client alert | explanatory memorandum

March 2023

CURRENCY:
This issue of **Client Alert** takes into account developments up to and including 27 February 2023.

Working from home expenses: new fixed rate

A new revised fixed-rate method for calculating working from home expenses will apply from 1 July 2022 onwards. This new rate of 67 cents per hour covers energy expenses; internet, mobile and home phone usage costs, stationery and computer consumables. With the previous shortcut method of 80 cents per hour no longer available, taxpayers will only have the choice between this new revised fixed-rate method and the actual cost method from 1 July 2022. To use the new method, additional record keeping requirements in terms of actual hours worked from home and evidence of the expenses will need to be met.

From the 2022–2023 income year, taxpayers can no longer rely on the 80 cents per hour "shortcut" method, with the introduction of a revised fixed-rate method for calculating the work-related additional running expenses incurred as a result of working from home. Taxpayers are still able to use the actual costs method to calculate the actual expenses incurred as an alternative to the revised fixed-rate method.

To use the new revised fixed-rate method, taxpayers must:

- work from home while carrying out employment duties or carrying on a business on or after 1 July 2022 (minimal tasks such as occasionally checking emails or taking phone calls while at home will not qualify as working from home);
- incur additional running expenses which are deductible under s 8-1 of the *Income Tax Assessment Act 1997* as a result of working from home that are not reimbursed by a third party (ie the person's employer); and
- keep and retain relevant records in respect of the time spent working from home and for the additional running expenses incurred.

The new revised fixed-rate method covers energy expenses including electricity and gas for lighting, heating, cooling and use of electronic items while working. It also covers internet, mobile and home phone expenses, as well as the costs of stationery and computer consumables such as printer ink. While the new revised fixed rate of 67c per hour is lower than the previously available shortcut method, the new method does not include the work-related decline in value of any depreciating assets used during the income year or any other running expenses not specifically covered.

However, three years into the pandemic, with many taxpayers having already purchased depreciating assets early in the piece to be able to perform their duties effectively from home, the lower revised fixed-rate method means many taxpayers may lose around $100 in deductions going forward. For example, a taxpayer working three days per week from home at eight hours per day over 49 weeks will only be able to get a deduction of $787 under the new rate, compared to the $940 they could previously claim under the shortcut method.

In addition, if a taxpayer chooses to use the new revised fixed-rate method, no additional separate deductions can be claimed for any of the expenses covered. This includes instances where taxpayers use their personal mobile phones for both working from home and working elsewhere (ie in the office). The total deduction for the year would consist of the amount covered by the amount of 67 cents per hour.

Taxpayers who choose to use this new method need to ensure that relevant records are kept. For the 2022–2023 income year only, taxpayers will need to keep a record which is representative of the total number of hours worked from home during the period from 1 July 2022 to 28 February 2023, and a record of the total number of actual hours worked from home for the period 1 March 2023 to 30 June 2023.

For 2023–2024 and later income years, taxpayers must keep a record for the entire income year of the number of hours worked from home during that income year. An estimate for the entire income year or an estimate based on the number of hours worked from home during a particular period and applied to the rest

of the income year will not be accepted. A record of hours worked for the entire income year can include timesheets, rosters, logs, time tracking app entries and diaries that are kept contemporaneously.

To be able to claim expenses for 2022–2023 and later income years, one document for each of the additional running expenses incurred must be kept. For energy, mobile, phone and internet costs, one monthly or quarterly bill in the relevant name must be kept. If the bill is not in the relevant name, additional evidence such as credit card statements showing payment or lease agreements showing sharing of property and expenses must be present. For stationery and computer consumables, receipts must be kept for any purchases. Those claiming a deduction for any decline in value of depreciating assets must also keep documents which demonstrate the income-producing use of the assets.

If an eligible taxpayer uses the revised fixed-rate method, the ATO undertakes not to apply compliance resources to review a deduction for working from home expenses (unless the taxpayer claims for hours not worked, or claims a separate deduction for any of the expenses listed): see practical compliance guideline PCG 2023/1.

If an objection is lodged in relation to working from home expenses, the ATO says that PCG 2023/1 cannot be relied on to determine whether the taxpayer is entitled to a deduction.

These changes apply from 1 July 2022. The fixed-rate and shortcut methods are not available from this date.

Source: www.ato.gov.au/Media-centre/Media-releases/ATO-announces-changes-to-working-from-home-deductions/
www.ato.gov.au/individuals/income-and-deductions/deductions-you-can-claim/working-from-home-expenses/fixed-rate-method---67-cents/
www.ato.gov.au/law/view/document?DocID=COG/PCG20231/NAT/ATO/00001

Upcoming FBT-related changes

Car parking: primary place of employment

Employers that have provided FBT car parking benefits for the 2022–2023 FBT year should be aware that the ATO has finalised the changes to its ruling on car fringe benefits – specifically on the concept of "primary place of employment". A broad test of primary place of employment now applies. Considerations of whether a place is an employee's primary place of employment may include where their duties are performed, the place at which is primary to the employee's conditions of employment.

The FBT ruling on car fringe benefits has finally been updated to include changes to address the concept of primary place of employment as a result of the Full Federal Court's decision in *Federal Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd* [2021] FCAFC 209. A draft addendum was previously issued by the ATO in late 2022 on the topic and this has now been finalised, largely unchanged from the draft.

Determining the primary place of employment for FBT car parking purposes is important because, among other things, benefits are only fringe benefits taxable where a car is used by an employee to travel between home and their primary place of employment and is then parked at or in the vicinity of that primary place of employment.

In the *Virgin* case, the Full Federal Court determined that the "home base" airport of various flight and cabin crew was their primary place of employment, and this was the case even on days when the employee did not attend the home base airport at all (eg because their work meant they had flown to and were required to stay at other locations overnight). As a result, the Court found that car parking benefits were provided, because the employees' cars were parked at, or in the vicinity of, the primary place of employment. Hence, FBT would be payable by the company for providing the car parking.

Before that decision, the Federal Court had determined that where employees operated on only one aircraft during the day, that aircraft was their primary place of employment; and where employees operated on more than one aircraft during the day, then they had no primary place of employment. Thus, with no primary place of employment or a primary place of employment on an aircraft, any car used by the employee would not be parked in the vicinity and no FBT was payable by the company. This previous decision no longer stands.

The updated ruling now states that an employee's primary place of employment on a particular day will be either:

- the business premises of an employer which are, or were, the "sole or primary place of employment of the employee"; or

- the business premises of an employer that are, or were, “otherwise the sole or primary place from which, or at which the employee performs duties of his or her employment”.

A broad test of primary place of employment has been used in this context, and “primary” has been given its ordinary meaning of “first or highest in rank or importance, chief, principal”. Considerations of whether a place is an employee’s primary place of employment may include the place at which duties are performed, and the place which is primary to the employee’s conditions of employment as contained in employment contracts and/or industrial instruments (ie rostering, allowances and car parking entitlements).

Specifically, the updated ruling confirms that where an employee’s conditions of employment indicate that a particular business premises are primary to their employment, those premises may satisfy the definition of primary place of employment even if the employee performs duties principally at another place on a particular day.

In addition, where an employee performs duties from, or at, more than one business premises on a day, the employee’s primary place of employment may be identified through a quantitative and qualitative analysis of the duties performed from, or at, the different business premises. This updated ATO view applies both before and after its date of issue, so employers will need to take care, in particular when preparing for the end of the 2022–2023 FBT year.

Car parking: employer guide

An update to *Chapter 16 of FBT – a guide for employers* is also planned to be completed in April 2023. This update will incorporate practical guidance on the application of the car parking FBT law, including the meanings of “commercial parking station” and “primary place of employment”, and should be read in conjunction with the aforementioned updated ruling.

Electric vehicles: compliance guideline

A new area that the ATO is working on is the issuance of a draft practical compliance guideline for calculating electricity costs when charging an electronic vehicle (EV) at an individual’s home for FBT purposes. According to the ATO, this draft guideline will provide a methodology to enable users of EVs to determine the approximate cost for the electricity when charging an EV at home. It is expected to be released soon (sometime in March 2023).

While this new draft practical compliance guideline will not currently apply to those electric vehicles both held and used on or after 1 July 2022 and meets the other conditions for exemption from FBT (ie under the LCT threshold, and a zero or low emissions vehicle), it will be helpful for those vehicles that do not meet the conditions for FBT exemption and for reportable fringe benefits amount purposes.

For an eligible EV that is exempt from FBT, car expenses such as registration, insurance, repairs/maintenance and fuel (including electricity to charge and run electric cars) are also exempt. However, it should be noted that the provision of a home charging station is not a car expense associated with providing a car fringe benefit, and may be a property or an expense payment fringe benefit.

Although the private use of an eligible vehicle and associated expenses are exempt, businesses are still required to include the value of the benefit when working out whether an employee has a reportable fringe benefits amount. This entails working out the notional taxable value of the benefits, which under both the statutory and operating cost method is reduced for any employee contributions made.

For employees that charge EVs at their homes, the new draft guideline will hopefully provide an easier method for working out their contribution and reducing the taxable value of benefits for reportable fringe benefits amount purposes. It may also be useful in the future for all zero or low-emission vehicles, as the government has committed to a complete review into the FBT exemption by mid-2027 to consider electric car take-up, which may result in the FBT exemption being removed.

Source: www.ato.gov.au/General/ATO-advice-and-guidance/Advice-under-development-program/Advice-under-development---FBT-issues/
www.ato.gov.au/law/view/document?LocID=%22SAV/FBTGEMPD16%22&PiT=20220923000001&docid=SAV/FBTGEMPD16/00001

ATO targeting private not-for-profit schemes

As a part of its ever-tightening compliance net, the ATO has recently announced it is targeting specific tax avoidance behaviour in the not-for-profits sector. The first is private foundations used to operate businesses or income-producing activities on which no tax is paid. In some cases, a small portion of the income made

may be paid to humanitarian or social causes, such as through charities, which is used as justification for the foundation's purported tax-free status. The second is public benevolent institutions using schemes to avoid or reduce FBT.

This type of scheme using not-for-profit foundations first surfaced and was popular in the 2015–2016 income year. Its use declined after the ATO issued a taxpayer alert that same year; however, according to ATO intelligence, the scheme is now making a comeback. The basic premise of the scheme is that an adviser or promoter helps individuals to set up a "private foundation" which is then claimed to be exempt from all taxes.

This "private foundation" is then used by individuals to operate businesses or for income-producing activities. Unlike genuine not-for-profit foundations, individuals stream their untaxed employment, contractor or business income through their sham foundations, pay no tax on the income and use the funds for their own benefit. In some cases, a small portion of the income made may be paid to humanitarian or social causes, such as through charities, which is used as justification for the foundation's purported tax-free status.

According to the ATO, this type of sham arrangement has most or all of the following features:

- Articles of Association (Articles) or a similar document, often supplied by the adviser or promoter, typically describe the structure as a "non-profit private foundation". The Articles typically state that participants, who are sometimes described as "principal participants", are responsible for carrying on the activities of their foundations. The Articles often describe other individuals, who assist the participants in conducting the day-to-day affairs of the foundation, as "volunteers".
- Bank accounts are opened in the name of the foundation with the participants as signatories. The adviser or promoter may sometimes facilitate the opening of the bank accounts.
- The foundation is not registered for a tax file number (TFN) or an Australian business number (ABN).
- The foundation is not registered as a charity with the Australian Charities and Not-for-profits Commission (ACNC), nor does it have deductible gift recipient (DGR) status or otherwise meet the requirements for tax exemption under the tax law.
- The foundation may notify the ATO that it is excused from withholding tax obligations, on the basis that any payment from the foundation is exempt income. Participants often do not lodge income tax returns for themselves, with some notifying the ATO that lodgement is not required or that they have nil income to report. Some participants lodge income tax returns, but omit from their assessable income the business or personal receipts that have been streamed through the foundation.

The ATO notes that it is taking this matter seriously and has already commenced investigations of potential promoters.

The other issue that's currently under the spotlight involves not-for-profit organisations that are operating registered public benevolent institutions (PBIs) and are endorsed by the ATO as eligible for an exemption from FBT, up to a capping threshold. The ATO is concerned with arrangements where employees of PBIs are used to undertake charitable or commercial activities of other entities that are not themselves benevolent in nature.

Typically, these arrangements involve the provision of employment services by the PBI to another entity within the group which will include a charge-back or labour-hire agreement. Participants will then claim that the arrangement's purpose is to provide funding to the PBI to achieve its benevolent purpose. Accordingly, the ATO will be seeking to review these arrangements to determine if any have the sole and dominant purpose of avoiding or reducing FBT.

Source: www.ato.gov.au/Non-profit/Newsroom/General/Straight-from-the-Source---February-2023/?page=1#_Private__not_for_profit_foundations
www.ato.gov.au/law/view/document?DocID=TPA/TA20165/NAT/ATO/00001&PiT=99991231235958

Outcomes of quality of financial advice review

In a bid to increase the accessibility and affordability of quality financial advice, the government had previously commissioned a report into possible changes in the regulatory framework. The final report has now been released, containing 22 wide-ranging recommendations. According to the author of the report, Ms Michelle Levy, the current regulation of financial product advice focuses on providers and not consumers, and is itself an impediment to consumers getting useful guidance and good financial advice.

The recommendations are therefore more consumer-focused, and are wide-ranging. The government is currently consulting widely on the possible implementation of the requirements to make financial advice more accessible, along with strong professional standards. The following offers just a snippet of the relevant

recommendations in relation to financial services, and doesn't include other areas such as insurance, super, or wholesale clients.

Broaden the definition of personal advice

The definition of personal advice in the *Corporations Act 2001* should be broadened so that all financial product advice will be personal advice if it is given to a client in a personal interaction or personalised communication by a provider of advice who has (or whose related body corporate has) information about the client's financial situation or one or more of their objectives or needs.

Personal advice must be provided by a relevant provider

The Corporations Act should be amended to indicate that personal advice must be provided by a relevant provider where the provider is an individual and either the client pays a fee for the advice, or the issuer of the product pays a commission for the sale of the product to which the personal advice relates. In all other cases, personal advice can be provided by a person who is not a relevant provider.

Introduce a good advice duty

An individual who provides personal advice to retail clients must provide good advice. "Good advice" means personal advice that is, at the time it is provided, fit for purpose (having regard to various matters such as scope, content, nature, etc), and in all circumstances, good. If the advice is provided by a financial adviser (relevant provider), this duty applies to the financial adviser. In all other cases, this duty applies to the Australian financial services (AFS) licensee.

Introduce a new statutory best interests duty

The new best interest duty would be a true fiduciary duty that reflects the general law and does not include a safe harbour. This duty would apply only to financial advisers (relevant providers).

Implement new ongoing fee and consent arrangements

Providers would still need to obtain their clients' consent on an annual basis to renew an ongoing fee arrangement, but they should be able to do so using a single "consent form". The consent form should explain the services that will be provided and the fee the adviser proposes to charge over the following 12 months. The consent form should also authorise the deduction of advice fees from the client's financial product and should be able to be relied on by the product issuer.

Change the requirement to provide a statement of advice

The existing requirement to provide a statement of advice should be replaced with the requirement for a provider of personal advice to retail clients to maintain complete records of the advice provided and to provide written advice on request by the client. Clients should be asked whether they would like written advice before or at the time the advice is provided, and a request for written advice would be required to be made before, or at the time, the advice is provided.

Source: https://treasury.gov.au/publication/p2023-358632

Superannuation tax break changes

In an attempt to repair the Federal Budget and lower the overall national debt, the government is seeking to introduce changes to the way superannuation in accumulation phase is taxed over the threshold of $3 million. It is proposed that from the 2025–2026 income year, the concessional tax rate applied to future earnings for those with super account balances above $3 million will be 30%, instead of the current 15%. It will not affect those with super account balances below $3 million, which accounts for the majority of Australians.

Currently, earnings from super in the accumulation phase are taxed at a concessional rate of 15% regardless of the super account balance. It is now proposed that from the 2025–2026 income year, the concessional tax rate applied to future earnings for those with super account balances above $3 million will be 30%. This change would not apply retrospectively to earnings in previous years, and would not impose a limit on the size of super account balances in the accumulation phase.

This measure would affect an estimated 0.5% of people who have money in Australian super accounts, or around 80,000 individuals, so the government considers it a "modest" adjustment which is in line with its proposed objective of superannuation – to deliver income for a dignified retirement in an equitable and sustainable way.

To illustrate just how little the change would affect ordinary Australians: in the latest ATO taxation statistics (relating to the 2019–2020 income year), the average super account balance for Australian individuals is around $145,388, with a median balance of only $49,374. In addition, according to ASFA (Association of Superannuation Funds of Australia) estimates, for a comfortable retirement, a single homeowner individual aged 67 at retirement will need $65,445 per year. If that individual lives to the ripe old age of 100, their required balance would only equate to an amount of $1.5 million in super – well below the $3 million threshold proposed.

Let's take another example of an individual aged 65 in 2023 who is (perhaps unrealistically) hoping to retire by the time they reach the age of 67. If they had started contributing to super from 1992 (when compulsory super was introduced) and contributed up to the current concessional cap ($27,500) every year since 1992 for 33 years to the 2025 income year, they would have a capital amount of $907,500. Assuming a balance portfolio return of 6% per annum over the entire 33 years, that individual would still be shy of a $3 million super account balance, coming in at $2.8 million.

With younger Australians increasingly facing cost of living pressures, astronomical house prices, slow wages growth and uncertain international headwinds, most have no hope of contributing up to the maximum concessional cap every year and attaining a super balance even close to $3 million, short of winning the lotto or receiving a lucky inheritance. This effect is amplified for women, who are usually more likely to take time away from work, or move to part-time opportunities, in order to raise children and take on caring responsibilities.

According to the latest Expenditure and Insights Statement released by the Treasury, government revenue foregone from super tax concessions amount to $50 billion per year, and the cost of these concessions is projected to exceed the cost of the Age Pension by 2050. With this single proposed change, the government estimates that around $2 billion in revenue will be generated in its first full year of implementation, which can be used to reduce government debt and ease spending pressures in health, aged care and the National Disability Insurance Scheme (NDIS).

According to Treasurer Jim Chalmers, the government will seek to introduce enabling legislation to implement this change as soon as practicable. Consultation will still be undertaken with the super industry and other relevant stakeholders to settle the implementation of the measure.

"More than 99.5 per cent of Australians will continue to receive the same generous tax breaks that help them save more for retirement through superannuation. The 0.5 per cent of individuals with superannuation accounts over $3 million will receive less generous tax breaks for balances that are beyond what is necessary to fund a comfortable retirement", Dr Chalmers said.

Superannuation rates and thresholds for 2023–2024

The Client Alert team has used the latest average weekly ordinary time earnings (AWOTE) details from the Australian Bureau of Statistics to calculate the following superannuation rates and thresholds for 2023–2024 in accordance with Subdiv 960-M of the *Income Tax Assessment Act 1997*.

While the concessional contributions cap of $27,500 will remain unchanged for the 2023–2024 financial year, certain other important superannuation thresholds are set for an increase from 1 July 2023.

Contribution caps

The concessional contributions cap is $27,500 for 2023–2024 (unchanged since 2021–2022). As the concessional cap is now only indexed in $2,500 increments, the AWOTE index number of 1,807.70 for the quarter ending on 31 December 2022 was insufficient to trigger an increase to $30,000.

The non-concessional contributions cap is also unchanged at $110,000 for 2023–2024 (or $330,000 under the bring-forward rule over three years, subject to the other eligibility requirements).

The CGT cap amount for non-concessional contributions is $1.705 million for 2023–2024 (up from $1.650 million).

Co-contributions

The government co-contribution "lower income threshold" is $43,445 for 2023–2024 (up from $42,016 for 2022–2023), and the "higher income threshold" is $58,445 (up from $57,016).

Super guarantee

While the current super guarantee (SG) rate is already legislated to increase from 10.5% to 11.0% from 1 July 2023, the "maximum contribution base" will rise to $62,270 per quarter for 2023–2024 (up from $60,220 for 2022–2023).

An employer is not required to provide the minimum super guarantee support for that part of an employee's ordinary time earnings (OTE) above the quarterly maximum contribution base (ie $62,270 for 2023–2024). This quarterly maximum represents a per annum equivalent of $249,080 for 2023–2024.

Super benefits

The following indexed thresholds apply for 2023–2024:

- lump sum low rate cap: $235,000 (up from $230,000);
- untaxed plan cap: $1.705 million (up from $1.650 million);
- ETP cap amount: $235,000 (up from $230,000); and
- genuine redundancy and early retirement payments – tax-free amounts: base amount, $11,985 (up from $11,591); service amount, $5,994 (up from $5,797).

Pension cap

The general transfer balance cap, which is indexed to the consumer price index (CPI) rather than AWOTE, is set to increase from $1.7 million to $1.9 million on 1 July 2023.

The "total superannuation balance" threshold for making non-concessional contributions (which is tied to the general transfer balance cap) will also increase to $1.9 million for 2023–2024.

The "defined benefit income cap" will increase to $118,750 for 2023–2024.

Source: https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/consultation-begins-legislating-objective-super
https://treasury.gov.au/consultation/c2023-361383
www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earnings-australia/nov-2022

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