client alert | explanatory memorandum

July 2023

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 23 June 2023.

Key tax considerations this tax time

As the financial year draws to a close, it's time to start thinking about whether year-end tax planning is in order. Tax planning requires consideration of income and deductions for the whole year, as well as whether compliance requirements have been met – for example, whether appropriate elections have been made on a timely basis and other appropriate documentation has been prepared.

Working from home deductions

The ATO has updated its guidance (contained in Practical Compliance Guideline PCG 2023/1) on an accepted method that individuals may use in calculating deductions for working from home expenses as an alternative to the actual expenses method.

The shortcut method of claiming a rate of 80 cents per hour worked from home is no longer available – the measure ended on 30 June 2022. It was temporarily introduced during the COVID-19 pandemic (between 1 March 2020 and 30 June 2020 in the 2019–2020 income year, and for the 2020–2021 and 2021–2022 income years).

From 1 July 2022, taxpayers can claim deductions using the revised fixed-rate method, using a rate of 67 cents per hour (up from 52 cents per hour in previous years) provided they satisfy three conditions:

- the work performed must involve carrying on substantive employment duties or carrying on business (occasionally checking emails is not sufficient to meet this condition); and
- the taxpayer must have incurred deductible additional running expenses; and
- the taxpayer must keep records that show they incurred the expenses.

The fixed-rate method estimates the expenses incurred in relation to the following categories:

- energy expenses (electricity and/or gas) for lighting, heating/cooling and to run electronic items used for work;
- internet expenses;
- mobile and/or home telephone expenses; and
- stationery and computer consumables.

This means two things. First, taxpayers who use the fixed-rate method cannot claim additional deductions for expenses in relation to any of these categories, even if they are incurred in relation to working somewhere other than home (eg using a mobile for phone or internet when travelling or at the office). Second, depreciation of furniture and equipment (eg desk, computer and printer) may be calculated separately (and in addition) to the fixed rate.

Taxpayers who don't meet all three conditions will not be able to rely on the fixed-rate method and will need to utilise the actual expenses method.

Rental properties and holiday homes

The ATO has flagged rental properties and holiday homes as an area of particular focus for this 30 June.

Include all income: data-matching

The ATO receives information from a number of sources (eg sharing economy platforms, rental bond agencies and state and territory revenue authorities) that enables it to detect under-reporting of income.

Interest on loans

Interest on loans may not fully be deductible if the property is not genuinely available for rent, if it is used for private purposes for part of the year, or if family or friends are charged a below-market rent. Additionally, interest on the loan secured against the property will need to be apportioned if part of the amount borrowed is used for private expenses, such as holidays or a new car.

Depreciation

Where the rental property was acquired after 8 May 2017, no deduction will be available in respect of depreciating assets installed in a rental property at the time of acquisition unless the property qualified as “new residential premises” within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) or the taxpayer’s rental activities amount to the carrying-on of a business. Where the rental property was acquired before 9 May 2017, no deduction will be available in respect of depreciating assets installed in the property as at 30 June 2017 if no depreciation deduction was available in the year ended 30 June 2017 because, for example, the property was not available for rent at any time during that year.

These rules do not apply to limit depreciation deductions for companies, superannuation entities (other than self managed superannuation funds) and certain other entities.

Travel expenses

No deduction is available for travel expenses related to inspecting, maintaining or collecting rent for a rental property unless the expenses were incurred in carrying on a business of providing residential accommodation or were incurred by a company, self managed superannuation fund or certain other trusts or partnerships. There are exceptions where the taxpayer’s rental activities amount to the carrying on of a business, or the taxpayer is a company, superannuation entity (other than a self managed superannuation fund) or managed investment trust.

Temporary full expensing

The immediate deduction for the cost of eligible depreciating business assets that has been available under the temporary full expensing concession since 2020 comes to an end this 30 June. In order to access the concession, the depreciating asset must be used or installed ready for use by 30 June 2023. The Federal Government announced in its May 2023 Budget that from 1 July 2023, an immediate deduction will only be available to small business entities (that is, those with aggregated turnover less than $10 million) and will be limited to assets costing less than $20,000.

Loss carry-back for corporate tax entities

Subject to certain eligibility criteria and integrity rules being satisfied, corporate tax entities may be entitled to claim a refundable tax offset by carrying back a tax loss arising in the 2022–2023 income year to one or more of the four prior income years (that is, as far back as the 2018–2019 income year).

Deductions for superannuation contributions

For an employer to be entitled to a deduction for superannuation contributions, the contribution must be received by the fund on or before 30 June. The super guarantee contribution rate increased to 10.5% of an employee’s ordinary time earnings from 1 July 2022.

Individuals wishing to claim a deduction for personal contributions must provide their fund with a notice of intention to claim a deduction and have that acknowledged by the fund before the earlier of the day the individual’s tax return is lodged and 30 June of the next income tax year.

Trust considerations

In addition to ensuring the requirements of the trust deed and the constitution of the corporate trustee, where relevant, are satisfied, trustees need to consider the implications of the Victorian Court of Appeal decision in *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142 and the ATO guidance in relation to reimbursement agreements.

In *Owies*, two of the three primary beneficiaries of the Owies Family Trust took action against the trustee (a company controlled by their parents) claiming that, in making distributions over a period of years, it breached its fiduciary duty to give “real and genuine consideration” to their needs. The beneficiaries were successful in getting an order that the trustee be removed and replaced by an independent trustee, such that the family no longer had control over trust distributions. The Court also noted that the beneficiaries may have been successful in having prior distributions being declared void and an order for compensation to be paid. The commercial risk this case highlights is that an aggrieved beneficiary may be able to challenge prior year distributions and have them declared void and have the trustee removed.

Division 7A matters

Transactions involving a company and any associated entity (individual, trust or partnership) to which Div 7A of Pt III of the *Income Tax Assessment Act 1936* might apply (eg a payment, a loan, forgiveness of a debt or use of the company’s assets) should be carefully considered to determine whether a deemed dividend arises and, if so, what action could be taken to avoid that consequence.

Ensure that minimum yearly repayments (MYRs) are made before 30 June in respect of Div 7A loans made in prior years. Where dividends need to be declared by 30 June to enable MYRs to be made, ensure necessary resolutions are made and offset agreements are entered into before year end. For prior year unpaid trust entitlements that have been placed on investment agreements, ensure that appropriate amounts of interest have been recorded and that the interest has been paid in cash.

Source: www.ato.gov.au/Tax-professionals/Prepare-and-lodge/Tax-Time/Overview-of-key-changes/

Stay alert for tax time scams

The Federal Government has warned of scammers targeting Australians ahead of tax time 2023. The number of scam reports received to date has topped 19,843 and impersonation scams are becoming increasingly commonplace. These scams typically consist of unsolicited contact through SMS, email, or on social media offering refunds or help to solve tax issues. The ATO recommends not engaging with any unsolicited contact, ending any conversations as soon as possible and independently looking up the ATO's number to initiate contact in order to verify any communication is genuine.

In a sign of just how widespread scams have become, Assistant Treasurer and Minister for Financial Services Stephen Jones has issued a warning for Australians to beware of scams that are circulating in the lead-up to tax time 2023. According to the government, the number of scam reports received to date for the 2022–2023 income year is already at 19,843 and is projected to exceed the 20,000 scams reported in the 2021–2022 income year.

Tax time scams typically involve the impersonation of the ATO to obtain personal information or solicit unlawful payment. The common tricks tax scammers are using recently include:

- posing as the ATO on social media and offering to help individuals with tax and super questions, which require the individuals to hand over personal information such as tax file numbers, dates of birth, names, addresses etc;
- luring unsuspecting individuals with an offer of a fake tax refund in return for the provision of personal information;
- initiating conversations via phone, social media private messages, email and SMS, attempting to keep the individual engaged for as long as possible through various means including threats and intimidation, offers to help and so on, to either collect personal information or solicit payment.

The ATO now has a dedicated team that monitors queries and assists taxpayers who have fallen victim to scammers. While the ATO will sometimes contact taxpayers by phone, email, SMS or post, it will never send out links to login to ATO online services or ask taxpayers to send personal information via any means. To be extra cautious, the ATO recommends that if taxpayers are unsure whether a communication they've received is genuinely from the ATO, they should not reply and not call any number shown in the caller ID, phone log, SMS or voicemail. Rather, they should look up and use the ATO phone number or other contact details on the official ATO website, www.ato.gov.au/.

Many scammers will use spoofing technology to show a real ATO or an Australian phone number in the caller ID or call log. The ATO notes that its genuine calls will not show a number, but will be shown as No Caller ID. In addition, as some scammers may also attempt to get the individual into a conference call with a third party – for example, fake tax or law enforcement officers – the ATO states that it will never pull any individual into a conference call with a third party, not even the individual's tax agent or law enforcement.

In terms of SMS and email communications, the ATO says it will never send an unsolicited message asking individuals to return personal identifying information through these channels. It also does not send links or attachments for taxpayers to open or download. If the communication contains either a link or attachment and is purportedly from the ATO, it is highly likely to be a scam.

Individuals who have fallen victim to an ATO scam are encouraged to contact their bank or financial institution if financial information or money was provided to the scammer, make an official report to local police, and report the scam through either the ATO's phone hotline or specific scams email address.

Source: www.scamwatch.gov.au
www.ato.gov.au/general/online-services/identity-security-and-scams/verify-or-report-a-scam/
https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/tax-scammers-are-targeting-you-tax-time

Small business lodgment amnesty: reminder

The ATO has reminded eligible small business taxpayers to take advantage of the lodgment penalty amnesty program announced in the recent 2023–2024 Federal Budget. The amnesty applies to tax obligations covering income tax returns, business activity statements or FBT returns that were originally due between 1 December 2019 and 28 February 2022. Superannuation obligations and penalties associated with

the taxable payments reporting (TPAR) system are not included as a part of the program. The amnesty is running for the period 1 June 2023 to 31 December 2023.

"The past few years have been tough for many small businesses, with the pandemic and natural disasters having a significant impact", said ATO Assistant Commissioner, Emma Tobias. "We understand that things like lodging ATO forms may have slipped down the list of priorities. But it is important to get back on track with tax obligations. Lodging these forms are not optional, so we hope our amnesty will make it easier for impacted small businesses to get back on track."

To be eligible for the amnesty, small businesses must have had an annual turnover of less than $10 million at the time the original lodgment was due, and lodge the relevant overdue forms and returns during the amnesty period (between 1 June 2023 and 31 December 2023). It should be noted that the amnesty does not apply to privately owned groups or individuals controlling over $5 million of net wealth.

Where eligible small businesses lodge relevant overdue forms and returns during the amnesty period, any associated failure to lodge (FTL) penalties will be proactively remitted and businesses will not need to separately request a remission. The ATO flags that some taxpayers may see a FTL penalty on their account for a short period of time, but reassures eligible taxpayers that it will be remitted as per the amnesty.

Although FTL penalties will be remitted, the ATO emphasises that no other administrative penalties or general interest charge (GIC) amounts will be remitted as a part of the amnesty. Therefore eligible small businesses with an existing debt or that accrue a new debt through late lodgment may still have GIC applied to those debts. The most current annual rate of GIC (for the July to September 2023 quarter) is 10.90%.

In addition, the ATO encourages businesses outside the amnesty eligibility to also lodge any overdue forms or returns to avoid being classified as not being actively engaged with the tax system, which is a red flag that may lead to other action. While FTL and other penalties may apply to those businesses lodging outside of the amnesty, the ATO will consider the unique circumstances of every business taxpayer and may remit penalties on a case-by-case basis.

Small businesses that may be concerned about debts which may arise once they lodge their overdue forms or returns can take comfort in ATO's assurances that it will work with taxpayers to figure out the right solution for each situation. This includes having a range of support options available, including payment plans, compromise of tax debt, or deferring repayments. Some small businesses may also be able to set up their own payment plan online through either MyGov or the ATO Business Portal.

Source: www.ato.gov.au/Media-centre/Media-releases/Small-businesses-given-opportunity-to-get-back-on-track/

"Buy now pay later" sector facing more regulation

As foreshadowed last year, the "buy now pay later" (BNPL) market will soon be facing more regulation. Assistant Treasurer Stephen Jones recently announced that the government will be moving forward to bring BNPL within the Credit Act's application to apply a tailored version of the responsible lending obligations to BNPL products. Consultation with industry and consumer groups will be occurring in the coming months, with draft legislation expected to be released later this year. The final Bill is expected to be introduced into Parliament by the end of the year.

Late in 2022, the Federal Government released a consultation paper seeking views on options to regulate the BNPL market. The paper outlined three increasingly rigorous options for the regulation of the BNPL market, consisting of: strengthening the BNPL industry code plus an affordability test; limited BNPL regulation under the *National Consumer Credit Protection Act 2009* (Credit Act) (including licensing and a scalable unsuitability test); or regulation under the Credit Act.

Consultation has since ended with 78 submissions received from a range of stakeholders, including 16 confidential submissions. In response to the submissions and studies by consumer advocates, the Assistant Treasurer announced that the government will be moving forward with change of law to regulate the BNPL market that is in line with Option 2 of the consultation paper (that is, limited BNPL regulation under the Credit Act).

"Our plan prevents lending to those who cannot afford it, without stopping safe, prudent BNPL use", Stephen Jones said. "Our plan maintains the benefits of BNPL that many Australians enjoy, and we must ensure that providers will have appropriate safeguards in place, and we must ensure that they operate honestly, efficiently, and fairly, in line with other regulated credit products."

According to the original consultation paper, Option 2 proposes to bring BNPL within the Credit Act's application to apply a tailored version of the responsible lending obligations (RLOs) to BNPL products. It proposes to amend the Credit Act to require BNPL providers to hold an Australia credit licence or be a representative of a licensee with a requirement to comply with most general obligations including internal/external dispute resolution, hardship provisions, compensation arrangements and marketing rules.

In addition, BNPL providers would be required to assess that credit is not unsuitable for an individual (similar to the existing RLO framework), scaled to the level of risk of the BNPL product or service. Providers would also be prohibited from increasing a consumer's spending limit without explicit instructions from the consumer, and fee caps for charges relating to missed or late payments would be required, combined with additional warning and disclosure requirements. Merchants who offer BNPL products to consumers would not be required to be an authorised credit representative of the BNPL provider.

In the announcement, the Assistant Treasurer touted that the proposed regulation would also give the Australian Securities and Investments Commission (ASIC) strong enforcement powers, which is in line with the consultation paper. In it, an enhanced role for ASIC as the regulator of BNPL was envisaged with a corresponding extension of ASIC's industry funding arrangements to allow recovery of costs from the BNPL sector. Further, there was consideration in relation to putting in place arrangements to monitor and measure outcomes arising from BNPL use and the effectiveness of any reforms and industry initiatives.

The government will be consulting with the industry and consumer groups in the coming months to bed down the details of the potential legislation. Draft legislation is expected to be released later this year for consultation, and the final Bill is expected to be introduced into Parliament by the end of the year.

Source: https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-borrowing-summit
https://treasury.gov.au/consultation/c2022-338372

Minimum pension payment changes

Retirees who draw an account-based pension from their super need to be aware that the 50% reduction in the minimum pension drawdown rate for superannuation and annuities which applied for previous years will no longer apply from 1 July 2023. This temporary measure was introduced by the previous Federal Government as part of its response to the COVID-19 pandemic, which was negatively impacting super and pension/annuity balances. It applied for the 2019–2020 to 2022–2023 income years.

By way of background, most income streams paid from a super account held in an individual's name (ie the member) are account-based pensions. These pensions are required to meet minimum standards, including not being able to increase the capital supporting the pension using contributions or rollover amounts once the pension has commenced, and paying a minimum amount at least once a year.

In general, minimum payments are determined by two factors:

- age of the beneficiary – the age of the beneficiary is determined at either 1 July in the financial year in which the payment is made, or the commencement day of the pension or annuity if that is the year in which it commences; and
- account balance of the superannuation or annuity – determined as at 1 July in the financial year in which the payment is made, or by the balance on the pension commencement day (if the pension commenced during the financial year), or the amount of the withdrawal benefit (if the amount of the pension account balance is less than the withdrawal benefit that the member would be entitled to if the pension were to be fully commuted).

For the 2023–2024 financial year, the following standard percentage factors will apply.

Age of beneficiary (years)	Standard percentage factor (%)
0 to 64	4
65 to 74	5
75 to 79	6
80 to 84	7
85 to 89	9
90 to 94	11
95+	14

In addition, it should be noted that any pension commenced on or after 1 June in a financial year will not be subject to minimum payment requirements for that specific financial year.

Example

Trevor is 70 years old and decides to retire on 1 July 2023. On that date, Trevor's super account balance was determined to be $800,000. The minimum drawdown rate according to Trevor's age is 5%; therefore, his required annual minimum pension payment for the 2023–2024 income year is $40,000 ($800,000 × 5%). If the pension is commenced on another date during the income year, it will need to be apportioned by the number of days remaining in the year. So had Trevor commenced the pension on 1 January 2024 instead, the required annual minimum pension payment for 2023–2024 would be $20,000 ($8000 × 5% × 182 days/365 days).

Note that if Trevor decided to commence his account-based pension on 1 June 2024 instead of 1 July 2023, no minimum payment would be required from the pension for 2023–2024.

While the minimum annual payments are mandated, there are no maximum annual payments, except for transition to retirement pensions which have a maximum annual payment limit of 10% of the account balance at the start of each financial year. This means that retirees can draw a pension above the minimum pension payment amount, which may be especially welcome given the current cost of living pressures.

Source: www.ato.gov.au/Super/SMSF-newsroom/General/Minimum-annual-payments-for-super-income-streams/ www.ato.gov.au/super/apra-regulated-funds/paying-benefits/income-streams/#Minimumpayments

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