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Question 1

Subject: Farm Management Deposit - Deductible Loss

Hi, I have a primary producer client (Partnership).

In March 2020, each of the partners deposited $100,000 into a Farm Management Deposit. However, it appears that their respective share of net PP income before the FMDs will be less than $100,000.

Can the FMD deposit result in a tax-deductible loss for the year?

Note both taxpayers qualify under the FMD provisions.

Answer

The amount deposited needs to be funded from primary production activities – this is a requirement.

The Reader ran a test entry against a sample tax client, and the tax return failed the integrity test when the FMD was greater than the net farm income.

The answer here is that a loss cannot be created. The relevant sections are s393-5(1) and s393-5(2).

Question 2

Subject: Sole Trader – Income Tax

If he chooses to pay a superannuation contribution for himself, is he entitled to an income tax deduction?

Answer

A tax deduction may be claimed up to the annual limit of $25k.

Of course, this assumes no other contributions have been made in the year by the sole trader and that no employer contributions have been made on his behalf.

Question 3

Subject: Real Estate Value Test

I have a client (substantial rural enterprise) that derived a capital gain from selling one of his properties on 1 January 2018.

He chose to defer the assessable gain of around $470,000 under the small business CGT deferral provisions to acquire another active asset within that period.

Unfortunately, as of today, this has not occurred, although he is currently in the process of arranging to fund the purchase of this active asset in the immediate future.

I do not believe that he can request an extension of time to offset this gain against the new property, assuming purchased prior to June.

Alternatively, he does have around $700,000 in carry forward PP losses...is he able to offset the deferred gain against the C/F PP losses?

He does not meet the turnover and real estate value test and has no other non-pp income exceeding $200,000 other than the deferred gains.

Answer

We assume we are dealing with an individual.

The two-year period is from contract to contract – not settlement. It still looks like the period has been exceeded.

Also, we assume that the active asset concession and individual concession were applied correctly to the gain.

It is not too late to revisit this.

As the two years have expired, we are dealing with CGT event J5.

Note it is still possible to apply the CGT Small Business Retirement Concession to this gain.

This assumes the individual's lifetime limit of $500k is still wholly or partially intact.

We advise that any remaining capital gain can be offset against the losses carried forward.

Question 4

Subject: Taxable Distributions of Trusts

A Trust has a Trust Loss of non-primary production of $ 10,000 plus a Capital Gain of $ 100,000.

Is the taxable distribution to each beneficiary as per below? -

Beneficiary #1	Beneficiary #2
50% Non-Primary Production = ($5,000) Capital Gain = $ 50,000	50% Non-Primary Production = ($5,000) Capital Gain = $ 50,000

I thought that you are not able to distribute losses of income to the Beneficiary - even though there is a Net Income in the trust.

Answer

You are correct.

The trust's taxable income retains its character as it flows through the trust.

The fact that the trust has a taxable income due to the capital gain allows the loss on revenue account to flow down to the individual.

The 50% capital gains tax discount (if available) will be applied individually.

Question 5

Subject: SBE rules

Regarding the SBE Pool for the year ended 30 June 2020.

If you claim your depreciation under the SBE rules, 30%

and 15%, do you have to write the pool balance off, if under $150,000 as at 30 June?

Answer

Yes, and this is an interesting situation because it does not always give the most optimal outcome.

In most cases, SBEs will be very grateful for the concession, but some don't require it due to the tax-free threshold in a limited number of cases.

This could apply to sole traders, partners, and beneficiaries of a trust. Of course, if the write-off results in a loss, this may be carried forward. The relevant section is ITAA 328-210.

Question 6

Subject: Vehicle Under Finance

Can a residual value of a motor vehicle under finance be considered a second-hand motor vehicle and qualify for an instant asset write-off (IAWO) for this financial 2019-2020?

Answer

Yes, the answer is a genuine purchase, but the total claim, including 2019-20, is limited to the motor vehicle depreciation cost limit of $57,581 and the business percentage.

However, if by 'residual value', you are referring to paying the final amount on a contract you took out, say…3 years ago, then this is not a new purchase, and you cannot claim the IAWO.

Question 7

Subject: Sale of a Lease

A "person" has two businesses with 1 ABN.

This "person" owns a cane farm and had an NBN tower built on their property about seven years ago. There is a lease in place with 13 years remaining, with rent paid in August each year.

The "person" has been approached by a "company" that purchases these leases' rights and interests. The "person" would still be the primary Lessee and will always own the land, but the "company" would take over the rental payments and pay them a purchase amount. So, this is not property as a land sale; it is the lease.

The "person" also owns a nightclub. Being in the Hospitality Industry has been shut down by the Government with this Covid 19 and will be one of the last business's allowed to re-open, officials are saying maybe the middle of July. They have been impacted severely with no income at all and are now collecting Jobkeeper.

Reading the JobKeeper rules, the understanding is that you only had to show that your business was down 30% for one month compared to last year in the same month, and you were eligible to claim Jobkeeper. If your business picks up the following months and keeps doing very well, your Jobkeeper is not affected. The "person" is down over 100%, so definitely eligible.

The issue is… they would like to commence with the sale of the lease immediately, but their accountant has told them that if they make the sale now, it would be classed as income, and they would have to declare this in next months estimated turnover and would lose the Jobkeeper payments.

The rent each year was classed as income, so is the sale to be classed the same?

So, do they have to declare the sale as income, or will it be an asset sale? And if the "person" had to declare it as income, would they have to add this amount into next months estimated reporting and then lose the Jobkeeper as the accountant is telling them?

I would appreciate some clarity to proceed with the sale or is there any way around this.

Answer

This is not business income but a capital receipt.

Depending on what the contract says, it is either capital gains tax event D1 or F1.

In either case, there is no prospect of the 50% CGT individual discount applying because the asset is effectively created at the time of disposal.

As a capital receipt, it does not have to be disclosed on the JobKeeper form – they are receiving passive, non-business income on the site's rent as a NBN Tower, which is irrelevant to their nightclub operation.

Furthermore, you are correct in your comments regarding the eligibility of JobKeeper – you only have to qualify once to continue to receive the benefit.

Question 8

Subject: Deceased's PPR

The questions follow but first, some background.

The sole executor of a deceased estate (daughter of the deceased) is also the sole Beneficiary.

One of the assets is the deceased's PPR.

The executor wants to sell when the market has recovered somewhat from the effects of the pandemic.

She has the option to go on title now by Transmission Application in the capacity of the executor or as the Beneficiary, which would convey legal ownership.

She is aware of the 2-year rule of CGT if the PPR is sold within two years of DOD. It may take the market a while to recover, putting a sale close to the end of the 2-year period.

A. Does it make any difference to tax consequences if she is on the title in the capacity of the executor or Beneficiary:
   1. If the PPR is sold within two years of DOD; or
   2. If the PPR is sold after two years of DOD?
B. The executor will never live in the property, so if she goes on the title as a beneficiary and assumes legal ownership now, the deceased's PPR will become an investment property from that date. I wonder if the 2-year rule then applies at all.

Would CGT be payable on the property's value on the date the TA (Transmission Application) was registered to put her on title as the Beneficiary, and the sale price regardless of when the sale was achieved (i.e., within two years of DOD or after that)?

I hope you follow where I am coming from and look forward to hearing from you.

Answer

There may be some flexibility in the 2-year rule due to Covid 19.

The Commissioner has a discretion to extend this period and done so on many occasions when there are difficulties causing delays in dealing with the estate.

As the estate appears to be uncomplicated, it is suggested that this would only occur if it could be shown the property was on the market – all be it for the price being sought.

So, if the Executrix is genuine in her desire to sell the dwelling as soon as practicable, she may wish to show the property is being marketed.

Depending on the timing, there is a reasonable chance that the Commissioner may exercise discretion.

If the Beneficiary took ownership now – any gain in market value until the contract sale date will be assessable to her, with the individual 50% discount being assessable after 12 months.

If this is a short period, then there should not be a problem, but a valuation at the time of transfer would be prudent.

Question 9

Subject: Interpreter's Professional Attire

The client's business structure is a sole trader (and structure is changed to a company) and a professional interpreter.

A professional interpreter needs to dress appropriately at all times. As a rule, an interpreter's attire should be comparable to that of the event's moderator.

This client generally wears casual attire on a non-working day, but they need to wear a formal suit/dress with a formal bag depending on the events they need to attend.

Can this professional attire be deductible?

If yes, where it should be included in the business schedule of tax return?

How much value of clothing/bag be reasonable or legitimate as a professional attire?

How often can the client purchase professional attire? The client is attending many jobs/cases (6 days a week).

Answer

This is no tax deduction – we are dealing with conventional clothes that are not unique to their occupation.

Similarly, professional staff are not entitled to claim a tax deduction for business suits or formal attire.

Question 10

Subject: Division of Estate – Ante Mortem or Posthumous

Scenario: A grandmother nearing death, but of sound mind. Her Will divides her estate equally between 2 sons. She now wishes to give four grandchildren (over 18) $20,000 each. Tax-wise, for the grandchildren, is there a difference between giving the money to them before death or incorporating it in the Will for distribution after death.

Answer

On the likely assumption, these funds are not in superannuation; there are no tax implications.

If the funds are in superannuation, it would be good to get the funds out prior to death to pay the grandchildren to avoid the death benefits tax payable by the fund.

Other than this, there are no death taxes in Australia as such. The gifting provisions could affect Govt pension entitlements, but we note your "nearing death" comments.

Also, your comments that your client is of "sound mind." However, this may be an issue after death if Will beneficiaries receive less than they expected.

They may suggest otherwise or that there was coercion involved. It may be better to consult lawyers and have this formalised in the Will to avoid any disputes.

Question 11

Subject: Farm Management Scheme

I have a primary producer client who has deposited funds under the Farm Management Deposit Scheme over the years.

He intends to make further deposits prior to 30 June this year. However, it appears that the planned deposit may result in deriving a loss on his farming activities.

The question is whether you can create a loss via a deposit into the Farm Management Scheme?

Answer

Carefully check the terms and conditions to ensure compliance with the FMDS. The source of the funds into the FMDS should come from farming activities.

Refer to our answer in Question 1. The ATO will not allow a tax loss to arise from this situation.

Question 12

Subject: Rental Property- Claim on Plant

The tax laws have changed regarding the amount we can claim on plant used in a rental property.

Could you give me some guidelines on what we can and cannot claim as a capital allowance for rental property plant?

Answer

The extent to which there is plant in a residential property is outlined in Taxation ruling TR 2004/16.

The outcome determines whether a deduction is available under Div 40 for depreciable assets or Div 43 for Capital Works.

Until 30 June 2017, investors could claim qualifying plant and equipment depreciation on assets found in an investment property they purchase even if the previous owner installed them.

Under the new rules, investors are able to depreciate new plant and equipment assets and items they add to their property. However, subsequent owners will not be able to claim depreciation on existing plant and equipment assets.

Note that if the property is new, investors are still able to continue to depreciate plant and equipment.

Investors are still able to claim capital works deductions, also known as building write off, including any capital works installed by a previous owner.

Note that these changes do NOT apply to existing depreciation assets used or installed in residential properties held before 9.5.2017 and those used solely or partly for a taxable purpose.

Question 13

Subject: JobKeeper – Payment Summaries

Regarding Payment Summaries, could you kindly advise which category "JobKeeper" payments are shown?

If it is under an allowance, which category would it be?

i.e., Are they included in "Gross Payments", or are they separated?

Also, the same situation with "Long Service Payments"?

Answer

The top-up payment of the Jobkeeper scheme is categorised as Allowance – Jobkeeper Top Up.

However, the entire amount of pay is classified as gross payment if someone earns more than $750 per week.

Reported as a Gross Payment - Payments for long service leave accrued after 17 August 1993 except if the amount was paid in connection to a payment that includes (or consists of) either:

- a genuine redundancy payment
- early retirement scheme payment
- invalidity segment of an employment termination payment, or
- super benefit.

Reported under Lump Sum A - Payments for long service leave accrued after 17 August 1993 where the amount was paid in connection with a payment that includes (or consists of) either:

- a genuine redundancy payment
- an early retirement scheme payment
- the invalidity segment of an ETP or super benefit.

Payment for long service leave that accrued after 15 August 1978 but before 18 August 1993 is reported under Lump Sum A.

Payment for long service leave that accrued before 16 August 1978 is reported under Lump Sum B.

Question 14

Subject: Definition of Dependant

I have a client married to a lady from the Philippines and has been for some years. She is his dependant.

His wife is a resident of Australia, returning for short periods to the Philippines due to visa problems.

Can this lady be classed as a dependant for reasons of the surcharge?

Answer

The client's spouse meets the definition of dependant.

As long as the spouse meets the tests to be a tax resident of Australia, this should not be a problem.

Question 15

Subject: Treatment of a Land Lease

Clients have had a land lease for 90 years.

They pay the rental every month, and they pay all the bills related to the land, e.g., Council rate, land tax etc.

Please advise what is the treatment of the lease, it is a financial lease or an operating lease?

How do we present this lease in their financial statement?

Answer

The distinction between operating and financial leases is relevant when assets with a limited life are financed by way of a lease.

Broadly where the benefits and risks associated with ownership are transferred to the Lessee, this is a financial lease.

While it would appear, we are dealing with an operating lease. There will be financial statement disclosure issues involved.

Refer to Accounting Lease Standard AASB 16 Leases for guidance.

Question 16

Subject: Cash Flow Incentive

Will, the cash flow incentive given by the ATO be accessible for tax purposes?

What would be the circumstances that would make it accessible?

I was under the impression that it was a tax-exempt benefit paid to small businesses to get them over these troubled times and help them meet business loan repayments, tax payments, and or meet trading business expenses?

Would you please clarify and elaborate on its treatment for tax purposes?

Answer

You are correct.

The cash flow boost is not assessable income and is not subject to GST.

The JobKeeper payments are assessable and not subject to GST.

Question 17

Subject: Loss Carry Back

I would like to know whether a company is able to use the Loss Carry Back legislation.

One of our companies has a hefty tax payable in the 2019 financial year; however, there are tax losses in the 2020 financial year.

The link of the Loss Carry Back legislation - https://treasury.gov.au/publication/business-tax-working-group-final-report-on-the-tax-treatment-of-losses/final-report-on-the-tax-treatment-of-losses/chapter-3-loss-carry-back

Answer

This has not been available for some time.

Sorry to advise that the repeal of the momentary loss carry back offset took effect on 30.9.2014.

Question 18

Subject: Car Depreciation Cost Limit

Could you please confirm that the car depreciation cost limit for the financial year ending 30 June 2020 is $57,581 plus GST? In other words, I can buy a car for up to $63,349.

Answer

That is correct – the motor vehicle deprecation cost limit does not include GST.

Question 19

Subject: Payment Following a Dispute

We seek your advice on how we account for and tax an employee settlement payment following a dispute.

Quick background and extract from the relevant sections of the settlement agreement:

BACKGROUND

A. The Employee was employed by the employer from on or about 14 September 2016 until on or about 8 April 2020 (the employment), on which date the employment was terminated (the termination).

B. The Employee has made claims against the employer alleging, variously, underpayment of wages and entitlements and or breach of a provision of the Hair and Beauty Industry Award 2020 and or breach of contract (the Employee's Claims).

C. The Employer denies all the Employee's Claims.

D. Without admission, the parties have agreed to resolve the Employee's Claims and all matters arising from or in any way related to the employment on the basis set out in this Deed.

3. THE PARTIES AGREE

3.1 In consideration of the Release given by the employee by virtue of clause 4.1 of this Deed, within 7 days of the employee serving upon the employer a properly executed counterpart of this Deed, the employer will pay to the employee by direct deposit to a nominated bank account the sum of $7,550.00, less taxation as required by law (the Settlement Sum), in full and final settlement of all Claims.

Could you please advise:

- Do we process this in MYOB as a single line item backpay payment for $7550?
- How much tax is to be deducted? Our lawyer suggests it is likely to need to be taxed in accordance with the Schedule 5 table as a back payment. The employee has a tax-free threshold.
- Can you confirm that no superannuation guarantee charge applies to settlement payments?

Answer

1) Yes, this is a MYOB single line item back payment for $7,550
2) Your solicitor is correct – apply the Schedule 5 table as a back payment and ensure adequate tax is deducted.
3) No superannuation guarantee payment applies to this post-employment settlement as it does not fall within the definition of ordinary times earnings.

Question 20

Subject: Employees with Student Visas

What are an employer's obligations regarding employees with student visas?

Answer

If it can be established that they are enrolled to study in Australia on a course that lasts six months or more, they may be regarded as an Australian resident for tax purposes.

This means they pay tax on their earnings at the same rate as other residents

So, the normal employer PAYG obligations will apply.

Generally, the terms of the student visa are that they can work up to 40 hours a fortnight.

Question 21

Subject: Voluntary Super Contribution

This issue is related to the tax-deductibility of FY2019 voluntary super contribution for sole trader/individual.

My client is a sole trader owner and made the voluntary super contribution payment (after tax) of $25k to ABC complying super fund company with the notice of intent form for FY2019 and claimed a tax deduction in FY2019 income tax return for the concessional super contribution.

After the lodgement of the FY2019 income tax return, the client received a letter from ATO that they did not receive the notification from the super fund company regarding the above, so tax-deductibility of $25k was denied.

The following chronological order of events is based on the information received from complying super fund company (final email received from super fund company on 31 July 2020 after my client made a formal complaint) and based on the client's records.

1. The client received the letter from the ABC Super fund for the confirmation of receipt of their personal contributions
2. The client was informed by the super fund company that the client received a small super payment from casual employment during FY2019. So, my client requested ABC Super fund company to refund $159.05 to avoid higher tax (because the total super contribution amount became $25,159.05 for FY2019, including a voluntary super contribution of $25k). If the super fund company notified my client about a small super amount earlier or at initial phone discussion(s), my client would pay only the remained balance to match the $25,000.
3. The client sent the revised notice of intent form with the revised $24,840.95 (=$25,000 - $159.05) to the super fund company. In addition, ABC complying super fund company never explained to my client that the refund request was subject to approval.
4. The client entirely relied on the acknowledgment letter they received in August 2020 about the deductibility of voluntary super contribution ($24,840.95).
5. The client did not receive the letter or phone call from ABC super fund company that the tax deduction of $24,840.95 was reversed.
6. The client received a simple email from ABC super fund company that a refund of $159.05 was declined, but it did not mention that the tax deduction of $24,840.95 was no longer valid. All I believed was that earlier confirmation of $24,840.95.
7. The client decided to change the super fund company to XYZ Super and finally did so on 12/12/2020.
8. After the client received the letter from ATO regarding the denial of the tax deduction for the FY2019 voluntary super contribution of $24,840.95, the client asked the Super fund company to check and advised that everything is good. Again, ABC Super never advised that a tax deduction of $25,000 or $24,840.95 was cancelled/reversed in prior communications.
9. XYZ Super fund company says they cannot do anything but tell my client to complain to AFAC. We notified the ATO, but they just advised us to contact ABC super fund company.
10. ABC Super fund company accepts their miscommunication (but not expressly), and my client is facing a denial of tax deduction of $24,840.95 that they made for FY2019 income tax return and at the risk of a big tax bill due to the above.

The Old super fund made a severe mistake/ miscommunication, resulting in not being taken as a tax-deductible super contribution.

I understand it is complicated because the super balance was rolled over to another super fund later. That is why the client is submitting the complaint to AFAC.

If the client wins the case, will or can the super fund be made responsible for their mistake and rectify the issue?

Will the ATO do anything regarding the mistake of the super fund company?

Is there anything a tax agent can do to support their client concerning dealing with the ATO?

Answer

The change of super funds is the complicating factor because if:

- The former super fund did not deduct the 15% contributions tax.
- XYZ super cannot rectify the error related to 2019 because they did not receive the contribution.
- It now is a case of what has actually transpired.
- Did the old super fund deal with the contribution as an allowable deduction with 15% tax being deducted?
- If not, then the error and or miscommunication cannot be rectified.

Not a great outcome for your client, and we are very sorry. The law binds the ATO.

While we are not willing to speculate on your client's prospects with their complaint to the AFAC … if it is found your client has sustained an economic loss through the negligence of the super fund, they may be entitled to receive compensation.

Question 22

Subject: JobKeeper - Payment Attracts?

As a professional Chartered Accountant in practice, I have been often asked the following as there is no real guidance from the material released by Government.

Paying the JobKeeper allowance to employees does this payment attract:

A. Accrual of Holiday Pay

B. Sick Pay

C. Super fund contribution

Also, on the Cash Flow contribution by the Government, what criteria does the Government use to assess the eligibility?

If I can get some clarification, it will be appreciated.

Answer

This taxable payment received by the employer maintains the employment relationship, and entitlements such as annual leave and sick leave will continue to accrue. The Fair Work Act JobKeeper provisions mean a qualifying employer can:

- Request an eligible employee to take paid annual leave (as long as they keep a balance of at least two weeks)
- Agree in writing with an eligible employee to take annual leave at half pay for twice the length of time.

To make an agreement about using annual leave under the Fair Work Act JobKeeper provisions, a qualifying employer needs to:

- Qualify and enrol in the JobKeeper Scheme
- Be entitled to JobKeeper payments for the employee to whom the agreement applies
- Be a national system employer in the Fair Work system

Agreements under the Fair Work Act JobKeeper provisions can only be made about using annual leave, not other types of leave.

Any agreements made under the new JobKeeper provisions end on 28.9.2020.

If an employer asks the employee to take annual leave, the employee has to consider the request. They cannot unreasonably refuse it.

Employees who are on annual leave continue to accrue their usual leave entitlements while they are on leave, and the period of leave counts as service.

Superannuation

For payments (or parts of payments) to employees in excess of an employee's usual wages, superannuation is not required to be paid. This situation may arise where:

- An employee's usual wages are less than $1,500 per fortnight (superannuation would be payable on the part of the $1500 payment necessary to cover the employee's wages, but not on ay windfall balance); or
- Employees have been stood down without pay (superannuation will not be payable on the $1500 JobKeeper payment paid to an employee as it is not paid as ordinary times earnings for work that has been undertaken).

Otherwise, employees will be entitled to statutory superannuation.

We trust this helps.

Question 23

Subject: SMSF – Rental Property

The facts of the matter are as follows:

- Commercial property owned by SMSF,
- SMSF is in full pension,
- SMSF has engaged a real estate agent for management for the property for a percentage of the rent.

My questions are:

- Is it okay for the Lessee to pay the rent into the account of the real estate agent company?

- In other words, is it legal for the real estate agent company (engaged by the SMSF) to collect the money on behalf of the SMSF, and once they have taken their commission, they transfer the remaining balance into the account of the SMSF?

Answer

We take it that the Real Estate is not an associated party.

This means any relative or business partner of SMSF's members and or their families.

On the basis these are arms' length, commercial dealings, then there should not be a problem.

Of course, you would want to establish that you are dealing with a properly licenced real estate agent and that their trust account is independently audited annually.

Question 24

Subject: JobKeeper - Is Superannuation Payable?

JobKeeper Payments - In respect to SGC superannuation, could you please clarify:

- Is it applicable only on the excess wages over and above the $750.00 per week?

or

- On the hours actually worked.

Naturally, it is assumed that it would not apply to any top-up.

Answer

Superannuation remains payable on ordinary times earnings, not the excess over $750 per week.

Using the concept of ordinary times earnings, you are right in saying it is not payable on any top-up.

Is superannuation payable on JobKeeper Payments?

Whether superannuation is payable depends on an employee's salary.

Superannuation is payable according to ordinary rules for payments to employees for ordinary time earnings (even if the funds for those payments are received through the JobKeeper Payment scheme). Therefore, superannuation is still payable for payments made to cover an employee's usual wages.

Scenario 1 - ***If an employee ordinarily receives $1,500 or more in income per fortnight (before tax) and is still working***, they will continue to receive their regular income according to their prevailing workplace arrangements. The JobKeeper Payment subsidy will assist the employer in continuing operating by subsidising all or part of the employee's income.

For example, Anne is a full-time employee who ordinarily earns $3,000 per fortnight before tax. As a result of JobKeeper Payment, her employer continues to pay her $3,000 in wages but will be reimbursed $1,500 from the Government. This means the employer will only pay Anne $1,500 of the $3,000 salary from its own pocket.

Using the example of Anne above, because she ordinarily receives a fortnightly payment of $3,000, superannuation will be payable on her entire salary (even though $1,500 of her salary comes from JobKeeper Payment).

However, according to the information, superannuation is not payable for payments to employees in excess of an employee's usual wages. The Government has said that 'it will be up to the employer if they want to pay superannuation on any additional wage paid because of the JobKeeper Payment'.

Scenario 2 - ***If an employee ordinarily receives less than $1,500 in income per fortnight (before tax):*** The employer must pay their employee, at a minimum, $1,500 per fortnight before tax.

For example, Nick is a permanent part-time employee who earns $1,000 per fortnight before tax. His employer continues to pay him $1,000 per fortnight before tax, plus an additional $500 per fortnight before tax, totalling $1,500 per fortnight before tax. The employer will then receive $1,500 per fortnight before tax from JobKeeper Payment which, in effect, subsidises Nick's entire salary. Nick is $500 better off under this scheme than otherwise.

Using the example of Nick above, the employer will be required to pay the superannuation guarantee on the $1,000 per fortnight of wages he is earning. However, it has the discretion whether to pay superannuation on the additional $500 (before tax) paid under the JobKeeper Payment.

For employees who have been stood down without pay, superannuation is not payable on the JobKeeper Payment.

Question 25

Subject: Rental Property

A married couple purchased a house in 1982 (i.e., pre-CGT). In 2008, they moved interstate to look after the husband's mother.

Their home has been rented continuously since 2008, and they continue to live in rented accommodation interstate (i.e., their PPR). They own no other property, and the property is not geared.

In 2019, the house remained tenantless for 135 days, and the property manager has warned them to expect worsening rental conditions in the future when the current lease expires at the end of 2020.

The couple would prefer to leave the house vacant but would face a $9,000 vacant residential land tax.

The couple are wondering whether they can rent the house to themselves, paying at the lower end of the going market rate? Leave the house vacant with no personal use, but possible 'free' short term stays by family and friends, declaring the rent as income and continuing to claim depreciation of assets as is being done at present.

Answer

If they rent the house to themselves, then there is clearly no landlord/tenant relationship.

In the event this comes to the attention of the ATO, this cannot be effective.

It might not be rented out if the property was genuinely on the market for only 15-20% above the standard rent for such a dwelling.

However, it must be genuinely on the market (with the evidence available), and there is the possibility a suitable tenant might apply.

In the event of this happening, it could be viewed as a windfall gain.

In the event the property is not rented out. Then it is mission accomplished.

Question 26

Subject: What Is Deductible?

Here is my case…

GST registered company buys Motorhome for $127,000.

The company intends to rent it partial out or using it to visit clients as the restrictions due to COVID-19.

A. Will this stand up for GST/Income TAX purposes?
B. Is there a limit like for Luxury cars?
C. What are the requirements that need to be met, e.g., logbook, issuing GST invoices when renting out, what is deductible when using for own company?

Answer

Here you can expect the ATO to be sceptical in the event of an audit. You will be expected to have detailed records outlining the percentage of business use and the commerciality of that business use.

For example, you can expect the claim to be denied if the motor home travels 900kms to have a short meeting with a prospective small client or existing low $ client at a popular tourist destination.

Clearly, an attempt is being made to justify business claims which relate primarily to lifestyle decisions.

However, if the travel consistently related to a schedule of well-planned visits showing a full calendar of meetings, demonstrating sound commercial outcomes, there would be a better prospect of success.

Detailed records would need to be kept – ambit claims would be likely to be disallowed.

We note in passing that business has been less mobile during Covid-19 and that zoom meetings have proved highly effective and productive.

You could claim up to the $150k instant asset write-off, but it is suggested there would need to be a substantial adjustment for personal use.

Further, unless the enterprise is in the business of renting out motor homes, then rentals would be deemed to be passive income.

There would need to be a further reduction for the time the motor home was not used for business and was available for rent.

The above comments also apply to the GST claimable on purchase and future outgoings and expenses.

Question 27

Subject: Estate vs Beneficiary

I was checking the published information from the bO2 site. Still, I could not find the **"Tax on super death benefits - Paid to estate vs beneficiary"** summary, which can be very useful.

Would you please advise if you already have this topic covered in any of the past published documents? If yes, please forward it to me or advise me which one it is.

If we do not have one, it will be great to have the summary or table explaining the **"Tax on super death benefits - Paid to estate vs beneficiary (i.e., adult)" with current tax rates.**

Answer

This is a very timely and helpful question.

We cover binding nominations, superannuation death taxes and estate planning on pages 40 and 43-45 in bonus issue 108.

However, we only cover the tax implications of the superannuation benefits going to a dependent (generally nil)) versus a nondependent (generally 17% or 32%).

This tax rate is determined as to whether the payment is from the taxed element (17%) or untaxed element (32%).

We also outline the opportunity to pay out the benefit to the fund member while they are still alive in the event of terminal illness, which should not attract tax.

The safest way to avoid death taxes may be to leave your super to your estate and put a Superannuation Testamentary Trust in your Will.

We think this what you are driving at, and we will cover this is in detail in issue 108.

Question 28

Subject: Capital Gain Implications?

My client was a beneficiary in a will of two blocks of land whose share was 50%. Prior ownership was for a considerable time, and there was no reliable value put on the land until disposal by my client.

He received $50,000 on disposal.

Are there any capital gain implications?

Answer

Yes, there is potential capital gains tax (CGT) implications.

If the deceased purchased the land prior to 19.9.1985, then your client is deemed to have acquired it at market value at the date of death.

If the land was disposed of shortly after that, then there should not be a problem.

If not, then a reasonable attempt must be made to calculate the capital gain – reference could be made to local real estate agents or registered valuers.

If the land was acquired after September 1985, your client is deemed to have acquired the asset at the amount paid by the deceased on purchase.

This is readily ascertainable from the relevant State Titles Office.

Of course, purchase costs, including stamp duty and legals, need to be considered when calculating the cost base—also selling costs.

Question 29

Subject: Land Subdivided and Sold

I am seeking some advice regarding the GST implications concerning land that is subdivided and sold.

My clients are a husband and wife partnership and operate a primary production business growing fruit and a secondary enterprise renting commercial properties.

The Partnership has an ABN and is registered for GST in relation to both enterprises.

They also hold several residential properties that are rented to tenants.

One of the residential properties has been owned since 1995, and they are considering demolishing the old house and subdividing the land.

They do not intend to sell each subdivided block simultaneously and are likely to spread the sales over several years, mainly to spread any CGT issues.

They have substantial borrowings and intend to use the proceeds from the sale of the blocks to reduce debt.

This property is not a business asset involved in either of their business activities.

They have not subdivided and sold blocks before. They would not be building any houses on these blocks and then selling them as a land & house package.

I understand that vacant land sold with the "potential" for a new house may be subject to GST.

My question is as follows:

1. Is the sale of vacant land that has the potential for new houses to be built automatically deemed subject to GST?
2. If not, what are the circumstances where GST would not be applicable?
3. As they would be simply re-organising their investment portfolio, does this influence the issue?
4. Does the fact that the land is not a business asset affect the issue?
5. Currently, the commercial rentals received are less than $75,000 pa. Would cancelling their GST registration have any effect?
6. Do you have any suggestions?

Answer

To answer your questions:

Q1 and 2: The ATO in Miscellaneous Tax Ruling MT 2006/1 considers when an isolated property transaction would result in carrying on an Enterprise. This hinges on whether the land was purchased with the intention of resale at a profit – this would constitute an enterprise. As in your case, it would appear the land was purchased as a long-term holding. We now consider other factors.

Q3 and Q4: Both circumstances assist the argument of being the mere orderly realisation of an asset.

Q5: The fact that the Partnership of husband and wife is registered for GST is a complicating factor. While you have not considered the primary production turnover, it is accepted that this is GST free. Deregistration from GST may be helpful.

Q6: Carefully review MT 2006/1, which provides comprehensive guidance and contains examples - if still in doubt, seek a private ruling from the ATO. You may also wish to review the ATO's Register of Private Rulings on the subject, which shows inconsistent and arbitrary views – this is a grey area... Note that private rulings only apply to the recipient. In supplying the information to the ATO for the Private Ruling, consider case law and the guidelines laid down by the ATO.

Question 30

Subject: Employee Quit Without Notice.

A client of ours has had an employee quit without any notice. Are they able to withhold one weeks' pay?

Answer

They can only withhold one week from the employee's accumulated annual leave. It cannot be withheld from wages for time worked.

Question 31

Subject: Redundancy Payment?

I own a Practice that is on track to be purchased by a corporate entity that will continue the practice name and business while employing myself and my staff under new contracts.

This is planned to occur in late August 2020. The corporate purchaser will be listing a new company name and operating it under this company name, with the same public business name it has always had.

Therefore, my employees will no longer be employed by my old company but by a different company, entirely owned by a different entity.

My question relates to my ability to reward very long-serving employees with a tax-effective cash payment for both them and I. I believe I may be able to pay them a redundancy payment with a tax-free limit.

This is calculated from a "base amount" of $10,989 plus a "service amount" of $5,496, multiplied by years of service.

Genuine redundancy payments are tax-deductible to the employer as well as not assessable for the employee.

My question is whether the ATO will regard such a payment as a genuine redundancy payment?

This is a genuine business sale, where my company no longer employs the employees, and my employees are employed by another company.

But the business itself will still trade uninterrupted, and in this case, the ATO may seek to "look through" the change in entity structure.

Can you give me more clarity as to how the ATO may treat my circumstances?

Answer

Taxation Ruling TR 2009/2 provides guidance in this area.

There are four primary conditions to be met:

- The payment being tested must be received in consequence of an employee's termination
- The termination must involve the employee being dismissed from employment
- The dismissal must be caused by the redundancy of the employee's position
- The redundancy payment must be made genuinely because of redundancy.

All the above would appear to apply here for your arm's length employees.

However, the situation is not so clear for working directors – particularly if your company continues to operate (see example 6 in the ruling).

The figures you suggest are correct.

Question 32

Subject: Depreciation – Rental Property

I received the information from a new client regarding rental property that previous tax agents did for my client.

Building cost (warehouse) is depreciated at 2% using the diminishing method (no other depreciable item). In my understanding, the depreciation rate for capital works generally should be either 2.5% or 4%. Do you know any case of 2% (2% for diminishing method - it means 1% for prime method)?

It was not an accounting entry as the same depreciation amount was also used for the partnership tax return.

- Capital works-special build w/off value was depreciated @ 2% (diminishing method)

The client paid the special levy for roof replacement. Shouldn't this be depreciated at 2.5% (prime cost method) from the payment date?

Do you think this is possibly a mistake? I think I should update it to 2.5% for past periods. Am I allowed to add the back-dated depreciation amount in the next financial period's tax return?

Answer

The figures you suggest for the capital allowance are correct.

You may be referring to accounting entries – estimates of useful economic life instead of what the Commissioner allows as a tax deduction.

Some entities have two depreciation schedules – one for accounting purposes and one for the tax return, with the rates varying on the above basis.

You are right about the roof – a replacement does not constitute a repair, and the capital allowance claims should be made at 2.5%.

If the previous roof was listed in the capital allowance schedule, this could now be written off.

It is an error, and you should go back and make the changes if they fall within the permitted timespan – generally two years from the date of assessment for an individual or four years for a business.

Technically you should go back and amend the relevant tax returns – having said this in practice, sometimes these amendments are done in the current year.

Question 33

Subject: Is Depreciation/ Amortisation claimable?

Scenario: " A client recently purchased an Accounting firm for $250,000, which settled on 4 June 2020. On the contract of the business purchase, the following assets are listed."

1. Computer Equipment - $10,000
2. Client List/Books Records - $220,000
3. Goodwill - $20,000

My question:

Is Depreciation/Amortisation claimable for tax deduction purposes for any item of the assets listed above?

The previous owner has already claimed 100% depreciation on the computer equipment, and the value of the client list/books and records is calculated based on the last year gross fees.

Answer

The computer equipment valued at $10,000 may be written off.

It is irrelevant that the vendor has written off the assets.

The remainder is essentially goodwill, and there is no tax deduction for this – the entire amount should be capitalised.

Question 34

Subject: Accrued Holidays- New position

Our Operations Manager is stepping down from his position due to health concerns. We have offered him a new position in the warehouse which he has accepted. However, a question regarding the value of his accrued holidays has come up.

In moving position, his new hourly rate is lower than the current rate he is being paid as Operations Manager.

When the Operations Manager moves to the new position and lowers the hourly rate, what happens to the value of the accrued leave? Does it transition to the lower rate, or is it kept at the higher previous rate when he was employed as Operations Manager?

If the Operations Manager is currently being paid $40/ hour and has 10 weeks holidays accrued, at the moment, his holidays would be paid at this rate (and paid out at this rate if requested).

Once transitioned to the new position, let us say his new rate is $30/hour, are holidays now paid at this rate or the higher amount?

If the higher amount, would this mean that he would get paid his previous hourly rate instead of the new lower rate if he were to take holidays? Would they get paid at the higher rate rather than, the lower rate if holidays were paid out?

Answer

If paid prior to the new role, annual leave would be subject to the Fair Work Act 2009 or relevant award or JobKeeper provisions, but if it is paid out prior to him taking the new role, it is at the higher rate.

His annual leave is paid at the salary/ wage he is on at the time he takes it. So, if he takes annual leave after changing into a new role and is only paid $30 per hour, then his annual leave is paid based on that rate.

Question 35

Subject: JobKeeper - Eligibility Criteria

Regarding the JobKeeper payment, as an eligible business participant. How does the director take the money out from the company? As wages, dividends, or director loans?

Would there be a problem if we take the money as wages and pay PAYG on it? Because in the eligibility criteria on the ATO website state that the business participant must not be employed on 1 March 2020. (Does it mean that the director then can be employed by the entity after 1 March 2020?)

Answer

As you rightly point out, there is a choice for a business owner/company director.

You need to consider the tax implications of each choice carefully.

In the event the company has tax losses and or franking credits, dividends could be a good choice.

Directors' loans could be repaid if the company does not need the tax deduction and owes the director money, i.e., no Div 7A issues.

On the basis, the director was not employed on 1.3.2020. Wages may also be an option shortly after that.

PAYG must be deducted from wages.

Question 36

Subject: Capital Loss

I am trying to find out for my client about the latest on (X Ltd) – all I can find is that it seems that someone is trying to sue the estate of the founder.

The client wants to cement a capital loss for use against a potential capital gain this year.

It is my understanding that they need a final letter from the Liquidator before they can do this.

Any advice/direction on finding out the latest on this would be most appreciated.

Answer

The Responsible Entity, X Limited, is still under external administration.

The status of your client's investment may depend upon the year the client invested.

PWC are the administrators, and if you can get a letter from them declaring the shares or financial instruments are worthless or have negligible value, you may be able to claim the capital loss in 2020-21.

Refer to the PWC website.

Question 37

Subject: Sick Leave – Annual Leave

I have a question regarding sick leave during annual leave.

If an employee becomes sick during annual leave or needs to care for someone, does the leave stay as annual leave, or should it be changed to sick leave?

Answer

It becomes sick leave and not annual leave.

Question 38

Subject: Personal Leave & LSL- Casuals

1. Previously sick leave was eight days per year, and if the sick leave what not used within the year, it dropped off. We have workers that have been with the company for at least 10 / 15 years. Can you please advise when Personal Leave actually started accruing? I can only find the Fair Work Act 2009 where it says it "can" accrue, not "must".
   1.1. So, if I must go back and calculate the personal leave accrual, what start date will it go from?
2. Is there a "Cap"? Previously I thought there was a maximum number of days that Personal Leave can accrue (i.e., 3 / 6 months). Is there a maximum number of Personal Days?
3. Is there a maximum amount of Personal Leave time that can be taken in succession? (Please assume the worker has been with the company for at least 15 years).
   3.1. If so, can the worker then use the remaining days the following year?

Casuals

4. Are Permanent Casuals entitled to Long Service Leave? Again, we have casuals with permanent hours that have been with the company for 10 / 15 years. Will I have to calculate LSL for these workers?
   4.1. If so, can you see any ramifications if I transfer them to Part-Time employees, which will drop the hourly rate, but be entitled to HP & PL. Can I then calculate the LSL on the hourly rate at the time of employment being the Part-Time rate?

Answer

Personal Leave

Q1. If Federal Awards covered them, it was in 1996 that sick leave went to 10 days. If Queensland state awards covered them, it was in 2009 that sick leave increased to 10 days.

Q1.1. 01 January 2009 for state-based and 30 June 1996 for federal employees.

Q2. There was no cap from 1996 Federal/2009 state. The state was a maximum of 13 weeks before 2009.

Q3. They can take as much leave as they have accumulated as long as they have a medical certificate.

Q3.1. Yes.

Casuals

Q4. Casual employees are entitled to LSL since 30 March 1994. For accumulation, see link:

https://www.business.qld.gov.au/running-business/employing/employee-rights/long-service-leave/entitlements

Q4.1. If the employees wish to transfer to part-time by mutual agreement, that is fine, they are entitled to be paid whatever rate of pay they are on when they take the leave, but accumulation would need to be done as per the link in question 4.

Question 39

Subject: Land resumed by Government

My question relates to a compensation payment for land resumed by the Government.

We own a holiday unit (not the principal residence) in a residential building. The Government resumed a portion of the common land of the body corporate to widen the main road. The land resumed was part of the swimming pool/recreation area. All owners received payment as compensation with the statement "for loss of amenities".

My query is - is the compensation amount taxable to us? If so, is capital gains- declared in the year received?

Answer

You are correct. It is a taxable capital gain assessable in the year of receipt.

Given there can be no replacement asset, there is no prospect of a rollover to defer the liability.

As there may be other issues at play, I would check this with the Body Corporate as they would have received advice on this.

Question 40

Subject: Tax or Stamp Duty Payable?

Is there any tax or stamp duty payable If a trading

company is sold while the shareholders keep its subsidiary?

If you sell the business and the name of the trading company (but keep the shares), can you, under such conditions, keep the subsidiary (which own properties) without having to pay CGT or S/D? Because if not then you would pay these tax & duty to buy something you indirectly own.

Answer

If you sell the shares in the trading company, you lose the subsidiary because it is the head company that holds the shares in the subsidiary.

For this reason, we think you are referring to the sale of the business by your head/trading company and not its shares.

This is the only way the shareholders keep their subsidiaries.

Stamp Duty applies as the sale of a business is a dutiable transaction, and the rate will depend on the state in which the business is located.

As long as all of the things required for the continued operation of the business are sold, then GST may not be chargeable under the going concern exemption.

A subsidiary company owned by the holding or trading company continues to own the properties.

The trading company continues to own the shares in the subsidiary, so there are no concerns with a change of ownership in "land rich" corporations.

The sale of the business is irrelevant.

It is clear there has been no change in beneficial ownership, and there are no stamp duty concerns.

As this is a significant transaction, it is essential you get legal advice on these issues.

Question 41

Subject: PPR- Tax Implications

My client purchased their principal place of residence property all-in for $600,000 in 2014 with $450,000 of bank debt.

The value has increased since 2014, and they have refinanced the bank debt to $750,000.

All the bank debt refinance top-up proceeds have been deposited into an offset account, including additional savings. Consequently, my client has $700,000 cash in their offset account which they now intend to reinvest into another property asset.

They live in the current property as their principal place of residence.

I have advised my client not to use the funds from the offset for the next investment. Instead, I believe they should split the current loan into a $700,000 limit and $50,000 limit and pay $699,900 into the redraw of the $700,000 limit then redraw these funds to buy a new property, as the interest would then be permitted to be deducted against the income of the new investment.

Please can you confirm my understanding is correct? If my client were to subsequently move out of the current property and no longer use it as his PPR, would this have any tax implication on the deductibility?

Answer

The fundamental test for deductibility of interest as consistently applied by the Courts is the "use test," i.e., the use to which the funds have been put.

The asset used for security or the flow of funds out of a carefully chosen account does not overcome this.

In this instance, at least $450,000 of the initial money has been used to purchase the principal place of residence (PPR), which is not tax-deductible.

The ATO will go back and trace transactions in situations such as these.

There can be real problems with split loans in these cases.

However, if there is $700k in available funds solely used for the purchase of the investment property, we suggest the interest is deductible.

To answer your question... if the clients moved out of the existing PPR and rented it out, the interest relating to your original purchase would be tax-deductible.

However, interest from funds drawn down for private purposes such as holidays and lifestyle items is not tax-deductible.

Question 42

Subject: JobKeeper – Leave Loading

I have a company client who receives the JobKeeper Funding from the Cwlth Government.

An employee of the company has taken some Annual Leave whilst receiving the JobKeeper allowance, which exceeds their normal weekly wage under the NSW Hairdressers Award. About $460.00 gross before tax.

My client wants to know whether the annual leave loading is based on the JobKeeper payment amount or the normal weekly wage of about $460.00 gross?

Are they just paid the $600.00 because it is more anyway, or is it $600.00 plus leave loading on $460.00?

Answer

Annual leave loading is paid on the wage that would be normally earned during non-COVID-19 non JobKeeper payments.

Annual leave loading is only payable on the $460.00.

Yes, they are paid $600 as that amount is greater than $460 plus Leave loading.

Question 43

Subject: annual Leave -Cash in

I have an employee who wishes to be paid out a portion of his annual leave entitlement.

Can you please advise if the annual leave payout is part of the annual leave accrual?

I am not sure it would be as it is a payment in addition to his ordinary time hours; therefore, if included, he would exceed his 20 days annual leave entitlement accrual.

Answer

It depends on what award the employee is covered by as to how much annual leave an employee can cash in.

When you cash it in, you do not accumulate annual leave on the cashed in portion, you only accumulate on the leave you take, but rightly so, you only accumulate 20 days a year.

Question 44

Subject: Tax Returns

Thank you for your latest glossy Tax Essentials Manual. I have some questions regarding tax returns that are now due.

1. Page 2 of Losses Schedule. Do we need to satisfy the 'business continuity test? What is the test?
2. What is a 'superannuation income stream', Item 7 In Tax return for individuals?
3. Are we required to lodge a 'reportable tax position schedule', Item 25 in the Company tax return?

Answer

1. The business continuity test applies for companies - means you carry on the same business at the time the loss was incurred and at the time the loss is recouped.

   You cannot derive new income from a transaction of a kind that you did not engage in when the loss was incurred or similarly from new business activity.

   The ATO applies this test strictly. You may, however, meet the continuity of ownership test (greater than 50%) - if this is the case, you do not have to meet the continuity of business test.
2. SuperStream is the way businesses must pay employee superannuation guarantee contributions to super funds. With SuperStream, money and data are sent electronically in a standard format.

   The ATO can see this in real-time.
3. The Reportable Tax Position is a schedule contained in the company tax return. Whether it applies to you will be evident from criteria in the Company Tax Instructions published annually by the ATO.

Question 45

Subject – Jobkeeper Extension

I have a question about the JobKeeper extension. Can you still get JobKeeper part 2 if you have an actual drop in turnover of 29%?

Answer

The requirement is 30%. Given you are so close to the required turnover decline, carefully consider:

- The definition is GST turnover, so we are dealing with taxable supplies
- Carefully peruse for non-assessable deposits which may have been included in error
- Check for deposits for work yet to be done which has not been invoiced.

There may be items you can exclude.

Question 46

Subject: GST – Imported Goods

Need your advice about GST on goods we import from overseas.

We import goods such as materials and software from overseas companies.

When we receive an invoice, e.g., AUD 55,000, I want to know how to account for GST when the invoice does not display the GST amount separately?

Answer

Generally, GST is payable before customs release the goods.

You should obtain clear written evidence that the GST has been paid. A review of customs documentation can ascertain this.

Clearly, if you negotiated a price for $50,000 – then paid $55,000, it would appear that the GST has been paid.

However, never assume this and always have the documentation on file to verify this.

We acknowledge an overseas supplier will not always issue a tax invoice in the prescribed format. Also, check whether your company is participating in the deferred GST scheme.

The scheme allows you to defer GST payment on taxable importations until the first activity statement you lodge after the goods are imported.

Question 47

Subject: JobKeeper – GST turnover?

In calculating GST turnover to qualify for JobKeeper, do you include the sale price of a business vehicle?

If not, how will you exclude it from the sales figure on the BAS return, or will the ATO declaration for JobKeeper allow for adjustments of this type of transaction?

Answer

All the eligibility criteria deal with "GST turnover." There does not appear to be exclusions.

The sale of a business vehicle by a GST registered entity is a taxable supply and included in GST turnover for calculating falls in turnover for JobKeeper 2 purposes.

Question 48

Subject: Car lease - inclusive of GST?

My question is regarding GST when returning a car.

The facts of the matter are as follows:

- Mercedes C250 was bought in January 2018 on an agility program for approximately $57,778, including GST.
- The GST component was recovered in the BAS in the first quarter of 2018.
- Monthly payments on this car were agreed upon and regularly paid monthly until December 2019.
- In December 2019 (almost two years on), the car was returned, and they valued it at $45,000.00 residual value.
- The new car, C300, purchased in December 2019, was $57,966, including GST, purchased on an agility program, and monthly payments agreed upon for two years ($936.00 per month for 24months with some residual value).

My question is:

"Does the $45,000 of the previous car balloon value (which was more than the expected residual value after two years of payments, therefore there were no out of pocket expenses, and I only had to return the car). Does that $45,000 have any component of GST in it? In other words, is it inclusive of GST?"

Answer

An entity registered for GST has just sold a business asset (Merc) for $45,000.

Just as you were able to claim the GST input tax credits on the purchase, the sale has GST implications.

The amount includes GST, and you need to remit 1/11th, i.e., $4,091, to the ATO on your next BAS.

Question 49

Subject: JobKeeper - Eligible Business Participant

I have a client who was operating a gym business as a sole trader when COVID-19 hit.

He qualified for JobKeeper as an Eligible Business Participant, and we are now looking to see if he will qualify for the Extension to JobKeeper.

As his gym business income fell, he found a new type of business to get involved in.

He is still running the gym, and this is still operating at less than 30% of last year's turnover. His new sales business is also run through his sole trader ABN.

As he now has this additional income from the new business, would this mean that even though his gym would still qualify for the JobKeeper extension, all his income from all sources needs to be added together to determine his eligibility for JobKeeper?

Answer

In general, eligibility for JobKeeper 2 compares turnover for the September 2020 quarter against the turnover of the September 2019 quarter. If the decline in turnover is more than 30%, then eligibility is maintained.

The new sales business will be included in the turnover calculation because it is on the same ABN.

There are a number of alternative tests for newly formed businesses from 1.10.2020 under JobKeeper 2. You should also explore those to see if your client qualifies.

Question 50

Subject: CGT for non-residents

There appears to have been a change to legislation relating to CGT for non-residents who sell property while non-resident.

My client, an Australian citizen currently an ex-pat working overseas, plans to move back to Victoria in January 2021 and become an Australian resident again. He intends to move back into his property in Victoria and use it as his principal place of residence. My client owns no other property. Below is a timetable of my client's occupancy:

1. The property was purchased in March 2010 and occupied as Principal Place of Residence for 12 months to February 2011.
2. The client moved in with their parents, and the property was rented from March 2011 to December 2012.
3. The client moved back into the property as the principal place of residence from Jan 2013 to Sep 2013.
4. The client moved overseas as an ex-pat non-resident and has been renting the property since September 2013.

5. He intends to move back into the property and become a resident in Victoria in January 2021.

Do the 6-year PPOR absence and CGT exemption still apply if my client moves back into the property, becomes an Australian resident, and then subsequently sells the property?

Also, if they move back into the property and set up all bills, water, gas electricity but can't find a job in Melbourne. Suppose they must relocate to another Australian city. Do the 6-year Principal Place of Residence CGT exemption reset and a new 6-year period apply?

Or is the exemption for a total of 6 years over the ownership? I believe the 6-year period resets every time the property is occupied as a PPOR?

In the example above, if my client moved back into the property as his PPOR then sells within a 6-year period from January 2021, I believe my client would only be liable for CGT for 16 months from Sep 2020 to Jan 2021, as my client has moved back into the property and reset the 6-year exemption in step 3?

My understanding is that if a dwelling is re-occupied as the main residence, the 6-year exemption resets. Thus, another six years of exemption is available from the date it next becomes income producing. Is there a minimum period my client would have to live in the house to reset it as my Principal Place of Residence from January 2021?

Answer

To answer your questions in order:

1. The PPR in this period
2. 6-year temporary absence applies
3. PPR obviously
4. 6-year temporary absence applies until September 2019
5. The property again becomes PPR

If the client moves back into the property in January 2021, a property that has been owned for 10 years and 10 months will have the PPR exemption apply for 9 years and 6 months up until that point.

Clear evidence must exist for occupation (electoral roll, gas, power, internet, phone et al.), and Australian residency for tax purposes must be established before that in any case.

The 6-year PPR absence will be freshened up if the client is forced to move interstate to secure employment. Once again, the above evidence is crucial, along with evidence of Victorian job applications.

There is no minimum period, but the evidence should establish a genuine intention to resume residence in Victoria.

For instance, the ATO might challenge if the client only made several job applications and only lived in the residence for, say, a fortnight.

If the client made, say, 35 job applications over 6 months in a very tough Victorian job market and then was offered an excellent position in Sydney deciding to move there, we suggest this would not be a problem.

Question 51

Subject: Cost Base of The Subdivide

In 1989 client bought a larger home property.

They are now downsizing and plan to subdivide a block of land from the property title and sell it separately to the home block.

What is the cost base of the subdivide block for capital gains purposes?

A. An apportionment of the land value in 1989

B. A valuation of the block at the date of subdivision

Answer

The answer is a reasonable cost base apportionment of the purchase cost of the land in 1989.

That is the genuine cost base. There is no basis to argue option B.

Question 52

Subject: Claim for Damages

We recently achieved a settlement, $52,000 with an insurance company over our claim for damages caused by a fire from a neighbouring property comprised as follows. It has been suggested that the total amount of $52,000 should be included in this year's income. Is this true?

Item	Cost claimed	Adjusted cost
Fencing	53,585	26,792.50
Removal of fencing	14,500	8,000
Polywater pipe	341	310
Pipe fittings	135	262.10
Pine posts	673 121	38 @ avg. $26.92 = 1,022.96
Hydraulic hose on the harrow	495.77	172.43 383.34
Topsoil	14,500	14,500
fertiliser	1,160	1,160
Total	85,466.07	52,000 (approx.)

Answer

Thank you for being a loyal subscriber down the years – it is much appreciated.

From past correspondence, we understand you operate a primary production business. If this is the case, you would have been able to claim the insurance premiums as a tax deduction.

Just as these premiums are tax-deductible… then so are the insurance proceeds assessable income.

However, we do not consider you will have to pay tax on this assessable income. The repairs and restoration you will have to undertake will be an allowable tax deduction.

Even without the COVID-19 instant asset write-offs, there are generous tax concessions for primary producers.

If there is any unclaimed depreciation for items destroyed, this can be completely written off as a tax deduction.

In the event you had ceased your business of primary production prior to the fire, then the proceeds would not be assessable.

Question 53

Subject: New Business Structure

My client in Victoria has a private company CML Pty Ltd. They have taken a $20,000 loan from the company and want to open a clothes business (MP).

The questions I have are:

1. Should this be set up differently, not as a Sole Trader? Perhaps as a Trust Account?
2. Would a MP Trust Account be appropriate? How would it work?
3. Should MP be set up as a company instead of CML Pty Ltd with a MP Trust Account? How would it work?

The bottom line is they need a structure that can be insured for public liability and removes liability from them personally. They also need to be able to employ people who can be paid from company funds. Importantly, they need the sales revenue to be reused to purchase more stock to grow the business. And finally, once the shop starts to make a profit, they need to share the profit with investors.

They need something to be set up quickly. If it is hard, they can continue to operate as a Sole Trader until the end of the financial year. On 1 July 2021, change the business to a new business structure as by then it would have proven whether the business will be a success requiring an appropriate structure to grow it.

Answer

Definitely, a second structure should be set up for this.

We would suggest a company structure which would only take 24 hours to set up.

If there are other investors (as opposed to lenders), they could be issued shares in the company.

In these volatile times, a sole trader structure should be avoided.

Question 54

Subject: Car Allowance

Can I please clarify if I have a salaried worker receiving a car allowance in her package, do I withhold PAYG Withholding on this and pay super?

Also, if I'm paying cents per KM to another employee for his travel, do I withhold PAYG Withholding and pay super?

Thank you

Answer

PAYG withholding must be deducted from the car allowance.

As the car allowance relates to the employee's ordinary hours of work, it falls within the definition of "ordinary times earnings" under the Superannuation Guarantee ruling 2009/2.

This means superannuation at 9.5% is payable on the allowance.

The situation is different with a cents per kilometre payment to an employee.

Here the employer merely reimburses an employee for an expense they have incurred. There is no PAYGW and no superannuation payable on this reimbursement.

Question 55

Subject: Income Boost via the BAS System.

Could you please help with clarifying the following regarding the ATO payments made as an Income Boost via the BAS System?

- Are these to be included in the BAS Gross Income as Tax-free?
- If so, do they come into calculation whilst applying for an extension of JobKeeper?

Answer

We believe that you refer to the cash flow boost.

It is a non-assessable government subsidy. It is not a reportable (NT) item in the context of BAS reporting.

It does not form part of GST turnover when you determine your eligibility for JobKeeper Extension.

Question 56

Subject: Need to Advise ATO Each Month?

Just a query, please – will we still need to advise the ATO each month from 1 November the actual income for October and the forecast for November?

It seems to me silly when we are now looking at the quarterly figures July to Sept 2020 v's 2019, which, if down by 30%, allows payments of $1200 f/n from Oct to Dec.

Answer

Yes, this requirement is ongoing. We are in very unusual times.

Question 57

Subject: GST – Margin Scheme

My client is looking to buy a residential house on a 1,000 sqm piece of land. He plans to rent the existing house initially while seeking planning permission to build four units on the land. Once he has received planning permission, he intends to build the four units and either rent or sell the units on completion (still undecided at this stage).

What is the best way my client should structure this acquisition with GST in mind?

He is looking to buy and engage the builder, all in his personal name. Is there a way my client can structure (e.g., in a unit trust) reclaim the GST on the build inputs if he is on-selling, and will he have to pay the ATO GST on the sale, noting these will be residential properties?

At what point would my client need to be GST registered to benefit from the margin scheme?

He will bid in the auction and wants to understand if he needs to be registered at the time of initial purchase or if it is ok to register after the purchase once he has received planning and is sure he is going ahead with the build? He does not want to register for GST unnecessarily if he decides not to go ahead with the purchase.

Can he benefit from the margin scheme if he buys in his own name, or does the acquisition have to be in a corporate entity? He has an ABN but is not GST registered currently.

Answer

As there is the possibility of some or all units being sold, it is recommended that your client register for GST to ensure the margin scheme can be claimed on the purchase contract.

There is no question that your client is conducting an enterprise, meaning there are GST implications.

If your client thinks he can rent out the units for a period and then sell them GST free, then you need to refer to GSTR 2003/3, which deals with "sales of a new property."

We refer you to the guidelines in para 22, which mentions section 40-75 and then para 26 and subsection 40-75 (1)(a). We suggest GST will be payable by the eventual purchaser.

If there is a change of use, i.e., he proceeds on the basis he will sell but decides to rent long term, then there will be an increasing adjustment (a clawback) to the GST input tax credits claimed.

We cannot be more specific until your client is sure of his intentions.

Your client may also wish to consider a purpose-built entity for the development – possibly a trustee company with an underlying discretionary trust.

The margin scheme will automatically apply to anyone registered or required to be registered in these circumstances.

So, the date of registration for GST is not crucial.

The 7% withheld by the purchaser, and paid to the ATO under the margin scheme, will be adjusted when your client lodges the BAS, including the sale.

Your calculations are broadly correct but check the profit margin and discuss with your client as the margins appear to be thin.

The margin scheme is available to corporate entities and individuals alike.

Question 58

Subject: Closing of super fund.

Facts of the matter.

1. We have two super funds; both have two members, myself, and my wife. We both are in pension mode.
2. Super fund 1 has cash only and has a concessional contribution part.
3. Super fund (2) is made of non-concessional contribution only. It has property, cash, and a small number of shares. This is the fund we draw pension for ourselves.
4. I am an employee of my company but thinking of terminating it soon and working part-time as a sole trader after 3-6 months.
5. We both have decided to draw the whole amount out from fund one (1), which has cash only for our personal needs.
6. Our pension will continue from the 2nd fund.

My questions are:

a. What will be the correct procedure?

b. The cash is needed now, so can we withdraw all the cash and paperwork be done as a continuation?

Answer

Once you reach 65, you can access your super benefit at any time, whether you have retired or not.

You may access your super benefit when you reach 65 as a lump sum withdrawal. A lump-sum withdrawal is simply an amount accessed from your SMSF that is not a pension payment.

You can make lump sum withdrawals whenever you like from your super fund once you have turned 65.

There is no maximum lump sum amount if you are aged over 65, and you are free to access all your super benefits as desired.

Not tax is payable on lump-sum withdrawals made after 65.

Question 59

Subject: Forced closure for South Australian Businesses

I have clients that have had to close their business for six days due to SA COVID restrictions.

Our question is, do they still have to pay their staff under Fairwork, or can they force them to take leave?

Most are no longer on JobKeeper payments. Therefore, Fairwork changes can not apply?

Answer

Firstly, see if the employees can work from home if they can, your clients should allow them, second is there any alternative work they can do, if not they can then stand them down under the provisions of the Fair Work Act 2009.

If they stand them down, they then have an obligation to offer them annual leave or any other time in lieu they may have.

Question 60

Subject: Cash Flow Boost.

My client is on accruals. Do I account for the Cash Flow Boost via Journal Entry at 30 June, or do I only account for the Cash Flow Boost NANE when received, which is in the next Financial Year?

The way I see it, the CFB is an addition to the BAS & does not form part of the BAS, so it should not be accrued. Is my logic correct?

Answer

We certainly agree with your logic – it is not an accrual arising from the entity's business activities.

We would not accrue if these were "Special Purpose" financial reports (with little anticipated review by third parties).

The entitlement to the second cash flow boost payment was crystallised after the June 2020 BAS lodgement, which occurred after year end.

While it is not mandatory to accrue, some Practitioners may validly choose to do so on the basis the lodgement of the BAS was a mere formality.

Of course, the second cash flow payment involves a portion of the payment attributed to the tax period ended 30.6.2020.

This will be either 50% of half the amount of the second cash flow boost payment where the entity lodges its BAS quarterly or 25% where the entity lodges its BAS monthly.

Effectively you have a choice.

Question 61

Subject: Unfranked or Franked Dividend on DIV7A Loans?

The company has franking credit balances of $145,705.68.

Div 7A loan agreement in place for :	**IN FY2020:** **Principal**	**Interest**	**Minimum repayment**
	1. Div7A 2018		
Div7A 18 balances $71,247.04	$12,150.02	$4,475.98	$16,626.00
	2. Div7A 2019		
Div7A 19 balances $82,865.53	$11,457.27	$5,062.73	$16,520.00
Div7A 20 balances $148,081.37			

My Questions are:

1. *The client wants to pay off the loan balances from dividends. Whether the repayment amounts each year are Unfranked dividends or franked dividends?*
2. *What will be the journal entry for the above?*
3. *What will be the amounts of dividends?*
4. *The director/shareholder is taking out $90k gross wages annually. What will be the treatment of the dividend in his personal tax return?*
5. *If the 2018 loan has been partially paid, can he pay it off earlier out of his pocket? What happens if he does this?*
6. *When can he pay himself, franked dividend, keeping in mind he has 90k wages?*

7. *Can he pay himself franked dividend, even if DIV7A loans are in place?*
8. *Can the repayments be made through a journal entry, i.e., capitalising the repayment onto the loan balance?*

Answer

1. The repayment amounts are the net dividend without the franking credits attached.
2. Dr dividend paid (P&L appropriation accounts) and Cr Loan account.
3. It is up to the client, but the marginal tax rates should be pointed out, i.e., over $180k = 47%.
4. In our view, the minimum dividend should be $65,250 with a franking credit of $24,750 to reflect the company tax rate for FY2020 of 27.5% In our example above and assuming no other income or tax deductions – the taxable income becomes $180k (90k + $65,250 + $24,750) with a franking tax credit of $24,750.
5. If the client has funds to pay down some of this loan account, they should be actively encouraged to do so.
6. If the 2020 tax return has not been lodged, a journal can do this in practice. Urgent action is required to deal with these loans.
7. Yes, having a Div 7A loan does not preclude a dividend as long as minimum payments have been made.

Question 62

Subject: Budget 2020 - Request for Confirmation on Information

I have received a booklet titled "Budget 2020" from the Liberal Party of Australia recently, and I would like confirmation on an item stating Asset Write Off:

"Over 99% of businesses will be able to write off the full value of any eligible asset they purchase for their business. This will be available for small, medium and larger businesses with a turnover of up to $5 billion until June 2022."

Answer

Yes, this is broadly correct.

"Eligible asset" includes second-hand assets if your aggregated turnover is less than $50 million.

This is a temporary full expensing incentive that enhances the instant asset write-off.

Question 63

Subject: Could you please explain what this means?

This information is from bO2 newsletter issue #108.

1. There is temporary full expensing for the purchase of capital assets between 6.10.2020 and 30.6.2022. If your business has a genuine need for new equipment, you could directly benefit from this. Businesses with aggregated annual turnover below the relevant threshold will be able to deduct the full cost eligible capital asset acquired from 7:30 pm AEDT on 6.10.2020 and first used or installed by 30.6.2022.
2. Full expensing in the year of first use will apply to new depreciable assets and the cost of improvements to existing eligible assets for businesses with an aggregated annual turnover of less than $5 billion.

I own a small agricultural business with a turnover under $5 million.

The instant asset write-off for eligible businesses is $150,000 until Dec 2020 with the ATO.

Are the above 2 points referring to an instant write-off of assets directly connected to your source of income?

Answer

The confusion is understandable, but there is no contradiction as such.

To clarify, the $150k instant asset write-off was the latest form of this incentive announced in March 2020 in response to the Covid 19 pandemic.

In the October 2020 Federal Budget, the "temporary full expensing incentive" (outlined above) was announced to stimulate the economy further.

This should be viewed as an enhancement of the instant asset write-off, which still exists.

Note second-hand assets are eligible if the turnover is less than $50 million.

Question 64

Subject: Cash Bonuses

The business partners are considering handing out cash bonuses to all their staff. They would prefer not to go through wages, so employees are not taxed.

It is a one-off cash bonus, some employees $1,000, others $5,000.

They are happy to register for fringe benefits tax if required. Is this the best way to go?

Answer

If you want to pay them cash... that is fine but keep it as part of wages.

Make a cash withdrawal – then determine the PAYG circumstances.

For instance, if someone's marginal tax rate is 34.5% and they are receiving $5,000, then the calculation becomes:

$5,000 divided by (1 - .345) = $7,633.59

This means for them to receive $5,000 net… the PAYG is $7,633.59 less $5,000 = $2633.59.

If you register for FBT and make the payment as a fringe benefit, you will effectively cost in the highest marginal tax (47%) into the equation.

It is far better to keep it legitimate within the salaries/wages system and factor in the PAYG withholding tax.

Question 65

Subject: Land Tax Enquiry

We seem to recall reading that an individual who owns two properties, one of which is rented, can nominate for land tax purposes which property is to be liable even though not occupied as their home.

If this is correct, an individual living in a nursing home who only owns one property rented out can nominate the rental property as their home and thus be exempt from land tax.

The enquiry relates to property situated in NSW.

Answer

Only under very limited circumstances.

There may be some hope under the living away from home exemption.

As suggested, this is limited.

To qualify, you must:

– Have lived there for at least six months before moving away.

– Not own another principal place of residence.

– Only earn income from the property to cover basic expenses such as rates, water, and other amenities.

– Not lease the property out for more than six months in a calendar year.

The above suggests that land tax will be payable if a full-time tenant is living there paying commercial rent.

Question 66

Subject: The JobKeeper Extension

1. If the business experienced a minor drop in turnover in the September 2020 quarter (e.g., not a 30% drop) however then did experience a drop of 30% or more in the December 2020 quarter, is it still eligible for the JobKeeper extension?

2. Is the JobKeeper extension tier of 20hours a week inclusive of unpaid lunch breaks?

We have employees who do not include lunch breaks, e.g., a 7.6 h day plus lunch and smoko breaks.

Answer

1) Yes, if the drop in the Dec. quarter exceeds 30% – you can enrol at any time the JobKeeper program remains open. For guidance refer the ATO website: www.ato.gov.au/general/jobkeeper- payment/in-detail/JobKeeper-guide---employers-reporting-through-STP/

2) Unpaid lunch and smoko breaks do not form part of the hours of work for the 20 hours per week threshold definition.

Question 67

Subject: Forex Investment Loss

Our client engaged in Forex Trading and incurred the following expenses: (FY 2019)

- Training fee $35,000 (borrowed from the bank to pay).
- Interest on borrowings $2,500.
- Travel expenses related to training $1,500.
- Trading loss $1,000.

Since she is not in a business of Forex Trading, we are aware the above expenses are not tax-deductible, except for the trading loss as the ATO website suggests forex trading is accounted on revenue account.

My questions are:

1. Can the training fee, interest on loan and trading loss be carried forward as investment loss instead?

2. If not, can she claim a trading loss of $1000 as an instant tax deduction?

Answer

Most small traders are usually dealing with CFDs that are on revenue account.

Without full details, it sounds like this will be quarantined as a non-commercial loss to be offset against future income.

The training course, interest and travel are not tax-deductible.

In our view, there has been no capital gains tax event for there to be a capital loss to be carried forward.

There is the faint possibility the course, interest and travel represent “black hole” expenditure which is deductible over 5 years.

For this to happen, you need to demonstrate a business is being carried on. While this is doubtful, you may wish to apply for a ruling.

Question 68

Subject: Pensioner - employee/contractor?

We are taking someone on as a contractor for one day a week to carry out, telephone liaison, organise weekly meetings and data entry only.

They are a pensioner, and we have made them aware

of their Centrelink/pension payments and how they can be affected if we pay them more than their assessable income will allow. They have told us that it is not an issue; they just want a fair hourly rate for their value to the business.

Can you please tell me what we would be paying them if we had to classify them as an employee as it will give us an idea as to what to pay them as a contractor?

Answer

We will not give that advice as it is hiding an employment contract. The work is that of an employee and would be classified as sham contracting.

Sorry about that!

Question 69

Subject: Instant asset write-off

When does the 150% investment allowance on machinery end? It is available on the purchase of second-hand machinery, tractors, 4-wheel drives for a primary producer?

Answer

There is not a 150% investment allowance but an instant asset write-off – also termed "full expensing" after the changes made in the October Federal Budget.

The incentive ends on 30 June 2022, and if your turnover is less than $50 million, it applies to the purchases of the second-hand items you suggest.

Question 70

Subject - Legal Obligation- Breastfeeding

I have a few questions regarding maternity leave (returning to work).

I have two staff members currently on maternity leave, both breastfeeding. They are due to return in March / April.

I wonder what I can legally do regarding them being able to feed their babies - off-site (as we are preschool 3-5 years) and do not have enough to cover ratios?

Answer

We need to be mindful that a business cannot discriminate against a person who is breastfeeding.

As each state differs on discrimination law, they all cover breastfeeding parents.

The answer to the question is that the employer does not have a legal obligation to let the employee go home to breastfeed but may find the employee takes the employer to the Anti-Discrimination Tribunal.

Negation is the keyword here, support breastfeeding in the workplace by allowing expressing of milk etc. Not doing so would be discriminatory. The business owners need for cover ratios to be maintained would be a key consideration in making an agreement.

The information below is from NSW Health when returning to work.

Can I go to work and still breastfeed my baby?

Many mothers return to work while their baby is breastfeeding. Although it may take some time before you get into a routine that works for you and your baby, it is well worth the effort. There are many ways you can balance breastfeeding and work. This will be determined partly by the kind of work you do and the length of time you will be away from your baby.

An increasing number of workplaces actively support women to return to work and breastfeed. Many workplaces are designated 'mother-friendly workplaces. This means that facilities are available to express and store breastmilk, and mothers are entitled to 'lactation breaks' to breastfeed their baby or express.

Talk to your employer before you go on maternity leave to determine what options are available for you when you return to work.

There are a number of options for balancing breastfeeding and work:

- Ideally, you should feed your baby just before you go to work and as soon as you return home. You may be able to arrange childcare close to work so you can feed your baby in the 'lactation breaks'.
- Suppose you miss a feed while at work, express and store your milk (see the section on Expressing your breastmilk). This milk can be given to your baby at a later time.
- Babies will need to be fed your breastmilk by spoon, bottle, or cup If under six months while you are at work. Once babies are over six months, bottles may not be necessary as your breastmilk can be given by cup and eating family foods.
- You also have the option to provide bottles of formula for worktime feeds while continuing to breastfeed at non-work times. Remember – the longer you breastfeed, the greater the benefits.

Question 71

Subject: Independent Contractor - Paying SGL

I am a subscriber to your excellent magazine.

I have recently become aware that in some circumstances, an entity engaging a person to do work as an independent contractor rather than an employee may have to pay SGL to the contractor's nominated super fund.

I have not been able to find any clarity on this and the circumstances it might apply.

Can you advise me of the circumstances when this may be payable?

I assume the rate would now be 9.5 per cent, but if not, I would appreciate confirmation of the applicable rate.

I get it that if a worker is an employee and not an independent contractor, even though contracted on that basis, SGL would be payable by the head contractor as the employer in truth (along with the proper leave entitlements). This would depend on the arrangements being determined to be a sham, I assume.

My concern is that in some circumstances, SGL may be payable by a head contractor to a person who is appropriately engaged as an independent contractor arises out of the Fair Work Fact sheet. http://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/independent-contractors-and-employees

Please see the note in para 5 in the independent contractor side of the table. The note's wording suggests that SGL may be legally payable even though there is a legitimate contractor relationship and no question of a sham arrangement. In support of this interpretation, it does not make the same qualification in terms of leave at the last paragraph in the table.

If this is right, I am keen to ascertain in what circumstances the obligation to pay SGL to a genuine contractor might apply to a head contractor. Presumably, as a starter, only if the contractor engaged is a natural person, not a company or partnership.

I would be pleased to hear your thoughts on this.

Answer

If you engage an independent contractor, then the 9.5% statutory superannuation will not be payable.

Typically, such people are paid for a result, not by the hour and can determine their hours of work and delegate their work.

You hit the nail on the head when you stated "contractor rather than employee" – if the person works under your direction and control, is paid hourly, working stipulated hours, and cannot delegate their work. Statutory superannuation will likely very likely be payable.

Some general protections provided under the Fair Work Act 2009 extend to independent contractors and their principals. Please see the Protections at work fact sheet for more information on workplace rights, industrial activities, and what constitutes adverse action.

https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/protections-at-work

Question 72

Subject: Deceased Estate

I am dealing with a lawyer who is winding up a deceased estate. I have received a letter from the lawyer asking me these questions.

Please would you confirm the following:

1. A new TFN must be obtained for the deceased estate.
2. The estate becomes a Trust following the death.
3. On a Trust tax return form, any income earned within 3 years from the death must be distributed to the beneficiaries as per the will.
4. The beneficiaries record this income on their personal tax returns and pay income tax on this income.
5. If the estate is not wound up after 3 years from the death, the estate pays income tax on its income.
6. Any value of the assets (cash, shares, property, etc.) distributed to beneficiaries, as per the will instructions, is Tax-free in the beneficiary hands.

Answer

1. Correct…
2. Obtain a **tax file number (TFN)** for the **deceased estate**. … This is required as a **deceased estate** is treated as a trust for tax purposes.
3. Broadly correct – in practical terms, the total distribution usually is made well within the three years with income earned simply forming part of the estate – if the estate is still being determined, there is no need to make an annual distribution.
4. Disagree- for the first three years of the estate. The estate pays tax being taxed at normal adult marginal rates.
5. Correct – this is at the highest marginal rate.
6. Correct - both super funds will have already paid the necessary tax for payments to non-dependents and made the required notifications to the ATO – there is no further tax to be paid by the beneficiaries, and the proceeds simply form part of the capital of the estate.

Question 73

Subject: Division 293

Can you please assist me with the date that Section 293 came into effect?

Answer

We believe you refer to Division 293 tax, a 15% super surcharge tax on high-income tax earners.

This was announced in the May 2012 Federal Budget and first applied in the year ended 30 June 2013.

The threshold of adjusted taxable income of $300k was lowered to $250k in the year ended 30.6.2017.

Question 74

Subject: Casual Rates or Normal Rates?

We have a cert 3 (children services) employee who works permanent hours (Thursday & Friday).

Suppose she gets called in on another day to replace another worker. Does she get paid casual rates or normal rates?

Answer

They are paid at ordinary time for the first 8 hours then over time as per the award.

Question 75

Subject: Overseas Company Tax Return

This is about an Australian private company (Pty Ltd), but an overseas company holds 100% ordinary shares. It has one Australian resident director, and its main activity is medical research and development.

Q1. 1- Ultimate and immediate holding company name and ABN or country code:

Should I put the name of the overseas company for this question in the above scenario?

Q2. 26- International related party dealings/transfer pricing - Did you have any transactions or dealings with international related parties (irrespective of whether they were on revenue or capital account)?

I just want to confirm whether IDS (international dealings schedule) is required for Equity contribution from the overseas parent company or not. Some people say "not required" for equity contribution from the overseas parent company.

a. The overseas company provided the fund for issued capital for the value of shares (paid shares amount by the overseas company). Should we say YES to this question?

b. Should we complete an International Dealings Schedule?

Q3. This Australian private company (Pty Ltd) is conducting medical research in Australia. The total income/turnover of the Parent and Australian company is AUD 6 mil. So, the Australian private company (Pty Ltd) can apply for an R&D tax incentive if all other conditions are met?

Australian private company (Pty Ltd) is a wholly owned subsidiary of the parent company. Is this going to affect the outcome of the R&D tax incentive?

Q4. What is the impact/consequences if we answer Yes to the above questions?

Answer

Q1. Yes

Q2. a. Yes

b. Yes. The following is a direct quote from international dealings schedule instructions 2020:

Trigger points that will require completion of this schedule.

If you are a relevant company, you must complete an International dealings schedule if you have written an amount or Y (for yes) at specific labels in your relevant tax return listed below:

"Company tax return 2020
Question 6 Calculation of total profit or loss
J Interest expenses overseas
U Royalty expenses overseas

Question 7 Reconciliation to taxable income or loss
C Section 46FA deductions for flow-on dividends
P Offshore banking unit adjustment

Question 27 International related party dealings/transfer pricing
Y Was the aggregate amount of the transactions or dealings with international related parties (including the value of property transferred or the balance outstanding on any loans) greater than $2 million?

Question 28 Overseas interests
Z Did you have overseas branch operations or a direct or indirect interest in a foreign trust, foreign company, controlled foreign entity or transferor trust?

Question 29 Thin capitalisation
O Did the thin capitalisation provisions affect you?"

Q3. The ownership of the subsidiary company has little impact on the eligibility of the Research & Development Offset. Division 355 covers companies either incorporated in Australia or overseas.

We suggest that you consider two aspects of the R&D tax offsets.

1. Whether or not the company is an R&D entity. You can only claim an R&D tax offset for expenditure on R&D activities conducted for you rather than for another entity. Working out for whom the R&D activities are conducted involves determining who receives the major benefit from carrying out the activities (for example, who owns the results of the activities). I refer you to Subdivision 355.35 & 355.220 of the ITAA 1997.

2. Whether or not the company has incurred notional deductions of at least $20,000 on eligible R&D activities. I refer you to Subdivision 355.20, 355.25 & 355.30 of the ITAA 1997.

Q4. 1. Please refer to the Company Tax Return Instructions 2020, which states:

"Under the income tax transparency reporting requirements, the Commissioner of Taxation will publish Report of entity tax information about:

- Australian public and foreign-owned corporate tax entities with a total income of $100 million or more, and
- Australian resident private companies with a total income of $200 million or more.

The information will be extracted from tax returns and amendments by the relevant entity processed by 1 September in the year following the one being reported. The report will be published around December. For example, information from 2018–19 will be extracted on 1 September 2020 and published around December 2020.

The information you include at items 1, 2 and 3, along with specific income labels, will be used to identify entities for inclusion in the Report of entity tax information."

And...

2. "International related parties are persons who are not dealing wholly independently with one another in their international commercial or financial relations, and whose dealings or relations can be subject to Subdivision 815-B of the ITAA 1997 or the associated enterprise's article of a relevant double tax agreement (DTA). The term includes:

- Any overseas entity or person who participates directly or indirectly in the company's management, control, or capital.
- Any overseas entity or person in which the company participates directly or indirectly in the management, control, or capital.
- Any overseas entity or person in which persons who participate directly or indirectly in its management, control or capital are the same persons who participate directly or indirectly in the company's management, control, or capital.

Participates includes a right of participation, the exercise of which is contingent on an agreed event occurring.

Person has the same meaning as in subsection 6(1) of the ITAA 1936 and section 995-1 of the ITAA 1997.

For more information as to the relevant degree of participation, see Taxation Ruling IT 2514 *Income tax: Company Schedule 25A: Information return for companies that transact business with related overseas entities*.

The type of 'dealings or transactions' that will require the entity to answer yes at this question are dealings by the entity with related parties (as mentioned above), such as an overseas holding company, overseas subsidiary, or non-resident trust in which the entity has an interest. These dealings or transactions may be:

- the provision or receipt of services, or
- transactions in which money or property has been sent out of Australia or received in Australia from an overseas source during the income year.

The dealings may also include the transfer of tangible or intangible property or providing or receiving loans or financial services.

Question 76

Subject: Small Business Entity Criteria

We have a client that has several commercial properties.

At what point can this be classed as a small business entity, and what are the relevant criteria to be met?

Are there any expenses that cannot be claimed?

Also, can you please confirm if Commercial Rental Income is to be recorded under a rental schedule like residential properties or under Business income?

Answer

Answer to the first question...

The fundamental question is whether your client is conducting a business such as short-term rental accommodation or a hotel?

You indicate that this is only passive rental income. This may not be a small business entity.

Helpful guidance is contained in Taxation Ruling TR 2019/1 Income Tax: when does a company carry on a business?

Although it may meet the criteria, the Capital Gains Tax Small Business concessions will not be available – refer to page 7 of this edition.

Second question – It should be recorded in the rental schedule.

Question 77

Subject: Instant Asset Write Off- Luxury Cars

We understand that there is an instant asset write off (100%) for assets up to $150,000 each. Please advise if this is also related to luxury cars bought in the business and if so, is there a limit to the number of luxury cars that can be bought under this ruling?

Answer

The accelerated deprecation tax incentive applies to all depreciable business assets. However, there is a ceiling for luxury cars. The car limit for the 2021 financial year is $59,136. Costs over this amount should be capitalised. Please refer to Section 995.1 of ITAA1997 for the definition of "car" and taxation ruling MT2033 for "modification of car".

Question 78

Subject: Anniversary/Entitlement Date?

An employee started with us on 27.1.16. She went on maternity leave on 11.4.18 & returned on 29.1.19. Then took maternity leave on 21.7.20 & returned on 27.1.21. What would be her anniversary/entitlement date?

Also, how do I calculate personal leave?

Answer

The anniversary date does not change; it is the original commencement date.

The service length is approximately 44 months and 8 days or 3.6 years' service upon returning to work on 27.1.2021.

The entitlement to **personal**/carer's **leave** is **calculated** based on an employee's hours of work, not days.

Sick and carer's leave comes under the same leave entitlement. It is also known as personal / carer's leave.

The yearly entitlement is based on an employee's ordinary hours of work and is 10 days for full-time employees and pro-rata for part-time employees. This can be calculated as 1/26 of an employee's ordinary hours of work in a year.

Refer to: https://calculate.fairwork.gov.au/leave

Question 79

Subject: FBT - Definition of an "Associate"

We understand that FBT is payable for any fringe benefits provided to an associate of an employee. What is the definition of an "associate"? Does it include wife, mother, children, in-laws, etc.?

Answer

The term 'associate' is widely defined to include a spouse, a child, or any other relative. Please refer to S318 of ITAA1936. It also includes any trust under which the employee could benefit.

Question 80

Subject: Clarification on The Margin Scheme

My client's scenario is:

The client decided to purchase land and build a duplex. At the completion of the duplex, he decided to sell one of them and keep the other as an investment property. I then advised my client that this would more than likely attract GST on the sale of the one he sold.

He then went away and sought some advice from the ATO. They said that he should register himself for GST and backdate the registration to before the signing of the land contract. So, the GST registration was backdated to 14 March 2019. They said that he could use the margin scheme.

My questions are:

Is he entitled to use the margin scheme in the first place?

He cannot claim GST on Stamp Duty, but the ATO literature shows that he cannot claim GST on his Conveyancing/Legal Fees on the purchase?

We have attached a spreadsheet with our calculations which divides everything by 50% to apply to the duplex he sold. Do you agree with these calculations?

We have attached the settlement statement that shows the GST withheld of $32,452 of the sale price.

Answer

We make general comments and, given we do not have source data, do not check calculations.

It is correct that GST cannot be claimed on legal fees for the purchase.

The ATO advice to register for GST is correct - there is no doubt that your client was conducting an enterprise.

As the land vendor was a company, we suggest that GST was charged on the transaction.

Therefore, unless there was a mutual agreement in writing that the margin scheme applied, then there is no scope to use the margin scheme.

Question 81

Subject: Using Franking Credits?

The question is:

If a client declares a dividend in 2021 using franking credits from 2017 to 2020 (during which different tax rates applied for small companies), what % will the franking credit be, 30%, 27.5% or 26%?

Answer

The franking rate applicable will be that of the current tax year - if it is prior to 30 June 2021, the franking rate applicable will be 26%.

Question 82

Subject: GST - Investment Property Transfer/Sale

I have a few questions about GST on investment property transfer as below:

1. My client bought a brand-new house from the developer. She then leases it back to them (for them to use as a display unit) for two years. After that, she plans to sell the house immediately. Will there be GST on the sale price?
2. My corporate client enters a contract to build four houses for their client. The total value of the building contract will be $950,000. On completion, their client

will transfer two houses back to them as the payment for the contract. My client will then sell these two houses to the public at an estimated price of $810,000 each. What are the taxes on the sale? Is there GST on the sale? What does my client need to do if there is GST, so GST does not apply to the sale.

Answer

1) The key issue you need to determine was whether there was a genuine change of title and your client paid GST on the purchase – if she did, then a second-hand property is being disposed of, and there will be no GST. If not, then it is very likely that GST will need to be charged. It sounds like the developer and your client may be associated in some way. GST needs to be paid once on the sale of the property at market value. If your client purchased the property at a significant discount to market value two years ago, then there is a real problem.
2) Refer to my earlier comments. There is no way to avoid the fact that GST must be paid on the market value on the sale of the properties. The building contract is $475k for each property, and GST is included in this amount.

   For your client to own the property, there must be a genuine change in title with stamp duty paid. Having effectively paid $475k... it now transpires the properties are worth $810k each – it goes back to our earlier comments that GST must be collected on the property's market value. If the ATO uncovers a scheme to avoid GST, they will take a dim view of this, particularly where the parties are closely associated.

Question 83

Subject: Employee - Not Called or Reported to Work

We require clarification on an issue we are experiencing with an employee.

The individual has not called or reported to work yesterday or today. Their usual workdays are Tuesday, Wednesday & Thursday.

Can you advise how long it must be before they have "abandoned" their place of employment?

Can you advise if we still must pay them for a "notice" period of two weeks if they do not return?

Do we still issue a letter of termination?

Answer

Abandonment of employment is a complicated and risky area, and employers should not lightly conclude that it has happened, especially if there is any indication the employee intends to return.

Employers should, at a minimum, try to make contact with the employee. If an employer can reasonably assume an employee has abandoned their employment, there are a number of steps it can take. Which steps are appropriate will depend on the circumstances?

The employer has an obligation to try and contact the employee via telephone on a couple of occasions, then try the next of kin. Failing any of that, they should report the matter to the police as a welfare check if they cannot contact the employee or relevant next of kin. Also, they need to send a registered letter to the employees' last known address when they call the police.

There is no set period of time that an employer must wait before they can assume an employee has abandoned their employment.

Clauses in modern awards previously required a period of at least three days' unexplained absence before there was prima facie evidence an employee had abandoned their employment. There is no longer any abandonment of employment clauses in the modern awards, as the Fair Work Commission considered they were unnecessary to meet the modern awards objective.

Once a reasonable period of time has passed, and an employer can reasonably assume the employee is not returning, there are many options available to an employer.

Which option is appropriate will depend on the relevant employment instruments and the facts of the matter?

Suppose there is no reply from the phone calls or reply from the letter. In that case, it is then that they can assume the person has terminated their employment due to abandonment. They pay the employee all outstanding entitlements up until the last day worked and the relevant notice period (casuals excluded from notice period).

Whilst the process seems a little arduous, anything less may be seen as unfair dismissal.

Question 84

Subject: CG Distribution

My query relates to Capital Gains distribution in a family trust.

Have three beneficiaries who are presently entitled and could receive a distribution of CG in the 20/21 year.

A - earns $3000 in the year.

B - earns $50,000.

C - is a foreign resident for tax purposes (no earnings here).

Could you please show what would be the likely tax payable on the $30,000 CG distribution made to each beneficiary?

Answer

Firstly, we assume the $30k distribution has taken into account the CGT individual 50% discount.

Also, consider that we are dealing with adults.

A – will pay very little tax but take $2,392 as a guide – if a senior Australian, this figure could be less.

B – will pay $10,350 on the distribution (at the 32.5% marginal rate plus 2% Medicare).

C - will pay $9,750 tax at a non-resident flat rate of 32.5%.

Question 85

Subject: SMSF and Limited Recourse Borrowing

Hi, this query relates to self-managed superfund and limited recourse borrowing.

An existing client (SMSF and member) jointly own commercial premises in Canberra, i.e., leasehold property, as is all land in Canberra.

The commercial premises are rented to another entity (unit trust) that operates a restaurant business. The commercial property is unencumbered.

The joint owners are considering expanding the commercial premises. However, they will require loan funds to facilitate the construction of this extension. Also, the proposed extended premises will be leased to the current operator.

The issue at hand is how the proposed extension can be funded without exposing the SMSF's assets, including its 50% share in the existing property.

My initial thoughts were (subject to A.C.T. Gov approval); to subdivide the existing leasehold property with the subdivided vacant parcel being owned (leased) by a new unit trust which in turn is owned 50/50 by the same joint property owners.

I understand that under the limited recourse borrowing provisions, providing the new asset is held in a trust, the trust is able to borrow the necessary funds providing the debt is secured only by the property of this trust and not by the SMSF.

Should the A.C.T. Gov not allow the subdivision of the existing leasehold, could the joint owners still borrow the necessary funds with the member using his own personal assets as security?

As such, neither the existing commercial premises nor other assets of the SMSF would not be exposed.

Answer

You are correct to identify that no existing asset owned by a SMSF may then be pledged as security or encumbered in any way.

This should not be confused with limited recourse borrowing arrangements (LRBA), where a SMSF purchases an asset using a bare trust arrangement.

The subdivision proposal you suggest may have merit, but you will need to take legal advice from a lawyer specialising in SMSFs and A.C.T. long term leases.

First, there will need to be an assignment of the long-term lease for consideration at market value and care taken to ensure the unit is not a related trust.

The in-house asset rules apply if the trust is related (more than 50% ownership).

Of course, the SMSF trust deed has to be checked to confirm such activity is allowed. LRBAs does not apply to purchases by unit trusts but to the bare trust arrangements outlined above.

If the subdivision is not allowed and the fund members finance the development themselves, then there is the danger of these funds being deemed contributions to the fund.

Depending on the funds required and the fund balances, this could be formalised by making non-concessional contributions.

In summary, there is a lot that can go wrong here – seek specialist advice.

Question 86

Subject: SMSF – Single Member Fund

I have a question regarding an SMSF.

I have a single member fund with a corporate trustee who also is the only director and member of a private company (A) that owns 16% of the shares in another private company (B) which the member is not a director or a majority shareholder.

My question is, can the SMSF buy from Company A - the unlisted shares in company B or does that constitute an in-house asset?

Answer

Buying these shares from the member (or associate) would undoubtedly constitute an "in house asset."

This means no more than 5% of the fund's assets are allowed to be in-house assets.

There are only two exceptions:

- Business real property
- Listed shares on the ASX or an equivalent approved stock exchange.

Question 87

Subject: Temporary Full Expensing

Regarding the Temporary Full Expensing - can these assets be leased? For example, truck/trailer.

The Client has financed the purchase of the truck/ trailer; however, they wish to lease to another entity. The entity is part of a corporate group, i.e., the entities are associated.

I am aware that with the instant write off, it is detailed that you are unable to receive the instant write if the asset is leased?

Please confirm that the entity that purchases the asset and leases to an associated entity can claim a 100% temporary full expense? As this asset cannot be claimed under the instant write off method.

Also, that there are no issues with leasing out to another related entity as with the instant write off method.

Answer

Yes, we confirm it is the holder of the asset who claims the tax deduction.

This is a common asset protection technique, no issues are highlighted, and we can find nothing to indicate that this is a problem.

However, we recommend you contact the ATO to confirm this and or apply for a private ruling.

Question 88

Subject: Mortgage Refinancing Expenses Tax Deduction

My client has incurred an exit fee of $2000 when refinancing the loan in FY 2019. They forgot to claim the tax deduction :

My Question:

1. Would that be tax-deductible as borrowing expenses?

2. Can this be adjusted in the 2020 tax return instead of amending the 2019 return?

Answer

Mortgage discharge expenses on investment properties are deductible in the year they are incurred.

For this reason, we would recommend amending the 2019 tax return as it is best practice.

If the relevant marginal tax scales are identical and the amendment involves additional work, you may wish to consider including the expense in 2020.

QueswTax Payable by Trustee?

A client has passed away and has an amount in super. The Super fund is an Industry fund, and it produces a PAYG Payment Summary – Superannuation Lump Sum.

Total Tax Withheld	$0
Taxed Element	$274,139
Untaxed Element	$65,139
Tax Free component	$0

Death Benefit – Yes

Type of Death Benefit - Trustee of the deceased estate.

Other information - 16/02/1957 was the Date of Death.

How much tax is payable by the trustee?

Answer

Assuming the Estate is the beneficiary, any tax payable will be paid by the superannuation trustee.

The deceased estate will not be liable for tax.

Question 90

Subject: Normal or Salary Sacrifice?

Suppose a NFP employee is being terminated and being paid 3 week's leave in lieu of notice. Can salary sacrifice be deducted from the ETP?

Currently, $610 and $165 of pre-tax pay per f/n is paid to salary sacrifice and Meals and Entertainment cards as part of our FBT. Do we just pay this as part of her normal salary or as a salary sacrifice?

Answer

It is suggested that the ETP be paid out in normal salary.

A payment on termination means there is no prospect of further salary sacrifice as employment has ceased.

Question 91

Subject: Classic Car in a SMSF

A client of mine wants to buy a classic car in a SMSF (1 member fund).

I am happy for him to do that as long as he follows the storage procedures etc., and doesn't drive the car himself, as pointed out by the ATO.

However, he wants to do some restoration work on the vehicle himself to increase the vehicle's value, but he is not qualified to do that - he knows cars and can work on the car as such, but he is not qualified.

I believe this will not be allowed by the ATO, but I just want your thoughts.

Answer

We would advise against this – as you say, he is not qualified, and an Auditor could construe this as straying into "personal use and enjoyment of the asset".

Next, your client will be suggesting he needs to take the car on a test drive.

Question 92

Subject: What Is the Best Practice?

I am the Director; the staff have complained to the Management Committee about a couple of issues.

The main one is ringing me when they are not coming in for work.

We are in NSW, and staff start at 8 am or 8.30 am. I ask staff to ring me on my mobile by 7.15 am to allow time to organise a replacement. Is this good practice? What is the best practice?

Should I be the one bringing these complaints up at a staff meeting to make changes? How should I do this?

Should they be speaking to me, or is leaving a message on the answering machine good enough?

Answer

The Fair Work Act 2009 says an employee should advise the Employer as soon as practical.

The best solution would be to have a staff meeting and memo regarding personal leave.

The memo should answer these questions below:

The memo should say, for example, that The Fair Work Act 2009 advises that you should notify the centre of your unavailability for work as soon as practical; we would appreciate notification by 7.15 am if you can do so.

Best practice is to be flexible but certainly, have a set of guidelines conveyed to employees so that they understand and raise the complaint but as a generalisation only not targeted at any one employee.

Speaking to you personally or is leaving a message is entirely up to you whether you feel leaving a message is appropriate or sufficient.

Some employers insist they speak to the manager in this regard. Other employers will call their employees back if they leave a message to gauge how legitimate the request for leave is.

There are no rules to suggest what is good enough.

However, we suggest you have written clearly in your staff policy manual precisely what is expected in this instance and be consistent in the way you manage it.

Remember, there will be times when flexibility, empathy and sensitivity toward the situation will be required.

Question 93

Subject: Employee Returning to Work

We have a teacher returning to work after maternity leave.

She is still breastfeeding and wanting time to leave the workplace to feed her baby.

She is an ECT under the Educational Services (Teachers) Award 2020.

Could you please clarify 16 - breaks? We are a preschool that operates for 41 weeks per year, not 48.

Also, can you clarify lactation breaks to express, as she will not be included in ratios for the time that she is off the floor?

Are we obligated to pay her? or are they unpaid breaks? I cannot find anything in the award.

Answer

We believe Clause 10 (below) covers your question. We have also included a link that will go far more in-depth and answer any questions regarding breastfeeding and the workplace.

According to the NSW Department of Education under the Educational Services (Teachers) Award 2020.

Clause 10: lactation breaks

10.1 This clause applies to employees who are lactating mothers. A lactation break is provided for breastfeeding, expressing milk or other activity necessary to the act of breastfeeding, or expressing milk and is in addition to any other rest period and meal break as provided for in this award.

10.2 A full-time employee or a part-time employee working more than 4 hours per day is entitled to a maximum of two paid lactation breaks of up to 30 minutes each per day.

10.3 A part-time employee working 4 hours or less on any one day is entitled to only one paid lactation break of up to 30 minutes on any day so worked.

10.4 A flexible approach to lactation breaks can be taken by mutual agreement between an employee and their supervisor, provided the total lactation break time entitlement is not exceeded. When considering any such requests for flexibility, a supervisor needs to balance the organisation's operational requirements with the lactating needs of the employee.

10.5 The Department shall provide access to a suitable, private space with comfortable seating for the purpose of breastfeeding or expressing milk.

10.6 Other suitable facilities, such as refrigeration and a sink, shall be provided where practicable. Where it is not practicable to provide these facilities, discussions between the supervisor and employee will take place to attempt to identify reasonable alternative arrangements for the employee's lactation needs.

10.7 Employees experiencing difficulties in effecting the transition from home-based breastfeeding to the workplace will have telephone access in paid time to a free breastfeeding consultative service, such as that provided by the Australian Breastfeeding Association's Breastfeeding Helpline Service or the Public Health System.

10.8 Employees needing to leave the workplace during the time normally required for duty to seek support or treatment in relation to breastfeeding and the transition to the workplace may utilise sick leave in accordance with subclause 17.9 Sick Leave of this award or, where

applicable, through the operation of the provisions of subclause 8.4 of this award.

https://education.nsw.gov.au/content/dam/main-education/industrial-relations/media/documents/lactation-breaks/Breastfeeding-and-Lactation-Breaks-in-Schools.pdf

Question 94

Subject: Late Lodgement of BAS's

Would you please advise how the late lodgement of BAS's impact on our tax agent lodgement program?

Also, how late lodgement of Tax Returns impacts our tax agent lodgement program.

If you can send through a link or documentation to confirm, it would be appreciated.

Answer

Generally, if more than 15% of the returns are late, the ATO may become concerned.

An ATO official for a discussion will sometimes visit you.

You may receive a "please explain" letter.

If lateness becomes an annual event, the concessions accorded in the usual tax agent program may be curtailed.

This rarely occurs.

If you have encountered difficulties through staff illness, family circumstances, or staff departure, simply email the ATO, outlining this and seeking lodgement extensions.

They will usually grant an extension in legitimate circumstances.

Question 95

Subject: One-Off Gift

Our client is a Church based in NSW, and they are asking if they can give a $10,000 one-off Gift per financial year to a pastor, which is tax-free on the pastor's hand.

Answer

If the payment is for work done or can be linked in any way to the performance of the Pastor's duties, then we suggest it is assessable.

Question 96

Subject: Capital Gains Implications

Our client inherited 2 x investment properties in June 2017 after her husband passed away.

Probate granted, and the deceased estate tax return was done sometime in August 2017.

She continued to rent the properties and decided to sell one of them last month and entered into a contract with settlement by the 1st week of April 2021.

In the title, she still appears as "Executor", not the sole owner.

We have established that the Property needs to be transferred from being executor into her name as the beneficiary.

Our questions:

1. *Are there Capital Gains Implications when she transfers the title to her as the beneficiary from her as executor?*
2. *Is there a Capital Gains Tax Implications in the Settlement happening in the 1st week of April?*

Answer

While probate has been granted and a tax return lodged, it does not mean the Estate has been finalised.

This only occurs when all assets are dealt with as instructed in the Will.

Further, as Executor, your client gets to call the shots.

If possible, have the estate dispose of the property.

This avoids paying stamp duty on the transfer to your client.

Division 128-10 states that passing an asset from the deceased to either the Executor or the Beneficiary will not trigger a CGT event nor the transfer from the Executor to the Beneficiary. Refer to page 41 of this publication.

If the property was purchased after September 1985, the original cost base to the late husband is used for the sale by your client.

A net foreign resident withholding certificate must be filled out prior to settlement if the sale proceeds exceed $750k.

Even if you are an Australian resident, this is necessary.

Question 97

Subject: - What Company Rate?

Could you please confirm what company rate is applicable on the following?

Distribution from a Family Trust to a Company. All income is from a trading business within the Trust.

As more than 80% of the income distribution from the discretionary trust to the company is not passive income, can you confirm that the company tax rate in this scenario is 27.5% for 2020?

Answer

For the year ended 30 June 2020 the company tax rate for base rate entities is 27.5% (26% in 2021).

To be a base rate entity, your turnover must be less than $50 million.

Receiving a discretionary distribution is passive income.

Given more than 80% of the income is a discretionary trust distribution, this means the company in question does not qualify as a base rate entity.

Therefore the 30% tax rate applies.

Question 98

Subject: Withholding Clearance - House Sold Over $750k

Query please – the client sold a house and was one day late with the certificate of clearance, so $50K was withheld.

I spoke to the ATO, and they said I cannot lodge a 2021 tax return now (by paper) to recoup the funds – the client needs the money now, not in, say July / August / Sept 2021

Is there some way around this ?– I am sure I have in the past lodged tax returns prior to the end of the tax year

Answer

We suggest there is no way around this, and your clients will need to wait for their money.

Lodging tax returns before the end of the year in the past was possible when people were going overseas, and there was some certainty, they would not derive additional income.

Question 99

Subject: Deferred Commercial Losses & Capital Gains

We have a new client they are a small family partnership. The previous accountant has deferred all the losses from the business activity. I believe this may have built up to approximately $200,000 for both partners.

I suspect this was to enable the client to receive the Age Pension.

Apart from a smallholding of shares and age pension, they have no other income.

The business activity was beef cattle farming. On 1 May 2019, they sold their property and made a capital gain.

Of the four non-commercial loss tests to pass, it shows that they easily passed the real assets test as the property was sold for $1,400,000.

Due to moving and being ill, they have not lodged their 2019 or 2020 Tax return yet.

Can the unused non-commercial losses (the ones that were deferred) be used to offset the capital gains?

The MTG points out at 16-020.

Paragraph 2
"The loss may be carried forward and offset against assessable income from the business in the next year that the business is carried on (future year)."

Is the capital gain (on the sale of the business asset), business income, and therefore, the losses are applicable?

Are we best to get a private ruling or a commissioner's discretion?

Answer

It is clear that some business activity was being undertaken.

There was no need to quarantine the losses as one of the four tests for a commercial business was met.

To claim the losses against the capital gain, it is suggested you will need to meet the test for a primary production business – the Commissioner has published guidelines on this, and we would also refer you to page 39 of our annual publication.

Suppose you are able to establish there was a genuine primary production business being carried on. In that case, this opens the possibility of the land being an "active asset" for the CGT Small Business Concessions.

This means it was an active asset for at least 7.5 of the last 15 years or half the time the land was owned if more than 15 years – meaning it must have been used in the cattle farming business.

In such circumstances, the capital gain will be eliminated.

Question 100

Subject: - Entitled School Holidays and (LWP)

Two employees have been doing extra days/hours for the entire term 1.

Regarding the two weeks holidays approaching (in which we do not work), are they entitled to be paid for the hours they have worked during term one or do they go back to their normal hours?

Also, we have an employee that has been absent (LWP) from work. Do they get paid for the two weeks (school holidays)?

Answer

When they do not work, they get paid normal hours.

Where the person is on authorised leave without pay (LWP), they do not get paid.

Question 101

Subject: Maximum Franking Credit For 2020/21

I know that the small company tax rate will be reduced to 26% from 2021/22. So far, the company has franking account balance on 30/06/2020 as follows:

Total profit $190,000 Tax (27.5%): $52250 all paid.

If the company wants to distribute $100,000 profit to its shareholders(two),

In this case, I understand that the franking credit (FC) will be $27500.

Can the company pay more than the amount (27.5k)?

In 2021/22, when the company distributes the previous profit (90k), do I use 26% or 27.5 for the FC?

It is honestly very confusing for me to calculate the franking credit.

Answer

If you distribute a $100,000 (50k each) as a net dividend to its two shareholders, the situation for each shareholder (if 50% each) will be as follows:

Net dividend	$50,000
Franking credit	18,965.50
Taxable dividend	68,965

The franking credit reflects the 27.5% company tax rate.

After 1.7.2021, we expect the franking credit rate to be 26%, confirmed in the May Federal Budget.

Question 102

Subject: Employee Moving to China

One of our employees is moving to China and will still work for us remotely. Is there anything we need to consider for tax purposes under this situation?

Do we still need to withhold PAYG tax? Although the employee will be in another country, she will still have her TFN and Australian banking account.

Answer

In the event the team member remains an employee:

- Medicare levy will not be payable due to non-residency.
- Employers have no obligation to pay statutory superannuation (9.5%) to non-resident employees for work they do outside of Australia.

Given this, you may wish to consider whether the worker can be classified as a contractor.

If the worker does not work under your control and direction, chooses their hours of work after being assigned tasks, and is able to delegate their work, then there is an argument that the person is a contractor.

This may be preferable to both parties, with the remote location and change of residency adding further weight to the argument.

If she is a genuine contractor (refer to our comments) regarding the need to withhold PAYG tax, the answer is no.

Also, the key is whether this is a genuine change of residency or just an extended absence.

Question 103

Subject: Termination Pay

I have a quick question about an employee's termination pay.

A staff member worked full time before their maternity leave. Due to the COVID impact and their young child, they changed to a different position and worked reduced hours after returning.

However, the new role is no longer available, and the business has decided to pay them their redundancy and in lieu of notice entitlements. I want to be advised if both the redundancy and the in lieu of notice payments should be processed per the reduced ordinary hours?

Please clarify if the same principle/rate applies to both the redundancy and the in lieu of notice payment? My understanding of in lieu of notice is that staff can work the notice period, or the employer is to pay the amount equal to the period of notice.

Answer

The same principle/rate applies to both the redundancy pay and the in lieu of notice payment. It depends on how the hours were reduced. If they were reduced because of JobKeeper, then the old hours apply. If they were reduced because of seeking changes, then it would be at the reduced rate.

Question 104

Subject: Staff Covid/Flu Shot Obligations?

We have a staff member who has been encouraged to have the Astra Zeneca Vaccine. "As recommended by my doctor and due to existing medical condition, I need to have Vaccine (Astra Zeneca)."

It is for the entire day, so have asked if they can submit the day off as sick leave?

If everyone wants a day off to have their Vaccine, where do we stand, Personal (Sick leave)? Can the business choose for it to be paid from the employee's annual leave also?

The Fairwork website states that personal leave can be taken when employees are "unfit" for work, not for a medical check-up or vaccination.

What if someone wants to get the flu shot? It is not covered under sick/personal leave, according to what I have read.

Can you advise if this is possible?

Answer

Firstly, a business can never choose any payment to

be taken from an individual's annual leave unless the employee mutually agrees. Otherwise, it is personal (sick leave).

While you are correct in what Fairwork is saying, this is during the norm, so what it comes down to is that it depends on your company's policy relating to Personal/ Sick leave.

In many instances, where employees have chosen to receive this significant vaccine (Covid), businesses have opted for supporting their employees by eliminating the need to choose between earning their wages and protecting their well-being.

They have done this by making allowances and by providing them with a personal day/ sick day off to recover in case of reaction, etc. as paying one day's personal day/sick day off is better prevention than if they were to contact Covid and require the further use of this leave.

This has been done on a case-to-case basis, especially for those with underlying health issues; this is critical.

Some companies or businesses opt to have this done for their employees in-house during work hours regarding the regular annual flu shot. Otherwise, the employee can be paid sick leave if the business chooses to, or if the lost time is only a couple of hours, possibly offering time in lieu.

Question 105

Subject: Calculating LSL

An employee started on 29.5.12 then become permanent 27.8.12. When calculating LSL, what date do I calculate from?

Answer

The Long Service Leave Act 1955 (the Act) provides full-time, part-time, and casual workers (or any combination of these throughout the period of service) in NSW to 2 months (8.6667 weeks) paid long service leave on completion of 10 years' service. Section 4(2)(a3) of the Act defines a month as 4 1/3 weeks (4.3333 recurring).

So, to answer your query, you would calculate from the start date of 29.5.12, as it is based on the period of service.

Question 106

Subject: Paid Personal Leave

I have a question regarding personal leave regulations.

In the last couple of years, there was a period that paid personal leave for part-time employees was increased to 10 days.

Can you please tell me when that started & finished?

Answer:

The High Court overturned the decision, so there is no effect moving forward.

Question 107

Subject: Sick Leave

Scenario: A staff member requires time off for ill-health but has no sick leave accrued and is minus 27 hours.

If we do not pay them for this time off, is it recorded as sick leave, even though they are not paid for it? If so, do we still deduct the sick leave amount from their sick leave hours, creating more negative hours?

Answer

It is recorded as leave without pay (LWP) if they have no accumulated sick leave.

Question 108

Subject: Industry-Specific Redundancy

An employee has handed in their resignation, and I am asking whether they are entitled to a redundancy payment on termination.

They are employed under the Building & Construction General Onsite Award 2010 and is currently employed as a trainee surveyor. When they first started with the company, they were employed as a Civil Construction Trainee Cert III. After completing this, they rolled into a Civil Construction Trainee Cert IV before rolling into their current position as a Trainee Surveyor.

From what I can see under the Award clause 40 notes that an exception applies to those identified under Sections 123(1) and 123(3) of the Fair Work Act 2009. Section 123(1) d – an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period or is, for any reason, limited to the duration of the training arrangement.

Based on this, will we need to pay redundancy?

Answer

Yes, you will have to pay redundancy.

The Building and Construction General On-site Award 2010 contains an industry-specific redundancy clause unique to the building and construction industry.

The Award defines 'redundancy' as …"a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty".

The redundancy provision is triggered where either of the following occurs:

- A construction employee is made redundant by their employer.

- An employee resigns after having been employed for 12 months or more.

Where an award has an industry-specific redundancy provision, the redundancy pay provisions of the Fair Work Act 2009 do not apply.

Unlike the provisions of the Fair Work Act 2009, the Building and Construction General On-site Award 2010 does not contain an exemption for small business employers. At clause 41 of the award, the employee is entitled to redundancy if you do not pay into a scheme.

The table below should assist in working out the payment.

Redundancy Pay

(a) A redundant employee will receive redundancy/ severance payments, calculated as follows, in respect of all **continuous service** with the employer:

Period of continuous service with an Employer	Redundancy/ severance pay
1 year or more but less than 2 years	2.4 weeks' pay plus for all service in excess of 1 year, 1.75 hours pay per completed week of service up to a maximum of 4.8 weeks' pay
2 years or more but less than 3 years	4.8 weeks' pay plus, for all service in excess of 2 years, 1.6 hours pay per completed week of service up to a maximum of 7 weeks' pay
3 years or more than but less than 4 years	7 weeks' pay plus, for all service in excess of 3 years, 0.73 hours pay per completed week of service up to a maximum of 8 weeks' pay
4 years or more	8 weeks' pay

Question 109

Subject: Car Parking Benefits

When using the statutory formula method for calculating FBT payable, would you please advise if we should be using Type 1 or Type 2?

Please provide an extract from the legislation if possible.

Answer

The difference between a **Type 1** fringe benefit and a **Type 2** fringe benefit is whether the amount is entitled to a GST credit. **Type 1 fringe benefits** are a GST taxable supply with an entitlement to a GST credit, whereas, with **Type 2 fringe benefits**, the provider of the benefit cannot claim a GST credit.

As a commercial organisation entitled to claim GST credits, your markup rate is 2.0802.

Refer to page 109 of our annual publication.

Also, see www.ato.gov.au -Fringe benefits tax - a guide for employers -Chapter 16 - Car parking fringe benefits.

Question 110

Subject: Proposed Merging Superfund

My client has a superannuation fund with defined benefits and member contributions with an employer.

The employer proposed to merge with another super fund with an accumulation merger fund.

My client question from me is :

What is advantage and disadvantage of merging proposed fund?

Answer

We assume your client has a choice.

Usually, a defined benefit fund has a formula that determines your final benefit rather than an investment return.

This could be a percentage of your final salary.

Most super funds of this type are corporate or public sector funds, with many closed to new members.

Usually, employers are keen to get super members out of defined benefits into accumulation funds.

Your client needs to see a financial planner.

It will be necessary to determine how good the defined benefit is compared to the accumulation amount on offer.

Other factors will include the client's health, years to retirement, risk profile, and financial needs.

Your client needs to make a considered, informed decision after weighing up all the benefits.

Question 111

Subject: What Company Rate?

Could you please confirm what company rate is applicable on the following?

Distribution from a Family Trust to a Company. All income is from a trading business within the Trust.

As more than 80% of the income distributed from the discretionary trust to the company is not passive income, can you please advise what tax rate is applicable if the trading distribution is from a unit trust?

Also, can you confirm that the company tax rate in this scenario is at 27.5% for the year 2020?

Answer

For the year ended 30 June 2020 the company tax rate for base rate entities is 27.5% (26% in 2021).

To be a base rate entity, your turnover must be less than $50 million, and no more than 80% of your income can be passive income.

Receiving a discretionary distribution is passive income.

If the company does not qualify as a base rate entity, the normal 30% company tax rate applies. Given more than 80% of the income is a discretionary trust distribution and, as outlined, this is passive income.

The situation here is that income retains its character as it flows through a trust.

This is the case whether it is a unit (fixed) or discretionary trust.

Due to this, it is possible for a company receiving a distribution from a trading trust to be a base rate entity.

Since this was TRADING income, we confirm that in the year ended 30 June 2020, the applicable tax rate is 27.5%.

Question 112

Subject: Distributions of a Discretionary Trust

Can you please advise if a Family Discretionary Trust (owned by son) can distribute trading profit to a Company (owned by father)?

Answer

This is quite possible, but you need to refer to the clause of beneficiaries in the trust deed to determine if the father's company is an eligible beneficiary.

Question 113

Subject: Semi-Retirement.

Scenario: The seller has been in practice as a sole trader for over 27 years, just turned 60, and starting to prepare for semi-retirement.

A colleague has discussed buying 50% of the business and eventually owning 100% down the track, so we are putting this in place, intending to buy in on 1 July 2021.

The buyer does not hold a tax agents' licence at this stage but is in the process of getting this organised. A consultant has been engaged to assist with agreements etc., during this transition.

The colleague already has a Company and Discretionary Trust, which could possibly be a shareholder in a new company with both involved.

What is the best structure going forward? Do you have any advice on minimising CGT issues on the sale of 50% and the further sale down the track?

Answer

Consider selling as a sole trader. The 50% interest in the firm would qualify as an active asset.

The seller could then roll over their partnership interests into a company.

Note, we suggest doing this immediately after the sale.

We would recommend against using a partnership of individuals, as partners can be jointly and severally liable.

CGT on the sale will be covered under the small business concessions, by the active asset 50% discount, followed by the individual 50% discount along with the retirement exemption to cover the balance.

Given that the seller is over 55 years of age, they do not have to place the funds for the retirement exemption deduction into a super fund – they effectively have a choice.

If a rollover is correctly done into a company, then they will enjoy the existing concessions.

When retiring, they will be able to sell the shares in the business and enjoy the abovementioned concessions or the 15-year exemption.

The incoming partner will have his thoughts, and these will need to be considered.

Question 114

Subject: Capital Gain Tax

Background

The taxpayer is a family trust which has owned a small shopping centre with five shops for 25 years.

All shops have been leased out for the last 25 years. One shop has been leased to a related entity.

The family trust sold the shopping centre in August 2020 with a profit of 2 million dollars.

Tax Issue

Can the family trust claim 20% of the CGT exemption under The Small Business Active Asset Exemption (for the one shop that has been leased to the related entity)?

Answer

In the event the one shop is not on a separate title and only derives 20% of the total rentals received, we suggest that the shop in question will fail the active asset test.

This is because the primary use of the shopping centre is to derive rent.

We do not have the full facts before us, and you may wish to apply for a private ruling or seek specialist advice.

Question 115

Subject: Trading v Business Name

Could you please advise on the following, or advise who to contact for information?

We have a family trust – XYZ Family Trust who has a trustee company XYZ Trading Pty Ltd. The business will trade out of the family trust, which will have an ABN & TFN. The trading name the family trust wishes to use is the trustee company name – XYZ Trading P/L. Is this ok to do without registering a separate business name? The person we spoke to from ASIC advises that they will not allow us to register the business name under the family trust ABN as it is the company name. The company will

not have an ABN as it is not trading.

To clarify, they wish to have XYZ Trading P/L on stationery, vehicles, etc. – but we will lodge tax returns, etc., under XYZ Family Trust – entity XYZ Trading P/L as trustee for XYZ Family Trust.

Answer

There is no need to register a business name as the company name is registered with ASIC.

This provides a level of protection from others being able to register the business name.

You may wish to consider registering trademarks if applicable.

The trustee company would indeed hold the business name if this were required.

It is correct that the trustee's name should be disclosed on stationery and letterheads.

The trust lodges a form T (Trusts) taxation return.

For an explanation of how Trusts work, please refer to pages 25-28 of issue 112.

Question 116

Subject: -Accruing Personal Leave

Does a permanent employee (teacher) accrue personal leave in any of the following circumstances?

- During two weeks of school holidays throughout the year.
- They are being paid Jobkeeper.
- During the shutdown period (4 weeks annual leave + Loading).

Answer

Yes, to each situation.

All full-time permanent teachers shall accrue fifteen (15) days paid sick leave per annum over the course of a year. The entitlement is fully cumulative, with the balance at 31 December each year rolled into the entitlement for the following year.

The JobKeeper scheme does not affect an employee's entitlement to accrue paid sick or carer's leave under the National Employment Standards and the relevant award. Employees continue to accrue paid sick and carer's leave as usual.

Question 117

Subject: Cryptocurrency

Can you please provide some details on calculating cryptocurrency?

Answer

In broad terms, if a person is not in the business of trading in cryptocurrency, then we are dealing with capital gains tax.

If the individual deals in contracts less than 12 months apart, there will be no CGT 50% discount.

Net sales proceeds less the total cost of acquisition = capital gain on the transaction.

For cryptocurrency held longer than 12 months, apply the discount if applicable.

If a person is in the business of trading in cryptocurrency, then apply the same principles you would to a share trader.

An experienced colleague in your office can assist you with this.

Question 118

Subject: Leave Entitlements

Employee (A) started with us in 2020 to replace Employee (B) when they went on maternity leave.

Employee (A) worked 38 hours until the end of 2020.

This year 2021, Employee (A) has been contracted to do only 17.5 hours as Employee (B) has returned part-time.

Due to staff shortages, Employee (A) has been working every day since.

How do I calculate Employee (A)'s personal leave entitlements?

Do I calculate the normal 38 hours from last year separately to the contracted 17.5 hours from this year, or do these extra hours accrue as well?

Answer

You are correct – you do two separate calculations.

One is for the hours of annual leave accumulated from full-time employment, and the other the hours of part-time employment.

If the employee reverted to full-time employment, factor this in and adjust the calculation for those relevant weeks.

Question 119

Subject: Motor Vehicle Lease

Our client is planning to lease a Motor Vehicle which has a purchase price of $185,000.

There also is an option to buy out the vehicle at the end of the lease for the amount equivalent to the residual amount.

Does the car limit of $57,581 apply here since it is not a hire purchase but simply a lease?

Answer

We are dealing with a luxury car - here, the lease is treated as a notional sale and loan transaction for income tax purposes.

A leased car, whether new or second-hand which exceeds the car limit in the financial year the lease was

granted (2020-21 $59,136), is generally a luxury car.

The first element of the cost of the car to the lessee is the amount lent by the lessor to the lessee for the car. It is taken to be the car's market value at the start time of the lease.

The actual lease payments made by the lessee are divided into notional principal and finance charge components. That part of the finance charge component applicable to the particular period may be deductible to the lessee.

The lessee cannot claim a tax deduction for the notional principal lease payments.

The lessee is generally treated as the holder of the luxury car and entitled to claim a deduction for the decline in value of the car, which is limited to the relevant motor vehicle deprecation cost limit – see above.

If the car's value is under the depreciation cost limit, there is no cap on lease payments.

Question 120

Subject: Exercising Power as Mortgagee

My question is on what the best way may be to take over or recall property under a mortgage?

The real issue is that they (a family member) have a bank loan in our name for the total amount, using our house only as security. Meaning their Title has a mortgage registered to us.

Background

The property was purchased in May 2019 and, in late 2020, completed the subdivision the previous owner had started, with Lot 2 being a completed house (PPR) and lot 1 an unfinished house as an outer shell to lock up.

In July 2020, special Government permission was granted on compassionate grounds to join their spouse in America. They had air tickets and Government approval to travel back to Australia in November 2020, but the plane was cancelled, as were the subsequent flights.

They had to leave America when their visa ran out and are now in Mexico.

After being trapped overseas for over ten months (mainly in hotels) with so many costs arising, they do not need the burden of owning the property, so they want to sell their permanent place of residence (which needs work to put on the market).

Option 1: As mortgagee, could we take over the PPR house (lot 2) and or the unfinished house (lot 1)? We would need to complete all works and then sell the two properties. Would we have to pay Stamp Duty and or Land Tax as the mortgagee recalling the property under the mortgage? Would we have to pay Capital Gains on the sale?

Option 2: We have a Self-Managed Super Fund. Could we put the completed house property and or the unfinished house property into our SMSF? What would be the issues regarding Stamp Duty, Land Tax, and Capital Gains? Would it be worthwhile? If we took over the house, we would need to complete the renovations to sell or rent it out.

Answer

We make the following general comments.

At the time of completion of the subdivision, the purchase costs (the cost base) need to be allocated between the lots on a commercial basis.

You correctly point out that they are trapped overseas due to Covid 19 – this is not a preference, and they must continue to lodge taxation returns on the basis they remain an Australian tax resident.

This allows them to maintain the possibility of the 6-year temporary absence for CGT principal place of residence exemption purposes.

Regarding any real estate agent quotes, you may wish in this market to get a second opinion and possibly do some market research of your own.

Exercising your power as mortgagee lodging a writ of possession does not mean you pay stamp duty.

You may obtain legal advice on this, but it would be preferable if they retain ownership of lot 1 for CGT purposes.

To the extent you may be expending considerable funds on lot 2, you may wish to acquire the property for your own security.

Your (family member) would be assessable for any capital gain on the sale.

In the event you completed the construction in a quick turnaround, you would be taxable on the profit you make on the sale.

If you held the asset for longer than 12 months, then there is the possibility of the CGT 50% discount applying.

If you moved into Lot 2, there is the possibility of your obtaining the principal place of residence exemption.

All the above scenarios are dependent on the exact facts and circumstances.

A SMSF cannot purchase residential property formerly owned by a fund member or associate.

Question 121

Subject: Pay Rates

Could you please advise if there is a specific award to be followed regarding employee pay rates in the accounting/ tax industry? E.g., Accountants and support team members.

Answer

Junior admin staff may fall under various clerical awards.

Accountants typically negotiate a salary with increases tied to individual performance and productivity.

Question 122

Subject: Tax Within an Inheritance

Question re; inheritance/capital gains tax/any tax within an inheritance

A parent dies leaving a home, cash, the deposit in a nursing home, and life insurance policies equally to 5 children.

The deceased was in residential care for almost three years. But the house was in the deceased name and principal place of residence till moving into the home.

Are there any capital gains tax implications on sale/gift of residence/ any items to be inherited to beneficiaries as the property left, was the principal place of residence till the deceased went into residential care?

Does time in residential care (as property no longer the principal place of residence) negate the tax-free inheritance status?

If the house is gifted to one beneficiary and then sells in a few years, is there any capital gains tax liability and who pays it?

Rather than gifting the property, suppose the beneficiaries purchase property within the estate. Would it be best to sell the home at a public auction (therefore at a genuine market price)? Or best to sell to someone, not a beneficiary, then distribute the beneficiaries shares as dictated by the Will, so the estate pays the capital gain (if any)?

If there is capital gains tax due, would it be better to make a more realistic value of the home within the probate valuation? When the property is sold, the difference in cost price base to market value would be less? Probate tax would be lower to pay than capital gain.

Suppose the property was gifted then sold by the beneficiary some years later. Are the beneficiaries who gifted/took lesser value for home initially liable to pay their original share (20%) capital gain tax? Or once gifted/ sold at the lesser value, does their CGT liability cease, regardless of how significant the gain is?

Answer

Under section 118-145 ITAA 1997, you can apply the six-year temporary absence to the sale of the home in order to maintain the principal place of residence (PPR) exemption for CGT purposes.

If one beneficiary takes legal ownership, they will be deemed to have acquired the property at market value – in a rising property market. They will be assessable on subsequent capital gains unless the property is their PPR.

Unless one of the beneficiaries wishes to pay market value for the property (say… the mean of two independent valuers), then public auction, as you suggest, is the best option.

As stated above, there should be no CGT.

With respect, the "gifting" you suggest may not be realistic. Five siblings appear to have an equal interest in this property and the estate's remaining assets.

It would appear the property needs to be sold. This should occur within two years of the date of death. Failure to do so could result in CGT on the increase in value since the date of death.

In the event the estate encounters difficulties in administration, then the Commissioner may have a discretion to extend the two years but do not count on it.

Question 123

Subject: Capital Gains Tax

Scenario:

- Unit Trust with Two Family Trusts – Beneficiaries
- Family Trust has beneficiaries who are working full time.
- Unit trust has invested in Commercial Properties for a regular/active income.
- Unit Trust now wants to sell one of the properties and will incur capital gain.

Questions:

- Can Unit Trust receiving rent from the commercial properties be treated as conducting business?
- If yes, can rent received be considered as "sales?
- Trading activity (Receiving rent from Commercial properties) can be classified as small business activity?
- If yes, can the rollover benefit of capital gains be availed by investing the property sale proceeds by the Unit Trust in another commercial property?

Answer

We believe it highly unlikely that the commercial property will be eligible as an active asset in order to meet the CGT Small Business Concessions.

You do not disclose how many properties your client owns – if it is only two or three, then there is little likelihood the client could be in the business of owning rental properties.

The primary use is clearly to derive rental income.

If these are just standard commercial tenancies, there is little prospect of success here – refer to Taxation Ruling 97/11 for guidance.

Question 124

Subject: Capital Gains Tax on An Estate

I have an interesting capital gains tax matter.

In summary, my clients (husband and wife) purchased a holiday house with the wife's parents.

It was purchased as tenants in common, but each half joint tenants.

Initially, the property was used only as a holiday cottage, but my clients later sold their residence and moved into the "holiday home".

They subsequently moved out, at which time the parents moved in as their permanent residence.

When their mother passed away, the father remained there for some time but eventually moved into an assisted living retirement home until his passing.

I understand the property is now in the hands of the father's estate.

My clients now wish to purchase the property (I assume their father's share) from the estate and want to know the exposure to capital gains tax on the estate's share of the property disposal.

Answer

The Estate simply calculates the days of occupancy by the parents on their 50% share and divides this by the total days of ownership up to the last surviving parent's death.

This assumes that the father had a temporary absence from the dwelling of less than 6 years when he moved into the nursing home – this allows the period spent in care to be included in days of occupancy.

Of course, the 50% individual discount will apply to the Taxable Capital Gain.

There is no question that the Estate must assume responsibility for paying the CGT on the sale of the last surviving parent's 50% interest for the simple reason that it was not the parents' PPR the entire time.

For there to be no further CGT implications after the date of death, the Estate has two years to dispose of its share in the property. Still, in exceptional circumstances, the Commissioner has a discretion to extend this.

Question 125

Subject: Deed of Settlement

Scenario:

In 1983 Client A purchased a commercial property (A.C.T. leasehold) in the A.C.T., which contained several commercial premises.

A substantial portion of the land was still vacant and available for further development.

In 2002 the whole property was sold to another party (Party B). However, Client A retained one of the commercial rental premises (rented to a third party) under the deed of trust pending the development of the vacant portion of the parcel of land and subsequent strata titling of the whole property.

Once the property was strata-titled, the retained commercial premises were returned to Client A for $1.00.

To date, this has not occurred, notwithstanding the demands made by Client A for this to be completed.

The property can no longer be strata-titled due to the long delay by Party B in lodging the appropriate application with the ACT Government.

As a result, Client A can no longer obtain possession of its commercial rental property.

Legal processes have now resulted in a deed of arrangement wherein Client A will be paid a yet to be determined amount as settlement for forging its right to the commercial property.

Client A has continued renting the commercial premises under the original deed of trust up to this point in time.

Whilst Client A did not have legal title of the commercial premises other than a deed of trust, are the following assumptions correct:

- The proceeds of the deed of settlement are not subject to CGT, given the original purchase occurred in 1983.
- The pending settlement is not subject to GST given that the "sale" is a going concern with the commercial tenant in place.

Note Client A is registered for GST?

Answer

Given that the A.C.T. has unique property title considerations and the complexity of this matter, we decline to give general advice.

While we accept that, in all likelihood, you have done an excellent job in summarising the matter. We need to know the full facts and circumstances.

Even if this were available, we would recommend seeking legal advice, or at the very least, an application be made for a private ruling.

Question 126

Subject: Request Advice

My client owns an old house on a large block. They intend to level the building and build two new units, which will be rented purely as a profit-making venture. Do you believe that the venture should be carried out through a discretionary trust? If not, please provide your alternative.

Answer

On the face of it, a discretionary trust has merits.

It allows asset protection along with flexibility as to who receives the income for taxation purposes.

Income retains its character as it flows through the Trust.

If a valid income distribution is made each year, the relevant individuals will be assessable on their share of income at their marginal tax rate.

A trust allows some perpetuity in that the corporate trustee will retain ownership after key individuals pass away.

You may wish to check with your client if holding the asset in a trust suits their estate planning requirements.

Question 127

Subject: Is CGT Applicable

Facts:

- The property was purchased on December 11, 2006.
- The cost of purchasing the property with her husband is $465,654.
- June 12, 2012, separated from husband.
- June 1, 2013, rented out the property and moved to a rented unit.
- July 1, 2013, divorce was finalised.
- February 1, 2015, refinanced the house with a new bank and an additional $95,000.00 was borrowed and given to the ex-husband.
- October 26, 2019, the house sold for $1,180,000.00 less costs of $ 10,368.00.

We believe that the six-year rule should apply due to the circumstances of the case, and no CGT will apply. Would you review the issue and confirm whether we are correct in our conclusion or **CGT will apply**?

If CGT applies, appraisal of the property from a reputable realtor valued it between $770,000 and $800,000 at the date she moved out.

Do we calculate the CGT on the sale price and valuation difference and apply the 50% balance?

Answer

The best outcome would be to apply for a 6-year temporary absence.

The taxpayer did not have any other principal place of residence (PPR) allowing this.

It is not necessary to move back into the property to claim the six years. This assumes the wife moved out of the property on 1.6.2013.

Because this means for the period 11.12.2006 to 1.6.2019, the property qualifies as the PPR.

For the period 2.6.2019 to 26.10.2019, CGT applies.

As this is apportioned on a 'days of ownership' basis, this is, of course, a tiny percentage of the total ownership of 12 years, ten months.

After applying the 50% discount, very little CGT will be payable.

Question 128

Subject: Concessional Personal Contribution

My question is about catch-up contributions. I have worked the whole year round as a sole trader and have stopped contributing to superannuation for more than 20 years now. I will be 73 years of age this June.

I want to make a concessional personal contribution of $50,000.00 and claim this contribution against my taxable income. I have not contributed to superannuation for a long time. I believe I can contribute a total of $75,000. ($25,000 x 3 years).

Can I then withdraw the money three months later, say on September 22, 2021?

My second question is, is there a time limit as to when I can withdraw my contribution? And what would be the possible reason for withdrawal?

Answer

You need to meet a work test to make contributions into super as you are over 67 years of age.

The main issue to resolve is whether, in the last 12 months, you have worked 40 hours in any 30 consecutive days?

There is a one-off exemption for the work test if you have ceased work within 12 months of the contribution and have a total balance in superannuation of less than $300k.

If you are still eligible, we need to consider your proposal.

You are effectively talking about making catch-up contributions for 30.6.2019 and 2020 in 2021, making a total of $75k.

To be able to do this, your super fund balance must be less than $500k.

We take it you are aware there is a 15% tax on concessional contributions as they go into the fund.

There is no time limit as such, but you would be well advised to leave the contribution in the fund for at least a month and then have a reason for any lump sum withdrawal. It is improbable you would be required to provide a basis; it could be pressing and personal family matters etc.

Question 129

Subject: Changing Super Funds

At the age of 67, my Client's ABC super fund benefit, after being conservative balanced for 30 years, is equal to $ 450,000. Not being happy with the return compared with XYZ super fund, now wants to transfer to the XYZ super fund(or another one), believing that the returns will be better.

Can you please advise whether transferring to a new fund will have an advantage or disadvantage regarding insurance or any other matters (like tax or getting a pension later)?

Answer

First, if your client has invested with a conservative risk profile, they cannot expect high returns.

We wonder if this has been fully explained to them by a professional.

The characteristics of the contributions and end benefits and preservation will not change which will be part of the information supplied by ABC to the new fund.

There may be some insurance issues, though, and you need to check this out.

It is quite possible the premiums vis-a-vis the benefits payable to the member, or their estate will be markedly different.

You will need to investigate this and proceed with caution.

It would be advisable to take advice from a reputable financial planner.

Several years ago, there were some grandfathered benefits that may need to be taken into account regarding the pension.

Question 130

Subject: SMSF Query

A Full Pension owns a commercial property, installed solar panels for $30,000. Can SMSF write it off at one go (as the legislation allows up to $150,000)?

Answer

Unfortunately, the answer is no, as the SMSF does not conduct a business.

Question 131

Subject: Non-Preserved - Roll Over to SMSF

We have a client aged 57, medically discharged from work on Work Cover with a state authority super scheme with a large portion of the fund having a restricted non-preserved amount.

Upon rollover, the specified non-preserved portion will change to unrestricted non-preserved once the Client provides medical documents showing he cannot work anymore.

The question is:

- If we set up a SMSF and transfer the total super balance, will there be any issues related to the restricted non-preserved amount?
- Will there be tax or any other issues when transferred to unrestricted from restricted non-preserved?
- Does it trigger a taxing event if transferred to the SMSF?
- I confirm it will just be a transfer, and the Client will not access any benefit until he is 60.
- We think there will be no tax payable, and when he is 60, he can set up a pension and receive tax-free.

Answer

1. There will be no change in the classification of the benefits due to the transfer between the superannuation funds.
2. When the classification of the benefits changes due to medical advice, there will be no tax issues within the SMSF.
3. The taxing event will be due to liquidation of benefits (to make the transfer) from the State Fund, and there will likely be capital gains tax issues. CGT is effectively 10% on assets held longer than 12 months... otherwise, 15% within a complying super fund.
4. Noted, and we mention in passing there may well be benefits in rolling over the permanent incapacity insurance to a SMSF.

Question 132

Subject: Anniversary of Traineeship?

I have a Certificate 3 trained educator for our pre-school. While employed as a trainee, we had to extend her traineeship by approximately 6mths because she could not get it done.

Is the anniversary date to go to the next level when she started her traineeship or finished training?

My payroll clerk has it as the day she started (this decision was not discussed). If this is not the case, can I change it to the date she completed her course after discussion with the employee?

Answer

The payroll person is correct by basing on when they left school, and it increments yearly on their anniversary whilst they are on a traineeship.

Nothing in the award impacts the fact the employee took an extra six months.

An apprenticeship is a different story.

Question 133

Subject: Business Sale – Employee Entitlements at Changeover

Upon sale of a business, is Long Service and Sick Leave calculation negotiable in QLD?

Recently, I was involved with a business acquisition in the construction industry where they calculated Long Service Leave on staff employed greater than five years and sick leave 100%. In NSW & Victoria, only 20 or 50% of total Sick Leave accrued; I could not find a fixed % for Qld.

Answer

If the new owner recognises the existing entitlements

When there is a transfer of business, a new employer must recognise an employee's service with the old employer when working out most of their entitlements, including:

- sick and carer's leave
- requests for flexible working arrangements
- parental leave.

However, there are some entitlements that the new employer might not have to recognise. These include:

- redundancy
- annual leave
- long service leave
- unfair dismissal
- notice of termination.

If they recognise service, then it is 100% there are no percentages.

Question 134

Subject: Family Trust Carry-Forward

A family trust has 100,000 carry-forward losses as at 30/6/2019. In 2020 the family trust had 100,000 profits.

My question is...

Can the family trust ignore the carry-forward losses, distribute the profit, including franking credits?

Answer

The carried forward losses are included in the calculation of taxable income.

The only argument for not including the losses would be if a valid family trust election (FTE) were not done in 2019.

However, not having a valid FTE in place could endanger the franking credits if they are over $5,000.

To gain the benefit of the franking credit, everything should be done to ensure the Trust legitimately has a small taxable income in finalising the accounts, including recognising revenue in 2020 or deferring expenses until 2021.

Question 135

Subject: Transfer Funds to Foreign Company

Company A was established in Australia and owned by foreign company B (100% ownership by ordinary shares: $600,000).

Company A used the fund of $600,000 to operate the business in Australia, and it made a total loss of $200k for two financial periods.

Company A decided to cease the operation in Australia. Company A currently has $400,000 in the bank because they have not spent all the initial funds.

Questions are:

1. How can the remaining balance be transferred to a foreign company (in an overseas country) and the process/tax implications?
2. Are they any other points to consider when company A ceases to operate?

I want to clarify if:

- There will be no tax payable regarding the transfer of remained cash balance in Company **A** to foreign company **B**, which owns 100% of Australian company **A**. Is it correct?
- There will be no limitation of the above when transferring to a foreign company?

Answer

For company A...

It is crucial that the company's balance sheet be cleared and there are no assets or liabilities.

In particular, make sure no lodgements or amounts are outstanding with the ATO or ASIC.

Be sure that the company is facing no legal matters.

Prepare appropriate company minutes returning the shareholder funds to company B.

After the funds have been returned to Company B, fill out a form 6010 for ASIC to deregister the company.

The lodgement fee for this is $42.

The Director must make signed declarations relating to the above on the form, so exercise due care.

The company has incurred tax losses – there is no tax payable on a return of capital to shareholders.

Question 136

Subject: Superannuation Guarantee

10% Superannuation Guarantee is payable effective July 1, 2021.

The various circulars we are receiving advocate that if the salary paid on July 21 for the period ended on or before 30/6/21, superannuation is still 10%.

Would this be true if we pay Cash / Bank (Salary) against "Salary Payable", for which we have booked expenses before 30/6/21 for the salary?

My argument is, expenses booked in a period before 30/6/2021, Super should be 9.5%.

Please advise what the ruling around this is.

Answer

We understand the confusion, but for payments related to the June 30, 2021 (or earlier) quarter, the amount is definitely 9.5%.

Question 137

Subject: - Deceased Estate with Farm

We have a deceased estate with farm property Estate JH.

Under the will of his father, who died in 1959, JH was left the farm property under these clauses:

"I authorise my wife to continue for such period as she may desire the farming operations carried on by me on my death."

"On the death of my said wife, I direct that all the property of which my wife shall have had the use of during her life as aforesaid shall pass to my son JH."

The wife died in 1985.

For capital gains tax purposes, what is the date on which JH is deemed to have acquired the property?

Answer

We need to be very careful where the CGT issues are linked to the terms and conditions of a Will.

While we strongly suggest you speak to the client's lawyers, the relevant CGT dates will be linked to title transfers.

Establish whether a testamentary trust was created by the terms and conditions of the Will – take legal advice.

If so, was the title transferred to the testamentary trust?

Or was the title transferred to the wife?

Or is this an Estate of long-standing that has not been settled?

It will be necessary to establish who has the current title and work back from there, taking legal advice.

Question 138

Subject: Residency of a Deceased Estate.

We have a question regarding the residency of a deceased estate.

Following are the facts regarding the estate:

1. The deceased was a non-resident of Australia (UK resident), lived in the UK since the 1960s.
2. The deceased owns 3 Property Units here in NSW, Australia. The properties were passed onto him under his brother's Will. The deceased filed his Australian tax returns as a non-resident and taxed at non-resident rates.
3. After death, the properties above formed part of the deceased's Australian estate.
4. The sole executor and trustee of the deceased's Australian estate is an Australian resident residing in Australia.
5. The estate's sole beneficiary is the deceased's spouse, also a non-resident (UK resident).

Given the above scenario, would you kindly advise the tax residency of the above deceased estate?

Answer

While we think this is a deceased estate for a UK resident, to be administered in accordance with the relevant legislation in the United Kingdom, you will need to take legal advice to confirm this.

The CGT issues on the disposal or transfer of the Australian units will be subject to Australian law.

A lawyer with Deceased Estate experience will need to review the Will.

Question 139

Subject: Top-Up Maternity Leave

We are current members & have a question regarding maternity leave & annual leave payments.

Is it possible for an employee to 'top-up' the minimum wage maternity leave with annual leave payments?

Answer:

The short answer is yes; they can.

As long as both the employer and employee agree, and a leave application is filled out.

Question 140

Subject: Loan for Investment Rental Property

If a family member lends funds for another family member to purchase an investment property and charges interest on the loan, is the interest deductible for the member/ owner of the property?

I assume if one claims a deduction, the other member declares the interest in their tax return.

What rate of interest should be charged against the loan?

Answer

The interest is deductible to the owner of the property as the principal was used to invest in an income-earning asset.

You are correct – the lender must include the interest they receive in their assessable income.

A commercial rate of interest should be charged, referring to the big 4 bank's standard variable home loan rate.

This will fluctuate over time.