

This is an outline of some of the important recent tax issues that have arisen in the months of May, June, July and August 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

Deduction for Self Education Expenses Allowed – *Anstis v Commissioner of Taxation [2009] FCA 286*

The Federal Court has held that a taxpayer was entitled to deduct self education expenses against Youth Allowance income.

No Deduction for Purchase Price as Expense Not Incurred – *Commissioner of Taxation v Malouf [2009] FCAFC 44*

The Full Federal Court held the obligation to pay the balance of the purchase price under a contract for the purchase of a retirement village was incurred in the year the payment was made, and not when the contract was entered into.

Internal Financier Entitled to Deduction for Bad Debts – *Billiton Finance Limited v Commissioner of Taxation [2009] FCA 276*

The Federal Court has held that a taxpayer was entitled to a deduction for over \$2 bn under the bad debt provisions in relation to monies lent to two subsidiaries of the BHP Billiton Group for mining projects which failed.

Investors only entitled to a Deduction for an Investment Loss in a Theatrical Production Investment Scheme to the Extent of their Contributions – *De Simone v FCT [2009] FCA 446*

The Federal Court has held that two taxpayers, who were partners in a partnership which invested in a theatrical production scheme, were only entitled to a deduction for their share of the partnership loss to the extent of their actual cash investment.

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No Deduction for Misappropriated Monies – *FC of T v Lean [2009] FCA 490*

The Federal Court has held that money misappropriated by the taxpayer's investment fund manager was not deductible as lost or misappropriated amount.

Interest Payments Under a Debenture Not Deductible – *St George Bank Limited v Commissioner of Taxation [2009] FCAFC 62*

The Full Federal Court has confirmed that interest payments under a debenture issued by St George Bank to its US subsidiary were capital and not deductible.

Penalties for False Statements but Not Recklessness – *Pearson v Deputy Commissioner of Taxation [2009] FCA 558*

The Federal Court confirmed that a taxpayer that failed to disclose trust distributions made to her made a false and misleading statement but she was not considered to be reckless.

Trust Income Includes Capital Gains – *Bamford v Commissioner of Taxation [2009] FCAFC 66*

The Full Federal Court has held that a capital gain made by a trust was correctly distributed. The Court confirmed that the 'proportionate' approach was correct and that the trust deed can determine what is 'income of the trust'.

Management Fees Paid by Footballers Deductible –
Spriggs v Commissioner of Taxation; Riddell v Commissioner of Taxation [2009] HCA 22

The High Court has held that two professional footballers who paid fees to their managers to negotiate contracts and other income producing activities such as sponsorships and endorsements were entitled to a deduction for those management fees. This was despite the fact the fees were paid for the negotiation of new playing contracts.

Taxpayer not Allowed to have Further Particulars Relating to Part IVA Litigation –
Futuris Corporation Ltd v FC of T

The Federal Court refused the taxpayer's application for further and better particulars of the events and transactions which the Commissioner alleges might have occurred had certain Part IVA schemes not been entered into.

Division 7A Applies to Payments Made to Director –
3D Scaffolding Pty Limited and James Doherty v FC of T [2009] FCAFC 75

The Full Federal Court has held that a company was not entitled to deductions for payments allegedly made for the hiring of scaffolding equipment used in its business. Further, it held that the payments were assessable to the director under Division 7A.

Tribunal Cases

No Deduction for Overseas Business Expenses –
Al Ibrahim and Commissioner of Taxation [2009] AATA 239

The AAT has held that a taxpayer was not entitled to deductions incurred in relation to an overseas business due to insufficient evidence of the business being conducted.

No Access to CGT Small Business Retirement Exemption –
Davies & Anor v FC of T [2009] AATA 29

The AAT has held that a husband and wife who worked on farms owned by trusts they controlled were not entitled to the small business retirement exemption for the capital gain made from the sale of the farms.

Payments Made into Foreign Bank Account Deemed to be Division 7A Dividends –
Reid and FCT [2009] AATA 357

The AAT has held that monies which were owed to a company but were paid into a US bank account, at the direction of the shareholders, were Division 7A deemed dividends.

Family Trust Distributions Come Home –
JHDY and Commissioner of Taxation [2009] AATA 356

The AAT has held a taxpayer was assessable on the reduction of their loan account with a family trust. The reduction represented the taxpayer's assessable profit from the promotion of tax avoidance schemes.

FBT Payable on Car Garaged at Business/Home –
Jetto Industrial Pty Ltd v Commissioner of Taxation [2009] AATA 374

The AAT has held that a car kept at the company's business premises, where those premises were also the home of the company's sole director, was subject to FBT.

Unrelated Clients Test Passed in Unusual Circumstances –
Yalos Engineering Pty Ltd v FC of T [2009] AATA 390

The AAT has directed the Tax Office to make a personal services business determination in favour of a taxpayer who, but for unusual circumstances, could have reasonably been expected to meet the unrelated clients test for the 2004 and 2005 years.

Insufficient Steps Taken to Rent Property –
Bonaccordo v FCT [2009] AATA 385

The AAT has held that a taxpayer was not entitled to rental property deductions in relation to a property which remained unrented for three years. This was on the basis that the taxpayer had not taken sufficient steps to advertise the property was available for rent.

No Deduction for Self Education Expenses –
Yan v FCT [2009] AATA 377

The AAT confirmed a taxpayer was not entitled to a deduction for self education expenses for the cost of a Masters of Commerce and a wealth management course at university.

Non-Resident Liable For Tax on Salary from Australia –
AAT Case [2009] AATA 428, Re Campisi and FCT

The AAT has held that an Australian non-resident who was in Australia on a five month working holiday during the 2008 year was liable for tax on salary and wages he earned in Australia during that period.

No Deduction for Accommodation and Telephone Expenses –
Confidential v Commissioner of Taxation [2009] AATA 478

The AAT has held that a taxpayer was not entitled to a deduction for self-education expenses relating to living expenses incurred while enrolled in postgraduate studies at an overseas institution. These disallowed deductions related to food and accommodation, phone cards and mobile phone costs.

Employer Should Have Made Super Contributions – *ML Griffiths and RD Griffiths and RJ Griffiths v Commissioner of Taxation [2009] AATA 482*

The AAT held that an employer was liable for the superannuation guarantee charge (SGC) for failing to make minimum superannuation contributions in respect of an individual operating in the taxpayer's business as an independent contractor.

Division 7A applied to Loans Made to Husband and Wife Company Shareholders/Directors – *AAT Cases [2009] AATA 435, 436, 438 & 439*

In four related cases, the AAT has held that Division 7A applied to 'loans' made by private companies to the husband and wife shareholder/directors of those companies. Further the exception for written loan agreements did not apply as the documents produced by the taxpayers were not 'written agreements' between the companies and the taxpayers. Rather, they were pro-forma documents created by the taxpayers' advisers, and were only executed by the borrowers and not the companies.

Significant Income Tax Rulings/ Determinations

Taxation Rulings

Genuine Redundancy Payments – *Taxation Ruling TR 2009/2*

This Ruling outlines the requirements which must be satisfied before any payment made to an individual whose employment is terminated qualifies for treatment as a genuine redundancy payment under Section 83-175 of the ITAA 1997. The Ruling also discusses the interaction between the tax treatment of genuine redundancy payments and the tax treatment of other termination payments provided for by Divisions 82 and 83.

Non-Share Distributions on Certain 'dollar value' Convertible Notes – *Taxation Ruling TR 2009/3*

This Ruling considers the application of section 177EA to arrangements involving certain 'dollar value' convertible notes that are non-share equity interests. These notes are classified as non-share equity interests under Division 974, essentially because the issuer may choose to convert the notes into ordinary shares that are equity interests in the issuer rather than to repay the issue price. The notes are expected to yield frankable periodic returns that are non-share dividends in the legal form of interest.

Trading Stock - Treatment of Discounts, Rebates and Other Trade Incentives Offered By Sellers to Buyers – *Draft Taxation Ruling TR 2009/D2*

This draft Taxation Ruling deals with the following:

- ▶ the application of the trading stock provisions to trade incentives offered by sellers to buyers; and
- ▶ clarifies when a trade incentive is derived by the buyer and incurred by the seller.

Superannuation Contributions – *Draft Taxation Ruling TR 2009/D3*

This draft Ruling explains the Commissioner's views as to the ordinary meaning of 'contribution' as in relation to a superannuation fund, approved deposit fund or retirement savings account.

Taxation Determinations

Real Property Includes Leasehold Interest – *Draft Taxation Determination TD 2009/D1*

This draft Taxation Determination states that for the purposes of provisions dealing with capital gains and foreign residents, the term "real property" includes a leasehold interest in land.

FBT Car Parking Threshold – *Taxation Determination TD 2009/11*

The car parking threshold for the FBT year commencing on 1 April 2009 is \$7.25. This replaces the amount of \$7.07 that applied in the previous year commencing 1 April 2008.

Car Limit for 2009-10 – *Taxation Determination TD 2009/13*

This Determination states that the car limit for the 2009-10 financial year is \$57,180.

Reasonable Travel and Overtime Meal Allowance Limits for 2009-10 – *Taxation Determination TD 2009/15*

This Determination sets out the amounts the Commissioner considers to be reasonable for the 2009-10 financial year in relation to claims for:

- ▶ overtime meal allowance expenses;
- ▶ domestic travel allowance expenses;
- ▶ travel allowance expenses for employee truck drivers, and
- ▶ overseas travel allowance expenses.

Division 7A Benchmark Interest Rate – Taxation Determination TD 2009/16

For the year commencing 1 July 2009, the benchmark interest rate for the purposes of Division 7A is 5.75 % pa.

GST Rulings

New Residential Premises – GST Ruling GSTR 2009/4

This GST Ruling explains the Commissioner's view of when an adjustment for a change in extent of creditable purpose arises under Division 129 of the GST Act in relation to acquisitions made in constructing new residential premises.

The Ruling provides guidance on how to determine the extent to which an acquisition made in constructing new residential premises is applied for a creditable purpose (where the new residential premises are being held for sale as part of an entity's enterprise) but prior to their sale the new residential premises are leased for a period of time.

GST Determinations

Draft GST Determination GSTD 2009/D1 – Trading stock taken for private use – taxable supply

When a partner in a partnership takes goods held as trading stock by the partnership for private or domestic use, there is a supply for GST purposes by the partnership to the partner in the course or furtherance of the partnership's enterprise.

GST Determination GSTD 2009/1 – In specie distribution to trust beneficiary – taxable supply

An in specie distribution of an asset applied in an enterprise carried on by a discretionary trust is a taxable supply for GST purposes, provided the supply is made in the course or furtherance of that enterprise.

Superannuation Rulings

Meaning of the Terms 'Ordinary Time Earnings' and 'Salary or Wages' – Superannuation Guarantee Ruling SGR 2009/2 –

This Ruling outlines the Commissioner's view on meaning of "ordinary time earnings" and "salary or wages" as defined in the SGAA. The definition of "ordinary time earnings" is relevant to employers for the purpose of calculating the minimum level of superannuation support required for individual employees under the SGAA.

Unpaid Trust Distributions Payable to a Self Managed Superannuation Fund (SMSF) – Self Managed Superannuation Funds Ruling SMSFR 2009/3

This Ruling considers whether a self-managed superannuation fund (SMSF) contravenes the Superannuation Industry (Supervision) Act 1993 (SISA) when the SMSF is presently entitled to distributions from a related trust which is not paid to the SMSF.

The provisions considered are:

- ▶ the in-house asset rules;
- ▶ the arm's length rules; and
- ▶ the sole purpose test.

SMSFs and Key Definitions in the Term Phrase "In-House Asset" – Self Managed Superannuation Funds Ruling SMSFR 2009/4

This Ruling explains the core concepts in the definition of "in-house asset" as they apply to SMSFs. The key definitions explained "asset"; "loan"; "investment in"; "lease" and "lease arrangement".

Miscellaneous Rulings/Determinations

Luxury Car Tax Threshold – Luxury Car Tax Determination LCTD 2009/1

The luxury car tax threshold for the 2009-10 income year is \$57,180 (which is equal to the car limit). It is used to determine if luxury car tax is payable.

The fuel efficient car limit for the 2009-2010 income year is \$75,000.

Taxpayer Alerts

Exploitation of 1999 Superannuation Transitional Provisions to Obtain Taxation and Regulatory Benefits – Taxpayer Alert TA 2009/8

This Taxpayer Alert describes an arrangement that involves the transfer of benefits associated with the 1999 'transitional provisions' for SMSFs with pre-existing interests in unit trusts. These arrangements may not satisfy the requirement that the pre 1999 SMSF has to be continuously maintained to provide retirement benefits to members both before and after its sale.

Contrived Cross-Border Arrangements that Seek to Generate Debt Deductions for Non-Assessable Non-Exempt Income – Taxpayer Alert TA 2009/9

This Taxpayer Alert describes certain cross-border financing arrangements which seek to generate debt deductions in Australia whilst taking advantage of the non-assessable nature of many foreign income amounts.

Non-Commercial use of Negotiable Instruments Involving Self-Managed Superannuation Funds – Taxpayer Alert TA 2009/10

This Taxpayer Alert describes arrangements involving non-commercial use of negotiable instruments to pay a benefit from or make a contribution to a SMSF.

Re-Characterising Capital Losses as Revenue Losses – Taxpayer Alert TA 2009/12

This Taxpayer Alert describes arrangements whereby taxpayers seek to re-characterise their shareholding status from that of a long term capital investor to a trader in shares.

Managed Investment Schemes: Purported partnership participation – Taxpayer Alert TA 2009/13

This Taxpayer Alert describes arrangements where a partnership is inserted into an investment in an afforestation, agricultural or horticultural managed investment scheme in order to generate deductions for the newly inserted partners.

Payment of Inflated Insurance Premiums to a Related Party – Taxpayer Alert TA 2009/15

This Taxpayer Alert describes an arrangement involving payments of amounts described as insurance premiums which are excessive by reference to the coverage provided and feature no significant transfer of insurance risk.

Circumvention of In-House Asset Rules by Self-Managed Superannuation Funds – Taxpayer Alert TA 2009/16

This Taxpayer Alert describes an arrangement where a SMSF enters into an agreement with a related trust to acquire assets, such as rental property, in order to obtain taxation and superannuation benefits. Such an arrangement may breach the superannuation in-house asset rules.

Legislation Update

Exposure Draft Legislation

Tax Laws Amendment (2009 Budget Measures No. 1) Bill 2009

The Treasurer has released exposure draft legislation to amend the current general income tax exemption for income earned in overseas employment contained in section 23AG of the ITAA 1936. These changes were announced in the 2009/10 Federal Budget and broadly seek to narrow the class of persons able to access the section 23AG exemption.

Carbon Pollution Reduction Scheme

The Government has introduced a collection of legislation to introduce the Carbon Pollution Reduction Scheme (CPRS). The CPRS is the Government's primary tool to drive the reduction of greenhouse gas emissions. The objectives of the Scheme are to give effect to Australia's international climate change obligations, support the development of an effective global response to climate change, and provide a way for Australia to meet national emission reduction targets.

Broadly, the CPRS seeks to establish an emissions trading scheme as part of an effective framework for meeting the climate change challenge.

Tax Laws Amendment (2009 Measures No. 5) Bill 2009 – Non Commercial Losses

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. These amendments were previously announced in the 2009-10 Federal Budget.

Legislation

Tax Laws Amendment (2009 Budget Measures No 1) Bill 2009

This Bill implements the superannuation and the section 23AG foreign income exemption changes announced in the 2009/10 Federal Budget. Specifically the Bill contains amendments in relation to the following:

- exemption of income earned in overseas employment;
- temporary reduction in the government co-contribution; and
- reduction in the concessional contributions cap.

Tax Laws Amendment (2009 Measures No. 4) Bill 2009

This Bill contains amendments in relation to the following:

- ▶ lifting the expenditure cap for eligibility to the research and development tax offset;
- ▶ prescribed private funds;
- ▶ demutualisation of friendly societies;
- ▶ consolidation: application of losses with nil available fraction; and
- ▶ minor amendments.

Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009

The Bill facilitates the smooth transition from the current law regarding the registration of tax agents to the new law in the Tax Agent Services Act 2009 (TAS Act).

The Bill proposes to:

- ▶ provide relief from certain administrative penalties for taxpayers who engage a registered tax agent or BAS agent;
- ▶ provide transitional arrangements for registration;
- ▶ provide for the transition of the functions of the state Tax Agents' Boards to the Tax Practitioners Board (Board); and
- ▶ make consequential amendments to existing legislation.

Should you require assistance additional information **please contact your PKF Tax adviser** or
Lance Cunningham Phone: 02 9240 9736 | Email: lance_cunningham@pkf.com.au
Level 10, 1 Margaret Street | Sydney | New South Wales 2000 | Australia

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