client alert | explanatory memorandum

September 2016

CURRENCY:

This issue of **Client Alert** takes into account all developments up to and including 17 August 2016.

Share economy participants reminded of tax obligations

The ATO has reminded tax professionals to consider clients who may be involved in the share economy. Some individuals may not be aware they have tax obligations when earning income through the sharing economy. The types of goods or services taxpayers provide, and how much they provide, will determine what they need to do for tax. Taxpayers may be involved in renting out part or all of a house, providing ride-sourcing services or providing other goods or services.

Source: ATO, "Sharing economy reminder for your clients", 9 August 2016, https://www.ato.gov.au/Tax-professionals/Newsroom/Income-tax/Sharing-economy-reminder-for-your-clients/.

The ATO has previously released information on view of the tax obligations of people who provide services in the sharing economy. The ATO's view is that the tax laws apply to activities conducted in the sharing economy in the same way as they apply to activities conducted in a more conventional manner.

Some key points:

- **Income tax obligations for providers:** People who earn assessable income from providing sharing economy services need to keep records of income from that activity and any allowable deductions, which may need to be apportioned for private use.
- **GST implications for providers**: Where a person is already registered for GST for another purpose, the activities in their sharing economy enterprise must be included with their other activities. People providing "taxi travel" must be registered for GST regardless of their turnover amount. People conducting other activities need to register for GST if the annual turnover from their sharing economy enterprise is $75,000 or more.
- **Taxi travel services through ride-sourcing**: The ATO has previously released guidance for people providing taxi travel services through ride-sourcing (also known as ride-sharing or ride-hailing). This is available on the ATO website at: https://www.ato.gov.au/Business/GST/In-detail/Managing-GST-in-your-business/General-guides/Providing-taxi-travel-services-through-ride-sourcing-and-your-tax-obligations/.
  The ATO has confirmed that people who provide ride-sourcing services are providing "taxi travel" under the GST law. The existing tax law applies, and so drivers are required to register for GST regardless of their turnover. Other key points:
  - GST must be calculated on the full fare, not the net amount received after deducting fees and commissions. For example, if a passenger pays $55 and the facilitator pays $44 (after deducting an $11 commission), the GST payable is $5 (not $4).
  - GST credits can be claimed on business purchases, but must be apportioned between business and private use. For example, if a new car is bought for for $33,000 (including $3,000 GST), and the usage is 10% ride-sourcing and 90% private, the GST credit will be $300.
  - For fares over $82.50 (including GST), drivers must provide their passengers with a tax invoice if they request one.
  - The ATO previously allowed drivers until 1 August 2015 to obtain an ABN and register for GST. The ATO does not intend to apply compliance resources regarding drivers' GST obligations before 1 August 2015, except if there is evidence of fraud or other significant matters.
- **Renting out part of all of a home:** The ATO has also previously released information for people renting out part or all of their home (available on the ATO website at: https://www.ato.gov.au/general/property/your-home/renting-out-part-or-all-of-your-home/). The rent money received is generally regarded as assessable income. Taxpayers must declare their rental income in their income tax returns; however, they can claim deductions for the associated expenses, such as part or all of the interest on a home loan. These people may not be entitled to the full CGT main

residence exemption. The ATO also notes that GST does not apply to residential rents, meaning GST credits cannot be claimed for associated costs.

Itinerant worker claim denied, so travel deductions refused

A taxpayer has been unsuccessful before the AAT in relation to deduction claims for work-related car expenses and work-related travel expenses (meals and accommodation) for the 2011-12 income tax year.

Background

The taxpayer worked a variety of short-term jobs for various employers at different New South Wales country towns over the relevant year (eg bunker hand at Bellata and West Wyalong, chemical mixer at Moree, mixer/driver at Parkes and Moree, forklift driver at Ashley). The taxpayer and his wife had a house in Springfield; however, they travelled to the various work locations taking two vehicles (a car and a motorhome) and, except at Parkes, the taxpayer and his wife stayed in the motorhome at various caravan parks. The taxpayer claimed deductions for the two vehicles using the cents per kilometre method. The amounts disputed included $5,325 claimed for car expenses and $32,543 claimed for travel expenses (comprising $26,195 for meals and $6,348 for accommodation).

The taxpayer contended he was entitled to the deductions under s 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997), on the basis that he was an itinerant worker and that he incurred the expenses in gaining or producing his assessable income. He also argued he was entitled to rely on Taxation Ruling TR 95/34 *Income tax: employees carrying out itinerant work – deductions, allowances and reimbursements for transport expenses*, and that, by virtue of s 357-60 of Sch 1 to the *Taxation Administration Act 1953* (TAA), the Commissioner was bound to apply the ruling if the law turns out to be less favourable to him. That is, the taxpayer claimed to be protected from any adverse fiscal consequences because of the public ruling issued by the Commissioner.

Decision

The AAT affirmed the Commissioner's decision that the taxpayer was not entitled to the deduction claims. The AAT found that the taxpayer was not an itinerant worker and his reliance on the Commissioner's public tax ruling was "misplaced".

In finding that the taxpayer was not an itinerant worker, the AAT noted that his duties did not involve him travelling from workplace to workplace, and that he was not required to travel to the different locations in the course of his employment; that is, he did not have a "web" of workplaces. The AAT regarded the employment arrangements at each location to be separate and discrete, noting that the taxpayer returned home at the end of each employment arrangement. It said each workplace could be regarded as a regular or fixed place of employment, even if there was some uncertainty about the length of time that he would be employed at each location because of the seasonal nature of the work.

The AAT held that the claimed expenses were not incurred in gaining or producing the taxpayer's assessable income, but were private and domestic in nature. In addition, the AAT held the taxpayer was not entitled to claim the car expenses using the cents per kilometre method, as he was not the owner of the vehicles for the purposes of s 28-12(1) of ITAA 1997. He also did not clarify the quantum of his claim, namely, the number of kilometres travelled in his motorhome. The AAT rejected the taxpayer's secondary argument that he was entitled to work-related travel expenses claims under TR 2004/6 *Income tax: substantiation exception for reasonable travel and overtime meal allowance expenses*, noting that the ruling had no application. The AAT was of the view that the taxpayer chose to travel from Springfield to live in towns near his work locations. It also noted that none of his employers demanded that he live away from his usual place of residence, and he was not paid an allowance or reimbursement for any expense to live away from home.

In relation to the public ruling protection claimed by the taxpayer, the AAT noted his reliance on the hypothetical examples of Valerie the fruit picker and Ian the shearer contained in TR 95/34 (at paras 44 and 55). The AAT held the taxpayer was not entitled to public ruling protection as his factual circumstances were different to those in the hypothetical examples. It said Valerie had a "web" of workplaces and Ian's travel was fundamental to his work. There was also a potential issue that the examples were under the "Explanations" heading and not the "Ruling" heading within TR 95/34; however, as no party raised the issue and because the AAT found that the examples did not apply to the taxpayer, the AAT decided not to address that issue.

Re Hill and FCT [2016] AATA 514*, 21 July 2016,*
http://www.austlii.edu.au/au/cases/cth/AATA/2016/514.html.

ATO flags retirement planning schemes of concern

The ATO has launched the Super Scheme Smart initiative (see: https://www.ato.gov.au/General/Tax-planning/Tax-avoidance-schemes/Super-Scheme-Smart/https://www.ato.gov.au/General/Tax-planning/Tax-avoidance-schemes/Super-Scheme-Smart/) to inform people about retirement planning schemes that are of increasing concern. According to the ATO, individuals approaching retirement are the most at risk of becoming involved in problematic schemes that are "too good to be true". This target category includes people aged 50 or over looking to put significant amounts of money into their retirement, particularly self managed superannuation fund (SMSF) trustees, self-funded retirees, small business owners, company directors and individuals involved in property investment.

While retirement planning schemes can vary, people should be aware of some common features that problematic schemes share. The ATO says the schemes of concern generally:

- are artificially contrived and complex, and usually connected with an SMSF;
- involve a lot of paper shuffling;
- are designed to leave the taxpayer paying minimal or no tax, or even receiving a tax refund; and/or
- aim to give a present-day benefit.

The ATO is concerned about the following scheme types.

Dividend stripping

In this type of arrangement, the shareholders in a private company transfer ownership of their shares to a related SMSF so that the company can pay franked dividends to the SMSF. The purpose is to strip profits from the company in a tax-free form (refer to Taxpayer Alert TA 2015/1).

In November 2015, the ATO made an offer to SMSF trustees who may have implemented a dividend stripping arrangement substantially similar to the one described in TA 2015/1. SMSF trustees were invited to make voluntary disclosures to correct the tax position resulting from such arrangements. The offer was opened in November 2015 and ended on 15 February 2016. In May 2016, the ATO said that while it was "happy with the response" it had received to date, it believed there may be many more SMSFs that have similar arrangements in place. Going forward, the ATO said it did not believe "trustees should be harshly punished when they think they have done the right thing". It encouraged trustees who are uncertain to engage with the ATO and, if necessary, seek an "early resolution to any dispute". Consideration will be given to reduced penalties in accordance with the ATO's remission guidelines.

Non-arm's length limited recourse borrowing arrangements

In this type of arrangement, an SMSF trustee undertakes limited recourse borrowing arrangements (LRBAs) established or maintained on terms that are not consistent with an arm's length dealing. For more information, see Practical Compliance Guide PCG 2016/5, which sets out the Commissioner's "safe habour terms" for LRBAs. If an LRBA is structured in accordance with PCG 2016/5, the ATO will accept that the LRBA is consistent with an arm's length dealing and the non-arm's length income (NALI) rules (47% tax) will not apply to the income generated from the LRBA asset.

On 30 May 2016, the ATO announced that it has extended until 31 January 2017 the deadline for SMSF trustees to ensure that any related-party LRBAs are on terms consistent with an arm's length dealing. It had previously announced a grace period whereby it would not select SMSFs for review for the 2014–2015 or earlier years where arm's length terms for LRBAs were implemented by 30 June 2016 (or LRBAs were brought to an end before that date). The deadline extension to 31 January 2017 follows the release of PCG 2016/5.

Diverting personal services income

In this type of arrangement, an individual (with an SMSF often in pension phase) diverts income earned from personal services to the SMSF, where it is concessionally taxed or treated as exempt from tax (refer to Taxpayer Alert TA 2016/6).

Taxpayers who have entered into a similar arrangement to that described in TA 2016/6 are encouraged to contact the ATO so it can help resolve any issues in a timely manner and minimise the negative impact on the individual and the fund. Individuals and trustees who are not currently subject to ATO compliance action, and who come forward before 31 January 2017, will have administrative penalties remitted in full. However, shortfall interest charges still apply.

ATO's Super Scheme Smart initiative

The ATO has said the schemes of concern "are designed by their promoters solely to help you avoid paying tax by encouraging you to channel money inappropriately through an SMSF". The ATO's Super Scheme Smart initiative provides information for individuals and intermediaries, including Q&As, case studies and a PowerPoint presentation.

"While the schemes we are targeting under Super Scheme Smart may be complex, our message is not – if it looks too good to be true, it probably is", said ATO Deputy Commissioner Michael Cranston.

Taxpayers who may have been caught up in a scheme can phone the ATO on 1800 177 006 or email: reportataxscheme@ato.gov.au for further information.

Source: ATO media release, Pre-retirees warned: avoid 'too good to be true' tax schemes, 28 July 2016, https://www.ato.gov.au/Media-centre/Media-releases/Pre-retirees-warned--avoid--too-good-to-be-true--tax-schemes/.

Deductibility for gifts to clients and airport lounge membership fees

On 27 July 2016, the ATO issued two Taxation Determinations. They apply for income years commencing both before and after their date of issue.

Deductibility of gifts to clients

Taxation Determination TD 2016/14 states that a taxpayer that carries on a business is entitled to a deduction under s 8-1 of ITAA 1997 for an outgoing incurred on a gift made to a former or current client, if the gift is made for the purpose of producing future assessable income. The ATO notes that a gift is not deductible if the outgoing is capital, relates to gaining non-assessable, non-exempt income, or is non-deductible under another provision.

The ATO provided the following examples.

Example 1

Sally is carrying on a renovation business. She gifts a bottle of champagne to a client who had a renovation completed within the preceding 12 months.

Sally expects the gift will either generate future business from the client or make them more inclined to refer others to her business. Although Sally got on well with her client, the gift was not made for personal reasons and is not of a private or domestic character.

The outgoing Sally incurred for the champagne is not of a capital nature.

Sally is entitled to a deduction under s 8-1 of ITAA 1997.

Example 2

Bernard is carrying on a business of selling garden statues. Bernard sells a statue to his brother for $200. Subsequently, Bernard gifts a bottle of champagne to his brother worth $170. Apart from his transaction, Bernard provides gifts only to clients who have spent over $2,500 during the last year.

The gift has been made for personal reasons, and is of a private or domestic character.

Bernard is not entitled to a deduction under ss 8-1 or 40-880 of ITAA 1997.

Deductibility of airport lounge membership fees for employers

Taxation Determination TD 2016/15 states that an employer taxpayer is entitled to a deduction under s 8-1 of ITAA 1997 for annual fees incurred on an airport lounge membership for use by its employees, where that membership is provided because of the employment relationship. The determination notes that the fees will not be deductible is if they are related to gaining or producing exempt income or non-assessable, non-exempt income. The determination indicates that the fees will be deductible in full even if there is substantial private use of the lounge membership by employees (eg while they are on holiday).

Changes to $500,000 lifetime super cap confirmed

The Federal Treasurer has confirmed there will be some changes to the Government's May 2016 Budget proposal for a lifetime cap of $500,000 on non-concessional superannuation contributions. A number of exemptions will be available.

Scott Morrison said in a Radio 2GB interview on on 8 August 2016 that he had previously spoken about the changes and that draft legislation will be released soon, containing a number of changes to the original proposal. He said if someone gets a pay-out "as a result of an accident or something like that, then that is exempted from the $500,000 cap". If someone had entered into a contract before Budget night to settle on a property asset out of their SMSF and they are using after-tax contributions to settle that contract, "that won't be included" in the $500,000 cap either. Mr Morrison also said there would be "other measures that will be in the exposure draft legislation […] coming out shortly".

The Treasurer effectively ruled out lifting the cap $500,000 cap, saying "the only people that would benefit are people who […] already on average have $2 million in their superannuation scheme, have already put $700,000 in after tax contributions […] Now, I don't know too many people out there […] who are sitting there with a bag of $500,000 which they want to put in their superannuation fund. [… T]here are about 42,000 of them in the country and that is less than 1% of the superannuants in this country. [T]hey are on higher incomes, have higher balances, have already benefited significantly from the generous tax contribution and other concessions that exist from superannuation and the argument they are making is – I want more. I want to put more in so I don't have to pay as much tax as someone else is on those earnings. So, look, I think [the cap] is a fair measure and I stand by the measure."

Source: Radio 2GB interview transcript, 8 August 2016, http://sjm.ministers.treasury.gov.au/transcript/100-2016/.

The $500,000 lifetime super cap as announced on Budget night

As part of the 2016 Federal Budget, the Government introduced a lifetime non-concessional contributions cap $500,000 effective from 7.30 pm (AEST) on 3 May 2016 (Budget night). The lifetime non-concessional cap (indexed) will replace the existing annual non-concessional contributions cap of up to $180,000 per year (or $540,000 every three years under the bring-forward rule for individuals aged under 65).

Non-concessional contributions include contributions not included in the assessable income of the receiving superannuation fund, such as non-deductible personal contributions made from the member's after-tax income (formerly known as undeducted contributions).

The $500,000 lifetime cap will take into account all non-concessional contributions made on or after 1 July 2007. Contributions made before the cap's commencement cannot result in an excess of the lifetime cap. However, excess non-concessional contributions made after 7.30 pm AEST on 3 May 2016 will need to be removed or subject to penalty tax. The cap will be indexed to average weekly ordinary time earnings (AWOTE).

The Government believes this measure will provide people with flexibility regarding when they choose to contribute to their superannuation. It will apply for all Australians up to age 74. It is estimated to mean a gain to revenue of $550 million over the forward estimates period.

Example

Anne, aged 61, is planning for her retirement. Five years ago, Anne received an inheritance of $200,000 which she put into her superannuation. Anne now intends to sell her home and buy a smaller property. She is hoping to put the proceeds into her superannuation. Anne can contribute up to $300,000 more into her superannuation before she reaches the non-concessional cap.

Anne's non-concessional contributions are in addition to the compulsory superannuation payments her employer makes and the additional salary-sacrificed contributions she elects to make from her salary.

Defined benefit schemes

After-tax contributions made into defined benefit accounts and constitutionally protected funds will be included in an individual's lifetime non-concessional cap. If a member of a defined benefit fund exceeds the lifetime cap, ongoing contributions to the defined benefit account can continue but the member will be required to remove, on an annual basis, an equivalent amount (including proxy earnings) from any accumulation account they hold.

The amount that can be removed from any accumulation accounts will be limited to the amount of non-concessional contributions made into those accounts since 1 July 2007. Removal of contributions made to a defined benefit account will not be required. The Government will consult to ensure broadly commensurate and equitable treatment of individuals for whom no amount of post-1 July 2007 non-concessional contributions are available for removal. See also Budget Superannuation Fact Sheet 5 (http://budget.gov.au/2016-17/content/glossies/tax_super/downloads/FS-Super/05-SFS-Defined_benefit_funds.pdf/).

Source: Budget Paper No 2, p. 27, http://www.budget.gov.au/2016-17/content/bp2/html/; Treasurer's press release, 3 May 2016, http://sjm.ministers.treasury.gov.au/media-release/053-2016/; Budget Superannuation Fact Sheet 4, http://www.budget.gov.au/2016-17/content/glossies/tax_super/downloads/FS-Super/04-SFS-NClifetime_cap.pdf/.

Home exempt from land tax for "world-traveller"

The Victorian Civil and Administrative Tribunal (VCAT) has set aside land tax assessments for the 2011 to 2015 land tax years issued to a taxpayer after finding that the principal place of residence (PPR) land tax exemption applied to his circumstances.

Background

In 2003, the taxpayer was left a property in Shoreham, Victoria in his mother's will. After moving into that property, the taxpayer continued his interest of overseas travel, meeting and marrying his now wife, who continues to live in Canada. Broadly, for each tax year in question, the taxpayer spent a couple of months in Australia at the Shoreham property, with the balance spent mostly in Canada and other overseas destinations. The taxpayer submitted that he considered the Shoreham property his "home", where he kept "all his personal treasures", among other things. He also noted "significant and communal family ties" in Victoria (including his three children and eight grandchildren in Melbourne) and "financial ties" to Australia.

Decision

VCAT was satisfied, based on the evidence before it, that for each of the relevant tax years the taxpayer "always had the intention of returning to his home" in Australia and that the taxpayer's absences from the property were "temporary" within the meaning of the legislation.

In this regard, the Tribunal said, "In this day and age, people are far more mobile than they have been previously and it is not unreasonable that someone should have a base at a particular place where they spent two or three months per year. It is clear that if a person has such a base as the [taxpayer] does in this case and he is away from that base but always intending to return as I find the [taxpayer] did, then it can be described that the [taxpayer's] absence from the property was 'temporary' within the meaning of the legislation."

VCAT was also satisfied that when the taxpayer returned home he had the intention to resume "occupation" of the property. Accordingly, it concluded that the taxpayer had made out the PPR exemption pursuant to s 54 and s 56(1)(a) and (b) of the *Land Tax Act 2005* (Vic).

Ward v Commissioner of State Revenue [2016] VCAT 1307*, 4 August 2016,*
http://www.austlii.edu.au/au/cases/vic/VCAT/2016/1307.html.

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