

FRAUDULENTLY ALTERED OR CREATED TAX RETURNS OR ACTIVITY STATEMENTS

The ATO has released PSLA 2008/11 titled -Fraudulently altered or created income tax returns or activity statements.

It applies to fraudulently altered or created income tax returns and/or activity statements used as the vehicle by a third party for the purpose of obtaining fraudulent refunds. The practice statement is limited to cases where it has been confirmed, as a result of an audit, investigation or review, that the fraudulent act has been perpetrated by a third party, and that the third party has acted without the authority of the taxpayer.

It applies to fraudulent practices by registered and unregistered agents including employees and associates who use their clients' income tax returns or activity statements to contrive refunds.

Examples include:

- (a) where the tax agent alters the authorised tax return to include fictitious deductions or losses before its lodgement via ELS.
- (b) where the authorised activity statement of an entity is altered to include false claims for input tax credits or understatement of the entity's GST liability;
- (c) where the tax agent lodges an amended income tax return without the taxpayer's knowledge or authority via ELS.

Argyle Comment:

Obviously this PSLA is directed at a particular type of situation. However, it illustrates how important it can be to employ procedures in your own practice to ensure that you are not held liable for the statements of your client, actions of staff and more importantly that you are not accused of having made statements without a client's authority.

FAMILY TRUST CHANGES

The (2008 Measures No 4) Bill contains the amendments which reverse 2 of the family trust changes introduced in the Tax Laws Amendment (2007 Measures No 4) Act 2007.

The Bill proposes to amend Sch 2F to the ITAA 1936 to change the definition of "family" in the family trust election rules to limit lineal descendants to children or grandchildren of the test individual or of the test individual's spouse, so that the definition of family that existed before the 2007 amendments will be restored.

The new/ old restored definition will apply to assessments for the 2008-09 year of income and later years. The Bill will also prevent family trusts from making a one-off variation to the test individual specified in a family trust election from the 2008-09 income year (*except in relation to a marriage breakdown*).

The Bill contains a transitional measure, to allow family trusts that meet the specified conditions, to make a one-off variation valid for only the 2007-08 income year so that such a trust will revert back to the test individual specified in the original family trust election from the 2008-09 income year. Accordingly, other than in the case of a marriage breakdown, no variation may be made from the 2008-2009 income year.

Argyle Comment:

Perhaps this is just a measure aimed at redistributing tax concessions. The amendment will restore the old definition of family.

SUPER SPLITTING AND CGT RELIEF FOR DE FACTO RELATIONSHIPS: BILL INTRODUCED

The Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 was introduced into the House of Reps late last month. The Bill will provide for de facto couples (including same sex couples) to access the financial settlement regime under Family Law Act 1975.

Whilst de facto couples can apply to the Family Courts for child-related proceedings, they are required to apply under State and Territory legislation for property and maintenance issues.

The amendments will provide jurisdiction for de facto financial matters in all financial matters presently available under the Family Law Act 1975 between parties to a marriage, including but not limited to:

- (a) maintenance,
- (b) declaration and alteration of property interests or financial resources,
- (c) orders and injunctions binding third parties,
- (d) financial agreements,
- (e) bankruptcy matters,
- (f) proceeds of crime and forfeiture, and
- (g) instruments not liable to duty.

However, de facto financial causes are restricted to proceedings taken once the relevant de facto relationship has broken down.

The provisions of the Bill have been referred to the Senate Standing Committee on Legal and Constitutional Affairs for report by 27 August 2008.

The Bill also extends:

- (a) the superannuation splitting arrangements under Pt VIII B of the Family Law Act 1975 to parties to a de facto relationship;
- (b) the CGT roll-over relief on the transfer of assets on marriage breakdown under Subdiv 126-A of the ITAA 1997 to cover binding financial agreements made between parties to a de facto relationship under new Pt VIII AB of the Family Law Act 1975;
- (c) CGT roll-over relief under Subdiv 126-D will apply to in-specie transfers between small superannuation funds (eg SMSFs) and another complying superannuation fund pursuant to a binding financial agreement made between parties to a de facto relationship under new Part VIII AB of the Family Law Act 1975.

Whilst some measures may commence sooner than others, the amendments will apply to de facto relationships that break down after the amendments commence in the States that have referred power to the Commonwealth and in the Territories.

Argyle Comment:

The changes will streamline not only the taxation concessions available to all coming out of long term relationships (whether de facto or marital) but will also allow many to access the Family Court for relief not otherwise available or as accessible. However, it is yet to be seen how this will impact on the waiting periods for matters to be heard in the Family Court.

GST: SUPPLIES OF REAL PROPERTY AND BARE TRUST - GST RULING GSTR 2008/3

The ATO has now finalised a GST Ruling from last year, which explains how the GST Act applies to supplies of real property involving bare trusts.

It deals with bare trusts (*or similar types of trusts*) where the trustee has limited active duties and acts solely at the direction of the beneficiary or beneficiaries and in the course of its enterprise, causes the trustee of real property (*held on a bare trust for the entity*) to transfer the property to a third party.

It explains that in applying the GST law to a dealing in real property held by a bare trustee, it must be identified which entity makes the taxable supply or creditable acquisition.

It also explains where the activities of a bare trust are (*as would be expected*) passive in nature, a supply or acquisition may be made in the course of an enterprise carried on by the beneficiary notwithstanding that title to the relevant property is conveyed by or to a bare trustee for the beneficiary.

The ATO explains that in the case of a supply or acquisition by a bare trustee:

- (a) the trustee issues or holds a tax invoice on behalf of the beneficiary;
- (b) if the trustee agrees in writing that the supply is a supply of a going concern, it does so as agent for the beneficiary.

The ATO confirms that there are no GST implications where:

- (a) a beneficiary first acquires a real property and subsequently transfers the title to the bare trustee;
- (b) there is a change of trustee, provided an asset that is held on bare trust continues to be used in an enterprise carried on by a beneficiary.

Argyle Comment:

This GST ruling confirms our view with regards to the approach we have taken with respect to the Argyle Debt Instalment Trust. But you should note, that this does not mean that a transfer of a property to a beneficiary of a trust will not have any GST implications. Don't assume that because a trust is labelled a particular way, that certain consequences will or will not follow.

GST - PARTITIONING REAL PROPERTY - GSTR 2008/D3

This Draft GSTR explains the Tax Office's preliminary view on the GST consequences of the partitioning real property among joint tenants or tenants in common.

The ruling deals with a number of issues including:

- (a) the definition of a partition;
- (b) whether co-owners of land make a supply under a partition by agreement;
- (c) if it is in the course or furtherance of an enterprise;
- (d) whether co-owners make a supply of land under a court ordered partition;
- (e) if it results in a supply, whether the supply is for consideration;
- (f) whether the margin scheme can apply to such a taxable supply;
- (g) a partition a general law partnership; and
- (h) a partition under a joint venture.

GST - PARTITIONING REAL PROPERTY - GSTR 2008/D3

continued

The Draft states that a partition of land may be effected by either an agreement between the co-owners or as a result of a court order. The Commissioner states a supply as defined in s 9-10(1) includes both a partition by agreement and court order. However, the ATO states that the subdivision of land by co-owners does not constitute a supply for the purposes of GST.

The ATO states that the consideration for a supply is the sum of the GST inclusive market value of all the other co-owners' interests in the part of the land acquired by a co-owner plus any money received in respect of the partition.

Argyle Comment:

It is extremely important that advisors dealing with multi party property developments ensure that their clients understand fully the GST and Taxation implications of the different types of property development vehicles and transactions.

DIVISION 7A - 2008-09 BENCHMARK INTEREST RATE

The benchmark interest rate for the 2008-09 income year, for the purposes of the deemed dividend provisions of Div 7A of ITAA 1936, is 9.45% from 8.05% last year.

Section 109N(2) of the Income Tax Assessment Act 1936, provides that the rate is the same rate as the Indicator Lending Rates - Standard Bank Variable Housing Loans Interest Rate last published by the Reserve Bank of Australia before the start of the income year.

Argyle Comment:

Many seem to forget that Division 7A loans can quite often be forgotten. This is one of the most problematic areas still. A tip: Make sure that if your client has borrowed with Super from a private company or trust, and Division 7A applies, the rates are adjusted at the relevant times..

NEW NATIONAL EMPLOYMENT STANDARDS RELEASED

The 10 new National Employment Standards (NES) have now been released. They will come into effect on 1 January 2010.

The new standards relate to:

- (a) Maximum weekly hours of work - 38 hours for a full-time employee.
- (b) Request for flexible working arrangements - employers must give employees a written response to the request within 21 days, stating whether the employer grants or refuses the request. The employer may refuse the request only on "reasonable business grounds".
- (c) Parental leave and related entitlements.
- (d) Annual leave - 4 weeks of paid annual leave (5 weeks for a shift worker) with the possibility of being able to cash out.
- (e) Personal/Carer's leave and compassionate leave - for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.
- (f) Community service leave.
- (g) Long service leave.
- (h) Public holidays.
- (i) Notice of termination and redundancy pay.
- (j) Fair Work Information Statement.

NEW NATIONAL EMPLOYMENT STANDARDS RELEASED

continued

Legislation is to be introduced into Parliament later this year to give effect to the Government's commitment and will include other aspects of workplace relations relating to compliance, interaction with agreement making and future reviews.

The NES will apply to all employees in the Federal system regardless of industry, occupation or income.

Argyle Comment:

Employers negotiating agreements extending beyond 1 January 2010 should ensure that they understand what the new employer obligations will be once the NNES commence.

TAXPAYER ALERT - TA 2008/12 - NON-CASH CONTRIBUTION TO SUPERANNUATION FUNDS

The Alert is concerned with arrangements designed to allow members of a superannuation fund to circumvent the new superannuation contributions limits that came into effect from 1 July 2007.

These types of arrangements generally involve a member which:

- (a) Makes an in specie contribution to the fund and the fund does not recognise and record the contribution at the true market value of the asset in its accounts.
- (b) May include an employer of members paying expenses on behalf of the fund and not seeking reimbursement from the fund.
- (c) Or, the fund paying expense but seeking reimbursement from another person.

It normally involves a member or associate making improvements to an asset of the fund to increase the asset's value without seeking reimbursement from the fund.

The example used in the Taxpayer alert is of a fund that owns real property and a member pays the cost of improvements to that property.

The ATO considers these types of arrangements may give rise to taxation and superannuation regulatory issues, including whether:

- (a) the trustee of the fund has properly recognised that the arrangement involves a contribution to the fund that must be allocated to a member and reported at its market value;
- (b) the contributor is subject to the correct amount of tax when an asset is contributed to the fund;
- (c) the general value shifting regime applies when rights in respect of particular investments by the fund are varied and value shifting occurs; and
- (d) the exclusion of superannuation contributions from fringe benefits tax properly applies if the contribution is for the benefit of an employee

Trustees are also reminded that when assets other than cash are transferred to a superannuation fund they must take any steps necessary to ensure the fund's ownership of the assets is recognised.

Argyle Comment:

Trustees and members need to ensure that improvements made to assets of funds such as property are properly recognised and recorded as contributions.

SPEECH BY JENNIE GRANGER, SECOND COMMISSIONER, TO THE NIA, NSW STATE CONGRESS AND BUSINESS EXPO 2000, 4 JUNE 2008

ATO Second Commissioner Jennie Granger in her speech to the NIA recently has flagged some areas that the ATO will be targeting in the 2008-2009 Compliance Program and an overview of the ATO's tax time focus for individuals and small business.

She indicated that the ATO will be paying particular attention to Investors (with key areas of risk including the stock market (46% of people now own shares), and capital gains events), particularly rental properties. She said the ATO will be writing to people who have been selected because they have some either, unusually high claims, low rental income, high claims for interest expenses, and high claims for borrowing expenses. She warned that a letter from the ATO is a big hint.

A major point that she emphasised is the data matching capabilities of the ATO with state and territory agencies.

AAT CASE, GST ACQUISITION OF ARTWORKS AND ANTIQUES HELD TO BE BUSINESS

The AAT has set aside the Commissioner's decision to cancel the GST registration of a taxpayer whose sole activity was the acquisition of artworks and antiques. The Tribunal was satisfied that it was carrying on an enterprise and entitled to be registered for GST.

Facts

- A company and had been registered for GST since 1 July 2000.
- The taxpayer spent approximately \$4.8m on acquisitions of artworks and antiques treated as creditable acquisitions and input credits were claimed.
- Claims were made on basis that the acquisitions were made in the course of an "enterprise".
- Taxpayer only sold 3 items during the relevant period, which were sold by engaging art dealers.
- Taxpayer suffered financial losses as a result of the sale.
- In November 2005, the Commissioner cancelled the taxpayer's GST registration, backdated to 1 October 2001.
- The taxpayer lodged an objection against the Commissioner's decision, which was disallowed in August 2006.

ATO Argument

- The taxpayer was not carrying on an enterprise for the purposes of s 9-20 of the GST Act but activities were of a private recreational pursuit or hobby.
- The intention of the taxpayer was to build up a collection of different to the intent of a trader who engaged in activities of buying and selling for profit or reward.
- Taxpayer was a long-term investor in serious art and antiques could not be said to be carrying on a business, either in substance or form.

Taxpayer Argument

- The repetitive nature of its activities and their frequency were indicative that it was carrying on an enterprise.
- The amount expended in acquiring the artworks and antiques was consistent with commercial activity.

AAT CASE, GST ACQUISITION OF ARTWORKS AND ANTIQUES HELD TO BE BUSINESS

continued

Decision

- The taxpayer at all relevant times was carrying on an enterprise.
- It was of the view that in its ordinary meaning, an enterprise consisted of an activity or activities comprising of one or more transactions entered into for business or commercial purposes.
- The evidence had shown the activities of the taxpayer were "conducted in accordance with a pre-formulated policy, coupled with a carefully devised investment strategy".
- Noted that the taxpayer retained specialist art consultants, kept detailed accounting records, and insured and properly stored the artwork, which were characterised by system, repetition and regularity.
- Noted that a profit motive existed because the artworks were acquired with the intention of eventually selling them at a profit.

DRAFT TAXATION RULING TR 2005/D5 AUSTRALIAN SUPERANNUATION FUND - RESIDENCY TEST

The ATO has set out its view of the meaning of Australian superannuation fund in s 295-95(2) of the 1997 Act.

It is relevant for determining whether a superannuation fund satisfies the residency test to receive concessional tax treatment as a complying superannuation fund.

It covers the central management and control test, which the Commissioner says focuses on the "who, when and where" of the strategic and high level decision making processes and activities of the fund.

From 1 July 2007, a resident regulated superannuation fund is an Australian superannuation fund within the meaning of s 295-95(2) of the 1997 Act.

All 3 elements of the residency test must be satisfied to ensure that a fund qualifies as an Australian superannuation fund at a particular time:

- (a) the fund was established in Australia, or any asset of the fund is situated in Australia;
- (b) the central management and control of the fund is ordinarily in Australia; and
- (c) the active member test.

Establishment

A superannuation fund is established in Australia if the initial contribution made to establish the fund is paid to and accepted by the trustees of the fund in Australia. The fact that no asset of the fund is situated in Australia does not affect this conclusion.

Where the initial contribution to establish the fund occurred outside Australia, notwithstanding that one or more of the signatories executed the deed in Australia, the Tax Office says the fund will not be established in Australia. If a superannuation fund was not established in Australia, it can still satisfy the first test in s 295-95(2)(a) if at least one asset of the fund is situated in Australia at the relevant time.

Note: If a fund was not established in Australia and ceases to have an asset in Australia, it will fail the first test and not be an Australian fund at that time.

DRAFT TAXATION RULING TR 2005/D5 AUSTRALIAN SUPERANNUATION FUND - RESIDENCY TEST

continued

Central Management and Control

This is determined by where the high level and strategic decisions of the fund are made and performed. Establishing who is exercising the CM&C of a superannuation fund is a question of fact. There may be situations where a person other than the trustee is exercising the CM&C of the fund.

It provides that the temporary absence rule does not otherwise restrict the meaning of ordinarily so that if the CM&C of the fund is outside Australia for greater than 2 years, the fund can still satisfy the CM&C test if it satisfies the ordinarily requirement, however the absence must still be temporary, but note that Commissioners comment that if the CM&C of the fund is not temporarily outside Australia, it will not be ordinarily in Australia at a time even if the period of absence of the CM&C is 2 years or less.

The third test

The active member test is satisfied if, at the relevant time the fund has no active member or at least 50% of the total market value of the fund's assets attributable to superannuation interests held by active members is attributable to superannuation interests held by active members who are Australian residents.

A member is active member at a particular time if:

- (a) the member is a contributor to the fund at that time; or
- (b) the member is an individual on whose behalf contributions have been made.

A member is not an active if contributions have been and:

- (a) they are a foreign resident;
- (b) they are not a contributor at that time; and
- (c) only contributions made on their behalf were made in respect time when they were an Australian resident.

A fund must satisfy the residency rules at all times to be eligible for the tax concessions that are available to complying superannuation funds.

A superannuation fund that loses its complying status will become liable for tax on the market value of its total assets less any crystallised undeducted contributions and the contributions segment for current members.

This amount is included in assessable income in the first year in which the status is different from the preceding year and is taxed at 45%.

Argyle Comment:

The requirements are particularly important for trustees of SMSF's who need to watch that their absence from Australia does not result in their SMSF losing its concessional tax status.

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