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Issue
#0110

Tax Essentials

Capital Gains Tax Minimisation Strategies 2021

APRIL	2021

THE NEWSLETTER

Tax Planning Update

MICHAEL'S CORNER

Article No. 10

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- Healius Ltd – Lump sum payments to doctors. Commissioner is successful in appeal to Full Federal Court.
- Burton's Case – Taxpayer is refused special leave to appeal to High Court and ATO releases Decision Impact Statement. This case dealt with capital gains tax discount and claiming overseas tax credits on capital gains.
- Eichmann – CGT small business concessions and whether land can be an active asset. Taxpayer wins on appeal to Full Federal Court.
- Minimising capital gains tax on the sale of the holiday home.
- Removing capital gains tax for granny flats.
- ATO releases Decision Impact Statement (DIS) on Full Federal Court Decision of Greig V Commissioner of Taxation (2020) FCAFC 25.
- Comment on CGT determination number 60.

The Newsletter

ATO CIRCLES PRIVATELY OWNED AND WEALTHY GROUPS AS AUDITS HEAT UP

Speaking at an Accountants luncheon in March, Jonathan Ortner, a partner at law firm Arnold Bloch Leibler, warned practitioners the ATO may ramp up its auditing efforts, notably larger companies, after compliance activities were deferred due to COVID-19..

According to Mr Ortner

- The ATO has deferred disputes due to COVID-19 but this is likely to end soon.
- It is likely that companies and individuals that fit the criteria of the Tax Office's Top 500 and Next 5,000 programs are likely to attract auditing efforts. Here the ATO is likely to take an industry-by-industry approach.
- Emerging privately owned and wealthy groups with a combined annual turnover — including associated subsidiaries — of more than $10 million, or controlled wealth of over $5 million, are also likely to be captured by the ATO audits, due to a tax gap of 7.7% indicating $772 million in lost revenue.

What Attracts Attention...

The following behaviours and characteristics of privately owned and wealthy groups may attract ATO attention:

- tax or economic performance not comparable to similar businesses
- low transparency of their tax affairs
- large, one-off or unusual transactions, including the transfer or shifting of wealth
- aggressive tax planning
- tax outcomes inconsistent with the intent of the tax law
- choosing not to comply, or regularly taking controversial interpretations of the law, without engaging with the ATO
- lifestyle not supported by after-tax income
- accessing business assets for tax-free private use
- poor governance and risk-management systems.

EXTENSION OF GOVERNMNET ASSISTANCE

The Morrison Government will expand and extend its 'SME Loan Guarantee Scheme' as part of its commitment to support up to $40 billion in lending to small and medium enterprises.

Under the existing Scheme, more than 35,000 loans worth more than $3 billion have already been provided, helping thousands of small businesses get to the other side of this pandemic.

As Australia moves into the recovery phase, the Scheme will be targeted and tailored to support those businesses that have been relying on JobKeeper during the March quarter.

The SME Recovery Loan Scheme will benefit from an increased Government guarantee, increasing from the current 50/50 split between the Government and the banks to an 80/20 split. This will encourage more banks to support small businesses and demonstrates the Government's commitment to back those businesses that are prepared to back themselves.

The expanded Scheme will also increase the size of eligible loans, increasing from $1 million under the current Scheme to $5 million. Businesses with a higher turnover will also benefit under the expanded Scheme, with the maximum eligible turnover increased from $50 million to $250 million.

Maximum loan terms under the expanded Scheme will also be increased from 5 to 10 years – providing businesses and lenders with greater flexibility.

The expanded Scheme will also allow lenders to offer borrowers a repayment holiday of up to 24 months.

Importantly, the Scheme will also be able to be used by eligible businesses to refinance their existing loans. This will allow SMEs to access the more concessional interest rates available under the program and to better manage their cash-flows through an extended loan term and lower combined repayments.

The Government has also extended the following programs to 30 September 2021:

- the successful Domestic Aviation Network Support (DANS) and Regional Aviation Network Support (RANS) programs
- the 50 per cent waiver of domestic air services charges for Regular Public Transport (RPT) and aeromedical flights

- the International Freight Assistance Mechanism.

The $50 million Business Events Grants Program will also be extended by three months to support Australian businesses to hold multi-day business events, covering up to 50 per cent of costs incurred in participating business events during the 2021 calendar year. This will help restart Australia's business events sector.

The $94.6 million Zoos and Aquarium program will be extended by six months to support zoos, aquariums and wildlife parks to maintain their animal populations where their tourism revenue has been affected by travel and social distancing restrictions.

The COVID-19 Consumer Travel Support Program will also be extended for three months beyond 13 March.

ATO UPDATE ON THE IMPACT OF COVID-19 ON CAR PARKING AND MOTOR VEHICLE FRINGE BENEFITS

In February, the ATO updated their Covid-19 guidance relating to car parking and vehicles.

No car parking fringe benefit will arise if:

- a work car park is closed due to COVID-19, as no car space will have been available for use by the employee for more than 4 hours between 7am and 7pm on that day
- all commercial parking stations within a one km radius of business premises are closed on a particular day due to COVID-19, or
- the reduced rates at commercial parking stations on 1 April 2020 within a one km radius of the business premises for all-day parking where less than $9.15.

The ATO has also provided guidance on cars returned to the employer's business premises during the period of COVID-19 restrictions. A car fringe benefit will no longer arise where:

- the car is returned to your business premises
- your employee cannot gain access to the car, and
- your employee has relinquished an entitlement to use your car for private purposes.

TAXATION DETERMINATIONS

The following Taxation Determinations relating to Fringe Benefits Tax were released by the ATO in March.

- TD 2021/3 – Fringe benefits tax: reasonable amounts under section 13G of Fringe Benefits Tax Assessment Act 1986 for food and drink expenses incurred by employees receiving a living-away-from-home allowance fringe benefit for the fringe benefits tax year commencing on 1 April 2021.
- TD 2021/4 – Fringe benefits tax: what are the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the fringe benefits tax year commencing on 1 April 2021?

FCT V HEALIUS [2020] FCAFC 173

The taxpayer's special appeal application against the Full Federal Court's decision has been declined by the High Court.

In this case it held that lump sum payments by a medical centre to its doctors were on capital account. The Full Federal Court had held they were not simply payments to secure medical practitioners as customers who would then pay to use the facilities provided by the centre. Rather, they were payments made for the practitioner to cease operating an existing practise, to commence trading as a part of the centre's mode of practise, and to accept a restraint on establishing a competing practise.

YOUR FUTURE, YOUR SUPER REFORMS INTRODUCED INTO PARLIAMENT

On 17.2.2021, the Morrison Government introduced legislation into parliament to ensure the superannuation system works harder for all Australians.

These measures will reduce waste in the system and save Australian workers $17.9 billion over 10 years by holding underperforming funds to account and strengthening protections around the retirement savings of millions of Australians.

Australians currently pay $30 billion per year in superannuation fees, while three million accounts sit in underperforming funds worth over $100 billion in retirement savings.

The Treasury Laws Amendment (Your Future, Your Super) Bill 2021 also addresses key recommendations from the Productivity Commission's (PC) comprehensive assessment of the system, Superannuation: Assessing Efficiency and Competitiveness.

The Your Future, Your Super package is scheduled to commence on 1 July 2021. Under the package, the superannuation system will be significantly enhanced by:

- **Having your superannuation follow you:** preventing the creation of unintended multiple superannuation accounts when employees change jobs.
- **Making it easier to choose a better fund:** members will have access to a new interactive online YourSuper comparison tool which will encourage funds to compete harder for members' savings.
- **Holding funds to account for underperformance:** to protect members from poor outcomes and encourage funds to lower costs the Government will require superannuation products to meet an annual objective performance test. Those that fail will be required to inform members. Persistently underperforming products will be prevented from taking on new members.
- **Increasing transparency and accountability:** The Government will increase trustee accountability by strengthening their obligations to ensure trustees only act in the best financial interests of members. The Government will also require superannuation funds to provide better information regarding how they manage and spend members' money in advance of Annual Members' Meetings and disclose all of their portfolio holdings to members.

This package builds on the Government's superannuation reforms which include consolidating $2.9 billion held in unintended multiple accounts on behalf of 1.4 million Australians, capping fees on low balance accounts, banning exit fees and ensuring younger Australians do not pay unnecessary insurance premiums.

EXTENSION OF MEASURES RELATING TO VIRTUAL AGMS AND SIGNING AND SENDING ELECTRONIC DOCUMENTS

On 17.2.2021, the Morrison Government announced it will introduce legislation into Parliament to extend the application of temporary relief measures introduced at the height of the coronavirus crisis relating to virtual AGMs and signing and sending electronic documents.

Specifically, the Treasury Laws Amendment (2021 Measures No. 1) Bill will extend from 21 March 2021 to 15 September 2021 the expiry date of the temporary relief allowing companies to use technology to meet regulatory requirements to hold meetings, such as annual general meetings, distribute meeting-related materials and validly execute documents.

Following 15 September 2021, member meetings will need to be conducted consistent with pre-COVID-19 laws which require an-in person meeting to be held.

The Government will also conduct a 12-month opt-in pilot for companies to hold hybrid annual general meetings to enable a proper assessment of the shareholder benefits of virtual meetings.

The Government will finalise permanent changes to allow electronically signing and sending documents prior to the expiry of these temporary arrangements on 15 September.

Extension of this temporary relief will allow businesses to continue to comply with their regulatory requirements as they continue to deal with and emerge from the COVID-19 pandemic.

TRANSFER BALANCE CAP

The transfer balance cap began on 1 July 2017. It is a lifetime limit on the total amount of superannuation that can be transferred into retirement phase income streams, including most pensions and annuities.

All retirement phase income streams and retirement phase death benefit income streams you receive count towards your transfer balance cap. The age pension (or other types of government payments) and pensions received from foreign super funds do not count towards your transfer balance cap.

The general transfer balance cap, currently $1.6 million, will be indexed to $1.7 million on 1 July 2021.

TRANSFER BALANCE CAP CHANGES ON 1 JULY 2021

Before 1 July 2021, all individuals have a personal transfer balance cap of $1.6 million.

From 1 July 2021, all Individuals will have a personal transfer balance cap between $1.6 million and $1.7 million. Individuals who start their first retirement phase income stream on or after 1 July 2017 will have a personal transfer balance cap of $1.7 million.

You will be able to view your personal transfer balance cap in ATO online.

Individuals who had a personal transfer balance account before 1 July 2021 will have a personal transfer balance cap calculated proportionally based on the highest balance of their transfer balance account. Their personal transfer balance cap will not be increased if, at any time before 1 July 2021, the balance of their transfer balance account met or exceeded $1.6 million.

PRIVATE WEALTH – WITHHOLDING TAX ON OVERSEAS INTEREST

The ATO's International risk for Private Groups program has launched a campaign focusing on non-resident withholding tax relating to interest expenses paid overseas for the 2018- and 2019-income years.

Taxpayers who have paid interest to a non-resident must meet certain obligations, including:

- lodging a PAYG withholding from interest, dividend and royalty payments paid to non-residents – annual report (PAYG annual report)
- paying withholding tax to the ATO (typically at the rate of 10%) unless a withholding exemption or double-tax treaty relief applies.

As part of the campaign, the ATO intends to contact identified taxpayers by an initial letter and a follow-up phone call. This is to ensure compliance with withholding tax obligations.

The campaign will also deliver targeted education to assist taxpayers in meeting their obligations to:

- withhold and remit tax
- claim deductions for overseas interest expenses
- lodge the PAYG annual report.

LARGEST PROMOTER PENALTY IN R&D HISTORY HANDED DOWN

The Federal Court has handed down a judgement against Mr Paul Enzo Bogiatto and ordered $22.68 million in penalties be paid.

On 12.2.2021, Mr Bogiatto was ordered to pay $6.51 million, in addition to $6.01 million and $3.65 million penalties for his related entities, Ryusei, Lambda Chase Chartered Accountants and Lambda Chase Service, respectively.

Between 2012 and 2015, Mr Bogiatto operated as a Research and Development Tax Incentive (R&DTI) adviser for a range of businesses in his capacity as a registered tax agent and chartered accountant.

Investigations into Mr Bogiatto's activities began in late 2015 and uncovered Mr Bogiatto's promotion of arrangements for his clients to lodge overstated and unsubstantiated R&DTI claims. In total, research and development (R&D) tax offset refunds of $45.5 million were paid to Mr Bogiatto's clients.

Evidence gathered in relation to Lambda Chase's activities indicated systematic abuse of the R&DTI, with claims that were not reflective of taxpayers' actual R&D expenditure for the relevant years.

Mr Bogiatto avoided regulators when investigated and never looked to redress any amount of loss or damage incurred by scheme participants.

According to Assistant Commissioner Ash Khera:

- This outcome reflects the scale of Mr Bogiatto's scheme, which had a devastating impact on the individuals and businesses that followed his advice and trusted him. The size of the penalty is the highest ever seen in Australia and reflects the scale and abusive nature of these schemes.
- The ATO aims to protect individuals and businesses from being unwittingly caught up in schemes like this one. Those who encourage others to do the wrong thing and claim the incentive to which they are not entitled will be caught and held to account for their actions.
- This decision builds on several previous successful results under promoter penalty laws that are designed to ensure that promoters are held accountable when they encourage their clients to enter into risky tax schemes.
- The ATO will continue to protect the tax system by those seeking to undermine it.
- The ATO has the tax technical and investigative skills to deal with those who promote non-compliance with the tax and superannuation system.
- This decision provides further judicial clarification on the application of the promoter penalty laws and the eligibility of the R&DTI.
- The ATO and the Commissioner view this recent decision as a strong deterrent for the advisers exhibiting repeated poor behaviour.

As a result of these investigations, Mr Bogiatto was also investigated and de-registered as a tax agent in October