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AUSTRALIAN TAX ADVISER

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IN THIS ISSUE

SECTION 1 — PROFESSIONAL DEVELOPMENT 1

PROPOSED CHANGES TO PART IVA 1

¶7.1 Changes to the 'purpose' test 2

¶7.2 Other drafting changes 3

¶7.3 Be afraid 3

¶7.4 Commencement 3

SECTION 2 — PROFESSIONAL CURRENCY 4

BILLS AND LEGISLATION 4

¶7.5 Bills passed and await Assent 4

¶7.6 Other legislation update 5

CASES AND DECISIONS 5

¶7.7 High Court special leave granted in Wickenby case: Agius v The Queen 5

¶7.8 Tax minimisation schemes: R v Cox; R v Cuffe; R v Morrison 6

¶7.9 Repaid deposit an assessable recoupment: AAT Case [2013] AATA 93, Re Batchelor and FCT 7

¶7.10 Taxpayer fails to prevent Commissioner issuing amended OBU assessments: Macquarie Bank Limited v FCT 9

¶7.11 Excess super contributions tax upheld: ignorance of rules not 'special circumstances': AAT Case [2013] AATA 110 and AAT Case [2013] AATA 111 9

¶7.12 Summary judgment granted for almost $23m in tax debts: DCT v Sent 11

¶7.13 Extension of time to lodge objection refused: AAT Case [2013] AATA 96, Re Flood and FCT 12

Continued

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IN THIS ISSUE

¶7.14 Used fuel oil not subject to excise: AAT Case [2013] AATA 99, Re Cooper Bros Holdings Pty Ltd t/a Triple R Waste Management and FCT.....13

¶7.15 Appeals.....13

¶7.16 Other High Court appeals.....14

RULINGS AND DETERMINATIONS **15**

¶7.17 Living-Away-From-Home Allowances.....15

¶7.18 GST: Adjustment notes: Draft GST Ruling GSTR 2013/D1.....19

¶7.19 GST: Payment fee charged by the supplier for 'supply failure' is not consideration for a supply.....20

STATE TAXES **21**

¶7.20 Vic: Land tax — SRO webinars.....21

¶7.21 Vic: Revised duties forms.....21

¶7.22 Qld: Payroll tax — contractors, workers on-hired to government.....21

¶7.23 WA: Stamp duty — nominal duty relating to deceased estates — Commissioner's Practice.....22

¶7.24 WA: Government pledges to raise payroll tax threshold.....22

SECTION 3 — QUESTIONS AND ANSWERS **23**

¶7.25 Writing off bad debt from family trust.....23

¶7.26 Writing off losses to capital profits reserve.....24

¶7.27 Division 7A — repayment of loan.....25

¶7.28 Low value asset write-off.....26

¶7.29 Contributions — bring forward rule for a 64 year old.....27

¶7.30 Sign up payment — tax deductibility.....28

¶7.31 Stamp duty on sale of property to SMSF.....29

¶7.32 Tax invoices and credit card payments.....30

¶7.33 Partnership of SMSF funds.....31

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SECTION 1 — PROFESSIONAL DEVELOPMENT

PROPOSED CHANGES TO PART IVA

Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 — click here to view

It's hard to believe that it's been almost a year since the proposed amendments to Part IVA were announced, but after many submissions, the Assistant Treasurer has finally introduced the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 into Parliament. Click here to view a copy of the bill.

Readers will be aware that Part IVA of the *Income Tax Assessment Act 1936* gives the Commissioner the power to set aside a scheme that had the purpose or effect of providing a tax benefit to an entity where the sole or main purpose of the scheme was to secure that benefit. For some time now, the Tax Office has lamented the shortcomings of this, our principal anti-avoidance measure — notably the ability of taxpayers to escape the operation of Part IVA by arguing that no 'tax benefit' had been obtained. (See, for example, the decisions in *FCT v AXA Asia Pacific Holdings Ltd* (2010) 81 ATR 180, *Futuris Corporation Ltd v FCT* [2012] FCAFC 32 and *RCI Pty Ltd v FCT* [2011] FCAFC 104.)

The draft Explanatory Memorandum describes the amendments as necessary to correct deficiencies arising from interpretation of the current law. It appears however that the changes go much further than this. For example, the proposed amendments seek to address circumstances that the courts have determined ought not to be covered by the current law — so in reality, the amendments have been introduced to address perceived inefficiencies that the government has decided to address on a policy basis — that is, to expand the operation of Part IVA to situations it was never intended to cover.

An Exposure Draft of the provisions was released for comment in November 2012 for comment — click here to view.

The core of the change centres on the amount of the tax benefit (being the amount on which tax is to be imposed). This is currently determined under s 177C which asks the question: what amount would have been, or might reasonably be expected to have been included in income or allowed as a deduction if the scheme had not been undertaken. The Explanatory Memorandum (click here to view) describes this as an open-ended inquiry into what, if anything, the taxpayer might reasonably have done if it had not participated in the scheme.

So the proposed amendments are intended to target perceived deficiencies in s 177C, and the way it interacts with other elements of Pt IVA, particularly s 177D. The proposed amendments seek to reinforce the view that the two limbs of the tax benefit element of Pt IVA in s 177C(1) — i.e. the 'would have' and 'might reasonably be expected to have' limbs — are alternative tests. In other words there is not just one test that merely spans a spectrum of likelihood.

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The way this has been achieved in the new bill is to add a new section to the legislation, namely s 177CB, which expands the enquiry to one based on one of two directions:

1. '... a postulate that comprises only the events or circumstances that actually happened or existed (other than those that form part of the scheme), or
2. a postulate that is a reasonable alternative to entering into or carrying out the scheme.'

The legislation does not have an explicit rule explaining when either constraint is to be applied but some guiding principles can be derived from the EM:

- Where the scheme reflects the overall transaction, and it has no non-tax results for the taxpayer, the first limb is to be applied to 'annihilate' the scheme and the second limb is then applied to the remaining elements of the transaction;
- Where the scheme has no non-tax results and the broader transaction 'remains effective' without the scheme — it is a first limb 'annihilation' case;
- Where the scheme is 'integral'/ 'intertwined' with a broader transaction because it 'facilitates' it 'in some way', then a second limb 'reconstruction' of the broader transaction to produce a reasonable counterfactual is required but that reconstruction would be 'limited by the role the scheme plays in [the] transaction.'

There are three requirements in the proposed s 177CB to determine whether or not an alternative will be regarded as a 'reasonable alternative' under the second limb:

- a requirement to have 'particular regard' to 'the substance of the scheme'
- a requirement to have 'particular regard' to 'any result or consequence for the taxpayer that is or would be achieved by the scheme' other than its tax consequences, and
- a requirement to 'disregard any result in relation to the operation of this Act' — in other words, the tax consequences of the alternative transaction for the taxpayer and anyone else are specifically to be ignored.

¶7.1 Changes to the 'purpose' test

As currently drafted, the provision has two requirements:

- the scheme must produce a tax benefit for the taxpayer, and
- the scheme must be entered into with the requisite purpose (of securing the tax benefit).

It will be seen that the current provision first asks whether a taxpayer has obtained a tax benefit and then sets out the purpose requirement. The bill inverts that order so that the purpose test appears first and the requirement to demonstrate a tax benefit appears second.

According to the EM, the intention in re-ordering these concepts is to 'emphasise the central role of the purpose test' but it is difficult to see how this really changes anything in practice.

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¶7.2 Other drafting changes

The bill makes a number of modest amendments to the current structure of Pt IVA, re-locating, consolidating and renumbering several existing provisions:

- rules dealing with withholding tax avoidance which used to be in a separate section are now consolidated with the other types and amounts of tax benefit;
- s 177D in the current law is now divided into a number of subsections; and
- cross-references that appear elsewhere in the Act are adjusted to reflect the new citations.

Again, nothing of real consequence should arise from these changes.

¶7.3 Be afraid …

Click here to view the submissions

Treasury has received a barrage of submissions, largely critical of the new measures.

For example, CPA Australia considers that the amendments are 'confusing and deficient and do not result in an anti-avoidance regime that is comprehensible to tax practitioners let alone the broader community'.

Similarly, the Tax Institute believes that the amendments in the bill are an unnecessary overreaction to recent court cases rather than being required to maintain the integrity of the tax system. The Institute is also concerned that the bill as drafted would 'bestow excessively wide powers on the Commissioner to levy tax on the basis of an unreasonable alternative postulate'. Such an unconstrained power would result in an inappropriate erosion of taxpayer rights and create potential for undesirable behavioural changes.

The Law Council of Australia noted that the EM to the bill states that losses in recent cases have shed light on weaknesses in Pt IVA. The committee does not accept that this is necessarily the case and instead suggests that the results in those cases 'may be due either to poor case selection or case management by the ATO, or attempts in litigation to try to make Part IVA extend to situations to which it was not intended to apply'.

The Law Council argues that the bill would fundamentally change the operation of Pt IVA as 'it would tax people by reference to things they did not do, and, importantly, would never have done'.

Given that the suggestions and criticisms of the amendments have largely been ignored in the new bill, it seems clear that the proposed amendments will lead to more rather than less confusion in regard to what taxpayers can legitimately do to manage their tax affairs.

¶7.4 Commencement

The bill has been referred to the House Committee on Economics for consideration but it is likely to pass both Houses. Once the bill receives Royal Assent, the new measures will apply to all schemes, except those entered into or commenced on or before 15 November 2012.

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BILLS AND LEGISLATION

¶7.5 Bills passed and await Assent

The following bills were passed by the Senate on 28 February 2013 without amendment and now await Royal Assent.

International Tax Agreements Amendment Bill 2012

Click here to view

This bill gives the force of law in Australia to the Protocol to amend the Double Tax Agreement between Australia and India. It also gives the force of law in Australia to the Agreements between Australia and the Marshall Islands and Australia and Mauritius for the Allocation of Taxing Rights in relation to Certain Income of Individuals. It establishes a Mutual Agreement Procedure in respect of Transfer Pricing Adjustments. The bill had previously been passed by the House of Representatives without amendment;

Federal Circuit Court of Australia (Consequential Amendments) Bill 2013

Click here to view

This bill will operate together with the *Federal Circuit Court of Australia Legislation Amendment Act 2012*, and makes consequential amendments to Commonwealth legislation to reflect changes to the name of the Federal Magistrates Court (to be known as the Federal Circuit Court of Australia) and the title of Federal Magistrates. This bill had been amended in the House of Reps.

MRRT and State royalties: committee recommends Bill not be passed

Click here to view

The report of the Senate Economics Legislation Committee on the Minerals Resource Rent Tax Amendment (Protecting Revenue) Bill 2012 (a Private Senator's Bill introduced by Greens Leader Senator Milne on 12 September 2012 was tabled in the Senate on 27 February 2013.

The report recommended that the Senate not pass the bill. The bill proposed amendments to the MRRT Act so that any increases in state royalties since 1 July 2011 would be disregarded when calculating royalty credits for the MRRT. The Greens issued a dissenting report, while the Coalition said the original MRRT Bills should be repealed.

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Baby Bonus; FTB changes — Bill referred to committee

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The Family Assistance and Other Legislation Amendment Bill 2013 has been referred to the Senate Community Affairs Legislation Committee, and the Economics Legislation Committee, for inquiry and report by 18 March 2013. The bill, which is still before the House of Representatives, proposes:

(i) that the amount of Baby Bonus for second and subsequent children who come into a family from 1 July 2013 be reduced from $5000 to $3000

(ii) amendments to ensure families can continue to receive family tax benefit until the end of the calendar year that the child finishes secondary study or its equivalent.

¶7.6 Other legislation update

Click here to view

The Social Security and Other Legislation Amendment (Income Support Bonus) Bill 2012 has now passed all stages without amendment and awaits Royal Assent. The bill amends several Acts to create a new tax-free Income Support Bonus to be paid to recipients of payments such as the ABSTUDY Living Allowance, Austudy and the Newstart Allowance.

CASES AND DECISIONS

¶7.7 High Court special leave granted in Wickenby case: Agius v The Queen

Click here to view

The High Court has granted a taxpayer special leave to appeal from the decision of the NSW Court of Criminal Appeal about an alleged offence of conspiracy. The Court of Criminal Appeal had upheld an interlocutory judgment which refused to grant a permanent stay on the second count of proceedings against the four persons, who were accused of tax conspiracy offences in a Wickenby-related matter.

In the application for special leave, Counsel for the applicant said that, notwithstanding the indictment:

> 'the particulars at application book pages 3 to 4 tell us that there was but one conspiracy. It was formed by May 1997. All the accused were parties to it by 31 December 2000, yet the indictment has it starting on 24 May 2001'.

Among other things, the applicant contended that proof of the conspiracy alleged in count 2 required evidence of an agreement entered into on or after 24 May 2001 because that was the commencing date

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alleged in count 2. The applicant argued that the NSW Court of Criminal Appeal erred in finding that proof of the conspiracy did not require evidence of an agreement.

Counsel for the applicant argued that Justice Simpson and the Court of Criminal Appeal relied heavily on the common law concept of conspiracy as a continuing offence as held in *Doot's case* ([1973] AC 807), and cases which followed Doot. Counsel submitted that the offence of conspiracy 'depends upon … the existence of, or participation in, an agreement, and not the precise timing of its formation'.

The High Court granted the taxpayer special leave to appeal, and has released a transcript of its decision.

¶7.8 Tax minimisation schemes: R v Cox; R v Cuffe; R v Morrison

Click here to view

The Queensland Court of Appeal dismissed appeals by two taxpayers against their conviction for conspiring to defraud the Commonwealth in tax minimisation schemes, but allowed other appeals and reduced the head sentences.

Cox, Cuffe and Morrison were charged with conspiring to defraud the Commonwealth. None of them gave or called evidence at the trial, and all were convicted. Mr Cox was sentenced to 9 years and 11 months imprisonment with a non-parole period fixed at 3 years and 4 months, while Mr Cuffe and Mr Morrison were both sentenced to terms of 6 years imprisonment with non-parole periods of 3 years.

Cox and Cuffe appealed against their convictions and sought leave to appeal against their sentences, while Morrison only made an application for leave to appeal against his sentence.

The Crown argued that the conspiracy was an agreement to defraud the Commonwealth by promoting tax minimisation schemes for the 1999 and 2000 tax years. The schemes involved taxpayers entering into loan agreements under which they notionally borrowed thousands of dollars at 5% interest for 10 years, and paid a fee of 12% of the amount borrowed to the promoters. Insurance policies were issued as security against the loans.

The funds were purportedly invested in retirement village joint ventures or in employee welfare funds, or paid by way of donation to a church building fund. All this was done to secure an immediate tax deduction. The schemes were promoted under the name of a company, National Health and Aged Care Pty Ltd.

The Crown alleged that Cox was the architect of the schemes and had previously been associated with Cuffe in relation similar schemes in the past. Cuffe had obtained approval from the ATO for the establishment of a college building fund, donations to which would be tax deductible provided the fund met certain conditions. He issued receipts in the name of the fund for donations which were then relied on by the participants of the schemes to claim deductions.

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Cuffe's role in relation to the purported retirement village investments was signing an agreement pursuant to which the relevant church's college building fund was to lend a developer $25m for the purposes of developing a retirement village at Caloundra.

Morrison's involvement began in about February or March 2000 when he became office manager for National Health and Aged Care.

The Crown's case was that Cox had adapted documents used in employee welfare fund schemes organised by Harts Accountants for National Health and Aged Care's purposes. Funds were set up by way of a loan backed by a promissory note from United Overseas Credit Limited, a Hong Kong based company. The promissory note was then endorsed by the employer, assigned to the employee welfare fund and re-assigned as payment for a 10-year life insurance bond with European Grande Assurance SA, a company incorporated by Hart. At the end of the 10 years, the bond would be used to pay back the original loan.

The court went on to describe the schemes in considerable detail. In respect of the offending, the trial judge noted that there was no evidence that the Commonwealth had suffered any loss as a result of the offence. However, over 400 participants in the schemes had paid more than $4.25m for a service they had not received and some had been charged penalty tax. That loss was to be taken into account. None of the accused had shown any sign of genuine remorse neither had they co-operated with investigations.

The court dismissed the appeal against conviction by the appellants Cox and Cuffe and refused the application for leave to appeal against sentence by the applicant Cox. It went on to grant the application for leave to appeal against sentence by the applicants Cuffe and Morrison and reduced the head sentence to 5 years imprisonment with a non-parole period of 2½ years.

¶7.9 Repaid deposit an assessable recoupment: AAT Case [2013] AATA 93, Re Batchelor and FCT

Click here to view

The AAT found that the repayment of a deposit paid upon entering into a contract to buy a retirement village was an assessable recoupment pursuant to s 20-20 of the ITAA 1997.

The case concerned four entities that together formed a partnership. Their business included the acquisition, development and management of retirement village facilities. The taxpayer held an interest in the business and assets of the partnership through one of the entities forming the partnership.

In June 1999, the partnership entered into an agreement with two other entities (Cresthaven and GDK), under which Cresthaven was appointed to act as bare nominee for the partnership and GDK was appointed to manage the partnership's business. Shortly thereafter, Cresthaven entered into a contract

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to buy a retirement village in Victoria from Primelife. Cresthaven paid a deposit of $6.5m, of which the taxpayer's share was $55,500. The balance of the purchase price was payable on settlement, which was conditional on Primelife completing certain works.

The taxpayer claimed a deduction in the 1998–99 income year for a partnership loss of $284,674. This included her share of the full purchase price for the retirement village, even though settlement had not occurred. The Commissioner's decision to allow only the taxpayer's share of the deposit (i.e. $55,500) as a deduction was eventually upheld by the Full Federal Court in *FCT v Malouf* (click here to view).

In February 2006, proceedings brought by the partnership against the seller of the retirement village were settled, with the seller agreeing to repay the deposit plus interest. Also, in proceedings brought by ASIC, the Federal Court decided that a scheme operated by certain entities, including Primelife, Cresthaven and GDK, in relation to the retirement village in question, was an unregistered managed investment scheme and ordered that it be wound up. As a result of these events, the partnership was eventually repaid most of the deposit, of which the taxpayer's share was $47,927. The issue before the court was whether that amount was assessable in the hands of the taxpayer.

The AAT said that as the partnership's business included the acquisition of retirement villages, the payment received by the partnership could be seen as the return of an amount paid as part of its on-going business activities and thus would seem to fall within the 'income from business' classification.

In addition, the AAT concluded that it was difficult to characterise the payment received by the partnership (whether described as a refund of the deposit or the settlement of a litigation claim) as anything remotely like a gain or profit to the partnership's business — at most, it constituted in one way or another, a compensatory amount equal to the amount that the partnership had previously expended in the form of the deposit. The payment was therefore not assessable under s 6-5 of the ITAA 1997 as income according to ordinary concepts.

The AAT then considered whether the payment was an assessable recoupment pursuant to s 20-20 of the ITAA 1997. The key question was whether the payment was received 'by way of indemnity'. The AAT looked at the dictionary definition of the term 'indemnity' — protection against, or compensation for, loss or damage — and various relevant cases and concluded that the $47,927 was received by way of indemnity and thus was an assessable recoupment in terms of s 20-20.

The court went on to briefly consider whether the payment was an assessable capital gain should its conclusion that the payment was assessable under s 20-20 be wrong. The taxpayer effectively conceded that CGT event E2 happened when the relevant intangible CGT asset (the bundle of rights under the contract to buy the retirement village, including the right to a refund of the deposit) came to an end. The AAT did not however accept the taxpayer's argument that the capital gain was effectively nil because the cost base of the asset was $47,927. The AAT pointed out that if the payment was not assessable under s 6-5 or s 20-20, then s 110-45(2) would have excluded the payment from the cost base (which would therefore reduce the cost base to zero). Hence the entire $47,927 would be assessable as a capital gain.

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¶7.10 Taxpayer fails to prevent Commissioner issuing amended OBU assessments: Macquarie Bank Limited v FCT

Click here to view

The Federal Court dismissed a taxpayer's application for interlocutory injunctive relief that sought to restrain the Commissioner, until further order, from issuing amended assessments to the taxpayer. The taxpayer claimed that the Commissioner was going to retrospectively apply a changed view on the law relating to Offshore Banking Unit expense allocations.

The court said the issue related to what is said to be a change of policy or change of view by the Commissioner as to acceptable accounting methodologies. The Commissioner intended to issue amended assessments, covering at least five income years, and the time limit for issuing those assessments would expire at the end of February 2013 in the case of the first two income years and sometime in April 2013, in the case of the third of those income years.

The taxpayer argued that the indication given by the Commissioner as to his change of view was in breach of ATO Practice Statement PS LA 2011/27, which sets out certain procedures that the ATO must follow if it changes its mind on relevant taxation issues. The Practice Statement deals with the circumstances where the ATO can adopt a change of view and have it apply prospectively. If the ATO wished that view to apply retrospectively, certain procedures or requirements needed to be followed and the taxpayer claimed they had not been in this case.

The court dismissed the taxpayer's interlocutory application (even though the taxpayer offered to consent to an extension of the time period for issuing the amended assessments), but granted an abridgement of time to enable the matter to come back before Edmonds J.

¶7.11 Excess super contributions tax upheld: ignorance of rules not 'special circumstances': AAT Case [2013] AATA 110 and AAT Case [2013] AATA 111

AAT Case [2013] AATA 110 - click here to view

AAT Case [2013] AATA 111 - click here to view

In two similar excess superannuation contributions tax cases, the AAT has upheld the Commissioner's decision not to exercise his discretion to disregard excess superannuation contributions for a financial year under s 292-465 of the ITAA 1997. The AAT rejected the taxpayers' contentions that the discretionary relief under s 292-465 should be available to produce an outcome that would have ensued had the taxpayers complied with the formalities to claim a deduction for part of the contributions. In both cases, the AAT found that the taxpayers' would not have been entitled to a deduction for any part of the contributions in any event.

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In AATA 110 the taxpayer had made two personal superannuation contributions totaling $482,136 in the 2008 income year. Each of the contributions was accompanied by an application to commence a pension income stream from the fund. The taxpayer did not claim a deduction for any of this amount in her 2008 income tax return and claimed that she had given her super fund a notice pursuant to s 290-170 of the ITAA 1997 to the effect that she intended to deduct $32,136 of the contributions made in the 2008 financial year. However, the notice (dated 9 September 2011) was not received by her fund (and acknowledged) within the time required.

This meant that the entire $482,136 in personal contributions made in the 2008 year were non-concessional contributions with $32,136 in excess of her non-concessional cap of $450,000 under the bring-forward rule. As such, the taxpayer was issued with an ECT assessment of $14,973.

The taxpayer applied to the Commissioner to exercise his discretion to disregard the excess non-concessional contributions under s 292-465 on the grounds that the taxpayer intended $32,136 of the contributions to be concessional contributions (within the taxpayer's $50,000 cap). The taxpayer argued that the discretionary relief should be applied so that she would be taxed in a manner consistent with that applicable had a valid s 290-170 notice been given and acknowledged.

The AAT upheld the Commissioner's decision not to exercise his discretion after ruling that the taxpayer's situation did not constitute 'special circumstances' as it was not 'unusual or out of the ordinary'. To the contrary, the AAT said the law applied to the taxpayer's circumstances precisely as it was meant to.

The AAT also dismissed the taxpayer's submission that her circumstances were 'special' because the Commissioner did not notify her of the excess contributions until after the period for giving the s 290-170 notice had expired. Rather, the AAT noted that the system is one of self-regulation. While the taxpayer argued that the Commissioner had exercised his discretion favourably in other cases, the AAT said insufficient details of such other cases were provided to allow this contention to carry any weight.

Similarly, in AATA 111, the AAT held that the taxpayer's situation did not constitute 'special circumstances' to disregard excess contributions for the year.

In this case, the taxpayer, a university lecturer, had made personal contributions of $320,000 and $170,000 in the 2008 and 2009 years, respectively, acting on advice from a firm associated with her tax agent. The contributions resulted in $40,000 of excess non-concessional contributions for the 2009 year, generating an ECT assessment of $18,600.

The taxpayer argued that the Commissioner's discretionary relief under s 292-465 should be applied to disregard the excess contributions. To this end, the taxpayer contended that she was a contractor and not an employee (within the meaning of s 290-160 of the ITAA 1997), and that she intended to claim a deduction for $40,000 of the personal contributions she made in the 2009 financial year.

In the first instance, the AAT rejected the taxpayer's contention that she was a contractor and not an employee, as her tax return described her income from lecturing as salary and wages. The AAT said that

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the only conclusion open on the evidence was that the taxpayer was an 'employee', as generally understood or within the extended meaning in s 12(3) of the SGAA.

As nearly 90% of the taxpayer's income was from employee activities in 2009, the AAT said she would not have been entitled to a deduction for any of her super contributions under s 290-150, even if the proper notification under s 290-170 had been given and acknowledged.

The taxpayer was seeking the discretion to be exercised to 'relieve her from the burden of taxation liability incurred through ignorance of the applicable rules,' but the AAT noted that the ECT liability arose as a result of advice given by an advisory organisation which had allegedly failed the taxpayer. This, the AAT said is not a case where the discretion ought to be exercised.

¶7.12 Summary judgment granted for almost $23m in tax debts: DCT v Sent

Click here to view

The Victorian Supreme Court granted the Commissioner summary judgment against a taxpayer for outstanding tax and penalties totaling almost $23m.

This was a recovery action by the Commissioner arising from notices of assessment for income tax and penalties. On 20 February 2013, the Supreme Court gave summary judgment for the Commissioner for $22,848,994.13. The court said the assessments arose out of a payment of bonuses made to the taxpayer by his employer, Primelife Corporation Ltd, to a trust of which the taxpayer was a beneficiary. The bonuses were paid in the form of shares which were treated as assessable either as ordinary or statutory income. In the alternative, the Commissioner also determined that Pt IVA applied and issued the assessments giving effect to that determination. The taxpayer was unsuccessful in an appeal to the Full Federal Court (in *Sent v FCT* [2012] FCAFC 187) and sought special leave to appeal to the High Court.

The court did not accept the taxpayer's argument that the certificate by which the Commissioner sought to prove service did not properly comply with the statute and rejected the taxpayer's assertion that the assessments were not assessments 'because they involved double counting'.

The court also rejected the taxpayer's request for an order that the taxpayer be allowed to apply to set aside or vary the order made in view of the pending special leave application.

The Supreme Court granted the Commissioner summary judgment against the taxpayer but agreed to the filing of material and submissions to determine the taxpayer's application for a stay of execution of this judgment pending the hearing and determination of his High Court special leave application.

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¶7.13 Extension of time to lodge objection refused: AAT Case [2013] AATA 96, Re Flood and FCT

Click here to view

The AAT refused a taxpayer's application requesting an extension of time to lodge an objection in relation to a capital gain on disposal of shares that occurred in the 2005 year.

For the year ended 30 June 2005, the taxpayer had lodged an income tax return prepared by her accountants which included a net capital gain of $9,551 in relation to the disposal of shares. In May 2006, a notice of assessment was issued based on the return as lodged. In December 2011, the taxpayer applied for a private ruling regarding capital losses on her investment. The private ruling related to capital losses from monies forgiven. She received a favourable reply in March 2012 applicable to the year ended 30 June 2010.

In April 2012, the taxpayer asked the Commissioner to apply that ruling to her 2005 assessment and to refund the CGT she had paid. In June 2012, the taxpayer lodged an objection against the 2005 assessment, but the Commissioner refused to grant her an extension of time to lodge the objection. The taxpayer argued that due to the favourable findings of the private ruling, she should also be able to apply that ruling to the 2005 year. She contended that she was not adequately advised in 2005 that she could object to the assessment.

The Commissioner argued that the taxpayer had provided no adequate explanation for the delay and that she had failed to establish any arguable case for the extension of time to lodge an objection.

The AAT found that the taxpayer had not provided an adequate explanation for the delay in lodging the objection, and that her case was without legal merit. It said the taxpayer was competently advised and represented in 2005 and that the assessment regarding the CGT liability was made correctly.

In addition, the AAT said the taxpayer tried to establish that monies forgiven constituted capital losses against which she could offset a capital gain from six years earlier and in doing so, attempted to achieve a benefit in retrospect. The Tribunal said it was satisfied that the capital gain in 2005 related to the disposal of shares and was a separate, distinct and unrelated event to the capital losses arising from the debts forgiven. Therefore, the AAT held the taxpayer had not demonstrated an arguable case and refused to grant an extension of time to lodge an objection.

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¶7.14 Used fuel oil not subject to excise: AAT Case [2013] AATA 99, Re Cooper Bros Holdings Pty Ltd t/a Triple R Waste Management and FCT

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The AAT has held that used fuel oil collected and sold by the taxpayer was not dutiable under Item 10(d) of the Schedule to the *Excise Tariff Act 1921*.

The taxpayer company collects used oils drained from automotive sumps, machinery and transmissions serviced in mechanical workshops and industrial engineering workshops. The used oil is passed through filters and is then transported to Excise licensed depots managed and operated by the company at Bendigo and Melbourne. The used oil is then sold to customers.

The taxpayer sought a ruling from the Commissioner as to whether it was manufacturing excisable goods.

The ruling stated that the company **was** manufacturing an excisable good within the meaning of s 4 of the *Excise Act 1901* when it removed foreign matter by filtration and separated excess free moisture by applying heat through heating coils positioned within storage tanks at its Melbourne depot.

However, it stated that the company ***was not*** manufacturing an excisable good within the meaning of s 4 when it removed suspended foreign matter by filtration and separated excess moisture by naturally occurring means (gravity/heat from the sun) in storage tanks at its Bendigo depot.

The taxpayer objected to the ruling on the grounds that the ruling ought to have answered the first question negatively. The objection was disallowed and the matter came before the AAT.

The Tribunal decided that the objection should be allowed, since the fuel oil could not properly be said to be have been 'derived' through the taxpayer's processes according to the ordinary meaning of that word. Accordingly, it held the fuel oil was not dutiable under Item 10(d) of the Schedule to the Tariff Act.

Since the fuel oil did not in the Tribunal's view constitute goods in respect of which excise duty is imposed pursuant to s 5(1) of the *Tariff Act*, it held that the Commissioner's the ruling was incorrect. Accordingly, the Tribunal set aside the objection decision and allowed the taxpayer's objection in full.

¶7.15 Appeals

The High Court has granted a taxpayer special leave to appeal from the decision of the NSW Court of Criminal Appeal in *Agius & Ors v R* reported above in this newsletter. The Court of Criminal Appeal had upheld an interlocutory judgment which refused to grant a permanent stay on the second count of proceedings against the four persons, who were accused of tax conspiracy offences in a Wickenby-related matter.

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¶7.16 Other High Court appeals

Unit Trend Services Pty Ltd v FCT

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The Commissioner's appeal against the Full Federal Court decision in *Unit Trend Services Pty Ltd v FCT* concerning the application of the GST anti-avoidance provisions in Div 165 of the GST Act will be heard by the High Court.

The case concerned the use of the margin scheme in relation to commercial and residential properties. In a majority 2:1 decision, the Full Federal Court partially allowed both the taxpayer's appeal and Commissioner's cross-appeal from a 2010 decision of the AAT in which it was found that the taxpayer was entitled to use the margin scheme for some acquisitions of property, but did not have approved valuations for others, and that the GST anti-avoidance provisions did not apply.

The majority of the Full Federal Court found that the GST anti-avoidance provisions did not apply to any settlements up to and including 16 March 2005. Div 165 was excluded as the GST benefit on the end purchaser transactions was attributable to relevant choices made by the taxpayer.

The Qantas case

On 4 June 2013 in Brisbane, the Full High Court will hear the Commissioner's appeal against the Full Federal Court decision in *Qantas Airways Ltd v FCT* (2011) 81 ATR 816 (click here to view http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/113.html). The Full Federal Court had unanimously allowed an appeal by Qantas Airways Ltd against an earlier AAT decision that the airline had made a supply for GST purposes when a passenger cancelled his or her flight booking or didn't show for the flight and no refund was either available or claimed.

Byrne Hotels Qld Pty Ltd

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On 8 June 2013 in Brisbane, the High Court will hear the Commissioner's application for special leave to appeal against the Full Federal Court decision in *FCT v Byrne Hotels Qld Pty Ltd*. A majority of the Full Federal Court confirmed that for the purposes of accessing the CGT small business concessions, a real estate agent commission incurred on the sale of a hotel business could be included as a 'liability' for the purposes of the 'maximum net asset value test' (which requires the test to be satisfied 'just before the CGT event'). This was the case even though the taxpayer was invoiced for commission after CGT event A1 (i.e. after entering the contract of disposal) and even though it was, in effect, contingent on the sale of the business being completed.

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Hart case

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Also on 8 June 2013 in Brisbane, the High Court will hear the taxpayer's application for special leave to appeal against the decision of the *Queensland Court of Appeal in Hart v Commonwealth Director of Public Prosecutions*. The court unanimously dismissed an appeal by an accountant against decision of the District Court of Queensland which granted an application by the Commonwealth Director of Public Prosecutions for a pecuniary penalty order that the accountant, Mr. Hart, pay the Commonwealth over $14.7m pursuant to Pt 2-4 of the Proceeds of Crime Act 2002. In doing so, the Court of Appeal dismissed the various grounds of appeal raised by the accountant, including that Pt 2-4 was constitutionally invalid.

RULINGS AND DETERMINATIONS

¶7.17 Living-Away-From-Home Allowances

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The Commissioner has released a new determination (TD 2013/4) outlining what he considers to be reasonable amounts under s 31G of the *FBT Assessment Act 1986* for food and drink expenses incurred by employees receiving a living-away-from-home allowance fringe benefit, for the FBT year commencing on 1 April 2013.

Readers will be aware that as long as the total of food and drink expenses for an employee (including eligible family members) does not exceed the amounts that the Commissioner considers to be reasonable, they do not require substantiation under section 31G. Where an employee receives a LAFHA fringe benefit, the employer can reduce the taxable value of the fringe benefit by the exempt food component provided the expenses are either:

- equal to or less than the amount the Commissioner considers reasonable under paragraph 31G(1)(b); or
- substantiated in accordance with the requirements in subsection 31G(2).[1]

1 Where the total of an employee's food or drink expenses exceeds the amount the Commissioner considers reasonable, the substantiation provisions under section 31G of the FBTAA will apply. The exempt food component will be so much of the food and drink expenses (less the applicable statutory food total) that are substantiated by the employee. Where substantiation is required, all food and drink expenses must be substantiated before they can be treated as an exempt food component. Where food and drink expenses exceed the reasonable amount, and are not substantiated in full, the reasonable amount will be exempt, but the employer will be subject to FBT in respect of any excess paid to the employee over the reasonable amount.

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Table 1: Amounts of reasonable food and drink — within Australia

	Per week
One adult	$233
Two adults	$350
Three adults	$467
One adult and one child	$292
Two adults and one child	$409
Two adults and two children	$468
Two adults and three children	$527
Three adults and one child	$526
Three adults and two children	$585
Four adults	$584

('Adults' for this purpose are persons who had attained the age of 12 years before the beginning of the FBT year).

For larger family groups, the above figures can be increased by:

- $117 for each additional adult
- $59 for each additional child.

Table 2: List of countries*

Country	Cost Group	Country	Cost Group
Albania	1	Libya	3
Algeria	4	Lithuania	3
Angola	6	Luxembourg	5
Antigua and Barbuda	4	Macedonia	1
Argentina	1	Malawi	2
Austria	5	Malaysia	3
Azerbaijan	4	Mali	4
Bahamas	5	Malta	4
Bahrain	3	Mauritius	3
Bangladesh	2	Mexico	1
Barbados	5	Monaco	6
Belgium	5	Morocco	3
Bermuda	5	Mozambique	1
Bolivia	1	Myanmar	3
Bosnia	2	Namibia	3
Brazil	5	Nepal	2
Brunei	2	Netherlands	5
Bulgaria	3	New Caledonia	5

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Country	Cost Group	Country	Cost Group
Burkina Faso	3	New Zealand	4
Cambodia	1	Nicaragua	1
Cameroon	4	Nigeria	4
Canada	4	Norway	6
Chile	2	Oman	5
China (includes Macau & Hong Kong)	4	Pakistan	1
Colombia	4	Panama	2
Congo Democratic Republic	3	Papua New Guinea	4
Cook Islands	4	Paraguay	1
Costa Rica	1	Peru	3
Cote D'Ivoire	5	Philippines	3
Croatia	4	Poland	4
Cuba	2	Portugal	4
Cyprus	4	Puerto Rico	3
Czech Republic	4	Qatar	4
Denmark	6	Romania	3
Dominican Republic	3	Russia	5
East Timor	2	Rwanda	2
Ecuador	2	Saint Lucia	3
Egypt	2	Saint Vincent	2
El Salvador	1	Samoa	4
Eritrea	1	Saudi Arabia	2
Estonia	4	Senegal	3
Ethiopia	1	Serbia	2
Fiji	2	Sierra Leone	2
Finland	5	Singapore	5
France	5	Slovakia	4
Gabon	5	Slovenia	3
Gambia	2	Solomon Islands	2
Georgia	2	South Africa	2
Germany	5	Spain	4
Ghana	3	Sri Lanka	1
Gibraltar	4	Sudan	2
Greece	4	Surinam	2
Guatemala	2	Sweden	5
Guyana	2	Switzerland	6
Hungary	3	Syria	3

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Country	Cost Group	Country	Cost Group
Iceland	5	Taiwan	3
India	3	Tanzania	2
Indonesia	3	Thailand	3
Iran	2	Tonga	3
Irish Republic	5	Trinidad and Tobago	4
Israel	5	Tunisia	2
Italy	5	Turkey	4
Jamaica	3	Uganda	1
Japan	5	Ukraine	3
Jordan	4	United Arab Emirates	4
Kazakhstan	3	United Kingdom	5
Kenya	3	United States of America	4
Korea Republic	5	Uruguay	2
Kuwait	4	Vanuatu	4
Laos	1	Venezuela	5
Latvia	4	Vietnam	1
Lebanon	4	Zambia	3

* If the employee lives away from home in a country that is not shown in Table 2 the employee can use the amount for Cost Group 1 in Table 3.

Table 3: Amounts of reasonable food and drink — outside Australia cost groups

Cost group	Food and drink for one adult
1	$137
2	$201
3	$246
4	$310
5	$419
6	$510

Where the employee is accompanied by other family members while overseas, the reasonable food and drink amount per week for the family is worked out by multiplying the amount shown in Table 3 by the relevant factor in Table 4 below.

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Table 4: Factors to apply for family groups — overseas

Family group	Factor
Two adults	1.5
Three adults	2.0
One adult and one child	1.25
Two adults and one child	1.75
Two adults and two children	2
Two adults and three children	2.25
Three adults and one child	2.25
Three adults and two children	2.5
Four adults	2.5

For larger family groups, these amounts can be increased:

- for each additional adult by a further 50% of the relevant single adult rate in Table 3
- for each additional child by a further 25% of the relevant single adult rate in Table 3.

Date of effect

This Determination applies to the FBT year commencing on 1 April 2013. However, the determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the determination.

¶7.18 GST: Adjustment notes: Draft GST Ruling GSTR 2013/D1

Click here to view

This Draft Ruling, released on 27 February 2013, sets out the requirements for adjustment notes under Div 29 of the GST Act. In particular, it outlines:

- when a document is in the approved form for an adjustment note
- the information requirements that the Commissioner has determined under s 29-75(1)(c) and an explanation of how those information requirements in the A New Tax System (Goods and Services Tax) Adjustment Note Information Requirements Determination 2012 apply
- when the Commissioner will treat a particular document as an adjustment note even though that document does not meet all of the adjustment note requirements under s 29-75(1).

The Draft Ruling also summarises the circumstances when a decreasing adjustment can be attributed without an adjustment note as determined by the Commissioner under s 29-20(3).

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It does not however consider third party adjustments and third party adjustment notes under Div 134. Nor does it consider in detail special rules in the GST Act that may be relevant to adjustment notes, including those concerning agents, insurance brokers, GST groups and GST branches.

¶7.19 GST: Payment fee charged by the supplier for 'supply failure' is not consideration for a supply

GST Determination GSTD 2013/1

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This determination (issued as a final determination on 27 February 2013) states that the payment of a failed payment fee is not consideration for a supply in the circumstances 'when a payment for a supply fails'. This is intended to cover situations where there is an attempt to make a payment for the underlying supply by way of a cheque or direct debit on the recipient's bank account but the attempted payment is dishonoured or declined and the supplier's financial institution imposes an 'inward dishonour fee' on the supplier.

The supplier and the recipient have agreed that if the payment fails, the recipient will be liable to pay a fee (which may be included in the agreement or contract for the underlying supply, or in the terms of the Direct Debit Authority for a direct debit, or because the supplier's ability to charge a failed payment fee is specified by statute).

In these circumstances, the determination states that the payment of a failed payment fee is not consideration for either a financial supply or any other supply. However, the determination also states that the characterisation of a payment for GST purposes is dependent upon the facts in each case and that as a result it may be possible for the payment of a failed payment fee to have a sufficient nexus with the underlying supply for the failed payment fee to form part of the consideration for that supply.

Class Ruling CR 2013/13: GST treatment of developer contributions and other dedications of land made to NSW councils.

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This ruling applies to all councils that are members of the Local Government Association of NSW and the Shires Association of NSW. The ruling states that developer contributions (either monetary or in kind) imposed on or after 1 July 2013 in relation to the provision of a development consent are exempt under s 81-10 and s 81-15 of the GST Act. It also considers the GST treatment of dedications of land or infrastructure made to Council (or another entity) for which the Council does not grant a development consent and for which consideration is not provided by the Council or any other entity. The ruling applies from 1 July 2013.

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Class Ruling CR 2013/14: GST: goods and services supplied by dentists.

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This ruling applies to dentists who are members of the Australian Dental Association. The ruling states that the supply of dental services is GST-free under s 38-7(1) of the GST Act and the supply of goods in the course of supplying the GST-free services is also GST-free under s 38-7(3). It also states that supplies of various medical aids and appliances used in the dental industry are also GST-free under s 38-45(1). The ruling applies on or after 20 February 2013.

STATE TAXES

¶7.20 Vic: Land tax — SRO webinars

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The Victorian State Revenue Office has advised that it will run weekly webinars for the month of March on land tax. The webinars provide an introduction to land tax and will cover joint ownerships, exemptions, property valuations, objection processes, and website demonstrations. Further details, including registration requirements, are available on the SRO website (www.sro.vic.gov.au; Vic stamp duty: revised duties forms — transitional period extended).

¶7.21 Vic: Revised duties forms

Click here to view

On 17 December 2012, the Victorian State Revenue Office (SRO) released 11 revised duties forms. The SRO had required that the revised forms be used from 1 March 2013 onwards.

Following requests to extend this date, the SRO says the cut-off date has now been postponed until 1 May 2013. That is, forms signed/attested to on or after 1 May 2013 must be submitted to the SRO using the new versions. Forms signed/attested to prior to 1 May 2013 may be submitted on either the new or old versions of the forms.

¶7.22 Qld: Payroll tax — contractors, workers on-hired to government

Click here to view

The Qld Office of State Revenue (OSR) has issued the following new harmonised Public Rulings:

- PTA021 — Exemption for contractors ordinarily rendering services to the public
- PTA022 — Contractors — services not ordinarily required
- PTA028 — Employment agency contracts -- workers on-hired to government.

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The OSR says PTA021 and PTA022 explain the Commissioner's Practice in relation to administration of certain exemptions to the contractor's liability provisions in the *Payroll Tax Act 1971* (Qld). PTA028 clarifies the correct payroll tax treatment of payments made by an employment agent to a worker on-hired to a government department.

The Rulings have effect from 1 July 2008.

¶7.23 WA: Stamp duty — nominal duty relating to deceased estates — Commissioner's Practice

Click here to view

The WA Office of State Revenue (OSR) has issued Commissioner's Practice DA 29.0 (Nominal duty for certain dutiable transactions relating to deceased estates) which outlines how the Commissioner will apply duty to the transfer of dutiable property as a result of a distribution under a will, a distribution on intestacy, a vesting pursuant to a court order, or a deed of family arrangement. The Commissioner's Practice took effect on 19 February 2013.

¶7.24 WA: Government pledges to raise payroll tax threshold

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On 26 February 2013, the WA Liberal Party announced that a Liberal Government, if re-elected in WA, would raise the payroll tax threshold from its current level of $750,000 to $800,000 in 2014–15 and then $850,000 in 2016–17. WA Treasurer Troy Buswell said more than 16,000 employers would save $121m through this tax relief measure.

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SECTION 3 — QUESTIONS AND ANSWERS

¶7.25 Writing off bad debt from family trust

Date Published	13 March 2013	Subject	Tax
Adviser	Luis Batalha B Com, LLB (Hons I)	Library Name	Q&A Library
Firm	batallion legal	Source Industry	Accounting services

Question

I have a client (75 years old) and his wife (74 years old) who have a 50:50 farm partnership, which effectively ended on 20 December 2012 when they sold off the farm and all the stock. They came to me from a medium-sized accounting firm with four years of outstanding tax returns. I have completed and lodged 2009, 2010 and 2011, and I am just finalising 2012.

On the balance sheet for the partnership is a debtor line item:

Current assets
Loan — X X X Family Trust DR $113,234

This has been unchanged since 2007, which is the earliest tax return that I have access to. Previously the client (who suffers from a severely debilitating disease which impedes his memory) gave me little guidance on this. So I accepted it at face value.

Today he reluctantly told me that this X X X Family Trust relates back to when he became financially insolvent, and a previous accountant pressured him into setting up a corporate trustee/family trust. In 1992 the company was liquidated and a search of ASIC shows no record of its existence. The $113,234 does not exist, and has not existed for as long as he can remember. There are no 'hidden' assets anywhere.

Recently, as a result of applying for Centrelink pensions, the existence of the trust came into question.

My client approached a lawyer (around August 2012), and the lawyer amended and updated the trust so that the beneficiaries now include not just him and his wife but also his son and daughter and their grandchildren.

There is no money in the trust.; the lawyer apparently didn't suggest that the trust be wound up!

Can I write off the $113,234 as a bad debt, either on the 2012 or 2013 partnership tax return?

Answer

Given that there is no reasonable prospect of the debt ever being repaid, it seems that it's writing off is appropriate in the 2012/13 income year, being the year in which the debt will be formally written off.

For the writing off of the debt to be deductible, the debt must be in existence and be written off as a bad debt. A release of a debt extinguishes it, leaving nothing to be incurred within the meaning of ITAA 1997

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s 8-1, nor to be written off as bad under ITAA 1997 s 25-35 (*Point v FC of T* 70 ATC 4021). This is also the case wherever a debt is released, compromised or otherwise extinguished by the voluntary or acquiescent act of the creditor (*GE Crane Sales Pty Ltd v FC of T* 71 ATC 4268).

To qualify for a bad debt deduction under ITAA 1997 s 25-35, the debt or part of a debt must not only be objectively bad (*Case X9*, 90 ATC 144) but must satisfy the two conditions set out below.

- The debt must be written off as bad during the year of income in which the deduction is claimed. There must be a physical writing off of the debt — not necessarily a book entry but something in writing to indicate that the creditor has treated the debt as bad (e.g. a notation on a ledger card or in an account). It is not sufficient that the debt is written off when the accounts are completed after the close of the income year (in conformity with usual accounting practice) and merely relates back to the income year just closed (*Point v FC of T* 70 ATC 4021).
- Except in the case of taxpayers in the business of lending money, the debt must have been brought to account by the taxpayer as assessable income (e.g. *Case 7/2000*, 2000 ATC 168). This requirement will not be satisfied by a taxpayer who lodges returns on a cash basis because those debts will not have been brought to account as assessable income (*Case P78*, 82 ATC 381).

¶7.26 Writing off losses to capital profits reserve

Date Published	13 March 2013	**Subject**	Tax
Adviser	Rob Power	**Library Name**	Q&A Library
Firm		**Source Industry**	Accounting services

Question

My client company has retained earning $100,000 and current year has a capital loss of $50,000.

Can I put the capital losses under equity account as ‘capital reserve’ instead of showing it in the profit and loss, which will affect the retained earning?

In next year, can I declare the $100,000 dividend out of the retained earning?

Answer

Your question is more of an accounting/reporting issue as opposed to a tax issue which is my expertise. However, I would have thought whether you record the loss to a capital reserve or through the P&L that this would make no difference to the company’ ability to declare and pay a dividend in the following year due to the amendments made to the Corporations Act from June 2010.

The Corporations Act formerly provided that a company could only pay dividends out of profits. The term profits encapsulated both trading and capital profits. The *Corporations Amendment (Corporate Reporting Reform) Act 2010* amended this requirement with effect from 28 June 2010. The new requirements are set out in section 254T as follows:

254T Circumstances in which a dividend may be paid

(1) A company must not pay a dividend unless:

- the company's assets exceed its liabilities immediately before the dividend is declared and the excess is sufficient for the payment of the dividend; and
- the payment of the dividend is fair and reasonable to the company's shareholders as a whole; and
- the payment of the dividend does not materially prejudice the company's ability to pay its creditors.

Note 1: As an example, the payment of a dividend would materially prejudice the company's ability to pay its creditors if the company would become insolvent as a result of the payment.

Note 2: For a director's duty to prevent insolvent trading on payment of dividends, see section 588G.

(2) Assets and liabilities are to be calculated for the purposes of this section in accordance with accounting standards in force at the relevant time (even if the standard does not otherwise apply to the financial year of some or all of the companies concerned).

¶7.27 Division 7A — repayment of loan

Date Published	13 March 2013	**Subject**	Tax
Adviser	Luis Batalha	**Library Name**	Q&A Library
Firm	batallion legal	**Source Industry**	

Question

This question is about DIV 7A.

One company had high balance of loan to shareholder/director (debit balance of unsecured loan) without a loan agreement during 2012 financial year. This is subject to DIV 7A issue. Tax return due date has not come yet and has not lodged yet.

That shareholder tries to pay back the debt by buying a new car and business from his pocket. I believe that this is not wrong way to pay back.

However, purchase agreements of them are instalment payment. Shareholder fixes the contracts under his name and will pay for a couple years without using the company's fund. Company is not a guarantee, anything. All responsibilities to pay are taken by him; ownership of the business and the car change to the company under the contracts.

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For example, DIV 7A loan balance is $100,000. This has to be paid back by the lodgment date. Shareholder fixes the contract to buy total $100,000 of business and a car by instalment payment for three years, off course, without using the company's fund.

In this case, can he pay back the debt, $100,000 to the company and avoid DIV 7A?

Answer

To the extent that the shareholder individual has actually transferred assets to the company with a value of $100,000 (or less), it would appear that the loan has been fully (or partially) repaid by the shareholder individual (ITAA 1936 s 109D(1)). It is a matter of the extent of value transferred to the company and whether or not the assets are placed in the name of the company.

Moreover, the shareholder individual must assume responsibility for the payment of the instalments for the car and business acquired in the name of the company to overcome the ITAA 1936 Div 7A issue.

¶7.28 Low value asset write-off

Date Published	13 March 2013	Subject	Tax
Adviser	Rob Power	Library Name	Q&A Library
Firm		Source Industry	Accounting services

Question

My client has hardware and software related to a product of theirs. The hardware will have a longer life than the software and the software will be updated on a regular basis, however, the hardware cannot be used without the software and vice versa.

So can these assets be separated and deducted immediately by their customers for the $6500 capital write-off if the hardware is $4500 and the software is $3500 or will they need to depreciate over a few years based on a joint capital cost of $8000?

Answer

This is a tricky question! The write-off in section 328-180 ITAA 1997 applies to a depreciating asset. Typically computer hardware is a depreciating asset and in-house software is a depreciating asset and both can be viewed as separate assets in their own right.

In your case, however, it seems one cannot be used without the other indicating an extreme reliance on each other. This could indicate the two together represent one useable asset such that their cost is aggregated on the basis it is one asset. Refer to TR 94/11 and TR 93/12.

Maybe there is a need to consider a private binding ruling.

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¶7.29 Contributions — bring forward rule for a 64 year old

Date Published	13 March 2013	Subject	Tax
Adviser	Graeme Prowse	Library Name	Q&A Library
Firm		Source Industry	Accounting services

Question

On 1 July 2012 our client was age 64. He made a non concessional contribution of $200,000 before his 65th birthday without breaching the $150,000 NCC cap as allowed under the three-year bring forward rules ITAA s292-85(3), (4).

My question is what is the maximum amount he can contribute in the 2013/14 year when he will be age 65 on 1 July 2013? Which of the following is it?

1. $150,000, the NCC cap under ITAA s292.85(2)

2. $250,000, based on ITAA s292.85(4)(b) (but this amount must be made in two or more contributions with no contributions exceeding $150,000).

Assume client will meet the work test for making contributions after age 65.

Answer

Where an individual is under 65 at any time in a year then the bring-forward rule can apply to all contributions in that year (section 292-85(3)(b)). This provides for a cap of $450,000 which can be used at any point of the relevant three year period.

As he has made a $200,000 contribution in the current year he is able to contribute a further $250,000 this year.

Assuming that no such contribution is made then for FY14 his contribution cap is the cap as worked out for the first year (i.e. $450,000) less contributions made so far in that three year period. The remaining available amount is $250,000 in your case.

The amount of non-concessional contributions your client can make for FY15 will be $450,000 less the sum of all contributions made in FY13 and FY14.

Subsection 292-85(4) applies for these three years as the conditions in subsection 292-85(3) are met for FY13.

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¶7.30 Sign up payment — tax deductibility

Date Published	13 March 2013	Subject	Tax
Adviser	Luis Batalha B Com, LLB (Hons I)	Library Name	Q&A Library
Firm	batallion legal	Source Industry	Accounting services

Question

A medical centre enters into contracts with dctors who operate their own businesses from within the medical centre and pay the medical centre a 35% fee for providing administration services.

The medical centre is currently in negotiation with a doctor for the doctor to move from his current business/practice and operate from the medical centre. The doctor has requested an upfront payment of $40,000 and has agreed to stay at the centre for four years and pay 45% administration cost rather than the standard 35%.

If the they reach an agreement as per the above, do you believe the upfront payment of $40,000 by the medical centre is a section 8 deduction? If this is not a straight out deduction, could the $40,000 be written off over the four years of service?

Can you also provide your opinion on how the receipt should be treated by the doctor? Would it be on a revenue or capital basis?

Answer

Considering the one off, non-recurring character, of the initial payment, it may be that no immediate deduction will be available under ITAA 1997 s 8-1 (*Sun Newspapers Ltd v FC of T* (1938) 61 CLR 337; 5 ATD 87).

A 20% annual write off, under ITAA 1997 s 40-880, may, however, be available, as the incurring of the initial cost is related to the taxpayer's business, but it may not be otherwise deductible/claimable under any other provision of the income tax legislation.

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¶7.31 Stamp duty on sale of property to SMSF

Date Published	13 March 2013	**Subject**	Tax
Adviser	William Cannon	**Library Name**	Q&A Library
Firm		**Source Industry**	Accounting services

Question

My question is in relation to stamp duty payable in NSW and concessions available.

Our client owns a business real property in NSW in their own name valued at $3.5m. Our client wishes to transfer this property into their SMSF. The SMSF has more than $4m in cash so it able to purchase the property outright.

My first question is, if the SMSF purchased the property outright is my understanding correct that the stamp duty concessions outlined in s62A *Duties Act 1997* would apply in the above case and that:

(i) duty of $50 would be payable if purchased in the name of the SMSF trustee (s62A(1)), or

(ii) duty of $500 would be payable if purchased in the name of a custodian of the SMSF trustee,

rather than ad valorem rates, provided that the other requirements in s62A(1) and s62A(3) are met (i.e. property to be held for the sole benefit of the client if there is more than 1 member in the SMSF)?

My second question is, if the SMSF did not have sufficient funds to purchase the property outright and the SMSF trustee decided to undertake a limited recourse borrowing arrangement (LRBA) to purchase the property would the stamp duty concession still apply? In this case my understanding is that the property would have to be purchased in the name of the trustee of the bare or holding trust.

Is this the same as purchasing the property in the name of custodian of the SMSF trustee and therefore s62A(3) would apply?

Answer

Your question indicates that the property is owned in the names of more than one person.

The exemption in section 62A of the *Duties Act 1997* (NSW) only applies to a transfer ‘from a person’ to the trustee or custodian. That implies the exemption will only apply where there is one transferor. It could apply to separate transfers of interests in the property (as an interest in property is dutiable property); for example, if the property is owned as tenants in common. the transfer of a one half interest as tenant in common would seem to satisfy the section requirements.

However, it would be necessary to obtain a private ruling from the OSR before executing the contract or transfer to be sure the Commissioner accepts that the exemption applies. In applying for the ruling you can’t put alternatives to the Commissioner. For example if you want him to rule whether a transfer by joint

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owners will qualify for exemption you can't then say if the exemption does not apply in that case will it apply to a transfer by a tenant in common of his/her half interest in the property. You have to get separate rulings for each question.

In my view subject to the other provisions being satisfied, the section does not exempt a joint transfer. However, I have not asked the Commissioner that question before and he may agree that it does.

In my view subject to the other provisions of the section being satisfied, the section should exempt a transfer by a tenant in common of his/her interest in the property. However, again obtaining a ruling would be necessary as the Commissioner may not agree.

Regarding your second question, the bare trustee should be a custodian. However, again you would need to get a ruling on this question from the OSR giving them a copy of the proposed trust deed, because these deeds are not all the same depending on the lender and the answers to the questions of what constitutes a 'bare' trust and who is to be regarded as a custodian are not clear.

¶7.32 Tax invoices and credit card payments

Date Published	13 March 2013	**Subject**	Tax
Adviser	Tony van der Westhuysen	**Library Name**	Q&A Library
Firm		**Source Industry**	Government

Question

I work in a public hospital and the accounts payable department has asked me to pay on a statement. (Motorpass Diesel have given us statements with the breakdown of the cost and GST, GST exclusive and the total.)The usual practice, however, is to ask the supplier for a tax invoice.

On the bottom of each page it states: 'In accordance with Tax Ruling F2008L03345, your business will not need to retain original Tax Invoices to claim input tax credits for the GST.'

I have tried to look this up with no luck. Can you please advise if this is valid ruling and the statement correct?

Answer

'F2008L03345' refers to a determination that allows corporate credit and charge card holders to claim input tax credits without holding a tax invoice in certain circumstances. The concession was granted to reduce compliance costs for entities claiming input tax credits, by allowing the holder of certain corporate credit or charge cards to claim an input tax credit without holding a tax invoice. Instead, the cardholder is required to hold a corporate card statement (issued by the corporate card provider) that met certain information requirements specified in the determination.

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¶7.33 Partnership of SMSF funds

Date Published	13 March 2013	Subject	Tax
Adviser	Luis Batalha B Com, LLB (Hons I)	Library Name	Q&A Library
Firm	batallion legal	Source Industry	Accounting services

Question

I want to purchase business real property (an office) in my super fund in partnership with another super fund. Both super funds to own 50% each without any borrowings.

My questions are:

1. Does the purchase need to as ‘tenants in common’ or can it be a ‘joint tenants’?
2. Does the trustee have to a company, as currently the trustees of my super fund are myself and my wife?
3. Are there any specific restrictions in purchasing assets like this in a partnership of super fund entities?

Answer

Responding to your queries:

1. The interests of the two super funds should be owned as tenants in common (not joint tenants), since under a joint tenancy, if the trustees of one of the superannuation fund die, then the property will pass to the trustees of other superfund. This would be inconsistent with superannuation law (in that benefits are to be paid to the member’s dependants: SIS Act s 62(1)(iv)) and/or breach the terms of the deeds of each superannuation fund.
2. Strictly speaking, there may be nothing to prevent the ownership of the property from being effected through individuals, as trustees of the two superannuation funds. However, it may be preferable from an asset protection perspective to have corporate trustees of each of the superannuation funds.
3. There should be a partnership agreement in place between the two superannuation funds to ensure that the terms of their purchase are properly set out. Particularly, there should be a clear exit strategy for both funds, and, at the very least in the event of a dispute there should be provision for the forced sale of the property (to ensure that neither fund is stuck with the other fund indefinitely, or until a resolution is reached).

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