare under a reciprocal health care agreement;
- New Zealand citizens who have spent less than six months in Australia within a 12-month period; and
- Australian citizens living overseas for five years or more.

The information that will be obtained as part of the ATO's extended data-matching program includes MES applicants' identification details, entitlement status and approved entitlement period details. The ATO will also match the number of days for which an individual claims they were not entitled to receive Medicare benefits with the information included in the MES.

The data collected will be used to ensure that exemptions claimed by taxpayers in their tax returns for the relevant years are correct, as well as to avoid the ATO unnecessarily seeking information from genuine claimants of the exemption.

In previous years of this data-matching program, the ATO was able to verify around 87% of the Medicare exemptions claimed in individual tax returns without needing to contact the taxpayers directly. However, the remaining 13% of taxpayers (around 11,000 individuals) who claimed Medicare exemptions were subjected to ATO review.

While the ATO has not detailed the specific compliance activity that may flow from the continuation of the program, this data-matching is expected to be used to promote voluntary compliance and develop educational strategies.

Building delays may cost you in more ways than one

Most of Australia has been experiencing a building boom, fuelled by government policy such as the HomeBuilder scheme and a general desire to make our living spaces better as we spend more time working, educating and living at home. However, with global supply chains and transport routes disrupted due to the effects of COVID-19, there have been well publicised material shortages and builder collapses in the sector.

If you're building or substantially renovating your home, any related delays you experience may also end up costing you when you decide to sell.

Individual Australian tax residents are able to access a capital gains tax (CGT) building concession, which in essence means you can treat either the land or the dwelling on the land as your main residence even while not living there during building or renovations. However, this concession only applies for a maximum of four years and is subject to certain conditions. Absent the concession, for example if your construction or renovation project has been substantially delayed by COVID-19, you may be slugged with CGT on sale of the residence.

For most individual Australian tax residents (not companies or trustees), there is an automatic exemption from CGT for the capital gain (or loss) that arises when you sell your home. This is called the "main residence exemption". Generally, for the exemption to apply it must have been your main residence for the entire ownership period; however, exemptions may apply in instances where you've had to move out while building, renovating or repairing your residence.

The "building concession", as it is known, allows an individual to treat a dwelling as their main residence from the time that the land was acquired for a maximum period of up to four years, subject to certain conditions. For example, the dwelling must become the individual's main residence as soon as practicable after the construction, repair or renovation is completed, and must remain so for at least three months. The individual must also choose to apply the building concession.

The four-year maximum period applies from either the time you acquire the ownership interest in the land, or the time you cease to occupy a dwelling already on the land. If it takes more than four years to construct or repair the residence, you may only be entitled to a partial main residence exemption. This means that if you sell the residence at a future date, the period during which you didn't live in the residence during construction or renovation will be subject to CGT.

Example

You purchase a piece of land for $100,000, intending to build a dwelling on it and live in it as your main residence. Due to various set-backs the dwelling isn't completed within the four-year maximum period, but is eventually completed after five years. You move into the dwelling and live in it for another two years before you sell it for $300,000. The taxable capital gain in this circumstance that would roughly be $143,000 (ie capital gain adjusted by the ratio of non–main residence days to days in the ownership period).

As you can see, the financial consequences of getting it wrong are very real. If you are unable to complete your main residence construction or renovation project within the four-year maximum timeframe either due to the builder becoming bankrupt or due to severe illness of a family member, you may be able to apply to the ATO for discretion to extend the four-year period so you don't get penalised financially.

Cryptocurrency scams on the rise

As investing in cryptocurrency becomes more popular in Australia, there is also a corresponding increase in the number of scams being reported. Due to the unregulated nature of cryptocurrency and the recent failure of two Australian cryptocurrency exchanges, this investment space has become a risky free-for-all, with Scamwatch estimating that around $35 million was lost to cryptocurrency scams in the first half of 2021. If you're one of the unlucky ones to have been scammed, depending on the circumstances you may be able to claim a capital loss deduction.

Scamwatch, a part of the ACCC (Australian Competition and Consumer Commission), estimates that Australians lost over $70 million in investment scams in the first half of 2021. Of this $70 million, around half was lost in cryptocurrency scams, especially involving Bitcoin. Cryptocurrency scams were also incidentally the most commonly reported type of investment scam in 2021, with around 2,240 reports.

Cryptocurrency scams can come in a variety of forms, the most common being impersonation, where scammers pretend to be from a reputable trading platform and have legitimate-looking digital assets (eg fake trading platforms which look like the real thing, email addresses that approximate a genuine company they are impersonating, etc) to lure investors in. Investors who fall into this trap will usually see the initial money they invested skyrocket on fake trading platforms and may even be allowed to access a small return. Once people are hooked, though, the scammers will typically ask for further investments of large sums of money before cutting off contact and disappearing completely.

What to do if you think you've been scammed

People who think they've been scammed should contact their bank or financial institution as soon as possible. They can also contact IDCARE on 1800 595 160 or via www.idcare.org if they suspect they are the victim of identity theft. IDCARE is a free, government-funded service that will support individuals through the process.

People can alsomake a report to Scamwatch at www.scamwatch.gov.au/report-a-scam and to the Australian Securities and Investments Commission (ASIC) at https://asic.gov.au/about-asic/contact-us/how-to-complain/report-misconduct-to-asic/.

Are cryptocurrency losses from scams tax deductible?

Whether you can deduct a loss all boils down to whether you actually owned an asset. For example, if you actually owned cryptocurrency such as Bitcoin in a digital wallet and due to the collapse of an exchange all the cryptocurrency you owned has disappeared, then it is likely you can claim a capital loss. This is likely to also apply if the cryptocurrency you own is stolen in a scam.

According to the ATO, to claim a capital loss on cryptocurrency, you may need provide the following kinds of evidence:

- when the private key to the cryptocurrency was acquired and lost;
- the wallet address that the private key relates to;
- the costs you incurred to acquire the lost or stolen cryptocurrency;
- the amount of cryptocurrency in the wallet at the time of the loss of private key or access;
- evidence that the wallet was controlled by you (ie transactions linked to your identity) and that you are in possession of the hardware that stored the wallet; and
- transactions to the wallet from a digital currency exchange for which you hold or held a verified account or is linked to your identity.

If you have this supporting information, you will be able to claim a capital loss on your tax return in the year that the loss or theft of Bitcoin occurred. This can be offset against current year capital gains, or carried forward to offset future capital gains.

Unfortunately, it is unlikely that a deduction can be claimed (capital or otherwise) for individuals who have been scammed into handing over money for "cryptocurrency investment" in schemes where no actual cryptocurrency ownership occurred. This is because they have not technically lost an asset, as they did not own the cryptocurrency in the first place, and the money invested is not considered a capital gains tax (CGT) asset under Australian tax law.

Take care with small business CGT concessions

Recently, the ATO has noticed that some larger and wealthier businesses have mistakenly claimed small business capital gains tax (CGT) concessions when they weren't entitled. By incorrectly applying the concessions, these businesses were able to either reduce or completely eliminate their capital gains. The ATO has urged all taxpayers that have applied the small business CGT concessions to check their eligibility. Primarily, this means that the business should meet the definition of a CGT small business entity or pass the maximum net asset value test.

Australia's tax law provides four concessions to enable eligible small businesses to eliminate or at least reduce the capital gain on a CGT asset, provided certain conditions are met.

To be eligible to apply these CGT concessions, the business must have a maximum net asset value (ie the net value of assets owned by the business and related entities) of less than $6 million. Failing that, the business must qualify as a "CGT small business entity". That is, it must be carrying on a business, and have an aggregate turnover of less than $2 million.

In addition, the CGT asset that gives rise to the gain must be an active asset, which just means it is an asset used in carrying on a business by either you or a related entity. It should be noted that shares in a company or trust interests in a trust can qualify as active assets although additional conditions may apply.

Once the basic conditions are satisfied, your small business can choose to apply one or all of the four CGT concessions provided the additional conditions to each concession is also met. Meeting all the conditions means that the concessions can be applied one after another, in some cases eliminating the entire capital gain. The concessions are as follows:

- *15-year exemption:* The business may be entitled to a total exemption on a capital gain if the asset has been continuously owned for at least 15 years up to the time of the CGT event. Or, in cases where the CGT asset is a share or trust interest, the company or trust must have a "significant individual" for at least 15 years. For individuals (ie sole trader businesses), there is an additional condition that they must be at least 55 years of age and that the CGT event occurs due to either retirement or incapacitation.
- *50% active asset reduction*: The business may be entitled to an automatic 50% reduction of a capital gain made on the disposal of an active asset if the basic conditions are satisfied, and the asset does not have to held for more than 12 months.
- *Retirement exemption:* A business that is an individual, a company or a trust may be able to choose to disregard all or part of a capital gain made from a CGT event, up to a lifetime limit of $500,000. Note,

there is no age limit on using this concession, nor is there any requirement to retire, even though it is called the "retirement" exemption. However, individuals aged under 55 who apply this exemption must roll over the exempt amount to a complying superannuation fund.

- *Rollover concession*: A business can choose to roll over all or part of the capital gain and then acquire a replacement asset if the basic conditions are met. In the event that a replacement asset is not acquired within the required timeframe, the rolled-over capital gain will be reinstated.

The 15-year exemption takes precedence over the other concessions listed and is applied without first having to use prior year capital losses. If the 15-year exemption cannot be applied, then depending on the circumstances of the capital gain, the other concessions can be used in any order to reduce the amount of tax payable.

ATO concerns on luxury car tax

The ATO has issued an alert warning taxpayers that it is investigating certain arrangements where entities on-sell luxury cars without remitting the requisite luxury car tax (LCT) amount. This applies to those selling luxury cars in the ordinary course of business in any structure (company or sole trader), as well as those that sell a luxury car to an employee, an associate, or an employee of an associate as a one-off transaction.

Businesses and individuals who sell cars valued over a certain threshold (the luxury tax threshold) in the course of their business are subject to luxury car tax (LCT). This is a requirement if your business is registered or required to be registered for GST. LCT doesn't just apply to instances where a dealer is selling a car to an individual or a business – it also applies in instances where a business sells or trades in a car that is a capital asset.

For the 2021–2022 financial year, the luxury car threshold is $79,659 for fuel-efficient vehicles and $69,152 for all other vehicles. This means that if your business buys a car with a GST-inclusive value above these thresholds, you are liable to pay LCT (except in certain circumstances).

If you're the seller of a luxury car, whether or not it is within your usual course of business, you're required to charge LCT to the recipient, reporting the associated LCT amount in your BAS and remitting the amount to the ATO by the due date for BAS payment. You cannot avoid LCT by selling a luxury car to an employee, an associate, or an employee of your associate for less than the market value, or by giving it away for no consideration. The LCT value of the car in that instance will always be the GST-inclusive market value.

The ATO is currently investigating arrangements where a chain of entities that progressively on-sell luxury cars have improperly obtained LCT refunds and evaded remitting LCT to the ATO. Usually, in this arrangement, one of the entities will claim a refund of LCT while creating a consequential liability to another entity in the supply chain. Following on from that, one or more of the participating entities down the chain, referred to as a "missing trader", will not correctly report and pay their purported LCT liabilities to the ATO. These entities will then be liquidated to thwart ATO compliance or recovery action.

While the primary concern is the evasion of LCT, these arrangements also concern the ATO because they have the potential to result in luxury cars being sold without income tax and GST obligations being met. For example, luxury cars could be sold to end-users at more competitive prices, with generally higher profit margins, due to the intentional avoidance of tax obligations and false refund claims. This would in turn economically affect legitimate businesses that are meeting all their tax obligations.

Being aware of these potential illegal practices, the ATO is engaging with taxpayers to ensure that all parties have correctly met their LCT, GST and income tax obligations. It warns that it has sophisticated systems in place to identify high-risk LCT refunds, which will then be withheld pending adequate reviews. Further, in high-risk cases, the ATO will scrutinise contractual obligations that arise under each sale in the supply chain to ensure compliance. Transactions will not be viewed in isolation, and all sales of cars, including the ultimate sale to end-users, will be examined to ascertain the purpose of the entities involved in the arrangements.

Up and coming changes to super

Recently, a number of significant superannuation changes were proposed in Parliament as a part of the government's plan to enhance super outcomes for Australians. If passed, the changes will allow individuals aged between 67 and 75 to make non-concessional contributions and salary sacrifice super contributions without meeting the work test. Other changes introduced in conjunction include lowering the age for downsizer contributions, increasing in the maximum releasable amount under the First Home Super Saver Scheme, and removing the minimum threshold for super guarantee.

Changes to work test and bring-forward rule

Under the current law, individuals aged between 67 and 75 either need to pass the "work test" or satisfy the work test exemption criteria if they want to make non-concessional and salary sacrifice contributions to their super. To pass the work test, an individual must work at least 40 hours during a consecutive 30-day period each income year. To satisfy the work test exemption criteria, an individual must have satisfied the work test in the income year preceding the year in which the contribution was made, have a total super balance of less than $300,000 at the end of the previous income year, and have not relied on the work test exemption in the previous financial year.

The recently proposed amendments would allow individuals aged between 67 and 75 to make non-concessional contributions and salary sacrifice super contributions without meeting the work test, subject to contribution caps. Following on from that, individuals under 75 years of age would also be able to access bring-forward non-concessional contributions in a particular financial year (provided eligibility conditions are met). The age limit to bring forward non-concessional contributions is currently 67.

Downsizer contributions age to be lowered

The current downsizer contributions measures allow individuals aged 65 or over to make a contribution into their super of up to $300,000 from the proceeds of selling their home. With the introduction of amending legislation, the government is seeking to reduce the age limit of the downsizer contributions to apply to those aged 60 or over. If passed, this change is expected to apply to downsizer contributions made on or after 1 July 2022, subject to other eligibility conditions being met.

Increase in maximum releasable amount for first home buyers

The First Home Super Saver Scheme was designed to help first home buyers save for a deposit by allowing them to make voluntary concessional and non-concessional contributions into super, and later withdraw those eligible contributions and associated earnings for purchasing a home. Currently, the maximum amount that can be released from super is $30,000. Under the proposed changes, the maximum amount would increase to $50,000. Note, however, that while the overall maximum amount would increase, the amount of voluntary contributions eligible to be released in any one financial year would not change from $15,000.

Removing minimum threshold for super guarantee

Currently, an employer does not have to pay super guarantee for an employee who earns less than $450 in a calendar month with that employer. The $450 threshold was originally introduced as a way to minimise the administrative burden on employers. However, with the technological advancement of single touch payroll (STP), the government no longer sees a need for the threshold, which is increasingly affecting young, lower-income, part-time and female workers, and has proposed removing it so that employers must pay super guarantee to all employees.

SMSF trustees: reminder to apply for director IDs

Directors of corporate trustees of self managed superannuation funds (SMSFs) should be aware that the director identification regime is now in force. Depending on when you became a director, the deadline for application is either November 2022 or within 28 days of the appointment. The application process itself is easy and can be done online through the new Australian Business Registry Services (ABRS). Once you receive it, your 15-digit identification number will be permanently linked to you even if you change companies, stop being a director, change your name or move interstate or overseas.

The director ID regime was implemented as a way to prevent the use of false or fraudulent director identities, make it easier for external administrators and regulators to trace directors' relationships with companies over time, and identify and eliminate director involvement in unlawful activity, such as illegal phoenix activity.

Generally, a director ID starts with 036 and ends with an 11-digit number and one "check" digit for error detection. Each director will need to apply for their own ID, so if there are two or more directors for the corporate trustee of your SMSF, each director will need to apply separately. The process is entirely free, and the number that is assigned will be permanently linked to the individual.

Depending on when you became a director, the deadline for obtaining the director identification number will differ. Individuals that became directors of a corporate trustee before 31 October 2021 have until November 2022 to apply. Any individuals that are appointed to be a director of a corporate trustee between 1 November 2021 and 4 April 2022 will need to apply within 28 days of their appointment. After 4 April 2022, individuals seeking to be appointed to be directors of a corporate trustee will need to apply for a director ID before being appointed.

To apply for your director ID, you will need to first set up myGovID, which is different to myGov. The myGovID is an app that you need to download onto your smart device and confirm your identity in using standard documents (drivers licence, passport, etc). When your identity is authenticated, you'll be able to log on to a range of government services, including the online director ID application with the ABRS.

To complete the director ID application, you will need to provide additional information such as your tax file number (TFN), residential address as held by the ATO, and/or details from two specified documents to verify your identity, such as: bank account details; ATO notice of assessment; super account details; a dividend statement; Centrelink payment summary; or PAYG payment summary.

Once you receive your director ID, you will need to pass it onto the record-holder of the corporate trustee, which may be the company secretary, another director, a contact person or an authorised agent of the company. If the corporate trustee changes or you become the director of another company, you will need to pass on this information to the new corporate trustee or the other company.

Going forward, you will also be able to log on to ABRS and update your details if required; however, if your personal details change, such as your name, role or address, you must still notify the corporate trustee within seven days. This is to enable relevant company officeholder(s) enough time to notify the Australian Securities and Investments Commission (ASIC) of the change, which typically needs to occur within 28 days to avoid late fees. Currently, director IDs are not searchable by the public; however, the Registrar (the ATO Commissioner) will be consulting the community about what details can and should be disclosed and searchable in the future.

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