

# client alert

## tax news | views | clues

June 2010

### Division 7A Applies To 'Payments by Direction'

The Federal Court has confirmed that the deemed dividend provisions can apply where a payment is made by a debtor of a company to a shareholder at the direction of the company.

The taxpayer and her former de-facto spouse were the shareholders and directors in a private company. In the 2001 income year, the company directed US clients to pay over \$160,000 in debts owed to the company into the account of the taxpayer (of which she was sole signatory). The funds in the account were used for the private expenditure of the taxpayer and her former de-facto spouse.

The Court held that the deemed dividend provisions can apply if a company makes a payment to a shareholder by way of directing its debtors to make the payment. In the Court's view, there was no reason to construe the notion of 'pay' as requiring a direct flow of money from the payer to the payee, or that it precludes payment by direction.

Broadly, a payment or loan by a private company to a shareholder (or their associate) will be considered a deemed unfranked dividend unless steps have been taken to avoid this.

### Judgment of \$81.4 million Stands Against Trustee

A taxpayer has lost an appeal before the Qld Court of Appeal in which the taxpayer sought to exonerate itself from a liability to pay tax imposed.

The taxpayer was the trustee of four trusts. The Commissioner commenced proceedings against the taxpayer to recover outstanding income tax, interest and penalties which related to the trusts. In an earlier judgment, the Qld Supreme Court granted the

Commissioner summary judgment against the taxpayer for \$81.4 million.

The taxpayer argued that it was not personally liable for the tax because it had not received any of the monies which were the subject of the Commissioner's assessment.

However, in the Court's view, the relevant provisions of the tax legislation that the taxpayer relied on did not have potential application to limit its liability as it was assessed under a provision relating to the tax treatment of trusts. Therefore, the Court affirmed that the taxpayer was liable for the \$81.4 million.

### Personal Superannuation Contributions Deduction Denied

The AAT has refused a taxpayer's claim for a deduction for personal superannuation contributions after ruling that he did not satisfy the 'maximum earnings as employee condition'.

Following a work accident in 2004, the taxpayer was unable to work and received workers' compensation payments until he retired on grounds of invalidity on 12 July 2007. The taxpayer received a lump sum payment upon his retirement. During the 2007/08 income year, the taxpayer made personal contributions to two superannuation funds.

The Tribunal found that the taxpayer was engaged in the relevant activity of holding an office for the 12 days in July 2007. While the taxpayer said he was not engaged in any activity because he was unable to work, the Tribunal stated that a person could hold office that does not require any activity.

As a result, the Tribunal agreed that the 10% test for the maximum earnings as employee was not satisfied, as the taxpayer's lump sum payment (which was attributable to those activities) clearly exceeded 10% of his assessable income for the 2007/08 income year.

## SMSF Trustees with Enduring Power of Attorney

The Tax Office has released a Ruling explaining the Commissioner's views on how a person who holds an enduring power of attorney in respect of a member of a self-managed superannuation fund (SMSF) can be a trustee in place of the member (or a director of the corporate trustee) for the purposes of the superannuation legislation.

The Tax Office considers that a legal personal representative (LPR) does not become a trustee of the fund (or a director of the corporate trustee) merely by virtue of holding an enduring power of attorney. Rather, the LPR must be appointed as a trustee of the SMSF in accordance with the trust deed, the superannuation legislation and any other relevant legislation.

Furthermore, the Tax Office says a member must cease to be a trustee of the SMSF or a director of the corporate trustee, except where the LPR is appointed as an alternate director. Provided that the alternate director can only exercise the powers of a director where the main director does not, the Ruling says it is not necessary that the member resign as a director of the SMSF in these circumstances to satisfy the superannuation legislation.

## SMSF Trauma Insurance Policies

The Tax Office has also released a Determination in which it sets out the circumstances where a trustee of an SMSF can purchase a trauma insurance policy in respect of a member and still satisfy the superannuation legislation, in particular the sole purpose test.

To briefly explain, the sole purpose test requires an SMSF to be maintained solely for at least one core purpose (eg the provision of benefits for a member on or after the member's retirement) and, also possibly, at least one ancillary purpose (eg the provision of benefits for a member on or after the member's death).

The Commissioner says any benefits payable under a trauma insurance policy must be payable to a trustee of the SMSF and become part of the assets of the SMSF, at least until the relevant member can satisfy a condition of release. If an SMSF trustee purchases a trauma insurance policy that provides for benefits payable under the policy to be paid directly to someone other than a trustee of the SMSF (eg the insured member or member's relative), the Tax Office says this would contravene the sole purpose test.

## Super System Review: Preliminary Report on SMSFs

The Super System Review has released its preliminary report, *Self-Managed Super Solutions*, which contains a host of recommendations. While the Government has not responded to the recommendations, if implemented, they will impact on the SMSF landscape.

The report makes the following key recommendations:

- **Exotic assets prohibited** — Investments in collectables and personal use assets should be prohibited, such as paintings, jewellery, antiques, wine, exotic cars and yachts.
- **In-house assets prohibited** — SMSFs should be prohibited from any in-house assets. (In brief, an in-house asset is an investment in a related party of the fund.)
- **Leverage and instalment warrants** — A review of the borrowing exception (ie instalment warrants) should be carried out in two years to ensure that borrowing has not become a significant focus of SMSFs.
- **Annual member disclosure** — The corporations legislation should be amended to ensure SMSFs' members are provided with key information annually.
- **Illegal early release** — Existing tax laws should be amended so that amounts illegally early released are taxed at the superannuation non-complying tax rate (currently 46.5%) rather than an individual's marginal tax rate.
- **Binding SMSF rulings** — The Tax Office should be given the power to issue binding rulings in relation to SMSFs.

## Cents per Kilometre Rates

The Government has released the cents per kilometre rates for calculating motor vehicle expenses for the 2009/10 income year:

<b>Car</b>	<b>Non-rotary engine</b>	<b>Rotary engine</b>	<b>Rate per km</b>
Small car	1,600cc or less	800cc or less	\$0.63
Medium car	1,601-2,600cc	801-1,300cc	\$0.74
Large car	2,601cc or more	1,301cc or more	\$0.75

Important: This is not advice. Clients should not act solely on the basis of the material contained in this Bulletin. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. The Bulletin is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.

Liability limited by a scheme approved under Professional Standards Legislation