

CPA TAX NEWS

NEWS, LEGISLATION AND RESOURCES

CPA AUSTRALIA

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LATEST UPDATES

JobKeeper Payment further expanded

The Government has announced further changes to the JobKeeper Payment scheme that relate to the GST turnover reference period and employee eligibility.

From Monday 28 September 2020, businesses and not-for-profits will be required to reassess their eligibility for the JobKeeper extension and demonstrate that their actual turnovers have significantly declined in the previous quarter, instead of multiple quarters.

From Monday 3 August 2020, the relevant date of employment for an eligible employee will move from Sunday 1 March 2020 to Wednesday 1 July 2020, expanding employee eligibility.

Treasury has released **updated fact sheets** on the JobKeeper Payment scheme.

Further, more information on the eligibility rules for businesses and not-for-profits and their employees is on the **ATO website**.

CPA Australia has prepared a **summary** of the updated scheme extension plus a member-only **Fact Sheet** to use for your clients.

The Joint Bodies continue to highlight the lack of access to support for new businesses. Elinor Kasapidis, Tax Policy Adviser at CPA Australia, **says**, "There has been no relief for new businesses, and given the sustained period of economic downturn, many of these businesses will struggle to remain viable."

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ATO reminder for super guarantee amnesty deadline

The Government has said that the ATO will send notices to employers to remind them that the deadline for the super guarantee amnesty is Monday 7 September 2020.

The ATO has acknowledged that some businesses may not be fully able to pay their super guarantee debt during COVID-19.

To encourage businesses to still apply for the amnesty, the ATO has pathways in place to work with businesses and create payment plans.

MANAGE YOUR ENTIRE PRACTICE IN THE CLOUD

READ MORE

Tax treatment of government grants and payments received during COVID-19

The ATO has published guidance on the tax consequences of government stimulus measures to assist Australians impacted by COVID-19. The information covers federal, state, territory and local government assistance.

ATO welcomes decision of Full Federal Court in the matter of FC of T v Addy

The Full Federal Court of Appeal has found in favour of the Commissioner in the matter of *Addy v. Commissioner of Taxation* [2020] FCAFC 135.

"This decision upholds the ATO's current view meaning that employer obligations have not changed, and employers should continue to apply the appropriate tax tables when determining the amount to withhold for working holiday makers," Deputy Commissioner Jeremy Geale said.

The parties have until Thursday 3 September 2020 to seek special leave to appeal the Full Federal Court's decision to the High Court.

Stage 4 business restrictions in force for metro Melbourne

Restrictions on the operations of various businesses in the Melbourne metropolitan area continue.

Unless an exception applies, only **Permitted Work Premises** may operate with on-site operations from Wednesday 5 August to Monday 14 September 2020, and only to the extent permitted.

Permitted Work Premises must have a **COVID Safe Plan**. For workers working on-site at Permitted Work Premises, employers are required to issue a **Permitted Worker Permit** to such employees.

Accounting services are not listed as a permitted industry and therefore all accounting offices must be closed for on-site work.

Subsection 7(1) of the **Directions from the Public Health Commander** states that a person who owns, controls or operates a Closed Work Premises (for example, an accounting practice) in the Melbourne metropolitan area must not permit persons to attend that premises during the restricted activity period.

Subsection 7(2) permits persons to attend that premises:

- for the purpose of essential maintenance (meaning critical maintenance and safety works including to satisfy environmental obligations)
- To ensure the premises is closed safely for the duration of the restrictions
- Permitting employees to work from the place where they ordinarily reside to operate the premises
- As required or authorised by law, or
- In an emergency.

For further detail on the restrictions, review the **directions issued by the Public Health Commander** and the **table** accompanying these restrictions. These requirements are subject to change and should be read regularly.

IGTO survey on ATO communication of taxpayer rights now open

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) has commenced an investigation into the effectiveness of Australian Taxation Office (ATO) written communications of taxpayer rights to review, investigate or appeal decisions made and actions taken by the ATO.

You can make a **submission** or participate in a short **survey**.

TPB data on practitioner terminations

The Tax Practitioners Board (the Board) has released data on tax practitioner terminations and suspensions.

During 2019-20, over 300 cases were presented to the Board Conduct Committee, which resulted in over 178 terminations — a 122 per cent increase compared to the previous year. Suspensions also rose from nine in 2018-19 to 60 in 2019-20.

The use of data analytics capability in the investigations team as well as an increase in the number of investigators had supported the Board's role in acting on complaints, referrals and intelligence. This in turn accounted for the increase in terminations.

APRA to recommence prudential policy program

APRA has announced that it will recommence public consultations on select policy reforms following its March 2020 announcement of the suspension of the majority of its planned policy and supervision initiatives in response to the impact of COVID-19.

This member only fact sheet can be branded and emailed to relevant clients to provide them with information about the recent changes to the government's JobKeeper Payment scheme. Simply **download** the document and add your business details.

A new tool from CPA Australia makes it simpler to check that you have the right insurance coverage to participate in the Professional Standards Scheme. **Manage your insurance policy today.**

Another My Firm. My Future webinar has been scheduled to help our members in public practice prepare for the future. If you aspire to grow or get your business succession ready, improve profit, and find more meaning in work, then this webinar series is for you. **Register** today to prepare your practice for the future.

- Trust liquidity issues due to COVID-19
- Additional support to help with tax obligations during COVID-19
- ATO support for not-for-profits (NFPs) affected by COVID-19
- Common tax and super FAQs about COVID-19
- Information about the treatment of grants for GST purposes
- End-of-year finalisation through STP
- Offsetting current year business losses
- Claiming business tax losses from previous year
- Video presentation on business losses
- Information to help in reviewing cybersecurity practices
- Information on 2018 Australian financial accounts held by foreign tax residents collected under the Common Reporting Standard (CRS)
- Tax transparency report of corporate tax entities
- GST Administration Performance Agreement from 1 July 2020 to 30 June 2023
- ATO consultation report for July 2020
- Open consultation by the ATO
- ATO advice and guidance under development
- List of consultation matters completed in 2020

- Recent trustee communication on SuperStream rollover message version 3 implementation

During times of economic turmoil, illegal phoenix scheme promoters come out of the woodwork.

Taxation Ruling **TR 2020-4** considers the key technical issues that may arise in determining an entity's arm's length debt amount under the thin capitalisation rules as they apply to entities that are not authorised deposit-taking institutions.

Practical Compliance Guideline **PCG 2020-7** has also been issued to provide administrative guidance to taxpayers in applying the arm's length debt test. It provides a risk-assessment framework that outlines the ATO's compliance approach to an application of the test in certain circumstances that are identified as low risk.

The above guidance replaces *Taxation Ruling* **TR 2003-1**, which is withdrawn with effect from 12 August 2020.

Penalty practice statement updated

The ATO has **updated** its practice statement dealing with administration of penalties for failing to lodge documents on time.

Practice Statement Law Administration **PS LA 2011-19** has been **updated** to expand the term "significant global entity" to include a subsidiary member of a consolidated group or a multiple entry consolidated group and to make other minor adjustments.

Class rulings issued

The ATO has issued the following two class rulings:

- *Class Ruling* **CR 2020-42** Nova Eye Medical Ltd — return of capital. The ruling applies from Wednesday 1 July 2020 to Wednesday 30 June 2021.
- *Class Ruling* **CR 2020-43** Sienna Cancer Diagnostics Ltd — scrip for scrip CGT roll-over relief following merger with BARD1 Life Sciences Ltd. The ruling applies from Wednesday 1 July 2020 to Wednesday 30 June 2021.

CASES

ATO wins backpacker tax test case

The Commissioner has won the "backpacker tax" test case in the Full Federal Court. The Full Court said that Ms Addy, on a working holiday visa in Australia from the United Kingdom (UK), had to pay the "backpacker tax" and was not entitled to benefit from the tax-free threshold.

In so finding, the Commissioner's appeal against the decision of the Federal Court was allowed.

The backpacker tax is specified in **Pt III of Sch 7** to the *Income Tax Rates Act 1986*. It requires working holiday makers to pay 15 per cent tax on their first \$37,000 of income in Australia.

Australian citizens who are tax residents have a tax-free threshold on income up to \$18,200. The taxpayer in the test case, Ms Addy, travelled to Australia in 2015 and in the 2016-17 financial year worked as a waitress in two Sydney hotels before returning home to the UK.

She was subsequently advised by the ATO that she owed Australian tax because she had been a non-resident, not entitled to a tax-free threshold, and was required to pay the backpacker tax.

At first instance, Logan J held (at *Addy v FC of T* **2019 ATC ¶20-719**, **[2019] FCA 1768**) that Ms Addy was a resident under both the ordinary concepts test and the 183-day test in para (a)(ii) of the definition of "resident" in **s 6** of ITAA 1936.

His Honour also ruled that the backpacker tax could not be applied to working holiday makers from countries including the UK, the United States, Germany, Finland, Japan, Norway, Turkey and Chile because it contravened non-discrimination clauses contained in the Double Tax Agreements (DTAs) that Australia has signed with these countries.

The Full Federal Court allowed the Commissioner's appeal against the Federal Court's decision. First, the Commissioner succeeded in establishing that Logan J erred in concluding that Ms Addy was a resident under the ordinary concepts test from 1 July 2016 to 1 May 2017. However, Logan J was correct to conclude that Ms Addy was a resident under the 183-day test, albeit for erroneous reasons.

The Commissioner's failure to consider the application of that test in the particular circumstances had the consequence that the proviso did not operate to avoid her residency status arising from the duration of her presence in Australia. Nevertheless, Logan J erred in holding that his Honour could substitute his state of satisfaction for that of the Commissioner if the Commissioner erred in forming an opinion under the 183-day test.

Finally, the court said that as the holder of a working holiday visa, Ms Addy's income was subject to the backpacker tax. Although that imposed a greater tax burden on her than is imposed upon Australian residents who have the benefit of the tax-free threshold, it did not trigger the operation of Art 25 of the Australia/UK DTA. The imposition of a tax at a higher rate on the holders of specific visas did not discriminate against the holder solely on the basis of nationality and did not offend the agreement.

Addy v FC of T **2020 ATC ¶20-756**, **[2020] FCAFC 135**, Davies, Derrington, Steward JJ, Thursday 6 August 2020.

Commissioner could not recover tax refund

The Federal Court has held that the Commissioner was not authorised to apply **s 8AAZN** of the *Taxation Administration Act 1953* (TAA) to recover a tax refund from a taxpayer. The refund related to a purported claim for a research and development (R&D) tax offset for the 2013 income year for activities that were subsequently found to be ineligible for the tax offset.

The taxpayer claimed in its 2013 income tax return company an R&D tax offset refund of approximately \$2.23 million for a project that was registered in March 2014 as an eligible R&D activity. The tax return also disclosed a taxable loss of approximately \$6.6 million and the carrying forward of tax losses of approximately \$27.8 million. The Commissioner paid the tax refund to the taxpayer in May 2014. The activities were subsequently found to be ineligible for the tax offset. In September 2019, the Commissioner issued a notice under **s 8AAZN** seeking repayment of the refund.

The Commissioner submitted in Federal Court proceedings that the payment had occurred by mistake because it has transpired that the taxpayer was not entitled in 2013 to the R&D tax offset. The court found that the Commissioner could not apply **s 8AAZN** to recover the tax refund. It accepted the taxpayer's submission that the presence of the phrase "by mistake" required the presence of a mistake that was the activating cause of the overpayment for it to be an "administrative overpayment" as defined by **s 8AAZN**. Inferentially, it must be a mistake made by or imputed to the Commissioner because he was the person who made the relevant overpayment.

Auctus Resources Pty Ltd v FC of T **2020 ATC ¶20-755**, **[2020] FCA 1096**, Steward J, 31 July 2020.

Australian citizen working in Singapore found to be Australian resident

The AAT has held that an Australian citizen working in Singapore was a resident of Australia according to the "ordinary concepts test" during the 2015 tax year.

The taxpayer, his wife and two young sons moved from South Africa to Australia in 2010 when the taxpayer accepted a position in Perth with an Australian company. After being unemployed for 10 months, the taxpayer moved to Singapore in July 2014 to work and earn money to support his family in Australia. He became an Australian citizen in November 2014. As schooling in Singapore was expensive and the family had settled in Perth, it was decided that the taxpayer's wife and sons would remain in Australia until at least 2023 when their sons would finish schooling.

During the 2015 tax year, the taxpayer used his Australian passport to enter and leave Australia. He had returned to Australia 25 times to visit his family in Perth. He was present in Australia for 141 days and his longest absence from Australia was 38 days. His employer was the lessee of the apartment in Singapore where he lived until he renewed it as lessee in 2018. The taxpayer had no substantial assets either in Singapore or Australia. In Australia, he had a superannuation account to which no contributions were made since 2013, a motor vehicle for his family and a private health insurance policy with the family's Perth address. He had bank accounts and some personal possessions in Australia and Singapore.

The AAT held that the taxpayer was an Australian resident for the 2015 income year. The totality of the taxpayer's circumstances and the objective connections with Australia supported a finding that he was a resident of Australia according to the "ordinary concepts test."

Joubert v FC of T **2020 ATC ¶10-545**, **[2020] AATA 2645**, J C Kelly, Senior Member, 3 August 2020.

Taxpayer's direction to employer to pay super fund was income

The AAT has held that once a taxpayer had mistakenly instructed her employer to direct a part of her

salary to a superannuation fund and the employer acted on that instruction, the taxpayer was taken to have derived the income under **s 6-5(4)** of the ITAA 1997.

The taxpayer was an employee of Westpac. In October 2010, she instructed Westpac to contribute to a superannuation fund through its human resources portal, Peoplexpress, where she selected the deduction as "Employee Nominated Contributions (Post-tax) – DB". The taxpayer requested the ATO to amend her 2013 and 2014 returns. She said that she intended to enter into a salary sacrifice arrangement such that the contributions to the superannuation fund were pre-tax but she mistakenly instructed Westpac to make after-tax deductions from her salary.

The Commissioner said that as there was no effective salary sacrifice arrangement, the amounts were subject to income tax as a part of the taxpayer's salary was paid at her direction to the superannuation fund.

The AAT affirmed the Commissioner's decision. It said that Westpac could not be said to have accepted a request to enter into a salary sacrifice arrangement in the face of the taxpayer's explicit contrary instruction through Peoplexpress. The taxpayer had mistakenly instructed Westpac to direct a part of her salary to the superannuation fund and Westpac acted on that instruction. Once that occurred, under **s 6-5(4)** of ITAA 1997, the taxpayer was taken to have derived the income. It said that it had no power to correct the taxpayer's error.

Kander v FC of T [2020] AATA 2635. R Olding, Senior Member, 31 July 2020.

Appeal news — Hamilton

The taxpayer has appealed to the Federal Court against the decision in *Hamilton v FC of T* 2020 ATC ¶10-537. [2020] AATA 1812. In this case, the AAT held that a chartered accountant contracted to work on short-term assignments by the International Monetary Fund (IMF) was not entitled to the income tax exemption available to officeholders in the IMF.





TAX PRESS ROUNDUP

Available via CPA Library

- **Super funds slapped for gouging non-smokers** — Superannuation providers charged members more for life insurance premiums after classifying them as smokers by default. 08.08.20
- **Can my SMSF co-own an apartment with a friend?** — I'd like to buy a half share in a residential property as an investment for my self-managed super fund. 08.08.20
- **DIY fund tips when a relationship ends** — Super fund laws are complicated, especially when divorce is involved, so it's worth seeking advice. 08.08.20
- **We'll need more super, so let's lift the guarantee** — The greatest concern for most Australians who are approaching retirement is that they don't have enough money. 10.08.20
- **Super funds to tip \$100b into private equity** — Australian superannuation funds will more than double their private equity exposure over the next five years. 11.08.20
- **A bigger second super hit for funds** — Australians taking full advantage of the early super offer are withdrawing more on their second bite than the first, new figures show. 11.08.20
- **Vital for SMSF investors to pick between trading and investing** — As bad news continues to dominate the headlines, there is a growing cohort of investors trying to profit from the daily movements of the market as it absorbs the latest economic developments. 12.08.20
- **JobKeeper misses the mark in retail boom** — One of the country's top fund managers has hit out at the JobKeeper wage subsidy scheme. 12.08.20
- **Majors reveal JobKeeper earnings cushion** — The \$12bn Sydney Airport and property giant GPT have emerged as recipients of millions of dollars in JobKeeper payments. 12.08.20

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