SECTION 59-30 "AMOUNTS YOU MUST REPAY"

1. In 2003, Parliament systematised the emerging class of "non-assessable non-exempt income", or "NANE income". In the process, a new NANE income category was inserted, for amounts you must repay.

Background from EM

2. The EM to *Taxation Laws Amendment Bill (No. 4) 2003* explains that there had been a growing number of provisions stating that amounts, which would have been ordinary income or statutory income, were instead classified as "NANE income". The new framework in 2003 would "put the rules for non-assessable non-exempt income on the same footing as those for other core income tax concepts such as taxable income, assessable income, exempt income, deductions and tax offsets": paragraph 3.24.

3. This note deals only with one of the specific concepts introduced at that time.

What does section 59-30 say?

4. Section 59-30 provides that an amount you receive is "not assessable income and is not exempt income for an income year if:

   (a) you must repay it; and

   (b) you repay it in a later income year; and

   (c) you cannot deduct the repayment for any income year.

5. Section 59-30 goes on to make other provisions to clarify that general proposition. By subsection 59-30(2), it does not matter that you receive the amount as part of a larger amount. It does not matter that the obligation to repay existed when you received the amount, or if it came into existence later.

6. Finally, section 59-30(3) restricts the scope of the section, by excluding an amount you must repay because you received a lump sum as compensation or damages for a wrong

or injury you suffered in your occupation. (This comes up in the only recorded case, below.)

7. Because of timing aspects, item 22 of the table at section 170(10AA) of *Income Tax Assessment Act 1936* was introduced to enable amendment of assessments for the purpose of giving effect to section 59-30. It overcomes time limits.

8. That apart, there is little commentary in the EM explaining why section 59-30 was considered necessary, or its possible scope. This probably does not matter, as it is a well drafted provision, with ample scope (albeit, with little visibility).

A couple of examples in the public rulings

9. The application of section 59-30 is certainly recognised in public rulings dealing with 2 kinds of payments.

10. Thus, TD 2008/9, which deals with amounts mistakenly paid as salary or wages to employees, does mention section 59-30 in one of the examples. The example involves a worker paid a retention bonus to encourage the worker to serve an agreed period. The bonus is paid as a lump sum. It must be paid back *pro rata* if the worker does not serve to the end of the retention period. The worker resigns before the end of that period. The ATO reasons that the full amount of the retention bonus received was ordinary income in the income year in which received. But pursuant to section 59-30 the amount of the retention bonus that the worker must and does repay in a later year is NANE income.

11. That demonstrates the power of this little-regarded provision. Presumably the Commissioner must then amend the prior year's assessment, in the year of receipt, to exclude the amount paid back, as NANE income.

12. See also Ruling TR 2006/3 (government payments to industry to assist entities), which speaks about repayment of an incentive, and the mechanism for amendment to assessments provided under section 170(10AA). Interestingly, if the incentive has to be

repaid with interest or penalty, neither of those components is regarded as NANE income paragraph 123. (This presumably follows from the fact that interest and penalty would not have been paid to the taxpayer in the first place, but are rather a cost of failing to meet the requirements for the incentive.)

13. Those couple of instances in public rulings apart, and a couple of dozen PBRs, I can find only 2 references to section 59-30 in the cases (being *Vargiemezis*, & *Keys*, see below). It appears to have gone largely unnoticed.

14. But it is a fundamental aspect of the structure of income tax, now. Its possible application does require recognition.

Cases

15. The couple of cases show the power, and the limitations of section 59-30.

16. Section 59-30 is referred to, negatively, in *Keys v Commissioner of Taxation* [2019] AATA 238 (Deputy President Boyle), for the proposition that the amount refundable to Workcover, on receipt of a common law judgment for personal injury in Western Australia, was not NANE income by virtue of subsection 59-30(3). That is as it ought to be. And it is an important decision, in the field of work injuries.

17. *Keys* is unsurprising, given the earlier decision of *Vargiemezis*.

18. Again, section 59-30 did not strictly arise in *Vargiemezis* (2008) 73 ATR 984; 2008 ATC ¶10-068; [2008] AATA 1152. The government disability pension mentioned at [14] was not assessable income.

19. Where a disability pensioner later receives compensation from someone for injury, this is first payable to the government to recoup the pension expended by the government. The effect of the tax and social security laws must have been an unwelcome surprise for the taxpayer. The employer's payment, to the government, of the taxpayer's entitlement to compensation (but effectively for the taxpayer's benefit) had transmogrified his non-

taxable disability pension into taxable income. Section 59-30 did not arise because the effective repayment by the taxpayer of his pension was not a repayment of assessable income.

Potential scope of section 59-30 in private businesses

20. This leads to an observation about potential scope, in SME work. The potential scope of section 59-30, in cases where ATO alleges that someone associated with a company has taken more than the person's due entitlements, should be considered.

21. Quite often you see adjustments between a principal of a company, and the company, made up after year end as loan accounts. That can lead to further complication under Division 7A of *Income Tax Assessment Act 1936*.

22. Of course, where there is a proper loan agreement (or timely repayment), the issue of section 59-30 never comes up, since compliance avoids deemed dividends under Division 7A.

23. If the principal has relied upon money drawn from the company, to fund the principal's lifestyle and living needs, that may assist in characterising such amounts as ordinary income under section 6-5 of *Income Tax Assessment Act 1997*.

24. But if the principal is not entitled to those amounts, then making up loan accounts at some point after the end of the financial year was probably the farthest thing from the principal's mind. Regularising affairs (as complying Division 7A loans) obviously works, but sometimes this is not done.

25. The principal also probably thought little of the serious, legal division between an individual's money, and the money of the business entity, and has to hand back money sed to fund the individual's living requirements and lifestyle.

26. As is often the case, the simplest way to test matters is to consider what would occur if a liquidator was appointed to the company.

27. If the principal had been overpaid (beyond say the principal's agreed entitlement to wages or director's fees), then it would be trivial for the liquidator to recover the overpayment.

28. Likewise, in the absence of loan agreements putting the overpayments on an agreed basis for repayment, the liquidator might attempt to recover things that had later been classified as loans informally, where they simply amount to the principal of a business using the business entity's money for the principal's own purposes. The reality of that informal classification might be challenged. And in any case, the "loan" (if real) has to be repaid.

29. Each case will be sensitive to its own particular facts. I am not suggesting that section 59-30 undoes estate planning or tax planning, done carefully. Further, disingenuous behaviour on the part of a careless business owner will probably lead to other complications, where section 59-30 is not a "cure all".

30. Nevertheless, the potential for application of section 59-30 is oft overlooked and deserves further attention. I trust this starts a debate about its potential scope.

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