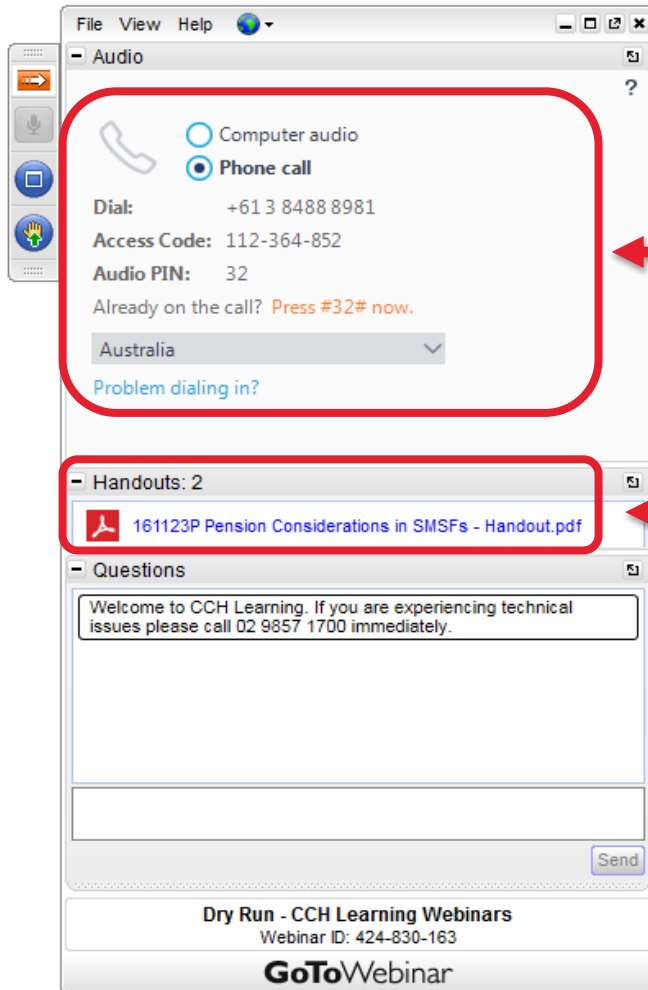

Tax Technical Update – October 2024

Carlo Di Loreto

Tuesday 29 October 2024



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Susannah Gynther
Moderator

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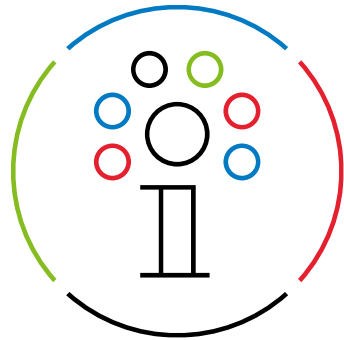
Your Presenter



Carlo Di Loreto

Partner - Tax Advisory
Crowe Australasia, an affiliate of Findex

Today's session will cover



October 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

Foreign Resident CGT withholding

- *Treasury Laws Amendment (2024 Tax and Other Measures No 1) Bill 2024*
- Referred to Senate Economics Legislation Committee – reported back on 24 October 2024
- Has recommended that the Bill be passed
- Increases the foreign resident capital gains withholding rate from 12.5% to 15%
- Removes the current \$750,000 threshold before which withholding applies for transactions involving either taxable Australian real property or an indirect Australian real property interest that provides company title interests
- Bill commences on the first 1 January, 1 April, 1 July or 1 October after Royal Assent
- Impacts on acquisitions that are made on or after the later of the start of 1 January 2025 and the commencement of the Bill

Paid Parental Leave

- *Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Bill 2024*
- Received Royal Assent 1 October 2024
- Provides for a superannuation contribution for people receiving Commonwealth-funded parental leave pay (PLP) in respect of children born on or after 1 July 2025
- The superannuation contribution will comprise 2 components:
 - a core component calculated by multiplying the total amount of PLP paid for the person in an income year by the superannuation guarantee rate for that income year, and
 - a nominal interest component to address the foregone returns resulting from the annual payment of the superannuation contribution
- ATO will calculate and disburse the super contributions

Deductibility of General Interest Charge and Shortfall Interest Charge

- *Treasury Laws Amendment Bill 2024: Denying Deductions for Interest Charges*
- Exposure draft legislation released on a proposal to deny deductions for GIC and SIC
- Currently, taxpayers may claim deductions on expenditure incurred to the extent that it is for GIC and SIC in the year in which the charges are incurred
- Proposes to amend sections 25-5 and 26-5 of ITAA 1997 to deny the income tax deductions for amounts of GIC and SIC incurred by a taxpayer from 1 July 2025
- The measure is at the consultation stage

Exposure Draft Luxury Car Tax

- *Treasury Laws Amendment (Fairer For Families And Farmers) Bill 2024: Luxury Car Tax*
- Will amend section 25-1 of the LCTA 1999 by:
 - updating the definition of a fuel-efficient car by reducing the maximum fuel consumption for a car to be considered fuel-efficient for the LCT to 3.5 litres per 100 kilometres from the current 7 litres per 100 kilometres; and
 - amending the index number used to index the LCT threshold from All Groups CPI to the motor vehicle purchase sub-group of the CPI
- Currently in consultation phase

Exposure Draft Luxury Car Tax

- A higher threshold that applies to fuel-efficient luxury cars, known as the fuel-efficient car limit which is indexed annually using the index number for the motor vehicle purchase sub-group of the CPI
 - This is \$91,387 for FY 2025
- A lower threshold that applies to all-other luxury cars, which is indexed annually using the index number for the All-Groups CPI
 - This is \$80,567 for FY 2025
- Amendments to commence on the first 1 January, 1 April, 1 July or 1 October after the day on which the Bill receives Royal Assent
- Applies to taxable supplies and taxable importations of luxury cars on or after 1 July 2025

Penalty Units increase

- *Crimes and Other Legislation Amendment (Omnibus No 1) Bill 2024*
- Passed by both houses and received Royal Assent 24 October 2024
- Increases the penalty unit value for Commonwealth criminal offences from \$313 to \$330 with effect from 1 July 2024
- Existing indexation mechanism to automatically increase the value of the penalty unit every 3 years in line with the Consumer Price Index will continue to apply
- The next indexation to occur on 1 July 2026

Better targeted superannuation concessions

- *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023 (the Bill) and*
- *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023 (the Imposition Bill)*
- Passed by House of Representatives 9 October 2024 – now in Senate
- Amendments to impose a tax of 15% for superannuation earnings corresponding to the percentage of an individual's superannuation balance in excess of \$3 million for an income year
- The tax will be imposed directly on the individual and is separate from the tax arrangements of the superannuation fund or scheme

Better targeted superannuation concessions

- Balances in Australian superannuation accounts will be included for the purposes of calculating an individual's total superannuation balance and earnings
- Includes APRA-regulated funds, self-managed superannuation funds and exempt public sector schemes
- Special rules will apply to certain Commonwealth judges and justices, certain State higher level office holders, and non-complying funds
- The new tax will apply from 1 July 2025
- Individuals who have a total superannuation balance greater than \$3 million on 30 June 2026 will be subject to the new tax on earnings from 1 July 2025 to 30 June 2026

Anti-money laundering regime

- *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024*
- Passed by House of Representatives 9 October 2024 – now before the Senate
- Expands the *list of designated services* in section 6 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006
- Includes higher risk services provided by “gatekeeper professions” which include professional service providers such as *lawyers, conveyancers and accountants*
- Businesses that provide these designated services would be regulated under the AML/CTF regime
- Will have obligations including client due diligence, reporting suspicious matters and record-keeping requirements in relation to those services

Anti-money laundering regime

- The services that will be added as designated services include:
 - buying and selling of real estate
 - managing of client money, securities or other assets
 - management of bank, savings or securities accounts
 - organising contributions for the creation, operation or management of companies
 - creation, operation or management of legal persons or arrangements, and buying and selling of business entities
 - acting as a formation agent of legal persons
 - acting as (or arranging for another person to act as) a director or secretary of a company, a partner or a partnership, or similar position in relation to other legal persons

Anti-money laundering regime

- The services that will be added as designated services include:
 - providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement
 - acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement, and
 - acting as (or arranging for another person to act as) a nominee shareholder for another person.

ATO / Government Announcements

Collecting unpaid tax and super

- ATO is taking a deliberate and targeted approach to collect unpaid tax and superannuation against businesses who refuse to engage with them and continue to ignore past engagement attempts such as SMS and letter reminders
- For businesses that do not engage with the ATO or set up a payment plan for unpaid GST, pay as you go (PAYG) withholding or employee super
 - ATO will move more quickly to firmer actions such as issuing *Director Penalty Notices (DPNs)* and garnishees

Collecting unpaid tax and super

- Directors of multiple companies who allow amounts of GST, PAYG withholding and employee super to go unpaid, and do not engage with the ATO:
 - ATO to look at their debts more "holistically"
 - These directors can expect to receive DPNs capturing the total value of these amounts across all related entities
 - If these directors do not take action, the ATO can recover these amounts directly from them, putting their assets at risk

Actions to consider

- Communicate this issue to clients who have outstanding obligations to the ATO
- Encourage engagement with ATO to avoid DPNs being issued

Data matching update

- Commissioner will acquire government payments data for the 2023–24 to 2025–26 financial years
- ATO will collect the following data from government entities who administer government programs:
 - service provider identification details (names, addresses, phone numbers, email, dates of birth, service type, ABN, ACN), and
 - payment transaction details (service provider ID, name of service, type of service linked to program, value of payments received for the financial year, count and type of claim, withholding and re-credit amount)

Data matching update

- Data collected will be used to:
 - identify and address tax and super risks, trends and non-compliance by service providers receiving government payments for delivering services
 - support government entities by providing feedback at an aggregate agency and/or program level and where allowed by legislation at an individual provider level
 - inform methodologies by which ATO select taxpayers for engagement activities, and
 - enhance data currently received from government entities through the Taxable Payments Annual Report

Administrative Treatment 'no goodwill' professional practices

- Update to ATO website
- A 'no goodwill' professional practice
 - the practitioner entities agree that when a new practitioner entity is admitted or exists the practice
 - they are not required to pay or receive an amount which reflects a value for any goodwill of the practice
- Guidelines are concerned with arm's length dealings between practitioner entities that are unrelated, aside from their involvement in the practice
- Capital gains tax, employee share scheme and off-market buy-backs may apply to such transactions, depending on the structure of the practice (whether partnership, company or trust)

Administrative treatment 'no goodwill' professional practices

CGT cost base

- Market value is taken to be the amount paid for the acquisition

CGT capital proceeds

- Market value is the amount the taxpayer receives

ESS acquisition

- Market value of the interest is equal to the amount paid

Off Market Buy-back consideration

- Market value is equal to the amount the taxpayer receives

Administrative treatment ‘no goodwill’ professional practices

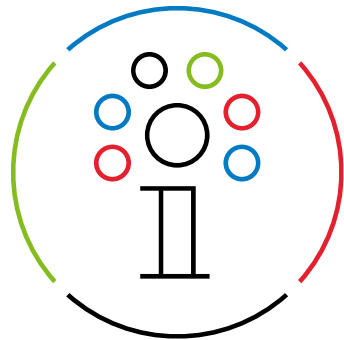
Conditions

- Practitioner must carry on or participate in the professional practice
- Must be a partner, shareholder or beneficiary of the practice
- Practitioner can be an individual, company or trust

Circumstances

- The governing documents must specify that practice interest in goodwill is nil or nominal
- The documents have no further provisions that can alter the goodwill amount
- Acquiring entity, each practitioner disposing of their interest have an arm's length relationship
- Evidence supports that governing documents and transactions are arm's length dealings
- Practitioner applies the treatment in the guidelines

Poll Question #1



The Foreign Resident CGT withholding changes will apply from which date:

- a) 30 June 2024
- b) 1 January 2025
- c) 30 June 2024
- d) 1 January 2026

Allocation of profits of professional firms

- ATO website update 26 September 2024
- Addresses ATO risk assessment on allocation of profits in professional firms if income is derived from professional services
- *This issue is high on ATO priority list for audit and review activity*
- Refer to *PCG 2021/4 Allocation of professional firm profits* – ATO compliance approach for individual professional practitioners (IPPs) when considering the allocation of profits by professional firms
- You should:
 - assess whether you can use the risk assessment framework in PCG 2021/4
 - sets out how ATO assesses risk and applies their compliance approach

Allocation of profits of professional firms

- PCG 2021/4 is about arrangements where:
 - taxpayers redirect their income from a business or activity to an associated entity
 - that income includes income from their professional services
 - the outcome is that they significantly reduce their tax liability.
- PCG 2021/4 applies from 1 July 2022 and clarifies how the ATO will assess the risk and sets out their compliance approach to the allocation of profits in professional firms
- Before applying PCG 2021/4, must assess if your arrangement is *commercial* and *does not have high-risk features*

Allocation of profits of professional firms

Commercial rationale gateway

- Assess whether the arrangement has a sound commercial rationale
 - Is it more complex than necessary
 - Does it serve a real purpose apart from gaining a tax benefit
 - Is the tax result at odds with commercial and economic results
 - Little or no risk where significant risks would normally be expected
 - Operating on non-commercial terms or in a non-arm's length manner
 - Present a gap between substance of what is being achieved and the legal form it takes

Allocation of profits of professional firms

No high-risk features gateway

- Arrangements with high-risk features can:
 - have financing arrangements relating to non-arm's length transactions
 - exploit the difference between accounting standards and tax law
 - be materially different in principle from Everett and Galland
 - involve multiple classes of shares and units, including creating discretionary entitlements such as dividend access shares
 - involve multiple assignments or disposals of an equity interest
 - misuse the superannuation system, including assignments or disposals of an interest to associated self-managed super funds (SMSFs)
 - distribute income to entities, other than the IPP, with losses

Allocation of profits of professional firms

- If one or both gateways are failed:
 - ATO may apply anti-avoidance provisions of Part IVA of the ITAA 1936 or other integrity rules
- *If both gateways are passed:*
 - *Can self-assess against the risk assessment framework*

Risk Assessment Framework

- Comprise 3 Factors
- Factor 1 is the proportion of profit entitlement from the whole of firm group returned in the hands of the IPP
 - Score 1 if this more than 90% and 6 if 25% or less

Allocation of profits of professional firms

Risk Assessment Framework

- Factor 2 is the total effective tax rate for income received from the firm by the IPP and associated entities
 - Score 1 if the tax rate is more than 40% and score 6 if 20% or less
- Factor 3 is the remuneration returned in the hands of the IPP as a percentage of the commercial benchmark for the services provided to the firm
 - Score 1 if the remuneration returned is more than 200% and score 6 if 70% or less
- *If the IPP returns 100% of the profit entitlement – automatically in the Green Zone*
 - No need to assess against other risk assessment factors

Allocation of profits of professional firms

Risk Zones

- If self-assessing using all 3 risk assessment factors:
 - arrangement is considered low risk (green zone) if your aggregate score of all 3 risk assessment factors is 10 or less
- Can self-assess against the risk assessment factors 1 and 2 only
 - Do this if it is impractical to accurately determine an appropriate commercial remuneration against a benchmark for risk assessment factor 3
 - Arrangement is considered low risk (green zone) if aggregate score for risk assessment factors 1 and 2 is 7 or less

Allocation of profits of professional firms

Table of Risk zone and risk rating

<i>Risk zone</i>	<i>Risk level</i>	<i>Aggregate score against first 2 factors</i>	<i>Aggregate of all 3 factors</i>
Green	Low risk	7 or less	10 or less
Amber	Moderate risk	8	11 and 12
Red	High risk	9 or more	13 or more

Allocation of profits of professional firms

Profits retained by Practice Entity

- For commercial reasons some or all of the profits of a firm may be retained by the firm in one or more income years, rather than being distributed to the IPPs of the firm
- An IPP's portion of retained profits is taken to be a part of their profit entitlement when calculating the basis for risk assessment factor 1 and 2

ATO Approach

- Applies to 1 July 2017 to 30 June 2022
- Can rely on the suspended guidelines if:
 - Arrangements comply with the suspended guidelines
 - Is commercially driven and does not exhibit any high-risk factors (see discussion earlier)

Tax avoidance taskforce: Medium and emerging private groups

- ATO website update on their Tax Performance programs for private groups
- Medium and emerging private groups are one of 3 private groups identified by the ATO Tax Avoidance Taskforce. The other 2 are:
 - Top 500 Private Groups, and
 - Next 5,000 Private Groups

Medium and private groups

- private groups linked to Australian resident individuals who, together with their associates, control wealth between \$5 million and \$50 million
- businesses with an annual turnover of more than \$10 million, that are not public or foreign owned and are not linked to a high wealth private group

Tax avoidance taskforce: Medium and emerging private groups

- ATO focus is on engaging with:
 - larger and higher risk private groups and entities
 - private groups experiencing rapid growth, increasing foreign links, looking to expand offshore or where controlling individuals are transitioning to retirement
 - foreign investment focused on acquiring high value assets in Australia and structured wealth extraction
 - private groups with higher risk issues or concerns

Tax avoidance taskforce: Medium and emerging private groups

Areas of focus for FY 2025

- Registration, lodgment and payment
- Incorrect reporting
- Tax advisors and professional firms
- Division 7A
- Capital Gains Tax
- Property and construction
- International transactions
- Other (NANE & SMSFs, FTEs, foreign trusts, Franking, 45 Day Holding Period Rule)

Tax avoidance taskforce: Medium and emerging private groups

Emerging Risks

- Overclaiming deductions in trusts
- Ineligible R&D claims
- Incorrect GST claims on employee allowances
- Division 149 pre-CGT assets
- Active foreign companies (subdiv 768-G)
- Private ancillary funds
- Trust losses
- Share buybacks
- Other (crypto based business models, Thin Cap & \$3M Super cap)

Tax avoidance taskforce: Medium and emerging private groups

Targeted focus areas

- Succession planning
- Private equity
- Retirement villages – GST and income tax
- GST retail and construction
 - Incorrect reporting GST on supplies and acquisitions
 - Incorrect reporting commercial and trading adjustments
 - Intra group transactions

Tax avoidance taskforce: Medium and emerging private groups

What to do

- Educate clients who are in the Medium and emerging private group population
- Prepare for the eventuality of a review by the ATO
- Review clients for issues that may be present
- Carry out prudential reviews and audits

Administrative Review Tribunal commences

- The Administrative Review Tribunal (ART) replaced the Administrative Appeals Tribunal (AAT) on 14 October 2024.
- Key features of the ART include:
 - improved accessibility for users
 - a responsive, demand-driven funding model
 - more flexible procedures and greater harmonisation across different case types
 - mechanisms to effectively escalate issues of significance to administrative law and decision-making, and
 - funding for a new case management system

Administrative Review Tribunal commences

- The ART has established jurisdictional areas, one of which is 'Taxation and Business'
- The Small Business Taxation Division no longer exists
- All matters that were before the AAT have now automatically transferred to the ART
- People who have applied to the AAT for review of a decision do not need to submit a new application to the ART
- All AAT decisions that have already been finalised will not be considered again by the ART
- ART website is <https://www.art.gov.au/>

International Transactions

- ATO website update highlighting the risk that failing/incorrectly reporting international transactions increases the risk of ATO attention:
 - Related party financing
 - Intangible assets
 - Controlled foreign entities
 - Thin capitalisation
 - Transfer pricing
 - Non-resident withholding tax
 - Income from overseas branches
 - Mischaracterising inbound foreign funds

International Transactions

- Foreign residents disposing of taxable Australian property
- Non-lodgment of international dealings schedule
- Residency status
- Change in residency
- Hybrid mismatch rules
- Significant Global Entity and Country by country reporting entities

Early engagement survey

- ATO website update
- Annual survey to understand client experience from involvement in the *Commercial deals early engagement service*
- The results showed that 92% of clients were satisfied with the service, while 5% were neutral and 3% were dissatisfied
- This is a 6-point increase compared to 2023 (86%)

Commercial Deals

- Any significant business transaction that may affect the structure of a business
- E.g. refinancing, IPOs, restructures, sale of commercial property, sale of business etc

Early engagement survey

Early Engagement

- ATO commercial deals service can be used to provide practical certainty on commercial deals
- ATO ideal time for engagement is after the transaction completes and prior to lodgement
- To provide certainty on the tax treatment of a settled fact pattern before lodgement of tax return
- In some circumstances – may be beneficial to engage with the ATO before the deal is executed
 - E.g. where rollover relief is planned or restructure carried out
- Can request a pre-lodgment agreement
- ATO also undertake pre-deal completion and pre-lodgment compliance activities
 - E.g. foreign residents and taxable Australian property, movement of funds outside Australia

ATO Rulings

Deductibility of Financial Advice fees

- *Taxation Determination TD 2024/7 - Income tax: deductions for financial advice fees paid by individuals who are not carrying on an investment business*
- Issued 25 September 2024
- Replaces withdrawn Taxation Determination *TD 95/60W*
- Considers the application of section 8-1 or 25-5 of the ITAA 1997 for fees paid for financial advice
- No change from views previously expressed in TD 95/60W
- Does NOT apply to individuals carrying on an investment business
- Does NOT consider fees paid from a superannuation fund
- Note that from 1 January 2022, only a qualified tax relevant provider registered with ASIC, or a tax agent registered with the Tax Practitioners Board can provide tax (financial) advice services for a fee

Deductibility of Financial Advice fees

- ‘Tax (financial) advice services’ includes:
 - a service that relates to advising on or ascertaining liabilities, obligations or entitlements of an entity that could arise under a taxation law
 - where it could be reasonably expected that a person would rely on the service to satisfy liabilities or claim entitlements under a tax law
- The ruling states at paragraphs 9 & 10:
 - *9. An individual is entitled to a deduction for fees paid to a financial adviser if they satisfy the requirements in sections 8-1 (general deductions) or 25-5 (tax-related expenses)*
 - *10. In certain circumstances, it may be necessary to apportion the deduction under sections 8-1 or 25-5 because the full amount of the fees paid may not be deductible*

Deductibility of Financial Advice fees

- An individual is entitled to a deduction for fees for financial advice under section 8-1 to the extent that the loss or outgoing is incurred in gaining or producing assessable income
- An individual is not entitled to a deduction to the extent that:
 - it is an outgoing of capital or of a capital nature,
 - private or domestic in nature, or
 - incurred in gaining or producing exempt or non-assessable non-exempt income
- The expense must be 'incurred', meaning there must be a presently existing liability to pay the expense, or must have paid the expense

Deductibility of Financial Advice fees

- There must be a sufficient connection between the expense and the activities which directly gain or produce assessable income (see paras 14 to 16)
- Relevant considerations include:
 - Is the expense preliminary to gaining or producing the assessable income
 - Is there a lapse of time between incurring the expense and the commencement of the income producing activity
- Fees incurred for financial advice on a recurring basis for an existing income-producing investment are deductible under section 8-1
- Includes advice on whether the mix of assets is still appropriate, and advice on whether to retain or dispose of assets

Deductibility of Financial Advice fees

- Deductibility of fees for insurance products will be consistent with the deductibility of the insurance premiums for the product
- Fees for advice on income protection insurance are deductible under section 8-1 where the premiums are deductible
- Fees for other insurance products, such as life, total and permanent disability or trauma, are not deductible

Capital or of a capital nature

- Must consider the nature of the advantage sought and the manner in which that advantage is to be used
- Consider the means of acquisition and whether it is a 'once-and-for-all' expense
- Does it produce an enduring advantage or a periodical outlay for use for periods

Deductibility of Financial Advice fees

Capital or of a capital nature

- Fees for financial advice on new investments are not deductible under section 8-1
- Expenditure may qualify as cost base for CGT purposes
- Fees for advice on pre-existing investments are NOT deductible under section 8-1 when:
 - *an individual seeks advice from a new financial advisor at the commencement of an engagement, and*
 - *that advice involves considering the individual's circumstances by that advisor for the first time and making recommendations and advising on the income earning structure*
- Advice on how an individual can invest additional funds to grow their investment portfolio is not deductible – amounts would be capital or of a capital nature

Deductibility of Financial Advice fees

Private or domestic

- Fees for advice incurred about an individual's household budgeting are private or domestic expenditure and will not be deductible under section 8-1

Section 25-5

- Deduction may be available where fees for financial advice relates to 'managing tax affairs'
- Must be able to identify that the payment was for advice to assist in managing their tax affairs
- Advice in relation to salary sacrifice arrangements would be an example
- Not all advice provided by a financial advisor will be tax (financial) advice
- Advice on tax laws must be provided by a 'recognised tax adviser'

Deductibility of Financial Advice fees

Section 25-5 and capital expenditure

- An individual cannot claim a deduction for capital expenditure under subsection 25-5(1)
- However, expenditure incurred in managing tax affairs is not considered to be capital expenditure merely because the advice relates to matters of a capital nature

Apportionment

- Expenses can be partly deductible under section 8-1 or section 25-5
- Fair and reasonable basis of apportionment

Record keeping

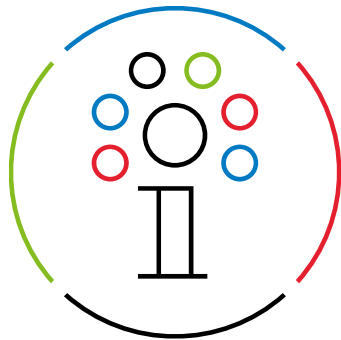
- Paragraph 49 covers the evidence required in order to claim a deduction

Deductibility of Financial Advice fees

Examples

- TD 2024/7 contains 4 examples
- Example 1 – initial advice arrangement
- Example 2 – continuing arrangement
- Example 3 – advice in relation to insurance policies
- Example 4 – superannuation and estate planning advice

Poll Question #2



Fees for financial advice regarding household budgeting is not deductible.

- a) True
- b) False

Exposure Draft Amendments Code of Professional Conduct

- Exposure draft amendments to legislative instrument *Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024*
- First registered on 2 July 2024 – sets out additional professional and ethical obligations of tax practitioners
- The Code is set out in section 30-10 of the Tax Agent Services Act 2009 and establishes ethical principles that apply to all registered ‘tax practitioners’
- TASA is administered by the Tax Practitioners Board (TPB)
- Following the registration of the Determination, the Board began consulting with industry on guidance materials to provide further detail on the Determination obligations to help tax practitioners to understand and comply with their obligations

Exposure Draft Amendments Code of Professional Conduct

- 9 September 2024 - amended the Determination so that the obligations under the enhanced Code *now apply from 1 January 2025 for larger firms and from 1 July 2025 for smaller firms*
- Exposure draft amends section 15 (false or misleading statements) and section 45 (keeping clients informed of relevant matters) to clarify these provisions

False or misleading

- Applies only to statements made or prepared by the practitioner
- Obligation to take action limited to only those cases where you have reasonable grounds to believe that the statement was false or misleading because of a failure by someone involved in preparing or making the statement
 - To take reasonable care
 - Intentionally disregarded or was reckless in the operation of the tax law

Exposure Draft Amendments Code of Professional Conduct

False or misleading

- Sets out reasonable amount of time to provide a defensible explanation or to take corrective action
- If a client does not act to correct a false or misleading statement within a reasonable time
- Practitioner's obligation is to take reasonable steps:
 - Withdraw services from client where due to recklessness or intentional disregard
 - If substantial harm – notify the TPB or the ATO
- Exception where doing so puts the practitioner personal safety is at risk

Exposure Draft Amendments Code of Professional Conduct

Keeping clients informed of relevant matters

- Subsection 45(1) contains a listing each of the matters, events and circumstances that tax practitioners need to disclose to current and prospective clients
- To protect clients from being potentially misled or from being subject to potential harm, from not being advised of what is necessary for them to being able to make a fully informed decision as a consumer of tax agent services
- Advising the client that the Board maintains a register of tax agent and BAS Agents
- How they can access and search the register, and how they can make a complaint about a tax agent service the practitioner has provided (including the Board's complaint's process)

Exposure Draft Amendments Code of Professional Conduct

Keeping clients informed of relevant matters

- Within the last 5 years:
 - certain breaches of the Act or instruments that have led to penalties or other sanctions;
 - matters relating to the solvency of the tax practitioner
 - any conviction relating to an offence involving fraud or dishonesty
 - any sanction or order in relation to promoting or engaging in a tax avoidance or evasion scheme under the tax law
 - any conviction relating to serious tax offences
 - any current conditions applying to registration



Cases

Employee and Superannuation Guarantee

Overview

- A plumber provided substantial services to an entity was not an employee of the entity under the superannuation guarantee law
- The entity was not liable to make superannuation contributions on his behalf

Facts

- The entity was the trustee of a trust, which operated a plumbing business in Queensland
- The t/p engaged an individual and an employee from July 1996 to December 1996 and paid superannuation contributions for the individual
- The individual was a licensed plumber who registered for GST in July 2000 and held an ABN since 2010

Employee and Superannuation Guarantee

Facts

- The individual commenced working for the t/p again as a maintenance plumber under a verbal agreement in 2010
- Submitted invoices to the t/p based on hours worked, paid GST and submitted BASs
- Individual owned own vehicle and plumbing tools
- He worked independently and unsupervised
- Was paid well above relevant award rate
- If a job needed fixing, he would return to fix it
- The individual operated his own plumbing business and advertised his business on his vehicle, Tradelink stores and online

Employee and Superannuation Guarantee

Facts

- Individual complained to ATO that the t/p had not paid superannuation from 2010 to 2020
- After a review, ATO determined that the relationship between the parties was of employer and employee for SGC purposes
- T/p was assessed for \$123,522 comprising of SGC plus interest

Arguments

- T/p appealed on the basis that the contract between the parties was NOT wholly or principally for the individual's labour
- Argued that he was engaged for his skilled labour as a qualified and licensed plumber and for the use of his plumbing tools.
- Individual had control over when work would be done and how it was to be carried out
- Individual was engaged to produce a result

Employee and Superannuation Guarantee

Decision

- AAT decided that the t/p had proven that the contract with the individual was NOT wholly or principally for his labour
- The contracts were for the provision of plumbing services to complete specified plumbing jobs
- The individual was not an employee for the purposes of subsection 12(3) of the Superannuation Guarantee Assessment Act 1992
- Numerous factors supported this conclusion:
 - Engaged to produce a result
 - Was paid for each job completed, and NOT for his time
 - Hourly rate was simply a measure by which to charge for each job
 - Individual could refuse a job and was in control of amount of work accepted

Dividend Stripping

Overview

- High Court has refused the t/p's application for special leave to appeal in the following case:
- *FC of T v Michael John Hayes Trading Pty Ltd ATF MJH Trading Trust & [2024] FCAFC 80*
- A distribution of fully franked dividends was made as part of dividend stripping operation
- The t/ps received dividends free of tax
- Original shareholders received capital sums as a substitute for taxable dividends
- Tax avoidance purpose was present

Dividend Stripping

Facts

- The four trustee companies were acquired in February 2010 by members of the Hayes family
- Became trustees of trusts that were formed to comply with the “trading trust” rules in Div 6C of the ITAA 1936
- Trusts formed as part of a reorganisation of the Hayes Group
- Trading trusts are treated as companies for some tax purposes
- Trading trusts are public trading trusts and not subject to Div 7A of the ITAA 1936

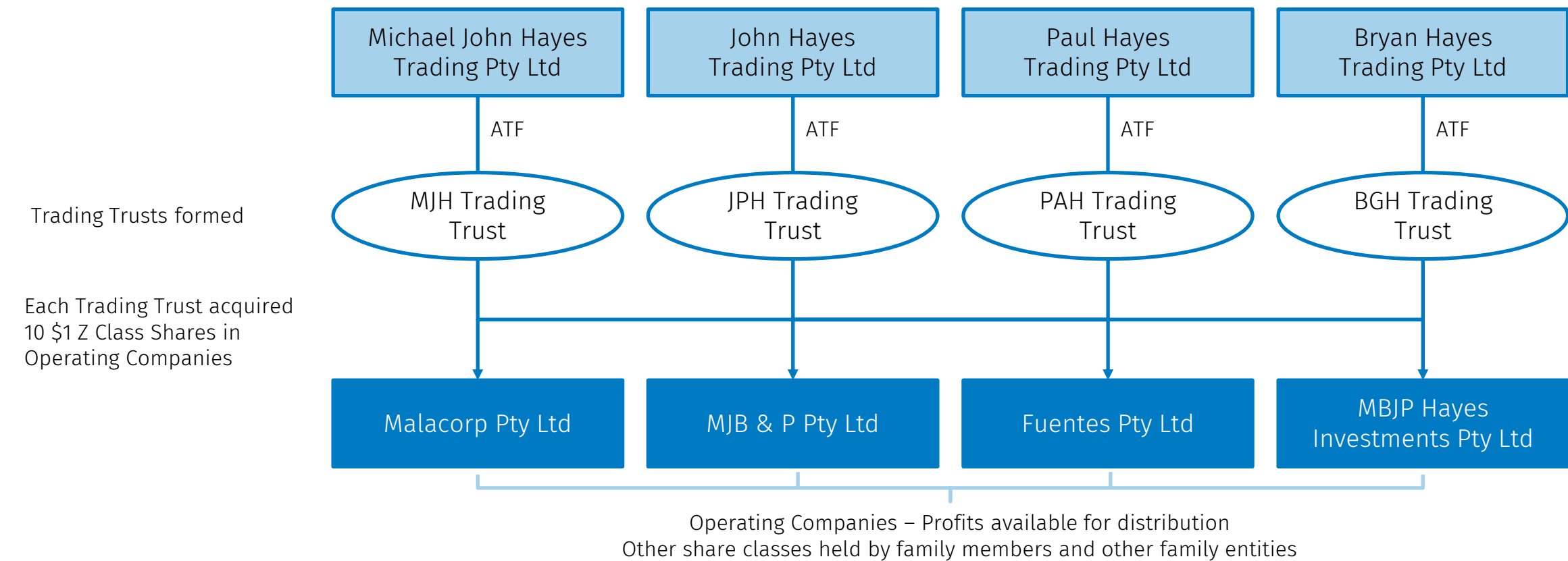
Dividend Stripping

Facts

- The Hayes Group included four “Operating Companies”
 - Malacorp Pty Ltd,
 - Fuentes Pty Ltd,
 - MJB&P Pty Ltd, and
 - MBJP Hayes Investments Pty Ltd.
- Each of these operating Companies had profits available for distribution to shareholders
- Each of the trading trusts acquired Z class shares in some or all of these operating companies

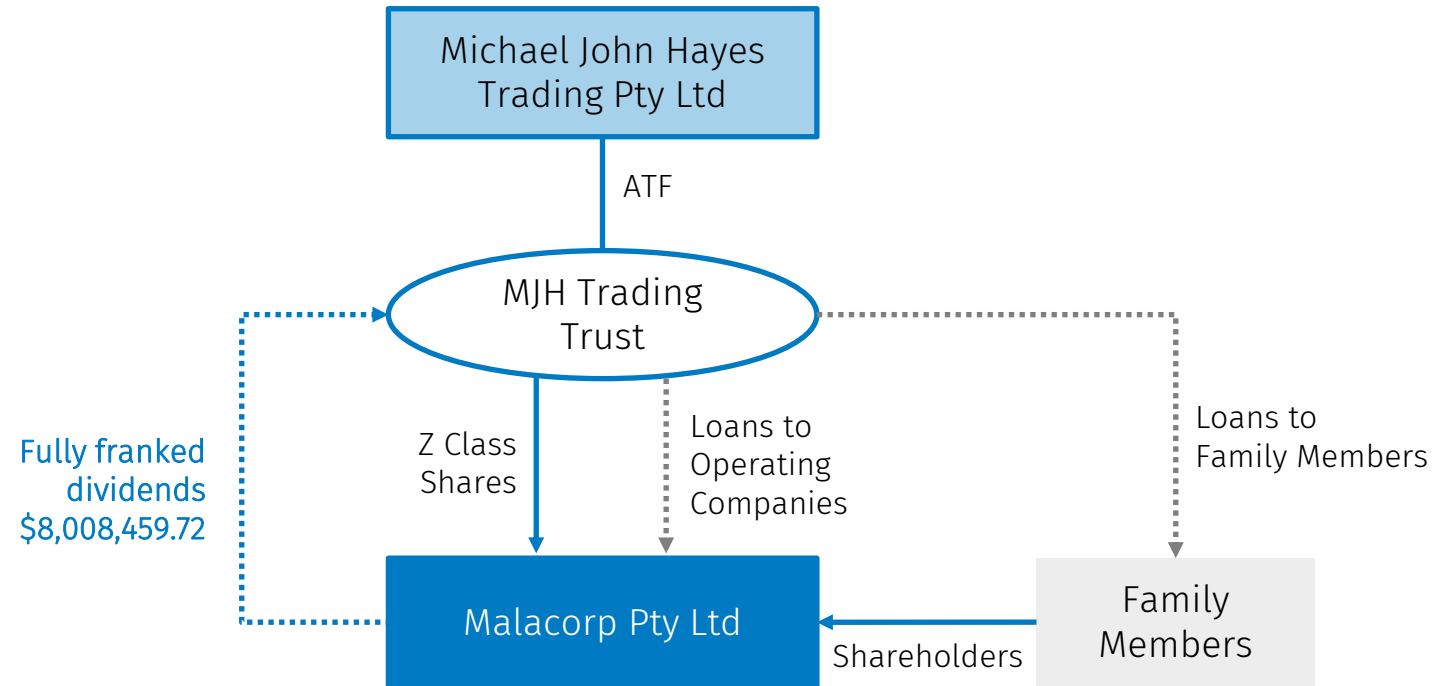
Dividend Stripping

Facts



Dividend Stripping

Facts



Dividend Stripping

Facts

- On the day the trading trusts acquired the Z class shares
- The four Operating Companies declared and paid fully franked dividends totalling \$8,008,459.72
- As holders of the Z class shares
- The dividends represented almost all of the retained earnings of the Operating Companies, being \$8,393,036.59
- The proceeds of the dividends were lent by the Trading Trusts either to the Operating Companies or to the original (existing) shareholders

Dividend Stripping

Issues

- The franked dividends and franking credit amounts were included in assessable income
- Tax offsets claimed on account of those franking credits
- The effect of the tax offset was to shelter the franked dividends from tax – received ‘tax free’ by the trading trusts
- Each trading trust claimed it was entitled to the tax offsets
- ATO disagreed arguing that all the dividends were distributions as part of a dividend stripping scheme – therefore tax offsets not available
- Court considered whether the purpose of the reorganisation was tax avoidance

Dividend Stripping

Arguments

- T/ps argued:
 - There was no tax avoidance purpose
 - Majority of dividends were loaned back to the Operating companies
 - Profits remained in the Australian income tax system

Dividend Stripping

Decision of Full Bench of Federal Court

- Court rejected the argument regarding the majority of dividends being loaned back to the Operating companies or that the profits were not removed from the Australian income tax system
- It did not matter that the Operating companies were the recipients of the capital sum rather than the original shareholders
- Dividend stripping rules applied to deny a tax offset for the franking credits

Dividend Stripping

Decision of Full Bench of Federal Court

- A loan back to the Operating companies does not preclude the scheme from being a dividend strip
- It does not matter that profits are distributed to associates of the original shareholders
- It also does not matter if the capital sum is not received by the original shareholders but by an associate controlled by those shareholders
- There does not need to be an 'outsider' to be a party to the scheme and the fact that the trading trusts are part of the group was not fatal to the ATO's arguments

Dividend Stripping

What is a dividend stripping arrangement?

- It is a scheme that is 'in the nature of dividend stripping'
- It is also a scheme that has substantially the effect of such a scheme
- The term 'dividend stripping' is not defined
- Where it applies:
 - Franking credit is not included in assessable income, and
 - No tax offset is available

Dividend Stripping

5 Elements of a dividend stripping arrangement

1. A target company has substantial undistributed profits – creates a potential tax liability if distributed to shareholders as dividends
2. There is a sale or allotment of shares in the target company to another party
3. There is a payment of a dividend to the purchaser or allottee of the shares out of the target company's profits
4. The purchaser escapes Australian income tax on the dividend
5. The vendor shareholders receive a capital sum for their shares in an amount that is the same as or close to the dividends paid to the purchaser or allottee

Dividend Stripping

Additional element of a dividend stripping arrangement

- Careful planning is evident
- All parties act in concert
- For the predominant or sole purpose of the vendor shareholders
- In relation to avoiding tax on the distribution of dividends by the target company

Dividend Stripping

Purpose of a dividend stripping arrangement

- A dividend stripping arrangement must have the dominant purpose of avoiding tax
- It is the nature of the scheme that is important – this must be objectively determined
- Subjective motives are not relevant
- Purpose is assessed from the perspective of a reasonable observer
- Must have regard to the characteristics of the scheme and the objective circumstances in which the scheme was designed and operated

Questions?

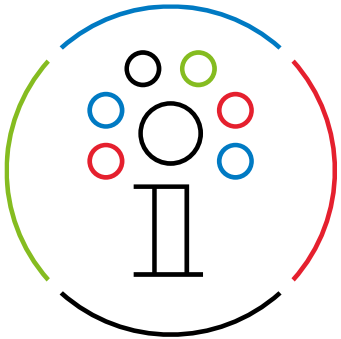


Susannah Gynther
Moderator

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Questions?



You can type them in the “Questions” box now,
Or contact me via:

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