

September 2009

## CLIENT ALERT

### Loans and In-house Asset Rules

In a recent decision, the AAT upheld a non-compliance notice issued to a self-managed superannuation fund (SMSF) for breaching the in-house asset rules.

The SMSF made loans to a company, which was a related party of the fund. The total of the loans exceeded the in-house asset rules limit of 5%.

The Tribunal noted that the loans remained outstanding for more four years after the breach. In addition, it considered the trustees' offer of enforceable undertakings came too late in the day.

A regulated superannuation fund is, generally, restricted from having more than 5% of the total market value of its assets at the end of an income year invested in in-house assets. An in-house asset includes a loan to a related party of the fund.

- ∅ A non-complying SMSF is subject to a tax rate of 45% rather than the 15% concessional tax rate available to a complying fund.
- ∅ An SMSF cannot extend a loan to a member (or a member's relative), even where the in-house asset rules are not breached.

### Personal Services Income

The AAT has affirmed that the Personal Service Income (PSI) rules applied to attribute the income of a company to a taxpayer who was the sole director, shareholder and employee of the company.

The Tribunal found that the taxpayer did not satisfy any of the tests required to be excluded from the rules. It also found that the company did not apply for a Personal Services Business (PSB) determination, which would exclude the company from the operation of the PSI rules.

PSI is included in an individual's assessable income if it is mainly derived from the individual's personal exertion, whether the income is received directly by the individual or through an interposed entity. However, the rules do not apply if a PSB exists or one of the PSI tests is satisfied.

### Meaning of Contributions

The Tax Office has released a Draft Taxation Ruling in which the Commissioner explains his preliminary views on the meaning of the word 'contribution' for superannuation purposes.

According to the draft ruling, an amount will be considered a superannuation contribution if the amount increases the capital of a receiving superannuation fund.

A contribution includes a payment of money and an in-specie contribution. The timing of when the contribution is taken to have been received by a fund depends on the nature of the contribution.

- ∅ The timing of a contribution is important for superannuation guarantee purposes, and determining the relevant income year for deducting the contribution and including it in the assessable income of a receiving fund.

### Deductibility of Interest on Loan to Settle Trust

The Tax Office has released a Taxation Determination in which the Commissioner sets out his views on the deductibility of interest incurred on a loan used to settle a trust to benefit the borrower and others.

The determination states that the interest incurred on a loan will only be deducted to the extent to which a taxpayer has used the borrowed monies to gain or produce assessable income of the taxpayer.

The determination also states that, generally, interest incurred on a loan to settle a 'hybrid trust' is not deductible either to a taxpayer or other beneficiaries of the trust.

A hybrid trust is a trust that has both fixed and discretionary elements.

## Interest on Loan to Acquire Options

The Tax Office has released an Interpretative Decision stating that interest incurred on a loan used to acquire options under an employee share scheme is not deductible.

In the Tax Office's view, the interest is incurred too early in time and, therefore, does not have a connection with the gaining or producing of a taxpayer's assessable income.

## Investment Commitment Time

In another Interpretative Decision, the Tax Office states that an option in a contract to delay the construction of a depreciating asset does not alter the investment commitment time for the purposes of the small business and general business tax break.

One of the requirements for the one-off tax deduction is that the investment commitment time for an eligible asset must occur on or after 13 December 2008.

## Assistance for Small Businesses

The Tax Office has recently introduced two measures to assist businesses that have an annual turnover of less than \$2 million to manage their tax payment obligations.

These measures are:

- twelve-month general interest charge (GIC)-free payment arrangements; and
- deferral of activity statement payment due dates.

### GIC-free payment arrangements

A business with an activity statement debt, such as GST and FBT, can apply for a twelve-month GIC-free payment arrangement.

An application for an arrangement must be entered into between 1 June 2009 and 30 June 2010.

- Ø A business can renegotiate an existing payment arrangement entered into before 1 June 2009 to take advantage of the GIC-free payment arrangement.

### Deferral of payment due dates

A business can also request a deferral of payment on its next activity statement. During the period of the deferral, no GIC will apply.

The maximum deferral period will depend on whether a business lodges its activity statement monthly, quarterly or annually.

Activity statements eligible for a deferral include:

- monthly statements for the period May 2009 to June 2010 (inclusive);
- quarterly statements for the period June 2009 to June 2010 (inclusive); and
- annual statement for the 2008/09 income year.

A payment deferral request must be made on or before the original due date of an activity statement.

## PAYG Withholding and Foreign Employment Income

An Instrument has been registered ensuring PAYG withholding from payments made to individuals employed in foreign countries closely approximate the Australian income tax payable on the relevant foreign employment income.

Since 1 July 2009, employers are required to withhold amounts from salaries, allowances, bonuses and commissions paid to their employees deriving non-exempt foreign employment income.

The amount to be withheld will be calculated under the relevant PAYG withholding tax table, less any amount of tax to be withheld and paid to a foreign country.

The Instrument applies from 15 July 2009.

## Tax Returns Not Required for New SMSFs

The Tax Office has advised that newly registered self-managed superannuation funds (SMSFs) that have not legally been established will not be required to lodge a tax return in their first year of registration.

To be eligible for this concession, a new SMSF must:

- be registered in April, May or June of an income year;
- not be operating by 30 June; and
- not have received contributions or rollover amounts by 30 June.

The Tax Office says the supervisory levy of \$150 is not payable in an SMSF's first year of registration.

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