AV CHARTERED ACCOUNTANTS

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Client Newsletter – Tax & Super

August 2019

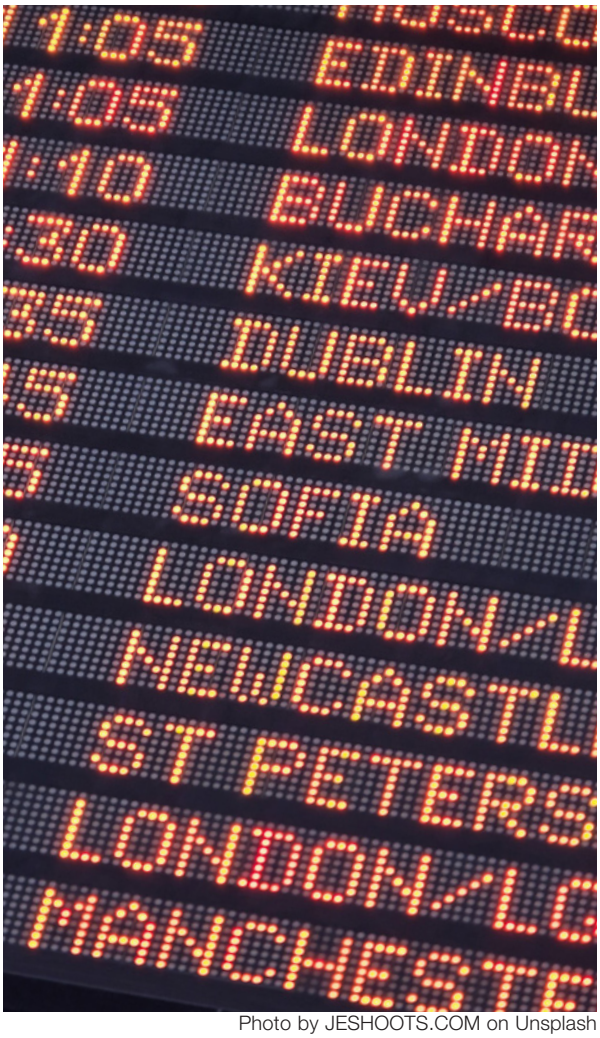

Photo by JESHOOTS.COM on Unsplash

Tax when you're headed overseas

Most people's "to-do" list when they are planning a trip overseas will likely include items such as travel insurance, phone chargers or taking photos of their passport — but probably the last thing on anyone's minds will be their likely tax situation before, during or after that trip-of-a-lifetime.

There are a few simple considerations, taken in the context of your personal circumstances, that may end up making quite a difference to your final fiscal outcome.

Generally you will remain an Australian resident for tax purposes if you're overseas temporarily and you don't set up a permanent home in another country.

There's usually nothing stopping you from working overseas, but you must lodge an Australian tax return and declare your "worldwide" income, even if tax was taken out in the country where you earned the income (there will most likely be a tax offset to take care of any doubled-up tax).

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About this newsletter

Welcome to **AV Chartered Accountants** client information newsletter, your monthly tax and super update keeping you **abreast of** current issues, news and changes you need to know about.

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Tax when you're headed overseas *cont*

We can help you lodge your Australian tax return even if you're overseas. Just in case, note that it could be a good idea to log in to your myGov account and turn off the myGov security code feature before you lose access to your Australian mobile number. If you have access to your number overseas, you can leave this feature on.

SOME CGT CONSIDERATIONS

If you leave your home in Australia temporarily and rent it out, you can continue to treat it as your main residence for up to six years for capital gains tax (CGT) purposes. If you don't rent out your vacated home, you can treat it as your main residence for an unlimited period.

If you cease to be an Australian resident and decide to sell your home in Australia you may be liable to CGT.

If you cease to be an Australian resident while overseas, the ATO may deem some of your assets (generally those not considered "taxable Australian property") to have been disposed of for CGT purposes, which may mean you become liable to pay CGT.

You can choose not to have this deemed disposal apply. But if you subsequently dispose of the asset some time later, the ATO may take into account the whole period of ownership – including any period when you're not an Australian resident – when it calculates a gain or loss for CGT purposes.

> If you cease to be an Australian resident and decide to sell your home in Australia you may be liable to CGT.

SUPERANNUATION

If you are an Australian citizen or permanent resident heading overseas, your super remains subject to the same rules, even if you are leaving Australia permanently. This means you cannot access your super until you reach preservation age and retire, or satisfy another condition of release.

If you have a small amount saved for retirement that you want to keep with your super fund, contact your super fund and tell them. This will prevent it from being transferred to the ATO as "unclaimed" super.

If you are a trustee of a self-managed super fund (SMSF) and you intend to travel overseas for an extended period, check before you leave that your fund will continue to meet the definition of an Australian super fund. Generally there are certain residency conditions for an SMSF, which include that:

- it was established here and at least one asset of the fund is located in Australia
- central management and control is ordinarily in Australia
- its active members hold at least 50% of the fund's assets.

If your SMSF fails the residency test, it could be advisable to roll over your funds to a resident regulated super fund and wind up the SMSF — as otherwise the SMSF will become non-complying. Professional advice in these situations is recommended.

HEALTH INSURANCE

The Medicare levy surcharge applies to Australian residents who have incomes above the surcharge thresholds and do not have an appropriate level of private patient hospital cover. So if you cancel your private health insurance while travelling overseas, you may be liable for the Medicare levy surcharge if your income exceeds the relevant threshold.

A good idea may be to contact your health fund to work out the amount of premium you expect to save by cancelling or suspending your cover, and then compare it to the surcharge you may have to pay.

You and all your family dependants must have private patient hospital cover to avoid paying the surcharge. Cancelling or suspending cover for yourself will mean you and your spouse may each still be liable for the surcharge if your combined income for the purposes of the surcharge exceeds the family surcharge threshold.

Remember, travel insurance is not private patient hospital cover for the purposes of the Medicare levy surcharge. Private patient hospital cover does not include cover provided by an overseas fund.

(Also note that although any foreign employment income may be exempt from Australian tax, the ATO will still take it into account when it determines your taxable income for the purposes of the Medicare levy surcharge.)

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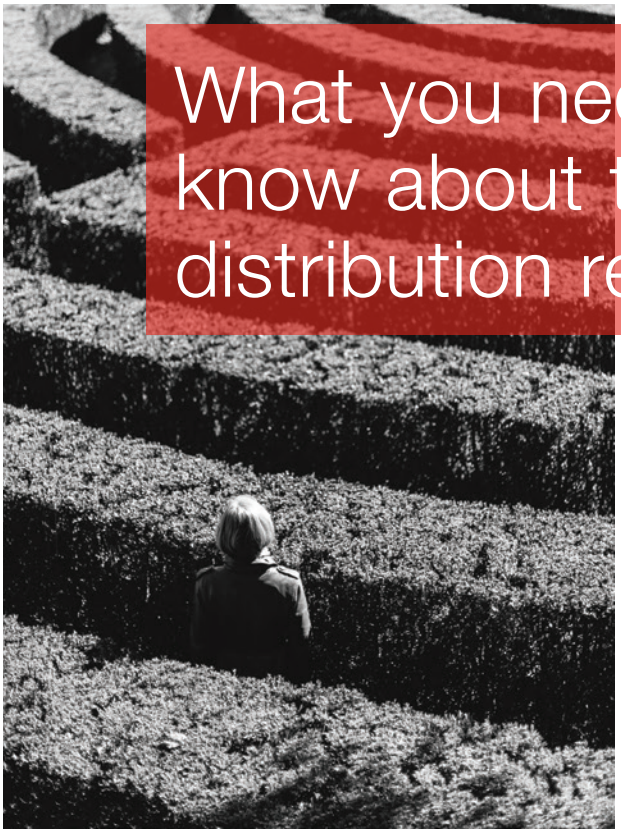

What you need to know about trust distribution resolutions

Photo by Maksym Kaharlytskyi on Unsplash

An essential starting point for consideration of trust income and how that income is to be distributed is to look at the trust deed. This very central document sets out the rules and expectations for the governance and operation of the trust and the powers that can be exercised by the trustee.

Although it can be commonly assumed that the trust deeds of similar types of trusts (such as family trusts, fixed trusts, public unit trusts and so on) are generally alike, the reality is that each deed is unique and can have important differences.

There is a certain level of external regulation of trustees, in that each state and territory has its own trustees' act, however in a practical sense such legislation generally tends to apply in circumstances where a trust deed is silent on specific areas that are relevant to operational and governance matters. And unlike companies, which operate under the regulations of the *Corporations Act 2001*, there are no "replaceable rules" available (whereby a company can choose to not spell everything out in a constitution and use the act's replaceable rules instead).

Distribution resolutions

Even from a purely practical point of view, it is important for distribution resolutions to be made — if only for the fact that any income of the trust to which no beneficiary is "presently entitled" is generally taxed at the highest rate. Distribution decisions should therefore be resolved as soon as possible so as not to expose the trust's income to a high tax rate.

First of all, it must be emphasised that all trust distribution resolutions must be finalised by 30 June. This has not always been the case with trust law, as a previous concession allowed for a two-month window after the end of a financial year where an income "present entitlement" could still be formed. Note that trust capital gain distributions still have that 31 August window, but not for gains already dealt with by 30 June.

The resolution format

Interestingly, the ATO does not insist that a distribution resolution be provided in writing, unless this requirement is specified in the trust deed. Theoretically therefore it may seem to be permissible to make a mental resolution, or orally in conversation (if the deed permits), as long as the trustee has made a resolution (that is, they "resolve" to distribute income in a certain way). Reality of course demands more than a note scribbled on a napkin.

A trustee will be required to have evidence that a distribution resolution was made before 30 June, and should be able to substantiate the fact. So while a resolution is not strictly required in a dated documentary form, it must be made in accordance with the trust deed on or before 30 June (or as the deed states) and objective evidence should be able to be provided.

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What you need to know about trust distribution resolutions *cont*

Objective evidence for resolutions could also include meeting minutes, diary entries, an exchange of correspondence, or a "draft" memo or minute that is approved to be finalised. These documents may be found to be dated after 30 June, but certainly must show that the decisions regarding the trust's distributions for the relevant year were made on or before that date.

For your own peace of mind, a dedicated document is the best way to achieve compliance. A written record will provide better evidence of the resolution and avoid a later dispute, for example with the ATO or with relevant beneficiaries, as to whether any resolution was made.

Also a written record will be essential if the trustee aims to effectively stream capital gains or franked distributions for tax purposes. This is because a beneficiary can only be specifically entitled to franked dividends or capital gains if this entitlement is recorded in writing in the records of the trust.

With corporate trustees, the recording of a resolution is more assured, as a company must act according to the responsibilities and liabilities spelled out in the *Corporations Act 2001.*

A trustee's distribution resolution does not need to specify an actual dollar amount to be effective in making a beneficiary presently entitled, unless the trust deed specifically requires it. Indeed in many (if not most) cases, trustees may not have complete income information on or before 30 June, and could be waiting on information from third parties by the time that date passes.

A distribution resolution can generally still be viable if it prescribes a clear methodology for calculating beneficiaries' entitlements — these can be expressed, for example, as a specified percentage of the trust's income (whatever this ends up being) and is often referred to as the proportionate approach.

Alternatively, if a trustee knows that the income of the trust will be at least a certain amount, they can choose to make one or more beneficiaries presently entitled to a defined amount, and other beneficiaries entitled to the balance (again, whatever this ends up being).

When the accounts and income tax return have been finalised, the trustee can confirm the precise dollar amounts of the distribution in a further resolution, reflecting the earlier theoretical calculation.

What can be distributed?

Generally, trust income is taxed in the hands of the beneficiaries (or the trustee on their behalf) based on their share of the trust's income — that is, the share they are "presently entitled" to.

The "income of a trust" is not accounting income (according to accounting standards) nor is it taxable income (according to tax law). It is calculated in accordance with the terms of the trust deed (as mentioned above), and through allocating receipts and outgoings to income or capital accordingly. This can also be referred to as "distributable income" and is available, as the name suggests, to be distributed to beneficiaries. ■

Trust deeds: Central concepts

The essential clauses in a trust deed are those that deal with and define the following:

Distributions: **The trust deed will generally specify that a trustee must resolve or take action to distribute the trust's income to the relevant beneficiaries by a particular time of the year. This is required to be made by 30 June, but a deed can also specify an earlier date. If this is the case, the deed's date takes precedence.**

Income: **Trust income is not straightforward, and it is not uncommon for trust deeds to define the net income of the trust. Some deeds may not define income so that it is determined according to relevant legislation as well as general concepts, but also case law.**

Note that a trust deed can give a trustee the discretion to determine if a receipt is treated as capital or income. Trust law has also given us the term "income of the trust estate" which, if the deed permits, can treat capital receipts as income.

Beneficiaries: **The trust deed will name the primary beneficiaries, but may also nominate general beneficiaries (defined by a relationship to a primary beneficiary, or in terms of a "class") and perhaps default beneficiaries. The latter are entitled to income from the trust should the trustee not make a valid distribution to the other beneficiaries.**

Keeping busy: but is it just a hobby, or are you in business?

Photo by Jamie Street on Unsplash

It is important to understand the differences between a hobby and a business for tax, insurance and legal purposes among other things. For one thing, there will be certain tax and other obligations that start once you are in business.

However it's a myth that there is a dollar threshold to be in a business (some people can have very expensive hobbies). What matters is whether, as a whole, your activity is "commercial", with an aim to make a profit. Once you are in business, there are dollar thresholds that can affect what you can claim for tax purposes.

Characteristics of a business

There is no single factor that determines if you are in business, but some of the factors you need to consider include:

- You've made a decision to start a business and have done something about it to operate in a businesslike manner, such as
  - registered a business name, or
  - obtained an Australian business number (ABN).
- You intend to make a profit or genuinely believe you will make a profit from your activity (even if you are unlikely to do so in the short term).
- You repeat similar types of activities, and the size or scale of your activity is consistent with other participants.
- Your activity is planned, organised and carried out in a businesslike manner. This may include:
  - keeping records and account books
  - having a separate bank account
  - operating from dedicated premises
  - having licenses or qualifications
  - having a registered business name.

If you aren't in business yet, it is important to keep these factors in mind as your activities change or grow, so you'll know when you need to register for tax and other business responsibilities.

Characteristics of a hobby

It is generally accepted that a hobby is a pastime or leisure activity conducted in your spare time for recreation or pleasure.

With a hobby:

- you achieve personal enjoyment and satisfaction
- you can gift or sell your work for the cost of materials

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What you need to know about trust distribution resolutions *cont*

- you can do it in your own time or when people contact you
- you don't have the reporting obligations of a business.

If you determine your activities are a hobby then you do not have any additional tax or reporting obligations. However if your activity is a hobby you may need to meet certain requirements to transact with a business. When making a purchase a business generally collects the seller's ABN. If the seller can't provide an ABN, then a business must withhold the top rate of tax from the payment for any total more than $75 for tax purposes.

Since you're not in business and therefore not entitled to an ABN, you need to provide justification that the payer need not withhold tax. This can be done by providing the payer with a "Statement by a supplier" form.

Changing status changes obligations and opportunities

Income-earning hobbies can sometimes grow into businesses, so it's important to monitor any change in income or practises so that you're aware of your obligations before they happen.

Once your hobby becomes a business, you may need additional licences and permits specific to your type of business. For example, if you're running a home-based business, you may need council approval to operate from your residence depending on the type of business.

But being a bone fide business also means that you will have access to many more tax deductions and other concessions than would otherwise be the case. We can advise you on this if and when that time comes. ■

Tax when you're headed overseas *cont*

✈ STUDENT LOANS

If you have moved overseas and have a Higher Education Loan Programme (HELP), VET Student Loan (VSL) or Trade Support Loan (TSL) debt, you will have the same repayment obligations as those who live in Australia. This applies even if you already live or intend to move overseas for a total of more than six months in any 12-month period.

You will need to update your contact details using the ATO's online services via myGov. You will also need to advise the ATO of your worldwide income, and make compulsory repayments or pay an overseas levy towards your debt if you earn over the minimum repayment threshold.

If you have a Student Financial Supplement Scheme (SFSS), Student Start-up Loan (SSL) or ABSTUDY Student Start-up Loan (ABSTUDY SSL) debt and go overseas, the ATO will continue to maintain your loan account. Your debt will not be waived and the amount outstanding will continue to be indexed each year until you have paid off your debt. You can still make voluntary repayments when you are overseas. ■

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.

Small businesses need to get "active" to pay less tax

Photo by Gesina Kunkel on Unsplash

For small business owners who are disposing of assets that have risen in value during the time they have owned and used them in their business, accessing one or more of the available small business capital gains tax (CGT) concessions can greatly reduce any consequent tax liability.

Indeed, many small business owners find they can reduce possible CGT liabilities to zero. For example, you can reduce the capital gain on an active asset by 50%, and in addition claim the general 50% CGT discount (which is available after owning any CGT asset for 12 months or more).

However one critical condition to be able to access this 50% active asset reduction concession is that it must be, as the name suggests, an "active" asset.

WHAT IS AN ACTIVE ASSET?

A CGT asset is an active asset if you own it and:

- you use it or hold it ready for use in the course of carrying on a business (whether alone or in partnership)
- it is an intangible asset (for example, goodwill) inherently connected with a business you carry on (whether alone or in partnership).

The active asset test is satisfied if the asset was an active asset of yours:

- for a total of at least 7½ years during the test period, if you've owned it for more than 15 years, or
- for at least half of the test period, if you've owned it for 15 years or less.

The test period:

- begins when you acquired the asset, and
- ends at the earlier of
  - the CGT event (that is, its sale), and
  - when the business ceased, if the business in question ceased in the 12 months before the CGT event (or such longer time as the ATO allows).

The periods in which the asset is an active asset do not need to be continuous. However, they must add up to the minimum periods specified above, depending on the total period of ownership. The asset does not need to be an active asset just before the CGT event.

THE OPTIONS

Unlike the other small business concessions, the small business 50% active asset reduction applies automatically if the basic conditions are satisfied, unless you choose for it not to apply.

You might prefer for it not to apply, and instead choose the small business retirement exemption or the small business rollover, if this gives you the best result for your circumstances. For example, a company or trust may make larger tax-free payments under the small business retirement exemption.

Otherwise, the small business retirement exemption or the small business rollover (or both) may apply to the capital gain that remains after applying the small business 50% active asset reduction. ■

The small business income tax offset

Photo by Blake Wisz on Unsplash

The small business income tax offset (also known as the unincorporated small business tax discount) can reduce the tax a sole trader business pays by up to $1,000 each year. The offset is worked out on the proportion of tax payable on business income.

To be eligible, a taxpayer must be carrying on a small business as a sole trader, or have a share of net small business income from a partnership or trust, and have an aggregated turnover of less than $5 million.

The rate of the offset is 8% up to the end of the 2019-20 income year, but will increase to 13% for 2020-21 and again increase to 16% for 2021-22 and then remain at that level.

The ATO calculates the offset using information from the business's tax return, with the offset amount shown on the notice of assessment. Its "Small business income tax offset calculator" (we can access this for you) can work out the income amounts to be used to work out the tax offset, however it doesn't work out the amount of the offset.

Net small business income is the sum of the assessable income from carrying on a business minus any deductions. If net small business income is a loss it is treated as zero, and you will not entitled to the offset.

The following income amounts are not included in working out net small business income:

- net capital gains made from carrying on a business
- personal services income (unless your business is a "personal services business")
- salary and wages
- allowances and director's fees
- government allowances and pensions
- interest and dividends unless it's related to a business activity
- interest earned on a farm management deposit.

Also the following deductions are not used when working out net small business income:

- tax-related expenses such as accounting fees
- gifts, donations or contributions
- personal superannuation contributions
- current year business losses, which are not deductible this year under the non-commercial loss rules
- tax losses from prior years (unless they are deferred non-commercial losses).