

## ATO REVIEW

### Business with high volumes of cash transactions

The ATO has advised that as part of its strategy to address the cash economy, they are increasing their direct contact with businesses that have high volumes of cash transactions.

During the months of July and August the ATO had planned to send 37,000 letters to businesses in the retail, construction and consumer service industries. Letters should now have been received advising that the ATO has made contact with one or more of your clients and you may receive more of these letters over the next few months.

The ATO has indicated that it is not necessarily reviewing these businesses at this stage, but that they have been identified as possibly been under stress, or having outstanding lodgments or payments, or the information they have reported may be outside of normal ratios.

Throughout September and October the ATO will send a further 7,000 letters to businesses identified as likely to present risks. The remainder will be sent to tax agents alerting them that they may have a number of clients in this position.

Some of the businesses identified will be subject to further review.

### Partnership and trust distributions

Another area of current review relates to partnership and trust distributions. The ATO is reviewing distributions from partnerships and trusts to the respective partner and beneficiary returns for the years ended 30 June 2004 to 30 June 2007 to ensure that distributions have been correctly disclosed.

The ATO has indicated that letters listing clients whose partnership or trust income distributions either have not been disclosed or have been understated in income tax returns may have already been received by some practitioners.

The ATO is advising practitioners to review the income tax returns for the clients listed and confirm whether the distribution has been correctly declared. If you find there is an error or mistake in the income tax returns, you should make a voluntary disclosure on behalf of your client by lodging an amendment, which will also result in a reduction of any penalties, provided the amendment is lodged within 28 days of the date of the ATO letter.

If the ATO does not receive a response to the letter within 28 days, an audit may commence for the income tax returns listed in the letter. The letter notifying of this action will be sent to the postal address of your client. If the audit determines distributions have been omitted or not fully declared, penalties will be imposed.

## ATO 2008/2009 COMPLIANCE PROGRAM KEY POINTS AND COMMISSIONERS COMMENTS

On Wednesday 13 August 2008, Tax Commissioner Michael D'Ascenzo released the Compliance program 2008-09, and in doing so made the point that the ATO will focus on income tax, tax havens, dodgy tax schemes, wealthy individuals, large business and the cash economy in the coming year.

A particular point was made in the Commissioners delivery that the ATO will expand their review of executives and directors to include senior executives of private and foreign owned companies, with a particular focus on the remuneration packages and any failure to report equity benefits and cash or share bonuses.

## ATO 2008/2009 COMPLIANCE PROGRAM KEY POINTS AND COMMISSIONERS COMMENTS

continued

He also noted that the ATO will also be examining the compliance risks associated with partnership and trust distributions as well as trying to deal with cash economy practices that adversely impact many small businesses by working with more industries to develop benchmarks that businesses can use as a guide to getting their tax right.

The Commissioner also commented that "This will be backed up by greater use of data matching to more effectively identify and target people who may have under-reported income or over-claimed expenses with more than 5,000 cash economy audits or reviews.

## NSW OSR COMPLIANCE PROGRAM FOR 2008-09

The NSW Office of State Revenue has released details on its Compliance Program 2008-09 including specific details relating to payroll tax, duties, land tax and first home benefits. Some of the key points include:

### Payroll Tax:

Activities in this area will focus on identifying and contacting liable employers who have failed to register or appear to have understated their wages. Some of the measures the OSR will be taking to ensure payroll tax compliance in 2008-09 include:

- a) Continue to audit unregistered businesses where information available suggests a business is liable for payroll tax.
- b) Investigate businesses where information available indicates taxable wages have been understated.
- c) Identify employers who are claiming the benefit of multiple thresholds by failing to declare group structures for payroll tax.
- d) Review all refund requests and investigate high value requests or where anomalies are identified with information provided by third parties.
- e) Target non-complying employers in the construction industry.
- f) Follow up employers who fail to lodge their monthly and/or annual returns on time.

### Duties

Initiatives to ensure duties compliance in 2008-09 are:

- a) Identify clients who haven't presented liable land rich transactions for assessment
- b) Identify transfers where duty has not been paid
- c) Review high value property transfers
- d) Identify transactions where the correct value has not been used to calculate duty payable
- e) Review sale of business transactions where 3<sup>rd</sup> party information indicates the correct duty hasn't been paid
- f) Continue to review corporate reconstruction exemptions

### Land tax

Initiatives to ensure land tax compliance in 2008-09 are:

- a) Identify liable landowners who have not registered with OSR for land tax
- b) Contact clients likely to be incorrectly claiming a 'Principal Place of Residence' or 'Primary Production Land' exemption
- c) Investigate owners claiming a 'Principal Place of Residence' exemption in NSW and other jurisdiction
- d) Identify land owners who receive the benefit of multiple thresholds because their properties have not been aggregated on one assessment

### First home benefits

Initiatives to ensure first home benefits compliance in 2008-09 are:

- a) Identify applicants who fail to meet the residency requirements
- b) Verify information provided by clients against third party data for spouses and prior ownership
- c) Investigate anonymous disclosures reported to the Compliance Information line.

**NSW OSR COMPLIANCE PROGRAM FOR 2008-09**

continued

Parking space levy

Initiatives to ensure parking space levy compliance in 2008-09 are:

- a) Identify new owners in St Leonards and Chatswood who may not be aware of the existence of the levy or their obligation to pay the levy
- b) Investigate registered clients where it appears that the client is overstating exemptions, including clients who continually claim large exemptions

**AUDITING A SELF MANAGED SUPER FUND: ATO INSTRUCTIONS**

The ATO has released a document titled "Auditing a Self Managed Super Fund; Questions and statements to consider when auditing a self managed super fund (SMSF). The NAT number for the document is NAT 16308-08.2008.

It outlines what the ATO believes auditors would as a minimum need to consider when auditing self-managed super funds (SMSF).

The ATO says it is a guide only and auditors should also consider professional auditing standards, accounting association's professional standards, and the joint Competency Requirements for audits of SMSFs applicable to members of the CPAA, ICAA and NIA.

**NSW LAND TAX - ADT DECISION****PRINCIPAL PLACE OF RESIDENCE EXEMPTION DENIED - BHATTI & ORS v CHIEF COM. STATE REVENUE**

The NSW ADT has upheld the Commissioner's decision to deny the principal place of residence exemption for the 2005 land tax year in relation to Land Tax.

Submissions/ Facts

In November 2004, 4 taxpayers purchased a residential property. The taxpayers were a mother, her son and his wife, and a family friend. The facts as presented were that the mother occupied the property from November 2004 to January 2005 as her principal place of residence.

The evidence as it relates to the state of the property was that the mother lived a "modest lifestyle, similar to that which she experienced in India". This was used as an explanation as to why the property only had tank water and no connected phone service.

Held

The Tribunal held the exemption was not available as the taxpayer did not occupy the property within the time frame required by the Act (ie from 1 July 2004) (per sub-clause 2(2)(a) of Sch 1A to the *Land Tax Management Act 1956* (NSW)).

It was determined that there was no strong evidence of occupation other than temporary stays. The Tribunal noted where her personal belongings were kept, and the contact address provided to her employer and the Department of Immigration. It was also noted that the property was rented from January 2005 onwards.

**NSW LAND TAX - ADT DECISION****PRINCIPAL PLACE OF RESIDENCE EXEMPTION DENIED - LEE v CHIEF COM. OF STATE REVENUE**

The NSW ADT has upheld the Commissioner's decision to deny the principal place of residence exemption for the 2007 land tax year in relation to land tax.

Facts

In 2004, the taxpayer and his late wife purchased a property with an intention to renovate and move in. Delays in selling their current home meant that they let the property to tenants. The taxpayer's wife was diagnosed with cancer and subsequently passed away in May 2006.

## NSW LAND TAX - ADT DECISION PRINCIPAL PLACE OF RESIDENCE EXEMPTION DENIED - LEE v CHIEF COM. OF STATE REVENUE

continued

The property was vacated in September 2006 and the taxpayer returned to Australia from a holiday in January 2007 to resume plans to renovate the property. More delays, this time caused by the builder and architect, meant that the owner then relet the property.

He claimed that when the tenant vacated in December 2006, he took possession intending to make it his home, and that the exemption applied on the basis that the property was his principal place of residence on 31 December 2006.

### Decision

The Tribunal was not satisfied that the taxpayer had used and occupied the property as his principal place of residence at the relevant time for the exemption to apply and agreed that the Commissioner had no discretion but to apply the law to the facts.

## AMENDED ASSESSMENTS AND PENALTY UPHeld AAT CASE (2008) AATA 666, RE BUI AND FCT

### Summary

The AAT has affirmed the Commissioner's decisions to issue amended assessments to a taxpayer for the 1997 and 1998 income years outside the 4 year time limit on the basis of fraud and evasion. It also confirmed the decision to impose 75% shortfall penalties for "intentional disregard" of the tax law.

### Facts

The taxpayer was a partner of a restaurant business. Income Tax Returns disclosed as income a share of the net partnership income which the taxpayer asserted was based on cash book entries.

In January 2006, the Commissioner audited the taxpayer's tax affairs and found 4 "handwritten pages" covering 4 weeks which recorded sales in excess of the cash book entries, and subsequently determined that the taxpayer's income was greater than that originally disclosed, and on this basis issued amended assessments. The Commissioner also determined the taxpayer was liable to a penalty of 75% of the shortfall.

### Decision

The AAT held that the Commissioner was not out of time in issuing the amended assessments and that he was empowered by s 170(2) to do so for the relevant years. The AAT held that the taxpayer bore the onus of proving the absence of fraud or evasion.

The taxpayer had argued that the adjustments based on the handwritten pages were unreasonable, or in the alternative, that it was unreasonable to extrapolate notes representing 4 weeks to cover 2 years. However, again, the AAT found that the taxpayer had not provided evidence to support her submissions, and accordingly, rejected her contentions.

The AAT also affirmed the Commissioner's decision to impose a penalty of 75%. The AAT commented that the evidence showed the Taxpayer made no effort whatsoever to assist the Commissioner in dealing with the matter, and that she continuously refused, through her solicitor to provide information, as well making the point that she was not prepared to attend a hearing.

## COURT ORDERS REINSTATEMENT OF DEREGISTERED COMPANY DCT v JAMES HARDIE AUSTRALIA FINANCE PTY LTD (DEREGISTERED)

### Summary

The Federal Court has ordered that ASIC reinstates the registration of a deregistered company, which was the subject of a members' voluntary winding up in 2005.

### Facts

The Commissioner requested that the Court order the reinstatement of the Company so that he could make a determination under Pt IVA and consequentially issue an amended assessment to the company, as well as allow the Commissioner's to appoint a liquidator to investigate into the affairs of the company.

### COURT ORDERS REINSTATEMENT OF DEREGISTERED COMPANY DCT v JAMES HARDIE AUSTRALIA FINANCE PTY LTD (DEREGISTERED)

continued

On or about June 2005, following receipt of information provided to the ATO, an estimate was made that the company had a tax and shortfall penalties (but excluding shortfall interest) exceeding \$150m.

The Commissioner was unable to make a determination and issue an amended assessment as the company had been deregistered, and on this basis it proceeded through the Federal Court.

#### Held

The Court was of the view that the "Commissioner cannot determine an amount be included in the assessable income of a taxpayer that has gone out of existence under s 177F of the ITAA 1936" and so while the lawyers acting on behalf of the company contended that the reinstatement of the company would potentially cause substantial prejudice towards the company, the Court found that the reinstatement of the company was "just" to ensure procedural fairness. On this basis, the Court exercised its discretion and ordered the reinstatement of the company and appointed a liquidator to investigate into the affairs of the company.

### NO DEDUCTION FOR MANAGEMENT FEES PAID BY PROFESSIONAL FOOTBALLERS FCT v SPRIGGS, FCT v RIDDELL

The Full Federal Court has unanimously held that 2 professional footballers were not entitled to a deduction for management fees. The court considered that the fees were paid for the negotiation of new employment contracts only and they were not carrying on a business in relation to this playing activity.

#### Facts

In the 2005 income year, Riddell (a Rugby League player) who previously played for the St George Illawarra Dragons, derived income from a new playing contract with the Parramatta Eels.

The new contract with the Eels had been negotiated by his manager, which provided a significant increase in his remuneration from his old contract. In the 2005 income year, Riddell returned employment income from his previous club, his new club and from endorsements and promotional activities. Riddell claimed a tax deduction for management fees of over \$21,000.

Similarly, Spriggs (an AFL player) derived income from a new playing contract with a new club that had been negotiated by his manager. In the 2005 income year, the Spriggs returned employment income from his previous club and his new club, and \$600 promotional activity. He claimed a tax deduction for management fees of \$2,300.

The Commissioner disallowed the deductions claimed for the management fees. At first instance in the Federal Court held the taxpayers were entitled to deductions for fees on the basis that professional footballers carried on a business of exploiting their sporting talent and that, accordingly, the fees were incurred in carrying on that business.

#### Held

The Full Federal Court unanimously allowed the Commissioner's appeal and held that as the fees were in fact paid for the negotiation of new employment contracts, and not deductible under either the first or second limbs of s 8-1 of the 1997 Act.

In relation to deductibility under the second limb of s 8-1, the Court found that if the footballers were carrying on a business in the relevant years, it was confined to their non-playing activities.

But on the basis that the fees were incurred entirely in negotiating a playing contract of employment, they were not incurred in the course of carrying on a business.

The Full Court emphasised that the Full Court's decision was decided on the uncontested finding that the fees were paid entirely for negotiating employment contracts. This comment of course leaves open the issue of deductibility of fees paid for something other than negotiating employment contracts.

## GENUINE REDUNDANCY PAYMENTS DRAFT TAXATION RULING TR 2008/D6

The ATO has released a new 63 page Draft Ruling which outlines the requirements to be satisfied before a payment qualifies as a "genuine redundancy payment" under s 83-175 of the 1997 Act (or former s 27H of the ITAA 1936). It explains that a genuine redundancy payment must be made in consequence of a particular type of termination from employment (dismissal) that is attributable to a particular reason (redundancy).

It explains that a close examination and evaluation of the particular circumstances of each employment relationship and how this impacts on the dealings between the parties will influence whether, and to what extent, a payment made on termination is a genuine redundancy payment. It outlines 4 necessary components to qualify as a genuine redundancy requirement. In particular:

- a) The payment must be in consequence of a termination
- b) The employee must be dismissed from employment
- c) The dismissal must be caused by 'redundancy'
- d) The redundancy must be genuine

### The payment must be in consequence of a termination

Any payment being tested against the basic genuine redundancy requirement must be made "in consequence of" the employee's termination before it can be a genuine redundancy payment. It refers back to TR 2003/13 which sets out the Commissioner's views on when a payment is made "in consequence of" termination of employment.

### The employee must be dismissed from employment

All employment with the employer must be severed in terms of there being no suitable job available for the employee with the employer, meaning that he or she must therefore be dismissed.

### The dismissal must be caused by 'redundancy'

The dismissal must be caused by redundancy of the employee's position, and not for some other reason, and that redundancy must be the prevailing or most influential reason for the dismissal if there is more than one contributing cause. An employee's position is redundant when an employer determines that it is superfluous to the employer's needs and the employer does not want the position to be occupied by anyone.

### The redundancy must be genuine

The fact that a payment on termination is caused by redundancy or that the employer treats the payment as a redundancy does not establish genuine redundancy. The following additional conditions must also be satisfied:

- a) the dismissed employee is not older than specified age limits (ie less than 65 at the time of dismissal);
- b) the termination is not at the end of a fixed period of employment;
- c) the actual amount paid is not greater than the amount that could reasonably be expected had the parties been dealing at arm's length;
- d) there is no arrangement entered into between the employer and the employee or the employer and another entity to employ the dismissed employee after the termination; and
- e) the payment is not in lieu of superannuation benefits.

### Treatment of redundancy payments

The Draft also deals with the treatment of genuine redundancy payments, including the division of termination payments on redundancy into relevant elements for tax purposes - and particularly the ascertainment of the genuine redundancy component that is tax-free under s 83-170. It also states that any amount of a genuine redundancy payment in excess of the tax-free amount worked out under s 83-170 will be taxable as an ETP, and that this is so even where the amount is received more than 12 months after the termination.

### Other matters

The Draft also deals with the treatment of multiple payments received for one dismissal due to redundancy and the situation where redundancy payments are received by "dual capacity employees" (ie a person who, in addition to being engaged as an employee of an employing entity, is also a directing mind of or holds an office with that entity).

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