

# April Tax Update

- Recent tax cases and rulings
- New tax Bills
- Superannuation
- Compliance

This month, the following developments have occurred, which include recent case judgments, tax determinations, and government initiatives.

## ***Cases and Rulings***

### ***FCT v Swansea Services Pty Ltd [2009] FCA 402***

The Federal Court considered whether in acquiring and occasionally selling artworks the respondent was carrying on an “enterprise” for GST purposes. The Commissioner argued that it was simply a vehicle for carrying out the hobby of its sole director or, alternatively, was simply accumulating assets as an investment, but without disposing of them. The decision of the AAT after fact finding, that the purpose of acquiring the assets was to eventually sell them at a profit, was upheld by the Federal Court. Therefore the arrangement was deemed an “enterprise.”

Developments in the concept of “enterprise” have relevance to similar transactions such as purchase of boats, and also to similar investments by super funds.



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### ***FCT v Malouf [2009] FCAFC 44***

The Full Federal Court has allowed the Commissioner's appeal against the first instance decision, which held that the amount of \$33,250,000, being the balance of the amount payable under a contract for the purchase of land in Mt Evelyn in Victoria, was incurred in and referable to the 1999 income year when the contract for sale of the land was entered into. The balance of the purchase price was not payable until completion of Stage 1 of building work involved in the development of a retirement village. The Full Federal Court, in allowing the Commissioner's appeal, held that there was no pecuniary liability incurred by the taxpayer in the 1999 year of income and the obligation to pay the residue was not referable to the 1999 year of income.

### ***Pape v FCT***

The High Court ruled that the *Tax Bonus for Working Australians Act* (No 2) 2009 (Cth) is a valid law because it is supported by one or more expressed or implied heads of legislative power under the Commonwealth Constitution.

### **Anstis v FCT [2009] FCA 286**

The Federal Court has allowed a taxpayer's appeal from the decision of the AAT, and ruled that the taxpayer, as a recipient of Youth Allowance (which is assessable income), is entitled to a deduction under s8-1 ITAA 1997 for self-education expenses in an amount of \$920.

### **Suntory (Aust) Pty Ltd v FCT**

The Federal Court has held that it was not unlawful for the Commissioner to collect the increased excise duty on 'alcopops' following the rejection of the *Excise Tariff Amendment (2009 Measures No 1) Bill 2009* and *Customs Tariff Amendment (2009 Measures No 1) Bill 2009* by the Senate in March 2009.

The government has announced its intention to re-introduce the measure when parliament resumes in May 2009. Revenue collected between 27 April 2008 and 13 May 2009 will be validated. See [media release, 15 April 2009](#).

### **Taxation Ruling TR 2009/2**

The Commissioner considered the when payments should be considered genuine redundancy payments under s 83-175 of ITAA 1997 (the equivalent of bona fide redundancy payments in former s 27F of ITAA 1936). Payment must be received in consequence of an employee's termination; termination must involve the employee being dismissed from employment; dismissal must be caused by the redundancy of the employee's position; and finally, the redundancy

payment must be made genuinely because of a redundancy. The "genuine redundancy" payment cannot be contrived, or based on agreement between employee and employer to treat as redundancy.

An adjusted amount (according to years employed, super entitlements, voluntariness of redundancy etc.) may be tax free under s 83-170 of ITAA 1997. Any amount of a genuine redundancy payment in excess of the tax free amount will be taxable as an employment termination payment.

### **GSTR 2008/D5**

Where input tax credits are claimed on things purchased for use in an enterprise, and the actual use differs from that originally intended, this change in creditable purpose, triggers an adjustment (for example from 100% to 0% where a residential property intended for sale is leased instead).

This Tax Ruling changes how the adjustment is applied under Division 129 of the *GST Act 1999*. The Commissioner now takes a longer term view of the 'use' of the thing in relation to taxable 'supply.' For example, where a property developer genuinely has a dual application of a particular property (ie short term lease and eventual sale), taxable supply may be apportioned to both 'uses.' This removes the necessity for harsh adjustments. Apportionment should be calculated according to periods of use. Only acquisitions in relation to the property that are genuinely used for dual purposes should be apportioned

(e.g. marketing costs may be sale or rent-specific rather than dual-purpose).

This ruling only applies to transactions that occur after 19 August 2008. More treatment of this ruling is required to confidently interpret this decision. Developers should exercise caution when applying its principles.

### **New Tax Bills** **Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009**

Under this proposed legislation, Taxpayers who engage a tax agent or BAS agent may be exempt from administrative penalties for errors solely due to the agent's carelessness. The new Bill affects the *Tax Agent Services Act 2009*. The proposed provision provides that a taxpayer is not liable under that act if they (a) engage a registered tax agent or BAS agent, and (b) give the registered tax agent or BAS agent all relevant taxation information, and (c) the registered tax agent or BAS agent makes the statement, and (d) the statement results in a shortfall amount, and (e) the shortfall amount did not result from intentional disregard or recklessness as to the operation of a taxation law.

In order to comply with this provision it will be necessary to demonstrate to the Tax Office that the client has provided the registered tax agent with *all relevant taxation information*. This includes provision by the taxpayer of all requested information and also bringing to the attention of the tax agent or BAS agent all other

information which they would reasonably expect to be necessary. The burden on the tax agent is to demonstrate that they have acted with reasonable care. This does not require scrutiny of every item, or independent audit or review to verify the accuracy of the information. Reasonable fact gathering and information checking is sufficient.

To benefit from these proposed protections, tax agents should ensure that clients provide all relevant information before lodgement, and also ensure that neither party acts recklessly.

### **Superannuation News** **Part-pension Centrelink payments**

Part-pensioners may be entitled to an increase in their Centrelink payments as a result of taking advantage of the government's 50% reduction in the minimum drawdown amount for certain superannuation pensions in 2008/09. The measure is a response to concerns that meeting the minimum drawdown amount in 2008/09 would mean retirees having to sell investments assets and realise losses in a depressed market.

Pensioners should notify Centrelink if they wish to make changes. Contact Centrelink's Financial Information Service on 13 2300.

### **Tax Compliance** **SME \$100-\$250M turnover risk assessment project**

The ATO has made a commitment to risk assess 100% of the Small and Medium Enterprise (SME) population in the \$100-\$250 million turnover

bracket in the next four years. This is one of many risk-based projects undertaken by the ATO, aimed at achieving voluntary compliance.

The SME population is being targeted for several reasons. It is diverse, encompassing taxpaying entities and individuals who control high NET wealth, make considerable tax contributions, and employ over a quarter of Australia's working population (see Drummond, ['Contextualisation of the SME'](#) 2009). Many utilise complex structuring with low reporting obligations, and control and ownership is often veiled. Furthermore, the majority of information on these entities is

gleaned by the ATO from tax return data.

The ATO is encouraging taxpayers in the SME population to review their self-assessed tax position and address any adjustments by voluntary disclosure. This has the affect of improving their tax risk status in the eyes of the ATO. Because the ATO has determined to favour those who are voluntarily tax compliant, this will have the ultimate affect of encouraging an environment of self-assessment and disclosure, and reducing relative compliance costs- a definite boon in the current climate.

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