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YOUR KNOWLEDGE

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Note: The material and contents provided in this publication are informative in nature only. It is not intended to be advice and you should not act specifically on the basis of this information alone. If expert assistance is required, professional advice should be obtained.

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The controversial case of the taxpayer who claimed a loss on their home

A decision by the Administrative Appeals Tribunal has the tax world in a flurry after the Tribunal found in favour of a taxpayer who sold the apartment she lived in for a loss, then claimed the $265,935 loss in her tax return as a deduction.

In this case, the taxpayer successfully argued that the purchase and sale of the apartment was a short-term profit making venture and that the loss generated from this could be claimed as a tax deduction. The tax rules generally allow you to deduct losses that relate to a commercial activity, although you cannot claim the loss if it is private or capital in nature. The taxpayer argued that she acquired the apartment in order to make a short-term profit and that the loss that was made on the sale should be deductible, even though she had lived in the property as her private residence across the ownership period. The Australian Taxation Office (ATO), as you can imagine, had a different point of view.

The facts of the case were:

- July 2015 – The taxpayer lived in a large family home. When her husband passed away, she entered into an ‘off-the-plan’ contract to purchase an apartment intended to be completed by 30 June 2019.
- December 2016 – The taxpayer was notified that completion of the off-the-plan apartment was delayed until 30 June 2020.

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- May 2018 – Taxpayer settles on the sale of her family home on advice from her real estate agent that it was a good time to sell.
- May 2018 – Taxpayer settled on another apartment, as a purchaser, in the same complex that had been completed. She had money from the sale of her family home that she could use, and only intended to keep the property for a short period of time as she needed to use the funds to settle the off-the-plan apartment. Her position was that it was an opportunity to make a profit.
- April 2020 – The taxpayer entered into a contract to sell the apartment at a loss during the first COVID lockdown.
- July 2020 – Settlement on sale of the apartment occurred.
- July 2020 – The purchase of the off-the-plan apartment completed and was settled. A substantial portion of the proceeds of the sale of the other apartment, and some of the proceeds of the sale of the family home, were used to settle the off-the-plan apartment.

The Tax Commissioner's position was that someone approaching the opportunity in a business-like manner as a profit-making venture would not live in the apartment and would have waited to sell if the market was not favourable.

The Tribunal set a low bar for proof of a profit-making intention and found that the fact that the taxpayer lived in the property was secondary to her profit-making intent.

The reason why this case is controversial is not simply because of the loss claimed by one taxpayer. It is because of the broader implications to property owners if the ATO determines that a transaction is commercial in nature and taxes any profit as ordinary income rather than under the Capital Gains Tax (CGT) provisions. For example, if the taxpayer in this case had made a profit instead of a loss, she would have paid tax on the profit at her marginal tax rate. She would not have been able to apply the main residence exemption or the CGT discount.

One of the important things to take from this case is that living in a property doesn't necessarily guarantee that the sale of the property will be taxed under the CGT rules or will qualify for the main residence exemption. For example, property 'flippers' who buy and renovate a house may face a significant personal tax bill on any gain they make with no access to the concessions that exist within the CGT rules.

It will be some time before we know the full implications of this case and the ATO is yet to confirm whether it will appeal the decision. Either way, determining whether a transaction is taxed on revenue or capital account can be a complex process and it is important to seek advice before entering into transactions involving property.

-End-

Merry Christmas

From all of the team, we want to take this opportunity to wish you a safe and happy Christmas.

The year has gone quickly and has no doubt had its challenges. The holidays are an opportunity to take stock and revel in the spirit of the season.

We will look forward to working with you again in 2024 and making it the best possible year for you.

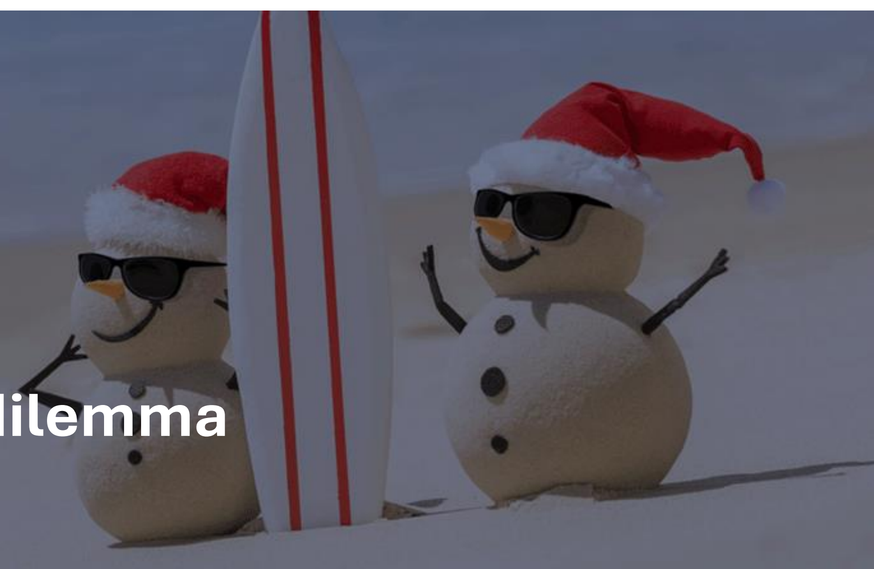
We wish you and your family the warmest of Christmas wishes.

Office closure

Our office will be closed for Christmas from Day, XX December 2023 and will reopen on Day, XX January 2024.

If you urgently need to contact us over this time, please call XXXX.

Bah humbug: The Christmas tax dilemma



Don't want to pay tax on Christmas? Here are our top tips to avoid giving the Australian Tax Office a bonus this festive season.

1. Keep team gifts spontaneous

$300 is the minor benefit threshold for FBT so anything at or above this level will mean that your Christmas generosity will result in a gift to the ATO at a rate of 47%. To qualify as a minor benefit, gifts also have to be ad hoc - no monthly gym memberships or giving one person multiple gift vouchers amounting to $300 or more.

Gifts of cash from the business are treated as salary and wages – PAYG withholding is triggered and the amount is normally subject to the superannuation guarantee.

Aside from the tax issues, think about what will be of value to your team. The most appreciated gift is the one that means something to the individual. Giving a bottle of wine to someone who doesn't drink, chocolates to a health fanatic, or time off to someone with excess leave, isn't going to garner much in the way of goodwill. A sincere personal message will often have a greater impact than a generic gift.

2. The FBT Christmas party crunch

If you really want to avoid tax on your work Christmas party then host it in the office on a workday. This way, Fringe Benefits Tax (FBT) is unlikely to apply regardless of how much you spend per person. Also, taxi travel that starts or finishes at an employee's place of work is exempt from FBT. So, if you have a few team members that need to be loaded into a taxi after overindulging in Christmas cheer, the ride home is exempt from FBT.

If your work Christmas party is out of the office, keep the cost of your celebrations below $300 per person if you want to avoid paying FBT. The downside is that the business cannot claim deductions or GST credits for the expenses if there is no FBT payable in relation to the party.

If the party is held somewhere other than your business premises, then the taxi travel is taken to be a separate benefit from the party itself and any Christmas gifts you have provided. In theory, this means that if the cost of each item per person is below $300 then the gift, party and taxi travel can potentially all be FBT-free. Just remember that the minor benefits exemption requires a number of factors to be considered, including the total value of associated benefits provided across the FBT year.

If entertainment is provided to employees and an FBT exemption applies, you will not be able to claim tax deductions or GST credits for the expenses.

If your business hosts slightly more extravagant parties and goes above the $300 per person minor benefit limit, you will pay FBT but you can also claim a tax deduction and GST credits for the cost of the event. Just bear in mind that deductions are only useful to offset against tax. If your business is paying no or limited amounts of tax, a tax deduction is not going to help offset the cost of the party.

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3. Avoid client lunches and give a gift

The most effective way of sharing the Christmas joy with customers is not necessarily the most tax effective. If, for example, you take your client out or entertain them in any way, it's not tax deductible and you can't claim back the GST. There are specific rules designed to prevent deductions and GST credits from being claimed when the expenses relate to entertainment, regardless of whether there is an expectation of generating goodwill and increased business sales. Restaurants, a show, golf, and corporate race days all fall into the 'entertainment' category.

However, if you send your customer a gift, then the gift is tax deductible as long as there is an expectation that the business will benefit (assuming the gift does not amount to entertainment). Even better, why don't you deliver the gift yourself for your best customers and personally wish them a Merry Christmas. It will have a much bigger impact even if they are not available and the receptionist tells them you delivered the gift.

From a marketing perspective, if your budget is tight, it's better to focus on the customers you believe deliver the most value to your business rather than spending a small amount on every customer regardless of value. If you are going to invest in Christmas gifts, then make it something people remember and appropriate to your business.

You could also make a donation on behalf of your customers (where your business takes the tax deduction) or for your customers (where they receive the tax deduction).

4. Charities love cash

Charities love cash. They don't have to spend any of their precious resources to receive it – unlike a lot of charity dinners, auctions, and promotional campaigns. And, from a tax perspective, it's the safest way to ensure that you or your business can claim a deduction for the full amount of the donation.

There are a few rules to giving to charities that make the difference between whether you will or won't receive a tax deduction.

The charity must be a deductible gift recipient (DGR). You can find the list of DGRs on the Australian Business Register (use the advanced search).

If you buy any form of merchandise for the 'donation' – biscuits, teddies, balls or you buy something at an auction – then it's generally not deductible. Your donation needs to be a gift, not an exchange for something material. Buying a goat or funding a child's education in the third world is generally ok because you are generally donating an amount equivalent to the cause rather than directly funding that thing.

The tax deduction for charitable giving over $2 goes to the person or entity who made the gift and whose name is on the receipt.

5. Christmas bonuses

If you are planning to provide your team with a cash bonus rather than a gift voucher or other item of property, then remember that this will be taxed in much the same way as salary and wages. A PAYG withholding obligation will be triggered and the ATO's view is that the bonus will also be treated as ordinary time earnings (unless it relates specifically to overtime work) which means that it will be subject to the superannuation guarantee provisions.

Quote of the month

"There are those who give with joy, and that joy is their reward."

Kahlil Gibran, author

The Christmas tax quick guide

Here's our quick guide to the tax impact of Christmas celebrations. The information is for GST registered businesses that are not using the 50-50 split method for meal entertainment.

	Exempt from FBT?	Tax deductible	GST credits
Christmas party on employer premises on a weekday			
Employees	Yes	No	No
Associates of employee (spouses etc.)	If <$300 per head	If $300 or more per head	If $300 or more per head
Customers	N/A	No	No
Christmas party (employer premises on a weekend or external venue)			
Employees	If <$300 per head	If $300 or more per head	If $300 or more per head
Associates (spouses etc.)	If <$300 per head	If $300 or more per head	If $300 or more per head
Customers	N/A	No	No
Christmas gifts (assuming the gift doesn't involve entertainment)			
Employees	If <$300 per head	Yes	Yes
Associates (spouses etc.)	If <$300 per head	Yes	Yes
Customers	N/A	Yes	Yes
Christmas lunch with customer at external venue			
Employees	If <$300 per head	If $300 or more per head	If $300 or more per head
Associates (spouses etc.)	If <$300 per head	If $300 or more per head	If $300 or more per head
Customers	N/A	No	No

Tax on super balances above $3m hits Parliament

Legislation enabling an extra 15% tax on earnings on super balances above $3m is before Parliament.

While not a concern for the average worker, if enacted, those with significant property or other illiquid assets in their superannuation fund are most at risk, for example farmers and business operators who own their business property in their self managed superannuation fund (SMSF).

The issue is how the tax is calculated. The tax captures the growth in the balance of a member's superannuation over the financial year (allowing for contributions and withdrawals). It captures both:

- Realised gains from the sale of assets, and
- Unrealised gains triggered by an increase in the value of superannuation assets. For example, if the value of a property increases.

If the member's total super balance has decreased - the loss can be offset against future years.

The ATO will calculate the tax each year. Members with balances in excess of $3 million will be tested for the first time on 30 June 2026, with the first notice of assessment expected to be issued to those impacted in the 2026-27 financial year.

If you are likely to be impacted by the impending new tax, it is important to speak to your financial adviser. While keeping assets within superannuation will remain the best option for many from a tax and planning perspective, it's important to ensure that you're in the best possible position.

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The key influences of 2024

Uncertainty has reigned over the last few years, but can we expect more consistency as we head into 2024? We explore some of the key issues and influences.

Inflation and labour supply

RBA Governor Michelle Bullock stated, "Inflation is past its peak and heading in the right direction, but it is likely to return to target a bit more slowly than we previously thought." While there have been encouraging signs, uncertainty remains. Domestically, inflation is persistent, growth has slowed but the labour market remains tight. And, the Australian economy remains at risk with uncertainty over the Chinese economy and ongoing international conflicts. At this stage, the RBA have not ruled out further interest rate increases.

The unemployment rate remains at 3.7% and the labour market tight. Wages grew 1.3% for the September 2023 quarter and 4.0% over the year, pushing wages to a 14 year high. High-skilled workers are particularly difficult to source, and we appear to have reached a point now where employers are unwilling to pay inflated salaries to acquire those willing to move.

Income tax cuts and the end of some concessions

From 1 July 2024, the **stage 3 tax cuts** that radically simplify the personal income tax brackets come into effect. The tax cuts collapse the 32.5% and 37% tax brackets into a single 30% rate for those earning between $45,001 and $200,000 – this is assuming the May Federal Budget does not postpone or scrap them!

The superannuation guarantee rate will rise again on 1 July 2024 to 11.5%.

For small and medium businesses with group turnover of less than $50m, a series of concessions are set to end or reduce back to conventional levels:

- The Skills and Training Boost ends on 30 June 2024. The boost provides a bonus deduction equal to 20% of eligible expenditure for external training provided to your workers for costs incurred between 29 March 2022 and 30 June 2024.
- The Small Business Energy Incentive is scheduled to end on 30 June 2024, although legislation to introduce this concession still hasn't passed through Parliament. The incentive is intended to provide an additional 20% deduction on the cost of eligible depreciating assets that support electrification and more efficient use of energy.

The instant asset write-off for businesses with group turnover of less than $10m is due to reduce back to $1,000 from 1 July 2024. The cost threshold is meant to be $20,000 for the 2024 financial year, but legislation relating to this measure hasn't passed through Parliament yet.

Worker rights and rewards

There have been a myriad of changes and enhancements to workplace laws across 2023 and employers can expect greater scrutiny in 2024:

- A 5.75% increase in the minimum wage to $23.23 per hour from 1 July 2023.
- New rules and a 2 year limit to some fixed term employment contracts (no renewing).
- A landmark case that defined how to determine whether a worker is a contractor or employee. The ATO has followed through with new rulings to ensure employers are paying the correct entitlements. It's essential that employers have assessed contractors to ensure that they are classified correctly.
- Greater flexibility for unpaid parental leave.