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ATO warning to SMSFs: "Paying the price for non-compliance"

There are various courses of action available to the ATO when trustees of self-managed super funds ('SMSFs') have not complied with the super laws, including applying administrative penalties.

A number of factors determine the amount of the administrative penalty, including:

- the type of contravention;
- when it occurred; and
- the number of penalty units that apply.

For example, if an SMSF contravenes a provision in relation to borrowings during the 2021/22 financial year, the ATO may apply a penalty of 60 penalty units and, at \$222 per unit for that year, this would result in the SMSF trustee having to pay \$13,320. This could be even more if there are multiple contraventions.

Editor: Note that the Government recently introduced a Bill to increase the value of a penalty unit for Commonwealth offences committed on or after 1 January 2023 from \$222 to \$275.

The ATO imposed total administrative penalties of around \$3.4 million on SMSF trustees last year for contraventions such as trustees illegally accessing super benefits, loans, or financial assistance given to members.

Also, just because a trustee receives an administrative penalty doesn't mean the ATO won't undertake any other compliance action, such as issuing a notice of non-compliance or disqualifying the relevant entity as a trustee.

ATO's record-keeping tips

The ATO has reminded taxpayers that they should understand the record-keeping requirements for their business and keep accurate and complete records as they occur, as this should help them avoid penalties that may apply and reduce the possibility of the ATO denying their expense claims.

The following are some of the ATO's top tips to help businesses get it right and avoid record-keeping errors (based on common record-keeping errors the ATO sees):

- Keep accurate records of all cash and electronic transactions.
- Reconcile cash and EFTPOS sales regularly (by ensuring payments recorded internally match external records) and enter the amounts into the main business accounting software system.
- Check for mistakes if things don't add up.
- For expenses that are for both business and private use, work out and record the business portion accurately.
- If the taxpayer has used trading stock for private purposes, remember to account for the stock as if the business sold it, and include the value in the business's assessable income.
- Don't use estimates to prepare tax returns and business activity statements ('BASs').
- If claiming credits for GST, set aside the GST in a separate ledger account to make record-keeping and calculations easier.

- Most records must generally be kept for at least 5 years — from when the record was prepared or obtained, or the transaction or related acts were completed, whichever is later. Records relating to the calculation of losses may need to be kept longer, depending on when that loss is deducted (or offset against a capital gain).
- Accurate and detailed records must also be kept when paying contractors to provide certain services on behalf of the business (so the business can easily complete its taxable payments annual report at the end of each year).
- Use the ATO's *Record-keeping evaluation tool* to find out how well the business is currently keeping its records.

If businesses aren't sure how this information applies to their situation, the ATO recommends they ask their registered tax or BAS agent, or contact the ATO for help. The ATO says it will help businesses get back on track if they make an error.

Input tax credits denied due to lodging BASs late

The Administrative Appeal Tribunal ('AAT') has held that a taxpayer could not claim \$91,239 of input tax credits ('ITCs') at least partly because it lodged the relevant BASs more than 4 years too late.

Specifically, the GST Act operates such that, if an extension of time to lodge a BAS has not been granted prior to the expiry of **4 years** after the day on which it was required to be given to the ATO, the entitlement to ITCs **immediately ceases**.

The AAT also noted that there is no discretion to circumvent this part of the GST Act, and the ATO **cannot** provide further time to lodge a BAS retrospectively outside of the relevant 4 year period.

It did not matter that the taxpayer was (for example) involved in a dispute with a franchisor nor that they were impacted by lockdown restrictions.

Therefore, the taxpayer was no longer entitled to claim ITCs in relation to the BASs lodged by the taxpayer 4 years after they were required to have been given (and was also denied other ITCs for BASs that were lodged within the required 4 year period, as a substantial amount of the ITCs claimed remained unsubstantiated by a valid tax invoice).

Chef spending most of a year on cruise ships still a 'resident'

The AAT has also held that a taxpayer, an Australian chef with over 20 years' experience both in Australia and overseas, was an Australian resident for taxation purposes in the 2016 income year.

During that year, he spent only 86 days in Australia, being the period prior to him leaving Australia to commence employment with a cruise ship company, and a period during which he visited his family between deployments.

However, the AAT noted that he had no intention that any new place of residence be indefinite, and he did not become a resident of a new place.

Importantly, his 'domicile' for tax purposes (being Australia) did not change (and the AAT stated that "a ship cannot be a domicile").

Requesting stapled super fund details for new employees

The ATO is reminding employers that, when they have new employees that have not provided them with their choice of super fund, super contributions should be made into:

- ◆ the employee's stapled super fund; or
- ◆ the employer's nominated account (but only if the ATO advises that the employee does not have a stapled super fund).

Editor: A stapled super fund is an employee's existing super account which is linked, or 'stapled', to them and follows them as they change jobs.

In December 2022, the ATO is releasing a solution that enables employer software and payroll products to request stapled super funds. That is, stapled super enabled software will allow the employer to request stapled super details from within their business software, so they will no longer have to request them separately via ATO online services.

Employers should contact their software provider to find out if their software solution will incorporate the stapled super functionality.

The ATO also encourages employers using the 'bulk request process' to begin discussions with their software providers, as the ATO's current bulk request process will be decommissioned from mid-2023.

Please note: Many of the comments in this publication are general in nature. Anyone intending to apply the information to practical circumstances should seek professional advice to independently verify their interpretation and the information's applicability to their particular circumstances.