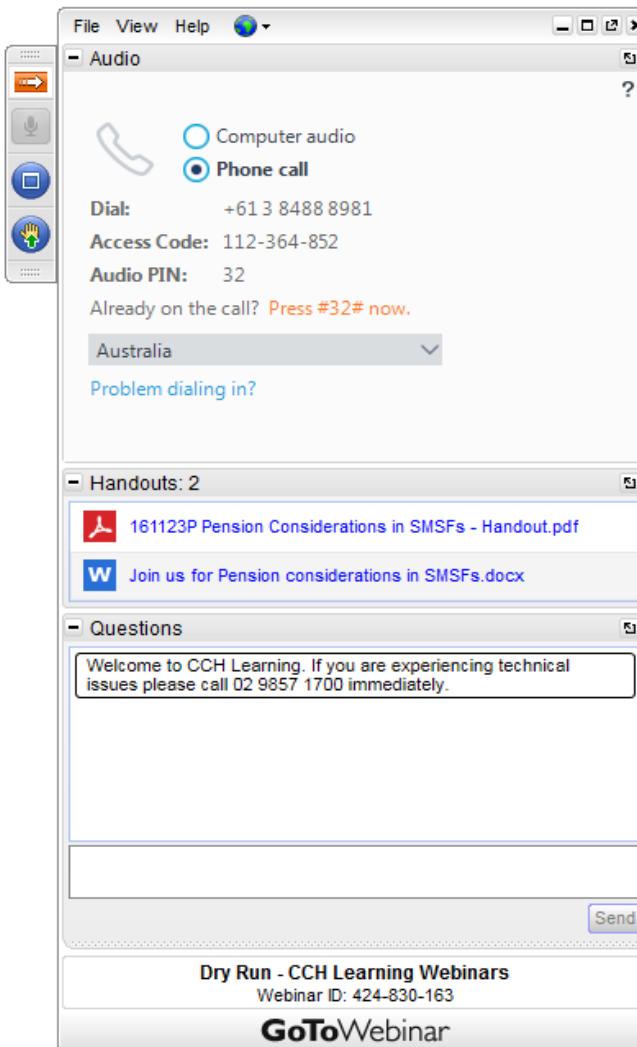

Tax Technical Update - December 2023

Carlo Di Loreto

Tuesday 12 December 2023



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Alison Wood
Moderator

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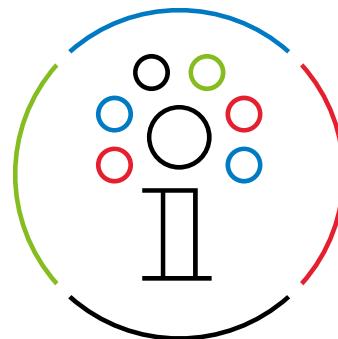


Carlo Di Loreto

Partner - Tax Advisory

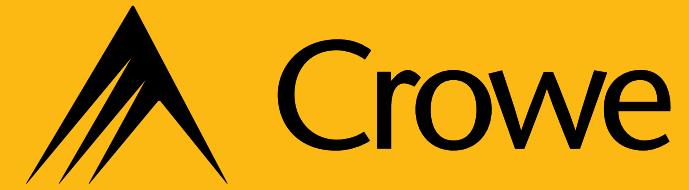
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Today's
session will
cover



December 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



Appointment of new Commissioner of Taxation

- Government will appoint Rob Heferen as the Commissioner of Taxation from 1 March 2024
- Replaces outgoing Chris Jordan
- Rob Heferen is currently the CEO of the Australian Institute of Health and Welfare
- Has over 30 years of experience in the Australian Public Service
- Previously worked at the ATO
- Has served as the Deputy Secretary of Revenue Group at the Treasury between 2011 and 2016



Instant Asset Write Off, Energy Incentive and NALI

- Senate Economics Legislation Committee has recommended that the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* be passed
- Bill includes amendments to implement a range of income tax measures, including:
 - Temporary increase of the small business instant asset write-off threshold
 - The small business energy incentive
 - Amendments to the non-arm's length expenses (NALE) rules for superannuation funds
 - Changes affecting deductible gift recipients
- Measures do not commence until Royal Assent has been given
- Passed House of Representatives 27 November 2023
- Currently before the Senate – no further sitting days this year – Senate will re-convene 6 February 2024



Enhanced Work Bonus scheme

Social Security and Other Legislation Amendment (Supporting the Transition to Work) Act 2023

- Received Royal Assent on 28 November 2023
- Amends the *Social Security Act 1991 and Veterans' Entitlements Act 1986*
- Applies to:
 - Eligible social security pensioners over age pension age, and
 - Certain veterans' entitlement recipients over qualifying age, with
- A \$4,000 work bonus concession balance on commencement and a permanent increase to the maximum concession balance they can accrue
- Enables eligible social security recipients, including recipients who take up full-time work, to access an extended employment income nil rate period of 24 weeks



Enhanced Work Bonus scheme

- Smooths the transition to work for income support recipients - doubling the employment income nil rate period and extending access to the nil rate period for recipients who enter full time work
- From 1 January 2024 - all pensioners over Age Pension age and eligible Veterans will have a maximum Work Bonus balance limit of \$11,800, instead of \$7,800
- All new Age Pension recipients will have a starting Work Bonus income balance of \$4,000 (currently nil)
- From 1 July 2024 - income support recipients will be able to retain their concession cards for up to 24 weeks (currently 12 weeks)



Share equity home ownership bills

- *Help To Buy Bill 2023* and the *Help To Buy (Consequential Provisions) Bill 2023* have been introduced to Parliament on 30 November 2023
- A shared equity program that will assist low to middle income earners to purchase new or existing homes by accessing an equity contribution from the Commonwealth
- Will be administered and monitored by Housing Australia (formerly known as the National Housing Finance and Investment Corporation)
 - In States that have referred power for the program or adopted the Commonwealth legislation, and in the Territories
- Financed from the Consolidated Revenue Fund



Share equity home ownership bills

- Housing Australia must pay the Commonwealth the value of the equity contribution that it receives when a Help to Buy arrangement concludes
- Eligible home buyers will receive an equity contribution of up to 40 per cent for new homes and 30 per cent for existing homes



Better targeted superannuation concessions bill

Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023

Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023

- Introduced to Parliament on 30 November 2023 – referred to Senate Committee 7 December 2023
- Reduces tax concessions available to individuals with Total Superannuation Balances (TSBs) exceeding \$3 million
- From the 2025-26 income year onwards, the headline concessional tax rates applying to superannuation earnings are:
 - up to 15% on earnings on superannuation balances \$3 million and below, and
 - up to an overall 30% on a percentage of earnings equal to the percentage of the individual's TSB above \$3 million.



Better targeted superannuation concessions bill

- Amendments reduce the tax concessions by imposing a tax of 15% on certain earnings based on the percentage of the TSB exceeding the \$3 million threshold
- The tax is imposed directly on the individual and is separate from the tax arrangements of the superannuation fund or scheme
- Balances in Australian superannuation accounts will be included for the purposes of calculating an individual's TSB and earnings
- Includes APRA-regulated funds, SMSFs and exempt public sector schemes
- Special rules apply to certain Commonwealth judges and justices, certain State higher level office holders, and non-complying funds
- Commences on the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives Royal Assent



Tax and Super Bills referred to Senate

Treasury Laws Amendment (Tax Accountability and Fairness) Bill

- for inquiry and report by 18 April 2024
- Bill contains measures announced in response to the PwC tax leaks scandal and the petroleum resource rent tax deductions cap

Superannuation (Objective) Bill 2023

- for inquiry and report by 28 March 2024
- Bill will legislate the objective of superannuation

Digital ID Bill 2023 and Digital ID (Transitional and Consequential Provisions) Bill 2023

- for inquiry and report by 28 February 2024
- Contain measures to introduce a legislative framework for an economy-wide Digital ID system in Australia



Thin Cap reforms Bill referred to Senate

Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023

- Government's technical amendments to the Bill introducing the thin capitalisation reforms have been referred to the Senate Economics Legislation Committee for review
- Bill was introduced into Parliament on 22 June 2023 and is currently before the Senate
- Government amendments to the Bill are intended to ensure the rules are appropriately targeted, and relate to various aspects including:
 - the ordering between the deemed third party debt test choice and the group ratio test choice under Subdiv 820-AA
 - simplified conditions for revoking certain choices
 - clarifying the meaning of "obligor group"

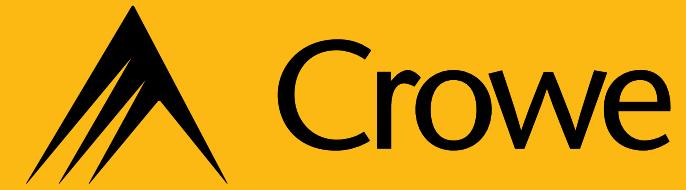


Thin Cap reforms Bill referred to Senate

Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023

- Government amendments (cont.):
 - various changes to the meaning of ‘tax EBITDA’, including to cater for trusts
 - the third-party debt test, and
 - changes to the debt deduction creation rules, including around precedence over other thin cap rules, exclusions for ADIs and securitisation vehicles as well as other exemptions and exceptions.
- Senate Committee is due to report on the amendments to the Bill by 5 February 2024
- Amendments apply to income years commencing on or after 1 July 2023





ATO/Government Announcements

APRA Insights on super industry fees and performance

- APRA has published new data on superannuation product performance, which sheds further light on the industry's fees and performance metrics
- Significant variance in the administration fees paid by fund members within each of the product segments
- Indicates considerable scope for fee reductions across the industry, particularly for trustee directed products
- Trustee directed products offered through platforms generally have the highest fees
- Trustees should review whether the additional services provided to justify the higher fees are delivering value for money to members
- larger funds tend to charge lower administration fees



APRA Insights on super industry fees and performance

- Also published each product's numerical results for this year's performance test
- These figures show how products performed relative to the tailored benchmarks beyond the 'pass' and 'fail' results announced in August 2023
- From next year, a comprehensive transparency package covering investment returns, fees and performance test metrics will be published soon after the annual performance test
- Insights and performance metrics papers are available on the APRA website
- <https://www.apra.gov.au/annual-superannuation-performance-test>



ATO debt awareness campaign on hold

- ATO has paused sending out letters reminding taxpayers of tax debts on hold
- Reviewing their communication approach
- Campaign has caused unnecessary distress to taxpayers - particularly to taxpayers who incurred the debts several years ago
- The letters were only an information piece with no action required
- ATO will review their overall approach about communicating debts on hold to taxpayers – after concerns raised by the community
- Tax debts on hold are debts that are payable, but the ATO is not taking active steps to recover



ATO debt awareness campaign on hold

- During COVID-19 - ATO paused offsetting debts previously put on hold entirely
- Debts were not deducted from tax refunds or credits
- Upon review by the Australian National Audit Office (ANAO)
 - Found that excluding any existing debts from being offset was not consistent with the law
 - Regardless of when the debt arose
- ATO has received clear advice that all debts must be offset against tax refunds or credits going forward



Consultation better retirement outcomes from super

- *Consultation on the retirement phase of superannuation* – Media Release 4 December 2023
- *Retirement phase of superannuation December 2023* – Discussion Paper Treasury website
- Government is seeking input on policy and regulatory changes to improve the outcomes for superannuation fund members in retirement
- Treasury has identified the challenges faced to ensure better retirement outcomes
- Seeking feedback on ways to achieve better access to:
 - information,
 - advice,
 - strategies, and
 - appropriate retirement income products



Consultation better retirement outcomes from super

- Discussion paper sets out broad policy responses to meet these objectives
- Will build on the government's '*Delivering Better Financial Outcomes*' package of reforms announced in June 2023 and the principles-based '*retirement income covenant*' which took effect on 1 July 2022
- Policy ideas identified in the paper cover three key areas which are to:
 - help members navigate the retirement income system,
 - help funds deliver better retirement products and services, and
 - address the low take up of lifetime income products
- Various policy ideas include:



Consultation better retirement outcomes from super

- Government and superannuation funds:
 - *to provide simple guidance or better general information to members on available retirement income sources,*
 - to *shift a current mindset of retirees typically withdrawing the minimum amount,*
 - which could lead to a less than optimal income streams and living standards
- Providing free guidance for those approaching retirement
- Include SMSFs in the retirement income covenant
- Use alternative drawdown profiles or various ‘default solutions’ to present to various classes of members to achieve different outcomes based on their circumstances
- Prompt retirees to consider eligibility for income sources outside of superannuation such as the Age Pension and assist them to apply for it



Consultation better retirement outcomes from super

- Introduce a standardised product disclosure framework for retirement products
 - *to enable retirees to compare product performance,*
 - designed to suit the particularities of the retirement phase.
- Develop a standard risk measure for retirement income products
- Develop tools like the YourSuper comparison tool and the performance test for the retirement phase
- Remove regulatory barriers to make retirement income products more attractive to consumers
- Provide funds with better support to manage longevity risk for lifetime income products, and
- Develop a framework for a standardised retirement product.



Consultation better retirement outcomes from super

- Specific questions and feedback sought for each of the policy proposals are noted in the discussion paper
- Interested parties are invited to give their comments and feedback by 9 February 2024
- Estimated 2.5 million Australians will move from the accumulation phase to the retirement phase of superannuation over the next 10 years
- APRA and ASIC joint review had also showed not enough was being done by APRA-regulated funds to assess and improve retirement outcomes

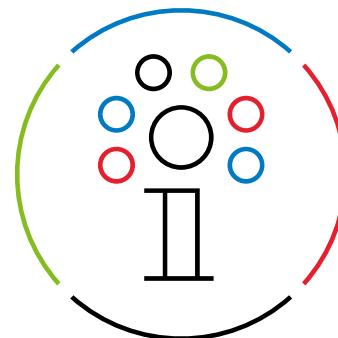


2024-25 Pre-Budget submissions

- Government has invited individuals, businesses and community groups to submit their ideas and priorities for the upcoming 2024-25 budget
- Intention is to get as wide a range of views as possible
- Closing date for submissions is Thursday 25 January 2024
- The 2024-25 budget is expected to be announced on Tuesday 14 May 2024 (based on the proposed parliamentary calendar for 2024)

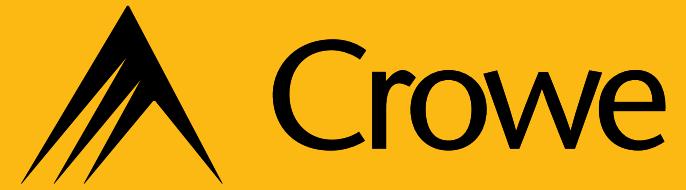


Poll Question 1



The Thin Capitalisation amendments apply for income years commencing on or after:

- a) 1 July 2022
- b) 1 July 2023
- c) 1 July 2024
- d) Date of Royal Assent



ATO Rulings

Employee v independent contractor

Taxation Ruling TR 2023/4 and *Practical Compliance Guideline PCG 2023/2*

- When an individual is an ‘employee’ of an entity for the purposes of PAYG withholding
- PCG 2023/2 outlines the Commissioner’s compliance approach for businesses that engage workers and classify them as either employees or independent contractors

TR 2023/4 – meaning of ‘employee’

- Reflects recent developments in case law, particularly the decisions in:
 - Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (Personnel Contracting) and
 - ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2.



Employee v independent contractor

- Whether a worker is an employee of an entity under the term's ordinary meaning is a question of fact
- To be determined by reference to an objective assessment of the totality of the relationship between the parties
- *Having regard only to the legal rights and obligations which constitute that relationship*
- The ruling reflects the direction provided on the meaning of the term 'employee' in Personnel Contracting
- Provides further clarity on:
 - Situations where the Commissioner will need to review evidence outside a written contract to establish the legal rights and obligations between parties



Employee v independent contractor

- Provides further clarity on (cont.)
 - casual employment being an example of when an employer's control does not extend to 'when' work is done
 - the focus still being the construction of a contract where indicia of employment identified in case law are used to determine whether a worker is working in the business of an engaging entity, and
 - when clauses of a contract are operative terms that represent more than mere labels reflecting the parties' opinion of the nature of their relationship.
- TR 2023/4 applies both before and after its date of issue
- It is not able to be binding on the Commissioner for those purposes of the Superannuation Guarantee (Administration) Act 1992



Employee v independent contractor

- PCG 2023/2 outlines the Commissioner's compliance approach for businesses that engage workers and classify them as either employees or independent contractors
- Explains when the ATO will allocate compliance resources to cases investigating a worker's classification based on the risks associated with the classification
- PCG 2023/2 covers federal tax and superannuation obligations administered by the ATO - it does not extend to payroll tax, workers' insurance or the Fair Work Act 2009
- The guideline also does not cover the income tax affairs of a worker, such as:
 - their eligibility to claim deductions or business concessions, or
 - the potential application of the personal services income rules



Employee v independent contractor

- Changes to risk zone criteria:
 - Very low/low zones – requirement to have a comprehensive written agreement governing the entire relationship between the parties
 - Medium zone – removal of requirement for the party relying on the guideline to have obtained specific advice confirming classification
 - Medium zone – inclusion of a requirement that the performance of the arrangement not significantly deviated from contractual rights and obligations agreed by the parties
- Applies to the application of compliance resources from 6 December 2023



Taxpayer Alert – tax exempt entities and franked distributions

Taxpayer Alert TA 2023/3

- ATO is currently reviewing arrangements involving franked distributions in the form of property other than money (in specie distributions) that are made to income tax exempt entities
- An in specie franked distribution is made (or flows indirectly) to an income tax exempt entity, and
- There are restrictions on the ordinary incidents of ownership of the distributed property that
 - are imposed as part of the terms and conditions for the making of the franked distribution, and
 - prevent the income tax exempt entity from receiving immediate custody and control of that property.



Taxpayer Alert – tax exempt entities and franked distributions

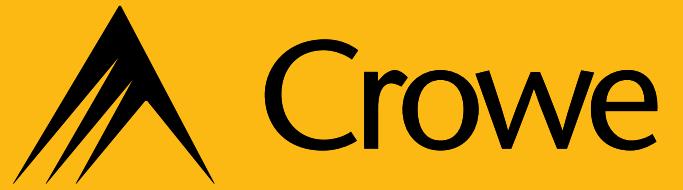
- ATO is concerned that income tax exempt entities may be entering into these arrangements without being aware that these restrictions may make them ineligible for a refund of the franking credits attached to the franked distribution
- Sec 207-122(b)(i) of ITAA 1997 requires:
 - an entity that receives a franked distribution in the form of property other than money will not be eligible for a refund of franking credits
 - where the terms and conditions on which the franked distribution is made are such that the entity ‘does not receive immediate custody and control of the property’
- Applications for franking credit refunds by income tax exempt entities will be monitored where the claim is in respect of an in specie franked distribution



Taxpayer Alert – tax exempt entities and franked distributions

- The ATO is also looking to identify an appropriate case to test the application of s 207-122(b)(i)
- Entities that have entered, or are considering entering, an arrangement of this type are encouraged to engage with the ATO through the contact details provided at the end of the Alert or
- Seek a private ruling
- The ATO also encourages affected entities to seek independent professional advice and make a voluntary disclosure to reduce any penalties that may apply





Case Law

Lump Sum Payment in Arrears

Overview

Sladden v FC of T [2023] AATA 3815

- AAT confirmed that a settlement payment made by an insurer under a deed of release was assessable as income to the t/p recipient

Facts

- T/p was a medical practitioner
- April 1999 - entered into 2 linked policies of insurance (the Policy) with National Mutual issued under the one policy number
- Covered a Life Protection Plan and a Professional Income Protection Plan (PIP Plan)
- February 2013 – t/p was diagnosed with breast cancer



Lump Sum Payment in Arrears

Facts

- T/p made a claim soon after for an income protection benefit under the PIP Plan
- Subsequently received benefits under the PIP Plan
- In late 2013 – t/p was also diagnosed with a debilitating immune system disorder
- January 2017 - the life insurance business of National Mutual was transferred to AMP Life Ltd (AMP)
- May 2019 - t/p appointed Mr F to engage with AMP on her behalf for possible commutation of her income protection benefit
- AMP offered \$1 million in full and final settlement of her claim



Lump Sum Payment in Arrears

Facts

- To assist in assessing AMP's offer, the t/p engaged an actuary to calculate the value of income protection benefits
- Actuary estimated them at between about \$1.78 million and \$1.94 million
- T/p instructed Mr F to accept the offer of \$1 million - after initially asking if AMP would be open to discussing how the payment was to be made given the significant tax disadvantage of a lump sum payment
- On receipt of further advice, she sought confirmation as to whether the life cover component of the Policy would continue as a stand-alone policy
- AMP's response was that the entire policy would be surrendered



Lump Sum Payment in Arrears

Facts

- Amendments were then requested to the deed of settlement, including that the Policy was to provide for payments “in respect of lost income and other events including the death” of the releasor
- The parties executed the amended version of the deed in September 2019 and the t/p received the \$1 million settlement sum soon after
- T/p objected to the Commissioner’s inclusion of the \$1 million settlement sum in her assessable income for the income year ending 30 June 2020
- Sought review of the Commissioner’s decision to disallow her objection



Lump Sum Payment in Arrears

Arguments

- T/p argued that the sum was not assessable income under either s 6-5 of ITAA 1997 or as statutory income under s 15-30
- The payment was an undissected lump sum comprising capital and income and thus, in accordance with case authority, it was all on capital account
- T/p argued that, in characterising the settlement sum, the matter was governed by the agreement between the payer and the payee
- The nature of the consideration for which the sum was paid was determined by the terms of the deed



Lump Sum Payment in Arrears

Decision

- The terms of the deed were not determinative of the issue
- Regard could be had to the facts and circumstances that led to the deed being executed to determine the true nature of the settlement sum
- T/p and AMP negotiated and resolved to commute her entitlements in respect of the income protection claim in consideration of payment of the settlement sum
- No other claim or entitlement was considered by either party in reaching agreement on the amount AMP was to pay
- The t/p agreed under the deed to surrender the life cover and release AMP from any claims she may at any time have against it the settlement sum remained \$1 million



Lump Sum Payment in Arrears

Decision

- In the case authorities cited - the lump sum received was incapable of dissection between income and capital
- In this case - no part of the settlement amount was other than in respect of commutation of the taxpayer's monthly benefits payable under the income protection cover



GST on supply of cash withdrawal services

Overview

Banktech Group Pty Ltd v FC of T [2023] AATA 3850

- Supplies of cash withdrawals using its cash dispensing equipment in hotels and clubs were taxable supplies

Facts

- T/p installed ‘cash dispensing equipment’ at venues, including hotels and clubs
- Received fees charged to patrons who made cash withdrawals by using the equipment
- T/p’s equipment had some of the features of an automatic teller machine (ATM) but, unlike conventional ATMs, access to the taxpayer’s equipment required intervention by staff at the venue



GST on supply of cash withdrawal services

Arguments

- T/p argued that the fees it received were consideration for input taxed financial supplies under s 40-5.09(5)(a) of the A New Tax System (Goods and Services Tax) Regulations 2019 (GST Regulations) - Not subject to GST
- S 40-5.09(5)(a) states:

A supply by an entity for a fee of not more than \$1,000 is a financial supply if it is a supply of one or more of the following ATM services:

(a) a withdrawal from an account;
- T/p argued this item did NOT require that a withdrawal from an account was also an ATM service
- Alternatively, ‘automatic teller machine service’ took its ordinary English meaning rather than a technical meaning



GST on supply of cash withdrawal services

Arguments

- Commissioner argued the term ‘automatic teller machine service’ took a technical meaning that reflected the definition of an ATM in the Issuers and Acquirers Community (“IAC”) Framework and Code Sets administered by AusPayNet
- Alternatively, the requirement for intervention by venue staff distinguished the equipment from the ordinary meaning of an ATM
- Commissioner argued that the provision did not apply - GST was included on the fees
- T/p objected to the Commissioner’s deemed assessment of its net amount for the December 2020 quarterly tax period
- When the objection was disallowed, it sought review



GST on supply of cash withdrawal services

Decision

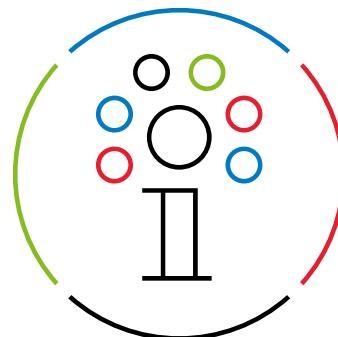
- s 40-5.09(5) of the GST Regulations required that a withdrawal from an account was also an ATM service
- The supply of an ATM service of a withdrawal from an account that was input taxed by s 40-5.09(5) was not limited to services provided through the ATM payment system designated by the Reserve Bank of Australia and in accordance with the definition in the IAC Code Sets
- T/p's supplies did not fall within the ordinary meaning of an ATM service because the equipment required the involvement of venue staff, involved the use of multiple devices and was not marketed as an ATM
- Evidence did not support that there was a technical meaning of 'ATM service' that would include the service of obtaining a cash withdrawal from equipment with the sole functionality of dispensing cash and where staff intervention was required to access the service



Poll Question 2

Whether a worker is an employee or contractor depends on the the legal rights and obligations of the relationship.

- a) TRUE
- b) FALSE



Undeveloped land deduction claims

Overview

Meakins & Anor v FC of T 2023 ATC ¶10-698; [2023] AATA 3852

- AAT has disallowed deductions claimed by a trust in respect of holding costs of land that, 17 years later, remained undeveloped
- Upheld penalties that were imposed for recklessness
- Found that gross carelessness was shown in persevering with the claims after the ATO had raised concerns over such and indicated they would not be allowed

Undeveloped land deduction claims

Facts

- July 2006 - Intaglio (as trustee for the AMF Trust) purchased vacant land in North Fremantle for \$1,300,500
- The property was funded by an interest-only business loan to Intaglio by the ANZ Bank in the amount of \$1,340,000 for a term of 15 years
- At the time of purchase the vendor had plans drawn up for the construction of a residential dwelling on the property – this was given to Intaglio
- The loan principle was paid out in August 2012 by payment by Intaglio of \$330,000 and finance of \$1,010,000 from ANZ on a fixed rate commercial bill facility, which was repaid in February 2016



Undeveloped land deduction claims

Facts

- 2007 to 2017 income years - the property was not rented out
- 2018 income year - the AMF Trust received \$7,000 in rental income from a company that leased the property for the storage of building materials and access
- In 2019 - Intaglio allegedly invoiced a company controlled by Ms M's husband for \$53,240 for use of the property as a car park from 1 July 2009 to 31 October 2016
- The AMF Trust claimed deductions of \$1,083,841 over the 2007 to 2013 income years in respect of the property
- ATO began conducting a review of Ms M's income tax affairs in 2014
- Raised concerns over the deductions and advising her in 2015 that its preliminary view was that the holding costs of the land were not deductible



Undeveloped land deduction claims

Facts

- July 2020 - ATO review escalated into an audit
- Resulted in:
 - Amended notices of assessment to Ms M for the 2017 and 2018 years
 - Notices of assessment of shortfall penalties to the AMF Trust for the 2017 and 2018 years
 - Notices of assessment of penalties for false or misleading statements to the AMF Trust for the 2015 and 2016 years
- The t/ps' objections to all assessments were disallowed
- The t/p sought review



Undeveloped land deduction claims

Issue

- Whether the holding expenses for the property were deductible under s 8-1 of ITAA 1997
- Whether the administrative penalties were correctly applied and/or should be remitted
- ATO and t/p relied on the High Court decision of Steele v DFC of T 99 ATC 4242

Arguments

- T/p contended that, at the time of the purchase of the property, as well as since, the sole purpose was to develop the property to be used for the purpose of deriving assessable income
- Through Ms M, Intaglio had taken, and continued to take, steps to further the purpose and intention of production of income from the property
- All the holding costs, and interest incurred, claimed as deductions were incurred solely in the acquisition or holding of the property for the purpose and intention of deriving assessable income



Undeveloped land deduction claims

Arguments

- The delays in the development of the property were caused by a variety of events, including
 - adjoining land development,
 - acquiring more land,
 - state land resumption and
 - adverse market factors.
- Regarding penalties, the t/ps contended that the deductibility of the holding costs was reasonably arguable



Undeveloped land deduction claims

Arguments

- The Commissioner argued that the t/ps could have had no expectation of earning rental income from the development of the property as they had not:
 - Commenced any development using the plans received at the time of purchase
 - Engaged architects or any other professional to seek alternative plans for development
 - Submitted any plans to council for development approvals
 - Sought any financing to fund any development, or
 - Had any discussions with builders regarding costings and timeframes for construction
- Even if Intaglio purchased the property with a particular profit-making scheme in mind
 - It had not engaged in activity or continual efforts demonstrating a commitment to that scheme



Undeveloped land deduction claims

Arguments

- The total lack of activities led to the conclusion that there could be no expectation of earning rental income
- As Intaglio did not carry on a business of property development, the holding costs were not deductible under s 8-1(1)(b) either

Decision

- T/ps had failed to establish an entitlement to the deductions claimed
- The relevant timeline and the actions taken by the t/p in Steele were sufficiently different to the present case to clearly distinguish it
- In Steele there was a continuum of activity unequivocally directed to the development of a motel/commercial operation



Undeveloped land deduction claims

Decision

- In the present case there was some 17 years without even getting to the stage of architectural drawings being produced
- Lack of any substantial action towards developing an income-producing asset was inconsistent with an ongoing intention to develop the property to generate assessable income
- Equally, if not more, consistent with an intention to hold the property on capital account
- The costs claimed were, at best, entirely preliminary to generating assessable income and were incurred too soon before the commencement of the business or income-producing activity
- T/ps' position was not considered to be reasonably arguable
- Facts in the present case were clearly distinguishable from the facts in Steele



Undeveloped land deduction claims

Reminder: TR 2004/4 Deductions for interest incurred prior to the commencement of or after cessation of, income earning activities

- Ruling deals with the deductibility of interest on borrowed funds incurred before the commencement of, and after the cessation of, business activities
- Follows the High Court decision in Steele's case, and the Full Federal Court decisions in Brown's case and Jones' case
- Deductibility of interest is determined through an examination of the purpose of the borrowing and the use to which the borrowed funds are put
- Interest expenses are recurrent expenses and where the interest is on revenue account, the fact that the borrowed funds may be used to purchase a capital asset does not alter this conclusion

Undeveloped land deduction claims

Reminder: TR 2004/4 Deductions for interest incurred prior to the commencement of or after cessation of, income earning activities

- Interest incurred before the derivation of assessable income will be deductible under s 51(1) of ITAA 1936 or s 8-1 of ITAA 1997 provided that:
 - the interest is not incurred ‘too soon’ and is not preliminary to the income earning activities;
 - the interest is not private or domestic;
 - the period of interest outgoings before the derivation of relevant assessable income is not so long that the necessary connection between outgoings and assessable income is lost;
 - the interest is incurred with one end in view, ie the gaining or producing of assessable income; and
 - continuing efforts are undertaken in pursuit of that end.



Undeveloped land deduction claims

Reminder: TR 2004/4 Deductions for interest incurred prior to the commencement of or after cessation of, income earning activities

- Outgoings of interest are a recurrent expense
- The fact that borrowed funds may be used to purchase a capital asset does not mean the interest outgoings are therefore on capital account

Vacant Land

- Where the interest expense is associated with holding vacant land (for example, interest on a loan to purchase vacant land) and is otherwise deductible in accordance with this Ruling
- Section 26-102 of the ITAA 1997 may operate to deny that deduction



Undeveloped land deduction claims

Reminder: TR 2004/4 Deductions for interest incurred prior to the commencement of or after cessation of, income earning activities

Steele's Case

- Expenditure will be ‘incurred in gaining or producing the assessable income’ if it is ‘incidental and relevant’ to the gaining or producing of that income
- The relevant assessable income was not expected until well into the future
- The question arose as to whether, in all the circumstances, the interest expenditure was indeed both ‘incidental and relevant’
- Temporal relationship between the incurring of an outgoing and the actual or projected receipt of income may be one of several facts relevant to a judgment as to whether the necessary connection might exist
- Contemporaneity is not legally essential



Undeveloped land deduction claims

Reminder: TR 2004/4 Deductions for interest incurred prior to the commencement of or after cessation of, income earning activities

Steele's Case

- Expenditure can satisfy the positive limbs of section 8-1 even though it is incurred in a period prior to any expected resultant income
- The majority in Steele acknowledged that those limbs will not be satisfied if that expenditure is 'too soon', 'preliminary' or a 'prelude'
- An outgoing may be 'too soon' – there may be a significant delay between the incurring of an outgoing and the actual or projected receipt of income - may be relevant in determining whether expenditure is deductible

Undeveloped land deduction claims

Reminder: TR 2004/4 Deductions for interest incurred prior to the commencement of or after cessation of, income earning activities

Steele's Case

- An outgoing may be 'too soon' - where the advantage conferred by the expenditure is necessary for, but not to be found 'in' the regular income earning activities
- Often referred to as 'functionally too soon'
- Such a situation can arise even in the absence of a 'significant delay'
- Requires continuing efforts are undertaken in pursuit of assessable income – does not mean constant on-site development activity is required
- A test of 'continuing efforts' would need to be set within the context of the normal time frames of the relevant industry



Undeveloped land deduction claims

Reminder: TR 2004/4 Deductions for interest incurred prior to the commencement of or after cessation of, income earning activities

- If a venture becomes truly dormant and the holding of the asset is passive, relevant interest will not be deductible even if there is an intention to revive that venture sometime in the future

After income earning activities cease

- The ruling also applies where interest has been incurred after the relevant borrowings (or assets representing those borrowings) have been lost and relevant income earning activities have ceased
 - The outgoing will still have been incurred in gaining or producing assessable income if the outgoing was productive of assessable income of an earlier period

Transfer of foreign super funds into Australia

Overview

Came v FC of T [2023] AATA 3951

- T/p made an election under s 305-80 of ITAA 1997 to transfer foreign superannuation funds via an Emigrant Capital Account into his Australian complying superannuation fund
- Included in the assessable income of that complying fund
- Commissioner's decision to instead treat the applicable fund earnings as assessable to the taxpayer on the basis that the funds were not paid directly from the foreign superannuation fund into the complying superannuation fund overturned

Facts

- T/p ceased employment in South Africa and immigrated to Australia
- Became an Australian resident on 7 July 2004 - held vested benefits in a foreign superannuation fund for the purposes of Subdiv 305-B of ITAA 1997



Transfer of foreign super funds into Australia

Facts

- 2020 income year – t/p received lump sums from his then foreign superannuation funds
- Paid into his Emigrant Capital Account in South Africa in compliance with South African law
- Account was subject to South African exchange control regulation and restrictions
- T/p was otherwise free to use the amounts he received into the account as he wished
- Late 2019 and early 2020 - transferred the amounts into the Strayan Superannuation Fund (an Australian complying superannuation fund)
- T/p lodged his 2020 tax return on the basis that he made elections within s 305-80(2) of ITAA 1977 to have all his applicable fund earnings from the foreign superannuation funds included in the assessable income of the complying superannuation fund into which the superannuation lump sums were paid



Transfer of foreign super funds into Australia

Facts

- Commissioner issued a notice of amended assessment that assessed the applicable fund earnings to the t/p
- Commissioner disallowed the t/p's objections to the amended assessment and the t/p sought review

Issues

- Whether s 305-80(1) applied so that the t/p was entitled to choose (pursuant to s 305-80(2)) that all his applicable fund earnings in relation to the superannuation lump sums be included in the assessable income of the complying superannuation fund into which the lump sums were paid
- Whether so much of the lump sums as equalled the t/p's applicable fund earnings must instead be included in his assessable income



Transfer of foreign super funds into Australia

Arguments

- Commissioner argued that the choice was only available to a t/p where the superannuation lump sum was paid directly from the foreign superannuation fund into a complying superannuation fund at the t/p's direction or request
- The fact that a direct transfer of the superannuation lump sums from the South African superannuation funds was not permitted under South African law was 'irrelevant'
- Sec 305-80 did not apply where the t/p received the payment - notwithstanding it was made for the t/p's benefit
- 'the direction or request' under s 307-15(2)(b), resulting in the "deemed" receipt, must be a direction or request to make the payment to a complying superannuation fund



Transfer of foreign super funds into Australia

Arguments

- T/p argued that the provisions in ITAA 1997 that replaced s 27CAA of ITAA 1936 had substantive and not merely stylistic effect
- The legislature made a deliberate change to dispense with the requirement that a superannuation lump sum be paid directly from a foreign superannuation fund to a complying superannuation fund before the relevant election could be made
- The previous requirement for a direct payment only suited some people (eg. emigrants or Australians returning from the United Kingdom) and discriminated against others (eg. South African emigrants)
- Section 305-80 was said to address this inequity



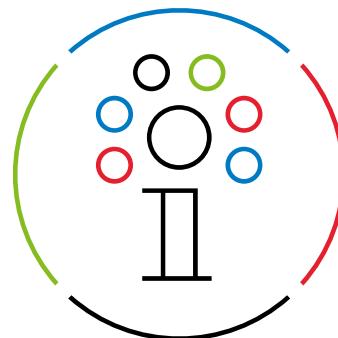
Transfer of foreign super funds into Australia

Decision

- AAT set aside the objection decision - Commissioner's construction of the relevant provisions was strained
- Commissioner's interpretation did not accord with the current legislation
- AAT agreed with the t/p that the provisions replacing s 27CAA made substantive and not just stylistic changes
- The idea that a superannuation lump sum payment from a foreign superannuation fund must be paid directly to a complying superannuation fund for the t/p to make the relevant election was clearly expressed in s 27CAA
- However, the same could not be said for the provisions in ITAA 1997 that replaced it - the amending Act evinced a legislative intention to bring about a change from the requirement that there be a direct payment from a foreign superannuation fund to a complying superannuation fund



Questions?



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

Questions?



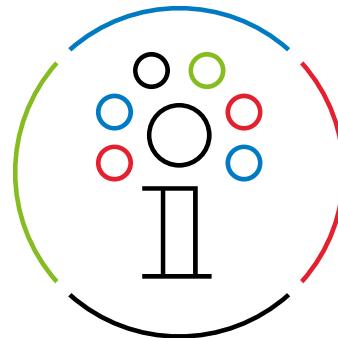
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Questions



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