

EMPLOYEE SUPER ENTITLEMENTS PROTECTED SPECIES – INSOLVENCY

The Tax Office has issued a reminder of the recent changes to the *Corporations Act 2001* giving superannuation the same priority as other debts when companies go into liquidation, administration or receivership from 31 December 2007. Under the changes superannuation entitlements will rank equally with employee entitlements such as unpaid wages and annual leave. Employees such as directors and associates will also be entitled to claim the super guarantee charge debt but this will be capped at \$2,000.

Argyle comment - it is important to remember that the law defines a director to be anyone registered as such and any who acts in the manner of one in respect of a company.

EMPLOYEE RELATED LEGAL EXPENSES DEDUCTIBILITY UPHeld *FCT v DAY* [2007] FCAFC 193

The Full Federal Court has held that a Customs Officer was entitled to a deduction for legal expenses incurred in defending 2 charges against him under the now repealed *Public Service Act 1922* (Cth).

The case was first heard by the Federal Court as an appeal against a decision by the Commissioner on an objection by the taxpayer against an assessment to tax for the year ended 30 June 2002. The taxpayer, a Customs Officer with the Australian Customs Service, incurred legal expenses in defending 3 separated charges made against him alleging improper conduct as an officer and failing to fulfil his duty as an officer.

The Full Court stated the legal expenses incurred either to defend the performance of one's duty or the observance of duties, which equally contribute to the taxpayer's continued employment, are an allowable deduction. What mattered was not the relationship of the alleged misconduct to the production of assessable income, but the "occasion of the expenditure", ie the defence of employment from that which threatens to destroy or diminish its income earning capacity.

Argyle comment - this case follows a long line of cases where the facts and the arguments raised in the original defence of the charges were critical in determining later tax deductibility of the legal expenses.

NSW REAL PROPERTY LEASES ABOLITION OF STAMP DUTY

Stamp duty has been abolished in NSW on lease instruments first executed on or after 1 January 2008. The obligation to pay duty in respect of a lease instrument and a variation of a lease instrument executed before 1 January 2008 still exists.

In relation to lease instruments first executed on or after 1 January 2008, stamping is not required unless the document falls under one of the following categories:

- (a) a lease or agreement for lease in respect of which a premium is paid or agreed to be paid;
- (b) a lease entered into pursuant to an option if an amount is paid/ payable for the grant of the option;
- (c) transfer or assignment of lease; and
- (d) surrender of lease.

Such transactions remain subject to duty. However, duty will not apply to a variation of lease made on or after 1 January 2008 regardless of when the lease was executed.

Argyle comment - all those who have avoided a lease involving their own business real property and their super fund no longer have an excuse, section 109 of SIS requires it and now it is stamp duty free.

OPERATION WICKENBY ACC ANNUAL REPORT 2006-7

The Australian Crime Commission (ACC) has released its 2006-07 annual report which details the ACC's operations and performance, including Operation Wickenby tax fraud investigations, for the financial year ending 30 June 2007.

The ACC reported that, in 2006-07, its Operation Wickenby activities resulted in close to \$1.2m in tax assessments being issued. However, in the same year, there were no proceeds for crime restrained or forfeited in relation to Wickenby matters. Further, no tax recoveries were made in 2006-07.

The ACC reported that Operation Wickenby investigations have been the subject of legal challenges, including challenges focused on:

- (a) the validity of summonses issued to witnesses;
- (b) the validity of the Money Laundering and Tax Fraud (Midas) determination;
- (c) the constitutional validity of the *Australian Crime Commission Act 2002*; and
- (d) the execution of search warrants obtained by the ACC pursuant to the *Crimes Act 1914*.

Since inception, 3 persons have been arrested on charges relating to conspiracy to defraud the Commonwealth. One individual has been charged as a result of his failure to take the oath or make an affirmation. Further, the Victorian County Court in *R v Wheatley [2007] VCC 718* sentenced Glenn Wheatley on 19 July 2007 to imprisonment for 2½ years, with a 15 month non-parole period, in relation to defrauding the Commonwealth and other related charges. Out of the \$17.3m 5 year funding for the project, in the these first two years, \$4.1m has been spent.

Argyle comment - does the end result justify the cost? Certainly not, but as press reports indicate the media objective has been achieved. And Australia is not alone, there are similar 'Wickenby' projects under the Revenue Departments of many countries. Argyle's current experience of four Wickenby and High Net Worth Taskforce matters emphasises a new manner of ATO approach using the same old blunt investigation tools.

TAXATION RULING TR 2008/1 PT IVA - "WASH SALE" ARRANGEMENTS

The ATO has now finalised TR 2007/D7 as TR 2008/1, which considers the circumstances in which Pt IVA may apply to "wash sale" arrangements. "Wash Sale" does not have any precise meaning, however the Ruling says it is concerned with arrangements under which a taxpayer disposes of, or otherwise deals with, a CGT asset where in substance there is no significant change in the taxpayer's economic exposure to, or interest in, the asset, or where that exposure or interest may be reinstated by the taxpayer (a wash sale), in order to apply a resulting capital loss or allowable deduction against a capital gain or assessable income already derived or expected to be derived.

The Ruling states that whether Pt IVA applies to a wash sale will depend on a careful weighing of all the relevant circumstances of the arrangement and the relative weight that should be attached to each of those circumstances.

The Ruling states that if the taxpayer disposes of, or deals with, the asset to an associate and the associate benefits in substance from the asset, or there are demonstrable non-tax advantages or objects, whether of a business or family nature, secured under the scheme, this would tend against the conclusion as to the dominant purpose such that Pt IVA might be expected not to apply.

However, the ATO view is that generally if the asset disposed of or dealt with to an associate is worthless or near worthless, the associate is unlikely to financially benefit from it by virtue of its worthlessness, and this would suggest that the dominant purpose of the scheme was to enable the taxpayer to incur a capital loss or allowable deduction.

For this reason where legitimate rearrangement of ones assets takes place in such a way that might suggest an intended wash sale, where one is in fact not intended, the reasons and circumstances surrounding such a transaction should be properly documented with supporting records and documentation.

Argyle comment - help clients to understand that their year end tax planning needs to start now. And they need to establish good non-tax reasons for any potentially tax-suspect transaction.

TD 2008/1: DIV 7A, UNPAID TRADE CREDIT AND THE APPLICATION OF S 109M

In the TD released the ATO states that, if a private company provides trade credit to a shareholder (or associate) on arm's length terms, a failure to repay the amount within the agreed payment term will not prevent s 109M of the ITAA 1936 from applying.

The provision of trade credit is a loan for Div 7A purposes because it falls within the definition of "loan" in s 109D(3). For s 109M purposes, the TD states that it is not relevant whether a trade debt is paid outside of payment terms such as 30, 60 or 90 day terms so long as it can be accepted that the credit was provided in the ordinary course of the private company's business and is similar to the usual arrangements made by the company with parties at arm's length.

According to the ATO, provided the private company deals with the failure to repay in the same manner in which it deals with defaults on similar loans made to parties at arm's length, section 109M will apply. However, if the amount is fully repaid before the company's lodgment day (or by the end of the income year for the 2003-04 and earlier income years), section 109M does not need to be considered.

**FAILURE TO PROVE PAYMENT OF FEES WERE LOAN
- NATIONAL MORTGAGE COMPANY PTY LTD V FCT**

A mortgage broking company that had entered into an agreement with a bank to "originate and manage" loans on the bank's behalf has failed to discharge the onus of proving that "management fees" paid to it under the agreement were not assessable income.

The taxpayer was a mortgage broking company that entered into an agreement with a bank to "originate and manage mortgages". The taxpayer was to receive a monthly management fee calculated by reference to the loans it made, and it originally returned such fees as assessable income. .

At a later stage the taxpayer sought to exclude the management fees from its assessable income and argue that the "management fees" were in fact advances by way of loans made to the taxpayer by the bank to provide it with funds for the loans that it then made to customers. The taxpayer maintained that it was required to repay the loans, subject to an offsetting mechanism for payment of the management fees due to it.

The Court found that there was no evidence to support the claim that there was "an oral agreement in existence for the advance of funds which were to be repaid primarily by way of reductions in the amounts payable as management fees". The Court also noted that the bank treated the payment as commissions. The Court also found there was no evidence to support the claim that the funds were loans. There was (a) neither any evidence of an express or implied promise to repay the amounts; (b) nor any evidence of the making of any loan repayments; (c) nor any evidence of any outstanding loan balances.

**NSW LAND TAX EXEMPTION FOR PROPERTY ADJOINING PPR
- SACCO V CHIEF COMR OF STATE REVENUE**

The NSW ADT has held that 2 adjacent properties are to be regarded as a "parcel of land" for the purposes of the principal place of residence (PPR) land tax exemption, regardless of the fact that the two properties were separated by a fence with a 2.4 metre gate.

The taxpayer owned 2 properties, one being his home and the other acquired some time later adjoining the property with his home. After purchasing the adjoining property, the taxpayer removed a section of the boundary fence (2.4 metres wide) and installed a gate to enable his family members to access the property.

The adjoining property was assessed to land tax for the 2005 to 2007 years. The taxpayer maintained that while the first property contained fixtures and the second property did not, the second property was intrinsic to his family's recreational needs.

The Tribunal concluded that the 2 properties were undivided both in use and in physical separation. The Tribunal found that the use of the second property was a use in conjunction with the residential purposes of the first property, and at all relevant times, was not used for any other purpose. Accordingly, the Commissioner's assessment was set aside.

TAXI INDUSTRY TARGETED BY CENTRELINK

The Minister for Human Services has recently announced that Centrelink has conducted a series of welfare fraud investigations targeting the taxi industry, picking up 75 taxi drivers who had their Government payments cancelled or suspended, potentially saving more than \$500,000 in welfare fraud.

It was noted that Centrelink fraud investigators work alongside other police and government agencies, such as the Tax Office, Federal Police and the Department of Immigration and Citizenship, in conducting investigations into cash economy activity. It was also noted that particular attention is directed to the taxi, building, harvesting and hospitality industries.

CONCESSIONALLY TAXED FIRST HOME SAVER ACCOUNTS

The recent announcements, the Federal Treasurer has now released a discussion paper outlining the proposed features of the 'Concessionally Taxed First Home Saver Accounts' and how they would operate. An individual will be able to open one of the new accounts if they:

- (a) are aged 18 or over and under 65;
- (b) are an Australian resident for taxation purposes;
- (c) have not previously purchased or built a first home in Australia to live in;
- (d) do not have or have not previously had an account; and
- (e) make an initial contribution of at least \$1,000.

It is proposed that individual contributions of up to \$10,000 (indexed) may be made into an account each year by the account holder or another party, such as an employer, on behalf of the account holder. However, such contributions have to be made from after-tax income.

The Government will make an additional contributions, which will be paid directly into the account, with arrangements reflecting those for superannuation. Features of the first home savers account include:

- (a) the Government contribution will be made on up to \$5,000 of individual contributions each year;
- (b) the contribution level will be either 15%, or the account holder's marginal income tax rate less 15%, whichever is greater;
- (c) individuals with incomes of up to \$80,000 who contribute \$5,000 to their account will receive a Government contribution of \$750; and
- (d) for individuals on incomes above \$80,000, the contribution will vary depending on the marginal income tax rate of the individual.

Contributions will not be subject to tax when contributed to an account. Investment earnings (or interest) will be taxed at a rate of 15%. Withdrawals will be tax-free if used to purchase or build a first home to live in.

To withdraw their benefits, individuals will have to contribute a minimum of \$1,000 in each of at least four years. However, individuals will be able to withdraw their account balance tax free to buy or build a first home to live in. The full amount in the account will need to be withdrawn and the account closed. Alternatively, individuals can close their account and contribute the full amount in the account to superannuation at any time.

Individuals will be able to apply to access their account in cases of severe financial hardship and terminal illness, and on compassionate grounds, through the superannuation early release provisions by transferring the full amount in their account to superannuation and closing the account.

Most superannuation providers, life insurers, banks, building societies, and credit unions will be able to offer the accounts. Self-managed and non-public offer superannuation funds will not be able to offer the accounts.

NEW (DRAFT) NATIONAL EMPLOYMENT STANDARDS

The Australian Government has released an exposure draft of its proposed ten National Employment Standards (NES), covering the key minimum entitlements for all Australian employees, to apply from 1 January 2010. Such entitlements will be guaranteed in legislation so that they cannot be excluded or modified in a way that undermines the safety net.

The proposed 10 national standards, which are to apply from 1 January 2010, are:

NEW (DRAFT) NATIONAL EMPLOYMENT STANDARDS

1. A standard working week of 38 hours, with no employee required to work unreasonable additional hours.
2. Parental leave, including the right for both parents to request up to 12 months unpaid parental leave. This can be taken sequentially, allowing a child to have a parent at home for the first 2 years of life.
3. The right to request flexible working hours for the parents of young children up to school age.
4. Four weeks' paid annual leave.
5. 10 days' personal and carer's leave a year plus 2 days' compassionate leave.
6. Community service leave for jury duty and emergency services work.
7. Protection of public holidays.
8. The right to basic workplace information.
9. Fair notice of termination plus redundancy pay for workers at workplaces with more than 15 employees.
10. Long service leave, with Labor working towards a nationally consistent scheme.

The 10 standards would form one part of the safety net, with the second being a "modern, simple award system" for employees earning \$100,000 or less.

TAX BILL NO 1 FOR 2008

The **Tax Laws Amendment (2008 Measures No 1) Bill 2008** was passed by the House of Reps on 21 February 2008 without amendment and now moves to the Senate. The Bill includes amendments:

- (a) to the ITAA 1997 and ITAA 1936 to remove tax deductibility for contributions and gifts to political parties, members and candidates; and
- (b) the ITAA 1997 and the *Income Tax (Transitional Provisions) Act 1997* so that a superannuation lump sum paid to a person who has a terminal medical condition is tax-free (*regardless of whether the payment is from a tax or untaxed source*). The amendments will apply to payments made on or after 1 July 2007. It should also be noted that appropriate regulations have also been registered to work with the amendment.

ATO RULINGS TO LOOK OUT FOR IN 2008

- (a) Meaning of "Australian superannuation fund" in s 295-95(2) of the ITAA 1997
- (b) CGT consequences of earnout arrangements. (*Is currently Draft TR 2007/D10.*)
- (c) GST and bare trusts. (*Currently Draft GSTR 2007/D3.*)
- (d) Transfer of real property by execution of a deed of partition.
- (e) SMSFs: The application of the sole purpose test in s 62 of the SIS Act to incidental benefits. (*Currently Draft SMSFR 2007/D1.*)
- (f) SMSFs: unpaid trust distributions.
- (g) SMSFs: Business real property in relation to self-managed superannuation funds
- (h) SMSFs: can a trustee of a self-managed super fund accept a direction from a member that nominates the recipient of a benefit in the event of the member's death?

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