

# July Tax Update



- Recent cases and rulings
  - New legislation
  - Developments in tax
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This month the following tax cases, rulings and legislation have been passed:

## ***Cases***

### ***Pape v FCT [2009 HCA] 23***

The High Court has published its reasons for the majority decision it made on 3 April 2009 that the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) was a valid law.

### ***Didasko Learning Resources Pty Ltd v Didasko Learning Institute Pty Ltd [2009] VSC 252***

A business was placed into voluntary administration by a secured creditor. During the administrators' trading period, liabilities to the ATO for PAYG, BAS and the superannuation guarantee charge were incurred. The administrators sold the business. Under the sale agreement the buyers agreed to pay all "trading liabilities" of the businesses from 5 May 2005.

The Victorian Supreme Court held the phrase "trading liabilities" includes "tax debts" and that the buyers were therefore liable for tax debts.

### ***BNZ Investments Limited & Ors v C of IR (CIV 2008-485-1056)***

The Bank of New Zealand (BNZ) entered into structured finance

transactions involving cross-border sales and repurchases. The transactions were essentially loans. They were structured so the BNZ could deduct its expenses, while receiving the income free of tax.

The High Court concluded that the transactions were caught by the anti-avoidance legislation because:

- the transactions had the purpose or effect of substantially altering the incidence of tax for the BNZ. This was not "merely incidental".
- the transactions had no commercial purpose.
- the transactions generated the claimed deductible expenses in a contrived way.
- the returns on the transactions were greater than what could be expected from a risk-free investment via a structured finance transaction negotiated at arm's length.

### ***Chief Commr of State Revenue (NSW) v Qantas Airways Ltd [2009] NSWCA 163***

The NSW Court of Appeal has upheld a decision to revoke

assessments of insurance duty that had been based on a broader meaning of the terms “premium” and “insurer” than the legislation allowed.

A taxpayer company had policies of insurance with foreign underwriters. They were not registered insurers under the *Duties Act 1997* (NSW). The Chief Commissioner assessed insurance duty totalling \$5,154,166.

The Court dismissed the appeal, commenting that using the ordinary meaning of the words “premium” and “insurer” did not necessarily produce a surprising result. The Commissioner failed to show that use of the ordinary meaning would produce absurdity or a departure from clear legislative intent.

#### **[Horner v FC of T \[2009\] AATA 537](#)**

The AAT rejected the taxpayer’s argument that a threshold “mischief test” must be met before the personal services income (PSI) provisions apply. The AAT affirmed the taxpayer’s 2004/05 assessment and stated that the Commissioner need not demonstrate a deferral or reduction of income tax to apply the PSI regime.

#### **[New Tax Bills](#)**

##### **[Taxation Laws Amendment \(2009 Measures No 4\) Bill 2009 \(TLAB4\)](#)**

###### *Leases over land in Australia:*

This Bill amends Div 855 of *Income Tax Assessment Act 1997* to confirm that non-residents can be subject to CGT in relation to leases over land in Australia. Such leases will also need to be taken into account when a foreign resident determines whether

an interest that they hold in another entity is taxable Australian property.

###### *Partnerships:*

The Bill also allows convertible foreign losses to be deducted in calculating a partnership’s net income or loss.

###### *Donations:*

The Bill also ensures donations made to deductible gift recipients through salary sacrifice arrangements do not cause an employer to incur FBT liability.

#### **[Draft incapacitated entity legislation released](#)**

The Assistant Treasurer has released draft legislation that will amend the GST law to ensure that a representative of an incapacitated entity is responsible for the GST consequences of its actions and that the GST consequences of the representative’s action are the same as those that would have arisen if incapacitated entity performed the action.

The amendments were necessitated by the Federal Court decision in *DFC of T v PM Developments Pty Ltd* 2008 ATC ¶20-078. The court found that the GST liability for transactions occurring during the period of a liquidator’s appointment was the liability of the company in liquidation and not the liquidator.

The amendments will apply from the commencement of the GST Act on 1 July 2000.

## **Tax Rulings** **TD 2009/17**

Interest on a loan used to settle moneys on trust to benefit the borrower and others cannot be deducted in full under s 8-1 of ITAA 1997.

The taxpayer's interest expense can only be deducted to the extent that the taxpayer has used the borrowed moneys to gain assessable income *of the taxpayer*. The interest will not be deductible to the extent that the taxpayer has used the borrowed moneys for the purpose of benefiting other persons.

The interest expense is not deductible at all if there is no connection between the interest outgoing and the taxpayer's assessable income.

## **TD 2009/D3**

This draft Taxation Determination was released on 8 July 2009 for public comment by 7 August 2009. Its full title is "Income tax: does a taker in default of trust capital have an 'interest in the trust capital' for the purposes of CGT event E8 in section 104-90 of ITAA 1997?"

The answer given to the question is "No" because, "having regard to the provisions of the ITAA 1997, only those interests which constitute a vested and indefeasible interest in a share of the trust capital fall within the scope of CGT event E8. The interest of a taker in default of the trust capital is defeasible because the trustee may resolve to appoint the capital to another beneficiary."

## **Div 7A benchmark interest rate - TD 2009/16**

For the income year that commenced on 1 July 2009, the benchmark interest rate for the purposes of ss 109N and 109E of ITAA 1936 is 5.75 % per annum. For a copy of TD 2009/16 go [here](#).

## **Superannuation** **Superannuation funds can now provide advice to members**

Under a new ASIC class order, trustees of regulated superannuation funds may provide personal advice to fund members about their existing superannuation fund if:

- the fund is not a SMSF;
- the trustee holds an Australian financial services licence that covers the provision of personal advice in relation to superannuation products;
- the advice relates to the member's interest in the fund; and
- the advice does not involve advice about any new interest that the member may wish to acquire (except eligible insurance).

## **New Rulings**

The ATO has released two self-managed superannuation funds rulings:

- SMSFR 2009/3 – which deals with the application of the *Superannuation Industry (Supervision) Act 1993* to unpaid trust distributions payable to a Self Managed Super Fund
- SMSFR 2009/4 – which deals with the meaning of 'asset', 'loan', 'investment in', 'lease',

and 'lease arrangement' in the definition of an 'in-house asset' in the *Superannuation Industry (Supervision Act) 1993*.

### **Superannuation Guarantee Regulations amended**

Superannuation Guarantee (Administration) Amendment Regulations 2009 (No 1) provides that employers are not required to provide superannuation guarantee contributions in respect of paid parental leave and ancillary leave payments.

### **SMSFs and enduring powers of attorney - SMSFR 2009/D1**

This draft Ruling explains how the section applies to SMSFs. It allows a person who holds an enduring power of attorney in respect of a member to be trustee, or director of the corporate trustee, of a SMSF in place of the member without causing the fund to cease to be an SMSF.

### **New Tax Instruments PAYG withholding for foreign employment income**

An instrument has been made so that the withholding from payments made to individuals employed in a foreign country is similar to the Australian income tax that will be payable on the relevant income. The instrument was necessitated by recent amendments to s 23AG of ITAA 1936 which limited the scope of the tax exemption of foreign employment income.

### **Income Tax Amendment Regulations 2009 (No 2) made**

These Regulations amend the

Income Tax Regulations 1936 to provide tax arrangements for overseas service and definitions of income used for determining tax offsets.

### **New Tax Measures Tax Office treatment of MITs and capital account elections**

The Tax Office has announced its administrative treatment concerning the changes proposed in the 2009/10 Budget to allow Australian managed investment trusts, except those that are taxed like companies, to make an irrevocable election to apply the capital gains tax regime as the primary code for taxing certain disposals of assets with effect from the 2008/09 income year.

The ATO will apply the existing law in the period between the announcement and enactment of the proposed law but will not undertake compliance activity to enforce the existing law during this period.

### **Fuel tax credit rate change from 1 July 2009**

There has been a decrease in the fuel tax credit rate for taxable fuel used in heavy vehicles travelling on a public road due to an increase in the road user charge. From 1 July 2009, the new rate is 16.443 cents per litre.

### **Exchange Rates**

The ATO has updated its foreign exchange rates page on its website.

**New Tax Treaty signed with New Zealand**

Australia and New Zealand have signed a new tax treaty that reduces withholding tax rate limits on certain dividends, certain classes of interest, and royalty payments.

The new treaty will also assist Australian managed funds by allowing Australia's managed investment trusts to access the treaty's benefits on income derived from New Zealand.

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