Sutherland Tse & Co Pty Ltd

Month Year



Trusts – are they still worth it?

The recent ATO crackdown on trusts will no doubt have some business owners (and even some advisors) asking themselves the question: Is this structure for business purposes still worth it?

To recap, trust distributions have been under the ATO microscope in recent years. The latest ATO crackdown was in February 2022 when it updated its guidance around trust distributions especially those made to adult children, corporate beneficiaries and entities that are carrying losses.

Depending on the structure of these arrangements, the ATO may potentially take an unfavourable view on what were previously understood to be legitimate distribution arrangements. The ATO is chiefly targeting arrangements under section 100A of the Tax Act; specifically, where trust distributions are made to a low-rate tax beneficiary but the real benefit of the distribution is transferred or paid to another beneficiary, usually with a higher tax rate. In this regard, the ATO's Taxpayer Alert (TA 2022/1) illustrates how section 100A can apply to the quite

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About this newsletter

Welcome to Sutherland Tse's client information newsletter, your monhtly super and tax update. It is very important to keep you updated with the latest topics, news and changes you need to know. Should you require any further information for any of the topics covered please contact our office:

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Tax Time: Unexpected first-time debts

For the first time, many Australians are finding themselves in a position where they are being told they owe the ATO money after completing their tax return this year.

A significant number of taxpayers in this position are those that are still paying off their HECS/HELP debts – many of them young Australians. Following are some myths and facts around why this may be the case.

We also tackle the LMITO myth.

1. *When PAYGW is deducted from salaries and wages to take account of HELP liabilities, the withheld amount is not applied against the HELP debt until after the end of the income year, when the tax return is lodged. This means that indexation is applied to the debt without taking into account any PAYGW withheld during the year.*

Fact or myth?

This is a myth.

Indexation only affects the loan balance, it doesn't affect the amount of the year-end tax liability.

2. *Where an employee has salary sacrificed, the lower salary will reduce the PAYGW withheld, but the reportable fringe benefit is included in the repayment income that is used to determine liability to HELP repayments.*

This is not likely to be understood or expected by affected taxpayers.

Fact or myth?

This is a fact.

HELP repayment income is the total sum of the following amounts from a person's income tax return for the income year:

- taxable income
- total net investment loss
- reportable fringe benefits (as reported on their payment summary)
- total net investment loss (which includes net rental losses)
- reportable super contributions (including salary sacrificed contributions); and
- any exempt foreign employment income amounts

3. *Negative gearing amounts are added back and included in HELP repayment income. The rapid rise in interest rates will flow through to negative gearing amounts which increase the repayment income.*

This is not likely to be understood by affected taxpayers and will have caught them off-guard.

Fact or myth?

This is a fact.

However, this will only affect those engaged in negative gearing which may not be many young Australians with a HELP debt.

continued overleaf ⇨

Trusts – are they still worth it? cont

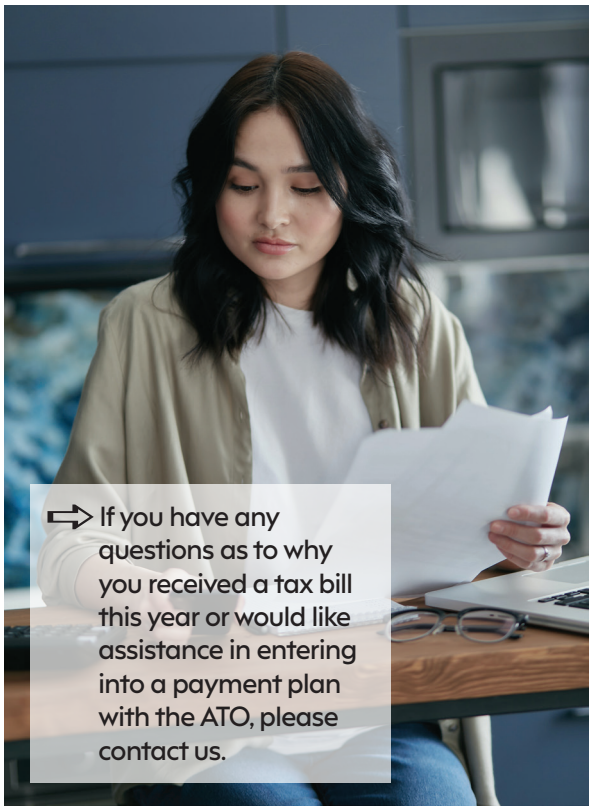
common scenario where a parent benefits from a trust distribution to their adult children.

Despite this new ATO interpretation and the wider crackdown on trusts in recent years, the choice of a trust as a business structure still has a range of benefits including:

- **Asset protection** – Limited liability is possible if a corporate trustee is appointed. Usually, when a person owes money and cannot meet the repayment requirements, the creditor can access the person's personal assets to recoup the debt payable. However if a trust is in place, there is no access to beneficiary assets.
- **50% CGT discount** – A family trust receives a 50% discount on capital gains tax for profits made from selling any assets the trust has held for more than 12 months. This contrasts with a company structure. Companies cannot access the 50% CGT discount.
- **Tax planning** – Income that sits in the family trust that is not distributed by year-end is taxed at the highest income tax rate. However, any trust income distributed to the beneficiaries is taxed at the income tax rate of the beneficiary who receives the distribution. The way to definitely get around the ATO's aforementioned section 100A crackdown is to ensure the distributed money actually goes to the nominated beneficiary and is enjoyed by the beneficiary rather than another taxpayer.
- **Carry-forward losses** – A trust does not distribute losses to beneficiaries. This means the beneficiaries will not be called upon to contribute money to the trust to meet any loss. Instead, losses from each year can be carried forward to the following year, subject to certain conditions being met. ■

If you have questions around your trust structure, or your business structure more generally, touch base with us.

Unexpected first-time debts *cont*



4. *The high indexation applied to HELP debts this year of 7.1% compared to prior years (3.9% in 2022 and 0.6% in 2021) has caught taxpayers off-guard. Prior to 2022, over the last 10 years, the rate had not exceeded 2.6% and was often around 2%.*

Fact or myth?

This is a myth.

Again, indexation only affects the loan balance, it doesn't affect the amount of the year-end tax liability.

5. *The end of LMITO after 2021/22 is only just being realised by taxpayers now, despite two years of talking about this. The message did not get through, or the impact was not fully understood.*

Fact or myth?

This is a myth.

For employees, the PAYGW rates were increased to take the LMITO abolition into account, so yes no refund, but there shouldn't be tax payable as a result of just the LMITO ending. ■

Gifting to employees

Some employers, especially at Christmas time or for birthdays, give small gifts to their employees or the employee's associates (i.e. spouses). These gifts typically take the form of bottles of wine, movie tickets, gift vouchers etc.

The tax treatment of these gifts from an employer standpoint, depends upon a range of factors including:

- To whom the gifts are provided (e.g. employees or clients?)
- Whether the gifts constitute entertainment
- The dollar value of the gifts, and
- The frequency with which they are provided.

Use the following steps as a guide:



1. Does the gift constitute entertainment?

- If yes...go to 2
- If no...go to 3

(gifts that constitute entertainment include: tickets to the movies/plays/theatre, restaurant meals, holiday airline tickets, admission tickets to amusement parks etc.)

(gifts that do not constitute entertainment include: Christmas hampers, bottles of alcohol, gift vouchers, perfume, flowers, pen sets)

2. Does it cost less than $300 (GST-inclusive) and is provided infrequently?

- If yes...no FBT, no deduction, no GST credit
- If no...FBT applies, is deductible and can claim any GST

3. Does it cost less than $300 (GST-inclusive) and is provided infrequently?

- If yes...no FBT, deduction can be claimed as can any GST credits
- If no...FBT applies, deduction can be claimed as can any GST credits

All told, from a tax standpoint it's best to buy employees and their associates non-entertainment gifts that cost less than $300. That way, no FBT is payable yet a deduction and GST credits can be claimed. Alternatively, you can put the tax burden back on the employee and pay them a cash bonus, in which case the amount will be assessable to the employee, and deductible to the employer. ■

Touch base with us if you require further clarification.

This information has been prepared without taking into account your objectives, financial situation or needs. Because of this, you should, before acting on this information, consider its appropriateness, having regard to your objectives, financial situation or needs.

SMSFs & higher interest rates



SMSF trustees with limited recourse borrowing arrangements (LRBAs) are now feeling the impact of ten interest rate rises since May 2022 in one hit, from July 2023.

SMSF trustees relying on the ATO's safe harbour terms to ensure that an LRBA remains, at all times, at arm's length will face an increase in monthly repayments of interest and principal from 1 July 2023.

The arm's length annual interest rate for 2023/24, as determined under the ATO's safe harbour terms is based on the published rate for the month of May 2023 of the Reserve Bank of Australia's Indicator Lending Rate for banks providing standard variable housing loans for investors.

In accordance with the ATO's safe harbour interest rate for SMSFs with a related-party LRBA that is funding the purchase of real property, the relevant interest rate for 2023/24 will increase to 8.85%. This is an increase of 3.5% from the former rate of 5.35%.

Where the LRBA is funding the purchase of listed shares or listed units in a unit trust, the safe harbour rules require an additional margin of 2%, meaning the relevant interest rate for 2023/24 has increased to 10.85%. This will make SMSF cashflow more important than ever. Speak to your SMSF advisor around how to maximise cashflow, including making additional contributions to your fund where you have the capacity to do so.

On the flip-side, higher interest rates are resulting in super funds pilling more money into cash and bonds as they look for low risk investments. Funds have been increasing their exposure to cash and cash products from 18% of their savings pools last year to 22% so far this year, a new report shows.[1]

Their exposure to the share market through direct investment dropped by 5% at the same time, as they funnelled their money into less volatile assets such as term deposits.

A reminder though that such a change in strategy must be consistent with your overall SMSF investment strategy, and may or may not be in the best interests of younger members whose circumstances may call for a higher risk, bolder investment strategy. ■

1: The Vanguard and Investments Trend annual survey of SMSFs

R&D reminder



The ATO has issued a reminder for companies wishing to claim a tax offset for their R&D (research and development) activities. The reminder was issued in the context of the ATO's success in the Federal Court decision *T.D.S. Biz Pty Ltd v FCT.* [1]

By way of background, the research and development tax incentive (R&DTI) helps companies innovate and grow by offsetting some of the costs of eligible R&D.

The incentive aims to boost competitiveness and improve productivity across the Australian economy by:

- encouraging industry to conduct R&D that they may not otherwise have conducted
- improving the incentive for smaller firms to undertake R&D
- providing business with more predictable, less complex support.

Broadly speaking, your eligibility to claim the tax offsets will depend on whether you:

- are an R&D entity
- incurred notional deductions of at least $20,000 on eligible R&D activities.

You are not eligible for an R&D tax offset if you are either:

- an individual
- a corporate limited partnership
- an exempt entity (where your entire income is exempt from income tax)
- a trust (with the exception of a public trading trust with a corporate trustee).

For income years commencing on or after 1 July 2021, entities engaged in R&D may be entitled to:

- A refundable offset of 18.5% above the company's tax rate.
- A flat non-refundable offset based on a progressive marginal tiered R&D intensity threshold. Increasing rates of benefit apply for incremental research and development expenditure by intensity:
    - 0 to 2% intensity: an 8.5% premium to the company's tax rate
    - greater than 2% intensity: a 16.5% premium to the company's tax rate.

Turning back to the aforementioned case, the ATO successfully contended that the taxpayer conducted significant R&D activities outside Australia by purchasing components designed, developed and fabricated overseas without an Advance Overseas Finding from the Department of Industry, Science and Resources.

The ATO states that, while companies can claim an offset for R&D expenditure incurred by them on R&D activities conducted overseas, there is a requirement to hold an Advance Overseas Finding for those activities. ■

If your company is conducting R&D, contact us to determine if you are eligible for the offset.

1 [2023 FCA 710]

Super withdrawal options

For individuals who have retired and met a condition of release, or who have turned 65 and are still working, you can receive your superannuation as a super income stream, as a lump sum, or a combination of both. This third option is quite popular for those who have yet to pay out their house, for example – a lump sum is withdrawn to pay off the remainder of the mortgage, and the balance used to commence a super income stream.

1. Lump sum

If your super fund allows it, you may be able to withdraw some or all of your super in a single payment. This payment is called a lump sum.

You may be able to withdraw your super in several lump sums. However, if you ask your provider to make regular payments from your super it may be classed as an income stream.

The downside to lump sums from a tax perspective is that once you take a lump sum out of your super, it is no longer considered to be super, and thus no longer enjoys the superannuation tax concessions (15% on earnings and capital gains, and tax-free if you convert your super into an income stream). That is, if you invest the lump sum outside of super, earnings on those investments are not taxed as super and may need to be declared in your tax return.



Further, if you're over age 60, super money you access from super will generally be tax free, but if you're under 60, you might have to pay tax on your lump sum.

2. Super income stream

A super income stream is a series of regular payments from your super provider (paid at least annually). The payments must be made over an identifiable period of time and meet the minimum annual payments for super income streams. To find out what will happen if the income stream doesn't meet the minimum annual payment, see Minimum annual payment not made.

The payments don't need to be at the same interval, and the amount paid may also vary.

Super income streams are a popular investment choice for retirees because they help you manage your income and spending. Super income streams are sometimes called pensions or annuities.

One of the most common income streams is an account-based income stream. This is an account made up of money you've accumulated in super, which allows you to draw a regular income once you retire. An account-based income stream includes market-linked pensions that started on or after 1 July 2017.

Your provider or SMSF normally continues to invest the money in your super account and adds returns from investments to your account. Your account balance fluctuates with market performance.

Each year you can withdraw as much as you like through your account-based super income stream (unless you're receiving a transition to retirement income stream).

You must withdraw a minimum amount each year – based on your age and account balance. There may be income tax implications if your provider does not pay you the minimum amount each year.

You can continue to receive your super income stream until there is no money in your account. How long your super income stream lasts depends on how much you take out each year and what investment returns you receive. There is a limit on the amount you can transfer into retirement phase; this is known as the transfer balance cap.

The chief advantage of this type of withdrawal is that earnings on the remainder of your account inside of superannuation are taxed concessionally.

Take-home message

Check with your super provider and adviser to find out what options are available to you, and which are best for your circumstances. ■