

Butlers Tax Bulletin

November 2009



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

Cases, Rulings, and Determinations

YXFP v FCT [2009] AATA 805 (21 October 2009)

The taxpayer, a property developer, was in dispute with the Commissioner over whether a supply of land was a GST-free supply of a going concern, and whether a separate investment of \$220,000 in a property development was deductible.

The AAT considered whether the parties had agreed in writing that the supply was of a going concern as required by s.38-325(1)(c) of the *GST Act*; whether the investment of \$220,000 in a property development comprising 17 units, which was owned by a separate company, was a tax deductible acquisition of trading stock; and finally if the investment of \$220,000 was not deductible, whether a tax shortfall penalty of 25% should be remitted.

The tribunal found against the taxpayer that a supply of land was

not a GST-free supply of a going concern as the parties had not agreed this in writing as required by the *GST Act*. It also concluded that the acquisition of an interest in a property development was not deductible as trading stock but rather was a one-off investment of a capital nature.

Determination MSV 2009/1

A determination titled 'A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements' has been made to specify the requirements for making valuations for the purposes of applying the margin scheme in Div.75 of the *GST Act*. The determination commences on 1 March 2010, and it sets out the Commissioner's requirements for making valuations under four methods.

The valuation methods available when produced by the supplier for the purposes of s.75-10(3) (approved valuation) and s.75-11 (margins for supplies of real property in particular circumstances) are: valuation by a professional valuer; valuation based on the consideration received by the supplier under the

contract of sale; or state government or territory government department valuation. The requirements apply to valuations for taxable supplies of real property made on or after 1 March 2010.

A fourth method allows valuations obtained by the Commissioner in specified circumstances for the purposes of s.75-10(3). The requirements apply to valuations for taxable supplies of real property made before, and on or after, 1 March 2010.

TD 2009/18

The Tax Office has issued an addendum to TD 2009/18 dealing with leasehold interest in land. The addendum applies on and from 18 September 2009 (the date of commencement of the amendment to s.855-20(a), and it states that, for the purposes of a provision dealing with capital gains and foreign residents, the term “real property” includes a leasehold interest in land. The addendum amends the date of effect of TD 2009/18 to reflect an amendment to s.855-20(a) of *ITAA 1997* made by the *Tax Laws Amendment (2009 Measures No 4) Act 2009*.

The amendment confirms beyond doubt that a lease of land, if the land is situated in Australia, is “real property situated in Australia” for the purposes of s.855-20(a).

The amendment applies in relation to CGT events happening on or after 20 May 2009. The amendment is to be disregarded for the purposes of interpreting subdivision 855-A of *ITAA 1997* as in force before the commencement of the amendment. The effect of this is that no inference

can be drawn from the amendment that the law operated differently before the amendment.

Impact Statement

Case 8/2009

The Tax Office has released an impact statement on the decision in *Case 8/2009*, 2009 ATC 1-012. In that case, the AAT held that a property developer which leased 22 unsold residential apartments for several years after construction was completed did not apply the apartments for a creditable purpose during the period they were leased merely because it had an intention to sell them at some time in the future.

The Tax Office states that the decision is consistent with its revised view in GST Ruling 2009/4 that an intention to sell new residential premises in the future, on its own, does not mean that the new residential premises are being held for the purpose of sale and will not constitute an application of the new residential premises for the creditable purpose of sale, for the purposes of Div.129 of the *GST Act*. It was not necessary for the AAT to consider whether the position would be different where attempts are made to sell a property contemporaneously with the rental of the property, as that was not the case in this matter.

New Tax Bills

The Budget No 2 Bill -Non-commercial losses

The Budget No 2 Bill will apply to the 2009/10 income year and later income years. It proposes to amend *ITAA 1997* to tighten the application

of the non-commercial losses rules in relation to individuals with an adjusted taxable income of \$250,000 or more.

These proposed amendments will prevent high income individuals with an adjusted taxable income of over \$250,000 from applying losses from non-commercial business activities against their other income, unless they have applied to the Commissioner and the Commissioner has assessed the activity as genuinely commercial. Therefore, if an individual has an adjusted taxable income of \$250,000 or more, losses from non-commercial business activities are quarantined.

Losses from non-commercial business activities are also quarantined if an individual has an adjusted taxable income of less than \$250,000 but fails to satisfy one of the four objective tests in Div 35 (assessable income test, profits test, real property test and other assets test).

All individuals may apply for the Commissioner to use discretion and not apply the non-commercial losses rules, by satisfying certain objective tests.

MIS Amendments

On 21 October the Government announced that it would amend tax law to protect around 19,000 investors in forestry managed investment schemes (MIS) from an unintended and adverse tax outcome.

The collapse of Timbercorp and Great Southern is expected to lead to a number of forestry MIS being

wound-up or restructured, which could cause investors to fail the requirement of having held their interest in the MIS for four years as a condition of an up-front tax deduction. The Government will amend this four-year holding period rule to allow an investor's deduction to stand where the four-year holding rule is failed due to events beyond the control of the investor. These events include insolvency of the MIS manager, the death of the investor or where an MIS interest is cancelled, for example because of trees being destroyed by fire, flood or drought. Civil penalties will still apply to the promoters of forestry MIS notwithstanding that the investors' deductions are allowed to stand because of the proposed amendment.

As the holding period rules apply only to investments in forestry MIS, investors in other agribusiness MIS are not affected.

For more on the tax implications for investors in non-forestry agribusiness MIS where the operator becomes insolvent, see the ATO website: www.ato.gov.au.

Tax Compliance

Discussion Paper: TFN withholding in certain trust cases

The Government has proposed an extension of the tax file number (TFN) withholding arrangements to closely held trusts, including family and related trusts. The proposal, as announced in the 09/10 Federal Budget, is currently the subject of a discussion paper.

In essence, the proposal will see the TFN withholding arrangements apply to the trustees of closely held trusts including family trusts where the trustee makes an assessable distribution (assessable payment or present entitlement to trust income) to a beneficiary that has not provided their TFN to the trustee.

The aim is to ensure that assessable distributions to beneficiaries of closely held trusts align with the amounts included by these beneficiaries in their tax returns.

For trusts subject to the trustee beneficiary reporting rules in Div 6D of ITAA 1936, where an assessable distribution is made to a trustee beneficiary, TFN withholding will only apply to interim distributions made during the income year.

TFN withholding will not apply to an amount that is subject to “family trust distribution tax”.

The trustee of the trust will be required to submit a number of reports and remit amounts withheld to the Commissioner.

This measure will not apply: where tax is payable by the trustee of the trust on behalf of the beneficiaries, such as in the case of minors and foreign resident beneficiaries; to foreign resident trusts (already covered by Pt III Div 6AAA); to assessable distributions to entities that are exempt from income tax; or where the closely held trust is a unit trust already subject to TFN withholding rules under s 12-140 or 12-145 of Sch 1 to the *Taxation Administrative Act* 1953.

The measure is proposed to apply from 1 July 2010. A copy of the discussion paper can be found at www.treasury.gov.au.

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