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# client alert

tax news | views | clues

## ATO scrutinising gifts or loans from overseas

The ATO has recently issued an alert warning taxpayers against disguising undeclared foreign income as gifts or loans from related overseas entities, including family and friends. It says it has continued to encounter situations where Australian resident taxpayers have derived amounts of income or capital gains offshore that are assessable, but the taxpayers have failed to declare the amounts in their income tax returns.

**TIP:** If you're an Australian resident for tax purposes, your worldwide income (not just money you make from Australian sources) is assessable and should be reported to the ATO in your annual tax return.

The ATO will now be looking closely at arrangements where taxpayers are aware of their residency status and the tax implications that flow from it, but attempt to avoid or evade tax of their foreign assessable income by disguising amounts as either gifts or loans from a related overseas entity.

If family or friends who live overseas have provided a genuine monetary gift or loan to you or your business, you should keep as much supporting documentation as possible about it. This is because if there is any uncertainty about whether particular amounts are genuine gifts or loans, the ATO will form a view based on all of the available evidence.

Contemporaneous and complete records should include detailed financial records, full loan documentation, formal identification of the giver and any declarations they made about the money in their country of residence. A deed of gift or a statutory declaration may not be accepted as conclusive evidence.

Inheritances also count as "gifts". If you receive an inheritance from overseas, a certified copy of the person's will or a distribution statement for the estate should be a part of your recordkeeping.

## New data matching program: government payments

A new data matching program designed to identify and address non-compliance with tax and super obligations is under way in relation to government payments for the 2018–2019 to 2022–2023 income years. It covers most services that the Commonwealth Government pays third-party program providers to deliver.

The ATO will obtain data from Comcare, the Department of Health, the National Disability Insurance Agency, the National Indigenous Australian Agency, the Department of Home Affairs, the Department of Veterans' Affairs and the clean energy regulator. This will add to the information the ATO currently receives from government entities through the taxable payments annual report (TPAR).

This means that contractors, subcontractors and consultants in any type of business structure (sole trader, company, partnership or trust) that receive payments from government under these agencies' programs may be subject to extra scrutiny.

It is estimated that 36,000 service providers will be captured under this program each financial year. Of that number, approximately 11,000 will be individuals and the rest will be companies, partnerships, trusts and government entities.

**TIP:** If you're a service provider under one of the affected government programs, you should ensure you're meeting all your registration and lodgment obligations. We can help review your records and correct any problems so you don't get a surprise letter from the ATO.

## Do you need a Director Identification Number?

Directors of companies will soon have to enrol in the Director Identification Number regime. This requires current and future directors to apply for director identification numbers (DIN) which will be permanently

linked to the individual, even if they are no longer a director. It is hoped the regime will make it easier to trace relationships across companies and reduce instances of phoenixing and other illegal activity. Most existing directors will have until 30 November 2022 to apply for the DIN through the ATO.

The Director Identification Number regime came into force late in 2020 as a tool for the Federal Government to reduce phoenixing and black economy activities.

**TIP:** Illegal phoenix activity is when a company shuts down to avoid paying its debts. A new company is then started to continue the same business activities, without the debt.

Individuals that operate under the *Corporations Act 2001* and became a director on or before 31 October 2021 are required to apply for a DIN before the end of the transitional period, which is between 4 April 2021 and 30 November 2022.

Directors who operate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* and became a director on or before 31 October 2021 will have even more time to apply for a DIN – until 30 November 2023 (with a transition period between 4 April 2021 and 30 November 2023). Any individuals who are appointed directors between 1 November 2021 and 4 April 2022 will have within 28 days of their appointment to apply for the DIN, and from 5 April 2022 individuals seeking to become directors will need to apply for a DIN before their appointment.

Any conduct that undermines the DIN requirement will be subject to civil and criminal penalties. This includes deliberately providing false identity information, intentionally providing a false DIN or intentionally applying for multiple DINs.

Directors will be able to use the new Australian Business Registry Services (ABRS) online services to register from 1 November 2021. Sign-ins and director identity verification will be conducted using the myGovID app.

## COVID-19 relief for SMSFs extended

Due to the ongoing economic impacts of COVID-19 on large parts of Australia, the ATO has announced the extension of various COVID-19 relief measures for trustees of self managed superannuation funds (SMSFs). The relief previously only applied to the 2019–2020 and 2020–2021 financial years, but will now also be available for the 2021–2022 financial year.

### SMSF residency test

To be a complying super fund and receive tax concessions, SMSFs must be an "Australian super fund" at all times during the year. This requires, among other things, for the central management and control of the SMSF (ie individual trustees, or directors of a corporate trustee) to ordinarily be in Australia. Under the relief, a fund will still meet this requirement even if its central management and control is temporarily outside of Australia for up to two years.

### Rental relief

If an SMSF or a related party has continued to provide rental relief based on the current market conditions, whether it be a rental reduction, waiver or deferral to a tenant, the ATO will provide relief in the form of not taking any compliance action against the fund. However, this is predicated on the rental relief being offered on commercial terms, and there being proper documentation with regards to the arrangement.

### Loan repayment relief

For loan repayment relief provided by an SMSF to a related or unrelated party due to the financial impacts of COVID-19, where the relief is offered on commercial terms and the changes to the loan agreement are properly documented, the ATO will provide relief on similar terms as the interim rental relief – that is, it will not take any compliance action against the fund. This will also apply to limited recourse borrowing arrangements (LRBAs).

### In-house assets

Where an SMSF exceeds the 5% in-house asset threshold at 30 June 2021 due to the financial impacts of COVID-19, trustees must still prepare a written plan to reduce the market value of the fund's in-house assets to below 5% by 30 June 2022. However, the ATO has said it will not take any compliance action where the plan has not been executed by the due date as a result of the market not having recovered, or in some cases the plan may be unnecessary because of market recovery.

### PAYG variations

The ATO has confirmed that its penalty and interest relief for excessive PAYG variations applies to SMSFs that continue to be impacted by COVID-19 during 2021–2022. The ATO will not apply penalties or interest for excessive variations of PAYG instalments during the 2021–2022 income year, provided that the taxpayer has taken reasonable care to estimate their end-of-year tax.

### Audits

The ATO has also extended to 2021–2022 its existing COVID-19 relief in the Addendum to the Auditor/actuary contravention report (ACR). The ACR relief for 2021–2022 will apply for rental relief (including rental reductions, waivers and deferrals), loan repayment relief (including for LRBAs), and in-house assets.

**TIP:** If you're a trustee of an SMSF and you or your fund's members have been affected by COVID-19, we can help you work out the potential tax implications and relief available, and put the proper documentation in place.

**Important**: Clients should not act solely on the basis of the material contained in Client Alert. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. Client Alert is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.