Kinsella TaxWise Business

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What's been happening in Parliament?

Instant asset write-off – small business

Small businesses that use the simplified depreciation rules can immediately write off the full cost of a depreciating asset used in the business, provided the cost is below the relevant threshold. This measure is known as the instant asset write-off (**IAWO**).

The threshold has changed a lot over the years, from $1,000 in 2015 to no threshold at all – that was when temporary full expensing was available in response to the COVID-19 pandemic. Along the way, the threshold has been $6,500, $20,000, $25,000, $30,000 and $150,000.

The IAWO threshold for the 2023–24 income year was $20,000. The Government announced as part of the Federal Budget 2024–25 that the measure to temporarily increase the threshold to $20,000 would be extended by 12 months to the end of the current income year (2024–25). However, when the enabling Bill containing the relevant amendment was eventually passed by Parliament in November 2024, the schedule to the Bill that proposed to temporarily increase the IAWO threshold to $20,000 for 2024–25 was removed due to a failure to reach agreement on the measure in the Senate and avoid holding up the other

measures in the Bill. So, as things currently stand, the legislated threshold for 2024–25 is only $1,000 and the future of the proposed temporary increase to $20,000 for this year is uncertain.

Many small businesses have been acquiring assets valued at more than $1,000 (but less than $20,000) on the (not unreasonable) assumption the threshold will be $20,000 for 2024–25. It will be important for businesses to watch this space and keep an eye out for further updates on where the IAWO threshold lands for 2024–25.

Lock out rule

Another consequence of the uncertainty surrounding the extension of the $20,000 threshold to the 2024–25 income year is that the deferral of the 'lock-out rule' for another year until 30 June 2025 is also in limbo.

The 'lock out rule' prevents a small business that has chosen to opt out of the simplified depreciation rules from re-entering the system for a period of five years.

Build to rent incentives

The build to rent (**BTR**) development tax incentives were finally passed by Parliament and are now law.

The BTR incentives give owners and investors in eligible BTR developments access to:

- an accelerated deduction of 4% for capital works relating to BTR developments; and
- a concessional final withholding tax rate of 15% on eligible fund payments (amounts referrable to rental income and capital gains from the BTR development).

To access these incentives, the owner must first notify their choice for the development to be an active BTR development, by lodging the *Build to rent development – notice of events* (NAT 75663) approved form with the ATO.

Capital works accelerated deduction

The owner of a BTR development can claim a 4% deduction for capital expenditure incurred in constructing the development. This includes buildings, structural improvements and alterations.

There are exceptions that allow eligibility to continue in some circumstances where a dwelling is not tenanted due to the construction of an extension, or an alteration or improvement to a dwelling or building.

To access the accelerated deduction of 4%, construction of the BTR development must have commenced after 7:30 pm AEDT on 9 May 2023.

Concessional withholding rate

A reduced withholding tax rate of 15% (instead of 30%) will apply to eligible fund payments made to certain foreign residents from a managed investment trust (**MIT**).

Payments eligible for the reduced withholding tax rate of 15% include:

- a payment of rental income under a lease of the dwelling within the BTR development (dwelling); and
- a payment that is attributable to a capital gain from a CGT event in relation to the dwelling.

Eligibility criteria

To access the BTR development tax incentives:

- the BTR development must consist of 50 or more residential dwellings made available for rent to the general public;
- the dwellings in the BTR development (and common areas that are part of the BTR development) must continue to be owned by a single entity for at least 15 years;

- dwellings must be tenanted or made available to the public to be tenanted by way of lease for a period of 5 years or more; and
- at least 10% of the dwellings are available as affordable dwellings (see below).

15-year compliance period

There is a 15-year compliance period. If dwellings are added to a BTR development as part of an expansion, the 15-year compliance period starts when those dwellings are added.

If a BTR development fails to meet the eligibility criteria in the 15-year period, the BTR misuse tax may apply.

What is an affordable dwelling?

Rules have been made explaining what is an affordable dwelling for BTR purposes. A dwelling is affordable if:

- the rent payable under the lease for the dwelling is 74.9% or less of the rent otherwise payable for that dwelling in an open market; and
- the dwelling is tenanted, or made available to be tenanted, only to a tenant or prospective tenant that satisfies the relevant income threshold (the threshold depends on the number of tenants and whether or not there are dependent children living in the dwelling).

From the ATO website

ATO focus areas for small business

Risky behaviours that are attracting the ATO's attention are small businesses that:

- knowingly operate outside of the system, like not declaring all income and over-claiming expenses;
- deliberately do not report or register correctly, and do not lodge and pay in full and on time;
- do not know their tax and superannuation obligations, including those of their employees;
- pay employees in cash and do not declare income to avoid their tax and superannuation obligations;
- use business funds and assets to support their personal lifestyle, tax-free;
- have poor record keeping and/or cash flow management.

A small business is a sole trader, company, trust or partnership that carries on a business for all or part of the financial year and has an aggregated annual turnover of less than $10 million.

The ATO says that if it contacts a small business, it will be clear and tell the business what it is concerned about, why it is concerned and what it will be doing about it. This is to help the business get it right the first time and help the ATO be transparent in its dealings with the business.

Your concerns

If you are concerned about your business' tax or superannuation position, you can:

- engage with the ATO for advice;
- correct a mistake by requesting an amendment or making a voluntary disclosure;
- contact your registered tax professional for help and advice.

ATO activities

The ATO says that it wants to help small businesses get it right by providing education and tailored support to address common errors. For example, the ATO will send prompt or reminder messages, provide industry specific education and messaging to keep small businesses on track and undertake early debt intervention where it sees debt increasing or taxpayers going off track.

If the ATO finds a concern, it will contact the small business owner's tax professional (or small business owner if they don't use a tax agent) for more information or clarification.

If the ATO finds a small business is deliberately avoiding the ATO or their obligations, it will take firm action to ensure that the correct amount of tax is paid. This may include:

- reviews or audits;
- penalties (up to 75%) and interest on any unpaid tax, plus debt collection activities; or
- seeking the application of civil or criminal sanctions in more serious cases.

Difference between employees and independent contractors

Do you know the difference between an employee and an independent contractor?

You are responsible for classifying your worker for tax and superannuation purposes and you need to get it right. If you make an incorrect decision, you may face penalties.

To check if your worker is an employee or independent contractor, you need to review the whole working arrangement.

If you are engaging a worker who you believe is an independent contractor (and not an 'employee' for superannuation guarantee (**SG**) purposes), you can choose to pay them

superannuation to ensure you're not liable for the SG charge (**SGC**). You will need to pay any superannuation contributions directly to their chosen superannuation fund and should include this in your contract with the worker.

Serving in your business

The critical differences between an employee and independent contractor are:

- an employee serves in your business and performs their work as a representative of your business;
- an independent contractor provides services to your business and performs work to further their own business.

It is crucial that you accurately characterise the nature of the business that you carry on. You should examine the essential activities of the business that you operate and compare them with the legal rights and obligations contained in the contract you entered into with the worker.

The following workers are always treated as employees:

- apprentices;
- trainees;
- labourers; and
- trades assistants.

An employee must be a natural person. If you have hired a company, trust, or partnership to do the work, that is the contracting relationship for tax and superannuation purposes. The people who do the work may be directors, partners or employees of the contractor, but they are not your employees.

Superannuation obligations still may apply to certain independent contractors

In certain circumstances, you must pay superannuation for independent contractors who are deemed to be employees for superannuation purposes. These circumstances include if the worker:

- works under a contract that is wholly or principally for their labour;
- performs work that is wholly or principally of a domestic nature for more than 30 hours per week;

- is a sportsperson, artist or entertainer paid to perform, present or participate in any music, play, dance, entertainment, sport, display or promotional activity, or similar activity;
- is a person paid to provide services in connection with any performance, presentation or participation in these activities; or
- is a person paid to perform services related to the making of a film, tape, disc, television or radio broadcast.

Labour hire or on-hire arrangements

If you hired your worker through a labour hire firm and pay that firm for the work undertaken by the worker in your business, your business has a contract with the labour hire firm and not the worker. It is the labour hire firm that is responsible for pay as you go (**PAYG**) withholding, superannuation and fringe benefits tax obligations for the worker. Labour hire firms may be called different names, including on-hire firms, recruitment services or group training organisations. They will refer to your business as the 'host employer'.

Employee and independent contractor indicators

The table below outlines various indicators that may point towards or against a finding of employment. No single indicator is determinative and they should not be applied as if they are a checklist. Analysis of the indicators must be done by reference only to the legal rights and obligations that arise from the contract you enter into with the worker. Conduct and work practices are not relevant, unless they are, among other things, sufficient to vary the contractual terms agreed to.

Indicator	Employee	Independent contractor
Control	Your business has the legal right to control how, where and when the worker does their work.	The worker can choose how, where and when their work is done, subject to reasonable direction by you.
Mode of remuneration	The worker is paid either: ▪ for the time worked ▪ a price per item or activity ▪ a commission.	The worker is generally contracted to achieve a specific result, and is paid when they have completed that result, often for a fixed fee.

Ability to subcontract or delegate	There is no clause in the contract allowing the worker to delegate or subcontract their work to others. The worker must perform the work themselves and cannot pay someone else to do the work for them.	There is a clause in the contract allowing the worker the right to delegate or subcontract their work to others. The clause must not be a sham and must be legally capable of exercise.
Provision of tools and equipment	Your business provides all or most of the equipment, tools and other assets required to complete the work; or the worker provides all or most of the tools, but your business provides them with an allowance or reimburses them for expenses incurred.	The worker provides all or most of the equipment, tools and other assets required to complete the work, and you do not give them an allowance or reimbursement for the expenses incurred. The work involves the use of a substantial item that your worker is wholly responsible for.
Risk	The worker bears little or no risk. Your business bears the commercial risk for any costs arising out of injury or defect in their work.	The worker bears the commercial risk for any costs arising out of injury or defect in their work.
Generation of goodwill	Your business benefits from any goodwill arising from the work of the worker.	The worker's business benefits from any goodwill generated from their work, not your business.

Myths about Division 7A

A payment or other benefit provided by a private company to a shareholder or their associate (e.g. the shareholder's spouse, child, parent or sibling) can be treated as a dividend for income tax purposes under Division 7A of Part III of the ITAA 1936 (called a deemed

dividend) even if the participants treat it as some other form of transaction such as a loan, advance, gift or writing off a debt.

Division 7A can also apply when a private company provides a payment or benefit to a shareholder or associate through another entity, or if a trust has allocated income to a private company but has not actually paid it, and the trust has provided a payment or benefit to the company's shareholder or their associate.

Division 7A is intended to prevent profits or assets being provided to shareholders or their associates tax free.

The ATO has debunked various 'myths' about Division 7A.

- *The tax consequences are the same if I operate my business as a sole trader, partnership, trust or private company.*

  Each type of business structure comes with its own set of rules and key tax obligations. If you run your business through a private company, Division 7A may apply to payments and other benefits provided by your company to its shareholders and their associates.

- *If I own a company, I can use the company money any way I like.*

  A company is a separate legal entity. It is separate to you, even if you are a shareholder or a director or both. This means the company's money is not your money, and there will be consequences every time you take money or access other benefits from your private company.

  You can access private company money in the form of salary and wages, director's fees or dividends. All of these amounts will be included in the recipient's assessable income. Private companies may also provide fringe benefits to its employees, including directors.

  Division 7A may apply to private use of assets or money from your private company in a way not described, for example as payments by private companies (including use of assets), loans by private companies and debt forgiveness by private companies.

- *Division 7A applies only to the shareholders of my private company.*

  Division 7A applies to both shareholders and associates of shareholders. The definition of an 'associate' is broad and depends on what type of entity the shareholder is. For example, for individual shareholders, an associate can include their relatives, spouse, children, a company they control (or their associate controls) or a trustee of a trust that they (or their associate) can benefit from.

- *I don't need to keep records when my private company makes payments, loans, or provides other benefits to other entities.*

  You are legally required to keep records of all transactions relating to your tax affairs when you are running a business. You should adopt good record-keeping practices to ensure you identify and account for all payments, loans and other benefits correctly. Failing to do so can result in unintended consequences, including breaching Division 7A.

- *I can record a dividend in a journal entry, after an income year has ended, and use that to effectively offset my minimum yearly repayment obligation for that income year.*

  A journal entry, without other supporting evidence and contemporaneous action, will not be effective to offset a minimum yearly repayment obligation on a complying loan.

The dividend and minimum yearly repayment obligations must exist at the time of the offset and the borrower and the company must have agreed to the offset. The agreement and offset must be made by the end of the income year, usually 30 June.

- *There are no tax consequences if I use my private company's money to fund another business or income earning activity.*

  Division 7A may apply to any loan a private company makes (directly or indirectly) to its shareholders or their associates. Division 7A may apply regardless of what the loan recipient uses the amounts for, including for any taxable purpose.

  Division 7A may apply where a shareholder or their associate use a private company's assets for private purposes.

- *I can avoid Division 7A by making payments or loans to shareholders and their associates through other entities.*

  Division 7A may apply to payments or loans made from a private company through other entities, where the private company's shareholder or their associate is the target entity to whom the payment or loan is ultimately directed. The other entities involved in this type of arrangement are called interposed entities. For Division 7A purposes, an interposed entity can be an individual, company, partnership or trust.

- *Division 7A won't apply to payments or loans my private company makes to trusts.*

  Division 7A may apply to payments or loans made from private companies to trusts. Division 7A may also apply to trust entitlements of private company beneficiaries.

- *The interest rate I use to calculate my minimum yearly repayment on my complying Division 7A loan is the same every year.*

  You need to calculate your minimum yearly repayment for each income year using the benchmark interest rate for that particular income year. The benchmark interest rate generally changes each year. The benchmark rate for 2024–25 is 8.77%.

- *I can avoid Division 7A by temporarily repaying my loan before the private company's lodgment day and using the company's money to make my repayments.*

  A repayment you make on a loan by a private company may not be taken into account if you reborrow similar or larger amounts from the company after making the repayment, or you use money borrowed from the company to make the repayment.

- *If I trigger a Division 7A deemed dividend, the ATO will exercise a discretion in my favour to disregard it.*

  You cannot assume the ATO will exercise a discretion in your favour if you trigger a Division 7A deemed dividend.

  There are various discretions available to the ATO for Division 7A purposes. For a discretion to be exercised in your favour, you must meet certain conditions and your circumstances must support the exercise of the discretion.

- *The ATO will exercise a discretion in my favour because I relied on advice from a tax professional.*

  This will depend on your individual circumstances. The actions of the tax professional must have contributed to the breach, and your reliance on their advice must have been reasonable. Relevant factors would include the disclosures you made to your adviser, the nature of their advice and whether the adviser made an honest mistake or inadvertent omission.

  It will be difficult to demonstrate that you have reasonably relied upon professional advice for Division 7A purposes where no Division 7A advice is obtained or where your adviser has not turned their mind to the application of Division 7A to your circumstances.

Loan guarantee arrangements

The ATO is reviewing arrangements where:

- a private company (the first company) guarantees a loan made by a financial institution to a related private company that has no or minimal distributable surplus; and
- the related company on-lends (or pays) some or all of the amount borrowed from the financial institution to the first company's shareholders (or their associates) on terms that do not comply with the requirements of Division 7A.

These arrangements are being marketed on the basis that they do not give rise to a deemed dividend under Division 7A. This is despite the fact that a deemed dividend may have arisen had the first company directly paid or on-lent the amount to its shareholders (or their associates).

The ATO is currently engaging with taxpayers and advisers involved in such arrangements.

Those who have entered into, or are considering entering into, these arrangements are encouraged to contact the ATO, seek professional advice or make a voluntary disclosure. Penalties may apply to participants and promoters.

Tip!

Division 7A can be a minefield. If you operate a private company, talk to your tax adviser before distributing any amounts to shareholders or their associates.

Funding from overseas

The ATO has published new guidance for private groups that receive funding from an overseas related party or associate for property and construction.

The guidance explains the transfer pricing rules and will help businesses use – and demonstrate – arm's length funding arrangements.

Under the transfer pricing rules, it is important that funding arrangements (for example, a loan) with an overseas related party or associate (for example, a relative) apply the arm's length principle. This ensures funding arrangements are commercially similar to what would be expected between independent parties acting at arm's length.

The rules are intended to prevent businesses from using non-arm's length terms and conditions for funding, in order to claim excessive debt deductions such as interest, or to defer or avoid interest withholding tax.

What the guidance covers

Topics include:

- how to demonstrate the commerciality of your funding arrangements and ensure they are at arm's length;
- the ATO's observations of conventional funding practices in the property and construction industry;
- the ATO's concerns and factors that attract its attention;
- examples of different funding arrangements and behaviours along with the ATO's view on their level of tax risk; and
- your record-keeping and other compliance obligations when receiving funding from an overseas related party or associate.

Factors attracting the ATO's attention

Knowing the factors attracting the ATO's attention can help you get it right and avoid its focus.

These include:

- insufficient equity (capital) or excessive debt;
- subordinated or unsecured loans with excessive interest rates;
- loans with excessive durations; and
- deferral or avoidance of interest withholding tax.

Quick compliance tips

To stay on the right side of the rules, ensuring your funding arrangements are justifiable and well documented is key. This includes:

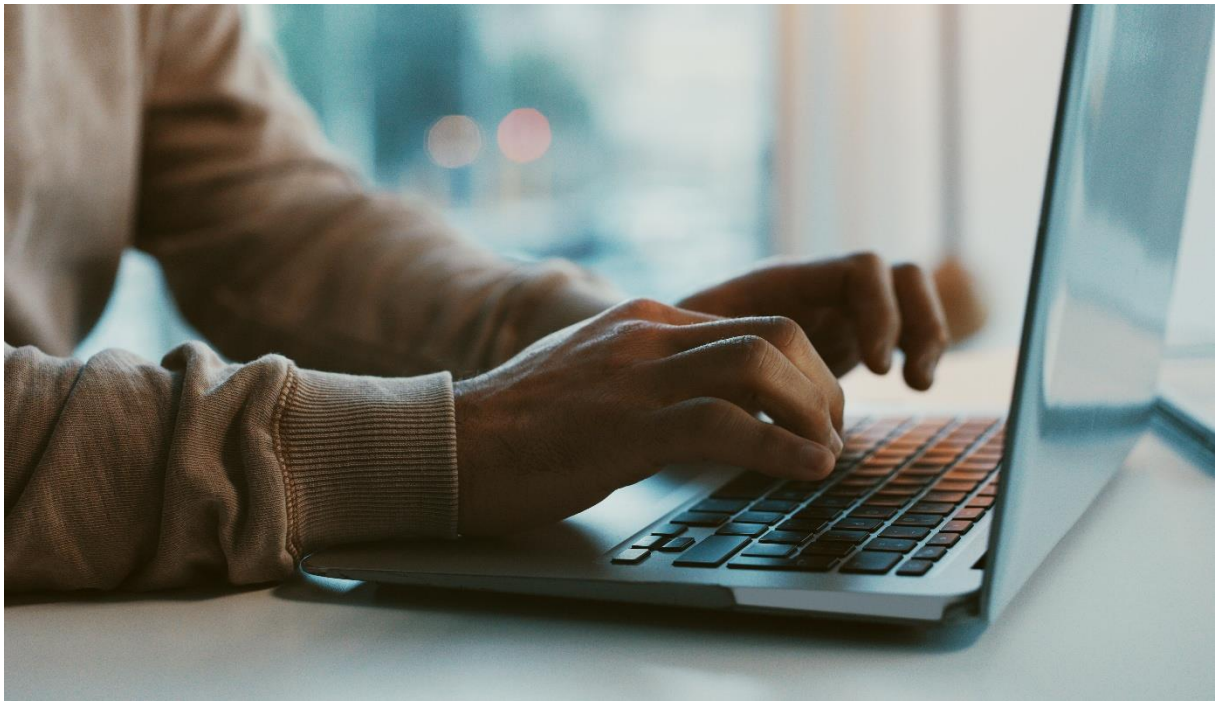
- explaining the funding options available to you and justifications for your choice;
- keeping evidence showing that your arrangement is commercial and at arm's length, such as project details, loan documentation, transfer pricing analysis and workpapers;
- lodging your International Dealings Schedule and accurately disclosing your arrangement;

- understanding and complying with interest withholding tax obligations, including timely remittance and proper reporting; and
- reviewing and monitoring your related party funding arrangements to ensure ongoing compliance.

The new guidance should be read with Practical Compliance Guideline PCG 2017/4, which sets out the ATO's compliance approach to taxation issues associated with cross-border related party financing arrangements and transactions.

Tip!

Talk to your tax adviser if your business receives funding from an overseas related party or associate.



Other Matters

Government committed to eInvoicing

The Australian Government has extended its commitment to increase Peppol eInvoicing adoption. By leading the implementation of eInvoicing, the Government aims to improve cash flow, disrupt payment redirection scams and boost productivity across the economy.

For these and other benefits to be realised, governments across the country need to use eInvoicing and encourage the businesses they interact with to use it too.

The main role for the government is as a buyer of goods and services and supporting businesses by paying eInvoices more quickly.

If you're already able to receive eInvoices, but eInvoicing is not yet fully integrated with your finance or enterprise resource planning (**ERP**) system and automated workflows, consider uplifting your accounts payable capability. Also include eInvoicing in your procurement and contract templates as the preferred way to receive invoices.

Consider your accounts receivable volumes and processes and investigate how you may embed eInvoicing as your default channel when sending invoices to businesses or other government agencies.

The ATO is also working with state and territory governments who are then furthering eInvoicing adoption in their jurisdictions.

Fuel tax credits

The fuel tax credit rates increase on 3 February 2025. The fuel tax credit rate is indexed twice a year in February and August – based on the upward movement of the consumer price index (**CPI**).

As a small business owner, you can claim fuel tax credits for eligible fuel you acquired, manufactured or imported and use in your business.

Fuel tax credits give you a full or partial credit for the fuel tax (excise or customs duty) that's included in the price of fuel used in your:

- machinery;
- plant;
- equipment;
- heavy vehicles; and
- light vehicles travelling off public roads or on private roads.

Key tax dates

Date	Obligation
21 Feb 2025	**January 2025 monthly BAS due**
28 Feb 2025	December 2024 quarterly BAS due
	Pay December 2024 quarterly instalment
	Annual GST return due (if no income tax return due)
	December 2024 SG statement due (if required)
	SMSF 2023–24 annual return due (unless first return or late with return for previous financial year)
21 Mar 2025	February 2025 monthly BAS due
21 Apr 2025	March 2025 monthly BAS due
28 Apr 2025	March 2025 quarterly BAS due Pay March 2025 quarterly instalment Employee SG contributions due
21 May 2025	April 2025 monthly BAS due Lodge 2024–25 FBT return Pay assessed FBT
28 May 2025	March 2025 SG statement due (if required)

Note! *This is the next business day as the due day falls on a Saturday or Sunday.