

This is an outline of some of the important recent tax issues that have arisen in the months of October, November and December 2009. The information provided in this publication is a guide only and should not be relied upon as advice from PKF. For more details please contact your PKF Tax adviser.

## Significant Taxation Cases

### Court Cases

#### **Legal adviser liable for advice on illegal activity –** *ASIC v Somerville & Ors [2009] NSWSC 934*

A legal adviser who instructed 8 company directors to take assets out of companies that were insolvent and put them out of the reach of creditors was found to have contravened the Corporations Act by being involved in the director's breaches. Consequently the legal adviser was disqualified from managing corporations for a number of years.

#### **Personal Services Income for a non-resident company –** *Russell v Commissioner of Taxation [2009] FCA 1224*

The taxpayer was an accountant who migrated from New Zealand to Australia. He was employed by his New Zealand private company, which under an agreement with another (unrelated) company provided the taxpayer's services as the financial controller of that other company.

The Court accepted the Tax Office's position that the income was reward for the personal skill and services of the taxpayer and did not pass the PSI tests.

The decision indicates that the PSI provisions equally apply to resident and non-resident taxpayers, including non-resident companies. And unfortunately for this taxpayer, this resulted in the individual being taxed in Australia and the company being taxed in New Zealand without being able to claim treaty relief.

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#### **Deduction for self education expenses allowed –** *Commissioner of Taxation v Anstis [2009] FCAFC 154*

The Full Federal Court has confirmed self-education expenses were deductible against Youth Allowance income. The Tax Office has requested special leave to appeal the decision to the High Court.

#### **Application of debt forgiveness provisions –** *Commissioner of Taxation v Tasman Group Services Pty Ltd [2009] FCAFC 148*

The Full Federal Court has held the commercial debt forgiveness provisions applied to significant loans made by a Japanese parent to its Australian subsidiary.

#### **CGT and Consolidation cost setting –** *Handbury Holdings Pty Ltd v Commissioner of Taxation [2009] FCAFC 141*

The Full Federal Court confirmed an "entity's net assets" are to be assessed just before the moment of deconsolidation.

### AAT Cases

#### **Interest on advance to partnership non-deductible –** *Jones v FC of T [2009] AATA 744*

The Tribunal has held interest and loan service costs claimed by partners in a partnership on money advanced to the partnership by one of the partners were non-deductible as the loan was an investment of capital in the partnership.

**Interest on loan used to satisfy guarantee deductible –**  
*Willersdorf-Greene v Commissioner of Taxation [2009] AATA 649*

The AAT has held interest payable on a loan used to satisfy a guarantee is deductible, even though the loan was taken out after the income producing activities had ceased.

**What is meant by “first practicable”?** – *Caller v Federal Commissioner of Taxation [2009] AATA 890*

In this case, the Tribunal determined that a taxpayer and his wife did not qualify for the main residence CGT exemption on a house they intended to live in but never did.

**Casual market researchers employees for SGC –** *Roy Morgan Research Pty Ltd and Commissioner of Taxation [2009] AATA 702*

The AAT has held market research interviewers were employees, and not independent contractors, of the taxpayer for superannuation guarantee purposes. Accordingly, the taxpayer was liable for SGC.

**Commissioner denied a Part IVA Determination –**  
*News Australia Holdings Pty Limited and Commissioner of Taxation [2009] AATA 750*

The AAT held Part IVA did not apply to a restructure of a corporate group which resulted in a \$1.5 billion tax benefit in the form of a capital loss. The dominant purpose of the scheme was not to obtain a tax benefit but to relocate the head company of the group to the United States. Accordingly, the Tax Office should not have cancelled the tax benefit.

## Significant Income Tax Rulings/ Determinations

### Draft Taxation Rulings

**Division 7A and unpaid present entitlements from a trust -** *Draft Taxation Ruling TR 2009/D8 – Income tax: Division 7A loans: trust entitlements*

This draft Ruling expresses the Commissioner's opinion on the circumstances in which a private company with an unpaid present entitlement (UPE) to an amount from an associated trust estate, in circumstances where funds representing that present entitlement remain intermingled with funds of the trust, may be taken to have made a loan to that trust within the meaning of Division 7A of ITAA 1936.

The draft ruling indicates that unless the funds representing the UPE are kept in a sub-trust separate from the funds of the main trust and used for the specific benefit of the corporate beneficiary, the UPE would be converted into a loan to the trust and deemed to be a dividend. This is unless the loan is governed by a complying Division 7A loan agreement or repaid before the corporate beneficiary's income tax return lodgement day for the year the loan was made.

### Taxation Rulings

**Trade incentives and trading stock –** *Taxation Ruling TR 2009/5 – Income tax: trading stock - treatment of discounts, rebates and other trade incentives offered by sellers to buyers*

This final Taxation Ruling deals with following:

- ▶ the application of the trading stock provisions to trade incentives such as discounts, rebates, or other incentives offered by sellers to buyers; and
- ▶ clarifies when a trade incentive is derived by the buyer and incurred by the seller.

### Draft Taxation Determinations

**Application of Part IVA to treaty shopping –** *Draft Taxation Determination TD 2009/D17 Income tax: treaty shopping - can Part IVA of the ITAA 1936 apply to arrangements designed to alter the intended effect of Australia's International Tax Agreements network?*

The Commissioner considers that Part IVA can apply to arrangements designed to alter the intended effect of Australia's International Tax Agreements network.

**Income from the disposal of target assets acquired by a private equity entity – Draft Taxation Determination TD 2009/D18 – Income tax: can a private equity entity make an income gain from the disposal of the target assets it has acquired?**

This draft TD states a private equity entity may make an income gain from the disposal of the shares or other interests in the target entity where they were acquired for the purpose of making a profit on their disposal.

## Miscellaneous Rulings/Releases

### Australia/New Zealand Double Tax Agreement

Australia and New Zealand signed a new DTA which reduces the withholding tax limits on dividends, interest and royalty payments. It also changes the definition of “permanent establishment”.

## Legislation Update

### Draft Legislation

**Company Losses – Exposure Draft: Tax Laws Amendment (2009 Measures No 6): Company Losses**

Treasury has released draft legislation to amend the company loss recoupment rules by:

- ▶ modifying the continuity of ownership test (COT) for companies whose shares have unequal rights to dividends, capital distributions or voting power; and
- ▶ clarifying the entry history rule does not operate in respect of an entity that becomes a subsidiary member of a consolidated group or MEC group for the purposes of applying the same business test (SBT).

**25% entrepreneurs’ tax offset – Exposure Draft: Tax Laws Amendment (2010 Measures No. 1) Bill 2010: 25% entrepreneurs’ tax offset**

The legislation contains amendments to restrict access to the 25% entrepreneurs’ tax offset (ETO) contained in subdivision 61-J of the ITAA 1997.

**Foreign source income deferral – Exposure Draft: Tax Laws Amendment (Foreign Source Income Deferral) Bill (No. 1) 2010**

The legislation contains amendments to repeal the Foreign Investment Fund (FIF) rules and Deemed Present Entitlement (DPE) rules.

**Review into the PSI rules – Board of Taxation – Post Implementation Review into the Alienation of Personal Services Income Rules**

The Board of Taxation has undertaken a post-implementation review into the alienation of personal services income (PSI) rules to establish if the legislation is having its intended effect and whether its implementation can be improved.

**Division 7A and the use of assets – Exposure Draft: Tax Laws Amendment (2010 Measures No. 1) Bill 2010: Division 7A**

The legislation contains amendments to the Division 7A non-commercial loan rules to tax a private company shareholder (or an associate) for the use of company assets, under a lease, licence or other right to use, for less than their market value.

The draft legislation also contains technical amendments to strengthen non-commercial loan rules to ensure that they operate in accordance with original policy intent and cannot be circumvented by the use of a corporate limited partnership.

### Legislation

**Trust Cloning – Tax Laws Amendment (2009 Measures No 6): CGT and Trusts**

The Government has introduced legislation which removes the CGT trust cloning exception and provides a limited fixed trust roll-over. Specifically the draft legislation provides for the following:

#### Trust Cloning

1. Exceptions to CGT events E1 (creation of a trust over a CGT asset) and E2 (transferring a CGT asset to an existing trust) are to be repealed. These are known as the ‘trust cloning’ exceptions.

2. The introduction of a limited CGT roll-over for the transfer of assets between trusts with the same beneficiaries with the same trust interests.

#### **Reforming the taxation of employee share schemes**

- ▶ Tax Laws Amendment (2009 Budget Measures No 2) Bill 2009 (Budget No 2 Bill), and
- ▶ Income Tax (TFN Withholding Tax (ESS)) Bill 2009 (TFN withholding Bill).

The two Bills seek to reform the taxation of employee share schemes by replacing current Division 13A and inserting new Division 83A into the ITAA 1997 dealing with employee share schemes. New subdivisions will also be introduced into the Taxation Administration Act 1953 (TAA 1953) to deal with the employee share scheme withholding tax, and employee share scheme reporting.

The changes apply to shares, rights and stapled securities acquired on and after 1 July 2009. Shares, rights and stapled securities acquired before this time will also be brought within the new rules. However, transitional arrangements will be provided to ensure the effect of the existing law is maintained for securities acquired before 1 July 2009.

#### **Non-commercial loss rules – Taxation Laws Amendment (2009 Budget Measures No. 2) Bill 2009**

This Bill tightens the application of the non-commercial losses rules in relation to individuals with an adjusted taxable income in excess of \$250,000. These amendments will prevent high income individuals from offsetting deductions from non-commercial business activities against their salary, wage or other income.

#### **Private Health Insurance Rebate and Medicare Levy Surcharge – Fairer Private Health Insurance Incentives Bill 2009, Fairer Private Health Insurance Incentives (Medicare Levy Surcharge) Bill 2009, Fairer Private Health Insurance Incentives (Medicare Levy Surcharge – Fringe Benefits) Bill 2009**

The Government has introduced a set of bills to reduce the private health insurance rebate and increase the medicare levy surcharge for higher income earners. These reforms were announced in the 2009-10 Federal Budget.

#### **Confidentiality of taxpayer information – Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009**

This Bill amends the secrecy and disclosure provisions applying to taxation information that are currently spread over many taxation law Acts.

Should you require assistance additional information **please contact your PKF Tax adviser**

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