# Developments in Tax September 2009

· **Developments in tax**
· **Recent cases and rulings**
· **New legislation**
[www.butlers.net.au](www.butlers.net.au)

## *Cases*

### *Mezrani & anor v FC of T [2009] AAT 654*

Taxpayers who failed to declare profits from a property development were successful in having tax shortfall penalties of 50% for recklessness reduced to 25% for failing to take reasonable care to comply with a taxation law.

The Tribunal took into account the fact that the taxpayers' accountant had died and they were affected by the death of their nephew who had taken over their financial affairs after the death of their accountant.

### *Case 10/2009 [2009] AAT 657*

The AAT affirmed the ATO's decision to treat dividends paid to a superannuation fund by a private company as special income of the fund (and therefore taxable at the top marginal rate).

The dividends paid by VCo were far in excess of the purchase price which was paid for four shares in VCo, and the taxpayer did not contest the Commissioner's submission that the purchase price paid for these shares was about 10% of their market value.

The Tribunal held that the facts did not warrant an exercise of the Commissioner's discretion to treat the dividends as income which was not special income. Although the reference in s 273(2)(a) to the 'value of the shares' did not mean market value (and that accordingly *Taxation Ruling* TR 2006/7 was incorrect in this regard), the market value of the VCo shares was relevant when considering s 273(2)(b) and (f).

### *Case 11/2009 [2009] AATA 726*

The AAT held that advances to a taxpayer in connection with a tax avoidance scheme were income of the taxpayer and not loans.

The taxpayer was a director of VN which was corporate trustee of the V Trust.

The taxpayer was involved in the promotion of tax avoidance schemes involving the use of limited recourse loans to increase income tax deductions claimed by participants.

Participants in the schemes claimed deductions totalling $76.9m, of which $14.9m represented cash contributions by participants, and $62m represented funds created by

means of a round robin of bills of exchange. A portion of the $14.9m in cash contributions paid by the participants in the schemes was paid to or for the benefit of the taxpayer, via a series of entities culminating in the V Trust.

These payments were styled as "loans" to the taxpayer from the V Trust, and were accounted for in loan accounts.

The Commissioner issued assessments which increased the assessable income of the taxpayer by amounts deemed to be additional income. The Commissioner also imposed a 75% tax shortfall penalty.

The AAT rejected the taxpayer's assertion that the advances from VN were loans and instead found that they were assessable income of the taxpayer. In coming to this conclusion, the AAT noted that:

- there were no written loan agreements or agreed terms of payment in respect of the advances
- the purported loans were unsecured and did not bear interest
- the taxpayer apparently regarded the V Trust as the "bank" of a group of his associated entities from which he could and did draw funds as and when required by him
- the transactions were artificial and contrived and inconsistent with any intention or obligation to repay the advances
- the regular advances were consistent with receipts to the taxpayer from the profits of VN derived from promoting schemes.

The AAT found that the taxpayer deliberately and intentionally failed to return income that he had received, that he took steps to disguise such income as loans or advances and that the penalty of additional tax of 75% of the tax shortfall should be upheld.

***Roy Morgan Research Pty Ltd v FC of T [2009] AATA 702***

The AAT held that casual market research interviewers were employees within the meaning of s 12(1) and s 12(3) of the *Superannuation Guarantee (Administration) Act 1992*. The AAT has also held that the Commissioner has no discretion to reduce the amount of super guarantee charge.

The taxpayer conducted market research through face to face interviews and computer aided telephone interviews. It paid persons to interview members of the public. The taxpayer did not regard the interviewers as its employees, did not lodge superannuation guarantee statements in relation to them) or report that it had any superannuation guarantee shortfall.

The Commissioner issued superannuation guarantee default assessments. When the taxpayer lodged an objection, the Commissioner disallowed it.

The AAT held that the taxpayer's interviewers were employees within the ordinary meaning of that word. It also found that they were employees

within the meaning of s 12(3) of the SGAA as they were engaged under contracts that were wholly or principally for the labour of the person.

In coming to this conclusion the AAT cited the following facts in support of its decision:

- the taxpayer controlled the crucial steps in the interviewer's work and checked that they had performed these crucial steps on a regular basis
- the interviewers had very little, if any, control over their interview contents. They were told how to ask questions, what words to emphasise and how to record the answers. They were not engaged for a result or a product but for their labour
- they carried identification cards that showed that they were doing the task for the taxpayer
- they invested little, if anything, other than their time and persuasive and recording skills
- the fact that the taxpayer paid money to someone other than the individual interviewer for that interviewer's assignments did not change the fact that the taxpayer engaged the individual.

The AAT also held that the SGAA does not expressly or implicitly provide the Commissioner with the discretion to reduce the SGC.

***FC of T v Burness (as trustee for the property of Bottazzi, a bankrupt) [2009] FCA 1021***

The Federal Court held that in remitting a penalty imposed on a taxpayer for failing to declare a capital gain from 75% to 25% of the tax shortfall, the AAT did not take into account irrelevant considerations.

In December 1995, the taxpayer purchased a residential property for $170,000 and sold it in March 1998 for $370,000. He did not declare the capital gain in his 1997/98 return.

The Commissioner issued the taxpayer with an amended assessment. He also imposed a penalty of 75% of the tax shortfall under s 226J of ITAA 1936 (intentional disregard).

The taxpayer submitted that the property was at all times held in trust for a long time friend and business partner (Mr F). He said that the transfer of the property to him in December 1995 and a bank loan obtained by him in respect of the property in July 1996 were solely for the purpose of enabling Mr F to refinance his residence.

A lease agreement was entered into between the taxpayer and Mr F for a rental of $300 per week. Further, the taxpayer's 1996/97 return showed rent received of $15,300, as well as interest and other rental deduction claims.

At first instance, the AAT held that as there was only evidence of the taxpayer being the legal and beneficial owner of the property, it was unable to accept that the property was held in trust for Mr F.

The AAT went on to find that factors such as the low purchase price (which indicated a possible non-arm's length dealing), the time lag involved (which caused difficulties with evidence) and the substantial penalty by way of liability for GIC made it appropriate to reduce the additional tax to 25% of the tax shortfall.

On appeal the Federal Court noted that in exercising the discretion to remit penalty under s 227(3) of ITAA 1936, the AAT stood in the shoes of the Commissioner and the discretion to remit was unconfined.

The court said that in exercising the discretion, the AAT should consider the particular circumstances of the taxpayer.

## Tax Rulings

### ATO ID 2009/101 (Tax break - reasonable testing or trialling)

The use of a motor vehicle which had an odometer reading of 10,500 kilometres and was registered and used as a 'demonstrator' model by a car dealer for almost 12 months does not qualify as being merely for the purposes of reasonable testing and trialling in terms of s 41-20(3) of ITAA 1997. Factors including the period and extent of the vehicle's use mean that it can no longer be considered new.

## Superannuation

### Re CBNP Superannuation Fund and FC of T, [2009] AATA 709

The AAT affirmed the Commissioner's decision to issue a notice of amended assessment to a self managed superannuation fund (SMSF) because it was not a complying superannuation fund as required under the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

The sole shareholder, director and member of the CBNP Superannuation Fund (the Fund) was Ms M. She ceased to be a resident of Australia for income tax purposes from 1 July 2000. From then, all decisions in relation to the management and control of the Fund were made by Ms M in New Zealand.

Following an audit, the Commissioner issued a notice stating that the Fund was not a complying superannuation fund for the relevant year because it was not an Australian resident superannuation fund. He considered that the requirements of s 6E(1) of the ITAA 1936 were not satisfied because the central management and control of Fund (i.e. Ms M) was not in Australia and Ms M did not satisfy the two year absence rule referred to in s 6E(1)(c)(ii) and s 6E(1B) of ITAA 1936.

The AAT considered that the Fund was a regulated superannuation fund. However, the Fund did not satisfy the central management and control test. After 1 July 2000 Ms M was not "temporarily absent from Australia" and the continuous period for which she was outside Australia exceeded two years. Accordingly, the Fund was not a resident

regulated superannuation fund at all times during the relevant year.

The AAT did not accept that the Fund could be deemed to be a resident regulated superannuation fund because s 42A(6) was not a deeming provision.

**| 1/17 Darby St Newcastle NSW 2300 |**
**| PO Box 957 Newcastle NSW 2300 |**
**| Tel: 02 4929 7002 Fax: 02 4929 6537 contacts@butlers.net.au |**

*Liability limited by a scheme approved under Professional Standards Legislation*