client alert | explanatory memorandum

May 2018

CURRENCY:
This issue of **Client Alert** takes into account developments up to and including 4 May 2018.

ATO closely examines work-related car expenses

The ATO has announced that it will be closely examining claims for work-related car expenses in 2018 tax returns. The ATO is concerned about taxpayers making mistakes or deliberately lodging false claims in relation to work-related car expenses. Last year, around 3.75 million people made a work-related car expense claim, totalling about $8.8 billion.

ATO Assistant Commissioner Kath Anderson said that this year, the ATO will be particularly focused on people “claiming things they’re not entitled to”. This will include people claiming things like home-to-work travel or other private trips, trips they didn’t actually undertake, or expenses their employer has already paid for or reimbursed.

The ATO also uses analytics to identify claim patterns. For example, Ms Anderson said the ATO knows that around 870,000 people claim exactly 5,000 kilometres of travel under the cents-per-kilometre method each year. While the ATO says it is not suggesting that all of those claims are wrong, “it is something that we’ll be able to look into”.

The Assistant Commissioner said the best way for taxpayers to avoid mistakes is to make sure they follow “the three golden rules”, only making a car claim if:

- you paid for the expense yourself and you weren’t reimbursed;
- it’s directly related to earning your income – in other words, your employer required you to make the trips as part of your job; and
- you have a record to support your claim.

Source: www.ato.gov.au/Media-centre/Media-releases/ATO-driven-to-scrutinise-car-claims-this-tax-time/.

Data matching finds taxpayers with unnamed Swiss bank accounts

Minister for Revenue Kelly O’Dwyer has announced that more than 100 Australians have been identified as “high risk” and requiring further ATO investigation because they have links to Swiss banking relationship managers alleged to have actively promoted and facilitated tax evasion schemes.

The Minister confirmed that following a joint international investigation, the ATO and other Serious Financial Crime Taskforce (SFCT) agencies have identified 578 Australians as holding unnamed numbered accounts with a Swiss bank.

“While the ATO has found the majority of Australians identified in the data to have complied with their tax obligations, a range of immediate compliance actions are being taken against 106 taxpayers, and one is under assessment by the Government’s cross-agency Serious Financial Crime Taskforce”, Minister O’Dwyer said.

She said the ATO is investigating whether those taxpayers are using a sophisticated system of numbered accounts to conceal and transfer wealth anonymously to evade their tax obligations in Australia.

In working with the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Minister said, the ATO has identified that these 106 taxpayers have had 5,000 cross-border transactions worth over $900 million in the past 10 years. The transaction amounts range from as little as $25 up to $24 million.

Ms O’Dwyer said information releases are becoming more regular, with the ATO and other government agencies receiving large data sets “reasonably regularly”. The ATO constantly receives intelligence from a range of sources which it cross-matches against existing intelligence holdings through its “smarter data” technology.

“I encourage anyone who believes they may have undeclared offshore income to come forward and contact the ATO to make a voluntary disclosure”, Minister O’Dwyer concluded. The SFCT comprises the Australian Federal Police, ATO, Attorney General’s Department, Australian Criminal Intelligence Commission, Australian Border Force, Commonwealth Department of Public Prosecutions and ASIC.

Source: http://kmo.ministers.treasury.gov.au/media-release/046-2018/.

CGT main residence exemption to disappear for non-residents

A person's Australian tax residency status is about to assume a whole new meaning. Currently, both residents and non-residents qualify for the capital gains tax (CGT) main residence exemption, but if a Bill before Parliament becomes law, that will change.

As the law stands right now, any individual (regardless of their tax residency status) who sells their home can qualify for either:

- the full CGT main residence exemption (eg if the residence has been used as a main residence throughout the whole ownership period, whether through actual use or imputed use) – there are various main residence extension rules that impute main residence use to taxpayers even where a home was not used as a main residence in the particular time (eg the six-year absence rule); or
- the partial CGT main residence exemption (eg if the residence has been used partly as main residence and partly for income-producing purposes during the ownership period).

However, if the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No 2) Bill 2018*, currently before the Senate (having passed the House of Representatives without amendment), is enacted, any individual vendor that is a non-resident (for tax purposes) at the time they sign a contract to sell their home will no longer be able to qualify for the full or partial main residence exemption – regardless of how long the home has actually been used as a main residence. This is causing some serious concerns.

The time from when this proposed measure will apply depends on the time when the home was acquired.

When will the proposed changes apply?

The full or partial main residence exemption will not be available for non-residents signing a contract of sale to sell their homes:

- after 9 May 2017, for homes acquired after 9 May 2017; and
- after 30 June 2019, for homes acquired on or before 9 May 2017.

These measures could have a profound effect on individuals who have used their post-CGT home as a main residence for a substantial period of time, seeing the value of the property increase substantially, and then eventually sell the residence (ie sign the contract for sale) when they are non-residents for tax purposes.

For example, take an individual who bought property in 1986 (post-CGT and before 9 May 2017) and has been using the property as their main residence since that time. In July 2018, the individual leaves Australia permanently and establishes a permanent place of abode overseas. This and other facts and circumstances indicate that the individual has become a non-resident for tax purposes.

If the non-resident individual were now to sell the residence and the date the sale contract is signed is:

- on or before 30 June 2019, no tax would be payable because the non-resident individual seller would still qualify for the main residence exemption; but
- after 30 June 2019, tax would be payable because the non-resident individual seller would not qualify for the main residence exemption.

Note: The practicalities can get complicated and "messy". From 8 May 2012 (when the CGT discount was abolished for non-residents), non-residents selling CGT assets can no longer qualify for the CGT discount. The discount is apportioned for sales after 8 May 2012 where CGT assets were acquired before 8 May 2012. So, if the non-resident signs a contract of sale (for property acquired before 9 May 2017) of the main residence after 30 June 2019, the capital gain will be taxable and only qualify for a partial CGT discount.

There are also flow-on effects for estate planning purposes (eg whether a beneficiary of a deceased estate who sells a property that was the deceased's main residence would qualify for the main residence exemption when the beneficiary sells the house – this would depend on the residency status of both the deceased and the beneficiary).

What other issues arise from the proposed changes?

Individuals who are non-residents at the time of signing the sale contract to sell their property that has been used as both a main residence and an investment property will lose their ability to:

- apportion the main residence exemption (for a home that was first used as an investment property and then used as a main residence); or
- get a step-up in cost base (for a home that was first used as a main residence and then used as an investment property.

Concerns about the changes

While the Senate Economics Legislation Committee has recommended that the amending Bill be passed, the Committee said it received evidence expressing concerns about how the changes would affect Australians living and working overseas. Those concerns included the following:

- The Bill seeks to retrospectively remove the CGT main residence exemption for non-residents from the time the property became the taxpayer's main residence, instead of from the time they became a non-resident.
- It has been argued that it was unreasonable to effectively penalise Australians for departing Australia for work or personal reasons by revoking their right to a CGT exemption on their family home.
- There was concern that the change could impose significant tax bills on Australian citizens and permanent residents covering periods not only when they are non-residents for tax purposes, but also when they were tax residents, paying their Australian tax obligations.
- The denial of the CGT main residence exemption for non-residents is based on their tax residency status at the time of the CGT event (ie generally when a taxpayer enters into the contract to sell the dwelling), irrespective of the use of the dwelling or the taxpayer's residency status during the ownership period of the dwelling. The Bill retrospectively changes the application of the exemption to as far back as 20 September 1985, when the CGT provisions first commenced.
- It was submitted that there should be a difference between a "foreign resident" (ie a foreign citizen) who buys property in Australia and treats it as their main residence, but remains a non-resident for tax purposes, and an Australian citizen or permanent resident who has always lived here but has relocated overseas and becomes a non-resident, then sells the dwelling that was their home.
- It was submitted that the Bill should include grandfathering provisions to ensure that Australian citizens who were foreign residents (not Australian resident for tax purposes) when the changes were announced (on 9 May 2017) should continue to be able to access the "CGT absence concession" under current rules, regardless of where they presently reside, on eligible properties they owned on 9 May 2017.
- Australian citizens living abroad should also be able to access time apportionment so that they would continue to have access to the main residence exemption for that part of the ownership period during which they lived in the home and were resident of Australia.

Despite these concerns, and those made in submissions by several affected Australian citizens, the Committee recommended that the Bill be passed and that the Government ensure that Australians living and working overseas are aware of the changes to the CGT main residence exemption for foreign residents, and the transitional arrangements, so they can plan accordingly.

Further thoughts

At the time of writing, the proposed changes are not yet law.

However, once (and if) these proposed changes do become law, it will be very important for vendors to determine their tax residency status before they sign a contract to sell a property that would potentially qualify for the full or partial main residence exemption.

It is important to note that there will be no apportionment of the time the individual used the home as a main residence – the only test is residency status at the time of signing the contract of sale.

This "all or nothing approach" may lead to catastrophic consequences for individuals who have used their properties as main residences for an extended period of time but sell their properties (ie sign the contract to sell the properties) when they are non-residents for tax purposes.

Residential rental property travel expense deductions: ATO guidance

With effect from 1 July 2017, the *Treasury Laws Amendment (Housing Tax Integrity) Act 2017* introduced s 26-31 into the *Income Tax Assessment Act 1997* (ITAA 1997) to disallow deductions for non-business travel costs incurred by individuals, self managed superannuation funds (SMSFs) and "private" trusts and partnerships in relation to residential rental properties. Such expenditure is also excluded from forming part of the cost base or reduced cost base of a CGT asset.

Draft Law Companion Ruling LCR 2018/D2, issued by the ATO on 2 May 2018, seeks to supplement the Explanatory Memorandum to this legislation by providing further guidance on the following matters:

- the meaning of "residential premises";
- the meaning of "carrying on a business" for the purposes of the business exclusion in s 26-31(1)(b), and
- the application of s 26-31 to travel expenditure that serves more than one purpose.

Residential premises

Section 26-31 of ITAA 1997 refers to the "use of residential premises as residential accommodation". The expression "residential premises" takes its meaning from the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), which is land or a building that is occupied, or is intended to be and is capable of being occupied, as a residence or for residential accommodation. The ATO's views on what constitutes "residential premises" for GST purposes are set out in GST Ruling GSTR 2012/5. Draft LCR 2018/D2 mirrors the GST Ruling by providing that:

- the premises must be fit for human habitation and must provide shelter and basic living facilities;
- the term of occupation or intended occupation is not determinative;
- the actual use of the premises as a residence or for residential accommodation is relevant to satisfying the first limb of the definition (concerning actual occupation);
- the second limb of the definition (concerning intended occupation) refers to premises that are designed, built or modified so as to be suitable to be occupied, and capable of being occupied, as a residence or for residential accommodation. This is demonstrated through the physical characteristics of the premises; and
- the premises may be in any of a number of forms, including single rooms or suites of rooms within larger premises.

Carrying on a business of property investing

A deduction for travel expenses is not denied under s 26-31 of ITAA if the expenditure is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. The draft states (as the legislation's explanatory memorandum did) that this exclusion covers taxpayers carrying on a business of property investing or a business of providing retirement living, aged care, student accommodation or property management services. The ATO then refers to the indicia of business identified by the courts and listed in Ruling TR 97/11 (on carrying on a business of primary production).

In determining whether a business of letting residential properties is being carried out, the draft states that the following additional factors may be particularly relevant:

- the number of residential properties being rented out;
- the hours per week spent actively engaged in managing the properties;
- the skill and expertise exercised in undertaking these activities; and
- whether professional records are kept and maintained in a business-like manner.

The draft adds that it is more difficult for individuals to demonstrate that they are carrying on a business of property investing than it is for companies (which are specifically exempt from s 26-31 anyway). In the ATO's preliminary view, "the receipt of income by an individual from the letting of property to a tenant, or multiple tenants, will not typically amount to the carrying on of a business as such activities are generally considered a form of investment rather than a business".

Apportionment if travel expenditure serves mixed income-producing purposes

The expenditure made non-deductible by s 26-31 is a loss or outgoing "insofar as it is related to travel". According to the draft, the use of the word "insofar" means that an apportionment is required if there are mixed income-producing purposes for the travel costs. If a single outlay of travel expenditure is incurred partly for producing income from the use of residential premises as residential accommodation and partly for other income-producing purposes (eg business or employment), the ATO expects the taxpayer to make a fair and reasonable assessment of the extent to which the amount relates to each purpose. When apportioning an indiscriminate sum, factors that may need to be taken into account include floor-area ratio, rental income and travel time spent attending to each income-producing purpose, the draft says.

Government to increase civil penalties for white-collar crime

On 4 May 2018, the Government released its response to the Senate Economics References Committee report into penalties for corporate and financial misconduct (white-collar crime), and agreed to increase the civil penalties in the *Corporations Act 2001* (Corporations Act) for both individuals and bodies corporate. In doing so, the Government agreed that civil penalties for white-collar offences should be set as a multiple of the benefit gained (or loss avoided) and allow for disgorgement of profits.

The Government also released its response to the Australian Securities and Investments Commission (ASIC) Enforcement Review Taskforce report, and agreed to set the maximum civil penalties in ASIC-administered legislation at:

- for individuals, the greater of 5,000 penalty units (currently $1.05 million) or three times the value of benefits obtained (or losses avoided); and
- for corporations, the greater of 50,000 penalty units (currently $10.5 million) or three times the value of benefits obtained (or losses avoided); or 10% of annual turnover in the 12 months preceding the contravening conduct, but not more than one million penalty units ($210 million).

The Government also agreed to expand the use of ASIC infringement notices for a broader range of the financial services and managed investments provisions of the Corporations Act. In this respect, the Government accepted the recommendation of the Taskforce to include as infringement notice provisions an extra 70 provisions of the Corporations Act and the *National Consumer Credit Protection Act 2009* (Credit Act). To improve the transparency of ASIC banning and disqualification orders, the Government said it is also considering the modernisation of the ASIC Business Registers.

Lowering of evidentiary standard rejected

Importantly, the Government rejected the recommendation calling for reforms that would reduce the evidentiary standards and rules for civil penalty proceedings involving white-collar offences. While the Government supported the Committee's observation about the difficulty in proving certain civil offences, it said this does not necessarily mean evidentiary standards should be lowered. Furthermore, the Government noted the Full Federal Court's decision in *ASIC v Whitebox Trading Pty Ltd* [2017] FCAFC 100, which has provided some clarity around the standard of proof and the application of "fault" elements in civil proceedings.

Source: https://treasury.gov.au/publication/p2018-282438-2/; https://treasury.gov.au/publication/p2018-282438/.

Businesses need to be ready: GST on low value goods from 1 July 2018

From 1 July 2018, GST will be imposed on the supply of goods valued at equal to or less than A$1,000 (ie low value goods) from outside of Australia to Australian consumers. Australia is the first jurisdiction in the Asia-Pacific region to move ahead with such changes and it is a fundamental shift from the current approach, which excluded supplies of low value goods into Australia by offshore merchants from the GST net. Businesses need to be ready for this change.

Summary of new regime and impacts on online merchants and operators of electronic distribution platforms

Broadly, the regime imposes a GST liability on merchants who sell goods valued at equal to or less than A$1,000 to an Australian consumer (ie a customer who is not registered for GST). This applies where the merchant delivers or facilitates the delivery of those goods into Australia. Sales made on a business-to-business (B2B) basis (ie where the recipient is registered for GST) are excluded from the regime.

The regime also provides special deeming rules where the low value goods are supplied through an electronic distribution platform (eg an online marketplace). If these deeming rules operate, the GST liability shifts to the operator of the platform rather than the merchant of the goods. Additionally, in some cases, a redeliverer may be taken to have the liability and responsibility to register and report the GST.

A registration requirement for those impacted by the regime will only arise where the taxpayer meets the annual GST turnover registration threshold of A$75,000. Further, a simplified GST registration system has been put in place that minimises the registration administrative burden through a streamlined application process via an online portal and reduced identification requirements for entities and related individuals (for instance, directors are not required to provide a certified copy of their passport). Entities registered under the simplified system are required to report and pay GST on a quarterly basis, regardless of GST turnover.

The new low value goods regime does not disturb the operation of existing provisions in relation to taxable importations, meaning that practically, the regime creates a tiered system where:

- the overseas merchant, electronic distribution platform operator or redeliverer may be liable for GST on goods valued at equal to or less than A$1,000 imported into Australia; and
- GST will continue to be payable at the border by the importer of record (typically the consumer in business-to-consumer cross-border sales) on goods valued at more than A$1,000 imported into Australia.

Preparing for the regime

In preparing for the start date of the regime (1 July 2018), those affected should consider:

- how their current systems can manage the imposition of GST – for example, whether they collect sufficient information to determine customer location, GST registration status and the amount of GST payable on a supply;

- if terms and conditions of store websites and platforms are required to be amended – for electronic distribution platform operators, this may include reviewing whether existing merchant terms and conditions allow the recovery of GST;
- compliance with Australian consumer law requirements on the display of pricing;
- the impact on customs compliance formalities and potential for double taxation – changes to the Integrated Cargo System (ICS) will mean that logistics providers and freight forwarders may begin to collect additional information on merchant and platform operator's GST registration details and whether a consignment is being shipped to an entity exempt from the low value goods regime (eg by virtue of being a GST-registered business) to avoid the double imposition of GST at the border; and
- whether additional paid services charged by the merchant or platform operator (such as shipping and gift wrapping) are captured by regime.

ATO compliance and enforcement guidance

On 4 April 2018, the ATO released additional guidance on how it intends to approach compliance activities in relation to the low value goods regime.

In this guidance, the ATO reiterated that it may seek to impose potentially significant administrative penalties, which can be substantial for "significant global entities" (entities or groups with global turnover of greater than A$1 billion), and have several mechanisms to approach collection of GST and penalty amounts for non-compliant entities. These include:

- intercepting funds from Australia that are destined for the overseas merchant or platform operator – this may include the issuance of garnishee notices to banks and financial institutions located in Australia;
- registering the debt in a court in the overseas merchant or platform operator's country; and
- requesting the taxation authority in the overseas merchant or platform operator's country to recover the debt on the ATO's behalf.

As an allowance to overseas merchants and platform operators, the guidance from the ATO provides for a concessionary penalty regime for entities that make efforts to comply with the new low value goods regime. Where an entity makes a genuine effort to comply with the regime, the ATO will not seek to impose penalties on mistakes made after the introduction of the regime (1 July 2018) for the first year of operation. Further non-imposition of penalties will be considered on a case-by-case basis after that date.

The ATO confirms that it will leverage multiple sources of information to identify non-compliant behaviour, including:

- tracking financial data and the flow of funds from purchasers to overseas suppliers – from 1 July 2017, payment system entities operating in Australia have been required to report transaction information to the ATO (the first annual report is due 1 July 2018); thus, administrative systems are already in place to capture transaction information;
- obtaining information from other jurisdictions under information-sharing agreements and tax treaties;
- online investigations to identify websites and businesses that supply goods to consumers in Australia; and
- customs data on the entry of imports into Australia – as already mentioned, the ICS data fields have been amended to capture more GST-related information on consignments entering Australia, although these fields have not yet been made mandatory.

Time to prepare

The idea for the regime has been around for some time and the Bill to implement it was introduced in February 2017, so businesses have been on notice. However, the 1 July start date is now rapidly approaching and the time to prepare is well at hand.

It is interesting to note that late last year, the Productivity Commission released a report designed to check that the legislated model is the best available collection model. The report said that while the legislated model has limitations and carries significant uncertainty about levels of compliance and the reactions of electronic distribution platforms, the Commission does not have sufficient sound evidence to recommend an alternative collection model at this stage. The Commission therefore recommended that the Government should conduct a comprehensive review of the collection of GST on low value imported goods five years after the commencement of the legislated model, unless exceptional circumstances – such as extremely low compliance, unintended impacts on consumers or significant trade policy issues – warrant an earlier review. Affected businesses will no doubt inform this review.

New Zealand proposes GST on low value goods

The New Zealand Government is proposing to levy GST on low value goods under NZ$400. A discussion document was released on 1 May 2018. Revenue Minister Stuart Nash said that currently, “foreign companies are not required to collect GST on goods under NZ$400. We are now calling for feedback on a system to register these suppliers for GST.”

Currently, New Zealand GST is collected at the border for goods valued at over NZ$400, but Customs Minister Meka Whaitiri said the Government proposes making offshore suppliers collect GST on low value goods at the moment of sale, and in turn, buyers of these goods will no longer pay New Zealand Customs tariffs or border security and biosecurity fees. This is designed to simplify compliance and administration costs at the border, she said. There would be no change to the tax treatment of goods valued above NZ$400, where the current process for collecting GST and tariff duty at the border will continue.

Offshore retailers (suppliers) would be required to register and collect GST if their total sales to New Zealand consumers exceed NZ$60,000 per annum (ie in a 12-month period). In certain circumstances, marketplaces and redeliverers may also be required to register. The offshore supplier registration is the same threshold that applies to domestic businesses and to offshore suppliers of cross-border services and intangibles (ie ebooks, digital downloads and software), which has applied from 1 October 2016.

This new regime is also broadly in line with recent international developments. For example, Australia has legislated rules to apply GST on all imported goods valued at or below A$1,000 from 1 July 2018. The European Commission announced in December 2016 that European Union Member States would use a variant of an offshore supplier registration system to collect value-added tax (VAT) on low value imported goods from outside the European Union by 2021.

The changes to New Zealand’s GST system would take effect from 1 October 2019. Comments on the discussion document are due by 29 June 2018.

Source: www.beehive.govt.nz/release/gst-loophole-closed-offshore-companies.

Financial Complaints Authority takes shape

Minister for Revenue and Financial Services Kelly O’Dwyer has announced the authorisation of Australian Financial Complaints Limited to operate the new financial dispute resolution scheme – the Australian Financial Complaints Authority (AFCA) – which will start accepting complaints from 1 November 2018. AFCA is intended to be a “one-stop shop”, having the expertise to deal with all financial disputes, including superannuation and small business lending disputes, with higher monetary limits and compensation caps.

The Minister also announced the appointment of four AFCA board members: Ms Claire Mackay, Mr Andrew Fairley, Ms Erin Turner and Mr Alan Wein. Ms O’Dwyer said one of the first priorities of the AFCA board (including its independent chair Helen Coonan) will be to consult on the AFCA terms of reference and interim funding model.

All Australian financial services (AFS) licensees, Australian credit licensees, superannuation trustees and other financial firms required to become members of AFCA by law will need to do so by 21 September 2018. AFCA will, in the coming months, outline the process for applying for membership. Until 31 October 2018, the Minister said consumers can to still lodge complaints with the existing Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO) and Superannuation Complaints Tribunal (SCT). The SCT will continue to operate beyond AFCA’s commencement to resolve the existing complaints it has on hand.

Source: http://kmo.ministers.treasury.gov.au/media-release/044-2018/;
http://kmo.ministers.treasury.gov.au/media-release/045-2018/.

Banking Royal Commission wraps up evidence on financial advice

The Banking Royal Commission has wrapped up its two weeks of hearings focused on financial advice. Counsel Assisting, Rowena Orr SC, summed up the gruelling evidence of misconduct and conduct falling below community standards and expectations in relation to the provision of financial advice by employees and authorised representatives of financial services entities. Ms Orr said this conduct has occurred in the context of fees being charged for no service, platform fees, inappropriate advice, improper conduct, and the disciplinary regime.

In her closing address on 27 April 2018, Ms Orr set out the details of each of the case studies where Counsel Assisting considered there was evidence leaving it open for the Commissioner to find that the conduct of the relevant individuals and entities might have amounted to misconduct. Ms Orr also set out various instances where it would be open for the Commissioner to find that the individuals and entities may have breached statutory obligation under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*. Commissioner Kenneth Hayne also permitted the parties to the case studies to make written submissions (not exceeding specified page lengths) about the findings.

The Royal Commission has adjourned until 21 May 2018, when it will begin its third round of hearings with a focus on small and medium enterprises (SMEs). The Commission is expected to provide an interim report by 30 September 2018, with a final report due by 1 February 2019.

Source: https://financialservices.royalcommission.gov.au/public-hearings/Pages/default.aspx.

ATO assessments issued for excess super pension balances

The ATO has started issuing excess transfer balance (ETB) tax assessments to self managed super fund (SMSF) members, or their agents, who had previously received an ETB determination and rectified the excess.

The ATO said these paper ETB tax assessments are sent to SMSF members (or their professionals), and not to the fund. It's then up to the member to decide how to cover the ETB liability for exceeding their $1.6 million pension transfer balance cap. The ATO said individuals can use assets from outside super, or they can access their super and either:

- take a lump sum from any accumulation interest they hold;
- make an additional commutation of their income stream; or
- make a larger than usual one-off pension payment.

As the member has prima facie met a condition of release, the ATO said it doesn't need to issue a special release authority to super funds to allow the individual to access their super.

The ATO warned that SMSF members may receive an ETB assessment even if they didn't receive an ETB determination. If they have rectified the excess before they were assessed for a determination, they are still liable for the ETB tax, the ATO said. However, SMSF members who were covered by the transitional rules for excesses not exceeding $100,000, and rectified in full by 31 December 2017, will not receive an ETB tax assessment.

ETB tax is due and payable 21 days after the assessment is issued. A general interest charge will accrue if any amount remains unpaid after the due date. ETB tax is calculated on the ETB earnings from when the individual started to have an ETB to when they are no longer in excess. The tax rate is set at 15% for an ETB in 2017–2018, but will increase to 30% from 1 July 2018 for second time offenders.

A person who receives an ETB assessment (or determination) should first ensure that their pension transfer balances have been correctly reported to the ATO before electing to access their super to pay their ETB liability. The ATO has also recently reported that it has identified a duplication error in its systems which can result in an incorrect total superannuation balance (TSB) being displayed on ATO Online for some people.

If a taxpayer needs to access their superannuation to pay the ETB liability, it would generally make sense to first access a lump sum from any accumulation interest they hold. Subject to the individual's circumstances, making an additional commutation of an existing income stream would generally be better than taking a larger than usual one-off pension payment. This is because a commutation will generate a debit for the pension balance account, while an additional pension payment will not result in a credit.

As always, consider the underlying tax components if an individual has multiple superannuation interests. While super pensions and lump sums are received tax-free from age 60, there may be estate planning benefits from first accessing the interest with the largest taxable component (subject to the individual's other circumstances). Also note that, unlike superannuation benefits released pursuant to a release authority, super benefits accessed to pay an ETB liability will be subject to the proportioning rule.

Source: www.ato.gov.au/Super/Self-managed-super-funds/In-detail/News/ATO-starts-issuing-ETB-tax-assessments/.

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