

# Butlers Business & Law Bulletin

## February 2010



- Cases, Rulings, & Determinations
- New tax Legislation Amendments
- Compliance

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

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### ***Cases, Rulings, and Determinations***

***No fringe benefit taxes (FBT) for 100% business related car, but still the need to lodge nil FBT return.***

***Jetto Industrial Pty Ltd v FC of T [2009] ATC (28 May 2009)***

In this case, a taxpayer who owned a car used 100% for business purposes, failed to lodge a fringe benefit return even though he only had to lodge zero dollars. The taxpayer, who resides near his principle place of business, was in dispute with the Commissioner over fringe benefit taxable (FBT) returns relating to a car bought by the business.

The taxpayer failed to lodge FBT returns because under the calculation method found in s9 and 10 of the *Fringe Benefits Tax Assessment Act 1986 (FBTAA)*, log book evidence showed the vehicle was 100% used for business purposes.

Under s7(1) of the FBTAA, the availability of a car for employee private usage constitutes a benefit. Section 7(2) provides a deeming provision which states that where a car is “garaged or kept at or near a place of residence of the employee”, it is deemed available for an employee’s private use.

The deeming provision was thus satisfied, and consequently, a fringe benefit arose. The proper basis for calculation was only the formula in s9, as no election was made for s10 to apply.

***Taxpayer not entitled to deduction for embezzlement claims.***

***Lean v FC of T [2010] FCAFC 1 (28 January 2010)***

The Full Federal Court has confirmed that a taxpayer was not entitled to a deduction under the Income Tax Assessment Act (ITAA) 1997 s25-45 in respect of money misappropriated by his investment fund manager.

The court held that the act of applying the money towards expenses or investment was sufficient to break the necessary connection between money included in the taxpayer’s assessable income

and a subsequent misappropriation. In so finding it dismissed the appeal to the Federal Court against the decision of Stone J reported at 2009 ATC ¶20-102. In dismissing this appeal, Emmett J (Edmonds and Perram JJ agreeing), found that where the money that was included in the assessable income of a taxpayer had left the taxpayer's hands, there could be no relevant misappropriation of that money.

Interestingly, in separate judgments both Edmonds J and Perram JJ expressed the view that s25-45 was limited to income derived by cash basis taxpayers on the receipt of money understood as cash or other ready means of exchange.

Disagreeing with Stone J's threshold finding that capital proceeds could constitute money included in a taxpayer's assessable income, Edmonds J stated that the money misappropriated in the present circumstances could never have given rise to an allowable deduction under s 25-45.

***GST & Sale of vacant land capable of being used for residential purposes***  
***Vidler v FCT [2009] FCA 1426***

On appeal, the Federal Court was asked to determine whether the sales of 2 blocks of vacant land by a taxpayer were taxable supplies or input taxed supplies of residential premises.

The taxpayer argued the sales were input taxed supplies of residential premises to be used predominantly for residential accommodation

pursuant to s 40-65(1) of the GST Act as the lands were intended to be occupied for accommodation. They relied on the Explanatory Memorandum to argue that land is capable of being occupied as a residence even if it's vacant land if it's able to be connected to water and sewerage facilities.

It was held by the Federal Court that the supplies were taxable supplies of land & not input taxed supplies of residential premises. Stone J referred to her judgement in *South Steyne Hotel Pty Ltd v Commissioner of Taxation* 2009, where she concluded that it is only necessary to have the element of shelter and basic living facilities for it to be called residential premises. However, here neither of these elements were present.

***Legal Alert***  
***Bankruptcy Legislation***  
***Amendment Recap***

In 2009, the Government instated a bankruptcy amendment bill relating to bankruptcy legislation.

The main areas of change included: the increase of minimum debt for a creditor's petition from \$2000 to \$10000, an increase in the period from 7 days to 28 days which a creditor cannot take action against a debtor giving notice to file a petition, a 20% increase in upper income, debts, and assets limits for persons wanting to enter into a debt agreement, the possibility for creditors to approve trustees' remuneration without having a meeting, the minimum amount of trustee's remuneration set at \$5000,

the ability to apply to the Inspector-General for a fixed remuneration if the one fixed by creditor's isn't practical, a new process accompanied with general principles and regulations for reviewing trustees' remuneration, new powers for the Inspector-General to investigate the possible commission of offences, the penalty for failing to file a statement of affairs will be quintupled, trustee's must now filing annual returns in relation to the administration of bankrupt estates within 35 days of the end of the year, and finally, a new infringement notice regime will be introduced for minor offences.

**Article - Can a Binding Death Benefit Nomination (“BDBN”) specify how a death benefit is paid?**

What is a BDBN? It's a nomination made by a member of a trust fund, that's given to a trustee, binding that trustee to pay member benefits upon death as specified. It's widely known that a BDBN can specify to whom death benefits are paid, however it's unclear as to whether it can specify how. Bearing this in mind, there are some niceties to consider. Let's consider SMSF's, not all SMSF's allow BDBNs as by law the governing rules must permit so.

There is an exception; Super legislation modifies this stance providing that governing rules of a non-SMSF must not permit discretion under these rules to be exercised by a person who isn't a trustee. On the contrary, a provision

subject to the super regulations shows that the governing rules may permit a member to give a notice to the trustee that binds them to pay any BDBN's to persons mentioned in the notice, thus acting itself as a BDBN.

Conversely, this exception is silent about whether a BDBN can specify how super benefits are to be paid, but this doesn't apply to SMSF's. Thus, all along SMSF's could specify how BDBN's are paid. Non-SMSF funds have BDBN's that can only last for 3 years while the Commissioner has released a determination stating that SMSF's may have BDBN's that last indefinitely.

Taking into account the Commissioners rules, there are **risks** to bear in mind:

1. The view that requirements in the regulations don't apply to SMSF's isn't universally accepted. This is reflected in case decisions.
2. An account-based pension could be exchanged for a lump sum at any time. Since there is no limit to that sum, to provide limitations a SMSF's governing rules would need to specify limits to ensure harmony with super regulations, though this is a strategy yet to be court tested.
3. Since members of SMSF's must also be trustees, they can also write SMSF's cheques. This could potentially eliminate the main aim of financially supporting a surviving partner upon death.

Here are some **solutions**; Provisions can be inserted directly in the SMSF's governing rules, though

this still leaves risk 2 and 3 high and dry. The client can just accept the risks as seen in risk 3. A client could specify in the BDBN that upon death, super death benefits should instead be paid to the deceased's estate. The last option is similar, but involves putting them into a family discretionary trust.

In conclusion, we've found that a SMSF's governing rules allow BDBN's to specify not just who, but how super benefits are paid, however, this comes with a price of risk.

## ***Tax Updates***

### ***Released: Government exposure draft on Tightening the Non-commercial Loan Rules***

The government has released an exposure draft for public consultation on changes to tighten the non-commercial loan rules in Division 7A as announced in the 2009-2010 budget. This division relates to the deeming of loans from private companies as un-franked dividends. The changes include the following:

- Division 7A will apply to closely held corporate limited partnerships as they do to private companies.
- The meaning of "payment" will include a licence or right to use real property (other than a transfer of property within the meaning of s 109C (3)(c)); and a lease, licence or other right to use other company assets.

3 exceptions exist; these are listed as the following:

1. The minor use of company assets (using the FBT ("Fringe Benefit Tax") \$300 minor benefit rule).
2. Certain payments that would otherwise be allowable as a once only deduction: and
3. Where a dwelling is being used by an associate or shareholder of a private company and the use wouldn't meet the otherwise deductible rule, say if it were for private purposes. The shareholder must be carrying on a business and the dwelling must be less than 10% of the area of the land or building used to carry on that business.

The proposed changes will apply from the 2009-10 income year.

### ***Released: Legislation Draft on the New Research and Development ("R&D") Tax Credit***

The government has released draft legislation for the new R&T Tax Credit. A 45% refundable tax offset is available to R&D entities with a total turnover of less than \$20 million unless they're tax exempt, majority owned or controlled by tax exempt entities. A 40% non-refundable tax offset is available for all other R&D entities. R&D entities accessing the non-refundable tax offset can carry forward any unused offset amounts, under the tax offset carry forward rules.

The proposed legislation will allow small innovative firms to get an immediate contribution towards their R&D allowance even if they haven't yet returned a profit. For example, a company in tax loss turning over \$10

million and spending \$1 million on eligible R&D activities will now receive a refund of \$450,000. This legislation is expected to be introduced into Parliament in early 2010.

**[Released: Exposure Draft on Changes to Rules RE Forestry Managed Investment Schemes](#)**

The Assistant Treasurer has released for public consultation a legislation draft to change a key tax rule for forestry managed investment schemes (MIS) that will protect investors in recently collapsed schemes.

The draft legislation amends the four-year holding period rule to allow an investor's deduction to stand if:

- a capital gains tax (CGT) event happens because of

circumstances outside the initial investor's control; and

- the initial investor couldn't have reasonably foreseen this CGT event happening at the time they acquired the forestry interest.

It also amends the promoter penalty provisions to ensure the law continues to deter forestry MIS covered by product rulings from being used in a way that is different from that described in the product ruling.

The rule applies to CGT events from 1 July 2007 and the amendments in the draft would take effect on this date.

***For more on these three exposure drafts visit the treasury website:***  
**[www.treasury.gov.au](http://www.treasury.gov.au)**

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