Tel: (08) 9444 9711
Web: www.infocusaccounting.com.au

IN THIS ISSUE

TAX OFFICE RELEASES FINAL GUIDANCE ON TRUST DISTRIBUTIONS AND S100A.

The ATO has now finalised its guidance on when they will seek to apply section 100A to trust distributions made to beneficiaries who don't receive or enjoy the benefit of that distribution.

Whilst the timing of this release may not suit many with the Christmas break fast approaching, it does provide a clearer indication of what the ATO will seek to target and waters down, ever so slightly, the draft position they released in February 2022.

The key changes include the removal of the "unhelpful" Blue Zone as the middle ground on their Risk Matrix, further and more relevant examples in the Green Zone have been provided, as well as a clearer statement on the ATO's position on pre and post 30 June 2022 trust distributions.

You might recall the ATO published draft guidance in February 2022 essentially seeking to apply section 100A (a section introduced in the later 1970's) to certain distributions from a trust that were made under what is termed a "reimbursement agreement", whereby the benefit of that distribution was meant for someone other than the beneficiary.

Targeted distributions included:

- Unpaid distributions to adult children (or grandparents);
- Distributions to beneficiaries with tax losses;
- Distributions to adult children that are offset against expenses incurred for those children before they turned 18;
- Distributions to beneficiaries that were gifted or assigned to others;
- Distributions to non-resident beneficiaries that remain unpaid.

The tax consequence of applying section 100A is that the trustee is assessed on the distribution rather than the beneficiary, and the trustee is taxed at a flat rate of 47%. As you can appreciate, this got the attention of trustees, beneficiaries and their accountants across the country.

Importantly the final ATO ruling only seeks to apply their detailed views to distributions made after 30 June 2022, provided that trustees acted in accordance with the ATO's website guidance released in 2014. This guidance was particularly brief and did not cover anywhere near the distributions highlighted as being of concern in the final ATO ruling.

We certainly hope the ATO focusses its attention prospectively and not retrospectively here, certainly where there is some doubt and we are pleased to hear that the ATO has said that in most cases, if they do seek to apply this retrospectively, it will only be within 4 years of the trustee lodging their return. This would mean the 2018 and subsequent year's trust distributions should be reviewed to determine whether any section 100A risks do exist and how they can be mitigated.

In terms of the Green Zone, or "safe" zone, the ATO have expanded their examples of trust distributions that they will not dedicate compliance resources to. These include:

- A Beneficiary who receives their trust entitlement within 2 years of the distribution, but the ATO state that just because some of the distribution remains unpaid after 2 years does not of itself mean this is high risk (or Red Zone);

- The Individual Beneficiary (who is also a trustee or employed in a management role) leaves their trust entitlement in the Trust for the Trust to use as working capital in an active business carried on by the Trust;

- A beneficiary within the family group with tax losses loans back the trust distribution to the Trust.

The Tax Ruling also identifies that the practice of a family beneficiary to not fully draw down on their trust entitlement until they actually need it, for example to buy a home, recognising that they are at liberty to enforce their rights at any time, is likely to be an ordinary family dealing and not subject to section 100A.

However, what remains clear is that the ATO will seek to apply section 100A to situations where trustees apply current year trust distributions to adult children against expenses incurred on the child's behalf by either the trustee or the parents before the child turned 18 years of age.

Regular or repeated gifting, assigning or loaning of unpaid trust distributions back to the Trust or other beneficiaries on higher tax rates are also Red Zone arrangements that you can expect some queries on, heightened where the original beneficiary is also a non-resident of Australia.

Whilst it will take some time to fully digest this final ruling and its accompanying guidance, trustees and their advisors will need to carefully review their prior year distributions that remain unpaid as at 30 June 2022, together with an eye on what is planned for the upcoming 2023 financial year end.

As more information comes to hand we will continue to provide you with those updates and our views on the way forward.

If you have any specific queries on how this guidance may impact your trust, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.

THE FBT EXEMPTION FOR ELECTRIC VEHICLES

Legislation has recently been passed with regards to making electric vehicles exempt cars (albeit with two Senate amendments). These new rules provide an FBT exemption for electric vehicles made available to employees for private use.

This "car fringe benefit" is an exempt benefit if it meets the following conditions:

1. the benefit is provided by employers to employees in respect of their employment or under Salary Packaging;
2. the cost of the car must be below the luxury tax threshold for fuel efficient cars (ie) $84,916 for 2022/23;
3. the car must also have been first held and used on or after 1 July 2022; and
4. the car is a zero or low emissions vehicle as detailed below:

   a) Battery Electric Vehicle
      A battery electric vehicle is a motor vehicle that:
      - uses only an electric motor for propulsion; and
      - is fitted with neither a fuel cell nor an internal combustion engine.

   b) Hydrogen Fuel Cell Electric Vehicle
      A hydrogen fuel cell electric vehicle is a motor vehicle that:
      - uses an electric motor for propulsion;
      - is equipped with a fuel cell for converting hydrogen to electricity; and
      - is not fitted with an internal combustion engine.

   c) Plug-in Hybrid Electric Vehicle (exemption applies from 1 July 2022 to 1 April 2025)
      A plug-in hybrid electric vehicle is a motor vehicle that:
      - uses an electric motor for propulsion;
      - takes and stores energy from an external source of electricity; and

- is fitted with an internal combustion engine for either or both generation of electrical energy and propulsion of the vehicle

When will the exemption apply?

The exemption will apply retrospectively to the following car types:

- Battery Electric Vehicle and Hydrogen Fuel Cell Electric Vehicle first used on or after 1 July 2022; and
- Plug-in Hybrid Electric Vehicle first used on or after 1 July 2022 until 1 April 2025 (the first Senate amendment).

A review of the exemption is to be undertaken in 3 years time to determine the effectiveness and 'take up' of these measures (the second Senate amendment).

Does the exemption apply to second hand Electric Vehicle?

Second-hand cars will qualify for this exemption provided that they were first purchased as new on or after 1 July 2022 for less than the luxury tax threshold set in that financial year.

Is this exempt benefit a reportable fringe benefit?

This exempt car fringe benefit still counts for reportable fringe benefits amount, even though it has a zero FBT payable. This means that employers will still have to prepare an FBT calculation for electric vehicles they provide as fringe benefits, and employees will still have to report the taxable value (before the exemption) of the car fringe benefit as part of their Reportable Fringe Benefits Amount on their tax return.

If you have any queries in relation to the above please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.

THE HIDDEN TRAP OF PRIVATE COMPANY LOAN REPAYMENTS

If you operate a private company you would have heard of Division 7A and how it applies to loans from private companies. Section 109R in Division 7A is an integrity measure aimed at targeting 'non-genuine loan repayments'. In summary, a repayment must be disregarded if a "reasonable person" would conclude that when the repayment was made, it was intended that another loan (with a similar or larger amount) would be made by the company.

This rule generally applies in the following circumstances:

- A Division 7A loan is repaid by the lodgement date of the relevant tax return; or
- A minimum repayment is made for a Division 7A compliant loan; AND
- A similar or larger amount of the repayment is lent to the borrower by the company.

The effect of section 109R is to disregard the 'non-genuine' loan repayment.

Consider the following question we often get asked by clients:

Can I borrow funds from my company and use these funds to repay my mortgage, then later re-draw the same amount and pay this to the company to repay my loan when I legally have to and then transfer back the funds immediately after to reduce my mortgage?

The initial borrowing of funds from the company will result in a Division 7A loan. Unless the funds are repaid by the lodgement date of the company's tax return for the year in which the loan was made, a deemed dividend will be assessable to you. The repayment of the loan by the lodgement date using the funds drawn down will satisfy the repayment requirement. However, as the funds are later loaned back to the borrower, section 109R will disregard the repayment, resulting in a deemed dividend for the amount initially borrowed.

Whilst the above example is an obvious breach of section 109R, there are circumstances where it is more difficult to identify such breaches.

Consider the scenario where an amount of $100,000 has been borrowed by a shareholder during the 2021 financial year and then repaid just prior to 30 June 2021. The 2021 financial statements will not reflect a shareholder loan by the end of that year. The company then again lends $100,000 to the shareholder on 2 July 2021. This loan is treated as a 2022 Division 7A loan and is again placed on a complying loan agreement by the lodgement date of the company's 2022 tax return.

Notwithstanding this, section 109R would not recognise the $100,000 loan repayment during the 2021 financial year as a genuine repayment, resulting in a deemed dividend of $100,000 assessable in the 2021 year.

We understand that the ATO are considering the application of section 109R with a view to providing some further public guidance to deal with various loan repayment arrangements.

If you have any queries in relation to the above please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.

Time Limits on Indirect Tax Assessments

As we wrap up another eventful year, it is worth noting that there are specific time limits unique to the application of indirect taxes. Specific provisions were inserted into the Tax Administration Act (TAA) to reflect the distinctive nature of the indirect tax laws. The assessment system for indirect tax laws introduces a new generic assessment framework.

Under the assessment system, the relevant provisions of the GST Act, Fuel Tax Act and Schedule 1 to the TAA reflects that an entity is only obliged to pay, and the ATO is only obliged to refund, amounts which have been crystallised in an assessment. Under self-assessment, an activity statement is treated as being a notice of assessment issued on the day the activity statement is lodged to the ATO. No other notice of assessment will be issued.

- **Period of Review**

For tax periods and fuel tax return periods commencing on or after 1 July 2012, a four-year period of review applies where the ATO can amend an assessment for GST, Luxury Car Tax (LCT), Wine Equalisation Tax (WET) or fuel tax credit amounts on the activity statement or claim form for a fuel tax return period.

The period of review starts on the day on which the ATO first gives you a notice of the assessment. In most cases, this will be the same day you lodge your activity statement. The period of review ends four years from the day after the notice of assessment is given.

After the period of review ends, an amendment will only be made by the ATO in limited circumstances such as fraud or evasion or where an assessment has been disputed, e.g. to give effect to a decision relating to objections, reviews or appeals.

Where a BAS has been amended due to a particular issue, the assessment that is amended during the period of review is subject to *a* "***refreshed four-year period of review***". However, the refreshed period is only in relation to that particular issue, this does not open the entire activity statement to a further four-year period of review.

A separate refreshed period of review applies for each particular issue that has been amended and the refreshed period of review cannot be extended. Thus it is imperative to keep track of amendments so you can identify whether you are able to apply for any further amendments for a relevant tax period.

- **Payments and Refunds**

Under the assessment system, the ATO now have **unlimited time to recover a debt** (subject to the entity being required to register and lodge a return) and there is no time limit on an entity being entitled to be paid an assessed amount in your assessment. However, there are still time limits on entitlement to GST credits and fuel tax credits.

- **Time Limit on Entitlement to Credits**

An entitlement to an indirect tax credit ceases if it is not taken into account in an assessment during a four-year period. The four-year time period to claim a GST or fuel tax credit ends four years *from* the due date of the return for the earliest tax period or fuel tax return period in which you would have been able to claim the credit.

An entity can claim the credit in any tax period but it must be included in an assessment that is made within the four years as set out above. If you are neither registered nor required to be registered for GST, and you have not previously claimed a particular fuel tax credit entitlement, you must claim the fuel tax credit within four years from the day you acquired the fuel.

- **Correcting BAS to Claim Credits and Refunds**

A four-year time limit also applies to correct a BAS to credits and refunds. Where correcting an error results in a refund of GST (a credit error) you can correct it on a current activity statement provided you are within the four-year time limit on GST credits and the period of review.

- **Backdating GST Registrations**

Where an entity was required to register for GST in a prior period, the ability to backdate their GST registration is limited to four years for tax periods commencing on or after 1 July 2012. GST ceases to be payable for those supplies and GST credits do not arise for those acquisitions made before the date you are required to be registered.

However, where the ATO considers there to be a case of fraud and evasion, they can backdate the GST registration indefinitely.

This means that, in the absence of fraud or evasion, the ATO will no longer backdate your GST registration beyond four years and you are accepted as being not required to be registered prior to that date.

The indirect tax assessment system is particularly nuanced. Where your client has a prior period issue it is particularly important to determine in the first instance whether their issue falls within these time limits, otherwise it may be difficult to proceed further.

Please call Andrew Lowry or Leonard Tebbutt on 08 9444 9711 if you would like to discuss the above matters further.