

GST REFUNDS

In response to the decision in *KAP Motors Pty Ltd v FCT* [2008], where the court held that the time restriction on paying refunds does not apply if GST is paid on a transaction which is later determined not to be a supply for GST purposes the Treasurer has announced that the Government will seek to amend the tax law to overcome this.

The Treasurer's announcement explains that the new provisions will be aimed at ensuring the benefit of the refund goes to the person who has borne the tax in situations similar to *KAP Motors*.

In addition, the Treasurer also explained that he will seek to limit the scope of the restriction on refunds to taxpayers if GST is overpaid to ensure a consistent 4-year time limit applies to all refunds and tax liabilities for indirect taxes as well.

Argyle Comment:

Taxpayers and advisors will need to ensure that where GST is withheld or may be deemed to have been withheld in circumstances where a supply is not considered a taxable supply, such amounts will need to be claimed within the four year time period. In addition, Taxpayers and advisors will need to ensure that careful consideration goes to who is deemed to have borne GST. Taxpayers need to pay careful attention to the GST provisions in contracts and arrangements where there is uncertainty as to the GST treatment of the object which is the subject of the supply.

FAMILY TRUST AMENDMENTS

The Federal Government has confirmed that it will reduce the scope for family trusts to be used to lower income tax by utilising losses. It will do this by reversing 2 of the family trust changes introduced by the previous Government in Tax Laws Amendment (2007 Measures No 4) Act 2007 as follows:

- the definition of family in the family trust election rules will be changed to limit lineal descendants to children or grandchildren of the test individual or of the test individual's spouse. This will have effect from 1 July 2008;
- amendments will also be made to preclude family trusts making a once-off variation to the test individual specified in a family trust election (other than in relation to a marriage breakdown). This will have effect from the 2007-08 income year.

Argyle Comment:

Practitioners need to take great care when advising in this area to ensure that a family trust election is not made unless necessary. Practitioners should also ensure that where such an election has been made, the trustee has acted in accordance with the trust deed in making that election. Taxpayers should review their affairs to ensure that they are not negatively impacted by the changes.

DIRECTOR PENALTY NOTICES - DECISION IMPACT STATEMENT

The ATO has released a Decision Impact Statement on the decision of the NSW Court of Appeal in *DCT v Meredith* [2007] NSWCA 354. In that case the court upheld a Deputy Commissioner's appeal that the statutory precondition to recovery of unpaid tax from a company director under s 222AOE of the 1936 Act was satisfied by sending the notice by post to the address which appears in the records of ASIC.

The ATO states the Commissioner will calculate the time for compliance with the notice from the date on which the notice was posted, irrespective of whether or when the notice was received or delivered.

DIRECTOR PENALTY NOTICES - DECISION IMPACT STATEMENT continued**Argyle Comment:**

Practitioners need to ensure that their clients understand the implications of the Commissioner sending a Directors penalty notice, and generally the exposure of directors in relation to unpaid PAYG. Advisors should ensure that their clients understood the seriousness of ensuring that their ASIC records are up to date, regardless of whether a company is deregistered or no longer trading.

**SHORTFALL PENALTIES - TAKING A POSITION THAT IS NOT REASONABLY ARGUABLE
DRAFT TAXATION RULING MT 2008/02**

This Draft sets out the Commissioner's views on penalties for taking a position that is not reasonably arguable.

The Draft states that the reasonably arguable position standard is an objective standard involving an analysis of the law and application of the law to the relevant facts and that the question as to the position taken by an entity is determined by reference to the law as it stood at the time the statement was made an entity.

Whilst entities are required to take note of the Commissioner's views on the operation of tax laws as expressed in public rulings, if they adopt alternative interpretations they must demonstrate sound reasons for doing so. The ruling states that the authorities used to support or reach the views expressed by an adviser may support the position taken by a taxpayer.

The draft provides that whilst an entity is not required to document a reasonably arguable position, if an entity provides its cogent reasons in writing for taking a particular position, it will assist the ATO to objectively and expeditiously determine whether a reasonably arguable position was taken.

Argyle Comment:

Advisors should note the importance of properly documenting taxation advice provided to clients with supporting authorities and sound reasoning where a reasonably arguable position is adopted by a client contrary to the Commissioners views on a particular matter.

**VOLUNTARY DISCLOSURE AND SHORTFALL PENALTIES
DRAFT TAXATION RULING MT 2008/03**

This Draft Ruling outlines the Commissioner's views on reductions in shortfall penalties for voluntary disclosures. The draft outlines that Penalties can be reduced to nil or by 80% where disclosure is made before notification of an audit or by 20% where disclosure is made after the commencement of an audit.

The Draft states that an entity will be treated as having been told that a tax audit is to be conducted when the Commissioner first makes contact with the entity or its representative about the tax audit such that the requisite notification of the tax audit may be made in writing or orally.

A disclosure will not be regarded as voluntary where the facts indicate that the Commissioner was about to uncover the shortfall amount or scheme shortfall amount. However, taxpayers do not need to admit liability in respect of shortfall amounts disclosed to the Commissioner.

Taxpayers will be eligible for reduced penalty rates whether or not they maintain an opinion contrary to the Commissioner's views or dispute the adjustment made by the Commissioner to the entity's tax-related liability.

Argyle Comment:

It is important to take the opportunity to review your clients' affairs at the point of first contact by the ATO. What is also important is that your clients appreciate the meaning of commencement of an audit. Advisors should note how MT 2008/D2 fits in with this ruling as regards disclosure whilst maintaining an opinion.

ATO TO DATA-MATCH "LUXURY VEHICLE SALES"

The ATO says it will be data matching details of individuals and entities that purchased or acquired a motor vehicle valued at \$57,009 or more between 1 July 2005 and 30 June 2007. The ATO outlined that the information is to be provided from each of the state motor registry authorities. It is estimating that records relating to approximately 600,000 individuals will be matched.

SHAREHOLDER AND UNITHOLDER RIGHTS: MCNEIL AMENDMENTS

Following the decision of the High Court in *FCT v McNeil* (2007) which held that the market value of 'sell-back rights' issued to a taxpayer under a share-buyback arrangement involving St George Bank Ltd where assessable as ordinary income in the taxpayer's hands, the government has now moved to amend the 1997 Act. The TLA (2008 Measures No 3) Bill 2008 introduced will amend 1997 Act to include a new section 59-40 of the 1997 Act aimed at ensuring:

- no amount is included in the assessable income of a shareholder in a company or a unitholder in a unit trust as a result of acquiring certain rights issued by the company to acquire further shares or by the trustee of the unit trust to acquire further units; and
- an amount that is included in the assessable income of a shareholder as a result of acquiring rights issued by the company to dispose of shares, is appropriately reflected in the cost base of the rights.

The amendments seek to restore the long-standing taxation treatment of call options issued by companies that existed prior to the decision of the High Court. These amendments will apply to rights issued on or after 1 July 2001.

SAME-SEX RELATIONSHIPS BILL INTRODUCED

The Same-Sex Relationships (Equal Treatment in Commonwealth Laws - Superannuation) Bill 2008 was introduced in the House of Reps on 28 May 2008. The Bill is aimed at removing discrimination against same-sex couples and the children of same-sex relationships in various pieces of Commonwealth legislation.

Some of the areas the Bill will cover include:

- Reversionary superannuation benefits on the death of a scheme member and related taxation treatment of superannuation benefits.
- Commonwealth civilian and military (defined benefit) superannuation schemes.
- The parliamentary, judicial and statutory legal officer pension schemes

The Bill will also amend the following Acts to provide equal treatment to same-sex couples and their children:

- Retirement Savings Accounts Act 1997;
- Small Superannuation Accounts Act 1995;
- Superannuation (Government Co-contribution for Low Income Earners) Act 2003;
- Superannuation Industry (Supervision) Act 1993;
- Income Tax (Transitional Provisions) Act 1997.

Argyle Comment:

Advisors need to ensure that clients who may be affected by the changes are made aware of how they might benefit. Advisors also need to ensure that estate planning documents, trust deeds and superfund deeds allow clients to benefit. Finally, advisors should also note that the changes could also cause a number of unintended tax consequences.

LOSS RECOUPMENT RULES FOR COMPANIES - ATO ADMINISTRATIVE TREATMENT

The ATO has announced details of the administrative treatment it intends to apply concerning the 2007 (Costello) Budget announcement that the Government will make changes to the loss recoupment rules for companies. The measures to remove the \$100m income cap on the SBT are contained in the *TLA (2007 Measures No 5) Act 2007* which received Royal assent on 25 September 2007. The ATO has indicated it will not undertake specific compliance activity to enforce the existing law between the announcement date and the enactment of the proposed law.

LOSS RECOUPMENT RULES FOR COMPANIES - ATO ADMINISTRATIVE TREATMENT continued

The amendments:

- remove the \$100m income cap on the same business test with effect from 1 July 2005;
- ensure that companies do not fail the continuity of ownership test by having multiple classes of shares issued or because special arrangements to make distributions of dividends and capital returns with effect from 1 July 2002;
- clarify the meaning of "voting power" in the context of the COT, with effect from 1 July 2007; and
- ensure that the entry history rule in the consolidation regime is to be disregarded in applying the SBT, with effect from 1 July 2002.

Argyle Comment:

This announcement would come as a relief to some advisors and clients who would have been dealing with these issues in the intervening period.

**FCT v RELIANCE CARPET CO PTY LIMITED
GST - HIGH COURT CONFIRMS THAT FORFEITED DEPOSIT SUBJECT TO GST**

This is the first GST case to come before the High Court. In a unanimous decision, the High Court confirmed that the forfeiture of a deposit, as rendered under a standard land contract, is consideration for a supply for the purposes of the GST Act.

Facts

- The taxpayer was the vendor of real property.
- In December 2001, it granted an option for \$25,000 to purchase the property for \$3m less the option fee.
- The 10% deposit of \$297,500 due under the sale contract became payable upon exercise of the option.
- The option was exercised in January 2002.
- The sale contract provided for deferred settlement of up to one year.
- The purchaser failed to settle in time and the taxpayer issued a rescission notice.
- The contract was rescinded and the deposit was forfeited.
- The purchaser's accountant requested a tax invoice for the forfeited deposit.
- The taxpayer's solicitor declined to provide a tax invoice on the basis that the deposit was retained as damages and not consideration for a taxable supply.
- The Commissioner assessed the taxpayer to GST on the forfeited deposit pursuant to section 99-5 of the GST Act which treats forfeited deposits as consideration for a supply.

Decision

The High Court held that:

- the Full Federal Court had erred in finding that no supply upon the rescission of a contract for sale could be identified.
- the Full Federal Court was incorrect in determining that when the taxpayer entered into the contract for sale with the purchaser, it entered into a contract for the supply of real property, but nothing more and nothing less.
- the payment of the deposit by the purchaser was in connection with a supply by the taxpayer, and within the definition of consideration in section 9-15 of the GST Act.
- that this nexus was established with the receipt of the written notice of the exercise of the option, the Option Agreement and the payment of the deposit.

FCT v RELIANCE CARPET CO PTY LIMITED**GST - HIGH COURT CONFIRMS THAT FORFEITED DEPOSIT SUBJECT TO GST** continued

- the payment of a deposit was only treated as consideration for a supply when the deposit was forfeited because of the application of section 99-5
- leading up to forfeiture the deposit was held as security for the obligation of the purchaser to complete the contract.
- upon forfeiture of the deposit, the supply represented by the making of the contract became a taxable supply.
- the taxpayer was making a taxable supply within the meaning of section 9-5.

Argyle Comment:

Now that this issue has finally been settled, Taxpayers and advisors need to ensure that clients understand their GST obligations when it comes to forfeited deposits. In addition, it is important that the terms of the contract dictate who will be liable for the GST in connection with a forfeited deposit.

© This document has been created for the educational benefit of our clients, refers referrers of legal services work to the Argyle Partnership, alerts readers to the taxation services and the expertise of the Firm. It is not intended to be a definitive analysis of legislative or other changes. Before relying on any aspect of this document you must ensure that the concepts remain appropriate at that time otherwise you may be negligent. You can avoid this by using the taxation services of the Argyle Partnership

For further information or enquiries please contact any member of The Argyle Partnership Taxation Team.

PETER BOBBIN
PARTNER

Contact Details

Phone + 61 2 8263 6622 (direct)

Fax + 61 2 8263 6633

Email pbobbin@argylelawyers.com.au

Mobile 0408 111 831

1983 Bachelor of Commerce (Accounting & Finance Systems)
Bachelor of Laws University of New South Wales

1998 Master of Taxation (distinction) University Western Sydney
Fellow of the Taxation Institute of Australia



GEORGE SAMARAS
SOLICITOR

Contact Details

Phone + 61 2 8263 6628 (direct)

Fax + 61 2 8263 6633

Email gsamaras@argylelawyers.com.au

Mobile 0407-003-010

2003 Bachelor of Laws /Bachelor of Commerce (Acc)
Studying Master of Laws
Member Young Lawyers Business Law Committee
Fellow of the Taxation Institute of Australia
Member of TIA Membership Committee
Regular chair and presenter in professional forums



DANIEL HAWRYLUK
SOLICITOR

Contact Details

Phone + 61 2 8263 6637 (direct)

Fax + 61 2 8263 6633

Email dhawryluk@argylelawyers.com.au

Mobile 0413 555 222

2002 Bachelor of Social Science / Bachelor of Laws University of Western Sydney

2006 Masters of Taxation University of New South Wales

