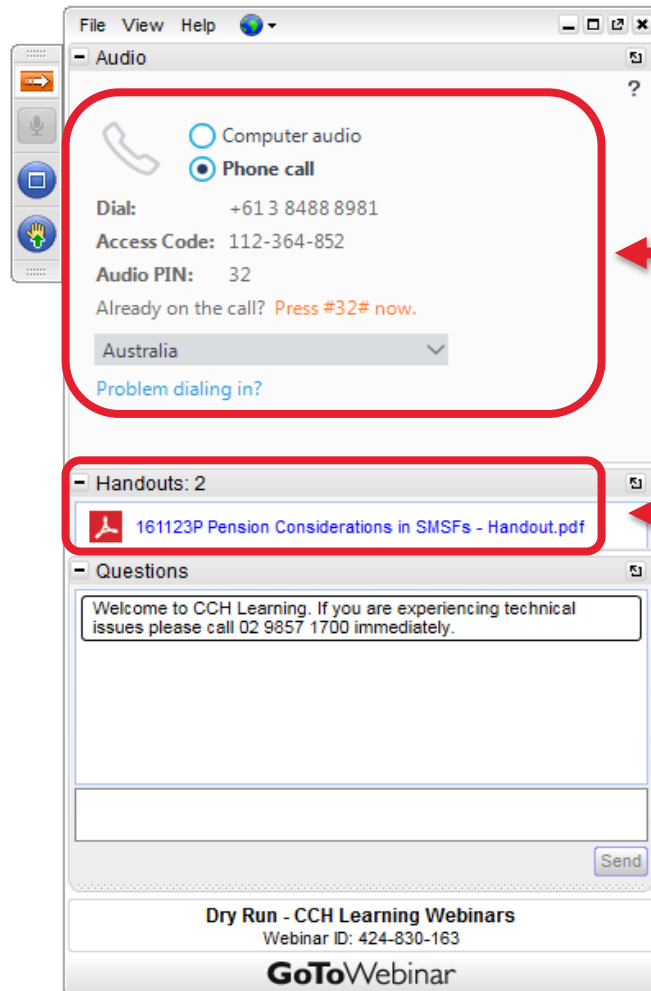

Tax Technical Update – June 2024

Carlo Di Loreto

Tuesday 25 June 2024



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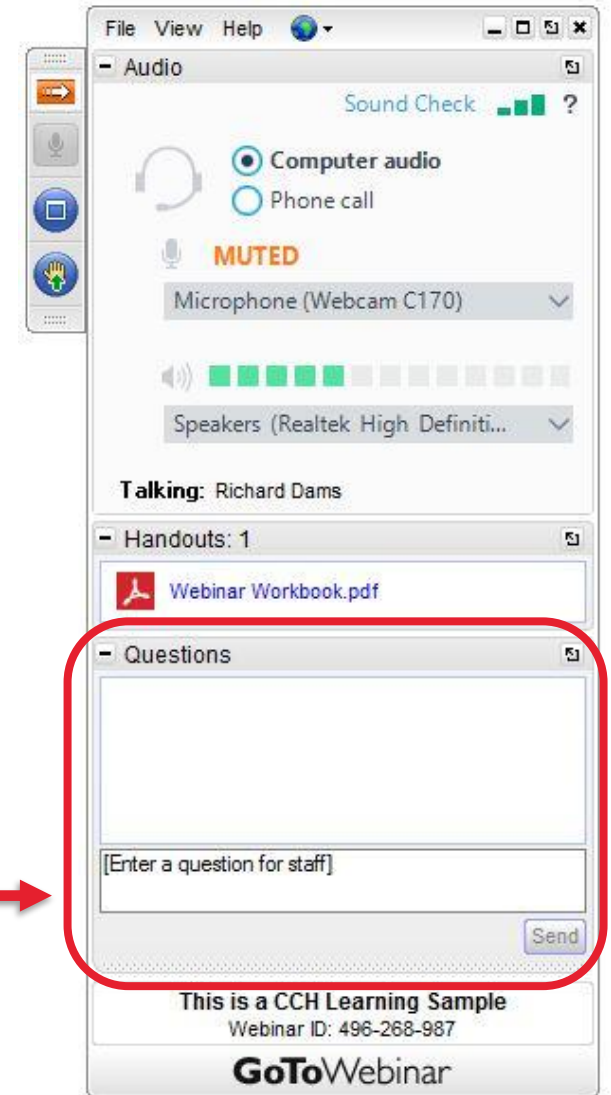
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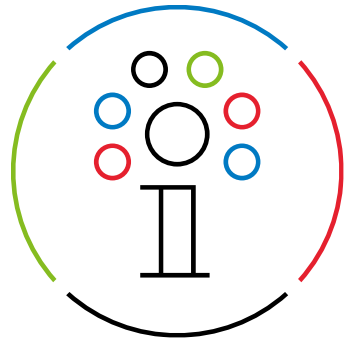
Your Presenter



Carlo Di Loreto

Partner - Tax Advisory
Crowe Australasia, an affiliate of Findex

Today's session will cover



June Tax Update

- Federal Parliament update
- Bills update
- ATO and Government Announcements
- ATO Rulings
- Cases



Federal Parliament & Bills Update

Federal Parliament Update

Sitting Days 2024

Sitting Days First Half 2024	Sitting Days Second Half 2024
January – No sitting days	July – 4 House; 4 Senate
February – 11 House; 8 Senate	August – 8 House; 8 Senate
March – 8 House; 8 Senate	September – 4 House; 8 Senate
April – No sitting days	October – 3 House; 3 Senate
May – 6 House; 4 Senate	November – 12 House; 5 Senate
June – 8 House; 5 Senate	December – No sitting days

Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024

- Introduced to House of Representatives on 5 June 2024
- Referred to Senate Economics Legislation Committee

Build to rent

- Provides incentives for investors to support the construction of *new build to rent developments* by:
 - *increasing the capital works deduction* rate to 4 per cent per year, and
 - *reducing the final withholding tax rate* on eligible fund payments from eligible managed investment trust investments to 15 per cent
- Introduces a specific reporting mechanism to enable the Commissioner to receive information from entities participating in active BTR developments

Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024

- Build to rent measures must meet the following conditions:
 - development's construction commenced after 7:30 pm (AEST) on 9 May 2023
 - development consists of 50 or more residential dwellings made available for rent to the general public
 - all dwellings in the development and common areas continue to be directly owned together by a single entity, at any one time, for at least 15 consecutive years
 - dwellings in the BTR development must be available for lease terms of at least 3 years
 - at least 10% of the dwellings are available as affordable tenancies

Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024

Instant asset write off

- Extension of the \$20,000 instant asset write off to 30 June 2025
 - Will **NOT** commence unless the Bill to increase the instant asset write off in the June 2024 income year commences

Other

- Exempts eligible lump sum payments in arrears from the Medicare Levy
- New reporting obligation on certain large multinational enterprises
- applies to CBC reporting parents that are members of a CBC reporting group
- CBC reporting parent will only be subject to the reporting obligation if \$10 million or more of their aggregated turnover for the income year is Australian-sourced

Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023

- Increases the \$1,000 instant asset write-off threshold in Div 328 to \$20,000 from 1 July 2023 to 30 June 2024
- Announced in the 2023-24 Budget
- Division 328 ITAA 1997 contains the simplified depreciation regime available to small business entities (aggregated annual turnover of less than \$10 million)
- Senate amendments propose to increase the instant asset write-off threshold to \$30,000 and increase the aggregated annual turnover threshold to \$50 million
- Latest development – 28 May House of Representatives insist on disagreeing to the Senate proposed amendments
- **This Bill currently sits before the Senate**

Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

- Received Royal Assent on 31 May 2024
- Contains various measures as part of Government's response to the PwC tax leaks scandal
- Covers the following:
 - Promoter Penalty law changes
 - Extending whistleblower protections
 - Tax Practitioners Board reforms
 - Information sharing
- Also contains Petroleum Resource Rent Tax changes

Digital ID Bill 2023

- Received Royal Assent on 30 May 2024
- Provides for the Digital ID as a secure, convenient and voluntary way to verify one's identity online against existing government-held identity documents
- Without having to hand over any physical information
- Digital ID is not a card, it is not a unique number, nor a new form of ID
- Sets out an Accreditation Scheme for digital ID service providers
- Legislates Australian Government Digital ID system for use by Commonwealth, State and Territory governments, and eventually to the private sector
- Establishes ASIC as the Digital ID regulator
- Expands role of the Information Commissioner

Administrative Review Tribunal Bill 2024

- Passed by the Senate on 28 May 2024
- Received Royal Assent on 3 June 2024
- Establishes a new federal administrative review body to replace the Administrative Appeals Tribunal
- The new Act commences on the date that is proclaimed by the Parliament – yet to be announced
- Otherwise, 1 July 2025

ATO / Government Announcements

Thresholds for 2024–25

Luxury Car Tax

- The *luxury car tax threshold* for the 2024–25 financial year is \$80,567 (\$76,950 in 2023–24)
- The *fuel-efficient car threshold* for the 2024–25 financial year is \$91,387 (\$89,332 in 2023–24)
- All amounts are GST inclusive
- Cars with a luxury car tax (LCT) value over the LCT threshold attract an **LCT rate of 33%**

FBT Parking Threshold

- The car parking threshold for the fringe benefits tax year commencing on 1 April 2024 is \$10.77 (\$10.40 for the previous year that commenced on 1 April 2023)

Car limit for 2024–25

Car Limit – capital allowances

- The car limit for capital allowance purposes for 2024–25 has increased to \$69,674 (\$68,108 in 2023–24) – *GST exclusive*
- Highest value to calculate depreciation on a car
- The car limit for capital allowance purposes for 2024–25 has increased to \$69,674 (up from \$68,108 for 2023–24)
- The car limit is used, among other things, in s40-230 of ITAA 1997 to work out the first element of the cost of certain cars to which the car limit applies

GST input tax credits

- Maximum input tax credit claimable is \$6,334 ($1/11^{\text{th}} \times \$69,674$): *[s69-10 GST Act]*

Car expenses cents per kilometre rate 2024-25

- *Income Tax Assessment (Cents per Kilometre Deduction Rate for Car Expenses) Determination 2024*
- The cents per kilometre rate for calculating work-related car expense deductions will be *88 cents per kilometre* for income years commencing on or after 1 July 2024 (85c in 2023-24)
- Rate has been updated in accordance with the annual movement of the Private Motoring Subgroup of the consumer price index
- Remains applicable until the Commissioner determines that it should be varied
- The Commissioner may determine rates for the “cents per kilometre” method for cars under s 28-25(4) of ITAA 1997
- When determining the rate, the Commissioner is required to have regard to the average operating costs for the cars to be covered by that rate

Division 7A minimum yearly repayments

- ATO website update
- Reminder that under complying loan agreements [s109N ITAA 1936] minimum yearly repayments (MYR) must be made each year
- Missing the MYR or not paying enough in an income year will result in a shortfall in the MYR - can be assessed to the borrower as an unfranked dividend
- Start repayments in the income year after the complying loan was made
- Use the correct benchmark interest rate to calculate the MYR for the current year
- Make the required payments on the loan by the due date – the end of the income year (usually 30 June)
- MYR shortfalls are a common problem found in ATO reviews and audits

Division 7A minimum yearly repayments - offsetting

- ATO website update
- Loan MYR can be made by offsetting a borrower's entitlement to an amount owed to them from a private company
- Examples include dividends, salary, wages and directors' fees
- Common issue in ATO reviews is the use of journal entries without supporting evidence
- *Company and borrower must owe each other the amounts at the time of the offsets are made*
- Must be a record that the shareholder is entitled to the dividend e.g. meeting minutes
- There must be an agreement between the borrower and the company to set off the MYR against the amount payable to the borrower
- Agreement and set off must be made by the end of the income year

Division 7A and debt forgiveness

- ATO website update
- A private company may be taken to pay a dividend to an entity at the end of the company's income year if it forgives a debt owed by the entity during the year either:
 - when the entity is a shareholder or an associate of a shareholder of the company, or
 - after the entity ceases to be a shareholder or an associate of a shareholder, and a reasonable person would conclude that the payment was made because the entity was a shareholder or an associate of a shareholder at some time.
- The total of all dividends a private company is taken to pay under Division 7A is limited to its distributable surplus for that income year
- Division 7A applies even if debt owed in capacity as employee or occurs in respect of the employment of an employee – FBT does not apply where Div 7A applies to the debt

Division 7A and debt forgiveness

- A debt or part of a debt is forgiven under the following circumstances:
 - the obligation to pay the debt is released, waived or otherwise extinguished
 - the private company loses its right to sue for recovery of the debt due to the operation of a statute of limitations
 - There is an arrangement with the private company, where the obligation to pay the debt will end at a future time without having to pay anything
 - the shareholder or their associate enters into *a 'debt parking' arrangement*
 - reasonable to expect that the private company will not insist or rely on the shareholder or their associate repaying the debt

Division 7A and debt forgiveness

- Debt forgiveness is not treated as a dividend where:
 - a private company forgives a debt *owed to it by another company*
 - the shareholder or their associate became *bankrupt*
 - debt that has been forgiven results from a loan from a private company that has been *treated as a dividend* under Division 7A (or section 108 of the Income Tax Assessment Act 1936) *in the current year or a previous year*
 - Commissioner *exercises his discretion* not to treat the debt forgiveness as a dividend
- The *commercial debt forgiveness provisions in Schedule 2C of the Income Tax Assessment Act 1936 do not apply* to a debt forgiveness treated as a dividend under Division 7A to the extent it is included in a shareholder's or their associate's assessable income

Withholding tax obligations on payments to non-residents

- ATO reminder – website update
- T/ps who have paid interest, dividends, or royalties
- *to a non-resident*
- that are *subject to withholding tax*
- have an obligation to:
 - lodge a Pay as you go (PAYG) withholding from interest, dividend and royalty payments to non-residents - annual report by 31 October each year and/or
 - *an investment body making interest payments to non-resident investors* must lodge an Annual investment income report by 31 October each year, (or lodge a nil return), and
 - pay withholding tax to the ATO, unless a withholding exemption or tax treaty relief applies.

Renting out main residence

- ATO reminder – website update
- Renting *part or all of a main residence or any other property* on an online accommodation sharing platform
- Must declare the income as rental income
- Only claim deductions for the *proportion of associated expenses* that reflect both:
 - the proportion of time the room/property is rented (or occupied for payment)
 - the proportion of the property that is rented.
- Keep records:
 - Statements from the online platform
 - Receipts of expenses

Renting out main residence

Example – taken from ATO website

- Jane has a two-bedroom unit with two bathrooms in a popular downtown area
- She mainly uses the ensuite bathroom
- The second bathroom is accessible from the main areas and is mostly used by visitors
- Jane decides to rent out the spare room using an online platform to earn extra income
- The unit is 80 square metres in total - the spare room being rented is 10 square metres
- Jane also gives paying guests access to common areas including the second bathroom, kitchen, living area and balcony, which totals 50 square metres
- She also offers her guests access to her wi-fi for free
- Jane had the room occupied for 150 days in the year

Renting out main residence

Example – taken from ATO website

- Jane can claim *50% of the deductible portion of associated costs related to the common areas for the period guests are staying* and have access to common areas (along with Jane)

Solution

- Room size = 10 square metres.
- House size = 80 square metres.
- Common areas = 50 square metres.
- Days the room is rented out = 150 days.

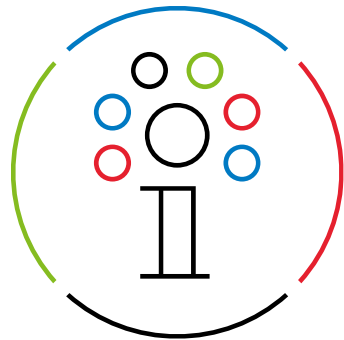
Renting out main residence

Example – taken from ATO website

Solution

- Jane can claim 17.97% of her general expenses after adding the two calculations together:
 - room occupancy – $(10 \div 80) \times (150 \div 365) \times 100 = 5.13\%$
 - common areas – $((50 \div 80) \times (150 \div 365) \times 50\%) \times 100 = 12.84\%$
- Jane can claim a *deduction of 17.97% of her general expenses* such as electricity, interest on her mortgage, rates and body corporate fees
- Jane can claim *100% of the expenses associated solely with renting out the room*, such as the platform's service fees or commission

Poll Question #1



The instant asset write off threshold for 2023-24 is:

- a) \$30,000
- b) \$20,000
- c) \$1,000
- d) All of the above
- e) None of the above

Family trust elections & Interposed entity elections

- ATO website update
- Family trust distribution tax (FTDT) applies when a trust has made a family trust election (FTE), or an entity has made an interposed entity election (IEE), and
- Makes a distribution outside the family group of the specified individual in the election
- FTDT is 47% tax payable by a trustee, director or partner
- Important to recognise who the members of the specified individual's family group are when making annual trustee resolutions

Family trust elections & Interposed entity elections

- Consider the following on an annual basis:
 - if the election is needed and whether it can, and should be, revoked
 - whether the specified individual remains the most suitable person and if not, whether the specified individual can, and should be varied
 - the timeframes to vary or revoke elections – these are limited and that outside these periods, the elections and the specified individuals can't be changed
- FTE and IEE relevant for:
 - Company loss tests
 - Franking Credits
 - Trust Loss rules

Superannuation rates and thresholds from 1 July 2024

- Concessional contributions cap — \$30,000
- Non-concessional contributions cap — \$120,000
- Capital gains tax (CGT) cap amount — \$1.78 million
- Maximum superannuation contributions base — \$65,070 per quarter
- Maximum co-contribution entitlement remains at \$500
 - The lower income threshold increases to \$45,400 and the higher income threshold increases to \$60,400.
- Employment termination payment (ETP) cap amount for *life benefit termination payments and death benefit termination payments* — \$245,000

Superannuation rates and thresholds from 1 July 2024

- Base limit of the tax-free part of *genuine redundancy and early retirement scheme payments* is \$12,524, and for each complete year of service is \$6,264
- Key superannuation rates and thresholds that have remained the same for 2024–25 include:
 - General transfer balance cap — \$1.9 million
 - Defined benefit income cap — \$118,750
 - Div 293 tax income threshold — \$250,000

Top 500 Private Groups

- ATO website update
- ATO advise create and stick to a lodgment and payment calendar to make sure obligations and due dates are identified and actioned on time
- review roles and responsibilities of everyone involved in reporting obligations and EOFY accounts so that everyone knows their responsibilities
- identify dates for managing compliance of specific tax issues, such as ensuring that trust resolutions are signed by 30 June and minimum yearly repayments are made on Division 7A loans from previous years
- engage an external auditor to verify amounts reported in the financial statements used as the basis for preparing tax returns

Top 500 Private Groups

Reminder

- The Top 500 private groups program includes private groups:
 - with over \$250 million turnover, regardless of net asset value
 - with over \$500 million net assets, regardless of turnover
 - with over \$100 million turnover and over \$250 million in net assets
 - that are market leaders or groups of specific interest
- ATO seeks to provide a level of assurance based on the principles of ‘justified trust’
- ATO uses data-matching and analytic models to identify wealthy private groups and link them to associated entities – then looks at the group as a whole

Top 500 Private Groups

Reminder – justified trust

- Approach the ATO uses to build confidence that a Top 500 group is paying the right amount of tax
- Seek objective evidence that would lead a reasonable person to conclude a particular t/p paid the right amount of tax
- Engage in the 4 key areas:
 - Understanding the tax governance framework
 - Identifying tax risks flagged to the market
 - Understanding significant and new transactions
 - Understanding why accounting and tax results vary

Next 5,000 Private Groups tips for correct reporting

- ATO website update
- Next 5,000 groups are Australian resident individuals who, together with their associates, control more than \$50 million in net wealth, and are not in the Top 500 Private Group
- If undertaking significant transactions, ATO recommend the following:
 - Define what counts as a significant transaction
 - Identify and record the sale of significant assets and material transactions through the year
 - Keep records to substantiate expenses and income relating to the asset or event
 - Seek independent valuations to support sales with related parties
 - Communicate significant transactions to tax agent and advisors in a timely manner

Next 5,000 Private Groups tips for correct reporting

Example

- A Next 5,000 group subdivided properties and reported sales of \$18 million on capital account
- Applied the capital gains tax (CGT) discount to reduce those capital gains by 50%
- During ATO review, the group could not support its tax position
- ATO started an audit
- ATO found the properties were revenue assets - denied the CGT discount
- ATO amended the group's tax returns - increased their tax payable to almost \$3.5 million, plus interest and penalties

Not for profit (NFP) self-review return

- ATO website update
- Non-charitable NFPs with an active Australian business number (ABN) need to lodge an annual NFP self-review return to notify their eligibility for income tax exemption
- First return for the 2023–24 income year is due between 1 July and 31 October 2024
- The return will guide the NFP to self-assess its main purpose and activities against eligibility requirements of an income tax exempt entity
- To be eligible to self-assess as income tax exempt, the main purpose must be a community service purpose
- Community service purposes are altruistic - the organisation must be established and operated for the wellbeing and benefit of others
- It does not include political or lobbying purposes

Small business restructure rollover

- ATO website update
- ATO concern that some wealthy groups are using the small business restructure roll-over (SBRR) for reasons other than a genuine restructure of an ongoing business
- SBRR allows the tax-free transfer of active assets from one entity to another, but *only when that transfer is part of a genuine restructure*
- See LCR 2016/3 for guidance on 'genuine restructures'
- Some indicators of a genuine restructure are:
 - a bona fide commercial arrangement
 - maintaining economic ownership of the business
 - continued use of the transferred assets in the business

Small business restructure rollover

- Some indicators of a genuine restructure are (cont):
 - a new structure that may have been adopted when establishing the business if appropriate professional advice was obtained
 - changes that facilitate growth rather than divestment
 - changes that aren't artificial or unduly tax driven
- SBRR also includes a safe harbour rule that provides an alternative way of meeting the requirement that a restructure is genuine
 - No change in ultimate economic ownership of any significant assets
 - The significant assets continue to be active assets
 - There is no significant or material use of those significant assets for private purposes

Trustee Resolutions reminder

- Distributions to beneficiaries of a trust must be made by way of an effective trustee resolution
- Distributions must be permitted under the trust deed
- The recipients of the distributions must qualify as beneficiaries of the trust
- The resolution may need to be done by a specific date that may be stated in the trust deed
- The trust should not have vested during the year
- Consider the effect of a Family Trust Election or Interposed Entity Election and whether the intended beneficiary is included in the family group
- If capital gains or franked dividends are intended to be streamed – check for streaming clauses in the trust deed and that the specific entitlement rules have been correctly applied

Medicare levy exemption data matching

- ATO to acquire Medicare Exemption Statement data from Services Australia for the 2023–24 to 2025–26 financial years
- Data items that will be collected include:
 - Full name, date of birth, residential address
 - Entitlement status, and approved entitlement period details.
- Data acquired will be matched with ATO systems to ensure individuals are correctly claiming exemption from payment of the Medicare levy and Medicare levy surcharge
- Estimated that records relating to approximately 180,000 individuals will be obtained each financial year

CGT improvement threshold

- Commissioner has determined that the capital gains tax *(CGT) improvement threshold* for the 2024–25 year is \$182,665 (\$174,465 in 2023-24)
- The improvement threshold is determined for the purposes of:
 - s108-70 (when a capital improvement to a pre-CGT asset is a separate asset), and
 - s108-5 (capital improvements to CGT assets for which a roll-over may be available) of ITAA 1997

Tax Practitioners Board (TPB) annual registration

- Updated registration fees for Tax agent and BAS agent registration have been released
- Under new 1-year registration period
- Applies to new and renewal registration applications from 1 July 2024
- Base registration application fee is \$273 for tax agents and \$54 for BAS agents
- One third of previous fees under registration period of 3 years
- If tax or BAS agent has existing registration on 1 July 2024 – next application to renew registration will be subject to revised renewal period and revised fee
- Fees to be indexed every year from 1 July 2025



ATO Rulings

Lodgment of tax returns 2023-24

- [*Legislative Instrument F2024L00550*](#) sets out who is required to lodge an income tax return, a franking return, a venture capital deficit tax return and an ancillary fund return for the 2024 year
- Includes a new requirement for certain entities whose income is exempt under Div 50 of ITAA 1997 to lodge an "NFP self-review return"
- Due date is 31 October 2024 unless or a substituted accounting period (SAP)
 - For full self-assessment t/p: SAP is due 15th day of 7th month after end of the SAP year, or
 - For others: Last day of 4th month after end of SAP year

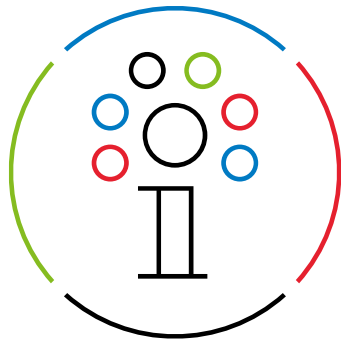
Lodgment of tax returns 2023-24

- *Legislative Instrument F2024L00551* requires *liable and recipient parents under a child support assessment* to lodge an income tax return for the 2024 year by 31 October 2024, except if:
 - Taxable income < \$28,464, and
 - In receipt of certain Aust Govt pensions, allowances or payments

Electronic Distribution Platforms

- *Taxation Administration (Reporting Exemptions for Electronic Distribution Platform Operators) Determination 2024* now finalised
- Legislative instrument that *exempts electronic distribution platform (EDP) operators from having to include specified classes of transactions in reports* lodged under the sharing economy reporting regime for reporting periods starting on or after 1 July 2024
- Exempts transactions:
 - where the supply is made through at least one other EDP
 - where the supplier is less likely to be sharing economy participants
 - that are less likely to be sharing economy transactions where the suppliers are compliant with tax obligations
- Applies from 1 July 2024

Poll Question #2



Which of the following is NOT an indicator of a 'genuine restructure' under the Small Business Restructure Rollover.

- a) facilitates growth
- b) to transfer wealth between generations
- c) adapting to changed conditions
- d) reduce administrative burdens
- e) reduce cash flow impediments



Cases

Market value substitution rule

Overview

- *Moloney & Ors v FC of T [2024] AATA 1483*
- Market value substitution rule did not apply to use a higher valuation in place of actual capital proceeds

Facts

- The t/ps were the beneficiaries of a discretionary family trust (the Moloney Trust)
- Between 1996 and 2015 the Moloney Trust carried on a bulk haulage freight business, trading as Mt Noorat Freighters (MNF)
- The trustee of the Moloney Trust was JG Moloney & Co (Noorat) Pty Ltd (JGM)
- The directors of JGM were 2 of the t/ps, Raymond and Anthony

Market value substitution rule

Facts

- From 2014, the business was restructured as follows:
 - 12 June 2014 - Mt Noorat Freighters Holdings Pty Ltd was registered with Anthony and Raymond as directors
 - 12 March 2015 - Anthony and Raymond commenced to hold their shares in JGM as beneficial owners
 - 25 March 2015 - the Moloney Trust sold the MNF business to JGM for \$3,500,000
 - 25 March 2015 – shares in JGM sold to Mt Noorat Freighters Holdings Pty Ltd for \$3,500,000 (the CGT event)
 - 31 March 2015 – JGM was replaced as trustee of the Maloney Trust by Raymond and Anthony
 - 19 June 2015 – income of the Maloney Trust appointed to the t/ps, including the capital gain after applying the 50% General Discount and the Small Business Concessions

Market value substitution rule

Facts

- ATO carried out an audit of the group – found that Small Business Relief did NOT apply
- ATO concluded that the shares sold by JGM to Mr Noorat Freighters Holdings Pty Ltd had a market value of \$10,640,000
- ATO adopted valuation prepared by Korda Mentha in 2021
- ATO applied market value substitution rule on the basis that the parties did not *'deal with each other at arm's length'* [s116-30 ITAA 1997]

Issue

- Whether the market value substitution rule applied to permit the ATO to substitute the Korda Mentha value of the shares

Market value substitution rule

Decision

- The parties did NOT deal with each other at arm's length – therefore s116-30 could be applied
- No real bargaining between the parties – valuation determined by the t/p's accountants – PKF Melbourne
- Difference between valuations was a difference in the perception of the economic and commercial circumstances of the MNF business at the valuation date
- PKF valuation considered to have taken a more realistic approach to cyclical nature of agriculture sector on MNF business
- PKF valuation more closely aligned to thinking of a willing but not anxious purchaser and seller at the valuation date – this was to be the preferred valuation over Korda Mentha's valuation

Market value substitution rule

Decision

- The maintainable EBITDA was within PKF's range of \$1.6 to \$1.7 million (eg \$1,650,000)
- The appropriate capitalisation multiple was at the high end of PKF's range of 3.75 to 4.25
- This valued the business at the valuation date at approximately \$7,012,500 ($\$1,650,000 \times 4.25$)
- The agreed long term/financial liabilities were \$3,660,000. This led to a valuation of \$3,352,500
- Adding the combined CGT assets of the connected entities (\$803,901) led to \$4,156,401
- T/ps established that the net value of the CGT assets of the Maloney Trust did not exceed \$6 million just before 25 March 2015

Market value substitution rule

Points to note

- The ATO regularly challenges valuations in the course of carrying out their audits and reviews
- Most restructures will involve transactions where the parties are **NOT** dealing with each other at arm's length – may cause market value substitution rule to be applied [\[s116-30 ITAA 1997\]](#)
- Best defence to s116-30 is a high quality, formal valuation that sets out in detail, the basis of the valuation
- The key variables in the valuation of a business are:
 - Ascertaining the future maintainable earnings of the business (making appropriate adjustments), and
 - Selecting an appropriate multiple by analysing comparable sales
- These matters should be discussed in detail in a formal valuation report

FBT on luxury cars provided to directors

Overview

- *BQKD v FC of T [2024] AATA 1542*
- No FBT liability arose to t/p for non-cash benefits provided to directors
- Not employees of the t/p, or alternatively, not provided in respect of employment

Facts

- T/p was the corporate trustee of a discretionary family trust
- T/p's directors were 3 brothers who were also eligible beneficiaries under the relevant family trust
- the business prospered, it established or acquired hundreds of other businesses and expanded into a large growing concern
- The brothers, who were also the directors and shareholders of most of the other entities in the notional corporate group, shared the responsibility for running the family business

FBT on luxury cars provided to directors

Facts

- no written contract of employment for any of the 3 directors, and no record of any resolution to enter into such an agreement
- T/p made superannuation contributions in respect of each director throughout the 2016, 2017 and 2018 years up to the concessional contributions cap plus personal contributions for 2019 & 2020
- Directors collectively decided that the profits of the trust available for distribution should be shared among the 3 of them equally
- Luxury motor vehicles were also purchased in the company name and made available for use by the 3 directors
- Each director used the vehicles allocated to him for business and personal use during the relevant fringe benefits tax (FBT) years

FBT on luxury cars provided to directors

Facts

- The expenses associated with their private use of the vehicles were debited through the trust against the directors' mother's account, who was also an eligible beneficiary under the trust

Issues

- Whether the 3 directors were employees of the t/p for the purposes of the FBT law
- If they were employees, were the benefits provided to them 'in respect of' that employment

FBT on luxury cars provided to directors

Decision

- AAT set the objection decision aside
- Evidence in regard to superannuation payments was a weak indicator of an employment relationship
- Other evidence tended to suggest that the relationships were not properly characterised as such due to the underlying rights and obligations
- Absence of any evidence of a board resolution to establish a contract of employment
- The evidence of control, and
- The directors were not integrated into the hierarchy of the taxpayer but appeared to sit at the apex of that company and a wider network of family businesses - pointed away from an employment relationship

FBT on luxury cars provided to directors

Decision

- If the directors were found to be in an employment relationship, the benefits were not available to them in connection with their employment in the relevant sense
- The directors were helping themselves to benefits because they genuinely believed they were entitled to them as beneficiaries, not because it was a reward for their work as directors, or as employees

Part IVA & Dividend Stripping

Overview

- *Merchant v Commissioner of Taxation [2024] FCA 498*
- The Federal Court has held that both the Pt IVA general anti-avoidance provisions and dividend stripping provisions applied to an arrangement involving the sale of high-cost shares at market value by a family trust to a related entity to trigger a capital loss

Facts

- The first taxpayer, Mr Merchant (Mr M), co-founded in 1973 the surf-wear brand Billabong (BBG)
- Mr M was also the director and controlling mind of several other Australian corporate entities (collectively, the Merchant Group), which included the second taxpayer, GSM Pty Ltd
- At the relevant time, GSM was a beneficiary with a 100% entitlement to the income of the Merchant Family Trust (MFT)

Part IVA & Dividend Stripping

Facts

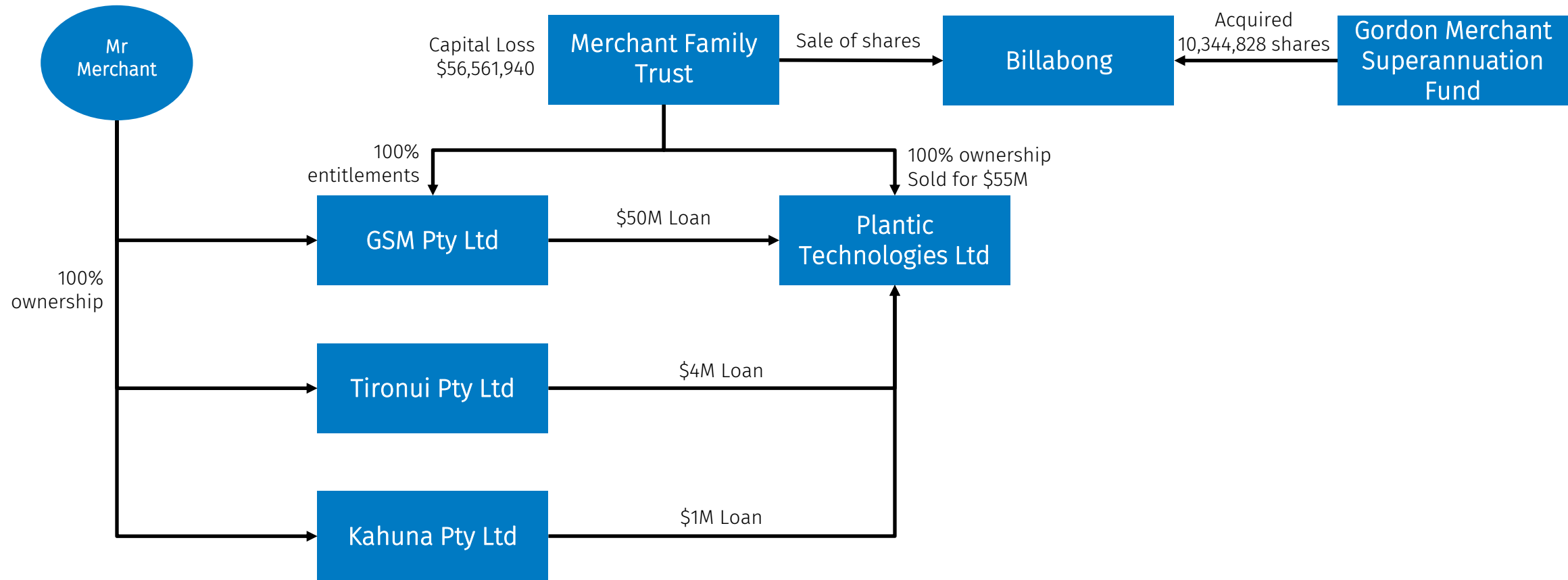
- A start-up company, Plantic Technologies Ltd was acquired by MFT in 2010
- Plantic relied on the Merchant Group for funding, with 3 entities in which Mr M was the sole shareholder lending about \$55 million to it between 2011 and 2015
- Due to the level of funding required, by mid-2014 Mr M considered selling Plantic
- He was advised by his accountants (Ernst & Young) that the sale of Plantic could generate a substantial capital gain in MFT

Part IVA & Dividend Stripping

Facts

- The preferable structure of a future sale of Plantic from Mr M's perspective was therefore for:
 - MFT to sell its shares in Plantic rather than for Plantic to sell its assets
 - the relevant Merchant Group entities to forgive the Plantic loans of \$55 million, and
 - the Gordon Merchant Superannuation Fund (GMSF) to acquire from MFT several MFT's high-cost shares in BBG, with the result that MFT would crystallise a capital loss

Part IVA & Dividend Stripping



Part IVA & Dividend Stripping

Facts

- On 4 September 2014 MFT sold 10,344,828 shares in BBG to the GMSF for \$5,844,828
- The result was that MFT crystallised a capital loss of \$56,561,940
- ATO conducted an audit into the affairs of Mr M and the Merchant Group
- Commissioner took the view that the predominant reason why the GMSF acquired the BBG shares from MFT was:
 - to crystallise a capital loss in MFT,
 - that could be applied against the capital gain from MFT's anticipated sale of its shares in Plantic,
 - resulting in a reduction in GSM's assessable income (the "BBG share sale scheme")

Part IVA & Dividend Stripping

Facts

- Commissioner made determinations under s 177F(1)(c) of ITAA 1936 for the 2015 income year denying the capital loss of \$56,561,940, which resulted in:
 - MFT's net income being increased to reflect the net capital gain
 - an amended assessment being issued to GSM increasing its tax payable
 - a penalty assessment to MFT for \$6,438,500, being 50% of the scheme shortfall amount (the subject of a separate proceeding before the AAT)

Part IVA & Dividend Stripping

Facts

- Commissioner also considered that the forgiveness of debts by GSM and Tironui
 - were schemes having substantially the effect of a scheme by way of or in the nature of dividend stripping
 - made a determination under s 177F(1)(a) those debts be included in Mr M's assessable income in the 2015 income year as dividends
- Commissioner issued an amended assessment to Mr M in relation to the 2015 year that increased his assessable income by \$54,407,000

Part IVA & Dividend Stripping

Issues considered

- Before the Federal Court were appeals from the objection decisions relating to:
 - the cancelling of the capital loss (the s 177D proceeding), and
 - the assessment arising from the Commissioner's conclusion the dividend stripping rules applied (the s 177E proceeding)

Part IVA & Dividend Stripping

Arguments

Part IVA

- T/p argued dominant purpose from the perspective of MFT was to convert its BBG shares into cash to enable it to:
 - continue to assist in meeting the demands on its cash, including the funding needs of Plantic,
 - in a way that did not dilute the Merchant Group's stake in BBG
- The dominant purpose from the perspective of GMSF was to acquire a further parcel of BBG shares, which was said to be an asset expected to appreciate in value

Part IVA & Dividend Stripping

Arguments

Part IV (Cont)

- Commissioner argued that from MFT's perspective:
 - the main objective of the BBG share sale was not to generate \$5.8 million in cash, but rather
 - to generate a capital loss in MFT in anticipation of MFT making capital gains on the sale of its shares in Plantic
- No *contemporaneous record or evidence to support the t/ps' assertion* that the dominant purpose of GMSF was to acquire an asset likely to appreciate
- Such an assertion was *inconsistent with GMSF's documented investment strategy*

Part IVA & Dividend Stripping

Issues considered

Dividend Stripping

- Whether the debt forgiveness scheme fell within the scope of s177E(1)(a)(ii)
- T/p argued that the narrow scheme merely identified a disposal of property and not a scheme resulting in the disposal
 - that *the essential characteristics of a dividend stripping scheme* (ie something becomes tax free and all parties acting in concert) *were also missing*, and
 - *the sole or dominant purpose of the scheme was not to avoid tax* on a distribution of the company profits to Mr M (the taxpayers primarily contending that the forgiveness served an obvious commercial objective)

Part IVA & Dividend Stripping

Decision

Section 177D proceeding (Part IVA)

- Federal Court found in favour of the Commissioner
- The *dominant purpose of the taxpayers was to obtain the tax benefit*
- The evidence established that the *predominant reason for entering into the BBG share sale was to crystallise a capital loss in MFT*
- BBG share sale was **NOT** undertaken for a purpose of funding a cash shortfall in MFT:
 - MFT had *ample funding available* at the time to meet the anticipated funding requirements of Plantic
 - Documents recording Ernst & Young's advice indicated that the *BBG share sale was related to the anticipated sale of Plantic*
 - Mr M's assertion under cross-examination that he *did what he was directed to do by Ernst & Young*

Part IVA & Dividend Stripping

Decision

Dividend stripping

- Federal Court found in favour of the Commissioner
- The objective purpose of the loan forgiveness was:
 - to permit the amounts forgiven to be *accessed in a way in which substantially less tax would be paid* than
 - if those amounts were repaid to GSM and Tironui and received by Mr M by way of dividends
- T/ps had not established that the debt forgiveness was NOT motivated predominantly because of the tax benefit it would deliver

Part IVA & Dividend Stripping

Decision

Dividend stripping

- The main purpose of the broader scheme was to avoid the payment of top-up tax by Mr M on GSM's and Tironui's undistributed profits
- If not for the forgiveness of the loans:
 - GSM would have had substantial undistributed profits
 - creating a potential tax liability for Mr M
 - who would have had to pay tax at marginal rates on dividends paid to him
- The effect of the scheme was, in substance, to *transfer undistributed profits in GSM and Tironui to MFT from where they could be distributed at substantially lower rates of tax*
- T/p has appealed this decision

Questions?

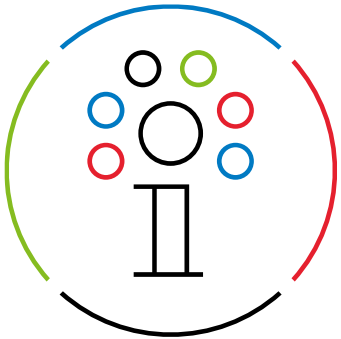


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