

# Developments in Tax August 2009



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## **Cases**

### ***White v FCT 2009 [2009] FCA 880***

The Federal Court has ruled that a partnership is not an “entity” for the purposes of s152-15(a)(ii) of ITAA 1997 (repealed). Accordingly, the total assets of two partnerships, in which a taxpayer was a partner, could not be aggregated with other assets of the taxpayer to determine whether the taxpayer exceeded the maximum net asset value test. This test, in Div 152, is used to determine whether an entity can access the small business tax concessions

This decision has relevance for taxpayers involved in partnerships, as only their share of partnership assets will be taken into account when determining whether they pass the maximum net assets test for the purposes of accessing the small business tax concessions.

### ***FC of T v Barnes Development Pty Ltd [2009] FCA 830***

A company which was indebted to one of its directors was ordered to pay the amount owed to the director to the Commissioner under the third party liability provisions in Div 260 of

Sch 1 to the *Taxation Administration Act 1953*.

The court rejected the argument that s 260-20, which provides a sanction for non-compliance with a s 260-5 notice under the criminal law, precluded the Commissioner from suing in debt to recover the amount in the notice.

This decision highlights the ATO's comprehensive powers to sue in debt.

### ***Khoury & Ors v FC of T [2009] AATA 612***

The AAT affirmed the Commissioner's decision to impose penalties on a partnership which failed to pay GST on sales of new residential property. The AAT held that the mitigating circumstances raised by the partnership, including the fact that it was in financial hardship, were insufficient to warrant a reduction in the penalties for failure to disclose taxable supplies and obstructing the Commissioner during the course of an audit.

This decision highlights the importance of ensuring that GST is

paid when required, and of co-operating with the ATO during audits.

### **Case 9/2009**

The AAT disallowed a taxpayer's deduction claims for depreciation and project pool expenditure as the project in question was still in its experimental phase and therefore failed the taxable purpose test. The case is an application of the rule that deductions can only be claimed when the expense was incurred in producing assessable income.

### **Hutson v FC of T [2009] AATA 574**

The AAT stated that where there were multiple trustees there was no basis to impose an administrative penalty on only one of them. Accordingly, where a trust entity incurs an administrative penalty, the penalty applies to all of the persons who are the trustees at the given time. This shows the importance of ensuring that co-trustees are reliable, as their actions can lead to problems for the other trustees.

### **Kleyn v Chief Commissioner of State Revenue [2009] NSWADT 218**

A taxpayer who purchased land adjoining his residence was denied the principal place of residence land tax exemption as there was no "unity of title" because his residence was owned as tenants in common with his wife while the adjoining land was purchased in his own name.

### **New Tax Bills**

#### **Carbon Pollution Reduction Scheme**

The bills for this scheme were rejected by the Senate.

### **Alcopops tax measures pass Senate, 13 August 2009**

Measures to increase tax on certain alcoholic beverages (sometimes referred to as "alcopops") have been passed by the Senate without amendment.

### **Tax Rulings**

#### **ATO ID 2009/93**

The ruling states the rental income received by an Australian resident from real property located in the UK is assessable under s 6-5(2) of ITAA 1997. However, the taxpayer is entitled to a foreign income tax offset under Div 770 of ITAA 1997.

#### **ATO ID 2009/89**

In determining whether it is reasonable to conclude, at the first use time, that a taxpayer will use an asset for the principal purpose of carrying on a business for the purposes of s 41-20(1)(d) of ITAA 1997, the taxpayer's use of the asset while it holds the asset together with the taxpayer's use while it is not the holder need to be considered.

#### **ATO ID 2009/81**

If a depreciating asset is subject to a hire purchase agreement, the investment commitment time under s 41-25(1)(a) of ITAA 1997 is the time at which the hire purchase agreement is entered into as this is the contract under which the taxpayer holds the asset.

### **Practice Statement PSLA 2009/7**

The ATO released [PS LA 2009/7](#) on the approach to be taken to certain trust issues pending the applications for special leave to appeal in

*Bamford & Anor v FC of T* [2009 ATC ¶20-105](#), where the full court held that the expression “income of the trust estate” in s 97 of ITAA 1936 does not mean income according to ordinary concepts but rather that which is treated as income by or under the trust instrument for the purpose of fixing beneficiary entitlements.

Pending the determination of the special leave applications and on the appeals if leave is granted:

- the ATO should, as far as possible, seek to defer the matters pending the resolution of the *Bamford* litigation. If that is not possible, staff should apply the Commissioner’s existing view while being mindful of the Full Federal Court decision and the special leave applications
- the ATO should not select cases for active compliance solely with a view to applying the Commissioner’s view, other than where there have been deliberate attempts to exploit Div 6

### **New Tax Measures** **Recognition of Taiwanese typhoon disaster**

Donations to public funds established and maintained by a public benevolent institution solely to provide money for the relief of people in Taiwan who are in distress as a result of Typhoon Morakot, which hit Taiwan on 7 August 2009, are tax deductible for a period of two years from 7 August 2009.

### **Australia – New Zealand Memorandum on Standard Business Reporting**

A *Memorandum of Understanding on Standard Business Reporting* (MOU SBR) between Australia and New Zealand has been formalised.

The initiative, which could potentially save businesses and taxpayers on both sides of the Tasman millions of dollars each year, will ensure greater cooperation on a key e-government initiative to standardise reporting processes for business.

"Reporting requirements in both countries impose a significant burden, with businesses often having to report similar information to many government agencies," the Assistant Treasurer said.

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