The

Tax Advisers'

Voice

Representing the Tax Agent Community

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What's New This Edition

Your Association

NTAA submission in relation to additional 15% super tax

As reported in the April 2023 edition of ***Voice***, the NTAA has numerous concerns about the Federal Government's proposed measure of imposing a 15% additional tax on individuals with a total superannuation balance ('TSB') of more than $3 million from 1 July 2025.

The NTAA has sent a detailed written submission to Treasury setting out our concerns, some of which were summarised in the April edition of ***Voice*** and we will keep members informed regarding this proposed measure. Click here to view a copy of our submission.

Joint submission made in relation to the proposed TASA changes

The NTAA was part of a joint written submission in response to the Senate Economics Legislation Committee's inquiry into the *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023*. The submission addressed proposed changes to the *Tax Agents Services Act 2009* ('TASA').

The following principal points were made in the submission:

- Provisions targeting disqualified entities seeking to engage a tax agent are too broad and need to be tightened;
- Concerns that the broad nature of the proposed changes could reduce, rather than enhance, the independence of the TPB from the ATO;
- The commencement date of the new code of conduct obligations could potentially be a minimum of only one day after Royal Assent;
- Many tax practitioners have expressed their preference for three-year renewal periods, rather than an annual registration period; and
- In providing the TPB with the ability to change the registration period to annual from 1 July 2024, the joint submission recommends that the intervening period be used to enhance the TPB's IT systems and design a more streamlined and efficient process.

Clearly these proposed changes will impact tax agents and we are actively engaging on behalf of our members.

Voice

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Practice Notes

ASIC continues to act against SMSF auditors

The Australian Securities and Investments Commission ('ASIC') has acted against a further eleven SMSF auditors for breaches of their obligations. These included breaches of auditing and assurance standards, independence requirements and registration conditions, or because ASIC was satisfied the individual was not a fit and proper person to remain registered.

More particularly, over the period 1 October 2022 to 31 March 2023, ASIC:

- disqualified seven SMSF auditors;
- imposed additional conditions on three SMSF auditors; and
- cancelled one SMSF auditor.

Ten of these SMSF auditors were referred to ASIC by the ATO. One SMSF auditor did not comply with conditions imposed by ASIC on their SMSF auditor registration.

This follows the cancellation of 374 SMSF auditors in January 2023.

ASIC Commissioner Danielle Press said: "*SMSF auditors play an essential role in supporting confidence in the SMSF sector. To protect the integrity of the SMSF sector, ASIC will continue to act against SMSF auditors whose conduct falls short or who do not meet their obligations.*"

Ref: ASIC website, 13 April 2023

Residential investment property loan data-matching program

The ATO will acquire residential investment property loan data from authorised financial institutions for the 2021-22 through to 2025-26 financial years, including:

- client identification details (names, addresses, phone numbers, dates of birth, etc);
- account details (account numbers, BSB's, balances, commencement and end dates, etc);
- transaction details (transaction date, transaction amount, etc); and
- property details (addresses, etc).

The ATO estimates that records relating to approximately 1.7 million individuals will be obtained each financial year.

The principal uses of this data include "education and online services", "data analytics and insights", as well as to help the ATO "identify relevant cases for administrative action, including compliance activities".

The ATO has a dedicated webpage dealing with its data-matching protocols (24 in total at the time of writing). It states on this webpage that: "*Matching external data with our own helps us to ensure that people and businesses comply with their tax and super obligations. It also helps us to detect fraud against the Commonwealth.*"

Ref: ATO website, 6 April 2023

'Sunsetting' instrument reissued regarding nil PSI withholding

The ATO has released the *Taxation Administration (Withholding Variation for Personal Services Income) Legislative Instrument 2023*.

The new instrument varies to nil the amount that a personal services entity ('PSE') is required to pay to the Commissioner when it receives alienated personal services payments, in certain circumstances. It continues the existing arrangements under the current legislative instrument which was due to 'sunset' or expire (and which was repealed by the new instrument), and so it makes no change to the current application of the law.

More particularly, the new instrument varies to nil the amount that a PSE is required to pay to the Commissioner in cases where:

- the PSE receives an alienated personal services payment that relates to one or more individuals' personal services income;
- the PSE pays salary or wages to the individual or individuals within a particular timeframe; and
- the salary or wages paid by the PSE is equal to or greater than a particular proportion of the gross personal services income ('PSI') it receives.

The new instrument also provides an alternative practical method for estimating the net amounts that will be included in an individual's assessable income under S.86-15 of the ITAA 1997.

If not for the new instrument, relevant PSEs would have to pay an amount of tax to the Commissioner every PAYG payment period, rather than retain this money until a related tax liability arises in the future after the income year in which tax returns are assessed.

Ref: ATO Legal Database, LI 2023/15 - Explanatory statement, 15 March 2023

'Your Future, Your Super review' – outcomes paper and draft regulations released

Treasury has released a paper entitled *Your Future, Your Super review – Summary of Issues*, which sets out the outcomes of its review into the 'Your Future, Your Super', laws that was initiated in September 2022.

The *Treasury Laws Amendment (Your Future, Your Super) Act 2021* involved the following four key elements to improve the superannuation system:

- **Performance test** – Products (i.e., superannuation investment options) are subject to an annual performance test with clear consequences. The test applied to MySuper products from 1 July 2021 and is legislated to extend to 'trustee-directed' products from 1 July 2023. The test was designed to protect members from underperformance by holding trustees accountable for the investment performance they deliver to members and encouraging trustees to reduce fees.
- **YourSuper comparison tool** – MySuper products are displayed on a comparison tool which launched on 1 July 2021 and aims to assist members to choose a well-performing MySuper product. The objective of the tool is to empower members to make informed decisions about who manages their retirement savings.
- **Stapling** – If a new employee does not choose a fund, then employers must check whether they have an existing 'stapled' superannuation fund before opening a new default superannuation account. Stapling started on 1 November 2021 and seeks to prevent the creation of unintended multiple accounts by ensuring superannuation follows individuals as they change jobs.

- **Best financial interests duty ('BFID')** – Trustees need to assess whether their spending is in the best financial interests of their members and must provide demonstrable evidence in the event of civil proceedings. Commencing from 1 July 2021, the BFID seeks to increase transparency and accountability for the way trustees manage their business operations to the benefit of members.

Treasury had previously issued a consultation paper on 7 September 2022 seeking public feedback on any unintended consequences and implementation issues arising from the above measures.

The Assistant Treasurer stated that the feedback from stakeholders was primarily focused on the annual superannuation performance test, which is intended to hold trustees to account to maximise returns to members. Responding to this feedback forms the first part of the Government's response to the review.

Proposed changes to the performance test are contained in exposure draft regulations which have also been released by Treasury. Key updates include the following:

- prospectively increasing the testing period from 8 to 10 years to encourage longer-term investment decisions;
- calibrating key benchmarks to ensure that funds are not unintentionally discouraged from investing in certain assets;
- adjustments to the notification letter that trustees of failed products send to members;
- minor changes to improve accuracy and reduce the administrative burden for APRA; and;
- ensuring the test is fit-for-purpose when it is extended to trustee-directed products this year.

Ref: Treasury website, Your Future, Your Super review, 4 April 2023 and Assistant Treasurer's media release, 4 April 2023

Draft regulations: financial reporting and auditing of most APRA-regulated super funds

Treasury has released draft regulations and an explanatory statement for public consultation. The draft regulations support amendments in Schedule 6 to the *Treasury Laws Amendment (2022 Measures No 4) Act 2023 (the 'amending Act')*, which extend and adapt the financial reporting and auditing requirements in the *Corporations Act 2001,* to apply to registrable superannuation entities ('RSEs').

The purpose of these amendments is to impose financial reporting and auditing obligations on RSEs that are consistent with the requirements that apply to public companies and registered schemes.

The financial reporting requirements in Schedule 6 to the amending Act require an RSE licensee for an RSE to:

- prepare and lodge financial reports for each financial year with ASIC;
- make the financial report, directors' report and auditor's report for each financial year publicly available on the entity's website;
- include details on how to access the financial report, directors' report and auditor's report for a financial year with the notice of the annual members' meeting; and
- provide the entity's financial reports for a specified financial year to a member upon request.

The auditing requirements in Schedule 6 to the amending Act require an RSE licensee for an RSE to appoint an individual auditor, audit firm or audit company to conduct an audit of the entity and for the auditor to:

- prepare an auditor's report for an audit of an entity's financial report;
- report specified matters to the relevant Regulator;
- meet auditor independence and rotation requirements; and
- prepare, lodge and publish auditor transparency reports, if required.

The draft regulations prescribe requirements for the preparation, lodgment, disclosure and publication of information and documents by RSEs to improve the compliance and transparency of the superannuation sector. Note that they do not apply to small APRA funds or SMSFs.

Ref: Treasury website, Superannuation financial reporting and audit, 14 April 2023

Draft instrument on work test for personal superannuation contributions

The ATO proposes to modify the operation of S.290-165(1A) of the ITAA 1997, so that a person can satisfy the 'work test' for superannuation purposes if they are an employee under the expanded meaning of that term in S.15A of the SIS Act and satisfy the other relevant criteria.

Before 1 July 2022, the work test in the SIS Regulations allowed a superannuation fund to accept personal superannuation contributions in respect of persons aged 67 to 75 if they are 'gainfully employed' (i.e., "*employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment*") in a relevant period.

For contributions made on or after 1 July 2022, the work test was relocated to S.290-165(1A) of the ITAA 1997, which also requires those aged 67 to 75 to have been 'gainfully employed' for a relevant period if they want to claim a deduction for personal superannuation contributions.

The SIS Act contains an expanded definition of 'employee' to cover certain employees who may not be common law employees, such as constitutional or statutory office holders, company directors, members of the Australian Defence Force and parliamentarians.

There is however no definition of 'employee' in the ITAA 1997, and so that term takes its ordinary common law meaning. Therefore, there may be some people who were previously able to claim deductions (because they fell within the expanded definition of 'employee' in the SIS Act) but who are not 'gainfully employed' for the purposes of the ITAA 1997 because they are not common law employees or self-employed.

The *Draft Taxation Administration (Remedial Power — Work Test for Personal Superannuation Contributions) Determination 2023* seeks to resolve the above issue. Pursuant to the instrument, all individuals aged 67 to 75 who are employees under the SIS Act and who would have been eligible to claim a deduction for their personal superannuation contributions if the 'work test' had not been relocated in 2022 from the SIS Act to the ITAA 1997, are still eligible to do so. In this way, the previous eligibility criteria for deducting personal superannuation contributions continue to apply.

Once it has been finalised, the instrument will apply to personal superannuation contributions made on or after 1 July 2022.

Ref: ATO website Legal database, LI 2023/D11 - Explanatory statement, 19 April 2023

Risks of using unregistered preparers

The Tax Practitioners Board ('TPB') recently warned taxpayers that they are taking big risks if they use an unregistered preparer to:

- prepare and lodge their tax returns and statements;
- provide them with advice;
- represent them in their dealings with the ATO.

Tax practitioners include tax agents and BAS agents. They must be registered with the TPB to provide tax agent services, BAS services, or, in some cases, tax (financial) advice services for a fee or other reward.

Taxpayers who use an unregistered preparer to provide them with a tax agent service (which includes a BAS or tax (financial) advice service) run the following risks:

- The unregistered preparer may not be fit and proper or have the required qualifications or experience to provide them with a competent service that meets appropriate professional and ethical standards.
- If the unregistered preparer fails to lodge a tax return or statement on the taxpayer's behalf by the required due date or makes a false or misleading statement to the ATO (for example, by lodging an incorrect return or BAS), and this results in a tax shortfall amount, the ATO may impose administrative penalties on the taxpayer.

  Under the 'safe harbour' provisions administered by the ATO, taxpayers will not be liable for penalties in certain circumstances if they engage a registered tax practitioner. However, they will not be entitled to any 'safe harbour' protection if they engage an unregistered preparer.
- The unregistered preparer may not have appropriate professional indemnity insurance cover to compensate the taxpayer if the taxpayer suffers loss due to an act, error or omission that results from a service they provide.

The TPB is investigating several cases involving unregistered preparers posing as legitimate registered tax practitioners, who lodge tax returns on behalf of their clients. These unregistered preparers often operate by accessing the myGov accounts of their clients and lodging their returns through myTax.

The TPB advises that myTax should only be used by a taxpayer to lodge their own tax return and is not an approved lodgment channel for registered tax practitioners. A registered tax practitioner also does not require access to their client's myGov account to act on their behalf.

Therefore, taxpayers should take care not to share their myGov password with anyone, as sharing such information with an unregistered preparer puts their personal and financial affairs at risk.

Taxpayers should check the *TPB Register* or look for the *Registered tax practitioner symbol* to ensure their tax practitioner is registered.

Using a registered tax practitioner means they:

- Have satisfied the TPB that they are fit and proper and have the required qualifications and experience to provide tax agent services.
- Are required to comply with the Code of Professional Conduct, which regulates the personal and professional conduct of registered tax practitioners.
- Have appropriate professional indemnity insurance cover to compensate the taxpayer if the taxpayer suffers loss due to any act, error or omission by the tax practitioner.

Ref: TPB eNews, Risks of using unregistered preparers, April 2023

Direct from the ATO

Insolvency advice and illegal phoenix activity

The ATO has recently provided advice for businesses that may be insolvent or struggling to pay their debts, saying that it is important for them to seek specialist advice from a qualified and registered insolvency practitioner as soon as they can, and they should be wary of inappropriate insolvency advice that could lead to illegal phoenix activity.

The ATO says that registered liquidators and trustees will provide businesses with sound insolvency advice that they can rely on. However, some insolvency or pre-insolvency advisers suggest actions designed to help directors avoid paying their creditors and create new companies to continue on without debts. This is illegal phoenix activity and can result in serious penalties. Following this advice could put business owners at risk of a fine, criminal conviction or even a jail term.

The ATO advises businesses to be wary if an adviser:

- contacts them with advice, especially after their creditor has taken court action;
- suggests they transfer their assets to a third party without payment;
- offers advice on restructuring their business to avoid paying debts or other obligations;
- offers them a fee based on a percentage of their debt or obligations;
- tells them they know a liquidator who will protect their personal interests or assets;
- tells them about a valuer who can under-value any assets;
- asks them to provide incorrect information to authorities;
- suggests they can withhold or destroy relevant records to prevent access by the liquidator or bankruptcy trustee;
- suggests that the adviser deal with the liquidator or trustee on their behalf; and
- encourages them to engage in any kind of illegal activity.

The ATO says that, if a business is experiencing difficulties, it is important that the business takes action and gets advice straight away. ASIC's website also has information:

- for directors whose companies are in financial difficulty or insolvent; and
- about illegal phoenix activity.

The Phoenix Taskforce (which brings federal, state and territory agencies together to combat illegal phoenix activity) is working to stop people promoting or engaging in illegal phoenix activity. Individuals who are offered advice that they think is illegal should report it to them.

Ref: ATO website, The fight against tax crime, 17 April 2023

SMSF ESA rollover relief ending 30 June

Since 1 October 2021, SMSFs have been required to make rollovers electronically. To do this, they must get an electronic service address ('ESA') from an SMSF messaging provider that provides rollover services.

The ATO has been noticing issues for some SMSFs in obtaining an ESA which meant they could not rollover funds. Accordingly, since March 2022, the ATO has been providing temporary relief to allow rollovers to be processed on paper forms if they received approval from the ATO.

This relief will be ending on 30 June 2023, having regard to the number of messaging providers now available, and the small number of trustees that have engaged the ATO for the relief.

SMSF trustees can find a list of SMSF messaging providers that offer an ESA for rollover services on the ATO's website. They can only have one ESA recorded with the ATO, so if they require both rollover and contribution services, they should make sure they select an SMSF messaging provider that offers both. They can also use their SMSF professional to assist.

If SMSF trustees are still experiencing issues in obtaining an ESA after 30 June and they proceed to make a rollover without using an ESA, their SMSF auditor will be expected to report this to the ATO as a contravention of the super laws.

The SMSF's auditor should provide details in the auditor contravention report as to why the SMSF experienced issues getting an ESA and the ATO will take this into account when considering the imposition of any penalties.

Ref: ATO website, SMSF Newsroom, 12 April 2023

Know the rules for accessing superannuation

The ATO has reminded SMSF trustees that their SMSF must be operated for the sole purpose of providing retirement benefits for its members. This means SMSF trustees can't use funds from their SMSF to pay for personal or business expenses. This is known as illegal early access of superannuation, and severe penalties apply.

The ATO also reminds SMSF trustees that there are rules around what they can invest in when dealing with a related party.

The ATO has recently released a factsheet to help SMSF trustees understand the rules on accessing their superannuation, and make sure they (and their business) comply with the rules surrounding SMSFs.

The ATO advises SMSF trustees who need assistance in this regard to consider appointing professionals to help them make the right decisions.

Ref: ATO website, Small Business Newsroom, 11 April 2023

How to claim deductions for temporary full expensing

The ATO has recently provided information to assist taxpayers in working out how to claim deductions under temporary full expensing when they lodge their tax return.

If the taxpayer's income years end on 30 June, deductions under temporary full expensing are only available in the 2021, 2022 and 2023 income years. They can claim the temporary full expensing deduction in their tax return for the relevant income year by completing the extra labels included in the tax return.

Taxpayers can choose to opt out of temporary full expensing for an income year for some or all of their assets and claim a deduction using other depreciation rules. However, they must notify the ATO in their tax return that they have chosen not to apply temporary full expensing to the asset.

Taxpayers can't change their choice, and they must notify the ATO by the day they lodge their tax return for the income year to which the choice relates.

Information given in the extra labels included in the tax return about the taxpayer's eligibility and their claim will assist the ATO in administering the temporary full expensing measure, as well as inform future services and initiatives for business.

The information that the taxpayer will need to provide on the extra labels in the tax return includes:

- whether the taxpayer is making a choice to opt out of temporary full expensing for some or all of their eligible assets;
- the number of assets they are opting out for (if applicable);
- the cost of assets they are opting out for (if applicable);
- the total amount of their temporary full expensing deduction;
- the number of assets they are claiming temporary full expensing for;
- whether they are using the alternative income test (corporate entities); and
- their aggregated turnover.

Taxpayers can use the temporary full expensing tax return label guide to help identify which labels they will need to complete in their tax return, to ensure they correctly claim or opt out of the temporary full expensing measure.

Further information can be found by accessing *Temporary full expensing* on the ATO's website.

Ref: ATO website, Business, Temporary Full Expensing, 5 April 2023

Advice for tax professionals whose clients are starting a new business

The ATO has recently provided advice for tax professionals to assist them in helping their clients understand their obligations in starting a new business.

Tax professionals are often the first to see when their clients start generating new sources of income or taking some new steps in life. They are often also the first source of guidance for clients who are looking to start a business.

The ATO's *Starting your own business* web content has been updated to help clients of tax professionals who:

- are new to business;
- aren't sure if their activities are considered a business; or
- need to better understand what it means to be in business.

This information will help them:

- determine if they are eligible for an ABN;
- understand the different kinds of business structures available to them; and
- learn what their tax, superannuation and registration obligations are.

The ATO also has steps to help clients of tax professionals work out if they are in business, such as when their hobby starts to earn them money.

Refer to the ATO's *Support for Small Business* webpage for further resources and information to assist clients get started with their new business.

Ref: ATO website, Tax Professionals Newsroom, 19 April 2023

Super funds must validate approval notifications before compassionate release

The ATO has recently received increased reports from superannuation funds that member benefits have been paid on compassionate grounds, where the ATO has **not** issued a determination.

The ATO reminds super fund trustees that, when it approves an application on compassionate grounds, the applicant is issued a determination. If the trustee's super fund is nominated by the applicant, the ATO will send the trustee an approval notification via *Online services for business*. The approval notification will be a copy of the applicant member's determination.

Where members request the payment of their benefits on compassionate grounds, the ATO strongly encourages fund trustees to validate the member's determination against the approval notification the ATO has issued to them. This ensures that the member has met a condition of release before benefits are paid, reducing the risk of super being inappropriately released.

Trustees that have not received a notification from the ATO or that have concerns about a determination provided by a member should contact the ATO via the *Super Enquiry Service* before paying any benefits.

Ref: ATO website, Super Funds Newsroom, 19 April 2023

SMSF clients' TBAR due date is changing

From 1 July 2023, all SMSFs will be required to report certain events by lodging a transfer balance account report ('TBAR') quarterly. All unreported events that occur before 30 September must be reported by 28 October.

*Editor: Previously (i.e., until 30 June 2023), quarterly reporting was generally only required if the total super balance of any of the SMSF's members was $1 million or more. However, from 1 July 2023, **all SMSFs** will be required to report quarterly, even if each member's total super balance is less than $1 million.*

The ATO notes that over the coming weeks tax agents and accountants may be working with their SMSF clients to lodge their 2022 SMSF annual return, and some of these clients may also be required to lodge a TBAR along with their annual return.

The ATO encourages tax agents and accountants, while they are working with their SMSF clients who have been lodging the TBAR annually, to report any events that have occurred during the current income year. This will make it easier for them and their clients to transition to quarterly reporting from 1 July 2023.

Ref: ATO website, Tax Professionals Newsroom, 19 April 2023

FHSS scheme: Updates to ATO documents regarding law changes and freehold interests

The ATO has issued **updated** versions of **Law Companion Ruling LCR 2018/5** and **Super Guidance Note SPR GN 2018/1** to reflect recent amendments to the first home super saver ('FHSS') scheme. The principal update (in relation to FHSS determinations requested on or after 1 July 2022) is about the maximum amount of voluntary superannuation contributions that can be released under the FHSS scheme across all income years increasing from $30,000 to $50,000.

Another update for these documents is the inclusion of further guidance regarding freehold interests. Individuals who have previously held a freehold interest in Australian real property cannot access the FHSS scheme unless the ATO determines that they have suffered a financial hardship.

The expression "freehold interest" is not defined for FHSS scheme purposes, and the ATO says "freehold interest" includes both legal and equitable interests in real property. Therefore, an individual may acquire a freehold interest in the form of an equitable proprietary right prior to settlement or completion of a contract.

The amendments generally apply from 1 July 2022.

Ref: ATO website, Legal database, 12 April 2023

Recent tax cases update

Editor: The following updates and cases highlight some of the interesting developments in tax-related case law over the past month.

Truck drivers held not to be employees for superannuation guarantee purposes

In a recent decision, the Full Federal Court has confirmed that two truck drivers were not "employees" for superannuation guarantee purposes, having regard to the expanded meaning of that term in the legislation.

The truck drivers were employed by ZG Operations Australia Pty Ltd ('ZG Operations'). They each set up a partnership in the mid-1980s with their respective wives, and each partnership entered into a contract with ZG Operations to purchase trucks and provide delivery services. The maintenance of the trucks and other costs was the responsibility of the partnerships. Income earned from the delivery services was declared as partnership income and the net income was split between the husband and his wife.

The contracts between the partnerships and ZG Operations were terminated in 2017, and the truck drivers then commenced proceedings in the Federal Court seeking payments of superannuation contributions under the *Superannuation Guarantee (Administration) Act 1992* ('SGAA') along with other entitlements associated with employment.

At first instance, Thawley J had concluded that the truck drivers were not employees of ZG Operations for superannuation guarantee purposes, but rather they were independent contractors. In his view, the truck drivers were not employees according to the "ordinary meaning" of that term, and nor were they employees within the expanded meaning of that term in S.12(3) of the SGAA.

On appeal, the Full Court concluded that the truck drivers **were** employees of ZG Operations according to the ordinary meaning of that term. It was therefore unnecessary for the Court to consider whether they were employees pursuant to S.12(3) of the SGAA.

However, on appeal by ZG Operations, the High Court held that the truck drivers were **not** employees of ZG Operations according to the ordinary meaning of that term. The matter was then remitted to the Full Federal Court to consider whether the truck drivers were employees under the expanded meaning of that term in S.12(3) of the SGAA.

Full Federal Court Decision
The Full Federal Court Decision unanimously held that the appellants were not "employees" of ZG Operations under the expanded meaning of that term in S.12(3) of the SGAA.

The Full Court held first that, under S.12(3) of the SGAA, the person claiming they are an 'employee' must be both a natural person and a party, in their individual capacity, to the contract with the claimed employer under which they worked. In this case, however, the truck drivers were not parties to the relevant contracts under which they performed work for ZG Operations in their individual capacities, but rather they executed those contracts for and on behalf of their partnerships.

The Full Court also held that the relevant contracts were not wholly or principally "for" the labour of the truck drivers. In this regard, the Court noted in particular that the provision of the delivery service under the contracts required the use of a substantial capital asset (i.e., the trucks), and that the partnerships were wholly responsible for this asset. While the delivery service included a labour component, that was not the "principal benefit".

Ref: Jamsek v ZG Operations Australia Pty Ltd (No 3) [2023] FCAFC 48

Taxpayers not carrying on an agistment business

Two taxpayers were not carrying on a business of providing agistment and full care animal husbandry and veterinary services to a company they owned and, consequently, were not entitled to the full amount of the associated deductions they claimed.

Facts

In February 2017, the two taxpayers acquired a property in Tasmania for $450,000, together with various chattels for $30,000.

In May 2017, the taxpayers set up a company, partly to run the farming business and hold any intellectual property, and *"to provide some asset protection against any liability they as individuals might encounter"*.

The principal issue in this case related to whether the taxpayers could claim various deductions in the 2017 income year on the basis that they were carrying on a business of providing agistment and full care animal husbandry and veterinary services to their company.

The taxpayers submitted that they had decided that their company would conduct a grazing business and agist stock on the property, and that the company had agreed to pay them an annual agistment fee of $20,000, as the owners of the property.

For the 2017 income year, each taxpayer disclosed half the fee (i.e., $10,000) as assessable income while claiming deductions in excess of that amount. The ATO accepted that each taxpayer was entitled to claim deductions up to a total of $10,000 and disallowed the additional deductions.

The other issue related to whether one of the taxpayers could deduct legal expenses incurred in relation to proceedings against her former employer for damages for losses arising out of "adverse action" allegedly taken against her.

The ATO agreed that she was entitled to a deduction calculated by reference to the proportions of the claim that were for past economic loss and incidental interest. However, the ATO disallowed the other legal expenses.

Decision

The AAT first concluded that there was *"an absence of persuasive evidence"* that the taxpayers had agreed to provide *"full animal husbandry and veterinary care"*, as they claimed.

The AAT then concluded that, on balance, the agistment arrangements did **not** constitute a business. In this regard, the ATO considered the following factors:

- **profit-making purpose** – there was insufficient evidence to establish a profit-making purpose for the agistment arrangements;
- **scale of the activities** – the agistment activities were on a relatively small scale (while the number of stock agisted ranged up to a maximum of around 80, the taxpayers' company was the only client);
- **commerciality** – the agistment transaction was not conducted in a commercial way; and
- **Business-like manner** – while the taxpayers conducted activities to some extent in a business-like manner, there was an exceptional degree of informality, especially regarding the loan and payment of the agistment fee.

The AAT noted in this regard that there was a degree of systematic, business-like behaviour. However, the AAT was of the view that the absence of a profit-making purpose, the uncommercial nature of the transactions and similar considerations nevertheless led to the conclusion that a business was not being carried on.

The AAT was also not persuaded that the expenditure incurred by the taxpayers was *"not disproportionate to the income derived or likely to be derived from agistment fees"*.

In relation to the legal expenses, the AAT agreed with the ATO that the proportion of the legal expenses that was referable to the claim for future economic loss was not deductible under S.8-1, as the expenses were capital in nature. The AAT also agreed with the ATO that the proportion of the legal expenses that was referable to the claim for future expenses and past special damages was not deductible, as the expenses were private or domestic in nature.

Ref: DQTB and FCT [2023] AATA 515

FBT, GST and Income Tax Rulings

The following are summaries of Tax Alerts, Practice Statements, Tax Rulings and Determinations, and Guidelines. Copies are available from the ATO Website.

PS LA 2023/1 – ATO rectification directions regarding SMSFs

The *Superannuation Industry (Supervision) Act 1993* ('SIS Act') provides a range of compliance options for dealing with contraventions of the SIS Act and Regulations. One such option is the giving of a rectification direction, which is a written notice the ATO gives to a person requiring them to take specified action to rectify the contravention (e.g., repay a loan or borrowing, dispose of an asset or lodge a return), and provide evidence to the ATO showing that they have complied with the direction.

A rectification direction can only be given to an individual trustee of an SMSF, or a director of a body corporate that is a trustee of an SMSF.

To provide guidance in this regard, the ATO has issued **PS LA 2023/1**, which sets out the relevant matters which ATO staff should consider when deciding whether to issue a rectification direction.

These factors include the following:

- any financial detriment that might reasonably be expected to be suffered by the SMSF as a result of the person complying with the direction;
- the nature and seriousness of the person's contravention; and
- any other relevant circumstance.

In weighing up any expected financial detriment, ATO staff are advised to focus on the significance and degree of that detriment, the proportion of the fund's assets involved in the contravention, and any reasonable estimates or opinions the fund may have provided about the expected financial costs or losses in complying with a direction.

However, some types of financial detriment "*would not usually bear much weight*" on the ATO's decision. For example, this could include situations where the fund would be required to:

- dispose of an asset and would incur typical transaction costs for disposal or experience adverse market fluctuations; or
- rectify a prohibited borrowing and would incur costs in clearing the loan early or restructuring the arrangement.

The Practice Statement indicates that other compliance options (e.g., giving an education direction or charging administrative penalties) may be used alongside a rectification direction.

A rectification direction is not to be given where the ATO:

- is disqualifying an individual and prohibiting them from acting as an SMSF trustee or as a responsible officer of a corporate trustee;
- is issuing a notice of non-compliance to the SMSF;
- is taking action to wind up the SMSF; or
- has accepted an enforceable undertaking which covers the contravention.

The Practice Statement has effect as from 30 March 2023.

PCG 2023/D1 – Electric vehicle home charging rates

The ATO released **Draft PCG 2023/1** ('the draft guideline') which sets out a methodology for calculating the cost of electricity when an electric vehicle ('EV') is charged at an employee's or individual's home.

The draft guideline may be relied on by employers and individuals who satisfy the required criteria, as set out in the draft guideline.

It is the employer's or individual's choice if they want to use the methodology outlined in the draft guideline, or if they would like to determine the cost of the electricity by determining its actual cost. The choice is per vehicle and applies for the whole income or FBT year. However, it can be changed by the employer or individual from year to year.

Cents-per-kilometre rate

The rate for the FBT tax year or income year commencing on or after 1 April 2022 is 4.2 cents per km (the "EV home charging rate"), which is multiplied by the total number of relevant kilometres travelled by the electric vehicle in the relevant income year or FBT year.

However, if electric vehicle charging costs are incurred at a commercial charging station, a choice has to be made. The EV home charging rate can be used, but only if the commercial charging station cost is disregarded. However, if the commercial charging station cost is used, the EV home charging methodology cannot be applied. Further, all necessary records such as receipts must be kept to substantiate the claim, as per normal record-keeping rules.

Record keeping

If a taxpayer wishes to rely on the EV home charging rate to calculate their electricity charging expenses, they will need to keep a record of the distance travelled by the car (i.e., generally odometer records) in either the applicable FBT year to 31 March or the income year to 30 June.

If an **employer** chooses to apply the draft guideline and the EV home charging rate for FBT purposes, a valid logbook must be maintained if the operating cost method is used.

If an **individual** chooses to apply the draft guideline and the EV home charging rate for income tax purposes, to satisfy the record-keeping requirements they must have:

- a valid logbook to use the logbook method of calculating work-related car expenses. For other vehicles, the draft guideline recommends a logbook is maintained to demonstrate work-related use of the vehicle; and
- one electricity bill for the residential premises in the applicable income year to show that electricity costs have been incurred.

Application

It should be noted that the draft guideline can only be relied on in relation to zero emissions vehicles. The draft guideline cannot be relied on, and the EV home charging rate cannot be used if, for example, the vehicle is a plug-in hybrid which has an internal combustion engine.

There are a number of worked examples in the draft guideline to illustrate the intended operation.

Once finalised, the draft guideline will apply from:

- 1 April 2022 for FBT purposes; or
- 1 July 2022 for income tax purposes.

Comments on the draft guideline are due by 26 May 2023.

MONTHLY TAX TIP — Depreciation deductions for landlords acquiring new residential premises or carrying on a rental property business

By way of background, depreciation deductions generally **cannot** be claimed from 1 July 2017, in respect of a depreciable asset that is acquired for a residential rental property **after** 7.30 pm AEST on **9 May 2017** that is a 'previously used' asset (e.g., a second-hand asset).

However, there are two important **exclusions** from this depreciation restriction, as follows:

- **Depreciable assets installed in new residential premises** – Generally, where a taxpayer acquires new residential premises (e.g., premises acquired from a builder after construction) that will be used for rental purposes, a depreciable asset in those premises will not be considered a 'previously used' asset. As a result, depreciation deductions can still be available in respect of these assets.
- **Landlords who carry on a rental property business** – The depreciation restriction does **not** apply where a landlord carries on a business of letting properties.

  This means that where, for example, a landlord acquires an existing residential rental property which is part the landlord's business of letting residential properties, depreciation deductions can still be available in respect of depreciable assets in that property at the time of purchase.

  Whether a landlord is carrying on a rental property business will depend on the specific facts of each case. Based on existing ATO and case law guidelines, to establish that a landlord is carrying on a rental property business, a landlord would need to at least prove the following:

  - **The landlord derives rent from multiple residential properties** – Many of the Tribunal decisions and ATO examples which found that a rental property business was carried on involved **at least nine** residential properties.
  - **The landlord is actively involved in rental property activities** – This would require a landlord to be actively and extensively involved in managing their properties. This will **not** be satisfied when a landlord solely uses the services of a managing agent to manage their rental properties.

Editor: This planning tip will be discussed in more detail in the upcoming Tax Schools Day 1 seminar, along with many other issues that may affect individual taxpayers.

What's on at the NTAA

2023 Tax Schools Day 1 & Day 2 Seminars Available as Online or Face to Face

Our **Tax Schools Day 1** Seminar focuses on all the key changes and developments affecting individual clients and the preparation of the 2023 Individual return.

Our **Tax Schools Day 2** Seminar provides tax practitioners with practical guidance on the key developments for business clients in the 2023 year.

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2023 Deceased Estates Online Seminar

The NTAA's 2023 Deceased Estates Online Seminar is designed to guide you through assisting clients with deceased estates and estate planning, and all the associated tax and administration issues.

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Social Media Influencers Online Seminar

A big challenge for Tax Agents is the uncertainty around income tax, GST and deductions in the social media influencer space.

This seminar addresses the tax issues you need to know.

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Tax on the Couch — May 2023

In the May 2023 edition of '***Tax on the Couch***', our tax specialists discuss the latest developments in tax and superannuation, including, amongst other things:

- an update on where key tax legislation is at since Parliament shut down for the Easter Break in anticipation of the May Federal Budget sittings;
- consideration of the key features of the 'Better Targeted Superannuation Concessions', including a summary of the key NTAA concerns addressed in our submission to Treasury;
- a look at the recently issued ATO guidance on how to calculate the cost associated with charging electric vehicles at home for both FBT and income tax purposes;
- the latest Court and Tribunal decisions, including a landmark super guarantee decision; and
- the NTAA's Hot Topic that considers the key tax and GST issues arising on the death of a business partner.

Tax On The Couch