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TAX MATTERS
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CGT and the family home: expats and foreigners targeted again

The Government has resurrected its plan to remove access to the main residence exemption for non-residents – a move that will impact on expats and foreign residents.

Back in the 2017-18 Federal Budget, the Government announced that it would remove the ability for non-resident taxpayers to claim the main residence exemption. The unpopular measures were introduced into Parliament but stymied. An election later, a re-composition of Parliament, and the Government has again introduced the reforms but in a modified form.

The proposed changes would apply from the original Budget announcement on 9 May 2017, so could impact on properties that have already been sold. However, a transitional rule would allow capital gains tax (CGT) events happening up to 30 June 2020 to be dealt with under the existing rules as long as the property was held continuously from before 9 May 2017 until the CGT event.

That is, if you held a property from 9 May 2017 up until the sale date, the existing rules might continue to apply.

If the measures pass Parliament, a non-resident taxpayer would be prevented from applying the main residence exemption to the sale of a property, regardless of whether they were a resident of Australia for some or most of the ownership period.

For expats, there is a proposed exception to the new rules for situations where the individual has been a non-resident for 6 years or less and a specific life event occurred during the period of foreign residency. "Life events" refer to terminal medical conditions suffered by the individual or certain family members, the death of certain family members or a marriage or de facto relationship breakdown. That is, if you were working overseas for 5 years and your spouse died during this time, the exemption could still potentially apply to your former Australian main residence.

For non-resident individuals, there will be a significant flow-on impact if the legislation passes Parliament as:

- They will miss out on a full or partial exemption under the main residence rules.
- They will generally be taxed at non-resident rates (i.e., no or only partial tax-free threshold).
- The CGT discount percentage could be less than 50%.
- The cost base reset rules that sometimes apply to provide an uplift in the cost base of the property to its market value at the time it is first rented out, are unlikely to apply, and
- The foreign resident withholding rules could impact on the cash flow position of the vendor.

Currently, individuals are generally not subject to CGT on the sale of the home they treat as their main residence. If the home was your main residence for only part of the ownership period or if the home is used to produce income (for example, you use part of the home as a business premises or rent out part of the property), then a partial exemption may be available. In addition, if you move out of your home and you don't claim any other residence as your main residence, then you can continue to treat the home as your main residence for up to six years if you rent it out or indefinitely if you don't rent it out (the 'absence rule').

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The main residence exemption is currently available to individuals who are residents, non-residents, and temporary residents for tax purposes. *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019* is currently before the House of Representatives and is not yet law.

While you should plan for change, do not act specifically on these impending changes until they have passed Parliament.

If you are concerned about how these impending changes may impact you, please contact us.

Calculating Super Guarantee: The new rule

From 1 July 2020, new rules will come into effect to ensure that an employee's salary sacrifice contributions cannot be used to reduce the amount of superannuation guarantee (SG) paid by the employer.

Under current rules, some employers are paying SG on the salary less any salary sacrificed contributions of the employee. Currently, employers must contribute 9.5% of an employee's Ordinary Time Earnings (OTE) and they choose whether or not to include the salary sacrificed amounts in OTE.

Under the new rules, the SG contribution is 9.5% of the employee's 'ordinary time earnings (OTE) base'. The OTE base will be an employee's OTE and any amounts sacrificed into superannuation that would have been OTE, but for the salary sacrifice arrangement. Let's look at an example:

Pablo has quarterly Ordinary Time Earnings of $15,000 which would ordinarily generate an entitlement to $1,425 in SG contributions ($15,000 x 9.5%). He salary sacrifices $1,000 a quarter, expecting his superannuation contributions to rise to $2,425 for that quarter.

However, his employer uses the sacrificed amount ($1,000) to satisfy part of the employer's mandated SG obligation, and only makes a total contribution of $1,425, mostly consisting of the employee's $1,000 salary sacrificed amount.

Under the new amendments, Pablo's $1000 sacrificed contribution will no longer reduce the charge. Therefore, the charge percentage would only be reduced by 2.83% ($425 / $15,000 x 100). As the employer is required to contribute 9.5% of the OTE base, they must contribute an additional 6.67% to meet their minimum SG obligations. The employer has a shortfall of approximately $1,000 (6.67% x $15,000).

As sacrificed contributions no longer reduce the charge Pablo's employer will need to contribute $1 425 (mandatory employer contributions) in addition to the $1,000 employee sacrificed amount, to avoid a shortfall and liability for the SG charge.

The amendments also ensure that where an employer has not fulfilled their SG obligations and the superannuation guarantee charge is imposed, the shortfall is calculated using the new OTE base.

Vacant land deduction changes hit 'Mum & Dad' property developments

Legislation that passed through Parliament last month prevents taxpayers from claiming a deduction for expenses incurred for holding vacant land. The amendments are not only retrospective but go beyond purely vacant land.

Previously, if you bought vacant land with the intent to build a rental property on it, you may have been able to claim tax deductions for expenses incurred in holding the land such as loan interest, council rates and other ongoing holding costs.

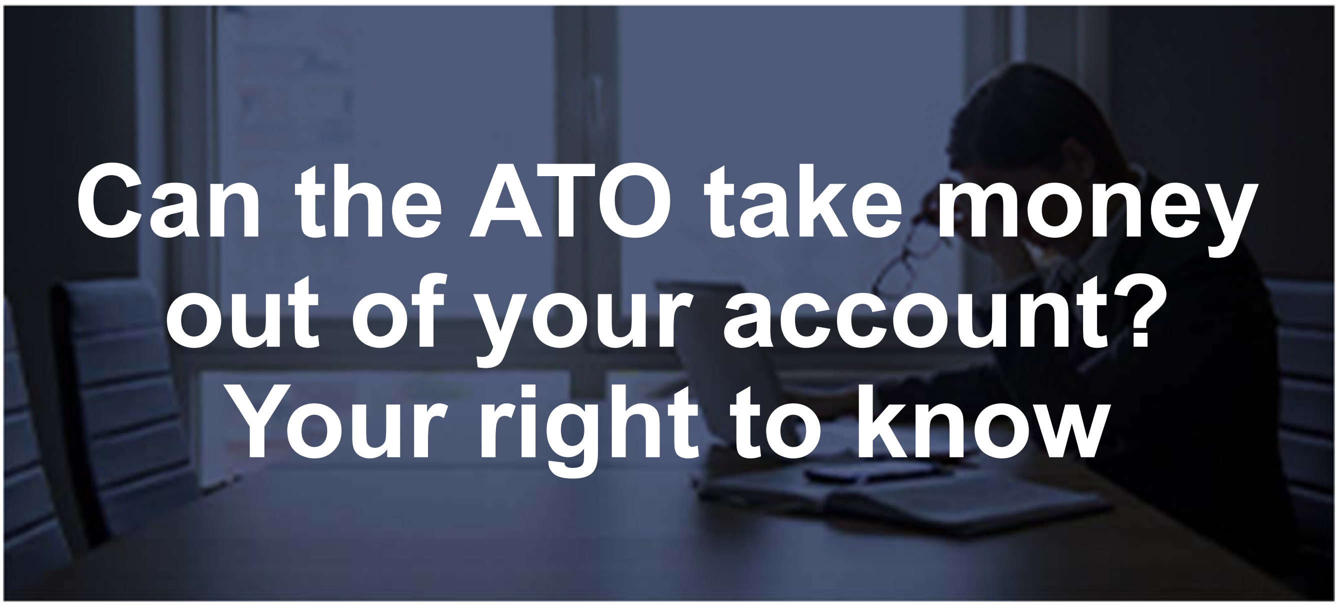
The new laws, aimed predominantly at Mum & Dads (individuals, closely held trusts and SMSFs), prevent these deductions from being claimed. Since the new laws apply retrospectively to losses or outgoings incurred on or after 1 July 2019 regardless of whether the land was first held prior to this date, and with no grandfathering in place, the amendments will not only impact those intending to develop vacant land but those who have already acquired land to develop. This is the same target as previous tax changes that denied travel claims to visit residential rental properties and depreciation claims on plant and equipment in some residential rental properties.

The changes however, go beyond purely vacant land for residential purposes. Deductions could also be denied for land with a building on it, if that building is not 'substantial'. The only problem is, the legislation does not clearly define what 'substantial' means. The Bill suggests that a silo or shearing shed would be substantial but a residential garage for example, would not meet the test.

If the new measures prevent holding costs from being claimed as a deduction, then they will generally be added to the cost base of the asset for capital gains tax (CGT) purposes. This means that they can potentially reduce any capital gain made when you dispose of the property in the future. However, holding costs for CGT assets acquired before 21 August 1991 cannot be added to the cost base and these costs cannot increase or create a capital loss on sale of a property.

On the positive side, vacant land leased to third parties under an arm's-length arrangement may continue to be eligible for deductions for holding costs after 1 July 2019 if the land is used in a business activity. Also, land used in a primary production business will generally be excluded from the new rules. However, deductions could still potentially be lost (at least to some extent) if there are residential premises on the land or that are being constructed on the land.

There are also carve outs for land which has become vacant or which cannot be used to produce income for a period of time due to structures being impacted by natural disasters or other events beyond the owner's control.



Can the ATO take money out of your account? Your right to know

You might have seen the recent spate of media freedom advertisements as part of the Your Right to Know campaign. The prime-time advertising states that the Australian Tax Office (ATO) can take money from your account without you knowing. The question is, do you really know what powers the ATO have?

The ATO is one of the most powerful institutions in Australia with very broad and encompassing powers. Over the last few years the approach has been to work with taxpayers to ensure that the tax they owe is paid. But this level of understanding only lasts so long and they will take action where taxpayers are unwilling to work with them, repeatedly default on an agreed payment plan, or don't take steps to resolve the situation (these steps include an expectation that you go into debt to clear your tax debt). And, there are also circumstances where the ATO can swoop in where they believe there is a need to secure assets such as bank accounts if there is a risk of disposal or flight risk.

The ATO's principal purpose is to collect the majority of the Federal Government's revenue. According to an Inspector-General of Taxation's report earlier this year, in 2016-17:

- 88% of tax payments owing were made by the due date
- 7% ($33.4bn) was paid within 90 days after the due date
- 1.3% ($6.1bn) was paid within a year after the due date, and
- $15 billion was left unpaid after a year.

At the end of the 2016-17 financial year, the total of undisputed collectable tax debt was $20.9 billion.

Here are just a few of the ATO's powers to ensure that tax owing is collected:

- **Issue a garnishee notice to someone holding money on your behalf** – for example a bank. For salary and wage earners, the ATO can require your employer to take part of your salary and pay it to them until your tax debt is paid. This is generally limited to a maximum of 30% of your salary. If you are a business, the ATO can go as far as accessing your merchant facility if you have credit owing.
- **Director penalty notice** – Directors can personally incur penalties equal to their company's unpaid PAYG withholding liabilities or superannuation guarantee charge. The Government wants to expand this to cover unpaid GST liabilities as well. If this debt is not paid, the ATO may issue a director penalty notice to start legal proceedings (and withhold any refunds due to the director).
- **Direction to pay super guarantee** – if employers receive a direction to pay superannuation guarantee, any outstanding Superannuation Guarantee Charge must be paid within the period specified. It's a criminal offence not to comply with this notice and may result in enforced penalties and/or imprisonment.

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- **Impose a freezing order** – for example, on your bank accounts. That is, without notice the ATO can freeze and then if required strip your accounts, particularly where they believe you have alternative sources of income. This freezing order cannot be initiated by the ATO but must be granted by a court.

- **Issue writs or warrants of execution, or warrants of seizure and sale.** For example, they can force you to sell certain assets to pay your tax debts.

- **Winding up - liquidate your company or bankrupt you.** Most taxpayers don't believe how strongly the ATO will act. The ATO can commence winding up procedures before any dispute is decided. In 2017-18 the ATO bankrupted 470 taxpayers and wound up 1,282 entities. The ATO would argue that in many cases the wind up forces the inevitable and prevents further debt being incurred either to the ATO or other parties.

The message is, make sure you are on top of your paperwork. If the ATO has queries or suspects something is not right, you need to be able to respond. The longer you take, or a lack of evidence, will only escalate the situation.

So, can the ATO take money out of your account without advising you first? With the support of the courts, absolutely and a whole lot more.

Are you paying your staff correctly? Woolworths $200m plus remediation

Woolworths is the latest company facing a fallout from the underpayment of staff. In what is believed to be the largest remediation of its kind, Woolworths have stated that they have underpaid 5,700 salaried team members with remediation expected to be in the range of $200m to $300m (before tax).

The discovery was made as part of a 2 year review following the implementation of a new enterprise agreement but could have been occurring since the implementation of the modern award in 2010.

In a statement, Woolworths stated: *The review has found the number of hours worked, and when they were worked, were not adequately factored into the individual salary settings for some salaried store team members.*

Interim back payments will be made to affected staff identified in the initial review before Christmas. Woolworths states that full remediation will be made as soon as practicable to all other staff impacted.

We cannot stress the importance of ensuring that staff are paid at the correct rates. If staff are underpaid, it is not simply a matter of making a catch-up remediation payment. Underpayment of superannuation entitlements in particular will incur significant penalties and charges.

To ensure that your staff are paid at the correct rate, check the Fair Work Ombudsman's pay and conditions tool and see their guide to audit your pay rates.

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