

# March Tax Update

- Recent tax cases
- New tax Bills
- Superannuation release



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## **Income Tax & CGT:**

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

### [Couch v FCT \[2009\] AATA 41](#)

The issue was whether the taxpayers were entitled to the 'main residence exemption' where the residence was not occupied at any time during ownership. The couple had intended to use the property as their principle residence, but employment circumstances intervened. Consequently, the unit was leased for entire time it was owned by the taxpayers. The AAT held in the negative. "Mere intention" to occupy the unit as principal residence was not sufficient for s.118-35 *Income Tax Assessment Act 1997* to apply.

### [FCT v Star City Pty Ltd \[2009\]](#)

FCAFC 19

The issue for the full Federal Court was whether a lump sum rental payment of \$120m to the NSW Government to acquire a casino license and operate a casino on Crown land was deductible. The Court found that the payment was of a capital nature, incurred to secure a casino license and obtain exclusive

right to operate a casino in NSW, and therefore not deductible. In particular, prepayment was not refundable if the lease was terminated and there was a disparity between first 12 years rent (\$15m) and next 87 years (\$250,000).

### [TD 2009/1](#)

This tax determination was made on the question: does an obligation for the purposes of subsection 974-135(1) of the *ITAA 1997* only apply to a legally enforceable obligation? The ruling states that an "obligation" for the purposes of this provision does not have to be a legally enforceable obligation. Rather, there will be an "effectively non-contingent obligation" to take an action under a scheme if, having regard to the pricing, terms and conditions of the scheme, there is in substance or effect a non-contingent obligation to take that action. A more 'natural reading' of the section was favoured: that is, that there must be a finding (under a scheme) of a non-contingent obligation "in substance or effect."

### [Lawrence v FCT \[2008\] FCA 1497](#)

The Full Federal Court dismissed the taxpayer's appeal against the Federal Court decision of *Lawrence*

*v Commissioner of Taxation* [2008 FCA 1497]. In doing so, the court confirmed that a “distributable surplus arrangement” was a “scheme” caught by the dividend stripping provisions of s 177E of *ITAA 1936* to which Part IVA *ITAA 1936 (Cth)* applies (Lawrence v FCT 2009 ATC 20-096).

[Ovens v FCT \[2009\] AATA 166](#)

The case concerns costs claimed by a taxpayer for operation of a home office. In the first instance, the Commissioner ruled that the home office expenses of the taxpayer fell into two broad categories of “running costs” (which included portions of the household gas and electricity bills and household contents insurance) and “occupancy costs” (which costs included portions of mortgage interest, building insurance premiums, local council and water rates and repair and maintenance costs). The AAT upheld the Commissioners’ decision to disallow the taxpayer’s claims for the home office occupancy costs. It said that the occasion of those items of expenditure was not to be found in the work that the taxpayer undertook in his home office. Rather, they were incurred by reason of the taxpayer’s ownership of the home. The AAT held that a proportion of the running costs were deductible as the occasion of those expenses was the work which the taxpayer undertook in his home office. Nevertheless, it found that in some cases the proportion of expenditure claimed was excessive.

The AAT upheld the 25% penalty imposed by the Commissioner in

relation to shortfall amounts resulting from the claims. However, the penalty imposed for statements relating to occupancy costs was partially remitted because the AAT was of the view that the taxpayer and his tax agent did *to some extent* take reasonable care in making the statements (despite the fact that the statements were found by the AAT to be wrong).

[Law Institute of Victoria Limited v DFC of Tax \[2009\] VSC 55](#)

The issue was whether information and records held by the Law Institute of Victoria (LIV) about a solicitor and his trust accounts attracted public interest immunity. The court considered whether the public interest in protecting the information outweighed the public interest in its disclosure. In the present case, some of the documents might attract public interest immunity notwithstanding that: (1) they were not provided by “whistleblowers”; (2) they were provided pursuant to a duty to provide them to the LIV; or (3) the receipt of any document by the Commissioner would be subject to secrecy provisions in s 16 of *ITAA 1936*. However, some of the documents being sought were created solely by or for the LIV in the exercise of its statutory duties and function, and the potential hindrance and damage to the LIV’s work was a matter capable of attracting public interest immunity. Pagone J said that the evidence of the description of documents being sought was insufficient and the Commissioner, despite being a model litigant, had not provided information that might bear upon whether the balance of

interests would favour disclosure. Accordingly, his Honour relisted the proceedings for the parties to make further submissions.

#### [CGT Main Residence exemption extended](#)

The government has reviewed the CGT main residence exemption in 118-B of *ITAA 1997*, which applies to surrounding land used for private purposes up to a total of two hectares, but does not currently apply to a disposal of surrounding land when dealt with separately from the dwelling, such as selling the vacant lot of a subdivided property (s 118-165). This was found not to be appropriate when the disposal is involuntary. From now on, capital gains or losses will be disregarded if they arise from 'compulsory acquisitions' of part of a taxpayer's main residence; compulsory endings of ownership rights over a taxpayer's main residence; compulsory creations of rights over a taxpayer's main residence; or relevant negotiated agreements made in connection with these compulsory transactions. Amendments are still in the consultative stages.

See the Assistant Treasurer's [media release No 19](#) (19 March 2009)

#### **New Tax Bills**

##### [Assets investment allowance](#)

A temporary bonus income tax deduction for new investment in tangible depreciating assets undertaken between 13 December 2008 and 31 December 2009 has been introduced into parliament in the *Tax Laws Amendment (Small*

*Business and General Business Tax Break) Bill 2009*.

The deduction is limited to new tangible, depreciating assets for which a deduction is available under 40-B of *ITAA 1997* and new investment in existing assets. It requires the amount of a taxpayer's investment in an asset to exceed a certain threshold, which is \$1,000 for small business entities and \$10,000 for all other taxpayers. The asset must also be used principally in Australia for the principal purpose of carrying on a business. The deduction is worked out using a rate of either 30% or 10% depending on when the taxpayer committed to investing in the asset and can be claimed in the income year that the asset is first used or installed ready for use.

For the purposes of the tax break, an asset is new if it has never been used or installed ready for use by anyone, anywhere. Second-hand assets are not eligible for the tax break. Further, a taxpayer must make a decision to invest either in a new asset or an existing asset between 13 December 2008 and 31 December 2009. Assets that a taxpayer held or entered into a contract to hold on or before 12 December 2008 will not qualify. However, additional investment in such assets undertaken from 13 December 2008 may be eligible for the tax break. The asset must be installed or ready to use on or before 30 June 2010 for the 30% bonus deduction, and 31 December 2010 for the 10% deduction, depending also on date of investment.

"Depreciating assets" has the meaning given by Div 40 of ITAA 1997 — it excludes most intangible assets, land and trading stock. Tangible depreciating assets include business machinery and equipment. A capital allowance deduction in relation to the asset must also be available under the core provisions of Div 40 contained in Subdivision 40-B. Cars for which a taxpayer uses the "12 per cent of original value" method to work out their car expense deductions may be eligible assets, and assets for which a small business entity claims capital allowance deductions under Subdivision 328-D may also be eligible assets. Tangible, depreciating assets that receive deductions under the research and development (R&D) provisions may also be eligible for the tax break.

#### Federal Government Stimulus Measures:

There have been several high profile developments in the evolution of the federal governments' stimulus packages.

#### *Bills passed rendering tax breaks*

The *Tax Bonus for Working Australians Act* (2009) has been passed by parliament, rendering breaks to tax payers. After much public debate, the Senate agreed to the following amendments:

- × Reduction of the Working Australians bonus amounts to \$900 (from \$950) for taxable income up to \$80,000; \$600 (from \$650) for taxable income \$80,001- \$90,000; and \$250 (from \$300) for

taxable income \$90,001 - \$100,00

- × Reduction of Single Income Family Bonus from \$950 to \$900.
- × Back to School, Training and Learning and Recipient Farmer's Hardship Bonuses all remain at \$950.

The Bills received Royal Assent 18<sup>th</sup> Feb 2009 and payments will be from 11 March 2009, with working Australians payments from 6 April 2009. Taxpayers and tax agents have until 12 March 2009 to elect address and method of payment. Extensions will be granted until 30 June 2010 for individual returns if the individual has suffered disaster, hardship, trauma or hospitalization. There will also be an automatic extension to 5 June 2009 for company, trust, partnership and super fund returns

#### *Constitutional challenge to tax bonuses*

A challenge to the tax bonus payments has been brought in the High Court by Mr. Brian Pape, a barrister and senior university lecturer. Mr. Pape brings the case against the Commissioner of Taxation and the court has joined the Commonwealth of Australia as a second defendant. Mr. Pape will challenge legality of the commonwealth making such payments on the grounds that they are an "overreach of commonwealth power" as granted by the constitution. The defendants will rely on various constitutional provisions such as the appropriations power, the incidental power, the external

affairs power, the trade and commerce power, and the taxation power to support the validity of the payments.

The case (to be referred to as *Pape v FC of T* [2009]) will follow the *Pharmaceutical Benefits* ([1945] HCA 30) and *AAP* ([1975] HCA 52) cases. It is of interest to tax professional because it could have deep repercussions for the function of tax and funding in Australia and this is an area that has long been uncertain. The case was heard on Monday 30<sup>th</sup> March, and adjourned until 10:15 Tuesday 31<sup>st</sup> March 2009.

For more on the tax bonuses and *Pape v FC of T*, see the [ATO website](#).

### ***Tax Office direct assist for small businesses***

A new program has been announced wherein the Tax Office will assist viable small businesses with meeting their tax obligations during the economic downturn. Under the new program, the Tax Office will identify small businesses showing early

signs of difficulty, for example later lodgments of activity statements or increasing debt levels. From 9 March 2009, Tax Office representatives will then visit these small businesses to discuss:

- Lodgment
- Record-keeping
- Options for activity statement completion
- Availability of the Small Business Assistance Program
- Options available for meeting pay as you go instalments and withholding, and
- Superannuation obligations.

Tax Office website "[Tax Office support for small business](#)", 4 March 2009.

### ***Superannuation***

The ATO has released a new Guide to trustees of Self Managed Superannuation Funds. Trustees should be reminded of their obligations and responsibilities as outlined in this guide.

Copies can be downloaded at the [tax office website](#).

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