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Employees vs contractors: more clarity coming

For many businesses, the line between employees and contractors is becoming increasingly blurred, partly due to the rise of the gig economy. However, businesses should be careful, as incorrectly classifying employees as contractors may be illegal and expose the business to various penalties and charges.

Recently, the High Court handed down a significant decision in a case involving the distinction between employees and contractors. In the case, a labourer had signed an Administrative Services Agreement (ASA) with a labour hire company to work as a “self-employed contractor” on various construction sites. The Full Federal Court had initially held that the labourer was an independent contractor after applying a “multifactorial” approach by reference to the terms of the ASA, among other things. The High Court, however, overturned that decision and held that the labourer was an employee of the labour hire company.

The High Court held that the critical question was whether the supposed employee performed work while working in the business of the engaging entity. That is, whether the worker performed their work in the labour hire firm’s business or in an enterprise or business of their own.

As a result of the decision, the ATO has said it will review relevant rulings, including super guarantee rulings on work arranged by intermediaries and who is an employee, as well as income tax rulings in the areas of PAYG withholding and the identification of employer for tax treaties.

Movement at the FBT station: COVID-19 tests, car parking

FBT is generally seen as a relatively slow-moving and quiet area of tax law. But Budget day this year saw some movement at the FBT station, specifically regarding COVID-19 tests provided to staff, and also car parking benefits.

RATs for employees

The 2022–2023 Federal Budget included a measure, now passed into law, to make costs for taking a

COVID-19 test to attend their workplace tax-deductible for individuals from 1 July 2021.

COVID-19 tests, including rapid antigen tests (RATs), provided by employers to employees are considered benefits under the FBT regime.

However, by allowing for an individual tax deduction, the new measure also allows for the operation of the “otherwise deductible” rule to reduce the taxable value of the benefit to zero. The result? By introducing a specific individual income tax deduction, employers would also not have to pay FBT.

Neat solution. Well, apart from the catch: employee-level declarations could be required when the provision of a RAT is a property fringe benefit (that is, legal ownership of the item passes from the employer to the employee).

Where a RAT is provided as an expense reimbursement or residual benefit, an employer-level declaration is available (that is, one declaration signed by the public officer on behalf of each employing entity lodging an FBT return to declare that there is no private use).

In case collecting hundreds or thousands of employee-level paper declarations is not how you’d like to spend your time, we see three options at this stage:

- assess the potential application of the minor benefit rule to your situation;
- explore your policy and processes to determine whether the benefit provided could meet an exemption or documentation exception; and
- use an automated, electronic declaration tool to take some pain out of the process.

“Commercial parking station” definition

As a reminder:

- a car parking fringe benefit can only arise where the employee parks their car for at least four hours during a daylight period in an employer-provided space in the vicinity of the principal workplace;
- there must be a commercial parking station that charges more than a threshold amount (currently \$9.25) for all-day parking within one kilometre of the entrance to the employer’s car park; and
- “all-day parking” means parking continuously for at least six hours between 7 am and 7 pm.

The scope of the term “commercial parking station” is therefore fundamental to determining if an employer has taxable car parking benefits.

Broadly, a commercial parking station is one where car parking spaces are, for payment of a fee, available in the ordinary course of business to members of the public for all-day parking.

The ATO issued a ruling in 2021 that no longer applied the interpretation that car parking facilities with a primary purpose *other* than providing all-day parking (usually charging significantly higher rates) are not commercial parking stations. This was to apply from 1 April 2022.

In effect, this would bring facilities like shopping centre car parks and hospital car parks into the definition of a “commercial parking station”. For employers with only that type of parking within a one-kilometre radius, the consequences were significant, potentially bringing previously non-taxable employer-provided car parking within the scope of FBT.

The Federal Government has announced it will be undertaking consultation with the intent of restoring the previously understood application of FBT to car parking fringe benefits, which is closer to the original policy intent of the car parking FBT provisions. The readjusted definition would then apply from 1 April 2022 instead.

ATO urges vigilance: new TFN and ABN scams

The ATO is urging people and businesses to be vigilant following an increase in reports of fake websites offering to provide tax file numbers (TFN) and Australian business numbers (ABN) for a fee, but failing to provide those services.

The fake TFN and ABN services are often advertised on Facebook, Twitter or Instagram. The scammers use the fraudulent websites they advertise to steal both money and personal information.

TIP: The ATO and Australian Business Register (ABR) *do not* charge fees for providing a TFN or an ABN. It's free, quick and easy to use government services online to apply for a TFN through the ATO, or apply for an ABN through the ABR.

The ATO is also still seeing scammers impersonating the ATO, making threats, demanding the payment of fake tax debts or claiming a TFN has been “suspended” due to fraud.

In 2021, more than 50,000 people reported various ATO impersonation scams, with victims losing a total of more than \$800,000.

Tips to protect yourself from scammers

- *Know your tax affairs* – You will be notified about your tax debt before it is due. Check if you have a legitimate debt by logging into your myGov account or calling your tax agent. Find the contact details for the ATO or your tax agent independently by searching online or using your

own paper records – don't trust details provided by possible scammers.

- *Guard your personal and financial information* – Be careful when clicking on links, downloading files or opening attachments. Only give your personal information to people you trust and don't share it on social media.
- *If you're not sure, don't engage* – If a call, SMS or email leaves you wondering if it's genuine, don't reply. You can phone the ATO's dedicated scam line on 1800 008 540 to check if it is legitimate. You can also verify or report a scam online at www.ato.gov.au/scams and visit ScamWatch at www.scamwatch.gov.au to get information about scams (not just tax scams).
- *Know legitimate ways to make payments* – Scammers may use threatening tactics to trick you into paying fake debts via unusual methods. For example, they might demand pre-paid gift cards or transfers to non-ATO bank accounts. To check that a payment method is legitimate, visit www.ato.gov.au/howtopay.

Federal Budget fuel excise reduction: will all businesses benefit?

The uncertainty around availability of fuel has seen fuel prices soar across Australia. The 2022–2023 Federal Budget proposed an answer for this by way of a temporary (six-month) reduction to fuel excise.

The six-month reduction is now law, and will end at midnight on 28 September 2022.

For petrol and diesel, this means an excise reduction from 44.2 to 22.1 cents per litre, which is already being felt by users at the pump. But who will actually benefit from this Budget promise and what does it mean for businesses claiming fuel tax credits (FTCs)?

Snapshot: who will benefit?

Individuals:

- all fuel uses of individuals – benefit of 22.1 cents per litre.

Businesses:

- businesses operating light vehicles on public roads – benefit of 22.1 cents per litre;
- businesses operating heavy vehicles on public roads – benefit of 4.3 cents per litre;
- businesses operating vehicles on private roads – no benefit; and
- businesses using fuel for non-vehicle use (auxiliary, machinery, plant and equipment) – no benefit.

What should businesses do?

For businesses that currently claim FTCs, it's important to understand the impact of these changes on their FTC entitlement and to adjust their FTC process accordingly.

Important: Clients should not act solely on the basis of the material contained in Client Alert. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. Client Alert is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.

We expect there will be increased complexity for businesses claiming FTCs in the first few weeks of the temporary measure and the weeks following its conclusion. This is because the changes in fuel excise are expected to trickle through from fuel suppliers depending on where businesses are located and how they purchase their fuel. Businesses will be required to determine which rate of fuel excise has been applied to fuel purchases to determine the rate of fuel tax credit available.

ATO's COVID-related support for SMSFs

Because of the financial impacts of COVID-19, trustees of a self managed superannuation fund (SMSF), or a related party of the fund, may provide or accept certain types of relief, which may give rise to contraventions of the super laws. Some trustees may also have been stranded overseas because of travel bans, which can affect their fund's residency status.

In recognition of these issues, the ATO is offering support and relief to SMSF trustees for the 2019–2020, 2020–2021 and 2021–2022 income years.

This generally includes not taking any compliance action against an SMSF and not requiring the SMSF auditor to report related contraventions in the following areas:

- where an SMSF trustee or a related party of the SMSF offered rental relief to a tenant due to COVID-19;

TIP: Temporary changes to a lease agreement for rental relief need to be properly documented, together with the reasons for those changes. A formal variation of the lease may need to be executed.

- where a plan to get the value of SMSF's in-house asset holdings below 5% of the fund's total assets couldn't be executed in time because of COVID-19;
- where a fund offered loan repayment relief because the borrower was experiencing difficulty repaying the loan because of COVID-19;
- where a fund no longer satisfies the residency rules because the trustee/s were stranded overseas for an extended period; and
- where a fund has a limited recourse borrowing arrangement (LRBA) with a related party lender, and the lender offered COVID-19 loan repayment relief to the fund.

Trustees must properly document all of these sorts of relief and provide their approved SMSF auditor with evidence to support it for the purposes of the annual SMSF audit.

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