PRINCIPALS:
MICHAEL COUGHLIN
CLARE MULLER

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Tax Office continues to target online sellers

Many taxpayers will have noticed that "pre-filling" has become much more widespread, which is only possible due to the amount of financial information that is able to be accessed by the Tax Office.

Each year the government's revenue collection arm extends further and further into the databases of financial institutions, employers and to other sources of relevant records, and with millions of dollars in play, the taxman's ability to pre-fill and use tools such as data-matching and performance benchmarks looks likely to increase.

With the amount of data kept online about taxpayers, it pays to be ever vigilant about meeting tax obligations and therefore avoiding otherwise unnecessary penalties.

This is especially so given the Tax Office's recent update to the protocols governing its Online Selling Data Matching Program. Now in its fourth year, the program was developed to assess the overall level of tax compliance for anyone involved in selling goods or services via online selling sites, such as eBay.

Both the Tax Office and the Department of Human Services (which governs Centrelink) have in the past asked for data from eBay, which is legally required to comply with a formal request for information. For a recent financial year for example, eBay was asked to reveal the identities of about 15,000 people who sold more than $20,000 worth of goods on the trading site.

The current program's threshold target is now $10,000 — so obviously a lot more buyers and sellers will be tapped on the shoulder. Matching this data to its own records, the Tax Office will use this information to identify omitted income as well as registration, reporting and lodgement obligations.

Is it a 'business' or a 'hobby'?

It is therefore crucial that a distinction be made between "recreational" selling (that is, a hobby) and being in the "business" of selling. There are income tax and GST obligations if the latter applies (see below).

In light of the Tax Office's activities, it is timely to revisit the indicators of whether a business is being conducted by individuals and how this may apply to online selling. The outcomes of court cases have over a long period established factors in working out whether an individual taxpayer is conducting a business or merely partaking in a hobby. These indicators are succinctly summarised in the table at below.

Indicators which suggest a business is being carried on	Indicators which suggest a business is not being carried on
A significant commercial activity	Not a significant commercial activity
Purpose and intention of the taxpayer in engaging in the activity	No purpose or intention of the taxpayer to carry on a business activity
An intention to make a profit from the activity	No intention to make a profit from the activity
The activity is or will be profitable	The activity is inherently unprofitable
Repetition and regularity of activity	Little repetition or regularity of activity
Activity is carried on in a similar manner to that of the ordinary trade	Activity carried on in an ad hoc manner
Activity organised and carried on in a businesslike manner and systematically – records are kept	Activity not organised or carried on in the same manner as the normal ordinary business activity – records are usually not kept
Size and scale of the activity	Small size and scale
Not a hobby, recreation or sporting activity	A hobby, recreation or sporting activity
A business plan exists	There is no business plan
Commercial sales of product	Sale of products to relatives and friends
Taxpayer has knowledge or skill	Taxpayer lacks knowledge or skill

The indicators listed in the table equally apply in working out whether an individual is carrying on an "online" business. As well, a Tax Office checklist created specifically for online sellers, which takes into account these indicators, is shown in the table on page 3.

Why is it important to ascertain if you online activity is a business?

The classification of whether a taxpayer is conducting a business is critical as there are a number of tax and reporting obligations that are required to be fulfilled. Obligations that are imposed on a taxpayer who is conducting a business include:

- online sales income will have to be declared as assessable income; however, expenses incurred in earning this income will generally be deductible
- an Australian business number (ABN) may need to be applied for if the taxpayer is conducting an enterprise
- a taxpayer may be required to register for GST in some cases – this is typically the case if their annual turnover meets or exceeds the $75,000 turnover threshold
- accurate records of expenses and sales will need to be kept in line with legal requirements – for example, it is necessary to keep the records for five years from the time that the documents are either prepared, obtained or when the transaction is completed (whichever occurs latest), and
- if the online activity results in a loss, an individual may be entitled to offset this loss against other income or carry it forward to offset against future income. The ability of an individual taxpayer to apply current year tax losses from business activities against other income (such as salary and wages) are subject to the non-commercial loss rules under tax law.

If the activity of the taxpayer constitutes a hobby, the implications include:

- any income derived from the activity is generally not assessable income to the taxpayer
- the taxpayer would also not be entitled to claim tax deductions for any expenses incurred in carrying out this activity, and
- if the activity results in a loss, the taxpayer is not entitled to offset this loss against other income or carry the loss forward.

Checklist for online selling: Hobby or business?

The simple checklist from the Tax Office on page 3 should help taxpayers determine whether their online selling constitutes a business or a hobby. Each time that the answer is "yes" to a question, the likelihood that a person is carrying on a business increases. All the questions need to be considered together to get an accurate picture of the taxpayer's situation as no one indicator is decisive. For taxpayers undertaking a "hobby", it may be necessary to periodically review this table to ensure circumstances have not changed.

Checklist for online selling: Hobby or business?	Y/N
1. Did you set up your online sales with the intention of being a business? Does it have a significant commercial purpose or character? If you set up a 'shop' on an online trading or auction site, you may be carrying on a business – this is more likely if you paid fees to operate this 'shop'. You are also more likely to be considered a business if it involves commercial sales of product rather than sales to relatives and friends.	
2. Do you have more than just an intention to engage in business? If the online space you sell on looks like a shop, has a brand name, a proper business name and any other signs that people would likely consider to be a business, then you are most probably carrying on a business – again, this is more likely if you paid fees for this to occur.	
3. Is your main intention to make a profit? If the answer is 'yes', you may be carrying on a business. However, even if you do not make a profit, you may still be carrying on a business. If you deliberately buy items to sell online for more money than you paid, then you are likely to be carrying on a business. Conversely, if you sell household goods that you do not want anymore – although you may get a 'good price' – it is unlikely to be a business.	
4. Do you make repeated or regular sales? If you sell items online on a regular basis, you may be carrying on a business. These sales could be to the same customer, or a number of different customers. For instance, if you sell a number of items every week (or month) for an extended period of time, then you may be carrying on a business.	
5. Do you sell your online items for more than cost price? If your answer is 'yes', you are most likely carrying on a business. For instance, if you make or buy an item cheaply and then sell it online for significantly more than you paid for it, you have made a profit and may need to declare that income.	

6. Do you manage your online selling as if it were a business? In the Tax Office's view, you are most likely carrying on an online business if any of the following applies to you: your online selling activity is organised, systematic, and has systems and processes in place your activity has characteristics of size, scale and permanency you have invested sufficient capital in the activity you advertise your online space you give quotes and supply invoices, and keep some or all of your records you have a business plan you use specialised knowledge or skills you have prior experience in the activity's area you have conducted ample market research you spend a significant amount of time on the online activity the activity is your main income-earning activity rather than a part-time sideline project you sell your items in a similar manner to other businesses in your industry instead of in an ad hoc manner, and your activity is better described as a business, rather than a hobby, recreation or sporting activity. Common areas where people are likely to carry out activities which may be a hobby rather than a business include hobby farming, motor car/bike racing, and hobby ceramics.	
7. Is what you are selling online similar or the same as to what might be sold in a 'bricks and mortar' business? If the items or services you are selling are reasonably easy to find in an offline store, then you are likely carrying on a business and these sales should be included as business income.	

The income tax implications of property lease incentives

Lease incentives are commonly used by landlords to entice tenants to enter into a lease. The most common type of lease incentive relates to new tenancies in commercial buildings.

These inducements can take many forms, including upfront cash payments, non-cash items such as motor vehicles or boats, expensive paintings, holiday packages, rent-free or rent-discounted periods for the leased premises or for premises in other cities, free fit-out of the premises, payment of removal costs or for the surrender of any existing leased premises, and interest-free loans. The enticements can even be a combination of any of the above.

What are the income tax implications?

The income tax treatment however of such lease incentives can vary depending on the nature of the incentive provided.

Tenants

For tenants in receipt of a lease incentive, it must be determined as to whether the incentive is assessable in their hands as "ordinary income" or alternatively under a specific tax provision. Certain incentives may not be assessable.

Further, the incentive may affect the extent to which certain tenancy costs are deductible to the tenant.

The circumstances in which certain lease incentives are assessable to the tenant have been established based on a body of case law. As a general rule, lease incentives received by a tenant would be treated as assessable income in their hands.

For cash incentives, the Tax Office considers that the receipt would typically be assessed as ordinary income. This applies irrespective of whether it is an incentive to:

- move into a new building
- stay in an existing building

- to take up additional floor space, or
- a relocation in the same building.

Non-cash incentives such as cars, boats, paintings and other benefits, which can be converted into cash, will be taxable at their full money value.

The law would ordinarily assess taxpayers on the receipt of a non-cash benefit as if it were convertible into cash. The value assessed would generally be the arm's length value less any consideration paid. It should be noted, however, that the assessable amount would be reduced to the extent that:

- the cost of the benefit, if it had been incurred by the tenant, would have been deductible, or
- the provider of the benefit would not be entitled to a deduction for the cost of the benefit provided (such as where the expenditure would constitute entertainment).

Further, a deduction for depreciation will generally be available if the item is used to produce assessable income.

The receipt of a rent-free period will typically not be subject to tax. The receipt of a rent free period or reduced rent from a landlord would result in an assessable amount, but a deduction equal to the value of the incentive would also be available. The net effect is that no amount would be assessed to the lessee.

For other non-cash incentives (such as free fit-outs, holidays, interest free loans, free plant, holiday packages, etc), the tax treatment can vary.

For example, the receipt of an interest-free loan is generally treated as tax-free if it is a genuine business loan.

Free fit-out is typically assessable on value provided, and a capital allowance deduction may be available if the tenant becomes the "holder" of the fit-out. Conversely, the fit-out may not be assessable if it is owned by the landlord instead. Removal expenses are normally assessable.

The table at below sets out the tax treatment for the tenant in respect of certain types of lease incentives received.

Lease incentive	Tax treatment
Cash payment	Assessable
Rent free period	Not assessable
Rent discount	Not assessable
Interest-free loan	Tax-free provided it is a genuine business loan
Free fit-out: If landlord owns fit-out If tenant owns fit-out	Not assessable Assessable but capital allowance deductions may be permitted
Free plant	Assessable but capital allowance deductions may be permitted
Holiday packages	Tax-free to tenant (note costs non-deductible to landlord)
Removal expenses	Assessable
Surrender payments	Assessable

Landlords

For landlords, the primary tax issue is typically whether the provision of the incentive would be an allowable deduction either under the general deduction rules or some other provision under the law (such as the capital allowance provisions).

As a general proposition, the provision of lease incentives should give rise to an allowable deduction if the landlord is in the business of leasing properties. This is so provided that the outgoing is not capital or private and domestic in nature.

Note that the general anti-avoidance provisions may apply where the provision of lease incentives is for the purposes of benefiting an associate of the landlord or shifting income to an associate.

For incentives, such as interest-free loans, no amounts would be treated as being deductible for both principal and foregone interest. Rent-free periods are also not deductible, as rent foregone is not a loss or an outgoing.

For free fit-outs, if the landlord owns the fit-out, a capital allowance deduction is permitted. The gift of a free holiday is treated as an entertainment expense, and is therefore not deductible. Removal expenses however are deductible.

Other considerations?

The relevant lease incentive should be properly documented as part of the lease agreement. Your solicitor should be able to assist in this regard. Note that there are also possible GST considerations. Ask this office for advice if that applies to your case.

The ins and outs of the Single Touch Payroll initiative

Back in January, the government unveiled its Single Touch Payroll (STP) initiative. STP is an application it said would cut down red tape for employers by streamlining tax and superannuation reporting obligations. The application is still about a year away, but the government is confident it will be a focal part of our tax system's administrative overhaul.

Single Touch Payroll in one way is similar to myTax as a kind of "one-stop shop" compliance system, with the former being specifically designed to allow employers fulfil their obligations much more easily.

Pay-as-you-go withholding reporting automated

Pay-as-you-go withholding (PAYGW) will be automated when a fully functional STP system is implemented.

Employers will see the biggest change in this aspect of their reporting obligations. They'll no longer have to report employee-related PAYGW events in their activity statements. Year-end employee payment summaries will go too. The STP tool will automatically report payroll information to the Tax Office when employees are paid.

Right now, there are a few different categories for PAYGW reporting and payment for business as follows:

Withholder category	Annual PAYG withholding liability	Payment and reporting cycle
Large	At least $1 million	Twice weekly
Medium	$25,000 to $999,999	Monthly (21st day of the following month)
Small	Less than $25,000	Quarterly (28th day of the month after quarter end)

When STP comes in, all withholder categories will be dissolved because all reporting will occur automatically at the time of employee payment.

How will the consultation period go?

The Tax Office's initial consultation period is closed but another round with stakeholders will commence soon. Its focus areas include:

- transition arrangements
- phasing the start date for employers of different sizes
- arrangements to support the move to STP, including how the new arrangements will build on the SuperStream changes currently being implemented
- the potential for employers to remit PAYGW and the SG at the same time employees are paid their salary and wages, and
- what support businesses may require to enable such a transformation in payments to government and superannuation funds.

As part of the recent consultation, the Tax Office explored the potential administrative burden of STP for businesses. It asked participants to pinpoint foreseeable hurdles in transitioning from the current system as well. We're yet to see the official collected findings, but there's a lot of concern with regards to cash flow as it applies to making scheduled payments under STP.

The cash flow problem

STP will bring forward the timing and increase the frequency of PAYGW and SG payments. Employers will balance paying more often with paying less, but this may still affect businesses with varying payroll schedules, especially in the transition period. The scale of the impact should be:

- minor for businesses that put aside their PAYGW and SG obligations for each pay cycle, but this cash reserve will diminish as the frequency of payments increases, and
- major for businesses that rely on the delay between payroll cycles and their tax and super obligation events to manage cash flow.

Cash flow issues will be considered when the Tax Office looks at designing the transition protocol for businesses.

Changes to TFN declarations and Super Choice forms

With STP comes a need to improve Australia's current suite of Standard Business Reporting products. This will mean a conversion of Tax File Number (TFN) declarations and Super Choice forms into digital software, with the purpose of making hiring new people easier.

Under STP, when a new employee commences they would have the option to supply their details electronically through the government portal myGov. The Tax Office says employee details data, like TFNs and addresses, can be pre-filled to minimise administrative legwork.

Once filled out through myGov, employee details would be transferred directly to the employer (to be filed into STP software), the Tax Office and other government agencies like Centrelink. It's hoped this process will make things easier for new employees and reduce delays in passing on super fund details and other vital information to employers.

Employers are currently transitioning into SuperStream to make super contributions on behalf of employees. Again, SuperStream handles contribution data and payments electronically.

There is currently however some issues in identifying whether super payments have been made. Firstly, the Tax Office has no means to identify whether employers have paid the correct amount of super by the common due date. This means non-payment may go undetected, at least for a period of time. Businesses that don't comply therefore may get an unfair commercial advantage over ones that do the right thing. Secondly, employees may also face missing out on super guarantee payments due to their employers going insolvent.

The Tax Office envisions STP as a kind of all-purpose fix for problems like these; if everyone is on the same register and their obligations are handled automatically, below-board practices become hard to execute.

The Reportable Fringe Benefits Amounts problem

The Tax Office is yet to resolve how annual Reportable Fringe Benefits Amounts and Reportable Employer Superannuation Contribution amounts will be reported under STP.

Although FBT is paid by the employer, the benefits received by the employee must also be reported by the employer on the employee's PAYG payment summary as reportable fringe benefits if the benefit exceeds $2,000. Reportable employer superannuation contributions are those contributions made for an employee where the employee influenced the rate or amount of super contributed for them, and the contributions are additional to compulsory contributions.

These amounts appear on payment summaries right now, which will not exist when STP comes in. An annual mechanism will need to be developed to reconcile the fact these amounts can only be calculated yearly.

Software requirements

Employers will need software that is both compatible with Standard Business Reporting requirements and able to build on SuperStream solutions. This means many businesses may need to upgrade or replace the software they currently use to prepare for STP's. There are obvious costs to consider here, but the Tax Office expects these will be recouped long term through time and resources saved in paperwork and processing.

Universal automation of government services is bound to go through a teething period. Ideally, the Tax Office's new consultation with stakeholders will iron out transition issues and solidify a migration process that suits businesses of all sizes. If implemented correctly, the government believes Single Touch Payroll will be a time and cost-saving measure worthy of modern technology.

Did you know… Tax on tips and gratuities

Have you ever gone to pay for your coffee or lunch and saw the tip jar at the local café counter, and wondered how (or if) the business accounts for tax on that money? Depending on a number of factors, this can add up to quite a sum over a year, assuming the café owner empties the jar each day. Not surprisingly, the taxman has thought of this scenario, and has devised guidance for dealing with "tips and gratuities".

A business registered to collect GST does not need to pay GST on the value of tips paid to staff, nor report this amount as income on activity statements or the business's annual income tax return. However any tips, or portion thereof, not distributed to staff but kept as part of business takings must account for GST and be reported as income.

The business owner does not have to deduct pay-as-you-go withholding from tips distributed to staff, nor include them on employee annual payment summaries. For contractors used, if they do not supply the business with their Australian business number, the business is expected to withhold 47% from tips provided.

For employees, it is generally the case that employment laws do not treat tips from customers as part of salary or wages. The Tax Office however takes a different view. It deems any tips that employees receive, either directly from customers or distributed by the employer, as needing to be reported by the individual as income if the employee is to lodge an income tax return.

The Tax Office also advises business owners that it expects them to keep a record of tips paid to staff.

Couple de-coupling, and specific complications for SMSFs

There is a unique problem with self-managed superannuation funds (SMSFs) when it comes to marriage breakdown and splitting assets upon divorce, and it is a problem that could become more common.

First, some salient facts to consider. Most of the 539,375 SMSFs in Australia are two-person funds (69.5% of them, according to the latest Tax Office statistical report). And of the 1,023,964 SMSF trustees in the country, many are husband and wife.

As many would already know, the SMSF sector now accounts for about a third of the nation's total superannuation savings. Now if you consider the on-going growth of SMSFs, and couple that with the latest estimate from the Australian Bureau of Statistics that about one in three marriages end in divorce, it is clear that the complication arising from splitting assets of an SMSF upon marriage breakdown is a problem that will become more common.

So what are these SMSF-specific complications? Consider for example an SMSF that has as its primary asset business premises that are used by a family business — which is not an uncommon situation. It is easily conceivable that realising the value from such an asset, so that it can be divided between the divorcing couple, may only be achieved through selling the business premises.

Not only is it possible that the family business may not be able to afford to purchase the property from the fund, but one or other of the divorcing couple will in all likelihood not want to continue to be involved in the business.

Unlike other superannuation funds, where members and trustees are separate individuals, SMSF members (even those whose relationship is strained at the very least, or worse) will be required to deal with each other as each is also a trustee. This can add further strain on relations as many tasks, such as preparing tax returns and financial statements, making investment decisions and signing cheques, can require both trustee signatures.

As the Tax Office clearly states, in such a situation "you must continue to act in accordance with the super laws and the trust deed of your fund". The SMSF regulator says that despite the difficulties that you may have with an individual on a personal level, "as a trustee you must continue to act in the best interests of all members at all times".

The Tax Office specifically states that SMSF trustees, upon risk of the fund being deemed non-complying, cannot:

- exclude another trustee from the decision-making process
- ignore requests to redeem assets and roll money over to another regulated complying super fund
- take any action that is not allowed by the *Superannuation Industry Supervision (SIS) Act 1993* or the SMSF's trust deed.

So clearly a "de-coupling" on a personal level does not wash away one's duties as a trustee, although this situation could be less of an issue if the trust deed is set up using a corporate trustee.

There are of course many other assets that SMSFs can hold, and before settlement can be agreed upon, or ordered by a court, these assets will need to be valued. For the scenario mentioned above, where business premises comprise the major asset of the SMSF, unless there are enough liquid assets available to allow the SMSF to cover the divorcing spouse's share of that value, the business premises may need to be sold.

A possible way out of this difficulty would be available if the premises had been acquired under a unit trust structure. An SMSF corporate trustee could then redeem units for cash (to cover the divorcing spouse's payout), and take up a limited recourse borrowing arrangement to acquire a beneficial interest in the same business premises. Of course this solution would only be available if the SMSF were set up initially with a corporate trustee and had an investment strategy that made use of unit trust structures.

Where the divided share of SMSF assets from a divorce are rolled over into a new fund, care needs to be taken that these are not sold for cash first and then the cash proceeds transferred to the new fund. Assets transferred in-specie are not subject to CGT and the original cost base is retained in the new fund, but these concessions are lost if a cash value is realised before rolling over.

And while on the subject of in-specie assets, while in usual circumstances the rules disallow the acquisition of assets from related parties, the legislation has been amended to allow this as a result of marriage breakdown. This broadening of the scope for such transactions applies to assets acquired on or after November 17, 2010.

Your 'lost' super could be costing you money

A recent report from the Federal Treasury said there were around six million "lost" superannuation accounts holding a total of about $18 billion as at mid 2014. This figure represents roughly one in five of every superannuation account.

A lot of working Australians may not even know that there could be super money out there that they've lost track of – people can change jobs a number of times over the years, or change address or even their name, and any super funds that were holding funds for them simply may not have the most current contact details.

Super is considered "lost" if the fund can't reach the person it belongs to, but also if the account has been inactive, with no contributions or rollover amounts being deposited for a period of a year. Unclaimed super money can also come about where an account is split, such as in a divorce settlement.

A lot of the lost money is in smaller amounts, but the tax rules that apply to all other super entitlements will still apply. And with super fund fees also eating into what's left, finding a cache of extra money, no matter how small, is probably worth the effort.

According to new figures released by the Tax Office, 45% of working Australians have more than one superannuation account, and many taxpayers are not even aware they have these extra, or "lost", superannuation accounts. As mentioned, changing jobs or moving house can often result in people losing track of these funds.

But remember, the Tax Office warns that having multiple funds could mean that many Australians are paying more — even up to thousands of dollars — in unnecessary fees each year. A recent study conducted by the Australian Prudential Regulation Authority (APRA) revealed that the median figure for fees and charges paid by Australians for a low-cost superannuation account is $532 a year.

The Tax Office is encouraging anyone with more than one super fund to consider consolidating their super into one preferred account. It says an efficient tool to use is the improved myGov online portal to check their super accounts and consolidate multiple accounts.

Using myGov to consolidate your super

Create a myGov account at the website my.gov.au, then link the Tax Office to your account (if you already have a myGov account, just log in and click on the Tax Office link).

Go to the "Super" tab.

You can do any of the following:

- see details of all your super accounts, including any you have forgotten about
- see details of any super the Tax Office is holding on your behalf
- combine multiple super accounts.

myGov allows you to check all your super accounts, find lost super, or any super being held for you, and request a transfer of super online.

Resident Individuals

2014/15 Taxable Income	Tax	% on Excess (marginal rate)
0 to 18,200	Nil	Nil
18,201 to 37,000	Nil plus →	19
37,001 to 80,000	**3,572 plus →**	32.5
80,001 to 180,000	**17,547** plus →	37
Over 180,000	**54,547** plus →	47

Plus Medicare levy 2.0%

2013/14 Taxable Income	Tax	% on Excess (marginal rate)
0 to 18,200	Nil	Nil
18,201 to 37,000	Nil plus →	19
37,001 to 80,000	**3,572 plus →**	32.5
80,001 to 180,000	**17,547** plus →	37
Over 180,000	**54,547** plus →	45

Plus Medicare levy 1.5%