Tax Technical Update – April 2023

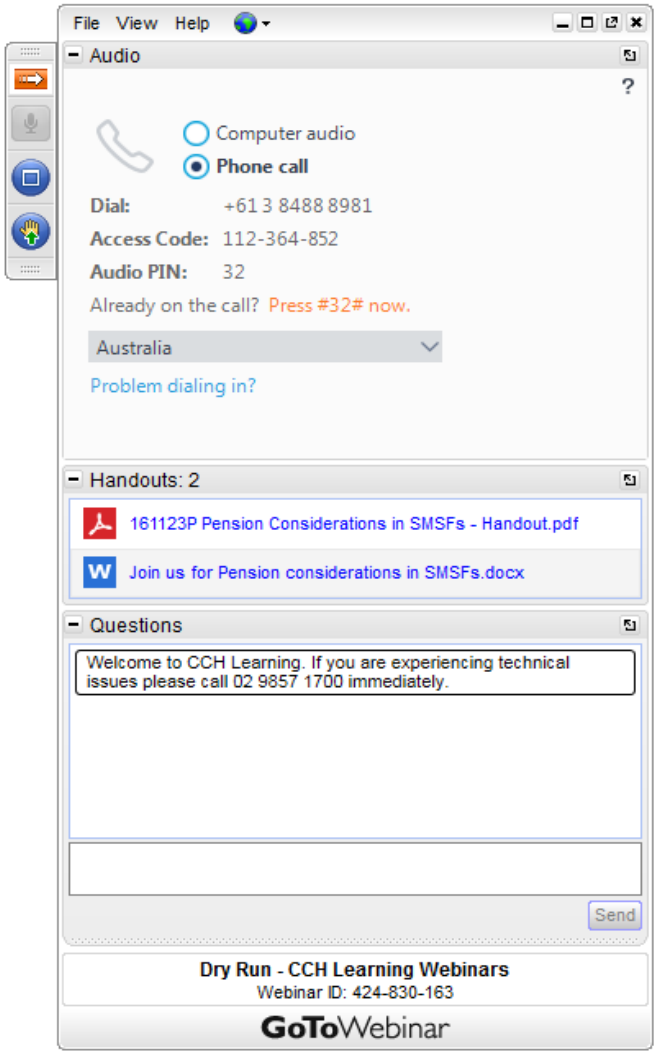
Carlo Di Loreto

Tuesday 18 April

Wolters Kluwer

Crowe

How to participate today



- Handouts Section - PowerPoint
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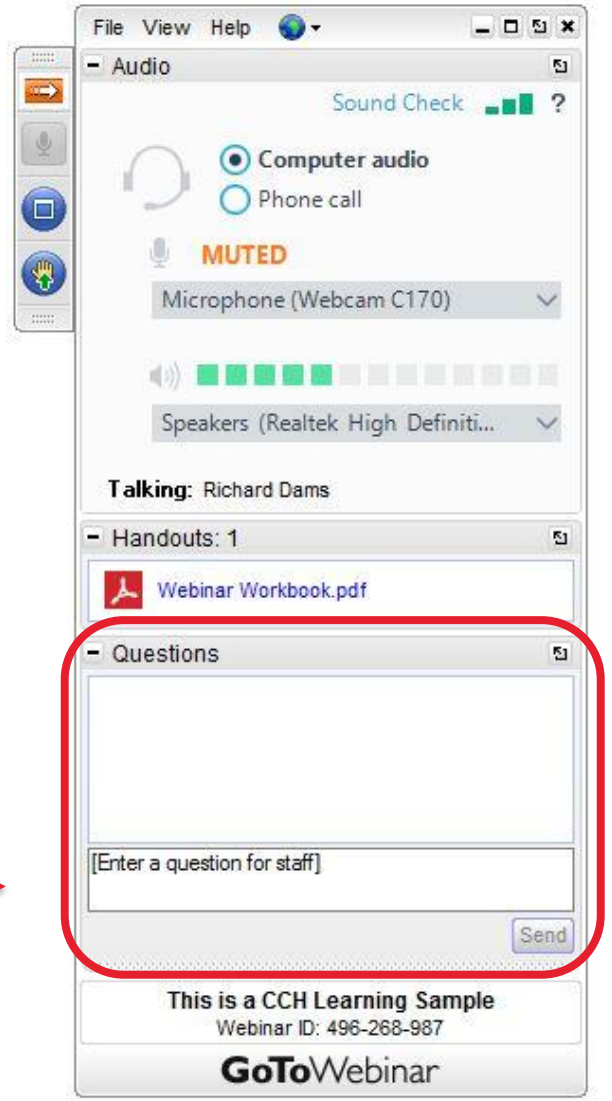
Questions?

Susannah Gynther
Moderator

Type your question and hit ‘Send’



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Your Presenter

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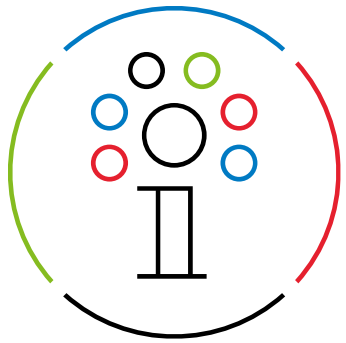
Today's session will cover



April Tax Update

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

Federal Parliament & Bills Update

Federal Parliament Update

Sitting Days 2023

Sitting Days First Half 2023	Sitting Days Second Half 2023
January 2023: No sitting days	July 2023: House and Senate – 1
February 2023: House – 8, Senate – 4	August 2023: House and Senate – 7
March 2023: House – 12, Senate – 13	September 2023: House and Senate – 8
April 2023: No sitting days	October 2023: House – 8, Senate – 4
May 2023: House – 9, Senate – 3*	November 2023: House – 8, Senate – 14
June 2023: House and Senate – 8	December 2023: House – 0, Senate – 4

*Federal Budget 2023/24 to be handed down by the Treasurer at 7:30pm (AEST) on Tuesday 9 May 2023

Proposed New Tax Transparency Measures for Public Companies

- The Australian government released Exposure Draft (ED) legislation on 16 March 2023 to give effect to new tax transparency measures for listed and unlisted public companies
- The ED is part of measures to increase transparency and strengthen public scrutiny over disclosures made by public companies that were announced in the March 2022–23 Budget
- The proposed measures would mean that Australian public companies would be required to publish a 'consolidated entity statement' as part of their annual financial report
- Applies to financial years commencing on or after 1 July 2023

Proposed New Tax Transparency Measures for Public Companies

- The consolidated entity statement would contain the following information for each entity:
  - Whether the entity is a body corporate, partnership, trust or participant in a JV
  - The location where the entity is incorporated or formed if the subsidiary is a body corporate
  - The public company's percentage ownership of each entity that is a body corporate at the end of the financial year
  - The tax residency of each subsidiary during the financial year

Exposure Draft Intangibles & low corporate tax jurisdictions

Treasury Laws Amendment (Measures for Consultation) Bill 2023: Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions

- Released 31 March 2023 - initially announced in the October 2022–23 Budget
- Anti-avoidance measure to prevent Significant Global Entities (SGEs) from claiming tax deductions for payments relating to intangibles connected with low corporate tax jurisdiction
- Under the arrangements, income from exploiting intangible assets is derived in a low corporate tax jurisdiction by an associate of the SGE
- Deductions are claimed in Australia for payments the SGE makes to an associate that are attributable to those or related intangible assets
- ‘Intangible asset’ takes it ordinary meaning

Exposure Draft Intangibles & low corporate tax jurisdictions

- Where an SGE makes a payment to an associate that is attributable to a right or permission to exploit an intangible asset, and
- As a result of that or a related arrangement, income from the exploitation of those or related intangible assets is directly or indirectly derived by an associate of the SGE in a low corporate tax jurisdiction
- The SGE will not be entitled to deduct an amount for that payment
- The proposed amendments operate in respect of payments or credits an SGE makes to an associate, as well as liabilities incurred by an SGE from an associate, on or after 1 July 2023

Exposure Draft Intangibles & low corporate tax jurisdictions

- *Low corporate tax jurisdiction* is a foreign country with a tax rate less than 15%, or nil
- *Intangible asset* is not defined – takes on ordinary meaning:
  - IAS 38 sets out the criteria for recognising and measuring intangible assets and requires disclosures about them
  - An intangible asset is an identifiable non-monetary asset without physical substance
- Examples of intangible assets include:
  - intellectual property, software and other licences
  - trademarks, patents, copyright
  - access to customer databases, leases over assets etc

Refresher: Significant Global Entities

An entity is a SGE if:

- It is a *global parent entity* either with annual global income of $1b or more in a relevant period or that is subject to a Commissioner's determination deeming it to have such annual global income
- It is a member of:
  - a group of entities that are consolidated as a single group for accounting purposes, or
  - a "notional listed company group", ie a group of entities that would be required to be consolidated as a single group for accounting purposes if a member of that group was a listed company and exceptions to requirements to consolidate were disregarded, and
  - another member of the group is a global parent entity that is a SGE

Refresher: Significant Global Entities

- An entity could be a SGE if it is a member of a group of entities whose accounts are consolidated (or would be required to be consolidated), or
- It could be a “stand-alone” entity
- A wide range of entities and groups of entities could be SGEs, including:
  - Individuals, corporations (including companies, incorporated associations and clubs)
  - bodies politic, which could be Australian federal, state, territory or local government bodies, or a foreign state
  - Partnerships, any other unincorporated association or body of persons
  - Trusts, a superannuation fund, or an approved deposit fund

Refresher: Significant Global Entities

- The definition was broadened from 1 July 2019 - applies to groups of entities headed by an entity other than a listed company in the same way as it applies to groups headed by a listed company

1. Global Parent Entity as a SGE

- A *global parent entity* is an entity that is not controlled by another entity, according to accounting principles or if accounting principles do not apply to the entity, according to commercially accepted principles related to accounting
- If "global financial statements" have been prepared for the entity, the "annual global income" for the relevant period is $1b or more (accounting period of 12 months)
- If global financial statements have not been prepared for the entity, the Commissioner has made a determination under s 960-555(3) in relation to the global parent entity.

Refresher: Significant Global Entities

2. Member of a group as a SGE

- The entity is a member of a group of entities that are consolidated for accounting purposes as a single group
- One of the other members of the group is a *global parent entity*
- If global financial statements have been prepared for the global parent entity, the annual global income for the relevant period is $1b or more
- If global financial statements have not been prepared for the global parent entity, the Commissioner has made a determination under s 960-555(3) in relation to the global parent entity

Refresher: Significant Global Entities

3. Member of notional listed company group that includes a Global Parent Entity

- An entity is also a SGE for an income year (or period) starting on or after 1 July 2019 under the following conditions
  - The entity is a member of a 'notional listed company group'
  - One of the other members of the notional listed company group is a global parent entity
  - If global financial statements have been prepared for the global parent entity, the annual global income for the relevant period is $1b or more
  - If global financial statements have not been prepared for the global parent entity, the Commissioner has made a determination under s 960-555(3) in relation to the global parent entity

Refresher: Significant Global Entities

3. Member of notional listed company group that includes a Global Parent Entity

- A notional listed company group is defined in s 960-575(1) ITAA 1997
- It is a group of entities that would be required to be consolidated as a single group for accounting purposes, if an entity (the test entity) was a 'listed company'
- A listed company is a company any of the shares of which are listed in the official list of a stock exchange in Australia or elsewhere (s26BC ITAA 1936)
- Each entity in the notional listed company group is a member of that notional listed company group

Refresher: Significant Global Entities

Implications of being a SGE

- Multinational Tax Avoidance Scheme rules in s177DA ITAA 1936 may apply
  - Contains a lower threshold for satisfying the ‘purpose’ test in Part IVA
  - Takes into account ‘any purpose’ of avoiding liability under foreign laws as well as of obtaining a tax benefit under Australian income tax law
- Country by Country reporting
- Increased penalties to combat tax avoidance and profit-shifting
- Scheme penalties doubled

Refresher: Significant Global Entities

Increased Administrative Penalties (with shortfall)

Culpable behaviour	Base penalty percentage applicable to the shortfall amount
Making a false or misleading statement	50%, 100%, 150%
Making a statement which treats a law as applying in a way that was not reasonably arguable	50%
Failing to provide a document as required	150%

Refresher: Significant Global Entities

Increased Failure to Lodge Penalties

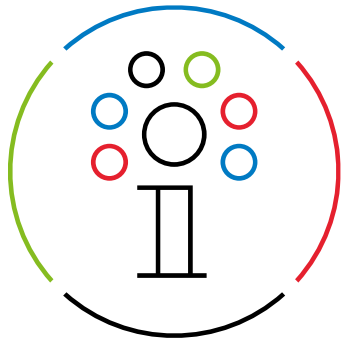
Days late	SGE penalties
28 or less	$137,500
29 to 56	$275,000
57 to 84	$412,500
85 to 112	$550,000
More than 112	$687,500

- FTL penalties multiplied by 500 for SGEs

Poll Question 1

The Exposure draft ‘Intangibles and low tax jurisdictions’ only applies to Significant Global Entities

A. TRUE
B. FALSE



ATO/Government Announcements

ATO update – new rules for working from home tax deductions

- The ATO has issued Practical Compliance Guideline PCG 2023/1, setting out a revised fixed-rate method for calculating a deduction for certain expenses incurred as a result of working from home
- The revised method applies a fixed-rate of 67 cents per hour to calculate a deduction for additional expenses incurred in relation to:
  - energy expenses (electricity and gas) for lighting, heating, cooling and to run electronic items used for work
  - internet expenses
  - mobile and home phone expenses, and
  - stationery and computer consumables

New rules for working from home tax deductions

- Depreciation deductions for assets used while working from home, such as a computer, desk or office chair, are not included under the revised fixed-rate method and may be claimed separately
- The revised fixed-rate method also does not cover occupancy expenses (eg. rent and mortgage interest), however such expenses are not usually deductible to the typical employee working from home.
- Before 1 July 2022, t/ps could calculate their home office running expenses using a fixed-rate of 52 cents per hour under Law Administration Practice Statement PS LA 2001/6
- A temporary shortcut method in Practical Compliance Guideline PCG 2020/3 also allowed t/ps to claim deductions for additional running expenses incurred while working from home due to COVID-19 using a rate of 80 cents per hour from 1 March 2020 to 30 June 2022.

New rules for working from home tax deductions

- A summary of expenses covered by the various methods is shown below

	PS LA 2001/6	PCG 2020/3	PCG 2023/1
Rate (per hour)	52 cents	80 cents	67 cents
Date of effect	1 July 2018–30 June 2022	1 March 2020–30 June 2022	1 July 2022 onwards
Energy expenses (electricity and/or gas) for lighting, heating/cooling and electronic items used while working from home	Yes	Yes	Yes
Cleaning expenses	Yes	Yes	No
Internet expenses	No	Yes	Yes
Mobile and/or home telephone expenses	No	Yes	Yes
Stationery and computer consumables	No	Yes	Yes
Decline in value — furniture and furnishings	Yes	Yes	No
Decline in value — electronic devices	No	Yes	No

New rules for WFH tax deductions – record keeping requirements

T/ps must also satisfy changed record-keeping requirements to use the revised fixed-rate method

- Actual records of all hours worked from home for the entire income year must be kept
- These records must be kept contemporaneously and can be in the form of timesheets, rosters, logs of time spent accessing systems, time-tracking apps or a diary
- A record which is representative of the total number of hours worked from home, such as an estimate or 4-week representative diary, will only be accepted for the period from 1 July 2022 to 28 February 2023
- For each expense incurred that is covered by the revised fixed-rate method, t/ps must keep one bill or invoice evidencing the additional running expense incurred

New rules for WFH tax deductions – record keeping requirements

- In circumstances where invoices and bills are in the name of one household member (eg. in the situation of a married couple or housemates)
    - each household member who contributes to the payment of that expense will be taken to have incurred it
- Note that this does not include paying board, as the Commissioner considers those arrangements to be generally private in nature
- Likewise, adult children living with their parents who do not pay their parents any rent or contribute to household bills are not taken to have incurred additional running expenses eligible for deduction

New rules for WFH tax deductions – other

- The application of PCG 2023/1 is also not limited to employees — the revised fixed-rate method can also be relied upon by t/ps working from home while carrying on their business
- For t/ps carrying on a business the revised fixed rate method calculates the total deduction for mobile phone and home phone expenses for the income year
- There is no additional separate deduction allowed in circumstances where a t/p's mobile phone or landline expenses are wholly attributable to carrying on a business
- The revised fixed-rate method is also limited to income tax purposes and does not represent expenditure for GST purposes

Withholding variation for alienated PSI

- A legislative instrument to vary to nil the amount of PAYG required to be withheld from certain alienated personal services income (PSI) payments has been made
- The *Taxation Administration (Withholding Variation for Personal Services Income) Legislative Instrument 2023* continues existing arrangements under the *2013 legislative instrument, Variation of withholding for personal services income*, which will be repealed on 1 April 2023 when the 2023 legislative instrument commences
- The 2023 legislative instrument will vary to nil the amount a personal services entity (PSE) is required to pay to the Commissioner in certain circumstances where it receives alienated PSI payments

Withholding variation for alienated PSI

- The variation applies to amounts a PSE is required to pay to the Commissioner under the Taxation Administration Act 1953 where:
  - the PSE receives an alienated personal services payment that relates to one or more individuals' PSI
  - the PSE pays salary or wages to the individual or individuals within 14 days after the end of the PAYG payment period in which it receives the alienated personal services payment, and
  - the salary or wages paid by the PSE is equal to or greater than either (i) 70%, or (ii) a "net PSI percentage", of the gross PSI (exclusive of GST) received by the PSE during the PAYG payment period.
- The net PSI percentage is calculated by dividing the entity's PSI (less allowable deductions) for the previous income year by its gross PSI for the previous year and multiplying the result by 100 to give a percentage.

PAYG and PSI recap

- PAYG withholding obligations arise where a business receives Personal Services Income (PSI) in some circumstances
- PSI is income produced mainly (more than 50%) from an individual’s skills or efforts
- Certain types of income are not PSI:
  - Income earned by an employee receiving salary or wages
  - Income produced mainly from supplying or selling goods
  - Income that is generated mainly by an asset rather than an individual's efforts or skills
  - Income generated from the business structure of an entity, rather than from an individual's personal services

PAYG and PSI recap

- If a business receives PSI and the PSI rules apply, that income will need to be declared by any individual who performed the services in their individual tax return
- The business will have additional PAYG withholding obligations if the PSI received by the business was not promptly paid as salary or wages to each individual who performed the service
- Promptly paid means paying an amount by the 14th day after the relevant PAYG payment period during which the PSI was received by the business
- If the business is registered for PAYG instalments, any PSI attributed may affect instalment income

ATO data matching – residential investment property loans

- The ATO will obtain data on residential investment property loans from authorised financial institutions for the period from 2021–22 to 2025–26.
- The ATO will collect the following data items from its data matching program:
  - client identification details
  - account details
  - transaction details, and
  - property details.

ATO data matching – residential investment property loans

- The data will help the ATO to execute strategies to:
  - identify relevant cases for administrative action
  - inform rental property owners of their taxation obligations as part of an educative campaign, and
  - avoid unnecessary contact to those that are correctly reporting and claiming rental property income or expenses.

ATO – key superannuation rates and thresholds for 2023-24

The ATO has published key superannuation rates and thresholds for the 2023–24 income year:

- The Capital gains tax (CGT) cap amount has increased to $1.705 million (from $1.65million)

  This is a lifetime cap on non-concessional contributions which have been sourced from the retirement or 15-year small business capital gains tax concessions.

- The Maximum superannuation contributions base will increase to $62,270 per quarter (from $60,220)

  This is the maximum limit on an employee's income on which SG contributions are required. If earnings exceed this amount, SG contributions are not required to be paid above this limit.

- Maximum superannuation co-contribution entitlement remains at $500. The lower income threshold increases to $43,445 and the higher income threshold increases to $58,445.

ATO – key superannuation rates and thresholds for 2023-24

The ATO has published key superannuation rates and thresholds for the 2023–24 income year:

- Low rate cap amount — $235,000

  The low rate cap amount is the limit set on the amount of taxable components of a super lump sum that can receive a lower (or nil) rate of tax. It applies to members that have reached their preservation age but are below 60 years.

- Employment termination payment (ETP) cap amount for life benefit termination payments and death benefit termination payments — $235,000

- Base limit of the tax-free part of genuine redundancy and early retirement scheme payments is $11,985, and for each complete year of service is $5,994.

ATO – key superannuation rates and thresholds for 2023-24

- General transfer balance cap — $1.9 million
- Defined benefit income cap — $118,750.

Key superannuation rates and thresholds that have remained the same for 2023–24 include:

- Concessional contributions cap — $27,500
- Non-concessional contributions cap — $110,000
- Div 293 tax income threshold — $250,000.

Resolving tax disputes

- Second Commissioner, Kirsten Fish speech for the 15th International Tax Administration Conference on 4 April 2023 *'The ATO perspective: Alternative pathways in resolving tax disputes'*
- Resolution comes through:
  - early and open engagement
  - tailored pathways
  - an informed, objective and impartial approach.

Resolving tax disputes

- Disputes happen, but they are not the norm
- To give a sense of size and scale, in the 2021–22 financial year there were approximately:
  - Over 325 million returns, statements and forms lodged – 40 million being returns
  - 537,000 adjustments from audits
  - 25,600 complaints across all categories not just relating to audits
  - 18,600 objections resolved – of these 55 % were by t/ps against their own self assessed positions and only 45% were in relation to audit decisions
  - 453 settlements
  - 455 litigation decisions

Resolving tax disputes

Resolution through early and open engagement

- When disputes do occur, ATO prefer to resolve them as soon as possible and at minimal cost to all parties
- There are a few things that ATO see as beneficial to achieving this:
  - Personalised engagement which happens early and often
  - Transparency about process and what to expect
  - Understanding of the drivers of and the opportunities to resolve the dispute
  - Positions being clearly explained and reaching a common understanding of what is needed to support that position

Resolving tax disputes

Which pathway will work best for you

- Depends on the nature of the dispute, the circumstances of the t/p and the outcome they are seeking to achieve
- If a process or decision is unclear or not able to be understood
  - a conversation and more information or reasons from the decision maker is the preferable path, and escalation to their manager if concerns remain
- If a concern or issue is with the process or how something was handled:
  - A complaint can be made and investigated by the ATO
  - If it can't be resolved, the IGTO (taxation ombudsman) is a further avenue

Resolving tax disputes

Which pathway will work best for you

- If the issue is an inability to pay:
  - Call centre and Lodge and Pay teams can consider payment arrangements, remitting the imposition of interest and penalties or, in limited circumstances, compromise a tax debt
- Large businesses and small business t/ps that disagree with a statement of audit position:
  - Can request independent review prior to their assessment being amended and prior to any liability crystalising, ensuring their points have been heard
- All t/ps who are dissatisfied with an audit amended assessment:
  - Have the statutory right to object and have a fresh set of eyes review their case in an impartial and objective manner

Resolving tax disputes

Which pathway will work best for you

- Vulnerable and unrepresented individuals and small businesses requiring some support, either before or after an objection is lodged:
    - Can obtain the assistance of one of ATO's dispute assist guides to guide them through the process
- Alternative dispute resolution - in-house facilitation involving an ATO trained facilitator commonly used during audits and objections
- Where ATO differ on the understanding of the law itself, litigation may be pursued to provide clarity not just for the ATO and the t/p, but all participants in the tax system

Resolving tax disputes

Which pathway will work best for you

- Settlements at all stages of the process is another pathway

Dispute assist

- Dispute Assist is a free service directed at supporting the most vulnerable people when they need assistance in navigating the ATO and the dispute process
- These are individuals and small businesses with exceptional circumstances that put them at a disadvantage in being able to engage with the ATO:
    - including mental health issues, risk of self-harm, domestic violence, homelessness, addiction, severe financial hardship and disability or illness

Resolving tax disputes

Alternative dispute resolution - in-house facilitation

- Used to resolve substantive disputes quicker and cheaper than other pathways
- May also be used to narrow, clarify or limit issues, maintain relationships or remove any blockers created by relationship issues between the parties
- In-house facilitation is a free mediation service for individuals and small businesses who may be represented or unrepresented
- A trained, impartial and nationally accredited ATO facilitator works with the t/p and ATO to reach a resolution

Resolving tax disputes

Alternative dispute resolution - in-house facilitation

- Using in-house facilitation has been particularly successful to reach a common understanding of the issues in dispute and where each party is coming from
- Last financial year - almost 90% of the time in-house facilitation was used, it resolved in part or all of the dispute
- In large, complex disputes, the ATO, or the t/p, may seek the engagement of an external practitioner to conduct conciliation or mediation:
    - Over the last three financial years, 70% of the time this type of ADR was used the dispute was resolved in part or in full

Resolving tax disputes

Independent review

- Independent review was originally introduced for the large market to promote the earlier resolution of disputes
- Conducted by an officer independent from ATO auditors and with no prior involvement in the case
- The review occurs before any amendment of assessment or liabilities are crystalised
- Has been extended to eligible small businesses:
    - An independent review can be requested if you disagree with some or all of the audit position on most income tax and indirect tax obligations

Resolving tax disputes

Objections

- Objection is the formal pathway for a t/p that is dissatisfied with their assessment
- It is a mandatory pathway for those who seek an external review by the AAT or the Courts

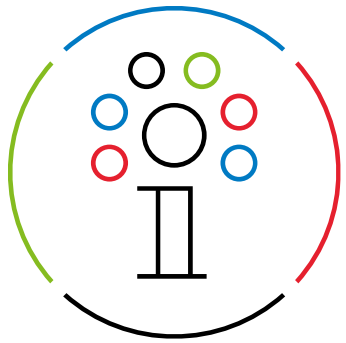
Litigating the right cases

- Around 85% of litigation cases are resolved by agreement between the ATO and the t/p
- Of the remainder which proceed to a hearing about 3 quarters of litigation cases go the way of the ATO
- The other quarter is split between those where the t/p is completely successful and those where both parties are partly successful

Poll Question 2

Which of the following is NOT included in the new ‘Working from Home’ deduction rate of 67 cents per hour?

a) Energy expenses
b) Internet costs
c) Mobile phone
d) Decline in value



ATO Rulings

Draft Guideline Electric Vehicle Recharging expenses

- Practical Compliance Guideline PCG 2023/D1 published on ATO website on 31 March 2023
- Applies for FBT purposes from 1 April 2022 and for income tax purposes from 1 July 2022
- Applies to employers, if they:
  - Provide an electric vehicle (EV) to an employee or associate for private use, and
  - The employee charges the EV at a residential premises and the electricity cost cannot be practically segregated from the cost of running other electrical appliances in the home
  - Are required to calculate the taxable value of a car fringe benefit, residual fringe benefit, car expense payment benefit (where electricity cost is reimbursed), or the grossed-up taxable value for reporting the employee's RFBA (continues to be reportable even if car benefit is exempt)

Draft Guideline Electric Vehicle Recharging expenses

- Also applies to individual t/ps if they use an EV while carrying out their income earning activities
  - Relevant records must be kept for the income year to substantiate business kilometres travelled
  - Evidence to show electricity cost incurred

Cents per kilometre rate

Rate applying to fringe benefits tax year or income year commencing on and after	EV home charging rate
1 April 2022	4.20 cents per km

Draft Guideline Electric Vehicle Recharging expenses

- Use of zero emissions vehicles (EVs) increasing in Australia
- Employers with FBT obligations, and individual t/ps who incur work-related car and motor vehicle expenses, are faced with the compliance challenge of calculating electricity costs incurred when charging electric vehicles at residential premises
- This is because electricity usage for charging electric vehicles is combined with the total electrical consumption of the household, and often cannot be separately identified and valued
- PCG 2023/D1 contains ATO methodology to calculate electricity cost when an EV is charged at an employee's or individual's home
- Choice whether employer or individual uses the methodology or using actual cost – choice is per vehicle and can be changed from year to year

Draft Guideline Electric Vehicle Recharging expenses

- Guideline does NOT apply to plug-in hybrid vehicles which have an internal combustion engine – short cut method applies home charging rate to all kilometres driven in an FBT or income year

Commercial charging stations

- Choice must be made
  - Home charging rate can be used – must disregard commercial charging station cost
  - If commercial charging station cost is used – EV home charging method cannot be applied

Odometer Records

- If records have not been kept as at 1 April 2022 or 1 July 2022, a reasonable estimate may be used based on service records – transitional measure only available in 2022

Draft Guideline Electric Vehicle Recharging expenses

Taxable Value of EV

- Use either statutory method or operating cost method
- EV home charging rate can be used under this Guideline to determine the home electricity charging costs for the:
  - statutory formula method - to include in the recipient contribution component
  - operating cost method - to include the electricity charging cost, both for the operating cost and the recipient contribution components, or
  - reimbursement by the employer to the employee where the expenditure is a Division 28 car expense.

Draft Guideline Electric Vehicle Recharging expenses

Deductibility of EV electricity charging expenses

- EV home charging rate can be used to calculate work-related car expenses when using the *logbook method* and otherwise when calculating *work-related motor vehicle expenses*
- logbook method - you need to keep:
  - a valid logbook
  - odometer records
  - written evidence of your car expenses.
- Home charging electricity deduction will be based on the proportion of business kilometres to total kilometres the car travelled during the income year x the EV home charging rate

Case Law

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Overview

- Full Federal Court has held that the primary judge was correct to find that Mr Whitby and Mr Jamsek did not fall within the extended definition of 'employee' pursuant to s 12(3) of the Superannuation Guarantee (Administration) Act 1992 (SGAA)
- That provision only applied where the employee was a natural person who was a party to the contract in his or her individual capacity; it did not apply to partnerships.
- The full court also held that the primary judge was correct to find that the relevant contracts of employment between Mr Whitby and Mr Jamsek and ZG Operations Australia Pty Ltd and ZG Lighting Pty Ltd (collectively referred to as "ZG") were not wholly or principally for their labour.

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Facts

- Mr Jamsek and Mr Whitby, were truck drivers employed by a predecessor company of ZG for nearly 40 years
- Were initially employed by ZG but were encouraged in late 1985 to become contractors
- Each driver then set up a partnership with their spouse, entered into a written contract with ZG, and purchased a truck from ZG in order to give effect to the new arrangements
- Mr Jamsek & Mr Whitby later commenced proceedings against ZG claiming relief on various bases, including that they were employees of ZG for the purposes of the SGAA

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Facts

- At first instance, the primary judge found that the appellants were not employees within the ordinary meaning of that term, nor were they employees within the expanded meaning of the term in s 12(3) of the SGAA
- On appeal, the Full Federal Court held that the appellants were employees of ZG within the ordinary meaning of that term and, having so determined, did not consider whether they also fell within the expanded meaning of the term in s 12(3)
- On further appeal, the High Court found that the appellants were not employees within the ordinary meaning of the term
- High Court remitted the appellants' cross-appeal regarding superannuation entitlements to the Full Federal Court

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Facts

- The High Court declined to rule on whether the workers were employees under s 12(3) as to do so could have substantial consequences for the revenue
- The Commissioner was not a party to the proceedings, and the Full Federal Court had not addressed the question

Issues For Full Federal Court

- Commissioner was joined as a party to the proceedings
- Whether the primary judge was correct to find that the appellants did not fall within the extended definition of employee pursuant to s 12(3) of the SGAA

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Issues For Full Federal Court

- s 12(3) of the SGAA required that:
  - there should be a contract
  - the contract was wholly or principally 'for' the labour of a person
  - the person must 'work' under that contract.
- Jamsek & Ors argued that the primary judge was wrong to find that there was no relevant contract because the 'contract' (whether express or implied) was between the relevant partnerships

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Issues For Full Federal Court

- Argued that a partnership was not a separate legal entity, so the contract was directly with the individual Jamsek & Ors
- Argued that the text of s 12(3) did not require the contract to be made with the employee, either solely or otherwise - rather s 12(3) required that 'a person works under a contract'
- Argued that in this case, Jamsek & Ors worked 'under' the relevant contracts that regulated their working activities including times of work, annual leave, rosters and rates of pay, with them being paid for their labour on a per hour basis
- Argued that the primary judge was also wrong to find that the contracts 'were not principally' for the labour of Jamsek & Ors because the contracts also provided for equipment, being the delivery vehicles

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Issues For Full Federal Court

- Contended that s 12(3) was intended to apply even where a contract may have multiple purposes,
    - with the court to determine in such cases whether the contract, viewed from the perspective of the employer, was “principally” for the labour of the person working under that contract
- Commissioner argued that s 12(3) only had application where the ‘employee’ was an identified natural person who was a party to the contract in their individual capacity, rather than in any other capacity such as a partner or trustee of a personal service trust

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Decision

- The full court unanimously dismissed the appeal, holding that the primary judge was correct to find that Jamsek & Ors were not employees within the meaning of s 12(3) of the SGAA:

  S 12(3) [Persons under contract]

  If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

- Section 12(3) only applied where the employee was a natural person who was a party to the contract in his or her individual capacity and did not apply to partnerships

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Decision

- S 72 of the SGAA rendered a partnership ‘a legal person’ for the purposes of treating it as being itself party to a contract as an employer under s 12(3)
- S 72 did not operate to deem a partnership to be ‘a legal person’ for the purposes of being treated as an employee under s 12(3)
- Only an identified natural person, and not a partnership, could be an ‘employee’ under any of the ss 12(2) to (11) provisions
- The contracts between the appellants and ZG were not wholly or principally ‘for’ the appellants’ labour - the benefit received by ZG was a delivery service that included a labour component

Jamsek & Ors v ZG Operations Australia Pty Ltd & Ors (No 3) [2023] FCAFC 48

Decision

- Jamsek & Ors failed to adduce evidence of the market value of the various components of the delivery service
- They also had not discharged their onus of proving that any of the contracts were principally for their labour
- It was also observed that the size of the capital commitment represented by the need to provide functional and properly maintained delivery trucks meant that labour could not be said to be the principal or predominant component in the circumstances at hand

DQTB & Anor v FC of T [2023] AATA 515

Overview

- AAT has held that 2 t/ps who provided agistment for stock owned by their company were not able to claim deductions for expenditure exceeding the amount of income returned
- The agistment arrangements did not constitute the carrying on of a business

Facts

- The t/ps (DQTB and KHMQ) acquired a 75-hectare property in Tasmania in 2017 on which to live and run a grazing business
- For the grazing business, they set up a company of which DQTB was secretary and KHMQ was sole director
- DQTB held qualifications in veterinary science and had published extensively in scientific journals, focusing on sheep reproduction - she was not a licensed veterinarian

DQTB & Anor v FC of T [2023] AATA 515

Facts

- Within the first few years of purchasing the property the couple spent nearly $120,000 constructing additional fencing, dams, water tanks and a laneway, and subdividing paddocks
- The company paid the t/ps $20,000 per annum as an agistment fee to conduct the grazing business on their property, including full payment for the 2017 year in which agistment only occurred for a few months
- In order to make that payment, the $20,000 was loaned to the company by the t/ps
- The loan was not documented and there were no agreed repayment terms.

DQTB & Anor v FC of T [2023] AATA 515

Facts

- Each t/p returned $10,000 as agistment income in the income year ended 30 June 2017
- They also claimed significant deductions for expenses said to be associated with their carrying on a business of providing agistment and full care animal husbandry and veterinary services to the company
- DQTB also claimed legal fees of $9,924 incurred on unsuccessful proceedings she instigated against her former employer for damages arising from ‘adverse action’ said to have been taken against her

DQTB & Anor v FC of T [2023] AATA 515

Issues For AAT

- Commissioner issued the t/ps with amended assessments
- Assessed on the basis that the deductions allowable were limited to the agistment income of $10,000 derived in the 2017 year
- In DQTB's case, an administrative penalty at the rate of 50% of the shortfall for recklessness was also imposed (amounting to $15,404)
- Commissioner disallowed the t/ps' subsequent objections in full and the t/ps sought review
- At issue was whether the t/ps, in conducting the agistment arrangements, were carrying on a business

DQTB & Anor v FC of T [2023] AATA 515

Issues For AAT

- Commissioner submitted:
  - The t/ps' activities on the property were in the nature of a hobby reflecting the professional background and interests of DQTB
  - The t/ps had not discharged the burden of proving they were carrying on a business
  - There was insufficient evidence to prove that the $20,000 agistment fee was in return for both making the land available for agistment and the provision of animal husbandry services and veterinary care as the t/ps maintained

DQTB & Anor v FC of T [2023] AATA 515

Decision

- AAT accepted that an annual fee of $20,000 was not an uncommercial amount to charge for agistment on the property (but not in respect of the 2017 year when agistment occurred for only a few months)
- The t/ps did actually provide some animal husbandry and veterinary care services for the calves and lambs on the property
- Lack of evidence that they had agreed to provide any particular level of care in return for the agistment fee
- There were services that DQTB, not being a licensed vet, could not provide and which were instead provided to the company by a local veterinarian

DQTB & Anor v FC of T [2023] AATA 515

Decision

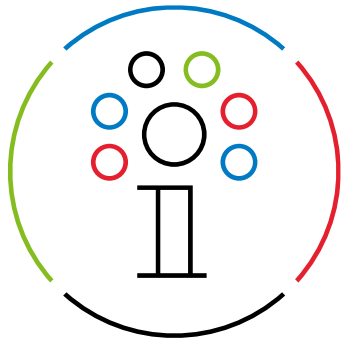
- Services of the external veterinarian was inconsistent with the assertion that the t/ps provided 'full service' husbandry and veterinary care service
- Regarding the indicia of a business - AAT found that there was some evidence that the company had a profit-making purpose, the same could not be said of the t/ps' agistment activities
- The agistment transactions were conducted in an uncommercial manner, any business plan the t/ps may have formed did not address the fundamental aspect of how their business activities might generate a profit
- The expenditure incurred was disproportionate to the income likely to be derived
- The weight of the evidence pointed against a conclusion that the t/ps were conducting a business

<Questions>

You can type them in the “Questions” box now

Or contact me via:

- <Carlo Di Loreto>
- <Partner – Tax Advisory>
- <Crowe Australasia – an affiliate of Findex>



Questions?

Susannah Gynther,
Moderator

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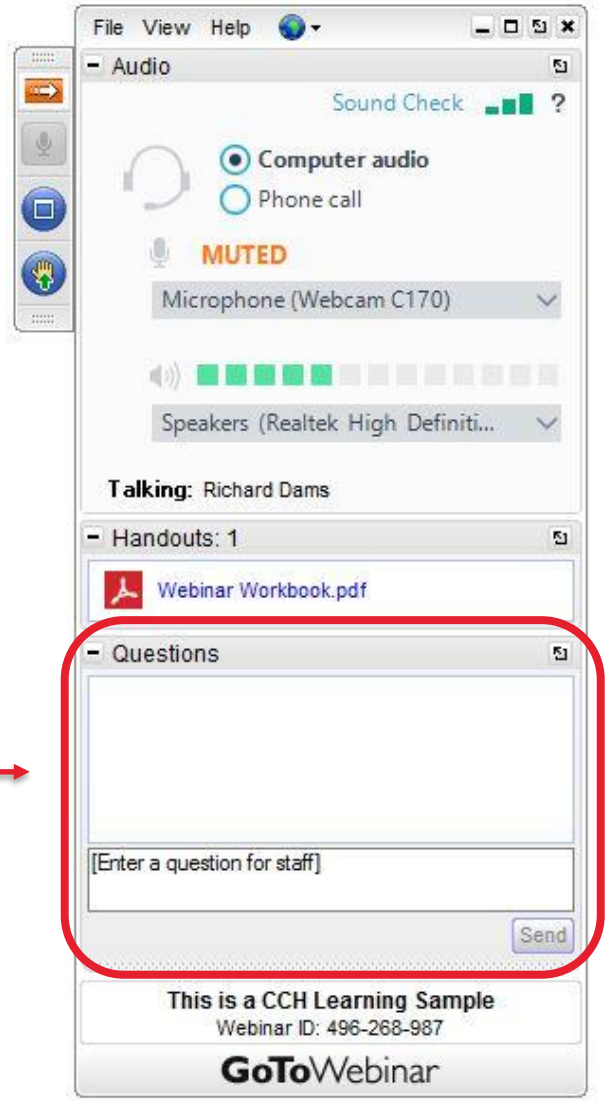

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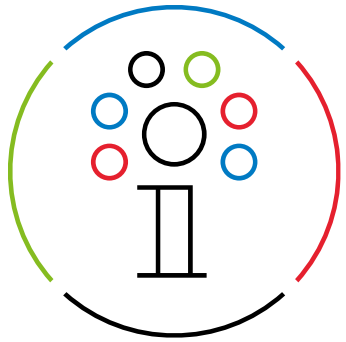

- 26 April – The Tips and Traps of Drafting a Financial Agreement
- 27 April – STP Phase 2 – A Deep Dive
- 27 April – Foreign Income and the Foreign Income Offset
- 2 May – Employees v Contractors
- 3 May – Navigating Conflict in the Workplace
- 4 May – Accounts Receivable and Cash Flow Modelling

Questions

Carlo Di Loreto

Partner - Tax Advisory
Crowe Australasia, an affiliate of Findex

Next steps

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Within 24-48 hours you will be enrolled into the E-Learning which includes:

- a PDF of the PowerPoint
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