



2012



# NEWSLETTER

## TAX LEGISLATION UPDATE IN PLAIN ENGLISH

- Decision Impact Statement
  - Matthew Groves V Commissioner Of Taxation
- School Children Caught Up In Education Tax Refund Fraud
- Decision Impact Statements
  - The Taxpayer & Commissioner Of Taxation
  - Crown Insurance Services Ltd & Commissioner Of Taxation (2011) AATA 847
- Tax Measures In Mid-Year Economic And Fiscal Outlook
- Review Of The ATO's Cash Economy Benchmarking
- ATO Publication-Self Managed Super Funds: A Statistical Overview 2008-09
- M & T Properties Pty Ltd And Commissioner Of Taxation (2011) AATA 857
- Mills V Commissioner Of Taxation (2011) FCAFC 158
- Decision Impact Statement
  - Jooheon Park V Commissioner Of Taxation
- Australia: ATO Data Matching Project And Temporary Visa Holders
- Business Tax Working Group – Interim Report On The Tax Treatment Of Losses
- Iyengar And Commissioner Of Taxation (2011) AATA 856
- Multiflex Decision Impacts GST Refunds
- Tax Measures In Mid-Year Economic And Fiscal Outlook
- Superannuation Measures As Part Of The Mid-Year Economic And Fiscal Outlook
- Extension Of Draw-Down Relief A Win For Self-Funded Retirees
- Superannuation Guarantee Age Limit To Be Abolished
- Tax Smart Questions And Answers

### *“Leigh’s Corner”*

#### BULLYING AND HARASSMENT IN THE WORKPLACE

The Sex and Age Discrimination Legislation Amendment Act 2011 (Cth) came into effect on 21 June 2011

## BONUS ISSUE

### TAX SAVINGS TIPS

THIS ISSUE HAS OVER 150 METHODS TO LEGITIMATELY REDUCE AND SAVE TAXATION IN ALPHABETICAL ORDER...INCLUDING SOME OF THE MOST COMMONLY OVERLOOKED FBT (FRINGE BENEFITS TAX) YEAR END CONSIDERATIONS!

#### Disclaimer

The information, statements and opinions expressed in this publication are only intended as a guide to some of the important considerations to be taken into account relating to taxation matters. Although we believe that the statements are correct and every effort has been made to ensure that they are correct, they should not be taken to represent taxation advice and you must obtain your own independent taxation advice. Neither the authors, nor the publisher or any people involved in the preparation of this publication give any guarantees about its contents or accept any liability for any loss, damage or other consequences which may arise as a result of any person acting on or using the information and opinions contained in this publication.

Readers seeking taxation advice should obtain their own independent advice and make their own enquiries about the correctness of information set out in this publication and its accuracy in relation to their own particular circumstances.

Copyright © 2009

This publication has been written and designed by Tax Smart Australia Pty Ltd as Trustee for the TSA Unit Trust. No part of this document that is covered by copyright may be reproduced without the express permission of Tax Smart Australia Pty Ltd as Trustee for the TSA Unit Trust.

# CONTENTS

## NEWSLETTER

### TAX LEGISLATION UPDATE IN PLAIN ENGLISH

• Decision Impact Statement	
- Matthew Groves V Commissioner Of Taxation .....	2
• School Children Caught Up In Education Tax Refund Fraud .....	2
• Decision Impact Statements	
- The Taxpayer & Commissioner Of Taxation .....	2
- Crown Insurance Services Ltd & Commissioner Of Taxation (2011) AATA 847.....	3
• Tax Measures in Mid-Year Economic and Fiscal Outlook .....	3
• Review Of the ATO's Cash Economy Benchmarking .....	4
• ATO Publication- Self Managed Super Funds: A Statistical Overview 2008-09 .....	5
• M & T Properties Pty Ltd and Commissioner of Taxation (2011) AATA 857.....	5
• Mills V Commissioner of Taxation (2011) FCAFC 158 .....	5
• Decision Impact Statement	
- Jooheon Park V Commissioner Of Taxation .....	5
• Australia: ATO Data Matching Project and Temporary Visa Holders .....	6
• Business Tax Working Group – Interim Report on the Tax Treatment of Losses .....	7
• Iyengar and Commissioner of Taxation (2011) AATA 856 .....	7
• Multiflex Decision Impacts GST Refunds .....	8
• Tax Measures in Mid-Year Economic and Fiscal Outlook .....	9
• Superannuation Measures as Part of the Mid-Year Economic and Fiscal Outlook .....	10
• Extension of Draw-Down Relief A Win For Self-Funded Retirees.....	11
• Superannuation Guarantee Age Limit To Be Abolished .....	11
• Tax Smart Questions and Answers .....	12
<i>“Leigh’s Corner”</i> .....	16

### BULLYING AND HARASSMENT IN THE WORKPLACE

**The Sex and Age Discrimination Legislation Amendment Act 2011 (Cth) came into effect on 21 June 2011**

<b>BONUS ISSUE</b> .....	19
<b>TAX SAVINGS TIPS</b>	

THIS ISSUE HAS OVER 150 METHODS TO LEGITIMATELY REDUCE AND SAVE TAXATION IN ALPHABETICAL ORDER...INCLUDING SOME OF THE MOST COMMONLY OVERLOOKED FBT (FRINGE BENEFITS TAX) YEAR END CONSIDERATIONS!

## DECISION IMPACT STATEMENT

### Matthew Groves V Commissioner of Taxation

This Decision Impact Statement outlines the ATO response to this case which concerned the residency status of a taxpayer.

The taxpayer arrived in Australia on a working holiday visa on 2 July 2009, spent about one and a half months travelling and then rented accommodation in Coogee from September 2009 to 27 May 2010 when he departed Australia, returning to the UK. While he was in Sydney, the taxpayer had earnings from work as a bar attendant in a Sydney hotel.

The Commissioner accepted, prior to the matter being heard that the taxpayer was a resident of Australia for tax purposes. However, the taxpayer submitted that he was a resident for the entire income year and thus should be entitled to a full year tax-free threshold (even though the taxpayer was only present in Australia for eleven months and not the full income year).

### Issues decided by the Court

The Tribunal affirmed the Commissioner's view that the taxpayer should be treated as having a part-year residency period of eleven months in accordance with section 18 of the Income Tax Rates Act 1986.

### ATO view of Decision

The decision was based on the facts of the case.

## SCHOOL CHILDREN CAUGHT UP IN EDUCATION TAX REFUND FRAUD

Suspected promoters of an Education Tax Refund scam had their personal computers and records seized on 30th November, 2011 with the execution of multiple search warrants by the Australian Taxation Office and Australian Federal Police.

It is suspected the group targeted students from South-Western Sydney high schools to submit fraudulent Education Tax Refund claims for non-existent school children or in the names of students not entitled to claim the refund.

According to Taxation Commissioner Michael D'Ascenzo:

- The ATO uses sophisticated data matching technology to review all refund claims and check for fraud before refunds are issued.
- To ATO received information from honest taxpayers who let them know about tax fraud happening in their area.

- Australians do not tolerate tax fraud. Make no mistake - if people try to make claims they know they are not entitled to, they are likely to be caught with serious consequences.
- A member of the group is alleged to have used Facebook as his main recruitment tool, telling students on the social networking site he could arrange refunds if they provided their Tax File Number (TFN), address and date of birth.
- Your TFN is one of your most valuable forms of identification. Like all personal and confidential information, your TFN should be kept secure, and never given to an unauthorised person.
- If someone steals your identity it could affect you for the rest of your life. Overseas travel, your future credit rating and access to your superannuation and savings can all be affected if you are a victim of identity theft.

All in all...very stupid and an easy one for the ATO to solve.

## DECISION IMPACT STATEMENTS

### The Taxpayer and Commissioner of Taxation

This case concerned whether discounts arising from the acquisition of shares under an employee share scheme are assessable income and not subject to the capital gains tax provisions.

The applicant, an employee of a multi-national corporation, exercised options as part of the company's employee share scheme to acquire 11,000 shares at a price below market value.

The Commissioner assessed the discount, being the difference between the market price of the share and the strike price of the option, as assessable income of the applicant in accordance with Division 13A of the Income Tax Assessment Act 1936. An administrative penalty was imposed at the rate of 25% for lack of reasonable care.

The Tribunal found the amount of the discount was assessable as income under Division 13A of the Income Tax Assessment Act 1936, and a capital loss or gain did not arise. In the circumstances, the discount would be included in the income year in which the cessation time occurred, being the date the shares were acquired. The Tribunal accepted that for the purposes of ascertaining the market value of the share, exchange rate data from the company's website could be used, and that the foreign currency calculation required by the legislation need only occur once the weighted average share price had been determined. The Tribunal allowed a recalculation of the discount to permit the use of the most favourable exchange rates.

The administrative penalty had been correctly imposed

as the applicant was experienced in financial matters as a result of his occupation and experience, and ought to have obtained advice given the amount of money involved.

The ATO considers that the case was decided on its facts. The decision confirms a discount arising from shares acquired under employee share schemes is to be included as assessable income of the taxpayer, and the methodology to be applied in ascertaining the value of the discount.

### **Crown Insurance Services Limited and Commissioner of Taxation (2011) AATA 847**

This AAT case dealt with source of income. The AAT found that an insurance company incorporated in Vanuatu was not a resident of Australia and the income of the company did not have its source in Australia.

Crown argued it did not carry on business in Australia and that business was reinsurance conducted in the relevant years in Vanuatu. The Commissioner took the position that Crown was a captive group insurer whose business was inextricably interwoven with that of the member companies which were all resident in Australia. The Commissioner did not put a case regarding voting power.

The AAT found that Crown did not carry on business in Australia. To quote an extract from the judgement:

'The external indicia of Crown, its registered office and its business premises, were all situated in Vanuatu. Its accounts were prepared in Vanuatu, from primary documents held in Vanuatu and audited by auditors in Vanuatu as was required by the laws of Vanuatu. Company meetings were conducted in Vanuatu and all of its corporate and financial records were maintained there... If, as I conclude, the business of Crown was the entry into the various contracts with member companies and the performance of those contracts it is not possible to find any Australian element to that business beyond the presence in Australia of the various entities insured under those contracts.'

The AAT held that Crown did not have its central management and control in Australia during the relevant years. Further if it had been necessary to reach a conclusion on where central management and control was, the AAT would have considered the answer to be Vanuatu.

Accordingly Crown neither carried on business in Australia nor had its central management and control in Australia, it was not an Australian resident during the relevant income years.

The Commissioner's contentions regarding source considered the original source of Crown's income – being premium amounts received directly or indirectly by the

ACBF group entities in Australia, from fund members solely in Australia, after management fees and other expenses have been deducted by the ACBF group.

The AAT held that the source of Crown's income was the insurance contracts with the various member companies and that the contracts were made and performed in Vanuatu. As such the income was sourced in Vanuatu not Australia.

## **TAX MEASURES IN MID-YEAR ECONOMIC AND FISCAL OUTLOOK**

Last November, the government announced a number of measures as part of the Mid-Year Economic and Fiscal Outlook stemming from ideas discussed at the October 2011 Tax Forum.

These measures are as follows:

- Fringe Benefits Tax (FBT) reforms to stop individuals from being able to exploit the tax exemption for living-away-from-home allowance and benefits
- Further reduce outdated workforce participation disincentives for spouses without dependent children to take up paid employment by restricting the dependent spouse tax offset to those with spouses born before 1 July 1952
- Deferring the four previously announced tax reforms by one year. These are as follows:
  - Standard deduction for work-related expenses will be deferred until 1 July 2013
  - The 50% tax discount for interest income will be deferred until 1 July 2013
  - Phase down in interest withholding tax for financial institutions will be deferred until 2014-15
  - New tax system for managed investment trusts will be deferred until 1 July 2013.

Unfortunately the Government's resolve to get the budget into surplus by 2013 involves some sleight of hand.

We are now looking at a \$37 billion deficit for fiscal year 2012 while expecting a 1.5 million surplus in 2013.

Just how is this achieved? Firstly bring expenditure earmarked for 2013 into the 2012 equation as follows:

- |  |               |
|--|---------------|
| • Natural disaster relief                | \$2.3 billion |
| • Household aid to offset carbon tax     | \$1.5 billion |
| • Emissions intensive industries support | \$1.4 billion |
| • Road, infrastructure projects          | \$1.4 billion |

Then we increase revenues in the forward estimates as

follows:

- Defer standard deduction for work expenses \$1.2 billion
- Defer indexing super cap, cut co-contributions \$1.1 billion
- Increased visa costs \$613 million
- Data matching blitz by Tax Office \$328 million

Then we look at the following savings:

- Public sector efficiency dividend increased to 4%. Thousands of jobs to go \$1.5 billion
- Computer systems \$1 billion
- Away from home allowance for business \$682 million
- University funding slashed \$644 million
- Tightening eligibility for dependent spouse \$370 million
- Baby bonus cut to \$5,000 \$320 million

As part of the Public Service squeeze the ATO's 2012/13 budget has been cut by \$73 million and while discussing this with unions barely 5 weeks later Tax Commissioner Michael D'Ascenzo foreshadowed the ATO was preparing for a new wave of business closures and taxpayer bankruptcies in 2012 that could mean a drop in tax revenue.

In 2012 the ATO wrote off \$3.8 billion in tax debts, up from \$1.7 billion in 2009-10, because of taxpayer bankruptcies or businesses being wound up, or due to the debts being "uneconomical to pursue."

The ATO has been unable to reduce the amount of outstanding tax owed by individuals and businesses battered by the global financial crisis and in the natural disasters that Australia faced in January 2011.

Mr D'Ascenzo disclosed the ATO was preparing for lower economic growth that would lower revenue as well as some of the High Court decisions that could undermine the business tax system.

All this makes interesting reading given the mid year economic and fiscal outlook has tax receipts increasing by \$34 billion to \$349 billion in 2012/13.

## REVIEW OF THE ATO'S CASH ECONOMY BENCHMARKING

On 28th November, 2011 the Inspector-General of Taxation (IGT), Mr Ali Noroozi announced terms of reference for his review into the Australian Taxation Office's (ATO) use of benchmarks to target the cash economy and called for stakeholder submissions.

"My review will look at the ATO's use of cash economy benchmarks for small businesses. Taxpayers and tax agents are concerned about how these benchmarks are developed and applied", said Mr Noroozi.

The ATO has published benchmarks for over 100 industries covering small businesses with a turnover under \$15 million. The ATO indicates that these key financial ratios provide guidance on the income it expects businesses in a particular industry to report. Taxpayers falling below the benchmarks may be contacted by the ATO and be required to explain the shortfall.

Mr Noroozi explained, "Taxpayers and tax agents have expressed frustration at what they see as an inference by the ATO that their business is just not making enough money".

Taxpayers and their agents are concerned that the benchmarks do not adequately account for legitimate differences between businesses. It is suggested that these differences may be due to external or internal factors such as locality, inaccurate business classification by the ATO or owner specific management decisions.

Mr Noroozi said, "Every business is unique in some way. Benchmarks like any rule of thumb may have limitations. We need to understand the extent to which taxpayers are being incorrectly captured and whether resulting compliance action is appropriate".

The ATO has indicated that, where taxpayers' explanations for benchmark variance are unsatisfactory, and their records are inadequate, benchmarks may be used as a basis for calculating default or amended assessments. Concerns have also been raised about the ATO's expectations of small business record keeping and its communication with taxpayers and tax agents.

Mr Noroozi said, "It has been suggested that the overall ATO approach in this area can be 'heavy handed' with too much faith being placed in benchmarks. My review will also consider whether record keeping requirements expected of such small businesses are too onerous and whether it is fair to use benchmarks as the basis for default assessments".

"I am actively seeking community input to this review. I welcome submissions with both positive and negative experiences with the ATO's compliance activities involving the use of benchmarks. Your submissions and identities are strictly confidential and not disclosed to anyone, including the ATO", said Mr Noroozi.

Terms of reference and submission guidelines for the review are available on the IGT website: [www.igt.gov.au](http://www.igt.gov.au). Submissions are due by 3 February 2012.

## **ATO PUBLICATION SELF MANAGED SUPERANNUATION FUNDS: A STATISTICAL OVERVIEW 2008-09**

On 13th December, 2011 the Australian Taxation Office (ATO) released the publication Self Managed Superannuation Funds: A Statistical Overview 2008-09.

The publication, based on 2008-09 data, is an update of the Statistical Summary of Self Managed Superannuation Funds produced by the Super System Review in December 2009 which primarily contained data from the 2007-08 year. It is anticipated that a further update based on 2009-10 year data will be released in March 2012.

## **M & T PROPERTIES PTY LTD AND COMMISSIONER OF TAXATION (2011) ATAA 857**

Here the taxpayer failed to satisfy the onus of proving that it satisfied the maximum net asset value (MNAV) test in s 152-15 of the *Income Tax Assessment Act 1997* so as to qualify for small business CGT relief in respect of a CGT event in the 2005 income year.

The parties identified the assets to be taken into account for the purposes of the MNAV test, including three properties. Unless the applicant's value was accepted in each case, the net value of all relevant CGT assets would exceed the \$5m threshold.

Clearly the taxpayer's valuation was on the low side as the AAT was not satisfied that the value attributed to each property by the applicant's valuer was reasonable.

## **MILLS V COMMISSIONER OF TAXATION (2011) FCAFC 158**

The Full Federal Court (Dowsett and Jessup JJ, Edmonds J dissenting) dismissed the taxpayer's appeal and upheld the decision of Emmett J in finding that a purpose of the Commonwealth Bank of Australia, not being an incidental purpose, in issuing certain securities, was to enable holders to obtain an imputation benefit. The imputation benefit was denied to the taxpayer under Part IVA of the Income Tax Assessment Act 1936 specifically s177EA.

Part IVA of ITAA 1936 is the general anti avoidance provision meaning there must be a scheme entered into for the sole and dominant purpose of obtaining a tax benefit.

In 2009 securities were issued known as Perpetual

Exchangeable Resalable Listed Securities (PERLS V) consisting of an unsecured subordinated note issued by the New Zealand branch of the Bank stapled to a preference share issued by the Bank. By issuing the securities in NZ, the Bank was able to obtain a tax deduction in NZ in respect of the distributions on the securities (considered as interest), with the advantage, in terms of cost, of offering Australian residents the imputation benefit.

The taxpayer argued that the imputation benefit was an incident of the issue of the securities for which he subscribed and therefore not subject to s177EA(3)(e). The purpose of obtaining imputation credits may have been 'a very real one, and by no means an insignificant one' but this did not matter.

However, taxpayer's arguments were rejected with the Court concluding that the Bank entered into or carried out the scheme for a purpose (not including an incidental purpose) of enabling taxpayer to obtain an imputation benefit.

Other 'Big Four' Banks have been involved in similar arrangements and this was a test case funded by the ATO.

## **DECISION IMPACT STATEMENT**

### **Jooheon Park V Commissioner of Taxation**

This Decision Impact Statement outlines the ATO's response to this case which concerned whether the personal services income of Photocom Pty Ltd (Photocom), a personal services entity, was properly attributed to the applicant under section 86-15 of the ITAA 1997.

The Applicant was the director of Photocom.

During the 2006 and 2007 income years, the Applicant, on behalf of Photocom, performed computer programming services for the clients of Candle Australia Ltd (Candle). Candle is a labour hire firm.

During the relevant years, the Applicant maintained a residence in Sydney. Also, during that period, the Applicant provided services to a client of Candle in Perth and while performing this role, he rented an apartment in Perth and purchased household items to furnish the apartment.

During the 2007 income year, the Applicant withdrew amounts from Photocom's business bank account and claimed these withdrawals as a payment of Living Away From Home Allowance (LAFHA).

Photocom and the Applicant were subject to an income tax audit for the 2006 and 2007 income years. As a result of the audit, amended assessments issued which attributed