POLICY BULLETIN

CRITICAL INFORMATION FOR TAX TIME 2018

Date: 4 July 2018

ANNOUNCED BUT UNENACTED MEASURES

COMPANY TAX RETURNS

The failure of the Parliament to pass the Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2018 by the end of the 2017–18 income year raises the issue of how companies and their tax advisers should lodge their 2018 company income tax returns (and shareholders' tax returns where they received a franked dividend during 2017–18).

The ATO advise taxpayers to lodge 2018 tax returns based on the current law. This means that the tax rate of 27.5 per cent for 2017–18 will be based on the company being a Base rate entity (BRE) under existing s. 23AA of the *Income Tax Rates Act 1986* which requires the company to be 'carrying on a business' and have an aggregated turnover (grouped with connected entities and affiliates) in the current year of less than $25 million.

TR 2017/D7, which provides the ATO's interpretation of 'carrying on a business' for the purposes of s. 23AA remains relevant, despite being in draft form.

Under the current law, the company's franking rate for 2017–18 will be determined by whether the company is carrying on a business and whether its 2016–17 aggregated turnover was less than $25 million.

Accordingly, no regard should be had to the company's BRE passive income in 2017–18 (to determine the tax rate) or its prior year BRE passive income (to determine its franking rate) at this time.

However, if the Bill is enacted in its current form, its start date is 1 July 2017 — this means that companies that lodge their 2018 tax return based on the current law may need to amend their returns.

Given the uncertainty, we suggest tax professionals exercise caution regarding the lodging of 2018 company tax returns and issuing distribution statements (which don't have to be provided to the company's shareholders until 31 October following the end of the income year) until we know whether the proposed law becomes law (the next Parliamentary session is from 13 August 2018 to 23 August 2018). This is especially so for companies that may meet the 'carrying on a business' test under the existing law but more than 80 per cent of their assessable income is passive — this includes interest income, rent, net capital gains and dividends other than non-portfolio dividends.

SUPERANNUATION GUARANTEE AMNESTY

The proposed superannuation guarantee (SG) amnesty uis contained in the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018. This Bill failed to clear Parliament before the end of the 2017–18 income year.

While this Bill has a proposed start date of 24 May 2018 and provides for a 12-month amnesty, it is not currently law and may not be enacted.
Under the current law, should an employer choose to disclose and pay historical unpaid SG, the ATO will treat this as a standard voluntary disclosure of an unpaid SG amount. This means that the ATO will impose Part 7 penalties and the administration component, and the catch-up payment will not be deductible to the employer. The ATO has a discretion to remit the Part 7 penalty and has advised that:

> The Part 7 penalty is automatically imposed at 200 per cent of the SGC amount which may be partially remitted. In determining any remission of the penalty, we will take into account the employer's ability to access the Amnesty.

Accordingly, if the measure is not enacted, any disclosures made to the ATO will be dealt with under the existing law.

We caution employers and their advisers on making a disclosure to the ATO before the Bill becomes law. Should employers wish to make a disclosure regardless, they should be aware that they may be subject to penalties and the payment will be non-deductible should the Bill not pass the Senate.

CHANGES TO THE SMALL BUSINESS CGT CONCESSIONS

The Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018 failed to pass Parliament by the end of the 2017–18 income year.

The Bill seeks to include additional conditions that must be satisfied to apply the small business CGT concessions to capital gains made in relation to CGT events that happen to shares in companies and interests in trusts. The Bill currently states that the measure begins 1 July 2017, although there have been media reports that the start date will be deferred to 8 February 2018 (this, however, has not been confirmed by the Government).

Should you lodge a tax return now where the taxpayer seeks to claim the small business CGT concessions, you should do so under the current law. However, if the Bill is enacted, you may need to amend your client's 2018 tax return. Adding to the confusion is speculation around the start date.

Given the uncertainty, we caution tax professionals on lodging tax returns where the small business CGT concessions are claimed until it becomes certain whether the Bill becomes law and, if so, what is the start date of the new law.

EXTENSION OF THE $20,000 INSTANT ASSET WRITE-OFF FOR SMALL BUSINESS ENTITIES

The Treasury Laws Amendment (Accelerated Depreciation for Small Business Entities) Bill 2018 did not pass Parliament before the end of the 2017–18 income year.

The Bill proposes to extend the $20,000 instant asset write-off for small business entities from 30 June 2018 to 30 June 2019.

Should the Bill not pass Parliament, then the current law will apply to depreciable assets purchased by a small business entity. The immediate deductibility threshold and the balance at which the small business pool can be immediately deducted reverted to $1000 on 1 July 2018 (reduced from $20,000).

While it seems likely that the Bill will pass Parliament in the next few months, there is still some uncertainty for depreciable assets being acquired now by small business entities and tax professionals may wish to exercise caution on the subject.

LOSS OF THE MAIN RESIDENCE EXEMPTION FOR NON-RESIDENTS

The Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018 did not pass Parliament before the end of the 2017–18 income year.

The Bill seeks to remove the entitlement to the CGT main residence exemption (MRE) for foreign residents from 9 May 2017 – subject to transitional relief. There are media reports that the Bill is subject to further consideration by the Minister (this has not been confirmed by the Government).

The proposed law applies to properties acquired from 7.30pm (AEST) on 9 May 2017 that are disposed of by a taxpayer who is a non-resident for tax purposes at the time of the CGT event (it is the tax residency status at the time of disposal that determines whether the MRE applies, not the residency status at the time of acquisition). Transitional relief applies to properties held as at 7.30pm (AEST) on 9 May 2017. In such circumstances, a non-resident can still access the MRE if the property is disposed of (i.e. the CGT event happens) by 30 June 2019.

The ATO advise that should affected taxpayers (those that acquired a property after 7.30 pm on 9 May 2017 and subsequently dispose of it as a non-resident) not include their capital gain on the disposal of their main residence, they will need to seek amendments and obtain or reconstruct records to support any costs associated with the property.

The ATO further advise that they will not apply any tax shortfall penalties in such a situation, and any interest accrued will be remitted to the base interest rate up to the date of enactment of the law change. In addition, any interest more than the base rate accruing after the date of enactment will be remitted where taxpayers actively seek to amend assessments within a reasonable timeframe after enactment.

Tax professionals should advise affected clients (non-residents who have a main residence in Australia) of the proposed change, especially given the transitional period for accessing the MRE for properties held as at 9 May 2017 is proposed to end on 30 June 2019 – that is, the property must be disposed of by that date, subject to the Bill being enacted in its current form.

WHISTLEBLOWING LAW

Finally, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 remains before the Parliament.

The Bill, among other things, seeks to create a whistleblower protection regime for disclosures of information by individuals regarding breaches of the tax laws or misconduct relating to an entity's tax affairs.

The proposed law is intended to apply in relation to disclosures made on or after 1 July 2018.

However, as the Bill is not yet law, tax agents are reminded that under the *Tax Agent Services Act 2009* (item 6 of the Code of Professional Conduct), you must not disclose information relating to a client's affairs to a third party unless you have obtained your client's permission; or are under a legal duty to do so.

The Tax Practitioners Board (TPB) states that if a tax agent discloses information relating to a client's affairs to a third party without the client's permission or being under a legal duty to do so, the TPB may find that they have breached the Code and may impose sanctions for that breach.

If the Bill is enacted in its current form, registered tax agents or BAS agents who make a protected disclosure about a client's tax affairs will not be sanctioned for breaching the confidentiality obligations contained in the Code of Professional Conduct (for disclosures from 1 July 2018).

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LEGAL NOTICE