client alert | explanatory memorandum

April 2018

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 23 March 2018.

ATO embarking on e-Audits

The ATO has recently published information about the "e-Audit" technology it utilises as part of its ongoing tax compliance activities. It says that if a taxpayer maintains electronic financial records, the ATO may use computer-assisted verification techniques to audit and analyse the records.

Accessing taxpayer records

Using formal access powers, the ATO is permitted full and free access to documents required for the purposes of the Acts it administers. Those documents include electronically stored information. The ATO says it will usually seek access to a taxpayer's information through a cooperative approach and it will consult with the taxpayer on the records required.

Supplying electronic information

When the ATO identifies a need for a taxpayer to provide electronic information, it will schedule a meeting – often with the taxpayer's adviser and information technology specialist – to obtain that information. The ATO says it will always discuss this with the taxpayer beforehand to develop an understanding of their electronic systems and identify what information the ATO may need to collect.

The ATO says it will seek to understand:

- the accounting systems the taxpayer uses;
- the taxpayer's system architecture and how the data flows through their systems;
- the format and extent of the taxpayer's electronic records; and
- the documentation available to assist the ATO's analysis, eg the taxpayer's chart of accounts, reference tables or data dictionary.

The ATO says it is flexible when organising a meeting time. Taxpayers will also be able to assist the ATO by having certain information ready prior to the meeting. This includes details of the taxpayer's software programs, relevant system documentation and contact details of advisers or staff who prepare the taxpayer's business activity statements or financial records.

ATO data review and analysis

Once the taxpayer has provided the necessary information, the ATO uses specialised software to verify that the data is accurate and complete. The ATO then conducts a series of tests on the data to ensure the taxpayer has complied with relevant tax laws.

Taxpayers can be assured that:

- the ATO's tests do not alter the data itself, so the integrity of the taxpayer's data is not at risk; and
- the ATO does not operate the taxpayer's computer system but, rather, works with a copy of the data.

Information systems risk assessment

The ATO says the integrity of the information systems used to support a taxpayer's business will affect the accuracy and completeness of the information they report. As part of the e-Audit process, the ATO may use its information systems risk assessment (ISRA) tool to assess a taxpayer's system risks in relation to correct reporting of tax and super obligations.

An ISRA is essentially a process that provides a high-level overview of a taxpayer's information systems and enables the ATO to derive a risk rating for key elements of the taxpayer's systems. The ATO will perform the assessment by speaking to someone within the taxpayer's business with knowledge of the information systems. The ATO will ask a series of questions about the history of the taxpayer's systems and what planning and support they have in place.

One benefit of an ISRA is that it can highlight particular compliance risks for a taxpayer, which may reduce the scope of further compliance activity. The ATO will provide the taxpayer with a final report that includes recommendations for addressing any issues the ATO identifies.

Source: www.ato.gov.au/General/Building-confidence/In-detail/Computer-assisted-verification--e-Audit-and-risk-assessment/.

Court finds pay-as-you-go amounts "withheld" from salary payments

The Federal Court has ruled that pay-as-you-go (PAYG) amounts were "withheld" from a taxpayer's salary so that she was entitled to a tax credit, despite the amounts never being remitted or notified to the ATO by her employers: *Cassaniti v FCT* [2018] FCA 92. The case illustrates the importance of records and documentation in establishing whether an employer has "withheld" PAYG in circumstances where that employer has not complied with their obligation to remit those amounts to the ATO.

Background

The taxpayer was an office clerk in a tax and accounting firm, Armstrong Scalisi Holdings Pty Ltd (trading as CAP Accounting). Over the relevant income years, the taxpayer was employed by three service companies that provided her services as a clerk to CAP Accounting. Her husband was also associated with CAP Accounting.

As the service companies had not remitted or notified any PAYG withholding amounts to the ATO in respect of the taxpayer, the Commissioner denied her claim for withholding tax credits in her income tax returns. The taxpayer sought declarations that she was entitled to withholding tax credits for amounts she claimed had been withheld from her salary payments for the 2012, 2013 and 2014 income years. The amounts in dispute were $14,427, $14,088 and $13,235, respectively, for those years.

The ATO argued that there was insufficient evidence to prove that the amounts had been "withheld" to qualify for a credit under s 18-15(1) of Sch 1 to the *Taxation Administration Act 1953*. The taxpayer submitted that just because the amounts withheld had not been remitted to the ATO, it was not necessarily the case that the amounts were not withheld from the payments made to her.

Decision

The taxpayer and the ATO generally agreed on the relevant legal principles (as established in *David Cassaniti v FCT* (2010) 79 ATR 340 and *Cassaniti v FCT* (2010) 79 ATR 378). The case was therefore a fact-finding exercise to determine whether, factually, the employers had "withheld" PAYG amounts from the taxpayer's salary.

On the balance of probabilities, the Court accepted the taxpayer's evidence, including details from her offer of employment, payslips, bank statements and payment summaries, which suggested that the salary payments she received were "net pay" amounts (and not "gross pay"). As such, the Court ruled that the taxpayer was entitled to the tax credits because the amounts had been "withheld" from her salary.

The Court noted that non-payment to the ATO of amounts withheld will invite scrutiny of the surrounding circumstances, especially where the taxpayer is not at arm's length from the employer. However, in this case, the Court accepted the taxpayer's evidence and rejected the ATO's submission that the documents were "falsely prepared" or "recent inventions". The Court also dismissed the ATO's claim that there was not sufficiently clear contemporaneous evidence of the PAYG being withheld from the payments.

It was also noted that the taxpayer did not work on the firm's payroll records. Rather, her role in the firm was limited to things like greeting clients, answering phones, filing, photocopying and making coffees. In assessing the evidence given by the taxpayer during the proceedings, the Court found that her knowledge of the events was consistent with her position as a clerk who did not have any responsibility for payroll matters.

Source: Cassaniti v FCT [2018] FCA 92.

"Transition to retirement" pensions to become simpler

The government has released exposure draft legislation to ensure that a superannuation reversionary transition to retirement income stream (TRIS) will always be allowed to automatically transfer to eligible dependants on the death of the primary recipient. The amendments are designed to remove a trap in the current legislation that has created administrative difficulties for some funds.

Currently, a reversionary TRIS cannot transfer to a dependant if the dependant themselves has not satisfied a condition of release under the Superannuation Industry (Supervision) Regulations 1994 (SIS Regs). This is because the primary member's superannuation can only be paid as an income stream if it is in the "retirement phase" and paid to a dependant beneficiary. Of course, where a reversionary TRIS currently cannot be paid for that reason, a deceased's super can still be paid to a dependant beneficiary as a *new* income stream without them satisfying a condition of release in their own right. However, having to commute the original TRIS and commence a new income stream is inconvenient, requires immediate action on the death of the member and may cause uncertainty.

The draft legislation would amend s 307-80(3) of the *Income Tax Assessment Act 1997* with effect from 1 July 2017 to modify the rules that determine when a TRIS is in the "retirement phase" to ensure that a reversionary TRIS can always be paid to a reversionary beneficiary. The amendment will allow the original

TRIS to be automatically paid to the dependant beneficiary, eliminating the need to commute the original pension and start a new income stream from the deceased member's underlying superannuation interests.

The proposed change also means that the reversionary beneficiary's transfer balance account will not be credited until 12 months after the death of the primary beneficiary. This will give the reversionary beneficiary some time to review their superannuation affairs and take any necessary steps to ensure they will not exceed their transfer balance cap. The amount of the credit is the value of the income stream at the time it first became payable to the reversionary beneficiary (ie at the date of death).

Source: https://treasury.gov.au/consultation/c2018-t261423/.

ATO releases latest small business benchmarks

The ATO has released its latest small business benchmarks, providing over 100 different industries with average cost of sales and average total expenses. Businesses can see clearly what the relevant benchmarks are for their industry and use these to assess their own business.

The benchmark data is derived from the income tax returns and activity statements of over 1.4 million small businesses around the country. The ATO says these benchmarks have multiple uses for businesses:

- **Tax compliance**: businesses who identify that their own figures are outside the benchmark range for their industry can review their records to ensure that they have accurately recorded all income and expenses. Being outside a benchmark range doesn't necessarily mean that something is wrong, but it can be a useful flag for prompting a business to double-check its records.
- **Business performance insights**: businesses can use the benchmarks to judge their performance against industry standards and to identify ways to improve profitability.

The benchmarks can be found on the ATO website via an A to Z list or by industry. Businesses can also use the "business performance check" tool on the ATO app to compare their own business against industry benchmarks.

Source: www.ato.gov.au/Business/Small-business-benchmarks/.

Capital gains tax withholding: updated information for trustees

The foreign resident capital gains tax (CGT) withholding regime requires a purchaser of certain Australian property to withhold an amount from the purchase price (for remission to the ATO) if the vendor is a foreign resident. This regime is designed to assist the ATO in collecting CGT payable by foreign residents.

If the vendor is an Australian resident, they must provide an ATO-issued clearance certificate to the purchaser on or before the day of settlement to ensure no withholding occurs. To apply for this certificate, Australian resident vendors must use the *Foreign resident capital gains withholding clearance certificate application form* to notify the ATO that foreign resident CGT withholding doesn't need to be withheld from the sale of the property. The form needs to be completed and lodged with the ATO as early as practical because it can take 14 days to process.

Trusts and superannuation funds

The ATO has provided updated information for trusts and superannuation funds. If the entity that has legal title to the asset is the trustee, the ATO says that it should (in its capacity as either a company or an individual) apply for the clearance certificate using its own tax file number (TFN) or Australian business number (ABN) as the identifier (if it has one). The ATO recommends including the Australian company number (ACN) as an attachment (if the entity has one). If a corporate trustee does not have a TFN, it should include an attachment in the application that provides the details of the relevant trust.

Source: www.ato.gov.au/Forms/Capital-gains-withholding-clearance-certificate-application-online-form-and-instructions---for-Australian-residents/.

Goods and services tax on low-value imported goods

The ATO has issued Law Companion Ruling LCR 2018/1, which covers the recently enacted measure to impose goods and services tax (GST) on supplies of imported low-value goods (ie goods valued at A$1,000 or less) from 1 July 2018. This measure was introduced to create a more "level playing field" for local retailers. The existing rules about GST on imports valued above $1,000 are unchanged.

The ruling explains:

- when a supply of low-value goods is connected with Australia;
- when a supplier needs to be registered for GST;
- how to calculate the GST payable on the supply;
- rules to prevent double taxation of goods;

- rules to correct errors or deal with changes in the GST treatment of a supply; and
- how the new measure interacts with other rules under which supplies are connected with Australia.

Note that for ease of reference, the ruling uses the term “Australia” in place of “indirect tax zone” (the equivalent technical term used in the GST legislation).

The ruling explains that the entity that is treated as the supplier will be responsible for GST on the supply of low-value imported goods. This may be the merchant, but it can also be an operator of an electronic distribution platform (EDP) or redeliverer.

The new measures do not change the requirements for registration. That is, a supplier is required to register if its current or projected annualised GST turnover equals, or exceeds, the GST turnover threshold (generally $75,000). The ATO says that the entity responsible for GST on offshore supplies of low-value goods must count the value of those supplies when determining whether it meets the GST turnover threshold.

Australian consumer law requirements

Generally, Australian consumer law requires retailers to provide a price that is inclusive of GST, where GST is applicable. This may be difficult for offshore suppliers – how will they be certain that a supply of goods will be liable for GST?

The ruling offers the possibility of some relief by stating that if it is initially considered less likely that GST will apply to the supply, the supplier can instead display a message that notes the potential for additional taxes to apply. However, when offshore suppliers are aware that they are offering low-value goods for sale into Australia to consumers, the price displayed should be a GST-inclusive price. Indicators that this is the case would include situations where:

- a website is advertising consumer goods in Australian dollars;
- a “.com.au” domain name is being used; or
- location services show the recipient is in Australia.

Supplies incorrectly treated as taxable supplies

An adjustment event will arise if the supplier (or entity treated as the supplier) discovers that the supply should not have been a taxable supply because of information about either the nature of the goods or the recipient. Where the supplier has already included the GST payable on such a supply in its assessed net amount in a return, the amount will be “excess GST” for GST purposes. The excess GST will only be refundable to the supplier if either:

- the excess GST has not been passed on to the recipient; or
- the recipient has been reimbursed.

Where the excess GST was not passed on to the recipient, the supplier can request an amended assessment or claim a refund in a later tax period. Alternatively, where the excess GST was passed on but a reimbursement has subsequently been made to a recipient, the supply ceases to be a taxable supply and the supplier can make a decreasing adjustment.

Source: www.ato.gov.au/law/view/document?docid=COG/LCR20181/NAT/ATO/00001.

Superannuation rates and thresholds for 2018–2019

Contributions caps

The concessional contributions cap for 2018–2019 is $25,000 for members of all ages (unchanged from 2017–2018). As the concessional cap is now only indexed in $2,500 increments in line with average weekly ordinary time earnings, it is not expected to increase to $27,500 until 2023 based on the current rate of wages growth.

The non-concessional contributions cap (which is set at four times the concessional cap) is also unchanged at $100,000 for 2018–2019 (or $300,000 under the “bring-forward” rule over three years).

The CGT cap amount for non-concessional contributions is $1.480 million for 2018–2019 (up from $1.445 million in 2017–2018).

Super guarantee

While the super guarantee percentage is frozen at 9.5% until 1 July 2021, the “maximum contribution base” will rise to $54,030 per quarter in 2018–2019 (up from $52,760 for 2017–2018). An employer is not required to provide the minimum super guarantee support for that part of an employee’s ordinary time earnings (OTE) above the quarterly maximum contribution base (ie $54,030 for 2018–2019). This quarterly maximum represents a per annum equivalent of $216,120 for 2018–2019.

Government co-contributions

The government co-contribution lower income threshold is $37,697 for 2018–2019 (up from $36,813 for 2017–2018). The higher income threshold is $52,697 (up from $51,813).

Super benefits

The following indexed thresholds for certain superannuation payments apply for 2018–2019:

- Superannuation lump sum low rate cap: $205,000 (up from $200,000 in 2017–2018).
- Untaxed plan cap: $1.480 million (up from $1.445 million).
- ETP cap amount: $205,000 (up from $200,000).
- Genuine redundancy and early retirement payments – tax-free amounts:
  - base amount: $10,399 (up from $10,155); and
  - service amount: $5,200 (up from $5,078).

Pension cap

The general transfer balance cap will remain at $1.6 million for 2018–2019 (unchanged from 2017–2018). This also means that the "defined benefit income cap" of $100,000 per annum is unchanged for 2018–2019. Likewise, the "total superannuation balance" threshold of $1.6 million is unchanged.

Source: www.ato.gov.au/Rates/Key-superannuation-rates-and-thresholds/.

Super guarantee: ATO compliance approach to non-payment

The ATO has issued a fact sheet explaining its compliance approach to employers who fail to meet their superannuation guarantee (SG) obligations. This may include non-payment, under-payment or late payment of SG contributions.

Employer SG obligations

The SG legislation requires employers to make SG contributions by quarterly due dates. The minimum required amount is currently 9.5% of an employee's "ordinary time earnings". SG contributions must be made irrespective of whether an employee:

- is full-time, part-time or casual;
- is a company director;
- is a family member working in the employer's business, provided they are eligible for SG;
- receives a super pension or annuity while still working, including a transition to retirement income stream (TRIS); or
- is a temporary resident.

Employers who pay an eligible employee $450 or more (before tax) in a calendar month are required to make SG contributions for that employee.

Some contractors are still "employees"

For SG purposes, certain contractors paid mainly for their labour are still treated as "employees" *even if the contractor quotes an Australian business number (ABN)*. The ATO says employers must make super contributions for these individuals if they are paid:

- under a verbal or written contract that is wholly or principally for their labour;
- for their personal labour and skills (which may include physical labour, mental effort or artistic effort) and not for a result; and
- to perform the contract work personally (ie, they must not delegate).

ATO compliance approach

The ATO says it uses sophisticated data analytics to identify employers at high risk of non-compliance. It takes a differentiated approach to compliance and penalties for SG non-compliance depending on the employer's compliance history and individual circumstances. The ATO warns that it will take firm compliance action against employers who are able but unwilling to meet their SG obligations (such as employers who fail to reply promptly to ATO correspondence or fail to take active steps towards resolving an SG discrepancy). The ATO will also target compliance action towards employers who:

- repeatedly fail to pay the correct amount of SG;
- attempt to obstruct the ATO in determining an SG liability;
- repeatedly fail to keep appointments;

- repeatedly fail to supply information without an acceptable reason;
- deliberately supply information that is irrelevant, inadequate or misleading; or
- engage in any culpable behaviour to delay the provision of information.

Penalties

In addition to the super guarantee charge (SGC), a penalty of up to 200% applies if an employer lodges their SGC statement late or fails to provide information when requested. While the Commissioner has a discretion to remit this penalty, any decision to remit will take into account the employer's compliance history and the extent to which the employer has attempted to comply. There is no discretion to remit the SGC itself. An administrative penalty of up to 75% may also apply if an employer makes a false or misleading statement.

Source: www.ato.gov.au/law/view/document?DocID=AFS/SGcompliance.

Single Touch Payroll reporting: ATO urges employers to get ready

The ATO has called on employers with 20 or more employees to start preparing now for the Single Touch Payroll (STP) reporting regime, which will be mandatory from 1 July 2018.

This major reporting change for employers means they will report payments such as salaries and wages and allowances, PAYG withholding and superannuation contributions information to the ATO directly from their payroll solution at the same time they pay their employees. STP reporting starts on 1 July 2018 for employers with 20 or more employees, and is slated to apply from 1 July 2019 for those with 19 or fewer employees.

Assistant Commissioner John Shepherd said STP will allow employers to meet their ATO reporting obligations for employees' tax and super information using their own payroll or accounting software that is STP-ready. Many employers will be able to update their existing payroll software to a version that is STP-ready. However, employers with 20 or more employees who do not use payroll software will need to choose a product that offers STP by 1 July 2018, Mr Shepherd said.

Steps to get STP-ready

The ATO urges employers to start preparing now to be STP-ready. The next steps are:

- Download the "Get ready checklist" from the ATO website.
- Do a headcount of employees as at 1 April 2018. The ATO has resources available on its website (including a video presentation) about which employees to include in the headcount.
- Talk to existing software providers about how and when their product will be STP-ready.
- For employers who don't have existing software – choose a product that offers STP. The employer's tax or BAS agent may be able to suggest a suitable product.
- Update the payroll software when it's ready for STP and start reporting to the ATO through STP.

Mr Shepherd said some payroll software providers have asked the ATO for more time to get ready. Therefore, employers should ask if their provider has been given such a deferral and check when their product will be updated to offer STP reporting. While employers with 19 or fewer employees are not required to use STP until 1 July 2019, Mr Shepherd said such small employers can choose to start reporting through STP early if their software is ready.

A number of STP resources including factsheets, checklists, information packs and advice on how to manage headcount are available on the ATO website.

Source: www.ato.gov.au/Media-centre/Media-releases/Time-for-employers-to-get-ready-for-Single-Touch-Payroll/.

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