CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 25 January 2023.

Non-deductible threshold removed for self education expenses

The $250 non-deductible threshold for work-related self education expenses has now been removed with the recent passing of legislation. This deduction limit was an artefact from when the self education deduction measure was first introduced and no longer served its original purpose. Now that it has been repealed, individual taxpayers only need to consider the deductibility of their self education expenses by reference to s 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997). The repeal of the non-deductible threshold will apply to assessments for the 2022–2023 income year and onwards, and does not affect types of self education expenses that were already deductible.

Self-education expenses are generally deductible if there is a sufficient connection with the taxpayer's income-producing activities; however, the amount of deduction was previously limited by s 82A of the *Income Tax Assessment Act 1936* (ITAA 1936) so that only the excess over $250 was deductible. This deduction limit was an artefact from when the self education deduction measure was first introduced more than four decades ago, which occurred alongside a long-repealed concessional tax rebate of $250. In essence, the original intention of the deduction limit was to ensure that taxpayers did not receive both the tax rebate and a tax deduction for the same set of expenses.

Given that the $250 non-deductible threshold for work-related self education expenses no longer served its original purpose and only adds compliance complexity and costs for individuals, stakeholders unanimously supported its removal in Treasury consultation.

Now that the non-deductible threshold for work-related self education expenses has been removed, individual taxpayers only need to consider the deductibility of their self education expenses by reference to s 8-1 of the ITAA 1997. This means that individuals can claim a deduction for self education expenses if the following applies:

- the expenditure is incurred in gaining or producing their assessable income;
- the expense is not private, domestic or capital in nature; and
- the deduction is not prevented by a provision of ITAA 1997.

With the repeal of s 82A of ITAA 1936, previous expenses, such as childcare expenses and travel expenses, that were not considered to be generally deductible but may still have been expenses for self education and used to reduce the $250 non-deductible threshold, can no longer be deducted if the expenditure does not meet the requirements under s 8-1 of ITAA 1997.

The repeal of the non-deductible threshold will also not affect the types of self education expenses that are deductible. For example, the costs of textbooks, stationery and professional journals will still be deductible, while certain student contributions and payments to reduce HELP, financial supplement and other higher education debts will remain non-deductible. Similarly, self education expenses incurred before commencing an occupation or to obtain a new occupation will remain non-deductible.

Example

Matt is a software programmer and decides to take a course to keep up-to-date with the latest developments in the various programming languages he uses for work. Because the course is expenditure incurred in gaining or producing his accessible income, Matt is eligible to deduct the associated fees. The total cost of the course – including materials, tuition, and stationery – totals $3,500. Matt also incurs $250 in childcare expenses in order to attend the course.

With the repeal of s 82A of ITAA 1936, Matt is able to claim the deduction of $3,500, but not the childcare expenses. Prior to the repeal, Matt would have been able to use the $250 in childcare expenses to offset the $250 non-deductible threshold, so that the full $3,500 could have also been deducted in that instance. However, with the repeal of s 82A, Matt no longer has to calculate or keep records of his non-deductible expenses to offset the $250 reduction to complete his tax return, thus lowering the compliance complexity and time required.

Source: www.ato.gov.au/Individuals/Income-and-deductions/In-detail/Education-and-study/
www.ato.gov.au/General/New-legislation/In-detail/Other-topics/Removing-the-self-education-expenses-threshold/
www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6890

Tax debts and relationship breakdowns: a warning

The ability of the Family Court to divide the assets owned personally by a couple – including superannuation – on a relationship breakdown is largely without question.

In contrast, the exposure of assets owned via (for example) a trust has been (and indeed arguably remains) subject to conjecture.

Another area that was, at least historically, potentially uncertain was the ability of the Family Court to allocate responsibility for payment of the tax debts of either spouse.

Past decision on responsibility for tax debts

The High Court decision in *Commissioner of Taxation v Tomaras* [2018] HCA 62 confirmed that tax debts can be apportioned by the courts where there is a relationship breakdown.

In the case of *Tomaras*, the wife had failed to pay tax amounts assessed to her and was out of time to challenge the assessments. Furthermore, the husband had been declared bankrupt.

As part of the property settlement proceedings after their relationship ended, the wife sought an order that the husband be substituted for her as the debtor liable to pay the ATO.

The High Court held that one spouse could indeed be substituted for the other in relation to such a tax debt, but in its decision it also confirmed this may not always be appropriate. In particular, the Court said it would need to be satisfied that:

- the making of the order to substitute one spouse for the other is reasonably necessary or appropriate to achieve a division of property between the parties to the marriage;
- it is foreseeable that the debt will be paid in full; and
- it is just and equitable in the circumstances.

Therefore, in *Tomaras*, given that the husband was bankrupt and the ability to challenge the assessments had lapsed, the Court did not in fact exercise its powers to make him liable for the tax debt that had been assessed to the wife.

Recent decision

In the recent case of *Cao & Trong* [2022] FedCFamC1F 754, the powers of the Family Court in relation to tax debts were further explored.

Relevantly in *Cao*, allocation of an amount in the region of $3.1 million was in dispute between the former spouses, the ATO and the Child Support Register.

The ATO was owed more than $7 million in unpaid tax and was held by the Court to be entitled to 100% of the disputed amount.

The Court specifically confirmed the following.

- It is for the Court to determine what is a "just outcome" – which often demands that an aggrieved spouse "take the good with the bad"; that is; the benefits indirectly gained by a spouse in having the pool of assets increased as a result of the availability of funds which would otherwise have been paid out in tax may in turn mean the spouse will be less entitled than the ATO.
- While no spouse has an automatic entitlement to funds, the benefit each party has received from funds is a highly significant consideration when addressing the position of an unsecured creditor (relevantly here, the ATO) whose prospects of recovery of the debt are uncertain.

- A creditor who becomes a party to family law proceedings does not, on the basis of justice and equity, improve their position as compared to what they would have enjoyed had the creditor pursued the spouse-debtor alone.
- This said, where the ATO is a creditor of taxpayers it is critical to understand that the onus is on taxpayers to make full and proper disclosure – the ATO does not extend credit at all, but rather becomes a creditor by virtue of the conduct of the affairs of the taxpayer.
- A spouse may have priority to the ATO where there are "compelling circumstances" supporting this – of which there were none in this case.
- Ultimately, a very relevant consideration for the court will be whether the parties to a marriage have enjoyed the benefit of the use of money on which a substantial liability for tax has not been discharged by payment – as was the case here.

Interestingly, the Court in *Cao* declined to specifically address whether it has a duty to protect the revenue in family law cases – despite the following statement by the barrister for the wife: "you [an impolite reference to … the judge] are not under a duty to protect the revenue".

Instead, the Court confirmed that the parties had enjoyed an opulent lifestyle at a time when the debt was due to the ATO – that is, the lifestyle that the husband and the wife enjoyed was in fact enjoyed by them mainly by reason of their failure to discharge the indebtedness to the ATO.

The Court further confirmed it would be incongruous for it to take into account non-financial contributions to the marriage by the wife while concurrently relieving her of any liability for the tax debt.

Cao is a timely reminder that the ATO will intervene in family law disputes to protect the revenue due to the Commonwealth, and that the courts will actively ensure the rights of the ATO are protected and enforced.

Source: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FedCFamC1F/2022/754.html
www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2018/62.html

Sharing economy reporting regime commences soon

Compulsory reporting of information to the ATO for sharing economy platforms is now in place. The legislation to implement this recently passed both Houses of Parliament, after previously lapsing due to the May 2022 Federal election. With the passing of this legislation, the ATO is expected to more easily monitor the compliance of participants through data-matching. The new reporting regime will leverage the existing Taxable Payments Reporting System (TPRS) and encompass platforms from a variety of sectors, including taxi, short-term accommodation and delivery services, to name a few.

As a part of the government's strategy to combat the tax compliance risks posed by the sharing economy, it has now legislated requirements for operators of electronic distribution platforms to provide information on transactions made through their platforms to the ATO. Sharing economy activity usually involves two parties entering into an agreement for one to provide services and/or loan personal assets to the other, for payment.

To meet the definition of an electronic distribution platform, the arrangement must:

- deliver service through electronic communication (ie platforms operating over the internet, including through applications, websites or other software); and
- allow entities to make supplies available to end-user consumers through the platform.

A service is not considered to be an electronic distribution platform if it only advertises or creates awareness of possible supplies, operates as a payment platform or serves a communication function. Generally, electronic distribution platforms facilitate transactions between two otherwise unrelated parties in the sharing economy and act in a quality assurance role to ensure a seamless experience for both parties, regardless of whether the payment is processed by the platform or a third-party operator.

Examples of sharing economy electronic platform operators in a variety of sectors include Uber, Airbnb, Car Next Door, Menulog, Airtasker and Freelancer.

Practically, electronic platform operators will be required to provide various information through the TPRS on certain transactions that occur through the platforms. Generally, reporting will only include transactions where the electronic platform facilitates a supply that is connected to Australia for consideration between two entities. However, it will not include supplies of goods where ownership of the goods is permanently changed, where title is transferred, or if the supply is a financial supply. The information obtained from TPRS will be used in ATO data-matching to help identify entities that may not be meeting their tax obligations.

The information will need to be reported to the ATO either annually, or at such other times as the Commissioner of Taxation determines. Currently, businesses in the building and construction industry, cleaning, security, and information technology services are required to report annually by 28 August each year under the TPRS. Therefore, it is envisaged that electronic platform operators will follow the same reporting deadlines.

Transactions in relation to the supply of taxi travel and short-term accommodation will be required to be reported to the ATO under TPRS from 1 July 2023. Electronic platform operators that deal in all other transactions will not have to report relevant transactions to the ATO under TPRS until 1 July 2024. This difference in application dates reflects the fact that data-matching protocols already exist between the ATO and operators of platforms that commonly facilitate taxi travel and short-term accommodation; hence, these entities do not need a lengthy lead time to ensure compliance.

Source: www.ato.gov.au/Business/Third-party-reporting/Sharing-economy-reporting-regime/ www.ato.gov.au/Business/Record-keeping-for-business/Detailed-business-record-keeping-requirements/Running-your-business---records/Sharing-economy-records/

Administrative Appeals Tribunal to be replaced

The Federal Government has announced that it will abolish the Administrative Appeals Tribunal (AAT) and replace it with a new federal administrative review body. According to Attorney-General the Hon Mark Dreyfus, the AAT's dysfunction has had a very real cost to the tens of thousands of people who rely on it each year to independently review government-body decisions. A dedicated taskforce within the Attorney-General's department has been formed to implement this reform, which will include a transparent, merit-based system of appointments. Stakeholder consultation will also be held on the design of the new body.

"The AAT's public standing has been irreversibly damaged as a result of the actions of the former government over 9 years, by appointing 85 former Liberal MPs, failed Liberal candidates, former Liberal staffers and other close Liberal associates without any merit based selection process, including some individuals with no relevant experience or expertise, the former government fatally compromised the AAT, undermined its independence, and eroded the quality and efficiency of its decision making", said the Hon Mark Dreyfus KC MP.

The government has said it will implement a transparent and merit-based appointment process, in which the selection of non-judicial members will be made against a core set of selection criteria (and additional criteria as required), as well as a panel report endorsed by the chair of the assessment panel to be provided to the Attorney-General recommending candidates suitable for appointment and reappointment.

Under the new process, appointment and reappointments of judicial members will be made following consultation by the Attorney-General with the AAT president and the relevant Chief Justice. To prevent a position from remaining vacant for too long, the Attorney-General will determine what position needs to be filled and at what level at least once a year, informed by the advice of the AAT present. Expressions of interest will also be sought at least every six months for vacant positions in relation to non-judicial members.

While this intended appointment process is a central pillar in this new body, the government has also committed to providing additional capacity to enable the rapid resolution of existing backlogs, and to implementing consistent funding and remuneration arrangements to enable the new system to respond flexibly to fluctuating case numbers. Thus far, it has committed to appointing an additional 75 new members to the AAT to deal with existing backlogs.

To ensure the new body is user-focused, accessible, fair and efficient, the government says it will also improve additional support services and emphasise early resolution where possible. A single, modern, reliable and fit-for-purpose case management system will also be introduced in order to capitalise on procedural efficiencies and address critical business risks.

Current cases before the AAT will continue. Taxpayers who have already applied to the AAT for a review of a decision will not need to submit a new application. The government envisages that many current cases before the AAT will be decided or finalised before the establishment of the new Federal administrative review body. Any undecided remaining cases will transition to the new review body when established.

Source: www.aat.gov.au/about-the-aat/a-new-federal-administrative-review-body www.ag.gov.au/legal-system/new-system-federal-administrative-review

SMSF changes and reminders for 2023

People who are thinking of starting a self managed superannuation fund (an SMSF) in 2023 need to be aware of the recent changes made by the ATO on fund registration and the application of the Director ID regime to those funds with corporate trustees. Due to an increase in fraud and in order to protect the retirement savings of Australians, the ATO has now removed the ability to add SMSF bank details to the online and paper applications for an SMSF registration. Any SMSFs with corporate trustees will also need to ensure that the directors of the corporate trustee obtain Director IDs before any appointment.

Previously, after the SMSF was established and trustees had been appointed, the trustees had 60 days to register the SMSF with the ATO by applying for an ABN through the Australian Business Register. That application process included a section where bank account details of the SMSF could be added, along with other information such as the TFN for the fund.

However, due to the recent explosion in fraudulent schemes targeting SMSFs, this feature has now been removed in a bid to protect the retirement savings of Australians. New SMSFs will now need to provide the ATO with their bank account details after the SMSF registration process. This can be done through the online portal for businesses, via phone, or through a registered tax agent.

New SMSFs with members who are likely to request a rollover should be extra careful, as both the SMSF bank account details and the electronic service address must be provided to the ATO before any rollover is requested. Otherwise, it will not be possible for the rollover to be processed, or delays will be experienced.

If you're contemplating starting an SMSF with a corporate trustee, you'll need to ensure that the directors of that corporate trustee apply for Director IDs before the appointment is made through Australian Business Registry Services (ABRS). The Director ID is a unique 15-digit identifier that will follow each individual through their business life and was introduced as a part of a suite of measures to combat phoenixing and other illegal activities. The process is free, simple, online and only requires individuals to confirm their identity. Every individual must apply for their own Director ID, and no one else can apply on their behalf.

The Director ID regime also applies to existing directors of corporate trustees of SMSFs. For individuals who first became a director on or before 31 October 2021, the deadline to apply was 30 November 2022. Individuals who first became a director of a corporate trustee between 1 November 2021 and 4 April 2022 were required to apply for a Director ID within 28 days of their appointment. However, the ATO has noted that those who missed the deadline can still apply for a Director ID because it is "taking a reasonable approach to those directors who try to do the right thing".

Individuals who have been unable to apply by the various deadlines can apply for an extension of time to apply. It was estimated by the ATO at the end of 2022 that around one million directors had not applied when required to do so. It is important to note that it is a criminal offence if Director IDs are not applied for on time, and maximum penalties of $16,500 (criminal) and $1,375,000 (civil) may apply.

Source: www.ato.gov.au/Super/Sup/Help-and-support-for-SMSFs/
www.ato.gov.au/Super/Self-managed-super-funds/Thinking-about-self-managed-super/

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