

Tax Essentials Capital Gains Tax Minimisation Strategies 2022

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THE NEWSLETTER

Tax Planning Update

MICHAEL'S CORNER

Article No.16

Dealing with difficult behaviours

SPECIAL ISSUE

Capital Gains Tax (CGT)- Minimisation Strategies



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The Newsletter

TAX-DEDUCTIBLE COVID-19 PCR AND RAPID ANTIGEN TESTS

The federal government will make COVID-19 tests tax-deductible for Australian individuals and exempt from fringe benefits tax (FBT) for businesses purchased for work-related purposes.

Key points:

- PCR tests and RATs will be tax-deductible, backdated to July 1, 2021
- Australians earning an income taxed at 34.5pc will receive a refund of about \$6.90 for every \$20 pack of two RATs
- Small businesses will reduce their FBT liability by about \$20 for every dual pack of RATs purchased for \$20

Initially, the change will see PCR and rapid antigen tests (RATs) become tax-deductible, but the government intends to include future medically approved tests in the scheme.

The legislation will be in effect from the 2021-22 FBT and income years and will be backdated to July 1, 2021.

Australians earning an income taxed at 34.5 per cent (including Medicare levy) will receive a tax refund of about \$6.90 for every pack of two RATs purchased for \$20.

Small businesses will reduce their FBT liability by about \$20 for every dual pack of RATs purchased for \$20 and provided to employees.

Treasurer Josh Frydenberg announced the changes to tax legislation in a speech to the Australian Industry Group on 7.2.2022. .

BAS DURING COVID

If you lodge your business activity statement (BAS) quarterly, the last one is due on 28 February 2022.

Like many small businesses that continue to be affected by COVID, you may be having trouble meeting your BAS lodgement obligations. If that's the case, these tips may help prepare your next BAS.

- Even if you have nothing to report, you still need to lodge your BAS as 'nil'.
- Lodge online, and you may receive an extra two weeks to lodge and pay.
- If you're reporting and paying pay as you go (PAYG) instalments, you may be able to vary the amount or rate for the current income year. If your business income is reduced, you can lodge a variation on your next BAS or instalment notice.
- Even if you can't pay in full, it's essential to lodge on time and pay what you can. Once you lodge and have up-to-date records, you can understand your tax position and find the best support. If you can't pay in full, payment options are available, and the ATO can assist.

If you're closing or selling your business, you need to cancel your GST registration. Remember to complete your lodgement and payment obligations before cancelling your GST registration.

Remember, your BAS can be lodged through a registered tax or BAS agent, giving you an additional two-week grace. Not dealing with this important lodgement obligation could result in a fine of \$222 for each week you are late. It is essential to lodge on time.

VACCINATION INCENTIVES

Many employers have encouraged employees to get COVID-19 vaccinations with incentives and rewards.

In December, the ATO published a fact sheet outlining COVID-19 vaccination incentives and rewards. Employers providing non-cash benefits such as gift cards, vouchers or raffle prizes to employees will likely be subject to FBT unless the minor benefits exemption or in-house reduction applies.

COVID TESTING

Due to the daily case numbers, some employers have provided COVID testing support to employees due to border restrictions or company safety mandates. ATO guidance has confirmed COVID tests will not attract FBT where:

- Testing is carried out by a legally qualified medical practitioner and is available to all employees.

- Provided infrequently and irregularly and the cumulative value of the tests provided to an employee is less than \$300; or
- The test is required for an employee travelling to work due to border restrictions.

TRAVEL

Refer to the below recently finalised ATO rulings and guidance when determining FBT treatment of travel expenses:

- TF 2021/1 – Income Tax: when are deductions allowed for employees’ transport expenses?
- TR 2021/4 – Income tax and fringe benefits tax: employees: accommodation and food and drink expenses travel allowances and living-away-from-home allowances
- PCG 2021/3 – Determining if allowances or benefits provided to an employee relate to travelling on work or living at a location – ATO compliance approach

Given the finalisation of these rulings and changes brought on by COVID-19, employers with mobile workforces should review their travel policies and arrangements. If you are not applying PCG 2021/3, consider the hiatus in extensive executive travel due to the pandemic. Now might be an opportune time for larger companies to revise protocols concerning executive travel. This could reduce FBT.

The PCG sets a “safe harbour” of an aggregate period of fewer than 90 days in an FBT year for presence at a particular temporary work location to be treated as travelling on work. Provided that this requirement is met, the Guideline allows an employee to have numerous short stints of travel of up to and including 21 continuous days. Notably, Fly-in Fly-out or Drive-in Drive-out are excluded from the PCG, so the safe harbour cannot apply in these scenarios.

ELECTRIC VEHICLES

Some employers consider including electric vehicles in their fleet to achieve emission reduction targets.

The FBT legislation was enacted in 1986 and did not contemplate the use of electric vehicles. The ATO currently considers some practical challenges on how to value the vehicle benefits (including substantiation).

Federal Labor targets 50% of new car sales to be electric vehicles by 2030 and has proposed an FBT exemption for electric cars to encourage increased uptake. The intended result is that purchasing or leasing an electric car for use by employees would result in the same outcome as purchasing a dual cab ute.

SIGNING AND SENDING OF ELECTRONIC DOCUMENTS

Around a million businesses will save around \$450 million in red tape each year after the Federal Government passed legislation on 10.2.2022 making permanent the temporary changes introduced at the height of the coronavirus crisis relating to AGMs and the signing and sending of electronic documents.

The *Corporations Amendment (Meetings and Documents) Bill 2021* amends the *Corporations Act 2001*, allowing companies and registered schemes to use technology to meet regulatory requirements to hold meetings, such as annual general meetings, distribute meeting-related materials and validly execute documents.

Specifically, the reforms provide greater certainty and flexibility to companies and registered schemes by:

- allowing them to hold physical and hybrid meetings and wholly virtual meetings if expressly permitted by the entity’s constitution.
- ensuring that technology used for virtual meetings will enable members to participate in the meeting orally and writing.
- allowing them to use technology to execute documents electronically, including corporate agreements and deeds.
- allowing them to send documents in hard or soft copy and give members the flexibility to receive documents in their preferred format.

The Federal Government aims to support higher productivity across the economy by ensuring that regulatory settings are fit-for-purpose, providing businesses greater flexibility and utilising technology to meet their regulatory requirements.

HIGH COURT BACKS CONTRACT JOBS

ZG Operations & Anor v Jamsek & Ors [2022] HCA 2

In a landmark decision handed down on 9.2.22, the High Court has backed the right of a business to engage workers outside of minimum wage laws and employment regulations. The decision could result in a surge in independent contracting and support Uber and Deliveroo’s claims that their drivers are not employees.

In a unanimous decision, the High Court held that two truck drivers who worked nine-hour days for a

lighting company for almost 40 years under a partnership arrangement were not employees entitled to minimum pay and conditions, including superannuation and annual leave.

Led by Chief Justice Susan Kiefel, a majority of the High Court overruled the long-running approach by some courts to look beyond a worker's contract to the social reality of the working relationship. Instead, it relied almost solely on the terms of the contract itself.

To quote the judgement, "The employment relationship with which the common law is concerned must be a legal relationship. It is not a social or psychological concept like friendship."

The decision could effectively mean that if lawyers draft a contract that correctly deals with the key issues, a business can avoid minimum award pay and conditions, workers' compensation, superannuation, redundancy, and other statutory requirements.

It is anticipated that this outcome will entrench existing independent contracting in industries like transport, construction and the gig economy. Other sectors in the long term may be encouraged to engage more contractors.

This ruling may well feature in the federal election, with the court leaving little option but legislation if unions want to protect workers' rights from "sham" contracts.

Here are the facts as taken from the court's summary. The High Court allowed an appeal from a judgment of the Full Court of the Federal Court of Australia. The appeal concerned whether a company engaged two truck drivers as employees or independent contractors.

Between 1977 and 2017, Mr Jamsek and Mr Whitby ("the respondents") were engaged as truck drivers by a business run by the second appellant ("the company"). The respondents were initially engaged as employees of the company and drove the company's trucks. However, in 1985 or 1986, the company offered the respondents the opportunity to "become contractors" and purchase their own trucks. The respondents agreed to the new arrangement and set up partnerships with their respective wives. Each partnership executed written contracts with the company for the provision of delivery services, purchased trucks from the company, paid the maintenance and operational costs of those trucks, invoiced the company for its delivery services, and was paid by the company for those services. Income from work performed for the company was declared as partnership income for income tax purposes and split between each respondent and their wife.

The respondents commenced proceedings in the Federal Court of Australia seeking declarations in respect of certain entitlements alleged to be owed to them pursuant to the Fair Work Act 2009 (Cth), the Superannuation Guarantee (Administration) Act 1992 (Cth) and the Long Service Leave Act 1955 (NSW). The respondents claimed to be owed those entitlements on the basis that they were employees of the company. The primary judge concluded that the respondents were not employees and instead were independent contractors. The Full Court overturned that decision and held that the respondents were employees regarding the "substance and reality" of the relationship.

The High Court unanimously held that the respondents were not employees of the company. A majority of the Court held that consistently with the approach adopted in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, where parties have comprehensively committed the terms of their relationship to a written contract, the efficacy of which is not challenged on the basis that it is a sham or is otherwise ineffective under general law or statute, the characterisation of that relationship as one of employment or otherwise must proceed by reference to the rights and obligations of the parties under that contract.

After 1985 or 1986, the contracting parties were the partnerships and the company. The contracts between the partnerships and the company involved the provision by the partnerships of both the use of the trucks owned by the partnerships and the services of a driver to drive those trucks. The context in which the first contract was entered into involving the company's refusal to continue to employ the drivers and the company's insistence that the only relationship between the drivers and the company be a contract for the carriage of goods. This relationship was not a relationship of employment.

THE COST OF TAX CONCESSIONS EXPLODES

A recent article in the SMH outlined how record low interest rates and government stimulus have helped save the economy from the COVID-19 recession. However, the flip side to this is an explosion in the cost of federal tax concessions.

While this gives the Government something to think about ahead of the 2022/23 budget on 29 March, there is no suggestion of the concessions discussed are under immediate threat.

Figures released by Treasury show the exemption of the family home from capital gains tax (CGT) will in 2021/22

cost a record \$64 billion in forgone revenue. It is a \$9 billion increase on the forgone revenue estimated for 2020-21, which itself was an \$8 billion increase over 2019-20.

The cost of the concessional tax rates on superannuation climbed by \$13.5 billion to a record \$43.1 billion. The 50 per cent concession on CGT available to individual taxpayers or trusts for assets held longer than 12 months lifted by 21 per cent to cost a record \$11.8 billion.

It is hardly surprising property prices and share values have soared due to the various government and Reserve Bank programs put in place to safeguard the economy amid COVID-19. That has driven the large increase in the relative value of the tax concessions around super, the family home and CGT.

The increase in the cost of the superannuation concession can be explained by:

- profit terms in the housing and share markets having more disposable liquid funds to place in superannuation
- the clear incentive for such individuals to maximise concessional (tax-deductible) superannuation contributions, including “catch up” contributions available from 1.7.2018
- Maximising these contributions can lower and, in some cases, eliminate the capital gain tax.

COVID-19 has delivered the largest budget deficits on record. After an \$85.3 billion shortfall in 2019-20, it increased to \$134.2 billion last financial year and is forecast to edge down to \$99.2 billion in 2021-22.

Gross government debt is at \$859 billion and is forecast to exceed \$1 trillion by the decade.

As always, preparing a Federal Budget is a delicate balancing act, especially with the challenges of COVID-19 and a looming Federal Election.

SUPPORT INVESTMENT AND JOBS

On 10.2.2022, the Morrison Government introduced legislation to create Australia’s first Patent Box to drive more investment, create more jobs and back Australian companies to commercialise their cutting-edge innovations in Australia.

Under Treasury Laws Amendment (Tax Concession for Australian Medical Innovations) Bill 2022, income earned from new patents that have been developed in Australia will only be taxed at a concessional rate of 17 per cent.

The Patent Box is a part of the Government’s economic plan, announced as part of the 2021-22 Budget. It will

increase investment by incentivising innovative Australian businesses to commercialise their research and development in Australia.

This new concession, provided through Australia’s patent box regime, will support research and development for decades to come, as well as help retain Australian innovations in Australia during commercialisation. It complements the Government’s additional \$2 billion investment in the Research and Development Tax Incentive announced in the 2020-21 Budget.

GETTING IT RIGHT FOR SUPER

Paying super is an integral part of being an employer. While most employers do their best to keep up with paying employees super, things don’t always go to plan.

If you missed or didn’t pay the total amount of your employees’ super guarantee (SG) for the quarter ended 31 December 2021, you’ll need to:

- lodge a *Super Guarantee Charge Statement* to the ATO by 28 February 2022
- pay the SG charge to the ATO.

By law, the ATO cannot extend the due date to pay SG.

How you calculate the SG charge is also different from how much SG you pay to your employees’ funds. The SG charge is calculated on an employee’s total salary and wages (including overtime and some allowances) and includes interest and an administration fee of \$20 per employee per quarter.

Even if you can’t pay the full amount, you should still lodge an SG charge statement by the due date to avoid a late lodgement penalty. The ATO will work with you to find a solution tailored to your situation.

ADDITIONAL SUPERANNUATION GUARANTEE CHARGE (SGC)

PS LA 2021/3 – Remission Of Additional Superannuation Guarantee Charge (SGC)

In what are very trying times, some employers place payment of employees’ statutory superannuation well down the list of priorities. The SGC becomes payable if you fail to pay employees within 28 days of the close of a relevant quarter. It includes the shortfall, a 10% admin fee and nominal interest. The SGC and the severe penalties discussed below are not tax-deductible which worsens matters. It all can become a costly exercise, which