INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

MONTHLY TAX UPDATE

November 2023

Presented by

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November 2023

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

Monthly Update – Agenda

Cases

- *Bendel* – Unpaid present entitlements and Division 7A
- *PQBZ* – Residency, default assessment and onus of proof
- *Hayes* – Dividend stripping
- *Simplot* – Prepared meal or meal component for GST

Legislation

- PWC – Collateral damage

Monthly Update – Agenda (cont'd)

ATO Guidance

- TR 2023/3 – Expenses associated with holding vacant land
- TR 2022/4 and PCG 2022/2 – Updated ATO guidance on s 100A
- PCG 2018/4DC1 – Updated ATO guidance on liability of legal personal representative of a deceased
- TR 2023/D1 – Self-education expenses
- LI 2023/32 – Correcting GST errors
- Decision Impact Statement – Sale of residential property (*Dals Property Trust*)
- GSTD 2023/D1 – GST and combination foods (*Chobani*)

Monthly Update – Agenda (cont'd)

From the Helpline

- CGT consequences of sale of a holiday home
- CGT relief for compulsory acquisition of easement

Other

- Is that ute really exempt from FBT?

Bendel – Unpaid present entitlements and Div 7A

Background

- Pre-16 Dec 2009 – s 109UB / Subdivision EA
- Post-16 Dec 2009 – s 109D(3) loan

  Under s 109D(3) a "loan" includes:

  - an advance of money;
  - a provision of credit or any other form of financial accommodation;
  - a payment of an amount for another person where there is an express or implied obligation to repay that amount; and
  - any transaction which is, in substance, a loan

Bendel – Unpaid present entitlements and Div 7A

Background (cont'd)

ATO's pre-1 July 2022 position (but post 16 Dec 2009):

TR 2010/3W provides where a private company has UPE from an associated trust but the trust uses the monies for its own purposes, Div 7A can have application. Can avoid by :

- fully paying the UPE to the corporate beneficiary before the lodgment day
- entering a complying Division 7A loan agreement, or
- putting a sub trust in place – PS LA 2010/4

Bendel – Unpaid present entitlements and Div 7A

Background (cont'd)

ATO's post-1 July 2022 position:

TD 2022/11 provides where a private company has UPE from an associated trust to avoid triggering Div 7A the trustee must act before the company's lodgment day by:

- fully paying the UPE to the corporate beneficiary, or
- entering a complying Division 7A loan agreement

Bendel – Unpaid present entitlements and Div 7A

Facts

- Common scenario in practice
- Net income of a trust for tax purposes assessed to a corporate beneficiary and individual in proportion to their present entitlements to trust income
- Company present entitlements remain unpaid (UPEs)
- Commissioner included a deemed dividend, taken to have been paid by the company to the trust, in the net income of the trust equal to amount of prior year UPE owed by the trust to the company
- Commissioner amended assessable income of beneficiaries to include the dividend amounts in proportion to their respective present entitlements

Bendel – Unpaid present entitlements and Div 7A

AAT decision

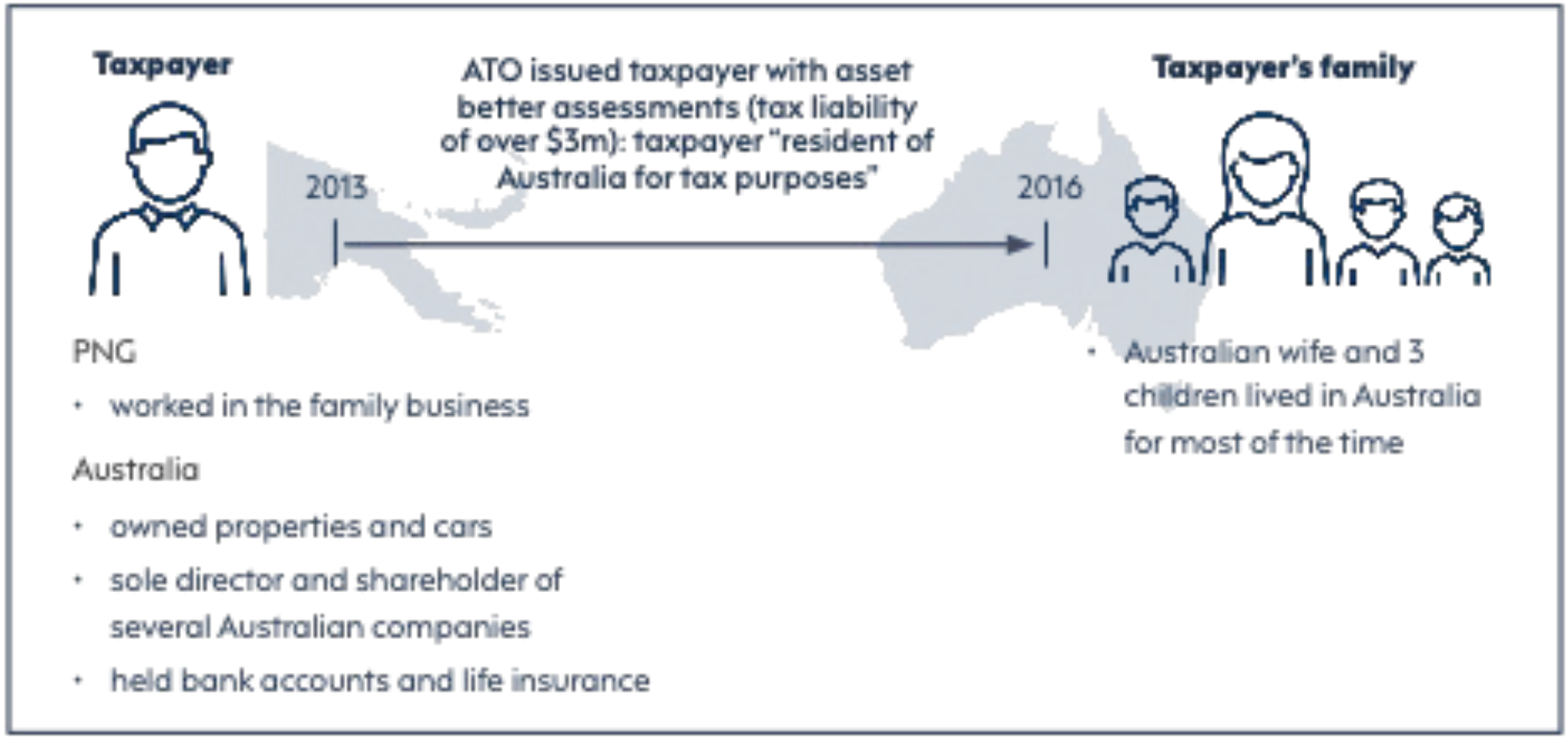
- UPE payable by trustee of discretionary trust to company beneficiary does not come within Div 7A definition of 'loan'
- Therefore, did not result in Div 7A deemed dividend from company to the trust
- Statutory context / absence of 'tie-breaker rule'
- Challenges longstanding ATO view regarding Div 7A and UPEs
- Where to from here?
- What do we with 2023 UPEs (current tax season)?

PQBZ- Residency, default assessment and onus of proof - As the Scouts will tell you – be prepared

Facts

- The taxpayer, a PNG citizen, worked in family business in PNG, while his wife and 3 children lived in Australia for most of the time
- Taxpayer owned properties and cars in Australia and held Australian bank accounts and insurance – and was sole director/shareholder of several Australian companies
- Asset better assessments issued (on basis of taxpayer being Australian resident)

PQBZ- Residency, default assessment and onus of proof - As the Scouts will tell you – be prepared



PQBZ- Residency, default assessment and onus of proof - As the Scouts will tell you – be prepared

Decision

- Taxpayer a resident of Australia for tax purposes under "ordinarily resides" test (without need to use supplementary "domicile" or "183 day" tests) because of:
    - significant business and personal ties with Australia;
    - no ties to PNG other than business interests and unit where he lived; and
    - for majority of the days, the taxpayer resided in Australia in relevant years

- Taxpayer discharged onus of proving assessments excessive – mainly on basis that taxpayer's evidence was uncontested and had not been contradicted by the Commissioner, which included evidence of a forensic accountant

Hayes – Taxpayer win in dividend stripping case

Facts

- Four Hayes brothers ran a rural enterprise through four Hayes operating companies (HOCs) with significant retained earnings with associated franking credits
- The HOCs were 100% owned by four Hayes brothers' family trusts
- A major restructuring took place in 2009-10, allegedly to improve asset protection, and driven by legal advisers
- Four trading trusts were created (among other restructure steps)
- Each of the four HOCs issued new Z class shares and offered them to their existing shareholders (the four family trusts), as required under the Corporations Law. After the family trusts declined to take up the offer, the Z class shares were offered to the trading trusts on the same terms ($1 each)
- Non-public trading trusts were treated as companies for tax purposes (at that time)

Hayes – Taxpayer win in dividend stripping case

Facts (cont'd)

- The four trading trusts each took up the offer of 10 Z class shares each and the HOCs paid out $8 million in fully franked dividends to holders of its Z class shares. What an investment!
- The funds representing the dividends were then mostly directed back to the HOCs or related entities by way of loan repayments or the making of new loans using Bearer Promissory Notes that were subsequently cancelled
- All these events took place on the same day
- The Commissioner said it was a dividend strip therefore no tax offset was available – s 207-145(1)(d) ITAA 1997
- Chose not to apply part IVA

Hayes – Taxpayer win in dividend stripping case

Dividend Stripping

- There is a somewhat circular definition of the term "dividend stripping operation" in the ITAA 1997:

  "a scheme that:

  (a) was by way of, or in the nature of, dividend stripping; or

  (b) had substantially the effect of a scheme by way of, or in the nature of, dividend stripping" (s 207-155 ITAA 1997)

- Ordinary meaning clarified by a series of court decisions including *Consolidated Press Holdings* (2001) which describes the following:
  - A target company with significant retained earnings that carry a latent tax liability issues shares to new shareholders, pays a dividend to those shareholders and **those new shareholders escape tax on that dividend**
  - The **original shareholders receive a capital sum equal or close to the dividend** paid out to the new shareholders
  - The scheme involved careful planning aimed at the original shareholders in particular **avoiding tax** on the dividend distributed by the target company

Hayes – Taxpayer win in dividend stripping case

Decision

In the circumstances of the Hayes restructure, the tribunal felt it needed to answer three questions:

1. **Did the new shareholders receive the dividends tax-free?**

Appellants argued amount of franked dividend fully assessable without any regard to the tax offset available - tribunal took the view in a net sense a franked dividend received by a corporate entity does not bear tax - a good start by the Commissioner

2. **Did the original shareholders receive tax-free or capital amounts as full or sufficiently partial substitution for the dividends paid to the new shareholders?**

After carefully tracing flow of funds, the tribunal determined the four Hayes brothers' family trusts only received about 30% of the dividends in the form of loans which was not sufficient to satisfy this test - advantage to the appellants

3. **Was there a sole or dominant purpose to avoid tax?**

Whist skeptical about asset protection claims, tribunal observed overall effect of restructure was to shift latent tax liability for top up tax within Hayes family group ie profits remain in the Australian tax net should trading trusts distribute the franked dividends to individual family members in future - the tax avoidance motive found to be lacking - game set and match to the appellants!

Hayes – Taxpayer win in dividend stripping case

Note

This is the second dividend stripping case the Commissioner has lost recently, the other one being BBlood, although the Commissioner succeeded under section 100A in that case

Simplot – GST exemption melts

Issue

Whether products in the Birds Eye SteamFresh product range were 'prepared meals' (and therefore subject to GST) or 'meal components' (and therefore not subject to GST)

Simplot

- The products are a 'meal component' and do not constitute a 'prepared meal'
- The labelling of at least some of the products, describing them as side dishes, supported this
- The products were not packaged in containers from which they could be consumed and were therefore not 'prepared meals'

Court

- Simplot assumes there are two categories of food (ie a prepared meal versus a meal component) – distinction not made in the Act
- To be a prepared meal not necessary for the food to be marketed as a breakfast, lunch or dinner - category looks to the *content* of the food rather than the time at which it is consumed
- Prepared meals should be considered as such by the ordinary person
- The form of packaging does not determine whether a food is of a kind marketed as a prepared meal

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Simplot – GST exemption melts

Decision

All the products were 'prepared meals' and therefore subject to GST

Note

In handing down her decision Justice Lisa Hespe noted the lack of coherent policy around many of the GST carve-outs, stating:

"One might speculate that the forms of the specific carve outs from the rule that food is GST-free were the product of compromise and lobbying. … The legislative scheme with its arbitrary exemptions ***is not productive of cohesive outcomes****. It has left the Court in the unsatisfactory position of having to determine whether to assign novel food products to a category drafted on the premise of unarticulated preconceptions and notions of a "prepared meal". … There is, for example, no clear rationale as to why soup marketed as a prepared meal should be GST-free but other types of food not."*

Something we can all agree with!

PWC – Collateral damage

- In the ongoing wake, or perhaps tsunami, of the PwC “scandal” the Government announced a significant package of reforms that are intended to:
    - strengthen the integrity of the tax system
    - increase the powers of our regulators
    - strengthen regulatory frameworks to ensure they are fit for purpose
- Treasury issued a consultation paper, draft legislation and factsheets for comment

PWC – Collateral damage

Treasury Laws Amendment (Measures for Consultation) Bill 2023: PWC Response—promoter penalty laws reform

- broadening the meaning of a 'promoter' to capture those that receive 'benefits' from their promotion of a scheme ('benefits' is a broader concept than the current 'consideration' requirement)
- expanding the meaning of "tax exploitation scheme" to cover schemes that breach, or would breach, the multinational anti-avoidance law or diverted profit tax rules; and
- expanding the coverage of the rules prohibiting the misrepresentation of a tax scheme's conformance with an ATO product ruling, whether the scheme is implemented or not, to all types of ATO rulings – private, public and oral rulings
- **Note**: The legislation proposes changes to the exceptions currently available to partners of partnerships or multiple trustees of a trust, where the promotion of tax exploitation schemes or schemes not conforming to ATO rulings has occurred. The draft legislation also proposes a change so that partners or trustees will no longer be able to fall back on this defence that they were unaware of what other partners or trustees were doing. This is a significant change in the "joint and several liability" landscape and one that may have many business structures being reconsidered.

PWC – Collateral damage

- *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Tax Practitioners Board*
  - The TPB Register will be enhanced to provide information about tax agent misconduct
  - The timeframe the TPB has to complete investigations will be extended from 6 months to 24 months
  - At the conclusion of an investigation the TPB will have the option to publish the findings of the investigation on the Register
- *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Extending tax whistleblower protections*
  - Whistleblower protections will be extended to disclosure of alleged misconduct to the TPB
  - The ATO and the TPB will be able to share information the ACNC and each other

PWC – Collateral damage

- *Treasury Laws Amendment (Measures for Consultation) Bill 2023: PwC response—information sharing*
  - The secrecy provisions that apply to the ATO and Tax Practitioners Board (TPB) will be amended to enable the regulators to disclose suspected breaches in confidence against government agencies to the Treasury
  - The secrecy provisions will be further amended to enable the regulators to disclose suspected misconduct of professionals to their professional associations or professional disciplinary bodies

TR 2023/3 – Expenses associated with holding vacant land

Background

- Section 26-102(1) denies a deduction for losses or outgoings relating to holding land on which there is no substantial and permanent structure in use or available for use
- The Ruling looks on the 3 tests to determine whether the section applies to a land holding:
    - Is there a **substantial and permanent** structure on the land?
    - If there is a structure, is it in use or available for use?
    - If there is a structure available for use, is it independent of and not incidental to the purpose of any other structure, or proposed structure on the land?

TR 2023/3 – Expenses associated with holding vacant land

The Ruling

- A “substantial structure” is significant in size, value, or some other criteria of importance in the context of the property
- A structure needs to be fixed and enduring to be permanent
- An independent purpose is determined in the context of the land on which it is located - and excludes the purpose of increasing the utility of another structure on the land
- Examples – see examples in notes and Ruling

TR 2023/3 – Expenses associated with holding vacant land

Exceptions

- The Ruling does not deal with the exceptions to s 26-102(1) - including:
    - the land is used in carrying on a business
    - the land leased to an entity carrying on a business
    - the land is held by primary producers etc

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TR 2022/4 and PCG 2022/2 – Updated ATO guidance on s 100A

- The Commissioner has updated his guidance around the application and enforcement of s 100A following the Full Federal Court decisions in *Guardian* and *BBlood*
- The ATO's fundamental position on s 100A has not changed – where beneficiaries are entitled to a distribution of trust income, the funds must be applied for the benefit of the beneficiary and not some other person

Updated Ruling

- The updated ruling refers to the role of advisers and notes that the weight attached to the purpose of the adviser in determining whether the requisite purpose that someone pays less tax by reason of the reimbursement agreement will depend on the degree of the adviser's involvement in the arrangement and the level of understanding and engagement on the part of the clients

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TR 2022/4 and PCG 2022/2 – Updated ATO guidance on s 100A

Updated Ruling (cont'd)

- There were important factual differences between the two cases in relation to the role of advisers which are explained in the updated ruling
- In *Guardian* Mr. Springer, who controlled the group, made his own decision to introduce a clean skin corporate entity for asset protection purposes and also made his own decisions about how to manage UPE's owing by the family trust to that corporate beneficiary
- In *BBlood* the restructuring was planned and executed by the advisers, with the client going along with the implementation of every step in a highly complex and integrated plan, including amending the trust deed in a way that had significant tax outcomes and effecting a share buy-back

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TR 2022/4 and PCG 2022/2 – Updated ATO guidance on s 100A

Updated PCG

- PCG 2022/2 has only been slightly modified and retains its colour coded approach to the world of trust distributions, mainly through green and red zones illustrating which practices are safe or not so safe
- Further judicial clarification around s 100A seems unlikely, particularly around the question of what constitute an ordinary family or commercial dealing
- There are some useful exceptions to the “beneficiaries must benefit” approach, probably reflecting an appreciation by the Commissioner that the ordinary dealing exception has to mean something

TR 2022/4 and PCG 2022/2 – Updated ATO guidance on s 100A

Updated PCG (cont'd)

Useful exceptions:

- Beneficiaries can use their entitlements to assist close family members who find themselves in a needy personal situation through illness or other circumstances (because that is what a lot of families do)
- A beneficiary can choose to leave their present entitlement for an unspecified period while they are waiting to buy a house or make a similar investment
- Benefiting a beneficiary's immediate family was never on the ATO's radar – a beneficiary can still use their trust entitlement to buy their kid a bike for Xmas
- And the ATO won't regard a present entitlement as being unpaid for s 100A purposes for two year following the appointment of the trust income
- The same concessional approach does not extend to Division 7A deemed dividends

PCG 2018/4DC1 – Updated ATO guidance on liability of legal personal representative of a deceased person

Background

It confirms the requirements that need to be met for legal personal representative (LPR) to distribute an estate without the risk of being personally responsible for liabilities of deceased person up to date of death

Note: It does not deal with outstanding tax-related liabilities that a LPR may have in relation to the deceased estate - that is, for the period after the death of the deceased person

PCG 2018/4DC1 – Updated ATO guidance on liability of legal personal representative of a deceased person

Key points

- LPR may have to meet the deceased person's liabilities personally if they distribute estate assets where the LPR has “notice” of any “outstanding tax-related liability” that deceased owed the ATO at the date of their death
- “Notice” means “notice of a claim by the ATO” – which includes “notice” by way of an assessment or amended assessment made after the death of the deceased person
- This approach allows LPRs of less complex estates to finalise the estates before the expiration of the relevant review period without concern that they may have to fund an outstanding tax-related liability of the deceased person from their own assets
- Note also: In absence of fraud/evasion, ATO cannot seek to recover estate assets that have been distributed to beneficiaries to meet outstanding tax-related liabilities of deceased

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TR 2023/D1 – Self-education expenses – updated draft ruling

What's new?

- Very little!
- Clarifies and summarises with some stylistic changes (eg case law and references in footnotes)
- Removal of s82A commentary (limit s 8 – 1 deductions to excess over $250 no longer applies from 1 Jul 22)
- Inclusion of commentary relating to travel between home, work, and place of education
- Impact of *Anstis* decision (no deductions allowable where in receipt of govt benefits eg Youth allowance)
- Inclusion principle in *Ting* (consider deductibility of individual components or subjects)
- Extensively updated and additional examples

TR 2023/D1 – Self-education expenses – updated draft ruling

- Not defined in tax legislation
- Updated ATO definition (draft paragraph 3):
    a) *courses undertaken at an educational institution (whether leading to a formal qualification or not)*
    b) *courses provided by a professional or industry organisation* ***[NEW]***
    c) *attendance at work-related conferences or seminars*
    d) *self-paced learning and study tours (whether within Australia or overseas)* ***[SABBATICALS REMOVED]***
- No impact in practice

TR 2023/D1 – Self-education expenses – updated draft ruling

Change in terminology - but no change in principles

Deductible	Not Deductible
Principle 1 Maintains or improves current skills or knowledge required for current assessable income earning activities	**Exclusion 1** Gain employment, new employment or role, or new source of income These expenses are incurred at a point too soon
Principle 2 Objectively leads to, or likely to lead to, an increase income from current assessable income earning activities eg by promotion in current role	**Exclusion 2** No income-earning activities at the time expenses incurred These expenses are not connected to income earning
Provided the loss or outgoing is not: - incurred other than to earn assessable income (eg relates to exempt income) - capital - private or domestic	

TR 2023/D1 – Self-education expenses – updated draft ruling

Clarification of deductibility - but no change in principles

Deductible	Non-deductible
Course and tuition fees – full fee paying	Tuition fees for Commonwealth supported places ('CSP')including student fee contributions paid using HECS-HELP
Student union, services, and amenities fees	Child-minding fees
Stationery, computer consumables, postage, internet and telephone use, depreciation, and equipment repair	Home office occupancy expenses
Airfares, accommodation, and meals (where student away from home overnight)	Meals where student not required to be away from home overnight or is living at a new location
Interest	Indexation of 'HELP' type student loans
Professional, trade journals and text books	Any expense that has been reimbursed
Car, transport, and parking fees	

Legislative Instrument LI 2023/32 – Correcting GST errors

Background

- GST legislation attributes GST to particular tax periods
- Time limits to claim, remit and amend
- Cost and time efficient to amend later BAS
- Updated guidance on if, and when, errors may be corrected on a later BAS
- Optional
- Similar LI for Fuel Tax Credit errors

Legislative Instrument LI 2023/32 – Correcting GST errors

Errors

- The following are NOT included as GST debit or credit errors (as defined):
  - Delayed GST input tax credits (4 years to claim a GST input tax credit)
  - GST adjustments
  - GST restricted refunds (no “windfall gain”)
- Important to know because:
  - Guidance only applies to GST debit or credit errors
  - Only GST debit and credit errors are included in “Net Sum” when testing if “debit error value limit” satisfied

Legislative Instrument LI 2023/32 – Correcting GST errors

Debit errors	Credit errors*
Reporting or paying too little GST	Reporting or paying too much GST
• Failing to include GST on a taxable sale • Understating GST on sales • Overstating GST credits (eg claim purchase twice) • Understating (or omitting) increasing GST adjustment • Overstating a decreasing GST adjustment	• Reporting a sale twice • Overstating GST on sales • Understating (or omitting) a decreasing GST adjustment • Overstating an increasing GST adjustment * Does not include delayed GST input tax credit claims (GST credits must be claimed within 4 years – see ATO website QC 22778)
Corrections subject to time and value limit – see over	**Corrections subject to time limit only – 4 years**

Legislative Instrument LI 2023/32 – Correcting GST errors

Debit Errors*

Time Limit

Current GST turnover	Debit error time limit
Less than $20 million	Corrected on a BAS that is lodged within **18 months** of the due date of the BAS in which the error was made (not discovered) – otherwise correct on original BAS
$20 million or more	Corrected on a BAS that is lodged within **12 months** of the due date of the BAS in which the error was made (not discovered) - otherwise correct on original BAS

Value Limit

Current GST turnover	Debit error value limit
Less than $20 million	Net Sum less than $12,500
$20m to less than $100m	Net Sum less than $25,000

*Provided not due to recklessness or intentional disregard of law

Net Sum = sum of debit errors *less* sum of credit errors

(to be corrected on same BAS)

If Net Sum › debit error value limit, up to the error value limit may be corrected on later BAS, with balance (excess) corrected on BAS in which the error was made

Decision Impact Statement: Sale of residential property (*Dals Property Trust*)

Background

- The ATO has issued a Decision Impact Statement on a 2022 AAT case which ruled that the sale of a residential unit by a property developer taxpayer was not input taxed (as residential property), while overpaid GST relating to the sale of a second unit could not be refunded
- Property developer taxpayer constructed the two home units but couldn't sell them
- Rented both to tenants for around five years before selling them
- GST calculated under the margin scheme was paid on both units
- Taxpayer claimed GST remittance was an error as sales should have been input taxed

Decision Impact Statement: Sale of residential property (*Dals Property Trust*)

Decision

- **First Unit**
  - Refund denied as the unit was advertised for sale just months before the s 40-75(2) five-year period expired, so GST was correctly charged
- **Second Unit**
  - Refund denied as the taxpayer just passed on the GST which was covered by the sale price. The taxpayer itself did not bear the GST burden as required under Division 142 of the Act

Decision Impact Statement: Sale of residential property (*Dals Property Trust*)

Decision Impact Statement

- **First Unit**
  - The Tribunal's decision confirmed the Commissioner's view that marketing premises for sale is a "use" of the premises
  - The decision confirmed the Commissioner's view that a continuous period of 5 years is required
- **Second Unit**
  - The Tribunal's findings support the Commissioner's view in GSTR 2015/1 in relation to the operation of Div 142

GSTD 2023/D1 – GST and combination foods (*Chobani*)

Making the most of their first up win in the *Chobani* test case (see TDG notes August 2023) ATO issued draft GST Ruling GSTD 2023/D1

Background

- Chobani produce flip Strawberry Shortcake flavoured yoghurt (flavoured yoghurt on its own is GST-free)
- One plastic tub with separate compartment holding dry ingredients – cookie pieces and white chocolate chips
- Consumer 'flips' the container to mix all the ingredients - sounds delicious!
- Is it a combination of one or more foods, one of which is a biscuit or confectionary?
- Applicant: It's like a cake, where the ingredients are subsumed in the finished product.
- Tribunal: No, it isn't. The dry ingredients remain readily identifiable after the 'flip'. The product is not GST-free.

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GSTD 2023/D1 – GST and combination foods (*Chobani*)

The Draft Ruling

Commissioner's view in the draft ruling:

- A supply of a combination food is the supply of a product comprising separately identifiable foods
- A food is separately identifiable when it can be individually perceived by ordinary visual inspection
- The word 'combination' takes its ordinary meaning
- Whether separately identifiable foods are sufficiently joined together so that they form a combination food is a matter of overall impression
- Whether food is a combination food must be evaluated at the point of supply

GSTD 2023/D1 – GST and combination foods (*Chobani*)

The Draft Ruling

Three principles to look out for, according to the ATO:

- There must be at least one separately identifiable taxable food
- The separately identifiable taxable food must be sufficiently joined together with the overall product
- The separately identifiable taxable food must not be so integrated into the overall product, or be so insignificant within that product, that it has no effect on the essential character of that product

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From the Helpline – CGT consequences of sale of holiday home

Key matters

- Although used for "personal use and enjoyment" it is not a "personal use" asset (s 108-20(3)) – as result, it is not subject to CGT rules that apply to personal use assets
- If used as an Airbnb, the ATO treats it as having been "rented" (eg see QC 23632) - unless the taxpayer can establish they were carrying on an "Airbnb business", in which case the CGT small business concession may apply
- If it was rented for the first time from 20 August 1996 after previously being the main residence, taxpayer will deemed to have acquired it for its market value at this time for any CGT calculation (s 118-192)
- A main residence exemption is not available unless it was taxpayer's main residence on a bona-fide basis at some time - in which case "absence concession can be used to maintain its exempt status (but no other dwelling can qualify as residence)
- If the holiday home was acquired on or after 20 August 1991, then the "costs of owning" can be included in the cost base for any CGT calculation purpose (eg non-deductible mortgage interest, land tax, council rates, repairs etc)
- A holiday home is not entitled to the full exemption for inherited homes under s 118-195, unless it was acquired by deceased "pre-CGT"

From the Helpline – CGT relief for compulsory acquisition of easement

Key matters

- In case of compulsory acquisition of land by a government authority, CGT event A1 occurs – and any capital gain is entitled to roll-over relief under Subdiv 124-B if, broadly, a replacement asset is acquired within the relevant time limits
- In case of compulsory acquisition of an easement over land by a government authority, the ATO takes view that CGT event C2 happens (end of intangible right etc) – and ATO takes "look-through" approach (see TR 97/3)
- As a result, any receipt of compensation results in a cost base reduction of the land equal to compensation received (in accordance with principles in TR 95/35).
- Seems also that roll-over relief under Subdiv 124-B could be chosen instead
- **Note**: CGT small business concessions available for gain (if conditions met)

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Is that ute really exempt from FBT?

Background

- Up until 30 June 2023, buying a ute for an employee's use on the job made a lot of tax sense
- The business was able to claim an outright deduction for the cost of the vehicle under Temporary Full Expensing (subject to the car depreciation limit if relevant) and there was no FBT payable under the right circumstances
- Recent media reports suggest the ATO may have concerns that some employees might be taking liberties with the minimal private use conditions that have to be satisfied before the compliance savings relating to private use of the vehicle apply
- If the ATO does have concerns, that would be understandable – utes (including dual cabs) are the biggest selling new car model in Australia, and they increasingly include features that are promoted to make them appealing for family and recreational use
- The law just says the private use of a van or ute is an exempt benefit where the private use of the vehicle is "minor, infrequent and irregular"
- The law also says that for eligible vehicles, travel to and from work is not regarded as private travel

Is that ute really exempt from FBT?

PCG 2018/3

- In PCG 2018/3 the ATO stepped in to say the employee is not required to maintain a logbook that establishes their level of private use, and it won't generally allocate compliance resources to the private use issue, provided the following conditions are met:
  - The ute must be principally provided for work purposes, not be salary sacrificed, with a GST-inclusive cost below than the Luxury Car Tax limit of $76,950 in 2023-24 ($89,332 for fuel efficient vehicles)
  - The employer has a policy in place that limits private use of the vehicle and obtains a written assurance from the employee that they have complied with the policy - the ATO expects the employer to occasionally check odometer readings to confirm this
  - Employees must always travel directly between home and work, with no diversion (eg for shopping) of more than 2 kilometres - even a single diversion exceeding 2 kilometres would disqualify the vehicle from the exemption
  - Trips between home and work are treated as work related only when the employee travels alone - in the ATO's view, dropping the kids off at school, for example, would turn the entire trip to work into private travel
  - Private travel must not exceed 1,000 kilometres for the entire FBT year - not a single private return journey in the whole FBT year can exceed 200 kilometres
- These rules might seem harsh, but using the dual cab ute to run the kids to and from school or taking the family camping over Easter would not satisfy the ordinary meaning of "minor, infrequent and irregular" private use, which is what the law says
- Just having an employee declaration might not be enough if they load up their socials with photos of the family's camping trip in a distant location, or where toll records show the vehicle was well over 100 kilometres from home on a non workday

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Is that ute really exempt from FBT?

Comments

- PCG 2018/3 is not the law – just the ATO's approach to its compliance activities
- Open to challenge – the law clearly contemplated some minimal private use before the FBT exemption no longer applies
- Maybe 1,500 kms in an FBT year is still minimal, and so is the occasional 4 km diversion on the way home
- The AAT might take a more lenient view, but is it worth the risk?
- Consider obtaining an indemnity for any FBT liability that arises in the event the information on the employee's declaration is found to be incorrect
- Consider having the employee maintain a representative logbook to help prove their private use of the vehicle is minimal

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