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Travel to a workplace: what's in, what's out

A recurrent topic of conversation is when taxpayers can claim deductions for travel to a work location, and the eligibility or otherwise of certain claims in regard to that travel.

Contact Us

Welcome to this month's issue of our newsletter. Our aim is to keep you informed about current tax and superannuation related matters. If you would like to discuss anything raised in the newsletter, please contact us. In the meantime ... good things.

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Work-related travel is a hot focus area of the ATO as taxpayers can often get claims wrong for such expenses and costs. Indeed, over the past few years the ATO has been setting its sights on incorrectly claimed work-related travel expenses.

While trips between home and work are generally considered private travel and therefore not deductible, you can claim deductions in some circumstances, as well as for some travel between two workplaces.

If your travel was partly private and partly for work, it is the general rule that you can only claim for the part related to your work.

Travel to a workplace: what's in, what's out ... *cont*

> If you do itinerant work (or have shifting places of work) you can claim the cost for driving between workplaces and your home.

You can claim the cost of travelling:

- directly between two separate workplaces – for example, when you have a second job
- from your normal workplace to an alternative workplace (for example, a client's premises) while still on duty, and back to your normal workplace or directly home
- if your home was a base of employment – that is, you started your work at home and travelled to a workplace to continue your work for the same employer – these rules are tricky so contact us for more information
- if you had shifting places of employment – that is, you regularly worked at more than one site each day before returning home
- from your home to an alternative workplace for work purposes, and then to your normal workplace or directly home
- if you needed to carry bulky tools or equipment that you used for work and couldn't leave them at your workplace – for example, an extension ladder or a piece of your own machinery (note that the ATO is targeting this particular deduction).

But you can't claim the cost of driving your car between work and home just because:

- you do minor work-related tasks – for example, picking up the mail on the way to work or home
- you have to drive between your home and your workplace more than once a day
- you are on call – for example, you are on stand-by duty and your employer contacts you at home to come into work
- there is no public transport near where you work
- you work outside normal business hours – for example, shift work or overtime
- your home was a place where you ran your own business and you travelled directly to a place of work where you worked for somebody else
- you do some work at home.

FLEXIBILITY FOR ITINERANT WORK

A notable flexibility for some work travel claims arises where the nature of the employment is deemed to be itinerant.

If you do itinerant work (or have shifting places of work) you can claim the cost for driving between workplaces and your home. Note that you cannot count your home as a workplace unless you carry out itinerant work.

The ATO says that the following factors may indicate that you do itinerant work:

- travel is a fundamental part of your work due to the very nature of your work, not just because it is convenient to you or your employer
- you have a "web" of work places you travel to throughout the day
- you continually travel from one work site to another
- your home is a base of operations – if you start work at home and cannot complete it until you attend at your work site
- you are often uncertain of the location of your work site
- your employer provides an allowance in recognition of your need to travel continually between different work sites and you use this allowance to pay for your travel.

FLEXIBLE, UP TO A POINT

In case the above factors give some impression of allowing for a very wide degree of flexibility, one recent Administrative Appeals Tribunal (AAT) decision adds to the factors to be considered if making claims for home-to-work travel in the case of itinerant work.

A taxpayer claimed he was entitled to deductions for certain work-related travel expenses for meals and accommodation on the basis that he was employed in itinerant work. On the face of it, he seemed to fit the bill. During the year, the taxpayer undertook a number of employment arrangements and engaged in various roles. Each job was in a different location, each were short-term

(continued...)

and seasonal in nature, and were all within the mining industry.

The taxpayer and his wife owned a house, which he asserted was their usual place of residence. However with the exception of one location, he stayed with his wife in a motorhome that they towed to rented caravan sites near each of the locations where he had work. It was found however that they returned home for short periods between each job.

The AAT considered some of the ATO's factors and concluded that the taxpayer was not an itinerant worker, and could not make his claims. Its reasons included the following:

- travel was not a fundamental part of the taxpayer's work as it did not arise out of the nature of his employment with each employer. That is, the taxpayer was under no obligation with any employer to work at multiple sites
- the taxpayer worked at only one work place at any given time
- employment duties did not commence at the usual place of residence or at the various caravan parks where he parked his motorhome
- when he finished the work at each workplace, he returned home for up to three weeks before commencing at another workplace
- the taxpayer did not have a "web" of workplaces, and the location of each workplace was known to the taxpayer with a large degree of certainty
- the taxpayer was not required to travel between different workplaces as part of his employment; he would travel between the caravan park where he parked his motorhome and the same workplace for the relevant period of each employment. None of his employers required him to travel from where he was staying to different workplaces
- none of the employers paid him an allowance for travel such that it may indicate that travel was a fundamental part of his employment.

The AAT further remarked as follows:

- the taxpayer's duties did not involve him travelling from workplace to workplace as is essential for itinerancy
- he made a lifestyle choice to work in regional towns and live in his motorhome
- he was not required to travel to these different locations in the course of his employment. Rather, he chose to travel from his home to undertake work in these locations
- each work place may be regarded as a regular or fixed place of employment, even if there was some uncertainty about the length of time that he would be employed at each location.

THE KEY MESSAGE

Over the past few years, the ATO has been setting its sights on incorrectly claimed work-related travel expenses (for example, car expenses, flights and accommodation).

This focus is expected to continue, and the ATO has warned that it will pay extra attention to people whose work-related deductions are higher than expected.

As can be seen above, your entitlement to a deduction for work-related travel expenses will be subject to, and will depend on, your individual circumstances.

We can help you work out your eligibility. Also, ask us about the best way for you to keep your relevant receipts digitally. ■

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Controversial super change scrapped: but other proposals need to be watched

At the time of writing, the new Parliament released the first batch of proposed changes to the superannuation regime, and among these was the announcement that the proposed $500,000 lifetime non-concessional cap is to be scrapped.

These proposed changes are still in exposure draft form and may be subject to further tweaking.

The government also revealed that:

- the non-concessional contributions cap is going to be $100,000 per year, starting from July 1, 2017 (instead of the current $180,000 cap)
- taxpayers with a superannuation balance of more than $1.6 million will no longer be eligible to make non-concessional contributions from the same date.

Also, these previously announced measures will not proceed, and have been postponed or abandoned:

- commencement of catch-up contributions using the unused caps from the prior five years for people with balances of $500,000 is postponed and to start from July 1, 2018, and
- harmonisation of acceptance of contribution rules for those aged 65 to 74 will not proceed at all.

The proposed rules that remain intact and will continue:

- the rule allowing fund members to "bring forward" three years' worth of non-concessional contributions for individuals aged under 65, and
- the requirement to meet the "work test" for individuals over the age of 65 in order to make non-concessional contributions.

IMPLICATIONS OF THESE CHANGES

Trustees required to finalise contracts that depended on large non-concessional contributions can be at ease now, as the caps and rules regarding non-concessional contributions will operate as is currently the case. The same applies to trustees who are required to restructure their limited recourse borrowing arrangements (LRBAs) in order to comply with the ATO's benchmark terms.

The work test continues to apply to taxpayers over the age of 65 seeking to make non-concessional, personal concessional, and salary sacrifice contributions.

CHANGES TO ELIGIBILITY FOR DEDUCTIONS FOR PERSONAL CONTRIBUTIONS

At present, the eligibility for a tax deduction for personal super contributions is subject to a maximum earnings condition. Among other proposed amendments is one that will remove the requirement that less than 10% of the sum of an individual's

- assessable income
- reportable fringe benefits total, and
- reportable employer superannuation contributions

...was attributable to employment or similar activities of the individual in the financial year in which a deduction for the personal contribution is sought.

Removing this condition will mean that a taxpayer will be able to claim a deduction for making personal super contributions to a complying fund irrespective of their employment circumstances.

This will enable employees to claim a deduction for personal contributions without resorting to salary sacrifice arrangements. Note however that salary sacrifice agreements will continue to be relevant because they reduce the PAYG withholding amounts from salary and wages hence increasing the take-home pay.

Contractors and self-employed, who are essentially providing labour, will also be able to claim a deduction for personal super contributions. This is a significant improvement over the current state of affairs, where contractors are disadvantaged in terms of choosing how much of their pre-tax pay is going into superannuation.

Certain contributions to defined benefit as well as untaxed superannuation funds will not entitle the contributing taxpayer to a deduction.

Please contact us if you have more questions regarding these proposed changes, and also about further reforms expected in the SMSF arena. ■

General facts about winding up your business

There are times where business owners, voluntarily or involuntarily, may need to wind up their business.

It is generally less complicated to wind up the business of a sole trader (who has declared “bankruptcy”) than to wind up a business run through other structures. For companies, the terms typically used would be to “go into administration” or “liquidation”. More on this below.

A sole trader is less complicated to wind up because the principal of the business is also personally responsible for all debts and liabilities accrued by that business.

DEALING WITH A COMPANY WIND UP

To wind up a business in a company, a trustee may be appointed (either by yourself or by your creditors) to conclude all current contracts, sell remaining stock and other assets, pay outstanding debts and creditors, and notify all concerned (the bank, customers, suppliers).

WHAT HAPPENS UNDER A VOLUNTARY ADMINISTRATION?

Voluntary administration is where a company's directors hand over the business to a professional administrator to decide on the best plan of action.

If your company can't pay its debts and is insolvent, voluntary administration and liquidation are two of the key options. The definition of insolvent is when liabilities total more than the value of assets, and debts cannot be paid. Insolvent trading is where a business continues to incur debts even though the owner or directors are aware, or should be, that the business cannot pay them. A business's principals in these cases can be held personally liable, and even face jail time in the most extreme cases.

Voluntary administration can be a way for businesses in financial distress to get wriggle room from creditors. Going into administration could stave off having to go into liquidation if the business is administered in such a way to maximise its chance of continuing in business (or if that's impossible, then to at least get a better result for creditors and shareholders upon inevitable liquidation).

The first step is a meeting of directors and appointment of an administrator, who will try to salvage the business's financial standing.

Apart from a director voluntary administration (where the directors opt to place the business in an external administrator's hands), a firm going into administration may also be initiated by a secured creditor or the company's shareholders. The company may also be put into receivership, which is where an external receiver takes over the company's assets and sells them to pay off secured debt.

WHAT HAPPENS UNDER A LIQUIDATION?

If going into administration or receivership does not lead to a viable arrangement, then liquidation is the alternative. Liquidation is the formal process for winding up a company's financial affairs to settle debts with the proceeds of the sales of its assets. A search of ASIC’s website will yield some useful information.

General facts about winding up your business ... *cont*

REMEMBER TO CANCEL YOUR ABN

For any business with an ABN, the ATO also says you need to notify it that you have ceased trading within 28 days of doing so, and also to cancel registration for GST, if applicable, within 21 days of cessation of trading.

You can keep and re-activate the ABN if things pick up in the future (even Donald Trump was bankrupt in 1992!). However as long as you keep the ABN active, you will still be expected to lodge activity statements.

A vote of creditors or a court order can put a business into liquidation, or the business can do so voluntarily. The appointed liquidator will prioritise creditors, with secured creditors first (those whose claims against the company are protected by a charge over a specific asset or group of assets – like a bank that issues a mortgage), then unsecured creditors (with contractual rights to receive a set amount of money but not backed by a charge over a specific asset) and lastly shareholders.

Generally, the claims of one priority class must be fully satisfied before those of the next priority level down get to see a cent. There may be pro-rata payments among claimants at the same priority level if not enough funds can be cobbled together.

The liquidator's job is to get the best result for creditors and shareholders, and part of this can be collecting, valuing and selling all assets. If insolvent trading is uncovered, company directors can also be sued by creditors to recoup funds.

But if continuing trading is in everyone's best interests, then the liquidator can also go down that path. Usually however, another outcome of this is to be able to sell the business as a going concern, as well as perhaps to finish and sell work in progress. The aim is to wind up the company, but to do it in a commercially practical way.

BEWARE ANY TAX IMPLICATIONS

Some general tax implications to consider when winding up your business include the following.

Asset sale

As with every other stage of the business life cycle, you will have to factor in the tax consequences of dealing with the business's financial woes.

If assets are sold to pay debts, the proceeds would still be subject to tax as ordinary income or as a capital gain. Just be aware that if the business has to sell its trading stock or other assets at bargain prices (below market value), in certain instances tax law may nevertheless treat the sale as having been made at market value, regardless of how much was actually received.

If you are a sole trader winding up your business or if you own shares in a company being wound up, and you sell the assets of the business or the shares in the company to a "white knight", you will still be subject to tax on the sale.

Where the sale is taxed under the CGT rules (eg real property or goodwill), you could be entitled to various tax exemptions and concessions under the small business CGT concession rules. In this situation's best-case scenario, 100% of a capital gain could be tax-free.

Debt forgiveness

If a creditor or a lender decides to forgive part or all of a debt or a loan (that is, releases the business from the obligation of paying the amount back), the amount may fall under the "commercial debt forgiveness" rules.

In essence, the business may have to reduce, among other things, the value of any carry forward tax losses (which could be the case if the business has been in strife for a few years), and perhaps capital losses, by the amount forgiven. However the forgiven amount would generally not be assessable income, and sometimes there would be no tax consequences at all.

On a related note, if you (or your company) cancel contracts in the course of winding up, there may be capital gains or losses as a result – intangibles such as contractual rights come within the CGT regime. Ask us for guidance.

Getting money out of the company

If you are a shareholder of a company being liquidated, any distribution you receive from the liquidator should be tax-free to the extent that it is a return of your original investment amount; anything above that amount is most likely to be taxed as a dividend.

The tax law in relation to voluntary administration and liquidation is very complex, so good advice is always preferable. See this office for guidance. ■

Start-up businesses: which is the right structure for you?

Start up businesses need to make one important decision from the outset – what type of business set-up will best suit your enterprise now? And which structure will be best for the future?

You've got a choice of four basic business structures – sole trader, partnership, company or trust. Of course, there are also more sophisticated structures out there, but most possible structures are essentially hybrids of two or more of these basic four.

? RELEVANT CONSIDERATIONS

Which structure is best will depend on a few considerations. Do you want to stay small and work from home? Will you need to employ staff? How long will you stay in business? Will you have a partner or partners? What is your market? Will you need to chase start-up capital or obtain funding from a bank or other source?

Of course you can always change business structure as your enterprise changes and grows, but it is helpful if you understand the costs involved in making this change and some of the impediments that may arise.

For many businesses, the growth plan may well include changing to a different structure at a key point in the future – for example, if you plan to expand overseas. Ultimately, the business should be in the structure that is most appropriate in each stage of its life cycle.

Luckily, eligible small businesses can now restructure without any tax consequences under some new CGT laws recently introduced by the government.

Difficulties can arise moving to the next level of business. Business owners are often not aware that they are passing different threshold tests for tax obligations, such as GST, PAYG withholding and payroll tax. Growing a business is satisfying, but more so when the tax and regulatory consequences have been taken into account.

Although the choice is yours, it may help to know how each structure will affect the way your income is taxed, your operating costs, how you will be able to protect your assets, and how clients and other businesses will deal with you. Another thing to keep in mind is how easily a structure may make a future restructure.

SOLE TRADERS

To be a sole trader is the simplest business structure, and as the name implies you will be operating the business in your own name, and will control and manage all aspects of your business. For tax purposes, your personal financial affairs and your business's affairs are one and the same – there is no separation.

The sole trader structure is inexpensive to set up and there are few legal formalities, but you will need an ABN (Australian Business Number). You receive the full benefit of any profits, and keep all after-tax gains when you sell-up (see below for more). However you also personally bear the full brunt of any operating losses.

Access to finances is limited to your own resources, and you are legally responsible for everything the business does. You also put private assets at risk, such as your house or car, if the business goes into serious debt and these private assets are targeted in any debt collection efforts.

As a sole trader:

- you use your individual tax file number when lodging your tax return
- the income of the business is treated as your own income
- your business income is taxed at your personal income tax rates along with your income from other sources (which can be as high as 49%)
- depending on your turnover, the ATO may need you to pay PAYG instalments over the year towards the amount of tax that can be expected at the end of the financial year
- you may also have to register for goods and services tax (GST)
- you will also need to take care of superannuation arrangements, but may still be able to claim for personal contributions, and

Start-up businesses: Which is the right structure for you? ... *cont*

- if you decide to take on an employee, you'll need to pay 9.5% of their ordinary time earnings into their super fund as well as PAYG withholding.

Also note that amounts of money you take from your sole trader business are not "wages" for tax purposes, even though you may consider this the case, so you can't claim a deduction for money you "draw" from the business.

PARTNERSHIPS

This arrangement sees you carrying on business with one or more other people, and receiving income jointly. There are more shoulders to bear the burden, but also more people to share profits, losses and responsibilities. A greater chance of legal dispute between the business partners themselves also exists (when compared to a sole trader).

Partnerships are still inexpensive to set up, and there will likely be greater financial resources than if you operated on your own as a sole trader. 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.

This means that where one partner refuses to pay a debt of the business, the other partner is still liable for the whole amount of that debt. 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.

A written partnership agreement may not be legally required in every state and territory, but these agreements are usually inexpensive and will clearly set out the terms of the partnership (which reduces the risk of a future dispute).

As a partnership:

- 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 at all on the disposal of CGT assets (such a real estate); 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 share of relevant income
- as a partner you will need to take care of your super arrangements, as you are not an employee of the business
- personal contributions may still be deductible, and any eligible employees of the business will still need to be covered for the compulsory super guarantee.

Again, money drawn from the business is not "wages" for tax purposes. As with any business, the partnership will need an ABN and will need to register for GST if the business's annual turnover is more than $75,000 (before GST).

COMPANIES

Operating your business as an incorporated company will transform your enterprise into a separate legal entity. This more complex business structure is usually more costly to set up and administer, and will also come under the regulations of the Australian Securities and Investments Commission (ASIC).

A company will have far greater access to capital as shares can be issued to potential shareholders in exchange for funding. Shareholders and directors are not generally liable for the debts of the business beyond the amount of capital they have contributed, therefore asset protection is one advantage of this structure because creditors cannot, in most cases, go after a shareholder's or director's personal assets, only the company's assets.

The company will pay its own tax on its own profits at a company tax rate (see below). But tax reporting requirements are more onerous than those for an sole trader or partnership, and minority shareholders have little say in the running of the business unless they hold a directorship or are in senior management.

For a company:

- it will need its own bank account, and its own tax file number
- it needs to lodge an annual income tax return, as money earned by the business belongs to the company
- the tax return will need to show the company's income, deductions and tax it is liable for
- PAYG instalments will need to be paid, which are credited against the end-of-year income tax
- it will pay tax on its assessable income (profits) at the company tax rate (currently 28.5% for a small

Start-up businesses: Which is the right structure for you? ... *cont*

business, otherwise 30%), and there is no tax-free threshold

- GST will need to be registered for and paid if annual turnover is more than $75,000
- compulsory superannuation payments have to be made where required by law in respect of the company's employees (including yourself, if you are a director paid as an employee of the company) as well as PAYG withholding
- if you receive wages, director's fees or dividends, these need to be shown on your individual income tax return.

If you are a shareholder in the company then you are entitled to receive dividends on which you will pay tax. Just be aware that if the company makes loans or payments to you, or if you take company assets for yourself, the law may treat these transactions as unfranked dividends, and they'll be taxable to you as such, unless they are formally converted into interest-bearing loans.

As outlined above, ordinarily a director is not liable for the debts of a company. However a number of obligations, like superannuation owed to an employee, bypass this rule. This means that where the company doesn't pay these debts, the ATO will make directors of the company personally liable for them.

TRUSTS

The way a trust operates can be described as an obligation or a promise, where a person or a company agrees to hold income-earning assets or property for the benefit of others. A trust formalises this obligation. The one who legally holds the assets is the trustee. Those who benefit from the income are the beneficiaries.

One basic outcome of a trust is to separate legal ownership and control (which the trustee has) from beneficial ownership (which the beneficiaries hold). A natural result from this is increased asset protection, as the beneficiaries' personal finances are not put at risk by the business, since the business assets are legally owned by the trustee and not by the beneficiaries.

Be mindful that this is a legal relationship, meaning that, unlike a company, the creation of a trust does not create an entity that can generally be sued in its own right. The exception to this general rule is taxation — for tax purposes a trust is seen as a separate entity.

The most common variety of trust is a discretionary trust – such trusts give the trustee flexibility as to who distributions of income and capital can be made to.

Setting up a trust can be more expensive, and administrative paperwork potentially more complicated.

But there can be tax advantages, because:

- tax is usually paid by the beneficiaries at their personal tax rates, which may be well below the top marginal rate
- as trustee of a discretionary trust, you can use your discretion each year to decide which beneficiaries receive income, and how much – as long as the outcomes are within the rules contained in the trust deed, which is the document governing how the trust operates
- the trust's beneficiaries, via their individual returns, pay tax on their share of the trust's net income "distributed"
- if all income is distributed, the trust itself would generally not be liable for any tax except in limited circumstances, when the trustee would pay tax on behalf of certain beneficiaries (mainly children under the age of 18 and people with certain disabilities)
- a trust will need its own tax file number and ABN, and GST obligations may apply
- a trust is not liable for PAYG instalments but beneficiaries may be, depending upon the amount and type of income distributed to them
- the same superannuation obligations also apply
- PAYG withholding and other obligations also apply if the trust hires employees for its business.

If the trust holds on to income, you as trustee will be assessed on that income at the highest individual marginal rate. If the trust carries on a business, all income earned and claims for expense deductions must be shown on a trust tax return, which will also show the amount of income distributed to beneficiaries.

COMPARISON: SPEAK TO US FOR ASSISTANCE

No one structure will suit all business types. Each individual business will have different requirements and growth plans. However, a consideration of what structure a business takes at the outset can minimise costs and risks to the business in the future.

The key determinates that will drive these decisions are:

- the need to remain flexible for possible restructuring of the business, and
- balancing the need to streamline the tax affairs of the business with the protection of the business and personal assets of the individuals involved.

This overview of basic structures is however general in nature, and you should consult this office if you are considering a new business venture or changing an existing one. This will ensure that the right structure for your business is put in place. ■