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PRACTITIONER ARTICLE

Fighting fire with fire: taking on a tax dispute

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Introduction

The relationship between taxpayers and their advisers on one hand, and the ATO on the other, ebbs and flows. Recent decades have witnessed the lows of the mid-1990s, with its mass marketed schemes controversy, to better times in recent years supported by the co-operative compliance initiative and greater focus on mediation and dispute resolution.

However, events can occur from time to time that rock the relationship. The ongoing commentary by the Commissioner directed at perceived work-related claims rorting might be an example. Statements made last year, at the Tax Institute national conference, to the effect that clients of tax practitioners are the worst culprits, thereby implicating all practitioners, most definitely soured the relationship.

Another matter that may be testing the relationship is the proceedings currently underway against a former tax official turned whistleblower. It is not uncommon for those who have had extended dealings with the ATO to complain that they have encountered problematic behaviour by ATO officials. As practitioners we typically take these in our stride and look for a work around. So when a whistleblower comes forth, from within the organisation, alleging inappropriate administrative practices this is something we may relate to. What then has the appearance of a persecution of the whistleblower damages our faith in the institution's preparedness to acknowledge and respond to poor practices.

A taxpayer who considers themselves the subject of overly zealous or unfair practices by the ATO has few avenues to respond. However, one potentially very effective opportunity may be available for a particularly brave (and well resourced) taxpayer to take the fight to the ATO.

The ATO's recovery powers

A troubling issue facing taxpayers in a contest with the ATO is that tax legislation is weighted heavily in favour of the ATO's tax collection rights at the expense of the protection of taxpayers. Conclusive presumption provisions exist that enable the ATO to instigate recovery proceedings, including garnishee and insolvency applications, albeit that the taxpayer has commenced proceedings to contest the assessment.

In the context of an extended dispute resolution process, a requirement to pay tax now and dispute later may have disastrous financial consequences for a taxpayer even if ultimately successful. In particular, as the Inspector-General reported in 2015 (http://igt.gov.au/publications/reports-of-reviews/atos-approach-to-debt-collection/), it may even impact on the ability of the taxpayer to prosecute the primary proceedings. Notably, the Australian position is to be contrasted to comparable jurisdictions and has led to calls for reform to better balance revenue protection with taxpayers' rights.

Is there a problem in practice?

Balancing these extraordinary rights are undertakings by the ATO that it will only exercise them in exceptional cases (such as where the taxpayer is vexatious and simply trying to delay payment) and would rather work with taxpayers towards a mediated solution. For over two decades, the ATO has pursued a co-operative compliance policy whereby it purports to work with, not against, taxpayers in the administration of the tax system. To its credit, the ATO has been a world leader in this regard.

Research has identified, though, that it is much easier for the ATO hierarchy to espouse such a policy than to implement it. The reluctance to devolve discretionary powers to tax officers in the field, together with the imposition of managerial constraints and targets, has meant that the pursuit of a more co-operative relationship may be largely aspirational. Furthermore, being human after all, tax officers' perceptions, real or imagined, as to poor or aggressive taxpayer behaviour do have an action and reaction affect.

A current flash point centres on the use of the ATO's garnishee powers in Div 260 of Sch 1 to the *Taxation Administration Act* 1953. An ABC Four Corners program in 2018 focused on the use of these powers in a program suggestive of the ATO as an institution administering the tax system regardless of the impact on taxpayers (https://www.abc.net.au/news/2018-04-09/whistleblower-exposes-ato-cash-grab-targeting-small-businesses/9633140). While the expose came as little surprise to most tax advisers, there was a sense that there might have been more to the story in each case and the taxpayers could have benefited from better advice. Nevertheless, the overall premise of a powerful, often intransigent, administrator was recognisable.

Since the program aired subsequent developments have not helped to dispel this sentiment. Although a review by the Inspector-General found no systemic problem, it did confirm that there had been incidents of overly zealous behaviour by ATO officers and that the recovery powers needed to be exercised with restraint (https://cdn.tspace.gov.au/uploads/sites/16/2019/03/190313-Review-into-the-ATOs-use-of-Garnishee-Notices-FINAL.pdf). A further report by the Australian Small Business and Family Enterprise Ombudsman was more damning, calling for the ATO to immediately cease debt recovery action against any small business with a dispute before the AAT (https://www.asbfeo.gov.au/research/ato-and-small-business).

Meanwhile, the whistleblower featured in the Four Corners program is on bail and remains on track for prosecution and a prison sentence of up to 161 years (https://www.abc.net.au/news/2019-06-03/ato-whistleblower-facing-prison-says-he-almost-died-from-stress/11167954). This is, notwithstanding, that he had initially made his disclosures, as to aggressive debt collection practices using garnishee notices, to the ATO hierarchy under the provisions of the *Public Interest Disclosure Act* 2013. It was reported that, upon his concerns being dismissed by an internal review, the ATO offered him a settlement, over an alleged breach of the Public Service Code of Conduct, in the form of a payout with no admission of liability but on the proviso a gag order was signed. He declined, asserting a greater need for his complaints to be actioned, only then going to the media.

What rights do taxpayers have?

Much has been said about the chilling effect the prosecution of this whistleblower has on public accountability. Certainly, mixed messages are in train. While enhanced corporate whistleblower protections commence from 1 July, a number of high profile attacks on whistleblowers are currently making headlines.

Focusing on this particular whistleblower's complaint, what can taxpayers do who perceive that they are the subject of an inappropriate exercise of the ATO's tax collection powers? After all, the Inspector-General did acknowledge that there had been instances of this, with the Small Business Ombudsman going further in suggesting that it was a bigger problem.

A distinction must be drawn between where an ATO policy is particularly draconian and where the issue can be attributed to overly zealous tax officers. In respect to the former, the appropriate response is for taxpayers and their advisers to lobby the ATO for a reconsideration of its policy in the first instance and then elevate the matter to the Inspector-General and ultimately the government if necessary. This approach might suggest reforms, such as specific statutory limitations on the powers of the ATO, a taxpayers' bill of rights or even a general bill of rights might avail aggrieved taxpayers who could point to a lack of proportionality.

As for alleged overly zealous exercises of power, the new ATO mediation procedure may prove useful to achieve better outcomes for taxpayers. Otherwise, in some situations taxpayers may be able to fall back on provisions such as s 482 or 459J of the *Corporations Act* 2001 (to have a statutory demand set aside or insolvency proceedings stayed where, for instance, conduct productive of substantial injustice can be established). Importantly, it has been held that no review of a decision to commence recovery is available under the *Administrative Decisions (Judicial Review) Act* 1977 as there is no decision under an enactment (*Golden City Car and Truck Centre Pty Ltd v FCT* 99 ATC 4131 and *Ruddy v DCT* 98 ATC 4369). Thus, most taxpayers are typically left to seek judicial review under s 39B of the *Judiciary Act* 1903 on the grounds of conscious maladministration. Such claims are almost always unsuccessful, suggestive of a very high threshold.

However, another cause of action, which has been the subject of some judicial discussion in Australia in recent years, may be worthy of consideration, namely the tort of misfeasance in a public office (*FC of T* v *Futuris Corporation Ltd* 2008 ATC

¶20-039 ; *FC of T* v *Donoghue* 2015 ATC ¶20-551 and at first instance 2015 ATC ¶20-494). This tort is under development and has the advantage of avoiding some of the limitations of judicial review proceedings and might found a claim for damages. The elements of the tort focus on the conscious or reckless invalid/unlawful exercise of power by a public officer with an intentional or reckless indifference to the interests of the plaintiff, where this causes loss.

In *Futuris*, the High Court held that a deliberate failure to administer the tax law according to its terms could amount to conscious maladministration allowing the validity of a tax assessment to be challenged in judicial review proceedings. The Court made reference to the tort of misfeasance in public office to support its conclusion. As a caveat though the Court made it clear that any such challenge would not be entertained without a solid prima facie case.

Subsequently, Logan J at first instance in *Donoghue* held that the Commissioner's use of privileged material in order to levy an assessment on a taxpayer was sufficiently reckless to amount to conscious maladministration as envisaged by this tort. While on appeal the matter was decided on other grounds, the premise was not displaced that the tort of misfeasance in a public office might be available to a taxpayer.

An added significance of this tort is that personal liability actually extends to the relevant public officer — most likely the Commissioner but how far down the chain is unclear (raising further issues as to vicarious liability and indemnification and state assistance in defending proceedings). Even if an officer might ultimately not be personally liable such actions/threats would be expected to take a personal toll and might be career terminating.

Of course, there would need to be a good faith basis to commence such an action but in the case of protracted disputes (particularly at the mid-tier company/high net worth individual level) it is often not difficult to characterise tax officer tactics and behaviour in such a way as to support an allegation of intentional or reckless unlawful exercise of power. Could it be that the institution of recovery/garnishee proceedings that hamper the ability of a taxpayer to prosecute their case, possibly coerce them into withdrawing or settling the primary matter or even bring the demise of the taxpayer through liquidation, might be so characterised?

Conclusion

It is hard to imagine that, given the rhetoric of the senior executive of the ATO and with all the checks and balances in place, rogue officers can still trample over a taxpayer's rights. But the Inspector-General and Small Business Ombudsman reports would suggest that this is possible. It is hoped that the relatively new ATO mediation procedure will have a role to check such indiscretions. If not, taxpayers and their advisers might consider whether an action specifically targeting the Commissioner and his officers would sufficiently focus their attention on the appropriateness of their actions.

But what of official policies? Although the ATO argues that their recovery powers are exercised with moderation, others challenge this proposition pointing to the potential for a disproportionately adverse impact on a taxpayer, especially where the underlying liability is contested. While other jurisdictions might apply a proportionality principle as part of their code of rights to ensure that equivalent powers are not exercised with reckless indifference as to the interests of the taxpayer, no such opportunity exists in Australia. Could it be that the courts might, ultimately, develop the tort of misfeasance in a public office to effectively apply such a principle?

PRACTICE ALERT

Six tax practitioners suspended for failing to lodge annual declaration

Tax practitioners risk facing suspension of their registration if they do not lodge their annual declarations with the Tax Practitioners Board (TPB) on time.

The TPB has for the first time suspended six tax practitioners for failing to lodge their annual declaration due by 1 April.

Annual declarations provide confirmation that registered practitioners are fully compliant with their legal and ethical obligations, including professional indemnity insurance, and for individual practitioners, continuing professional education.

The six tax practitioners were each issued with three sanctions on 20 June 2019, comprising:

- a written caution
- an order to lodge their annual declaration within two months, and
- suspension of registration for three months.

TPB CEO, Mr Michael O'Neill said the annual declarations help protect members of the public who use tax practitioner services and failure to submit by the due date may result in a sanction, including suspension or termination of registration.

He also mentioned that the TPB is working closely with recognised professional associations to ensure members submit their registration renewal or annual declarations with the TPB on time.

Source: TPB media release, 27 June 2019.

ATO to amend returns if low and middle income tax offset changes enacted

The proposed changes to the low and middle income tax offset, intended to take effect from the 2018/19 income year as part of the Personal Income Tax Plan changes announced in the 2019 Federal Budget, are not yet law.

The ATO has advised that if these changes become law after an individual's 2018/19 tax return is processed, it will automatically amend their assessments to add any additional credits, meaning taxpayers need not request for amendments.

Tax agents can access the amended notice of assessment using:

- Online services for agents Communication history or Lodgment — Income tax — History, and
- The Tax Agent portal Client Communication list or Assessment notice — income tax.

Source: ATO website, 24 June 2019.

Grace periods for corrections to single touch payroll reporting

Employers reporting tax and superannuation information to the ATO via single touch payroll have two weeks from 30 June 2019 to correct errors in statements submitted during the 2018/19 financial year without being penalised.

The Taxation Administration — Single Touch Payroll — Grace periods for correcting statements establishes a grace period which allows an entity to correct an error:

- within 14 days of the date on which the error is identified, or
- in the next regular Single Touch Payroll report for that person, and
- in all cases not later than the 14th day after the end of the relevant financial year in which the statement was made.

If an entity does not correct a statement within the relevant grace period, it may be liable to a penalty for making a false or misleading statement.

The legislative instrument commences on 1 July 2018. It applies retrospectively from 1 July 2018 to allow businesses to correct errors at a later date without penalties.

INCOME TAX

Guidance on CGT exemption for main residence from a deceased estate

The ATO has finalised guidance which outlines a safe harbour compliance approach for trustees or beneficiaries of deceased estates seeking to claim the CGT exemption when they sell a main residence owned by the deceased within two years of their death.

This exemption in s 118-195 of ITAA 1997 also permits the Commissioner a discretion to allow a period longer than two years to obtain the exemption.

Practical Compliance Guideline PCG 2019/5 sets out the circumstances in which trustees or beneficiaries of a deceased estate can manage their tax affairs as if the Commissioner had exercised this discretion. It also sets out the factors the Commissioner will consider when deciding to exercise the discretion to extend the two-year period.

The guidance was previously issued as draft PCG 2018/D6. The ATO has also published a compendium to respond to feedback on its draft guidance.

Compliance approach

To qualify for the safe harbour, all of the following conditions must be satisfied:

- during the first two years after the deceased's death, more than 12 months was spent addressing certain circumstances. These include a challenge to a will or ownership of the dwelling, a life or other equitable interest delayed the disposal, complexity of the estate delayed administration or settlement of a sale contract was delayed due to circumstances outside the taxpayer's control
- the dwelling was listed for sale as soon as practically possible after the above circumstances were resolved
- the sale completed (settled) within 12 months of the dwelling being listed for sale (increased from six months as stated in the draft PCG)
- no adverse factors exist, eg activities undertaken to improve the sale price of the dwelling, and
- the longer period for which the discretion to be exercised is no more than 18 months (increased from 12 months as stated in the draft PCG).

The guideline also illustrates the ATO's approach to the safe harbour in a number of examples.

Factors relevant to exercise discretion

The Commissioner will generally allow a period longer than two years if the reasons for not disposing the dwelling were beyond the control of the beneficiary or trustee and such reasons existed for a significant portion of the first two years. Both

favourable and adverse factors are weighed up in the context of the circumstances of the case. While the circumstances are more important than the length of delay, the amount of any potential capital gain or loss is not a relevant factor.

TPRS Exemptions: Legislative Instrument

A legislative instrument has been registered to provide a de minimis exemption from complying with certain obligations under the taxable payments reporting system (TPRS).

The *Taxable Payments Reporting System — Reporting Exemptions for Certain Entities Determination 2019* (F2019L00864) has been registered and will commence on 1 July 2019.

It exempts entities that meet specific criteria from having to prepare and lodge reports relating to payments to third party contractors for courier, cleaning, information technology, security, investigation, surveillance, or road freight services under s 396-55 of Sch 1 to the TAA 1953.

The exemption is for entities whose supply of the relevant services covered by the TPRS makes up only a small part of their overall business activities. Particularly, where the consideration received by the entity in a reporting period for a particular type of service, as listed in s 396-55, is less than 10% of its GST turnover for that period, the exemption is available.

The TPRS in Subdiv 396-B of Sch 1 to the TAA requires certain entities to lodge an annual report with the ATO giving details about consideration provided to other entities for supplying certain types of services on their behalf.

Effective life of depreciating assets for 2019/20

Taxation Ruling TR 2019/5

The Commissioner has issued the annual taxation ruling, TR 2019/5, which contains the effective life of depreciating assets under s 40-100 of ITAA 1997. It contains new effective life determinations which have been incorporated into Tables A and B in the Schedule to TR 2019/5.

Table A is an industry category table listing assets that are peculiar to a particular industry or for which a particular effective life is appropriate because of the way the asset is used in that industry. Table B covers assets generally. Taxpayers in industry can only use Table B entries if the particular asset is not listed under the relevant industry heading in Table A.

The ruling comes into effect from 1 July 2019.

Previous ruling withdrawn

TR 2019/5 replaces TR 2018/4, which is withdrawn with effect from 1 July 2019.

The views contained in TR 2018/4, to the extent to which they are still applicable, have been incorporated into TR 2019/5.

Draft ruling on non-concessional MIT income

The ATO is seeking comments on the draft *Law Companion Ruling* LCR 2019/D2 Non-concessional MIT income.

This draft ruling sets out the ATO's view on the application of amendments to the non-concessional MIT income provisions contained in the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Act 2019*. These amendments increase the withholding rate on fund payments by managed investment trusts (MITs), to the extent they are attributable to non-concessional MIT income (NCMI), to 30%.

The ruling covers the key aspects of NCMI, with particular focus on MIT cross staple arrangement income. It covers:

- determining when an amount derived, received or made by a MIT is attributable to NCMI
- the meaning of "cross staple arrangement" for the purposes of determining MIT cross staple arrangement income
- the scope and application of exceptions to MIT cross staple arrangement income
- the interpretation of the terms "facility" and "economic infrastructure facility"
- integrity rules, particularly in respect of economic infrastructure facilities where the income is attributable to rent from land investment
- the meaning of MIT trading trust income, MIT residential housing income and MIT agricultural income, and
- transitional provisions, which allow pre-existing MIT withholding rates to apply for certain periods of time.

The draft ruling includes various examples illustrated for better understanding of the Commissioner's view of these rules. When finalised, the ruling will apply from 1 July 2019, broadly the start date of the legislative amendments.

The last day for comments is 9 August 2019.

Division 7A guideline extended to sub-trust arrangements maturing in 2020 income year

The Commissioner has issued an updated *Practical Compliance Guideline* PCG 2017/13 to extend its application to sub-trust arrangements maturing in the 2020 income year.

The updated guideline applies to a private company (or trustee) beneficiary of a trust and sub-trust where the trustee:

- has, in accordance with PS LA 2010/4 *Division 7A: trust entitlements*, validly adopted investment Option 1 on, or before, 30 June 2013 to place funds representing an unpaid present entitlement (UPE) under a sub-trust arrangement on a seven-year interest only loan with the main trust, and
- does not repay the principal of the loan when it matures in the 2017, 2018, 2019 or 2020 income year.

PAYG withholding schedules for 2019/20

The Commissioner has issued a legislative instrument containing 11 withholding schedules specifying the formulas and procedures to be used for working out the amount to be withheld by an entity under the pay as you go (PAYG) system.

These schedules facilitate the collection of income tax, Medicare levy, Higher Education Loan Program, Student Start-up Loans, Trade Support Loans and Financial Supplement repayments.

Schedule 8 dealing with student loan repayments has been updated to replace the current repayment thresholds and repayment rates with new ones, including a new minimum repayment threshold and repayment rate plus additional repayment thresholds and rates.

The instrument, which commences on 1 July 2019, repeals and replaces legislative instrument *Taxation Administration Act Withholding Schedules 2018* (F2018L00973).

Source: Taxation Administration Act Withholding Schedules 2019, registered on the Federal Register of Legislative Instruments as F2019L00894.

Class and product rulings issued

The ATO has issued the following class rulings:

- *Class Ruling* CR 2019/40 MyLogbook Solution — use for FBT car logbook and odometer records. The ruling applies from 1 April 2019 to 31 March 2023.
- *Class Ruling* CR 2019/41 YWCA Canberra Ltd — deductibility of donations under a Payment Direction Deed. The ruling applies from 1 July 2018 to 30 June 2023.
- *Class Ruling* CR 2019/42 Amcor Limited — scrip for scrip roll-over. The ruling applies from 1 July 2018 to 30 June 2019.

Product ruling issued

The ATO has issued *Product Ruling* PR 2019/4 Income tax: Challenger Guaranteed Annuity (Liquid Lifetime) — 2019. The ruling applies from 6 May 2019.

Appeal news — Mingos

The taxpayer has appealed to the Full Federal Court against the decision of the primary judge in *Mingos* v *FC of T* 2019 ATC ¶20-694.

In that case, Davies J held that a taxpayer failed to establish that he had an ownership interest in a property or that he had an absolute entitlement to the property as against a trustee pursuant to s 106-50 of ITAA 1997. In the absence of documents substantiating land tax or selling costs, the primary judge held that he did not discharge his onus of proof that a capital gain on which he was assessed was excessive. The capital gain arose from the sale of the property, which he had received as a trust distribution.

SUPERANNUATION

No super guarantee shortfall on jockeys' riding fees

The Federal Court has held that a race club in NSW did not have a superannuation guarantee shortfall as a result of not making superannuation contributions in relation to riding fees paid by it to jockeys.

Facts

The taxpayer was a "race club" that operated a racecourse in New South Wales where the racing industry was regulated by a combination of legislation, the Australian Rules of Racing (ARR) and Local Rules of Racing (LR). Between 1 July 2009 and 30 June 2014 (the relevant period), the taxpayer paid fees to jockeys in respect of the riding in horse races and barrier trials (riding fees) in accordance with LR 72(1). The industry practice, however, was that jockeys were engaged by the horse trainer

to ride a horse in a race and race clubs such as the taxpayer had no involvement in the making of agreements between a trainer and jockey.

The Commissioner took the view that the taxpayer ought to have been making superannuation contributions in relation to the riding fees that it was paying to jockeys and concluded that the taxpayer had a "superannuation guarantee shortfall" under the *Superannuation Guarantee (Administration) Act 1992* (SGAA).

The Commissioner subsequently issued notices of assessment to the taxpayer for unpaid superannuation guarantee charge in respect of superannuation guarantee shortfalls during the relevant period. After the Commissioner disallowed its objection to the assessments, the taxpayer appealed against the objection decision.

The taxpayer submitted that it was not liable to pay the riding fees. The Commissioner submitted that, by virtue of the taxpayer's liability to pay riding fees to jockeys in accordance with LR 72/1, the taxpayer was "the person liable to make the payment" of riding fees to jockeys for the purposes of s 12(8) of the SGAA.

Decision

The Court held that the taxpayer did not did not have a superannuation guarantee shortfall during the relevant period.

It said the thoroughbred racing industry was highly regulated and was one in which there were longstanding practices in relation to the engagement of jockeys and in the division of responsibilities between industry regulators, race clubs (such as the taxpayer), owners, trainers and jockeys. Further, the taxpayer, owners, trainers and jockeys were each bound by the ARR and LR.

The court said that, by longstanding custom and practice, it was a trainer, on behalf of owners, who engaged jockeys to ride in races for reward. It was likely that during the relevant period all contracts to ride incorporated the practice that the related riding fees would be paid on behalf of the owner by a race club.

The court said that it was not difficult to see how, having regard to s 12(8) of the SGAA and reading LR 72 in isolation, the Commissioner might reasonably have formed the view which he did as to the taxpayer's liability. However, once the regulation of the industry and its customs and practices were understood, that view was not sustainable.

Scone Race Club Limited v *FC of T* 2019 ATC ¶20-698; [2019] FCA 976, Logan J, 21 June 2019.

GOODS AND SERVICES TAX

Draft GST ruling on creditable acquisitions in a transaction accounts business

The ATO is seeking comments on a GST ruling about acquisitions made in relation to certain accounts provided by a financial supply provider such as a bank or credit union.

The draft GSTR 2019/D1 Goods and services tax: determining the creditable purpose of acquisitions in relation to transaction accounts explains the Commissioner's preliminary views on the application of s 11-15(2)(a) of the GST Act to acquisitions made in relation to accounts such as everyday savings, cheque, deposit, online savings and term deposit accounts.

It considers the application of the Commissioner's views stated in GSTR 2008/1 and GSTR 2006/3 in the specific context of acquisitions made in a transaction accounts business, focusing on the analysis required to determine whether acquisitions are made solely or partly for a creditable purpose.

Draft GSTR 2019/D1 discusses determining the extent to which an acquisition relates to the making of input taxed supplies and the concept of a relevant connection. If an acquisition only has a relevant connection to the making of input taxed supplies, s 11-15(2)(a) precludes the acquisition from being for a creditable purpose and if an acquisition does not have a relevant connection to the making of input taxed supplies, it is solely for a creditable purpose. If an acquisition has a relevant connection to both making input taxed supplies and to making taxable or GST-free supplies, it is partly for a creditable purpose

For determining the creditable purpose for acquisitions made by account providers, the ATO's view is that in the absence of any other potential supplies, an acquisition that has a relevant connection to the supply of a transaction account will either:

- only have a relevant connection to the financial supply of the transaction account. Such an acquisition is for a creditable purpose only to the extent the supply of the transaction account is GST-free
- have a relevant connection to both the financial supply of the transaction account and the taxable supply of interchange services. These acquisitions are partly for a creditable purpose. This includes acquisitions that have a direct connection to making both supplies and acquisitions that have an indirect connection to all supplies made in the transaction accounts business.

For transaction accounts where the account provider does not make supplies of interchange services, there is no relevant connection to supplies of interchange services. These acquisitions will only have a relevant connection to financial supplies of transaction accounts.

The draft ruling contains various examples to illustrate the Commissioner's views.

The last day to submit comments on the draft ruling is 9 August 2019.

TAX ADMINISTRATION

Auditor-General report on Farm Management Deposits Scheme

The Auditor-General has released a report by the Australian National Audit Office (ANAO) on the ATO's administration of the Farm Management Deposits (FMD) Scheme, finding that it has not been fully effective.

One of the main reasons for this conclusion is that the risk identification and compliance arrangements to support the integrity of the FMD Scheme have not been fully effective. The ATO's compliance arrangements and risk assessment processes have not fully captured key elements of the Scheme's design.

The ANAO has made several recommendations which have been agreed to by the Department of Agriculture and the ATO including that:

- the department undertake a risk assessment of the scheme with the ATO providing input on tax risks
- the department and the ATO review quality of the Scheme data from financial institutions to ensure the data is fit for purpose, and
- the ATO use more data matching to support compliance with the FMD Scheme and maintain visibility over the nature and extent of compliance activities conducted on the Scheme to ensure these are commensurate with the assessed level of risk.

The ATO welcomed these recommendations and stated that the current risk management and compliance processes for assuring compliance with FMD scheme was adequate and commensurate with the level of relative risk to the system. It said it would continue working with the Department of Agriculture to refine its approaches to administration of the Scheme including a focus on seeking to realise potential benefits from improved data quality.

Source: Auditor-General Report No. 51 2018–19, 26 June 2019.

ATO UPDATES

Work-related car expenses under ATO scrutiny

The ATO is making work-related car expenses a key focus again during Tax Time 2019. It had warned last year that work-related car expenses would face greater scrutiny as some taxpayers make dodgy claims in order to get bigger refunds.

There are three rules for taxpayers to remember for car expenses:

- generally, trips between home and work cannot be claimed, unless the taxpayer is required to transport bulky equipment
- expenses paid for or reimbursed by employer cannot be claimed, and
- adequate records must be maintained to prove how the claim was worked out.

Although under the cents per kilometre method, taxpayers do not need to keep receipts, they do need to be able to demonstrate how they worked out the number of kilometres they travelled for work purposes. Over-claiming and being unable to demonstrate how they worked out their claims would lead to claims being reduced or disallowed and to penalties, in cases where it is done deliberately.

The ATO's sophisticated analytics compares a taxpayer's claims with others earning similar amounts in similar jobs. Where the ATO identifies questionable claims, they will contact taxpayers and ask them to show how they have calculated their claim or contact employers to confirm whether a taxpayer was required to use their own car for work-related travel.

Source: ATO media release, 25 June 2019.

ATO encourages early lodgers to wait this tax time

The ATO is reminding taxpayers that, due to the shift to the Single Touch Payroll system, they may not receive a payment summary directly from their employers this year as this information (income statements) will be pre-filled into their income tax return or provided to their registered agent.

Taxpayers will be able to see their year-to-date salary and wages, PAYG withholding tax, and any employer super contributions in near real time as many employers are now reporting wages, tax and super information to the ATO each payday.

The ATO has advised:

- taxpayers to wait for a few weeks before lodging their tax returns as employers have until 31 July 2019 to finalise income statements, and to allow the ATO to do the pre-filling of tax returns, and
- those with multiple jobs to ensure that all their employers have reported to the ATO before filing returns.

Taxpayers who have linked their myGov accounts to ATO online services will receive a message when their income statement is tax ready.

Source: ATO media release, 28 June 2019.

Queensland chef convicted for making fraudulent deduction claims

A chef employed by a Queensland hospital has been convicted of three criminal offences for fraudulently claiming travel and clothing expenses as work-related deductions and charity donations in her 2016 to 2018 income tax returns.

The Brisbane Magistrates Court convicted Ms Helen Feulufai for making false statements in her returns so claiming refunds over three years amounting to more than $45,000 from the ATO. In addition to having to repay the refunds, she was ordered to pay a fine of $3,000 and an additional $20,000 payment to the Commissioner and court costs.

The taxpayer was supplied with a work uniform including personal protective equipment and tools by her employer. In her capacity as a chef, she was not required to travel or use her own motor vehicle in the course of her employment. She also attempted to claim donations to an organisation not registered as a Deductible Gift Recipient in order to obtain refunds to which she was not entitled.

The ATO has reminded taxpayers that it is scrutinising work-related expenses as a priority.

Source: ATO media release, 21 June 2019.

ATO uncovers alleged illegal alcohol production

ATO personnel have uncovered suspected illicit alcohol supply and manufacture operations this week.

As part of ongoing compliance activity, more than 70 ATO personnel conducted access without notice visits across several sites in Victoria in relation to suspected illicit alcohol supply and manufacture operations.

An ATO audit had previously identified an organised group involved in the alleged manufacture and supply of a significant quantity of illicit alcohol where excise, income tax and GST had not been paid. The fact that the personnel visited the sites without prior notice ensured that vital documentation was not removed or destroyed.

Source: ATO media release, 27 June 2019.

TAX CALENDAR

Due dates in July 2019

The due dates for payment of tax, filing returns, lodging activity statements and satisfying various other obligations in July 2019 are noted below.

Where the due date for lodgment or payment falls on a Saturday, Sunday or public holiday, it may be done on the next business day.

14 July

Due date for payers of various payments covered by PAYG withholding made during the year to issue payment summaries to the recipients. Payment summaries must include details of reportable fringe benefits.

Due date for provider of employee share scheme (ESS) interests to give employee(s) a statement of ESS interests provided to them in 2018/19.

21 July

Due date for lodgment of activity statements for reporting and payment of:

- GST, wine equalisation tax and luxury car tax by monthly GST reporters
- PAYG withheld from employee share scheme amounts for the year ended 30 June 2019 where the employee did not quote his/her TFN or ABN
- PAYG instalment for June 2019 by monthly PAYG instalment payers that are not deferred BAS payers
- PAYG amounts withheld from payments during April to June 2019 by small PAYG withholders that are not deferred BAS payers
- PAYG amounts withheld from payments during June 2019 by medium PAYG withholders that are not deferred BAS payers
- the fourth PAYG instalment for the 2018/19 year by quarterly PAYG instalment payers that are not deferred BAS payers, and
- the first FBT instalment for the year ending 31 March 2020 for employers that are not deferred BAS payers.

Due date for investment bodies to pay to Commissioner amounts withheld during 2018/19 from certain deferred interest investments where TFN not quoted.

28 July

Due date for superannuation guarantee contributions for April to June 2019 quarter.

Due date for lodgment of activity statements for reporting and payment of:

- GST, wine equalisation tax and luxury car tax by quarterly GST reporters
- PAYG amounts withheld from payments during April to June 2019 by small PAYG withholders that are deferred BAS payers
- PAYG amounts withheld from payments during June 2019 by medium PAYG withholders that are deferred BAS payers
- PAYG instalment for June 2019 by monthly PAYG instalment payers that are deferred BAS payers
- the fourth PAYG instalment for the 2018/19 year by quarterly PAYG instalment payers that are deferred BAS payers, and
- the first FBT instalment for the year ending 31 March 2020 for employers that are deferred BAS payers.

31 July

Due date for investment bodies to lodge TFN reports for investments made during the June 2019 quarter where TFN quoted.

Due date for most companies to pay 2018/19 franking tax and lodge franking account return, if required.

Due date for Australian financial institutions to provide information to the ATO about US reportable accounts for FATCA purposes.

CUSTOMS

Customs tariff: import of driverless trains subject to duty

The AAT has affirmed the Comptroller-General's decision to refuse a tariff concession order (TCO) under *Customs Act 1901 (Cth)* (the Act) for the import of driverless trains. The AAT has held that the core criteria for grant of the TCO were not met since substitutable goods were produced in Australia at the time the application was lodged.

The taxpayer was a manufacturer of electric passenger trains in Australia and desired to import driverless trains from India. The taxpayer supplied to the NSW government authorities the driverless trains recently introduced in the Sydney metro system. The taxpayer applied for a TCO since each driverless train would otherwise attract 5% duty under Tariff Classification 8603.10.00.

The Comptroller-General refused the TCO under s 269P of the Act. The taxpayer applied for internal review and the Comptroller-General affirmed its decision. The taxpayer sought review by the AAT of the Comptroller-General's decision.

Relevantly, under Pt XVA of the Act, the core criteria for a TCO was considered to be met if, on the lodgement date of the application, no substitutable goods were produced in Australia in the ordinary course of business. Substitutable goods under s 269B of the Act were goods produced in Australia that were put or were capable of being put to a use which corresponded with a use to which the subject of the application or the TCO, that is, driverless trains, could be put.

The taxpayer submitted that the core criteria were met because: (a) the only use to which the driverless trains were put or could be put was the transport of passengers on a driverless metropolitan train line system, and (b) no such goods were produced in Australia. The Comptroller-General submitted that driven, electric passenger trains were produced in Australia in the relevant period and therefore the core criteria were not met. According to the Comptroller-General, the use of the goods (transport of passengers by rail) was to be distinguished from the means by which the use was achieved, which was by driverless train in the present case.

The AAT affirmed the Comptroller-General's order and dismissed the application. The AAT observed that the different environment in which the putative substitutable goods operated was a rail system without beacons and other equipment necessary to the operation of driverless trains. The AAT held that at the relevant time, substitutable goods were manufactured in Australia and that as per the definition of substitutable goods, their purpose or object, rather than details of the context or environment in which they were operated, was to be considered for grant of the TCO.

Alstom Transport Australia Pty Ltd v Comptroller-General of Customs [2019] AATA 1308, B W Rayment OAM QC (Deputy President), 17 June 2019.

STATE TAXES

NT Budget measures Bills now law

The following Bills implementing measures announced in the 2019/20 NT Budget received assent on 21 June 2019:

The Property Activation Bill 2019 (NT) as Act No 21 of 2019 introduces the *Property Activation Act 2019* (NT) to create a levy to promote the activation and occupation of land and buildings in the levy area from 1 July 2019.

The levy is imposed at a rate of 2% for lots which are vacant land and 1% for lots with unoccupied ground level non-residential buildings, based on the unimproved capital values of each lot.

The Revenue Legislation Amendment Bill 2019 (NT) as Act No 22 of 2019 amends the:

- *Stamp Duty Act 1978* (NT) to
  - introduce a new Territory home owner discount on stamp duty of up to $18,601 for homes valued up to $650,000 for home buyers who have not owned a home in the NT in the previous 24 months
  - cease the existing principal place of residence rebate from 8 February 2019
  - cease the existing first home owner discount from 7 May 2019, and
  - cease all stamp duty home owner assistance schemes still in effect from 30 November 2020.
- *First Home Owner Grant Act 2000* (NT) from 7 May 2019 to reduce the First Home Owner Grant to $10,000, and
- *Gaming Machine Regulations 1995* (NT) to maintain existing gaming machine taxation rates and thresholds for hotels, taverns and clubs.

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