

Tax laws amended to allow income 'streaming' by trusts

The Government has introduced legislation to ensure that capital gains and franked distributions can continue to be 'streamed' through trusts.

Editor: A recent High Court decision created significant uncertainty about whether trustees could stream different categories of income, such as capital gains (i.e., to flow them through a trust to some beneficiaries but not others).

However, for trusts that do not stream any capital gains or franked distributions to specific beneficiaries, the changes will broadly produce the same outcome as the current law.

Editor: In order to take advantage of these changes and effectively stream franked dividends or capital gains for tax purposes, the trust deed must generally give the trustee the power to stream these categories of income to different beneficiaries.

Please contact our office if you would like to have us organise to have your trust deeds reviewed to ensure that your trusts can take advantage of these legislative changes.

Also, even if you are not contacted by the ATO, if you think this may affect you, please contact our office so that we can see what your options are.

Deductions for TPD insurance

Superannuation funds will be able to streamline the way they claim tax deductions for the cost of total and permanent disability (TPD) insurance provided to fund members from the 2011/12 income year.

Editor: As a general rule, super funds that paid insurance premiums for a policy covering a member who became TPD for their 'own occupation' (as opposed to 'any occupation') were supposed to obtain an actuary's certificate to determine the deductible portion of the premium, unless that portion was specified in the insurance policy.

These changes will give many superannuation funds the option of using a simpler method to determine the deductible portion of TPD insurance premiums without having to engage an actuary.

ATO focus on unpaid present entitlements owed to companies

The ATO has advised that it may contact private companies about any unpaid present entitlements (UPEs) they were entitled to from related trusts between 16 December 2009 and 30 June 2010.

Editor: The ATO recently changed its position about the taxation treatment of these UPEs, claiming that, from 16 December 2009, UPEs that are not paid out to, or otherwise invested on behalf of, the company may be treated as loans by the company back to the trust (which may result in them being deemed to be dividends paid to the trust).

Certain actions can be taken, up until 31 December 2011, to minimise the problematic effects of the ATO's change of position.

Editor: If the ATO contacts you about this issue, make sure you then contact us before providing them with any further information.

ATO focus on SMSFs

The ATO has released its 'Compliance Program 2011/12' outlining key focus areas attracting its attention for the coming year.

They have a range of measures in place to detect and deal with those who evade their obligations, including working across government agencies and the use of overseas networks.

Their key focus areas this year include the cash economy, work related deductions and self-managed superannuation funds (SMSFs).

While the ATO "will continue to work with SMSFs to fix genuine problems", they state they may also take firm action, including making funds non-complying, if they commit serious breaches of the rules.

*Editor: If a superannuation fund is made 'non-complying', it will effectively be taxed on the value of its **assets** at 46.5%, plus their **income** will also be taxed at 46.5% going forward.*

This year, the ATO's compliance activity in relation to SMSFs will focus on:

- ◆ newly registered funds, to ensure they have not been established to provide illegal early release of super;
- ◆ funds lodging their first annual return to ensure they are entitled to receive their 'notice of compliance';
- ◆ related-party investments, to ensure they are not contravening the 5% in-house asset limit or the prohibition of lending to members;
- ◆ exempt current pension income and non-arm's length income; and
- ◆ re-reporting of contributions (particularly if the re-reporting results in the member no longer being liable for excess contributions tax).

New this year to family tax

The ATO has provided a summary of many of the tax changes that apply to families from 1 July 2011.

Education tax refund – Inclusion of school uniforms

The Government has changed the education tax refund to include school-approved uniforms (including hats, footwear and sports uniforms approved by a school as its uniform) purchased from 1 July 2011.

Dependent spouse tax offset phase-out

From 1 July 2011, eligibility for the dependent spouse tax offset will be confined to taxpayers with a dependent spouse born before 1 July 1971.

Taxpayers who maintain an invalid or permanently disabled spouse, support a carer or who are eligible for the zone, overseas forces or the overseas civilian tax offsets are exempt from the new age limit and will still effectively be able to claim the dependent spouse tax offset via an expanded invalid spouse, zone, overseas forces or overseas civilian offset.

Low income tax offset – Changes for minors

The Government will remove the ability of most minors (children under 18 years of age) to access the low income tax offset to reduce tax payable on their unearned income (for example, distributions from discretionary trusts, dividends, interest, rent, royalties and other income from property).

Medical expenses

Taxpayers can claim a tax offset of 20% of their net medical expenses over the set threshold, which is \$2,060 for the 2011/12 income year (up from \$2,000 for the 2010/11 income year).

Paid parental leave

Australia's Paid Parental Leave Scheme started on 1 January 2011. Eligible working parents will receive parental leave pay (currently \$589.40 a week before tax) for a maximum period of 18 weeks.

Superannuation: Common mistakes made by employers

The ATO has reminded employers of their superannuation obligations and has set out common mistakes they are seeing, including:

- paying insufficient super contributions for eligible employees;
- missing the quarterly cut-off dates (28 October, 28 January, 28 April, 28 July);
- not understanding that in some circumstances super should be paid for contractors, even if the contractor quotes an ABN;
- not keeping accurate records;
- not lodging a Superannuation Guarantee Charge statement if they have not paid their employees' super to the fund by the due date or don't pay the correct amount; and
- not passing on an employee's tax file number to their super fund. Employers must provide their employee's tax file number to their super fund within 14 days of receiving it. If they don't, the employee's super contributions will be subject to extra tax and may not be accepted by the super fund (and the employer may also be penalised).

ATO clamps down on GST fraud and cash income

A key part of the ATO's Compliance Program is increasing their focus on non-complying taxpayers in the GST system, as well as those who fail to report some or all cash transactions.

To this end, the ATO has increased its scrutiny of businesses deliberately not reporting cash income, with over 1.4 million small businesses evaluated against the ATO's "sophisticated risk detection systems". The ATO also states: "While it is not illegal to trade in cash, it is illegal to not report it".

Meaning of 'cost price' of a car for FBT purposes

Editor: The ATO has set out their opinion on how, for fringe benefits tax (FBT) purposes, various arrangements may affect the 'cost price' of a car.

This is relevant for the purposes of determining the taxable value of car fringe benefits.

The cost price of a car owned by a person (i.e., the employer or the lessor, such as a Fleet Management Company) will be the amount of the purchase price that has been borne by that person (inclusive of GST, luxury car tax and dealer delivery charges where applicable), as well as other amounts which are directly attributable to the acquisition or delivery of a car.

In addition, some amounts may reduce the cost price, including:

- fleet discounts, or any other incentives or discounts that are applied by a car dealer to reduce the purchase price of a car;
- manufacturer rebates paid directly or indirectly to purchasers; and
- the value of a trade-in vehicle provided by the employee to a car dealer (or a cash payment made by the employee) that reduces the purchase price for the employer or the lessor.

However, insurance costs and extended car warranties are **not** directly attributable to the acquisition or delivery of a car and are not included in the 'cost price' of the car.

Is an investment made by a trustee always on capital account?

Editor: Some people are under the impression that any investment made by a trust will be a capital investment, meaning that any capital gain made on selling that investment may be able to access the 50% capital gains tax (CGT) discount. However, this may not always be the case.

The mere fact that a gain or loss from an investment is made by trust (i.e., by the trustee of a trust) is not conclusive as to whether the gain or loss is on revenue or capital account for tax purposes.

That is, the character of a gain or loss must generally be determined having regard to all of the relevant facts and circumstances.

If a disposal of an investment by a trustee amounts to no more than a mere realisation or change of investment, the gain or loss will be on **capital account**, and the 50% discount may be available.

However, unless the tax law specifically treats it as being on capital account, the gain or loss is on **revenue account** for tax purposes (and taxed at normal rates **without** a discount) if it is determined that the gain or loss was from:

- a normal operation in the course of carrying on a business of investment;
- an extraordinary operation, but one entered into with the intention of making a profit or gain; or
- a one-off or isolated transaction where the investment was acquired in a business operation or commercial transaction for the purpose of profit-making.

The ATO will look at the nature of the trust and the terms and content of the trustee's duties, as well as other important considerations, as part of the characterisation process.

Please Note: Many of the comments in this publication are general in nature and anyone intending to apply the information to practical circumstances should seek professional advice to independently verify their interpretation and the information's applicability to their particular circumstances.