GDF PARTNERS
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Client Information Newsletter
Tax & Super

April 2021

Some money is not counted as 'income' by the ATO

It is possible to receive amounts that are not expected by the ATO to be included as income in your tax return. However some of these amounts may be used in other calculations, and may therefore need to be included elsewhere in your tax return.

The ATO classifies the amounts that it doesn't count as assessable into: Exempt income; non-assessable non-exempt income; and other amounts that are not taxable.

Exempt income

Exempt income doesn't have tax levied on it. However certain exempt income may be taken into account for other adjustments or calculations — for example, when calculating the tax losses of earlier income years that you can deduct, and perhaps the "adjusted taxable income" of your dependants.

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About this newsletter

Welcome to GDF Partner's client information newsletter, your monthly tax and super update keeping you on top of the issues, news and changes you need to be aware of. Should you require any further information on any of the topics covered, please contact us via the details below.

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Content in partnership with TAX & SUPER AUSTRALIA

New insolvency reforms to support small business

The Australian Government has made changes to the ATO's insolvency framework to help more small businesses restructure and survive the economic impact of COVID-19.

The insolvency system is facing a number of challenges:

- An increase in the number of businesses in financial distress because of COVID-19.
- A "one-size-fits-all" system, which imposes the same duties and obligations, regardless of the size and complexity of the administration.
- Barriers of high cost and lengthy processes that can prevent distressed small businesses from engaging with the insolvency system early, reducing their opportunity to restructure and survive.

Under the reforms, where restructuring is not possible, businesses will be able to wind up faster, enabling greater returns for creditors and employees. The package of reforms features three key elements, available from 1 January 2021:

- A new formal debt restructuring process for small businesses to provide a faster and less complex mechanism for financially distressed but viable firms to restructure their existing debts, maximising the chance of them surviving and contributing to economic and jobs growth.
- A new, simplified liquidation pathway for small businesses to allow faster and lower-cost liquidation, increasing returns for creditors and employees.
- Complementary measures to ensure the insolvency sector can respond effectively both in the short and long term to increased demand and to the needs of small business.

ELIGIBILITY

The new processes are available to incorporated businesses with liabilities of less than $1 million:

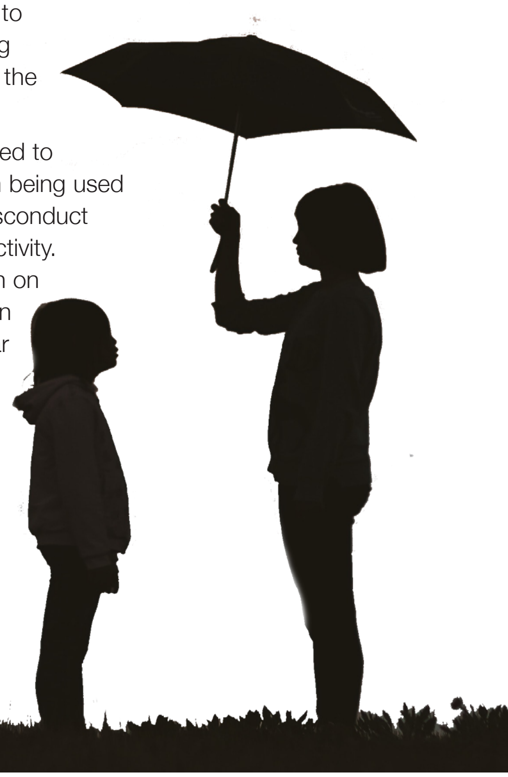
- simplified liquidation – you must have all your lodgments up to date to be eligible
- restructuring – before providing a restructuring plan to creditors you must have
  - paid all employee entitlements that are due and payable (including superannuation)
  - your tax lodgments up to date (or at least been "substantially complying" with this requirement).

The reforms adopt a "debtor in possession" model. That means that the business can keep trading under the control of its owners, who know the business best, while a debt restructuring plan is developed and voted on by creditors.

Business owners will be able to trade in the ordinary course of business when a plan is being developed; prior approval of a small business restructuring practitioner will be required for trading that is outside the ordinary course of business.

The business owners will be required to work with the practitioner to develop and put forward a restructuring plan and to provide information about the business's financial affairs to the practitioner to assist with identifying creditors and to assist creditors in making an informed decision on the restructuring plan.

Safeguards will be included to prevent the process from being used to facilitate corporate misconduct such as illegal phoenix activity. They include a prohibition on related creditors voting on a restructuring plan, a bar on the same company or directors using the process more than once within a prescribed period (proposed at seven years), and the provision of a power for the practitioner to stop the process where misconduct is identified.



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Some money is not counted as 'income' by the ATO cont

Exempt income includes:

- certain government pensions, including the disability support pension paid by Centrelink to a person who is younger than age-pension age
- certain government allowances and payments, including the carer allowance and child care subsidy
- certain overseas pay and allowances for Australian Defence Force and Federal Police personnel
- government education payments, such as allowances for students under 16 years old
- some scholarships, bursaries, grants and awards
- a lump sum payment you received on surrender of an insurance policy where you are the original beneficial owner of the policy – generally these payments are not earned, expected, relied upon or occur regularly (eg: payments for mortgage protection, terminal illness, and permanent injury occurring at work.

Non-assessable, non-exempt income

Non-assessable, non-exempt income is income you don't pay tax on and that also does not count towards other tax adjustments or calculations such as tax losses.

Non-assessable, non-exempt income includes:

- the tax-free component of an employment termination payment (ETP)
- genuine redundancy payments and early retirement scheme payments (shown as "Lump sum D" amounts on your income statement)
- super co-contributions
- a payment made on or after 1 January 2020 by a state or territory for loss of income as a result of you performing volunteer work with a fire service in the 2019-20 income year
- Disaster Recovery Allowance paid directly as a result of bushfires in Australia in the 2019-20 income year
- Ex-gratia disaster income support allowance for special category visa (subclass 444) holders paid directly as a result of the bushfires in Australia in the 2019-20 income year
- payments by a state or territory relating to the 2019-20 bushfires under the disaster recovery measures that were introduced.

Other amounts that are not taxable

Generally, you don't have to declare:

- rewards or gifts received on special occasions, such as cash birthday presents and gifts from relatives given out of love (however, gifts may be taxable if you receive them as part of a business-like activity or in relation to your income-earning activities as an employee or contractor)
- prizes you won in ordinary lotteries, such as lotto draws and raffles
- prizes you won in game shows, unless you regularly receive appearance fees or game-show winnings
- child support and spouse maintenance payments you receive. ■

New insolvency reforms to support small business cont

SIMPLIFIED LIQUIDATION

Regulation around liquidation in Australia, including mandated investigative functions, is suited to large, complex company failure, where intentional misconduct may have been involved. However most liquidations in Australia relate to small businesses, who overwhelmingly fail "honestly". In these cases, the costs of the liquidation can consume all or almost all of the remaining value of a company, leaving little for creditors.

Under the new process, also accessible to incorporated businesses with liabilities of less than $1 million, regulatory obligations have been simplified, so that they are commensurate to the asset base, complexity and risk profile of eligible small businesses. This will free up value for creditors and employees, and allow assets to be quickly reallocated elsewhere in the economy, supporting productivity and growth.

The simplified liquidation process will retain the general framework of the existing liquidation process, with modifications to reduce time and cost. As currently occurs, the small business can appoint a liquidator who will take control of the company and realise the company's remaining assets for distribution to creditors. The liquidator will also still investigate and report to creditors about the company's affairs and inquire into the failure of the company. ■

When it comes to real estate and CGT, look at timing

When you sell or otherwise dispose of real estate, the time of the event (when you make a capital gain or loss) is usually when one of the following occurs:

- You enter into the contract (the date on the contract), not when you settle. The fact that a contract is subject to a condition, such as finance approval, generally doesn't affect this date.
- The change of ownership occurs if there is no contract – such as when a property passes to a beneficiary.
- The real estate is compulsorily acquired – the time of the event is earliest of
    - when you receive compensation from the acquiring entity
    - when the entity became the property's owner
    - when the entity enters the property under a power of compulsory acquisition or takes possession under that power.

Although you report your capital gain or loss in the tax return for the income year in which the contract is entered into, you're not required to do this until settlement occurs. If settlement occurs after you've lodged your tax return and been assessed for the relevant income year, you will most likely need to request an amendment.

You may be liable for shortfall interest charge (SIC) because of an amended assessment for a capital gain. The ATO generally remits the SIC in full if the request for amendment is lodged within a reasonable time after the settlement (generally considered to be one month in most cases).

However, remission is not automatic – you must request it in writing, which we can help you with. The ATO says it considers each request on a case-by-case basis, so informed wording of that request can make a difference. If you consider that the shortfall interest charge should be remitted, it is generally best to provide your reasons when requesting an amendment to your assessment.

Two "main residences" is possible

It is generally accepted that an exemption to capital gains tax applies to the family home, or "main residence", and the exemption usually applies for only one home at any given time. But there is a rule that allows for a taxpayer to have two main residences and still maintain that CGT-free status for both premises for a temporary period.

Known as the "six month rule", this states that two properties can be claimed as a main residence at the same time where a taxpayer acquires a dwelling that becomes their new main residence before they dispose of the original. This is a sensible allowance for an overlap of periods in which a taxpayer can claim exemption from CGT for two properties — one newly acquired and one that is to be sold. Selling the old house may take longer than six months, but the CGT exemption only holds for that long, and the ATO cannot extend this concession.

It is available for the earlier of; six months after taking ownership of the new house, or when you transfer ownership of the old house. However there are two prerequisites to qualify — the old house must have been your main residence for at least a continuous three months in the 12 months before transfer; and if it was not your main residence for any of that time it can't have been used to produce income. ■

Managing your superannuation transfer balance account

Most people think of retirement as a time to put your feet up and relax, but it can also be a time when pre-retirees and retirees alike actually need to flex the grey matter.

With all the rules and regulations swirling around the superannuation sector these days, it's not unusual for those nearing retirement to feel compelled to dust off the calculator and bone up on certain superannuation concepts. The transfer balance account and the transfer balance cap are topics that can challenge many retirees.

Transfers into and out of retirement phase are referred to as credit or debit events. Your transfer balance account is calculated by keeping track of these events and is used to determine if you have exceeded your personal transfer balance cap (TBC, more on this below).

All of your retirement phase income streams are taken into consideration, including capped defined benefit income streams and market linked pensions.

The value of your superannuation interests is calculated by your superannuation fund and reported to the ATO (and if you believe the value reported is incorrect, it is best to contact your super fund or the ATO directly).

CREDITS TO YOUR ACCOUNT

Generally, a credit arises in your transfer balance account when you become the recipient of a super-annuation income stream that is in retirement phase.

The following events will cause a credit to your transfer balance account:

- superannuation income streams that were in existence just before 1 July 2017 and you continue to receive them after that date – including both reversionary and non-reversionary death benefit income streams
- new superannuation income streams that commenced after 1 July 2017 – including both reversionary and non-reversionary death benefit income streams
- when a transition to retirement income stream starts to be in retirement phase
- repayments from limited recourse borrowing arrangements
- excess transfer balance earnings.

These credits increase your transfer balance account and reduce your available personal TBC space.

SUPERANNUATION INCOME STREAMS

An income stream is a series of periodic benefit payments to a member. This includes both reversionary and non-reversionary death benefit income streams and can be either:

- account-based income streams (the amount supporting the income stream is allocated to a member's account), or
- non-account based income streams, including capped defined benefit income streams (these are income streams that don't have an identifiable account balance in the member's name — the member receives regular payments, usually guaranteed for life).

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Managing your transfer balance account cont.

ACCOUNT-BASED INCOME STREAM

If you were receiving an account-based superannuation income stream just before 1 July 2017, and you continued to receive it after that date, your fund will have reported the value of all the superannuation interests that support the income stream in retirement phase that you were receiving at that time.

If you started an income stream after 1 July 2017, your fund will report the commencement value of that superannuation income stream. This includes death benefit incomes streams and market linked pensions.

Transition-to-retirement income streams (TRIS) that are in retirement phase are also included in the transfer balance account. Your TRIS will start to count towards your transfer balance cap on the day it becomes a retirement phase income stream based on its value on that day.

CAPPED DEFINED BENEFIT INCOME STREAMS

Capped defined benefit income streams are treated differently because you usually can't commute these income streams, except in limited circumstances.

Capped defined benefit income streams are:

- lifetime pensions, regardless of when they commence
- lifetime annuities that existed just before 1 July 2017
- life expectancy pensions and annuities that existed just before 1 July 2017
- market-linked pensions and annuities that existed just before 1 July 2017.

The modified value of a capped defined benefit income stream is referred to as the "special value", and this value will be calculated by your superannuation provider.

A capped defined benefit income stream will not give rise to an excess transfer balance by itself. However, you may have an excess transfer balance when you have a combination of both an account-based income stream and a capped defined benefit income stream. If the combined value of the account-based income stream and the special value of the capped defined benefit income stream is in excess of the general TBC, then you will be required to commute the excess transfer balance from the account-based income stream.

TRANSFER BALANCE CAP

The transfer balance cap (TBC) is a limit on how much superannuation can be transferred from your accumulation superannuation account to a tax-free retirement phase account. At present, the general TBC is currently $1.6 million and all individuals have a personal TBC of $1.6 million.

However the general TBC is to be indexed from 1 July 2021, and will rise to $1.7 million. From then on there will be no single cap that applies to all individuals. Every individual will have their own personal TBC, somewhere between $1.6 million and $1.7 million, depending on their circumstances.

If you exceed your personal TBC, you may have to:

- commute (that is, convert a portion of your retirement phase income stream into a lump sum) the excess from one or more retirement phase income streams
- pay tax on the notional earnings related to that excess.

If the amount in your retirement phase account grows over time (through investment earnings) to more than your personal TBC, you won't exceed your cap. However if the amount in your retirement phase account goes down over time, you can't "top it up" if you have already used all of your personal cap space. ■

Refinancing loan interest may be deductible to a partnership

A general law partnership is formed when two or more people (and up to, but no more than, 20 people) go into business together. Partnerships are generally set up so that all partners are equally responsible for the management of the business, but each also has liability for the debts that business may incur.

Tax law also provides for the notion of a “tax law partnership” – which occurs when individuals are in receipt of income jointly – such as an investment property.

See the panel on the following page for some facts about partnerships as a business structure.

TYPICAL FINANCING SCENARIO FOR GENERAL LAW PARTNERSHIPS

A typical scenario when launching a business based on a general law partnership structure sees each partner advance some capital to start up the enterprise. As the income years come and go, each partner takes a share of the profit and counts this as part of their personal assessable income for tax purposes.

However as the business becomes established, or better yet proves to be viable and becomes a successful operation, there is likely to come a time when its working capital — which had been financed from each partners’ pocket — can be refinanced through the partnership business borrowing funds.

SO WOULD THE INTEREST COSTS BE DEDUCTIBLE TO THE PARTNERSHIP?

The refinancing principle

For such partnerships, there is a “refinancing principle” under tax law that provides some general principles governing the deductibility of loan interest in such circumstances.

As a general rule, interest expenses from a borrowing to fund repayment of money originally advanced by a partner, and used as partnership capital, will be tax deductible. This is covered in a tax ruling (you can ask this office for a copy).

The ruling states that to qualify for a tax deduction, the interest expense “must have sufficient connection” to the assessable income producing activities of the business, and must not be “of a capital, private or domestic nature”.

However interest on borrowings will not continue to be deductible if the borrowed funds cease to be employed in the borrower’s business or income producing activity. Nor will deductibility be maintained should borrowed funds be used to “preserve assessable income producing assets”. There is also a limitation on deductibility of loan interest in that borrowings to repay partnership capital can never exceed the amount contributed by the partners.

The ability to make these interest expense deductions under the “refinancing principle” is generally limited to general law partnerships — and not tax law partnerships. This principle would also not apply to companies or individuals. (There are prescribed conditions where, for example, a company may make such a claim, but under very specific circumstances.)

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Refinancing loan interest may be deductible to a partnership cont

Partnership facts and foibles

Set-up costs

Partnerships can be less expensive to set up as a business structure than starting business as a sole trader, as there will likely be greater financial resources than if you operated on your own. On the flip side however, you and your partners are responsible for any debts the partnership owes, even if you personally did not directly cause the debt.

Joint and several liability

Each partner's private assets may still be fair game to settle serious partnership debt. This is known as "joint and several liability" – the partners are jointly liable for each other's debts entered into in the name of the business, but if any partners default on their share, then each individual partner may be severally held liable for the whole debt as well.

Other tax factors

Other general factors to note about partnerships include:

- the business itself doesn't pay income tax. Instead, you and your partners will each need to pay tax on your own share of the partnership income (after deductions and allowable costs)
- the business still needs to lodge a tax return to show total income earned and deductions claimed by the business. This will show each partner's share of net partnership income, on which each is personally liable for tax
- if the business makes a loss for the year, the partners can offset their share of the partnership loss against their other income
- a partnership does not account for capital gains and losses; if the partnership sells a CGT asset, then each partner calculates their own capital gain or loss on their share of that asset
- the partnership business is not liable to pay PAYG instalments, but each partner may be, depending on the levels of their personal income
- as a partner you will need to take care of your super arrangements, as you are not an employee of the business
- money drawn from the business by the partners are not "wages" for tax purposes. ■