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Rundles Report

tax news | views | clues

Autumn 2017

ATO priority on settling cases – but not at any cost

The ATO has advised that it places a high priority on resolving tax disputes early, including through reaching settlements where appropriate, but that it will not settle disputes at any cost. It says “the sensible use of settlements” is part of its commitment to earlier and more effective dispute resolution. In this regard, the ATO has advised that in 2015–2016, it settled 1,362 cases (31% more than in the previous year) and that the increased number of settlements can be attributed entirely to settlements finalised as part of Project DO IT (Disclose Offshore Income Today).

TIP: The ATO’s stated policy of “placing a high priority on resolving disputes early, including through settlements where appropriate” is something that should be kept in mind in any dispute with the Commissioner, whether large or small. A settlement may provide a great opportunity to finalise a difficult or long-running dispute.

ATO develops work-related expenses risk profiles

The ATO has developed work-related expenses risk profiles to help it identify how work-related expense deduction amounts compare for similar taxpayers. The ATO said improvements in data analytics and modelling have allowed it to create a risk profile for tax agents’ practices based on comparing their clients’ work-related expenses claims with those made by similar taxpayers.

The ATO has said it will share these risk profiles with some tax professionals where their clients’ claims appear higher than expected.

TIP: The ATO’s increasing capacity to monitor the often difficult issue of work-related expenses claims means taxpayers and tax professionals need to take care when preparing returns. Contact us if you would like to discuss which of your work-related expenses may be tax deductible.

Onus on taxpayers to show no fraud or evasion: Full Federal Court

Several taxpayers have been unsuccessful in their appeals to the Full Federal Court in which they challenged tax assessments that dramatically increased their assessable income for certain income years. In each case, the Court confirmed that where the Commissioner of Taxation has issued an amended or default assessment out of time on the grounds of taxpayer “fraud or evasion”, the taxpayer bears the responsibility of proving that such fraud or evasion does not exist.

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No disclaimer of trust interest: unsuccessful appeal

A beneficiary of two trusts whose assessable income was increased from some \$70,000 to some \$13 million in light of her entitlement to distributions from the trusts has been unsuccessful in claiming on appeal that she had “disclaimed her interests” in the trusts. Instead, the AAT found that she could not argue she had disclaimed her interests in the distributions. This finding was on the basis that she did not bring up having made “disclaimers” when she originally objected to amended assessments that the Commissioner of Taxation issued in 2013. Additionally, in any event, the AAT found that the disclaimers were legally ineffective because of the significant period of time between the distributions being made (in 2006 and 2007) and the disclaimers being made (in 2015).

TIP: Any attempt to disclaim an interest in a trust for tax purposes must be legally valid first – and the key consideration is that there must not have been behaviour that indicates implied acceptance of the interest. In this case, the taxpayer’s behaviour was problematic because she did not act until well after she received the distributions and they were assessed as part of her income.

Admin penalties of 75% for failing to lodge FBT returns

The AAT has confirmed that 75% administrative penalties were rightfully imposed on several companies for their failure to lodge FBT returns over a four-year period. The AAT found that the Commissioner of Taxation was obliged to impose a 75% administrative penalty because the FBT returns were not lodged, and that the “safe harbour” provisions did not apply to such an administrative penalty.

The AAT also found that it was not appropriate to exercise its discretion to remit the penalties in part or whole under the circumstances. The AAT relied on the criteria in Practice Statement Law Administration PS LA 2014/4 in arriving at its decision.

New ATO data-matching program: ride-sourcing

The ATO has announced a new data-matching program involving ride-sourcing providers. Under the program, the ATO will acquire data to identify individuals who may be engaged in providing ride-sourcing services during the 2016–2017 and 2017–2018 financial years. Details of all payments made to ride-sourcing providers from accounts held by a ride-sourcing facilitator will be requested from the facilitator’s financial institution for the 2016–2017 and 2017–2018 financial years. The ATO estimates that up to 74,000 individuals (ride-sourcing drivers) offer, or have offered, the services.

TIP: If you work as a driver for Uber or a similar ride-sourcing facilitator, the money you make is assessable income that needs to be included in your tax return. It may also need to be reported for GST purposes. Contact us for more information about how the ATO’s data-matching program may apply to your circumstances.

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Taxation ruling on commercial website deductibility

A new taxation ruling from the ATO sets out the tax deductibility of expenditure incurred in acquiring, developing, maintaining or modifying a commercial website for use in carrying on a business.

Broadly, the ruling explains that acquiring or developing a commercial website for a new or existing business is considered to be a capital expense, and is therefore not deductible. On the other hand, maintaining a website, including remedying software faults, is generally a revenue expense, so may be deductible.

Taxation determination on deductions for bad debts: trust beneficiaries and UPEs

In a new tax determination, the ATO states that a beneficiary is not entitled to a bad debt deduction for an amount of unpaid present entitlement (UPE) that the beneficiary purports to write off as a bad debt.

It says this is because the amount of UPE is not included in the beneficiary's assessable income. Instead, the entitlement is used to determine how much net income of the trust is included in the beneficiary's assessable income. This means that the debt amount cannot be included in the taxpayer's income in that year or in an earlier income year, which is a requirement for writing off a bad debt.

Taxpayer failed to prove that payments were "loans"

In a recent case, the Full Federal Court has found that several taxpayer companies had not discharged the onus of proving that assessments the Commissioner of Taxation issued to them were excessive. The amended assessments took into account income of some \$4 million that the Australian companies received from overseas sources. The taxpayers had claimed that the payments were loans.

In allowing the Commissioner's appeal, the Court majority held that it would not be appropriate to find that the taxpayers had provided the required proof that the payments were genuine loans; in fact, they had made inconsistent or "alternative" arguments about the nature of the payments.

Re-characterisation of income from trading businesses

The ATO has released Taxpayer Alert TA 2017/1 to say it is reviewing arrangements that try to fragment integrated trading businesses to re-characterise trading income as more favourably taxed passive income. The ATO is concerned with cases where a single business is divided in a contrived way into separate businesses. The business income expected to be subject to company tax is artificially diverted into a trust and, on distribution from the trust, that income is ultimately subject to no tax or to a lesser rate than the corporate rate of tax.

The ATO explains that "stapled structures" are one mechanism being used in these arrangements, but the review will not be limited to arrangements involving stapled structures.

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TIP: Taxpayer Alert 2014/1 deals with similar arrangements where trusts “mischaracterise” property development receipts as concessionally taxed capital gains to obtain a lower tax rate.

ATO warning: research and development claims in building and construction industry

The ATO and the Department of Industry, Innovation and Science have released Taxpayer Alert TA 2017/2 and TA 2017/3 as a warning to businesses that are not being careful enough in their claims or seeking to deliberately exploit the research and development (R&D) Tax Incentive program. The alerts relate to particular issues identified in the building and construction industry, where specifically excluded expenditure is being claimed as R&D expenses. The alerts provide clarification for a wide range of businesses who had been incorrectly claiming ordinary business activities against the R&D tax incentive.

Intangible capital improvements made to a pre-CGT asset

The ATO has issued Taxation Determination TD 2017/1. It provides that for the purposes of the “separate asset” rules in the *Income Tax Assessment Act 1997* (ITAA 1997), some intangible capital improvements can be considered separate capital gains tax (CGT) assets from the pre-CGT asset to which the improvements are made, if the improvement cost base is more than the improvement threshold for the income year when CGT event happened, and it is more than 5% of the capital proceeds from the event.

This determination updates CGT Determination No 5 to apply to the ITAA 1997 provisions, without changing the CGT determination’s substance.

TIP: Contact us if you would like more information about how this determination applies to your CGT situation.

Personal services income diverted to SMSFs: ATO extends offer

Since April 2016, the ATO has been reviewing arrangements where individuals divert personal services income (PSI) to a self managed super fund (SMSF). The arrangements, described in Taxpayer Alert TA 2016/6, involve individuals (typically SMSF members at or approaching retirement age) performing services for a client but not directly receiving consideration for the services. Instead, the client sends the consideration for the services to a company, trust or other non-individual entity.

The ATO has previously asked taxpayers to help identify and resolve these issues before 31 January 2016, offering to remit the related penalties. That offer has now been extended to 30 April 2017.

Depreciating assets: composite items

Draft Taxation Ruling TR 2017/D1 sets out the Commissioner of Taxation’s views on how to determine if an entire composite item is a depreciating asset

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or whether its component parts are separate depreciating assets. The draft ruling says that a “composite item” is an asset made up of a number of components that can exist separately. Whether one or more of the item’s components can be considered separate depreciating assets is a question of fact and degree to be determined in the particular circumstances. For a component of a composite item to be considered a depreciating asset, the component must be separately identifiable as having commercial and economic value.

TIP: The draft ruling usefully lists the main principles to take into account when determining whether a composite item is a single depreciating asset or is made up of multiple depreciating assets. Contact us if you would like to know more.

Tax risk management and governance review guide released

The ATO has released a tax risk management and governance review guide to help businesses develop and test their governance and internal control frameworks, and demonstrate the effectiveness of their internal controls to reviewers and stakeholders. The guide sets out principles for board-level and managerial-level responsibilities, and gives examples of evidence that a business can provide to demonstrate the design and operational effectiveness of its control framework for tax risk. The guide was developed primarily for large and complex corporations, tax consolidated groups and foreign multinational corporations conducting business in Australia, but the ATO says the principles can be applied to a corporation of any size if tailored appropriately.

Overtime meal expenses disallowed because no allowance received

A taxpayer has failed in claiming deductions for overtime meal expenses before the Administrative Appeals Tribunal (AAT). The AAT denied his appeal because he was not paid an allowance under an industrial agreement.

The AAT noted that whether overtime meal expenses are deductible according to the tax law depends on whether the taxpayer receives a food or drink allowance under an industrial instrument. The AAT agreed with the Commissioner of Taxation that the taxpayer had not received an allowance of this kind and, in fact, had not received any allowance at all.

Time extension to review objection decisions disallowed – again!

The Administrative Appeals Tribunal (AAT) has refused to allow a taxpayer extra time to apply for review of a decision made by the Commissioner of Taxation. The taxpayer had previously made the same application for an extension, seven years after the Commissioner’s decision, but both the AAT and the Federal Court refused it.

In this later case, the AAT found that the taxpayer’s application should not be allowed because he had still not adequately explained why it took him seven years to ask for an extension and a decision review.

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TIP: This decision illustrates that a taxpayer can continue to apply to the AAT for extension of time to apply for review of the Commissioner's decision disallowing an objection, even after being previously rebuffed. The additional application must include new claims and the taxpayer's case must have merit.

No deduction or capital loss for apparent guarantee liability

The Administrative Appeals Tribunal (AAT) has affirmed that two family trusts that were involved in a building and construction business with other related entities were not entitled to a deduction or a capital loss for \$4.3 million that they claimed related to a guarantee liability. The AAT found that the documentary evidence and the oral evidence from the relevant trust controllers was not sufficient support for their claim that the guarantee obligation existed. The AAT noted that unusual features of the "guarantee deed" that put into question whether the trusts were genuinely subject to a guarantee obligation – including that the deed did not record any actions that the guarantors were to perform if the debtor defaulted.

Taxpayer denied deduction for work expenses of \$60,000

The Administrative Appeals Tribunal (AAT) has confirmed that a mechanical engineer with a PhD qualification was not entitled to deductions for various work-related expenses totalling approximately \$60,000. The expense claims in question (for vehicle, self-education and other work expenses), were denied because the taxpayer was unable to establish the required connection between the outgoing amounts and the derivation of his assessable income as a mechanical engineer. Furthermore, in relation to a range of miscellaneous expenses (such as mobile phone and internet charges, professional membership fees, conference fees and depreciation), the AAT found that most of the deductions were not substantiated with sufficient (or any) evidence. The AAT did not exercise its discretion to allow these deductions on the basis of the "nature and quality" of any other evidence regarding the taxpayer's incurring the expenses.

TIP: This case clearly shows the importance of properly substantiating any claims you make for work-related expense deductions. Contact us to discuss what documentation you should keep to make tax time easier.

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Noel's News



Film Reviews – by Susan Osbourne

***Perfect Strangers* - (Italian with English subtitles)**

Starring: Marco Gallini, Giuseppe Battiston, Anna Foglietta, Edoardo Leo

A box office hit at the 2016 Lavazza Italian Film Festival.

Seven friends from university, now in their forties, meet for dinner. They have known each other for half their lives and are comfortable in their friendships. The ubiquitous mobile phone becomes a topic of conversation and a dare is made. They should all place their phones on the table for the evening and any call or message will be shared with the whole group. How well do they really know each other? Of course, secrets are revealed and relationships tested.

An unsettling drama/comedy. **Would you play this game?**

Manchester By The Sea (M)

Starring: Casey Affleck, Michelle Williams, Lucas Hedges

Academy Awards: Best Actor (Casey Affleck), Best Original Screenplay

After Lee's older brother dies suddenly, Lee (*Casey Affleck*) is made legal guardian of his teenage nephew, Patrick (*Lucas Hedges*). Lee must return to the community where he used to live, to manage his brother's affairs. In dealing with the loss of his brother and trying to guide Patrick in his life, Lee must also come to terms with a past tragedy of his own.

This film deals with loss and grief with very moving and realistic performances.

Highly recommended.

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Restaurant Reviews by Mark Lisle

Fen

22 Sackville Street, Port Fairy

Fen is Port Fairy's best restaurant but it stacks up against any fine dining restaurant you would find in Melbourne as well. It prides itself on sourcing the best local produce and having an all-Australian wine list but I just like it because the food is good. The best option is probably the tasting menus – they have a 5 course and I think an 8 course menu. That way you get to try a bit of everything, which could include seafood, duck, lamb, beef or even a vegetarian dish. We found everything delicious.

As for the wine list, the fact that it only contains Australian wines does not restrict the range. I guess the only thing would be that, if your favourite wine was say, a NZ Sauvignon Blanc, or if you really love Champagne, you might be disappointed.

Fen is expensive but everything is top class. I haven't heard of anyone who has been disappointed with their experience at this restaurant.

Stokehouse

30 Jacka Blvd, St Kilda

We went to Stokehouse recently, for the first time since it has been re-built. It certainly looks a lot different from the old building. It is a more modern structure and it is designed to blend in with the landscape. Inside, it is definitely more spacious than the old Stokehouse and there are more windows, which means that the view of the Bay is larger. The décor is modern but still beachy, with light timber floors.

Stokehouse no longer has an upstairs and a downstairs. The Stokehouse restaurant is upstairs but downstairs there is a bar and a fish & chippery, which is not part of Stokehouse, although I have heard that they are owned by the same people.

The food, the wine and the service were all fine, hard to fault, but I thought the menu lacked a bit of "wow" factor. I couldn't be critical of the food but, to me, nothing really stood out on the menu. I think the Stokehouse experience is more about the décor, the view and the atmosphere than it is about the food. So, how much are you prepared to pay for that experience? Be prepared to pay plenty.

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Sporting Predictions – as seen by Brad Roach

AFL

The 2017 AFL season is underway with supporters of all teams having high expectations of the performance of their team for the year ahead.

My top 8 at the opening of the season is GWS, Adelaide, Western Bulldogs, West Coast, Geelong, Sydney, Melbourne and St Kilda. The grand final will be played out between GWS and Adelaide with GWS coming away with their first piece of silverware. Looking ahead to the Brownlow Medal, the top three vote getters will be Dustin Martin, Patrick Dangerfield and Rory Sloane. Josh Kennedy will win the Coleman Medal.

GOLF

The highlight of the golfing calendar is almost upon us with the US Masters only a couple of weeks away. Dustin Johnson has been in great form and will be tough to beat, with Rory McIlroy and Jordan Spieth rounding out the top three in what will be a close finish.

SOCCER – A LEAGUE

The A-League competition is approaching the end of the 2016-2017 season. Melbourne Victory will be the A-League premiers over Sydney FC 2-1.

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