client alert | explanatory memorandum

November 2015

CURRENCY:

This issue of **Client Alert** takes into account all developments up to and including 15 October 2015.

Unbundling phone and internet expense claims for work purposes

The ATO has released information on claiming deductions for mobile phone, home phone and internet expenses for work purposes. The following sets out some key points made by the ATO.

Substantiating claims

Taxpayers need to keep records for a four-week representative period in each income year to claim a deduction of more than $50. These records may include diary entries, including electronic records and bills. Evidence that the taxpayer's employer expects the employee to work at home or make some work-related calls will also help the taxpayer demonstrate that they are entitled to a deduction.

Apportioning work use for phones

As there are many different types of plans available, taxpayers need to determine their work use using a reasonable basis. The ATO provides the following guidance.

Incidental use

If work use is incidental and the deduction claim does not exceed $50 in total, the ATO says the taxpayer may make a claim based on the following, without having to analyse their bills: 25 cents for a work call made from the taxpayer's landline; 75 cents for a work call made from the taxpayer's mobile; and 10 cents for a text message sent from the taxpayer's mobile.

Where usage is itemised on taxpayer's bills

If the taxpayer has a phone plan and receives an itemised bill, the taxpayer needs to determine their percentage of work use over a four-week representative period, which can then be applied to the full year. The percentage needs to be worked out on a reasonable basis. This could include the number of work calls made as a percentage of total calls; the amount of time spent on work calls as a percentage of total calls; and the amount of data downloaded for work purposes as a percentage of total downloads. The ATO provides the following example:

Example

Julie has an $80 per month mobile phone plan, which includes $500 worth of calls and 1.5GB of data. She receives a bill which itemises all of her phone calls and provides her with her monthly data use.

Over a four-week representative period, Julie identifies that 20% of her calls are work-related. She worked for 11 months during the income year, having had one month of leave. Julie can claim a deduction of $176 in her tax return (20% x $80 x 11 months).

Where usage is not itemised on taxpayer's bills

If a taxpayer has a phone plan but doesn't receive an itemised bill, they can determine their work use by keeping a record of all their calls over a four-week representative period and then calculating their claim using a reasonable basis. The ATO provides the following example:

Example

Ahmed has a prepaid mobile phone plan which costs him $50 per month. Ahmed does not receive a monthly bill, so he keeps a record of his calls for a four-week representative period. During this four-week period Ahmed makes 25 work calls and 75 private calls. Ahmed worked for 11 months during the income year, having had 1 month of leave.

Ahmed calculates his work use as 25% (25 work calls/100 total calls). He claims a deduction of $138 in his tax return (25% x $50 x 11 months).

Bundled phone and internet plans

Phone and internet services are often bundled. When a taxpayer is claiming deductions for work-related use of one or more services, they need to apportion their costs based on their work use for each service. If other household members also use the services, the taxpayer needs to take into account that use in their calculation.

If the taxpayer has a bundled plan, they need to identify their work use for each service over a four-week representative period during the income year. This will allow the taxpayer to determine their pattern of work use, which can then be applied to the full year. A reasonable basis to work out the taxpayer's work-related use could take into account:

- for internet usage:
  - the amount of data downloaded for work as a percentage of the total data downloaded by all members of the taxpayer's household; and
  - any additional costs incurred as a result of the work-related use (eg if work-related use results in the taxpayer exceeding their monthly cap).
- for phone usage:
  - the number of work calls made as a percentage of total calls;
  - the amount of time spent on work calls as a percentage of total calls; and
  - any additional costs incurred as a result of work-related calls (eg if work-related use results in the taxpayer exceeding their monthly cap).

The ATO provides the following example:

Example

Sujita has a $100 per month home phone and internet bundle. The bill identifies that the monthly cost of Sujita's phone service in her bundle is $40, and her internet service is $60. Sujita brings in her mobile phone plan of $90 per month and receives a $10 per month discount. Her total costs for all services are $180 per month.

Sujita worked for 11 months during the income year, having had one month of leave.

Based on her itemised accounts, Sujita determines that the work-related use of her mobile phone is 20%. Sujita also uses her home internet for work purposes and based on her use she determines that 10% of her use is for work. Sujita does not use her home phone for work calls.

As the components are part of a bundle, Sujita can calculate her work-related use as follows:

Step 1 - work out the value of each bundled component:

Mobile phone:

$90 per month minus the $10 per month discount = $80 per month

Internet

$60 per month, as identified on her bill

Home phone:

Sujita does not need to determine the home phone costs, as she does not use this service for work purposes.

Step 2 – apportion work-related use:

Home internet use:

10% work-related use x $60 per month = $6 work-related use per month x 11 months

Sujita can claim $66.

Mobile phone use:

20% work-related use x $80 = $16 per month x 11 months

Sujita can claim $176.

In her tax return Sujita claims a deduction of $242 for the financial year ($66 home internet use + $176 mobile phone use).

Sujita cannot claim work-related use of her home phone, as she did not use it for work.

Source: ATO publication, "Claiming mobile phone, internet and home phone expenses", 20 August 2015, https://www.ato.gov.au/Individuals/Income-and-deductions/Deductions-you-can-claim/Other-deductions/Claiming-mobile-phone,-internet-and-home-phone-expenses/.

Student loan debt recovery from overseas

The *Education Legislation Amendment (Overseas Debt Recovery) Bill 2015* was introduced in the House of Representatives on 17 September 2015. It contains amendments to the *Higher Education Support Act 2003* and the *Trade Support Loans Act 2014* to implement a 2015–2016 Budget proposal to extend the Higher Education Loan Programme (HELP) and Trade Support Loan (TSL) repayment framework to debtors residing overseas.

The changes help ensure that the same repayment obligations that apply to debtors who live in Australia apply to those who live overseas. For these debtors, the Bill will create an obligation to make repayments on their HELP and TSL debts based on their total Australian and foreign-sourced income, known as their "worldwide income". This will be imposed as a levy (to be known as the "overseas debtors repayment levy") through another Bill, the *Student Loans (Overseas Debtors Repayment Levy) Bill 2015*, which was also introduced in the House of Reps on 17 September 2015.

Only those debtors living overseas and earning above the minimum HELP and TSL repayment thresholds will be required to make payments towards their HELP and TSL debts. Repayment rates and thresholds will mirror those applying to debtors residing in Australia.

Other important changes contained in the main Bill include:

- amendments to Sch 1 to the *Taxation Administration Act 1953* to allow a taxation officer to disclose taxpayers' contact and income information to a foreign government agency of a foreign country, or part of a foreign country, in order to assist that foreign government agency to identify people with student loan repayment obligations living in Australia and potentially recover outstanding student loan amounts. The then-Education Minister said this was necessary to "support potential reciprocal cooperation on debt recovery in line with good international practice". Mr Pyne said the Government intends to explore such reciprocal arrangements with other countries, starting with New Zealand and the United Kingdom;
- amendments to the *Higher Education Support Act 2003* to allow the Secretary of the Department of Education and Training to access TFNs of HELP debtors. This measure is designed to improve data exchange with the ATO to support administration of overseas debt recovery and HELP more generally; and
- consequential amendments to the ITAA 1936 and the ITAA 1997 to ensure that overseas HELP or TSL debt repayments are not allowable self-education expenses for Australian income tax purposes.

Date of effect

The new arrangements are proposed to apply from the later of 1 January 2016 and the day after the Bill receives the Royal Assent. From this date, debtors going overseas for more than six months (183 days) will be required to register with the ATO, while those already living overseas will have until 1 July 2017 to register. Repayment obligations will commence from 1 July 2017 for income earned in the 2016–2017 financial year.

[Then-Education Minister Mr Pyne noted that under the Government's proposed higher education reforms there would be a new minimum repayment income threshold of $50,638 in 2016–2017, and the new minimum repayment would be 2% per year.]

At the time of writing, the Bills were before the House of Representatives.

Source: Education Legislation Amendment (Overseas Debt Recovery) Bill 2015, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId%3Ar5546%20Recstruct%3Abillhome, and Student Loans (Overseas Debtors Repayment Levy) Bill 2015, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId%3Ar5547%20Recstruct%3Abillhome.

SMSF trustees warned to plan for cognitive decline

In a recent speech Kasey Macfarlane, ATO Assistant Commissioner, SMSF Segment, Superannuation, raised the issue of cognitive decline, noting that dementia is on the rise and that it is important for SMSF trustees to have a plan to ensure that financial matters will be effectively managed.

"SMSFs are in reality usually managed by one trustee and require a high level of financial decision-making. While many trustees remain perfectly capable of effectively managing their financial affairs well past retirement age, there is a risk that some with diminished capacity to effectively manage their fund may nevertheless continue to do so. Most don't have a plan for what to do if they get to this point", Ms Macfarlane said. In this regard, she said, it was essential that trustees "agree in advance about decision points and exit decisions, to have a will and appoint an enduring guardian and power of attorney".

Other key topics discussed include the following.

ATO compliance targets

In relation to the ATO's compliance focus, Ms Macfarlane said that while the ATO continues to focus on educating SMSF trustees, the public can expect to see the ATO take stronger compliance action against serial non-compliers – in particular, against SMSF trustees who do not deliver on agreements in enforcement undertakings.

The Assistant Commissioner also highlighted the following issues on the ATO's compliance radar for 2015–2016:

- individuals who enter the sector with poor personal taxation lodgment histories and no or limited income;
- SMSFs with overdue annual returns;
- breaches reported in auditor contravention reports that have not been rectified;
- SMSFs that have significant changes in assets and income, outside the previous pattern of the fund and without obvious reason;
- possible non-commercial related-party investments or transactions;
- non-compliance with pension rules; and
- inappropriately claimed tax deductions when a fund is in pension phase.

Aggressive tax planning

Ms Macfarlane highlighted aggressive tax arrangements involving SMSFs, noting the Commissioner's recent warning to trustees and advisers that the use of SMSFs as "avoidance" vehicles rather than "retirement" vehicles is "outrageously bold and is just straight up and down not on".

Ms Macfarlane said, "Trustees and advisers promoting arrangements that use SMSFs to inappropriately access tax concessions or to deliver present-day benefits should be on notice that they will be dealt with, with the full force of the law. Moreover, the income tax and regulatory issues associated with these arrangements will not be treated in isolation. Trustees engaging in tax-minimisation schemes also face the strong likelihood of being disqualified from being an SMSF trustee."

The Assistant Commissioner also discussed dividend stripping arrangements; in particular, the arrangement described in Taxpayer Alert TA 2015/1. The arrangements involve related-party transactions designed to deliver tax benefits to an SMSF in the form of franking credits, following the transfer of shares in a related company, often at significantly reduced values. Of the dividend stripping arrangements detected so far, Ms Macfarlane said the ATO was of the view that "none are effective at law". It has been put to the ATO that some "varied arrangements were okay" because they differed from the one described in the Alert; however, Ms Macfarlane said the ATO is of the view that these arrangements are also not effective at law. She said the ATO will "in the near future" publish an addendum to TA 2015/1 to highlight that these varied arrangements raise "exactly" the same concerns for the ATO as the original arrangement described in the Alert.

SMSF auditor compliance

The ATO monitors SMSF auditor compliance and independence through a range of compliance activities. Ms Macfarlane listed the following indicators of risk:

- where ATO data shows a personal or business relationship between the auditor and any of the trustees;
- where ATO data indicates that there is potential for a self-review threat, in that the SMSF auditor appears to provide advice accounting services to the fund – this is a new focus area, and the ATO plans to approach about 1,000 auditors this year;
- where the ATO becomes aware of reportable regulatory breaches that were not identified and/or reported by the auditor– this can arise from ATO fund audits, as well as intelligence from internal and external sources; and
- where the ATO analyses its data on the SMSF auditor and the clients they audit and identifies risks such as low auditor contravention report (ACR) rates when the clients audited have indicators that show a high likelihood of contraventions.

PAYG withholding obligations

Following reviews of super benefits paid to members, the ATO has identified that some SMSFs are not fulfilling all of their pay as you go (PAYG) withholding obligations. Some common omissions identified by the ATO include:

- failure to provide a payment summary to the member where the taxed component is less than the low-rate cap – the member is required to declare this benefit on their income tax return;
- failure to withhold from super benefits and provide a payment summary to the member; and
- failure to complete the annual PAYG withholding reporting to the ATO and provide copies of the payment summaries.

When paying a super benefit to a member, Ms Macfarlane said, it may be necessary to withhold an amount to meet PAYG withholding obligations.

Source: ATO speech, "ATO Regulation of SMSFs", 14 September 2015, https://www.ato.gov.au/Media-centre/Speeches/Other/ATO-regulation-of-SMSFs/.

Tax debt release application refused

The AAT has refused a couple's application for release from relevant tax debts after finding the couple (the taxpayers) would not suffer serious hardship if they were required to satisfy the liability.

The couple sought review of the Commissioner's decision refusing to release them from certain tax liabilities pursuant to s 340-5 of Sch 1 to the TAA. The amount that was eligible for release totalled $25,000 and related to the 2010 to 2012 income years. The taxpayers argued they should be released from the tax debts because their financial position was due to "serious family difficulties and problems", which had distracted them from their tax affairs (despite their having an accountant).

The AAT said "it was clear" from the factual background (which was mostly not in dispute) that the couple suffered from "serious unfortunate accidents and unforeseen events, including personal injuries and stressful family situations" and that "it was plain that the events distracted" the couple from meeting their tax obligations. It further noted the Commissioner acknowledged so much by already remitting the failure-to-lodge penalties and certain interest charges.

However, after calculating the couple's fortnightly income and expenses, the AAT concluded the couple had not discharged the onus of proving that they would suffer serious hardship if they were required to pay the relevant tax debts. The AAT accepted the Commissioner's contention that the couple was not required to make the level of mortgage repayments that they were making (which was more than the "minimum" repayment amount). The AAT also found the couple could redraw on their home loan. In addition, the AAT noted the Commissioner's previous indication of willingness to enter into an appropriate payment arrangement.

In addition, even if the AAT were to find there was serious hardship, the AAT said it would have held it this was not an appropriate case to exercise the discretion to release the tax debt. In this regard, the AAT said it would consider the following factors: one of the couple was a beneficiary in the estate of her mother and stood to receive approximately $200,000; the couple were able to work and earn income; and the couple's son was becoming less financially dependent on them.

Re Lipton and FCT [2015] AATA 754, AAT, File No: 2014/4943, Lazanas SM, 25 September 2015, http://www.austlii.edu.au/au/cases/cth/AATA/2015/754.html.

Retiring partner's individual interest in net income of partnership

Taxation Determination TD 2015/19 provides that where a retiring partner receives an amount representing her or his individual interest in the partnership net income, that amount is assessable under s 92 of the ITAA 1936 (assessable income of partners). In the Commissioner's view, this is the case even if the partner retires before the end of the income year or the payment is received in a subsequent income year. How the payment is labelled or described (ie consideration for something provided or given up by the partner) also does not change the ATO's conclusion that the receipt represents the partner's share of partnership net income and needs to be brought to account under s 92.

The Determination notes that a partner's individual interest in the net income of a partnership is essentially a question of fact in each case, to be determined by reference to the partnership agreement, the partnership's accounting records and any other relevant documents. The ATO states that it cannot be concluded that an ex-partner has no such interest merely because he or she ceases to be a partner before the partnership's profit or net income is determined. The ATO adds that while there may be practical difficulties associated with calculating the ex-partner's interest, this does not affect the "legally correct approach".

The Commissioner's views in TD 2015/19 represent a departure from the approach taken in several private rulings, where the ATO took these receipts into account under the CGT rules. The Determination notes that an amount representing an individual interest in partnership net income may also represent capital proceeds from a CGT event; however, any capital gain that would otherwise arise is reduced to the extent that it is assessable under other provisions.

The Determination finalises Draft TD 2015/D2 and is substantially the same as the Draft Determination.

The following example is extracted from the Determination.

Example

ABC is a professional partnership carrying on business in Australia. Paul was a partner in ABC but retired from the partnership with effect from 1 January, year one. Paul was a resident of Australia throughout year one.

Paul received a payment of $500,000 from ABC on 30 July, year two.

ABC's accounting profit for year one was $200,000,000. Of this amount, $500,000 (0.25%) was allocated to Paul. Both the profit and its allocation were determined in accordance with the terms of the ABC partnership agreement.

ABC's working papers indicate that Paul's 0.25% interest comprised:

- Paul's base profit share for year one, apportioned to reflect his retirement before 30 June;
- an additional amount expressed to be in respect of unused leave; and
- an additional amount described as a "retiring allowance", calculated by reference to the number of years Paul served as a partner in the firm.

The calculation of these components was consistent with the terms of the ABC partnership agreement.

ABC's Statement of Distribution indicates that ABC's net income was $205,000,000, of which $512,500 (0.25%) was allocated to Paul. A review of ABC's operations in year one indicates that ABC's net income was correctly calculated.

In Paul's Retirement Deed, the $500,000 payment is described as being in respect of Paul disposing of his interest in the partnership.

$512,500 is included in Paul's assessable income for year one under section 92. This represents Paul's individual interest in the net income of ABC for year one. It does not matter that the amount Paul is entitled to is expressed to be in respect of Paul disposing of his interest in the partnership or is, in part, calculated by reference to his past service.

Any capital gain which Paul might otherwise make as a result of a CGT event happening to his interest in ABC is reduced to the extent that it is reflected in the amount which is assessable under section 92.

Date of effect

The Determination applies to assessments made after 3 June 2015 (the date of issue of the Draft Determination). Accordingly, the ATO will not seek to disturb favourable assessments made before that date.

Source: ATO, Taxation Determination TD 2015/19, 7 October 2015, https://www.ato.gov.au/law/view/view.htm?docid=%22TXD%2FTD201519%2FNAT%2FATO%2F00001%22.

ATO targeting ride-sourcing drivers and eBay online sellers

Ride-sourcing drivers

The ATO has formally gazetted a notice stating that it will acquire data to identify individuals that may be engaged in providing ride-sourcing services during the 2013–2014, 2014–2015 and 2015–2016 financial years.

Details of all payments to ride-sourcing providers from identified accounts held by ride-sourcing facilitators with various financial institutions will be requested. The data acquired will be electronically matched with certain sections of ATO data holdings to identify taxpayers that can be provided with tailored information to help them meet their tax obligations, or to ensure compliance with taxation law.

The ATO will obtain the following data items from the source entities:

- payee account name;
- payee BSB;
- payee account number;
- date of payment to the payee; and
- amount of payment to the payee.

The ATO estimates that records relating to between 10,000 and 15,000 individuals will be matched.

The ATO said tax agents may receive correspondence about this on their clients' behalf. If those clients provide ride-sourcing services, the ATO asks agents to remind them they are required to:

- have an ABN;
- register, calculate and remit GST on the full fare of each ride-sourcing trip provided;
- declare their income in their 2014–2015 tax return; and
- lodge their business activity statements (BAS) on time.

Sources: Commonwealth Gazette, "Notice of Data Matching Program – Ride Sourcing", 7 October 2015, https://www.comlaw.gov.au/Details/C2015G01623 and ATO, "Ride-sourcing data matching", 6 October 2015, https://www.ato.gov.au/Tax-professionals/Newsroom/Activity-statements/Ride-sourcing-data-matching/.

eBay online sellers

The ATO has also issued a gazette notice announcing that it will acquire online selling data relating to registrants who sold goods and services to a value of $10,000 or more during the period 1 July 2014 to 30 June 2015. The collection of data under this program protocol was to occur in the period September to October 2015.

In accordance with the principles set out in the notice, the data would be sought from eBay Australia and New Zealand Pty Ltd, a subsidiary of eBay International AG, which owns and operates www.ebay.com.au. The data requested will include information that will enable the ATO to match online selling accounts to a taxpayer, including name, address and contact information, as well as information on the number and value of transactions processed for each online selling account.

These records will be electronically matched with certain sections of ATO data holdings to identify non-compliance with registration, lodgment, reporting and payment obligations under taxation laws. It is estimated that records relating to between 15,000 and 25,000 individuals will be matched.

In addition, the data-matching aims to assist the ATO with:

- identifying taxpayers apparently operating a business but failing to meet their registration and/or lodgment obligations;
- obtaining intelligence to increase the ATO's understanding of the behaviours and compliance profiles of individuals and businesses that sell goods or services via online selling sites; and
- promoting voluntary compliance and gaining insights which may help the ATO to develop strategies to improve voluntary compliance.

Source: Commonwealth Gazette, "Notice of Data Matching Program", 8 October 2015, https://www.comlaw.gov.au/Details/C2015G01628>.

Further information

More details on the data-matching programs are available on the ATO website, at: https://www.ato.gov.au/General/Gen/Data-matching-protocols/.

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