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New company loss carry-back regime

The Government intends to introduce a company loss carry-back regime and has released draft legislation for public consultation.

Under the proposal, which will have effect from 1 July 2012, companies will be able to carry back up to \$1 million worth of losses to obtain a refund of tax paid in the previous year. From 1 July 2013, companies will be able to carry back up to \$1 million worth of losses against tax paid up to *two* years earlier.

The regime is proposed to be available only to “corporate tax entities” as currently defined under the tax law. The Government has said that restricting loss carry-back to those companies that have recently paid tax would target the measure to companies that have had a history of being profitable, and would improve companies' cash flow by allowing access to losses in a more timely manner.

ATO focus on small businesses and wealthy individuals

The ATO has launched a public online resource that spells out its tax compliance approach to small businesses and wealthy individuals. The new resource is available on the ATO website at www.ato.gov.au/smecompliance.

This online resource contains information on how the ATO conducts itself in compliance activities and the tax risks that may attract its attention. It also explains that the ATO can, through powerful data-mining techniques, obtain an indicative view of a “private group” of entities that is under the control of an individual and their associates.

Key tax risks that may attract ATO attention include:

- tax performance that varies substantially from business performance;
- inconsistencies in activity statements or spikes in refund claims;
- large, one-off or unusual transactions;
- tax and economic performance that varies significantly from similar businesses in the same industry;
- unexplained losses;
- tax outcomes inconsistent with the intent of tax law;
- lifestyles not supported by after-tax income;
- treating private assets as business assets;
- not disclosing offshore dealings with overseas entities, especially low-tax jurisdictions and tax havens that allow banking secrecy;
- using complex structures and intra-group transactions to minimise tax;
- poor governance and risk-management systems;
- distortions and inconsistencies in market valuations and apportionments; and
- business performance that falls outside small business benchmarks (for businesses with turnover of up to \$15 million).

TIP: The ATO's main tool for detecting non-compliance is matching information reported to it by taxpayers and third parties, such as financial institutions both in Australia and overseas. The ATO says its matching capabilities have grown strongly over the years. This financial year, the ATO expects to match over 600 million transactions.

Bakery finds itself on the wrong side of ATO benchmarks

In a recent decision, the Administrative Appeals Tribunal (AAT) affirmed an amended assessment issued to a bakery business for undeclared income and incorrectly calculated GST.

Among the factors considered by the AAT was the fact that the taxpayer's costs were 58% of reported sales income, which was considerably higher than the 32% to 40% range identified by the Commissioner of Taxation as the benchmark for costs in bakeries and hot bread shops.

TIP: The ATO publishes small business performance benchmarks that it uses to identify businesses that may be avoiding their tax obligations by not reporting some or all of their income. There are benchmarks for over 900,000 small businesses in over 100 industries.

The ATO says approximately 90% of businesses in benchmarked industries fall within a benchmark range. This means around 800,000 businesses are likely to be competing on a level playing field with their peers. Reporting greater net income than industry peers could be a sign that a business has forgotten to claim a relevant business deduction. However, reporting significantly lower income than industry peers would attract ATO attention.

Worked overseas, but still an Australian resident, says Tribunal

The AAT has recently heard two cases relating to whether the individual taxpayers involved, men who worked in the oil and gas industry in the Middle East, were Australian residents for tax purposes.

In both cases, the AAT affirmed that they were Australian residents, and foreign sourced income derived by the men was therefore included as assessable income for Australian tax purposes. The men had argued that they were not Australian residents during the 2009 income year.

TIP: Taxpayers classified as residents of Australia pay Australian tax on their worldwide income, whether derived in or outside of Australia, subject to certain exceptions. In respect of foreign sourced income, a resident pays tax in Australia on that income but receives a foreign income tax offset for any overseas tax they are personally liable to pay on that foreign income.

TIP: Foreign sourced income derived by Australian residents remains a key ATO compliance focus area. The ATO increasingly obtains information from financial institutions and other organisations, both in Australia and overseas, that may identify employment-related income.

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Superannuation: excess contributions tax assessment set aside

A taxpayer has been successful in convincing the AAT that there were "special circumstances" that warranted the setting aside of his excess contributions tax assessment. As a result, the AAT ordered that superannuation contributions paid by the taxpayer's employer in early July 2009 be reallocated to the previous financial year.

The AAT was satisfied that there were "special circumstances" in this case. Among various factors noted by the AAT was an agreement between the taxpayer and his employer, requiring the employer to cease making contributions to a particular fund from 1 July 2009. The AAT was of the view that payments made by the employer into that fund in July 2009 were in fact intended for the 2008–2009 financial year.

TIP: The Commissioner may only exercise his discretion to reallocate or disregard excess contributions if "special circumstances" exist and the making of such a determination is consistent with the objective of the superannuation regime, ie that individuals build their superannuation gradually over their lifetimes.

TIP: The Government has recently amended the law to allow a limited, once-only refund option for excess concessional contributions of up to \$10,000. The new refund option is only available for excess concessional contributions in respect of the 2011–2012 or later years, and only for the first year. The refund option provides some relief, but is not without conditions and limitations.

Goods taken from stock for private use

The ATO has updated the amounts that the Commissioner will accept for 2011–2012 as estimates of the value of goods taken from trading stock for private use by taxpayers in certain specified industries.

For example, for a restaurant/cafe (licensed) the Commissioner will accept \$4,300 (excluding GST) for each adult or child over 16 years of age. Note that the ATO intends to adjust these values annually.