client alert | explanatory memorandum

September 2024

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 26 August 2024.

Claiming the tax-free threshold: getting it right

If you're an Australian resident for tax purposes, you don't have to pay income tax on the first $18,200 you earn each year, from any source. This is called the "tax-free threshold". If you have more than one job, change employers during the year, have a sole trader side gig or get government payments, it's important to think about the tax-free threshold and which employer, job or payment you'll claim it for. Getting this right will help avoid unexpected tax debt when lodging your return.

To make sure your employers withhold enough tax from your take-home pay, the ATO generally advises you should claim the tax-free threshold once, from your "main" payer. Broadly, this means claiming it from the job, gig or payment that pays you the most during the year. That payer will not withhold income tax from the first $18,200 they pay you, but will withhold tax from payments once your earnings go over the threshold.

When you do your tax return at the end of the financial year, the ATO adds up your income from all sources, and all tax withheld from that total income. If not enough tax has been withheld, you can expect a tax bill. If more tax has been withheld than you owe for your total earnings, you can expect a refund.

Claim the tax-free threshold

When you start a new job, your employer should ask you to complete a withholding declaration (as well as records like a tax file number declaration and super standard choice form). They may give you an electronic or paper form, or you can download one from the ATO website, or use ATO online services via your myGov account.

To claim the tax-free threshold, you must be an Australian resident for tax purposes (although some exceptions apply) and indicate this on the declaration, then answer "yes" to the question "Do you want to claim the tax-free threshold from this payer?". Where you answer "no", tax will be withheld from all income from that payer.

It's best not to claim the threshold from multiple payers at the same time unless you're completely sure you'll earn less than $18,200 in total for the year. Overclaiming might make your take-home pay higher each pay cycle, but will likely mean a tax debt later.

Changing jobs

If you change jobs during the income year, your previous employer stops paying you. This means you'll automatically no longer be claiming the tax-free threshold from them. You can claim the threshold from your new payer even if you have claimed it from your previous employer.

If you add a job or side gig that will provide more income than your existing main payer, you can change your claim at any time.

Altering your tax-free threshold claim

The easiest way to change your claim is using ATO online services, linked to your myGov account.

Sign in to myGov, go to ATO online services, and select *Employment* from the menu. Then select either:

- *New employment*: to complete your tax details or choose a super fund or both for a new employer, or provide your tax file number to your superannuation fund; or
- *Employment details:* to view and update your tax or super details with your current employer.

Select the dropdown box beside your current employer's business name/ABN to view your tax and super details. If your current employer isn't displayed or the *Update* button isn't available, select *New employment*.

Don’t forget your side gig

Remember that if you’re earning income outside of employment (eg as a sole trader) you’ll need to pay tax yourself on that income. This may mean putting a percentage aside for tax each time you’re paid, or using pay as you go (PAYG) instalments. How much you’ll need to pay depends on your total combined income for the year, and how much total income tax is withheld by your employers.

Source: www.ato.gov.au/individuals-and-families/jobs-and-employment-types/working-as-an-employee/tax-free-threshold https://community.ato.gov.au/s/article/a079s0000009GmuAAE/how-much-tax-should-i-pay-on-a-second-job-claiming-the-taxfree-threshold
https://community.ato.gov.au/s/article/a079s000000ZeJFAA0/tax-tips-for-managing-your-side-hustle

Withholding for foreign residents: an ATO focus area

Does your business or investment structure make payments such as interest, dividends or royalties to any foreign residents? You may be required to withhold tax from these payments. The ATO has recently reported that it’s currently focusing on ensuring that taxpayers are aware of these obligations.

If these withholding requirements apply to you, you’ll need to lodge a PAYG annual report or an annual investment income report, and withhold and pay the correct amount of tax.

When does withholding tax apply?

Figuring out whether an obligation to pay withholding tax arises from a particular payment can be complex. Assuming your structure is resident in Australia, the starting point is that the withholding tax regime generally applies to interest, dividends and royalties derived by foreign residents, unless an exemption applies. This means the withholding tax obligation arises whether you make the payment to the foreign resident, credit it to their account, or deal with the payment on their behalf or at their direction. (Certain payments can also be captured if your structure is not resident but has a permanent establishment in Australia.)

However, a number of exemptions apply. These include:

- the franked amount of any dividends;
- “deemed” dividends that arise under Division 7A;
- certain payments to non-residents who are carrying on business through a permanent establishment in Australia;
- certain interest and royalties that you incurred as an outgoing in carrying on business through a permanent establishment outside of Australia;
- payments to certain exempt entities involved in fields like charity, community service, health, tourism, culture and sports;
- payments related to certain publicly offered company or unit trust debentures or debt interests; and
- other exemptions.

As this list demonstrates, the exemptions are numerous and can be technical in operation. This is why it’s important to seek advice specific to your circumstances if you make any payments to non-residents. Further, if the payment is made to a resident of a country which has a tax treaty with Australia, this may affect the withholding tax rate or provide an exemption.

What is the ATO looking for?

The ATO is alert to payers who have not withheld and paid amounts (or have withheld and paid incorrect amounts), incorrectly relied on an exemption or treaty relief, or misclassified deductions for interest or royalty payments to an offshore entity.

The ATO has also issued several alerts in recent years regarding specific arrangements such as “treaty shopping”, use of interposed offshore entities, and deferral of interest with deductions claimed on an accrual basis as means to avoid, defer or reduce withholding tax obligations.

Source: www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/our-focus-withholding-tax-obligations-on-certain-payments-to-non-residents

Small business restructure roll-over: tax relief for genuine business restructures

With the latest statistics showing a significant rise in liquidations and with the ATO’s focused efforts on debt collection, small businesses face significant financial pressures. However, the answer isn’t to evade

responsibilities or take shortcuts. Business restructuring can be a saviour but it has to be done properly and in compliance with the relevant laws.

The small business restructure roll-over (SBRR) provides a legitimate, structured path for businesses to reorganise their operations, allowing them to better meet these challenges without prejudicing creditors or engaging in unethical practices. For many small business owners, the idea of restructuring can often seem daunting, laden with complexities and potential tax liabilities. However, the SBRR, which is contained in Subdiv 328-G of the *Income Tax Assessment Act 1997* (ITAA 1997), provides a valuable opportunity to transfer active assets between eligible restructuring entities without incurring an income tax liability.

This article explores how the SBRR facilitates genuine business restructures, enabling owners to protect and grow their businesses while maintaining full compliance with tax laws and creditor obligations. It delves into the eligibility criteria, the types of assets that qualify, and the practical implications of choosing the roll-over, empowering small business owners to make informed decisions about their restructuring strategies.

Defining a small business entity

A small business entity is defined as an entity with an aggregated turnover of less than $10 million. This includes businesses that operate as a sole trader, partnership, company or trust, provided they meet the turnover threshold. Entities connected with or affiliated with a small business entity also fall under this definition. The classification is crucial for accessing various tax concessions, including the SBRR.

Eligibility criteria for the SBRR

To qualify for the SBRR, the following conditions must be met:

- *Business structure:* Each party to the transfer must be a small business entity, an entity connected with a small business entity, or a partner in a partnership that is a small business entity.
- *Turnover threshold:* The business must have an aggregated turnover of less than $10 million.
- *Types of assets:* The assets being transferred must be active assets, which include CGT assets, trading stock, revenue assets, or depreciating assets.
- *Genuine restructure:* The transfer must be part of a genuine restructure of an ongoing business, not an artificial or inappropriately tax-driven scheme.
- *Economic ownership:* There must be no change in the ultimate economic ownership of the transferred assets.

Genuine restructure of an ongoing business

A genuine restructure is expected to deliver benefits to the efficient conduct of the business. This may involve:

- facilitating growth, innovation or diversification;
- adapting to changed conditions;
- reducing administrative burdens or compliance costs; and
- maintaining economic ownership and continuity of business operations.

Example 1: Asset protection

Facts: Andrew operates a small pool cleaning and maintenance business. Andrew's business has grown significantly and is generating larger profits. His insurance premiums have also increased. Due to legal risks, he moves the business into a discretionary family trust. He and his wife are the beneficiaries and Andrew is the primary individual specified in the family trust election in force in respect of the trust. For asset protection purposes, a corporate trustee is appointed and the trust contracts with clients. Andrew does not personally provide guarantees or indemnities. Andrew has also caused the trustee to employ other staff to service the larger client base. The trustee pays Andrew and the other employees a salary commensurate to the services they provide to the business. Andrew and the trustee of the discretionary family trust choose to apply the SBRR.

Outcome: This restructure is genuine as it provides asset protection and facilitates business growth, with no change in the economic ownership of the business.

Example 2: Maintaining essential employees

Facts: Swetha runs a family business with her siblings through a discretionary family trust. They transfer the business assets to a company and later issue shares to key employees to incentivise them.

Outcome: This restructuring is genuine as it aims to enhance business performance by retaining key employees, without significantly changing the economic ownership of the business.

Non-qualifying restructure

A non-qualifying restructure does not meet the criteria of a genuine restructure and is primarily tax-driven or results in significant changes in economic ownership.

Example 3: Tax-driven scheme

Facts: Kevin owns Amazing Projects Pty Ltd, which runs a successful business. To sell the business to buyers unwilling to purchase company shares, Kevin transfers the business assets to himself. After 12 months, Kevin sells these assets to the buyers, claiming the general 50% CGT discount, which Amazing Projects Pty Ltd would not have been able to claim.

Outcome: This restructure is not genuine as it is undertaken to facilitate the economic realisation of business assets and gain tax advantages, not to enhance business efficiency or growth. The SBRR is not applicable in this scenario.

Eligible assets

The SBRR applies to active assets, which include:

- *CGT assets:* assets subject to capital gains tax;
- *depreciating assets:* assets whose value declines over time due to wear and tear;
- *trading stock:* goods held for sale or manufacturing; and
- *revenue assets:* assets generating ordinary income.

Non-active assets, such as loans to shareholders, are not eligible for the roll-over.

Consequences of choosing the roll-over

Opting for the SBRR has several tax implications:

- *No immediate tax liability:* The transfer does not trigger an income tax liability at the time of the transfer.
- *Cost base for transferor and transferee:* The transferor is deemed to have received an amount equal to the asset's cost, and the transferee acquires the asset at this cost.
- *GST and stamp duty:* Potential liabilities like GST or stamp duty must be considered, as they might still apply.
- *General anti-avoidance rule:* The roll-over does not protect against the application of anti-avoidance rules, ensuring the transaction is not purely tax-motivated.

For CGT assets, the transferee must wait at least 12 months to claim the CGT discount on any subsequent sale, and pre-CGT assets retain their status. For trading stock, the roll-over cost is based on the transferor's cost or value at the beginning of the income year. Depreciating assets allow the transferee to continue deducting the decline in value using the transferor's method and effective life. Revenue assets are transferred without resulting in a profit or loss for the transferor.

Practical implications

The SBRR is a strategic tool for small businesses looking to restructure without the immediate burden of tax liabilities. It allows for greater flexibility in organising business assets, potentially leading to more efficient and effective business operations. For instance, restructuring from a sole proprietorship to a trust or a company can be seamlessly facilitated through the roll-over, provided the ultimate economic ownership remains unchanged.

Summary

The small business restructure roll-over offers significant tax relief and flexibility for small businesses undergoing genuine restructures. By understanding the eligibility criteria and implications, business owners can leverage this provision to enhance their business structure while maintaining compliance with tax regulations.

Source: www.ato.gov.au/law/view/document?docid=COG/LCR20163/NAT/ATO/00001&PiT=20180219000001
www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/eligibility-for-the-small-business-restructure-rollover

Super guarantee a focus area for ATO business debt collection

The ATO has revealed its focus areas for this year, with business debt collection identified as a key strategic priority. In its *Corporate Plan 2024–25*, the ATO says that it will have "an increased focus on business debt including superannuation guarantee, pay as you go withholding and goods and services tax". This is a timely reminder for all businesses to ensure they're meeting their obligations.

Superannuation guarantee (SG) remains an important compliance focus. The most recent ATO statistics show that although 94% of employers are meeting their SG obligations without ATO intervention, the ATO still raised over $1 billion in SG charge liabilities in the 2022–2023 financial year. That figure reflects a lot of extra super liability for Australian businesses that could have been avoided if they had paid the required SG contributions on time.

To ensure your business doesn't incur these extra liabilities, you must pay SG contributions for your employees and eligible contractors on time and to the correct fund. The quarterly due dates are as follows:

- Q1 (1 July to 30 September): 28 October;
- Q2 (1 October to 31 December): 28 January;
- Q3 (1 January to 31 March): 28 April; and
- Q4 (1 April to 30 June): 28 July.

Some important things to remember include:

- Some contracts and awards may require you to pay contributions more regularly than quarterly.
- If you make contributions to a commercial "clearing house", the contribution is considered to be paid when it's received by the employee's fund, not by the clearing house. However, if you use the ATO's Small Business Superannuation Clearing House, the contribution is "paid" when received by that clearing house.
- From 1 July 2026, employers will need to pay SG at the same time as salary and wages (commonly known as "payday super").

What if my business misses an SG payment?

Taking action promptly is essential to accessing the ATO's support services and minimising your exposure to penalties. The ATO says that it's willing to work with employers who want to put things right.

When you miss a payment, you must lodge an SG charge statement with the ATO within one month of the missed quarterly due date. Lodging on time is important, as failing to do so will incur a further penalty known as a "part 7 penalty", which can be up to 200% of your SG charge liabilities. Also, when you lodge on time, you may then be able to set up a payment plan to pay your liabilities in instalments. You can ask the ATO for an extension to the lodgement date, but you must do this before the due date.

You'll also need to pay the SG charge. This charge is more than the amount of contributions you would have paid if you had paid them on time, and it's not deductible. The charge comprises:

- the amount of the missed contributions (but calculated on salary and wages, including overtime, which is more than the usual "ordinary time earnings" basis for on-time SG contributions);
- interest of 10% pa (which accrues from the start of the relevant quarter); and
- an administration fee of $20 per employee, per quarter.

This is paid to the ATO, not your employee's fund. General interest charge will accrue on any outstanding SG charge, and the ATO may also issue a director penalty notice if it remains unpaid.

Source: www.ato.gov.au/businesses-and-organisations/super-for-employers/missed-and-late-super-guarantee-payments

New "bring-forward" contribution thresholds for 2024–2025

You may have heard that the annual cap on non-concessional contributions (NCCs) has increased for 2024–2025. This is great news for superannuation members who want to maximise their retirement savings. But do you know what this means for the three-year "bring-forward" arrangement? There are rules governing your eligibility, and it's important to understand how the relevant thresholds have changed – including a small trap that some may not have expected! Now is a good time to re-examine the rules.

NCCs are your own after-tax contributions, meaning they're distinct and separate from concessional contributions such as compulsory employer contributions made for you, additional salary sacrifice

contributions, and personal contributions you've made for which you claim a deduction. From 1 July 2024, the annual cap on NCCs increased from $110,000 to $120,000 due to indexation.

This increase means that the maximum amount that can be contributed under a "bring-forward" arrangement has also increased. A "bring-forward" arrangement allows eligible members to contribute up to three years' worth of NCCs in a shorter timeframe. The maximum amount is now $360,000 (being 3 × $120,000), up from $330,000. Therefore, eligible members could contribute up to $360,000 all at once, or as multiple contributions, as long as the total amount does not exceed $360,000 over three financial years. This may be an attractive contribution strategy for those with an inheritance, a large bonus payment, or proceeds from the sale of an investment.

If you already commenced a bring-forward arrangement in the last year or two, you won't get the benefit of the increased NCC cap for that arrangement. However, if you've been thinking about commencing one of these strategies, now is great time to consider this further.

What is my eligibility?

First, there's a basic age requirement that you must be aged under 75 at some point in the financial year when you commence the arrangement. (If you plan on activating a bring-forward arrangement in the financial year you turn 75, talk to your advisor because there are additional rules that will restrict when you can make contributions.)

The second key rule concerns your total superannuation balance (TSB). Importantly, it's your TSB as at 30 June of the previous financial year that counts:

- If your TSB was less than $1.66 million as at 30 June 2024, you're eligible to commence a maximum $360,000 three-year bring-forward arrangement in 2024–2025.
- If your TSB was at least $1.66 million but under $1.78 million, you're eligible to commence a $240,000 two-year bring-forward arrangement.
- If your TSB was $1.78 million or more, you're not eligible for a bring-forward arrangement.

Members who had TSBs of at least $1.78 million but under $1.9 million as at 30 June 2024 may simply make a regular NCC this year of $120,000. However, if your TSB was at $1.9 million or more, any NCCs would be treated as excess contributions.

Watch out for the trap

Be aware that the TSB eligibility limits have changed since last year – and they've decreased. In 2023–2024, the thresholds described above were slightly higher at $1.68 million and $1.79 million. So, while the NCC cap and the maximum bring-forward cap have increased, the cut-off points when your eligibility reduces or ceases are lower. Be careful about referring to older advice or information (eg online) that is based on the TSB thresholds for 2023–2024.

Source: www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/growing-and-keeping-track-of-your-super/caps-limits-and-tax-on-super-contributions/non-concessional-contributions-cap

Thomson Reuters would like to hear from you

Subscribers are invited to submit topics for articles for future publication. Information should be sent to:

Publisher – **Client Alert**

Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668
PO Box 3502, Rozelle NSW 2039

Tel: 1800 074 333

Email: SupportANZ@thomsonreuters.com

Website: www.thomsonreuters.com.au