

TAX ROUNDUP

KNOWLEDGE SHOP – JANUARY 2010

JANUARY 2010

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Hello,

Expect a big year in tax this year. The Henry Review, which signals the largest potential series of tax changes we've seen in many years, was released to the Government last month. For now, we need to satisfy ourselves with the leaks and speculation revealed in the newspapers rather than the actual report as the Government works out which of the recommendations it will accept and when it will enact the changes.

With another round of tax reform and the constant tinkering with tax legislation, it will be more important than ever to keep you and your team up to date. Here's what's coming up from Knowledge Shop:

Tax & Business Services Basics

There is no other program as practical or close to reality as this one! Tax & Business Services Basics is an exceptional one day training program that uses a real life client scenario to help your team bring work to review stage.

A great program for recent accountants and those wanting a practical refresher in the basics of tax and business services.

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Melbourne	Sydney	Brisbane
Wed 17 February	Mon 22 February	Wed 24 February

Super-ssentials 2010

Designed for those in SMSF advice or audit. An excellent training day for staff and refresher on the current rules for Seniors to Partners. Super-ssentials will take you through the key issues for the audit of SMSFs for the 2009 and 2010 year, the top super strategies for SMSFs, and an update of the latest happenings in the SMSF area.

[Click here](#) for details or [download the brochure](#).

Sydney	Melbourne	Brisbane
Mon 15 February	Tue 16 February	Fri 19 February

Remember, if you need any assistance from the Knowledge Shop team with any of the issues raised in this round up, use the help desk by logging into the website and [clicking here](#) or call us on 1800 800 232.

Evan Binos

Tax Adviser, Knowledge Shop

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FROM GOVERNMENT

Division 7A exposure draft released

The Government has released the exposure draft legislation (*Tax Laws Amendment (2010 Measures No.1) Bill 2010: Division 7A*) and explanatory materials for the proposed changes to Division 7A.

As announced in the last Federal Budget, the Government wants to expand the definition of “payment” to include a right to use an asset that is owned by a company. This will mean that Division 7A could apply when a company allows shareholders (or their associates) to use its assets without paying full market value for that right.

The draft legislation contains the following exclusions from the new definition of “payment”:

- The minor use of company assets (i.e., value of less than \$300);
- Where the shareholder would have been able to claim a deduction if they had made a payment in relation to the use of the asset (i.e., similar to the otherwise deductible rule for FBT purposes); and
- The use of certain residences on or adjacent to land that is used in a business (e.g., certain farm houses).

The exposure draft legislation also contains a number of other technical amendments, **many of which were covered in Knowledge Shop PD in November / December 2009.**

The changes will apply from 1 July 2009.

More information

- [Division 7A – Exposure Draft Legislation](#)
- Log in to [access the Knowledge Shop November / December PD program archive.](#)

R&D tax credit exposure draft released

The Government has released the exposure draft legislation (*Tax Laws Amendment (Research and Development) Bill 2010*) and explanatory materials for the new R&D tax incentive.

Under the new R&D Tax Credit, companies can claim a tax offset of at least 40% of their expenditure on R&D activities, rising to 45% for companies with a turnover of less than \$20 million.

The R&D Tax Credit will allow small innovative firms to get an immediate contribution towards their R&D spend even if they are not yet turning a profit. For example, a company in tax losses turning over \$10 million and spending \$1 million on eligible R&D activities will now receive a refund of \$450,000 rather than adding \$375,000 to its tax loss.

The new laws however come at a cost with tighter eligibility criteria.

The new R&D tax incentive will replace the existing R&D Tax Concession for all income years commencing on or after 1 July 2010.

More information

- [New R&D Tax Credit - Exposure Draft Legislation](#)
- [The New Research and Development Tax Incentive - Exposure Draft Legislation and Explanatory Materials](#)

Henry Review sitting with the Government

The Government received the final report of the Henry Inquiry into Australia's Future Tax System on 23 December 2009.

The Government have not committed to a time to respond to the recommendations of the review. We'll keep you posted on any significant details when they are released.

More information

- [Government Receives the Australia's Future Tax System Review](#)

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Report recommends changes to PSI

The Board of Taxation's review into the personal services tax laws heralds a series of changes.

Releasing the report, the Assistant Treasurer stated that "The Board has found evidence of a low level of compliance and a degree of uncertainty or 'greyness' around the rules, such that it has found the alienation of personal services income rules in their current form do not provide acceptable levels of integrity and equity."

Among other items, the review recommends:

- providing some third party information to assist in monitoring compliance with the rules by the ATO by introducing a reporting obligation, which could be supplemented by introducing a withholding obligation;
- addressing the alienation of income by entities deriving personal services income by extending the attribution rules to personal services businesses;
- clarifying and simplifying the deduction provisions;
- clarifying the rules around who is affected by the rules, possibly by implementing the tests of 'employee-like manner' as originally recommended by the Ralph Report; or
- introducing a deemed labour income approach which would focus on distinguishing that part of an entity's income that is derived from an individual's labour from the part that is a return to their business assets or capital.

The review noted that a key issue to be considered when assessing the options is whether to focus on those providers of personal services income who have 'employee-like' characteristics rather than those who operate in a 'business-like' way, or whether to focus more broadly on the providers of personal services income.

Any changes will be released as part of the Government's response to the Henry Review.

More information

- [Release of Report into Personal Services Tax Laws](#)
- [Post-implementation Review into the Alienation of Personal Services Income Rules — Report to the Assistant Treasurer](#)

Technical GST changes released in draft

The Government has released exposure draft legislation in relation to the following GST matters:

- To clarify that input tax credits will be attributable to the first tax period in which they are taken into account in a GST return where the taxpayer holds a tax invoice;
- To ensure that a decreasing adjustment is available in relation to certain payments made to third parties. This should apply to cash back payments made by wholesalers to end customers when the goods were actually sold to the customer by a retailer.

More information

- [GST - Exposure Draft Legislation](#)

Extension of CGT roll-over for transformation of water rights

The Government had previously announced that CGT rollover relief will apply for irrigators who wish to change their entitlement to water under an irrigation right into an individual water entitlement.

On 2 December 2009, the Assistant Treasurer announced the Government will seek to expand the CGT rollover relief in relation to water entitlements and water allocations.

This announcement means that the CGT rollover relief will apply more broadly to any capital gains or capital losses arising from the ending of an irrigator's water entitlement and the issuing to the irrigator of a replacement water entitlement. The rollover will not be available when water entitlements are unbundled.

The Government expects that the rollover measures will provide greater certainty for operators that are making changes to their arrangements with their member irrigators to ensure compliance with the Water Market Rules 2009.

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More information

- [Capital Gains Tax Relief Widened to Assist Irrigators and Operators](#)

Draft thin capitalisation changes released

On 17 December 2009, the Assistant Treasurer released draft exposure legislation on the proposed changes to the Australian Thin Capitalisation regime.

Broadly speaking, the thin capitalisation regime seeks to deny taxpayers deductions for interest expenses and borrowing costs where the income earning activities have been heavily funded by debt rather than by equity.

These proposed changes were announced in the 2009/2010 Budget and will apply to authorised deposit-taking institutions. The changes clarify how treasury shares, the business insurance assets known as 'excess market value over net assets' and capitalised software costs will be treated under the thin capitalisation provisions.

It is intended that the proposed changes will have effect from 1 January 2009.

More information

- [Exposure Draft – Thin Capitalisation \(AIFRS and ADIs\): Modification of the Rules in Relation to the Application of Accounting Standards](#)

Draft rules to repeal FIF and deemed present entitlement rules released

On 18 December 2009, the Assistant Treasurer released draft exposure legislation that will repeal the Foreign Investment Fund (FIF) rules and Deemed Present Entitlement (DPE) rules. The Government are still developing changes to the Controlled Foreign Company (CFC) and Transferor Trust rules.

More information

- [Tax Laws Amendment \(foreign source income deferral\) Bill \(no. 1\) 2010](#)

Corporate reporting changes

While not strictly tax related, the Government has released draft reforms in relation to reporting obligations for companies. The proposed changes include the following:

- Streamlining parent-entity reporting requirements;
- Providing greater flexibility for companies to pay dividends by replacing the existing profits test with a solvency test;
- Allowing companies to more easily change their year-end date.

The Government also intends to implement a number of reforms to the existing regulatory framework including clarifying the circumstances in which a company can cancel its share capital.

More information

- [Cutting Red Tape and Improving Australia's Corporate Reporting Framework](#)

More transparency tax agreements

Australia signed tax agreements with Aruba and Samoa in the latest round of tax agreements to improve transparency.

More information

- [Australia and Samoa Sign Tax Transparency Agreement](#)
- [Another Boost for Tax Transparency Program](#)

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FROM THE ATO

In-house asset practice statement released

[PS LA 2009/8](#) outlines the circumstances in which the Commissioner would exercise his discretion to make a determination under super laws that an asset is not an in-house asset of a SMSF.

The Commissioner would consider a determination where the facts of the case indicate circumstances that are unusual or out of the ordinary. An example cited is where legislative change leads to assets, previously excluded under the transitional provisions, being transferred to new SMSFs and becoming in-house assets. The practice statement specifically notes a series of circumstances that are not considered to be out of the ordinary including market fluctuations and the fact that the fund was better off.

More information

- [PS LA 2009/8](#)

Overview of the Trust Loss measures

The trust loss legislation is contained in Schedule 2F of the ITAA 1936 and these rules can be very complex to apply in practice.

This ATO fact sheet provides an explanation and examples of each of the trust loss tests that must be satisfied if a trust wishes to deduct a tax loss and/or certain debt deductions. In general, a trust will only be able to deduct a tax loss and/or certain debt deductions once it satisfies the appropriate trust loss tests that apply to it.

More information

- [Broad overview of the Trust loss measures](#)

National Rental Affordability Scheme update

The ATO has updated its information on the National Rental Affordability Scheme (NRAS) which commenced on 1 July 2008 and impacts income tax assessments for the 2008/2009 and later income years.

The NRAS was a 2007 election promise designed to encourage large-scale investment in affordable housing by offering tax and cash incentives. The scheme is offered to providers of new dwellings on the condition that they rent these dwellings to low and moderate income households at 20% below market rates.

The NRAS provides annual incentives for a period of 10 years. The incentive comprises a Commonwealth contribution in the form of a refundable tax offset or a payment to the value of \$6,000 per dwelling per year, and a state or territory contribution in the form of direct financial support or an in-kind contribution to the value of at least \$2,000 per dwelling per year.

The incentive is indexed in line with the rental component of the consumer price index.

More information

- [National rental affordability scheme - refundable tax offset and other taxation issues](#)

ATO takes over small lost super accounts from 1 July

From 1 July 2010, superannuation providers will need to transfer the balance of small unclaimed amounts and lost accounts to the ATO:

- Lost accounts (called "small accounts") with balances of less than \$200; and
- Lost accounts which have been inactive for a period of five years and have insufficient records to identify the owner

Former account holders will be able to reclaim their money from the Australian Taxation Office at any time.

The first reporting period for superannuation providers is 1 January 2010 to 30 June 2010, and the due date for lodgment and payment is 31 October 2010.

The change was announced in the 2009/2010 Federal Budget.

More information

- [Payment of small and insoluble lost member accounts to the Tax Office](#)

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Update on employee share schemes

As a result of the introduction of the new Employee Share Scheme rules contained in Division 83A of the ITAA 1997, the ATO has issued fact sheets outlining the major changes that affect employees and employers.

Broadly speaking, the major change is that under the previous law, the tax treatment of Employee Share Scheme interests was dependant on an election being made by the employee. Under the new law the structure of the scheme and the employee's circumstances will determine if an employee pays tax upfront or if tax is deferred on any discount received.

Under the new law the employer is required to provide the ATO with details of employee share scheme benefits that have been provided during the income year.

More information

- [Employee share schemes – information for employers](#)
- [Employee share schemes – information for employees](#)

RULINGS, DETERMINATIONS & INTERPRETATIVE DECISIONS

Can a trustee of a testamentary trust be assessed on a capital gain?

ATO ID 2009/144 - Capital gains tax: testamentary trust - trustee can choose to be assessed on capital gains

Facts

1. A trust was established under the terms of a deceased's will.
2. The trustee was a resident of Australia.
3. The trust property consists mainly of shares.
4. During the income year ended 30 June 2009, the trustee derived dividends and made capital gains from the sale of shares.
5. The deceased's child, as the life tenant, is entitled to all of the income of the trust for their lifetime.
6. The child is a resident of Australia.
7. Income is not defined by the trust deed. The trust deed does not provide the trustee the power to determine what constitutes income. Therefore, income needs to take its ordinary meaning.
8. The deceased's grandchildren have a contingent interest in the trust capital. That is, whichever of the grandchildren survive the life tenant they would be entitled to share equally in the trust capital.
9. If none of the grandchildren survive the life tenant, then the capital passes to a charity.
10. The trustee has not made a choice to be taxed on the capital gain of the trust, rather than the life tenant.

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Issue

Whether the trustee is assessable under section 99 or 99A of ITAA 1936 on the share of the net income of the trust estate that represents a capital gain.

Decision

The net income of the testamentary trust is determined in accordance with section 95 of the ITAA 1936. The net income is the trust's taxable income on the assumption that it was a resident taxpayer.

Following on from the above, section 97 of the ITAA 1936 provides that a beneficiary who is presently entitled to a share of the income of a trust estate (i.e. accounting profit) must include in their assessable income that share of the net income of the trust.

In this case, the life tenant is presently entitled to all of the income of the trust and so at face value, they should be assessed on the entire net income of the trust including the capital gains. This will apply despite the fact that the life tenant cannot benefit from those capital gains.

However, in accordance with section 115-230 of the ITAA 1997, the trustee of the testamentary trust can choose to be assessed on the share of the trust net income attributable to capital gains. This choice can be exercised where a beneficiary, who would be assessed under section 97 of the ITAA 1936 on this amount, cannot benefit from the capital gain.

The trustee must choose to be assessed no later than two months after the last day of the relevant income year in accordance with section 115-230(5) of the ITAA 1997.

As the trustee of the testamentary trust has not chosen for section 115-230 of the ITAA 1997 to apply, or sought an extension of time in which to make the choice, the whole of the net income will be included in the assessable income of the life tenant, as they are presently entitled.

If the trustee were to seek, and be granted, an extension of time in which to make the choice, the capital gains would be assessed to the trustee under either section 99A of the ITAA 1936 or, at the Commissioner's discretion, section 99 of the ITAA 1936.

More information

- [ATO ID 2009/144](#)

Rental scheme

ATO ID 2009/146 - National Rental Affordability Scheme (NRAS)

Facts

1. A non-entity joint venture (NEJV) is established that includes at least two parties, the dwelling owner and the manager of the NEJV.
2. The manager of the NEJV applies to the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to participate in the NRAS and effectively represents the parties to the NEJV.
3. The manager of the NEJV is the approved participant and receives the NRAS allocation for the dwelling.
4. The dwelling owner enters into a head lease with the manager of the NEJV and receives rent from the manager of the NEJV under the head lease.
5. The manager of the NEJV then enters into a sublease with NRAS eligible tenants (being low to moderate income households) and receives rent from the eligible tenants under the sublease.

Issue

Whether the dwelling owner, who leases their dwellings to the manager of the NEJV, has an entitlement to the NRAS tax offset under section 380-10 of the ITAA 1997 (applicable to non-entity joint ventures) where the manager of the NEJV subleases the dwelling.

Decision

No. The Commissioner considers that the dwelling owner does not have an entitlement to the NRAS tax offset as the dwelling owner does not derive NRAS rent. This is because:

1. The dwelling owner is not the approved participant under the NRAS.

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2. FaHCSIA do not associate the dwelling owner with an approved rental dwelling under the NRAS. This is because FaHCSIA does not have any knowledge of the dwelling owner or their connection with a particular approved rental dwelling under the NRAS. FaHCSIA does not have any dealings with the dwelling owner.
3. The dwelling owner does not directly provide the approved rental dwelling to a low-moderate income household at 20% below market rates and does not enter into a legal relationship with those tenants.
4. The dwelling owner enters into a legal relationship with the manager of the NEJV only, and provides the rental dwelling to the manager of the NEJV only.
5. As none of the dealings by the dwelling owner is specifically recognised by the NRAS Act and, in particular, the lack of a direct connection between the dwelling owner and the NRAS eligible tenant, the Commissioner consider that the rent paid under the head lease to the dwelling owner is not derived under the NRAS.

More information

- [ATO ID 2009/146](#)

Choice of roll over relief

ATO ID 2009/147 - Capital gains tax: CGT discount - application of Subdivision 152-E and Subdivision 124-B roll-over

Facts

1. The taxpayer, an Australian resident, satisfies the maximum net asset value test in section 152-15 of the ITAA 1997 for the purpose of the small business CGT concessions.
2. The taxpayer acquired land after 19 September 1985 which satisfies the active asset test in section 152-35 of the ITAA 1997.
3. The land was compulsorily acquired during the 2007 income year and the taxpayer received money as compensation.

4. A capital gain arose from the compulsory acquisition of the asset.
5. The taxpayer used the compensation to acquire replacement land which was immediately used by the taxpayer in the carrying on of their business.
6. The replacement land was acquired within one year of the land being compulsorily acquired.

Issue

Where the taxpayer qualifies for both the small business roll-over in Subdivision 152-E the ITAA 1997 and the replacement asset roll-over in Subdivision 124-B of the ITAA 1997 in relation to a capital gain, can they choose which to apply?

Decision

If the taxpayer satisfies the conditions for both of the roll-overs, the taxpayer can choose which of the roll-overs to apply. In making the choice, the taxpayer would need to consider the different ways in which the roll-overs operate.

More information

- [ATO ID 2009/147](#)

Necessary connection with Australia, taxable Australian property and the in between

ATO ID 2009/148 - CGT: non-resident becomes resident - assets in respect of which choice was made to treat as having the necessary connection with Australia

Facts

1. Prior to 12 December 2006, the taxpayer ceased to be a resident of Australia for income tax purposes.
2. At the time of becoming a non-resident, the taxpayer owned a number of assets where a choice had been made under the old section 104-165(2) of the ITAA 1997 to treat the assets as having the necessary connection with Australia. This had the effect of deferring tax in relation to these assets by keeping them within the Australian tax net.

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3. In January 2009, the taxpayer returned to Australia to become a permanent resident again. The taxpayer still owns the assets.

Issue

Whether the taxpayer is deemed to have acquired the assets at the time they became an Australian resident again in January 2009 or whether the original acquisition date should be used.

Decision

Section 855-45 of the ITAA 1997 applies to CGT assets owned by the individual just before becoming a resident. The special acquisition rule treats a taxpayer as having acquired their CGT assets at the time of becoming a resident.

However, the rule in section 855-45 does not apply to taxable Australian property or pre-CGT assets. Section 104-165 of the Income Tax (Transitional Provisions) Act 1997 treats as taxable Australian property, any assets a taxpayer has chosen to have a “necessary connection with Australia” under the old section 104-165(2) of the ITAA 1997.

Therefore, the Commissioner concluded that the acquisition date of the assets was when they were originally acquired, not when the taxpayer became an Australian resident again.

More information

- [ATO ID 2009/148](#)

Division 7A and Trusts

TR 2009/D8 - Income tax: Division 7A loans: trust entitlements

In a much anticipated draft determination the Commissioner has provided guidance in relation to when an unpaid trust distribution will be treated as a loan for the purposes of Division 7A. This issue will be relevant to many of our SME clients and will require some careful thought as to how to deal with this issue going forward.

In broad terms, the ATO will treat an unpaid trust distribution to a company within the same family group as a loan unless:

- The trustee has separated the funds to which the company is entitled into a separate account; and
- The corporate beneficiary is entitled to all income generated by the use of those funds.

The significance of treating an unpaid trust distribution to a company as a loan is that in most family groups, this will automatically trigger a deemed dividend under Division 7A unless a complying loan agreement is put in place.

Other issues to come out of the draft ruling are:

1. The ruling will only be applicable to subsisting unpaid present entitlements that have been raised on or after 16 December 2009.
2. The Commissioner will assume that the corporate beneficiary has knowledge of the trustee’s use of the funds that represent the unpaid present entitlement where the trust and company form part of the same family group.
3. Where the company has knowledge that funds are being used for trust purposes rather than for the absolute benefit of the company, the non-calling of payment amounts to making a Division 7A loan.
4. If an unpaid trust distribution is accounted for as a loan between both parties, the amount will be treated as a loan for Division 7A purposes. Therefore, proper accounting of these amounts becomes important.

The Commissioner will conclude the consultation process in relation to the draft ruling on 12 February 2010.

More information

- [TR 2009/D8](#)

TAX ROUNDUP

KNOWLEDGE SHOP – JANUARY 2010

Private equity and the city

TD 2009/D18 - Income tax: can a private equity entity make an income gain from the disposal of the target assets it has acquired?

Following on from the controversy surrounding the TPG restructure of Myer, the ATO have released a draft determination that seeks to explain their position with respect to taxing the profits of foreign private equity firms.

Broadly speaking, foreign residents are liable to Australian income tax on all ordinary and statutory income derived from Australian sources. However, foreign investors in Australia will not have to pay Australian income tax on capital gains derived from the sale of CGT assets that are not classified as taxable Australian property. This exclusion will generally apply to shares in public companies. Private equity firms typically seek to rely on this exclusion when restructuring and selling shares in Australian companies.

However, where the non-resident is carrying on a business of restructuring and selling companies or has acquired the shares as part of a profit making undertaking or scheme, then any gains derived by the private equity firm may be on revenue account rather than capital account. This means that capital gains exemptions will not be applicable.

Depending on the double tax treaty, any revenue gains derived by a non-resident from an Australian source may be subject to Australian tax. Usually, most treaties will prevent Australia from imposing tax on the business profits of a non-resident investor unless the non-resident has a permanent establishment in Australia.

The Commissioner concludes that profits made by private equity firms can be classified as ordinary income where the firm is in the business of restructuring and floating companies, particularly where the foreign investor does not have the intention of becoming a long-term investor to derive dividend income from the shares.

More information

- [TD 2009/D18](#)

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Treaty shopping and part IVA

TD 2009/D17 - Income tax: treaty shopping - can Part IVA of the Income Tax Assessment Act 1936 apply to arrangements designed to alter the intended effect of Australia's International Tax Agreements network?

The draft ruling considers the application of the general anti-avoidance provision for “treaty shopping” arrangements. Treaty shopping is the practice of interposing an entity between two countries to benefit from the terms of a particular double tax treaty. As with TD 2009/D18, this determination appears to be a response to the controversy surrounding the TPG matter.

The Commissioner will consider applying Part IVA to offshore ownership structures for Australian assets where such arrangements are put in place “to attract the operation of a particular tax treaty”.

The main issues to come out of this draft ruling are:

1. Although a number of Australia’s recently negotiated double tax treaties have specific treaty shopping provisions, the Commissioner will seek to apply Part IVA to deny any tax benefit in relation to double tax treaties that do not have such provisions.
2. The Commissioner will consider applying Part IVA to an offshore structure where the non-resident does not have a clear commercial basis to support the choice of business structure they are wishing to use.

More information

- [TD 2009/D17](#)

TAX ROUNDUP

KNOWLEDGE SHOP – JANUARY 2010

Interest deduction and the foreign dividend

TD 2009/21 - Income tax: to obtain a deduction under section 25-90 of the Income Tax Assessment Act 1997 for a cost in relation to a debt interest does the taxpayer have to actually derive a dividend to which section 23AJ of the Income Tax Assessment Act 1936 applies in the same income year as that in which the cost is incurred?

Section 23AJ of the ITAA 1936 provides that certain dividends paid from a non-resident company to an Australian company are classified as non-assessable non-exempt income.

The general rule is that a taxpayer cannot claim a deduction for expenses that are incurred to derive non-assessable non-exempt income. However, section 25-90 of the ITAA 1997 allows a deduction for interest expenses incurred in deriving foreign source income that is non-assessable non-exempt income under section 23AJ. The issue is whether section 25-90 allows a deduction if no section 23AJ dividends have been derived in a particular income year.

The Commissioner has determined that it is not necessary for a taxpayer to derive a section 23AJ dividend in the year in which the interest expense is incurred. However, there must be a clear connection at the time the interest expense is incurred with the production of an actual section 23AJ dividend or there is a reasonable expectation that a section 23AJ dividend will be produced in a future income year.

More information

- [TD 2009/21](#)

CASES

GST and cash back

The Electrical Goods Importer and Commissioner of Taxation [2009] AATA 854 (6 November 2009)

Facts

1. The Electrical Goods Importer (TEGI) is an importer and wholesaler of electrical goods in Australia, supplying to various retailers. In turn, the retailers supply to consumers.
2. During the relevant periods, TEGI undertook 'cash back offer' promotions in relation to specific models of particular items.
3. Retailers were given details of each promotional offer and point-of-sale advertising material, together with coupons to be filled in by customers to claim the cash back.
4. TEGI advertised the promotions through print and radio, and occasionally contributed money towards retailers' advertising costs.
5. All retailers agreed to participate in the promotions, expressly or by their conduct, either by confirming in writing that they would advertise and sell the promotional items or by confirming that they would display the advertising material and promote the products.
6. TEGI paid the cash back amounts by cheque directly to the consumers.

Issue

The wholesaler sought to claim an input tax credit on the cash back payments made to the consumers. The Commissioner contended that the cash back offers paid by the wholesaler to consumers did not reduce the GST payable on the wholesale sales.

Decision

The Tribunal held that there were two separate supplies in the arrangement, one between the wholesaler and the retailer, and one between the retailer and the consumer.

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As the cash back payment was not made in connection with either of the two supplies, the Tribunal found that the payment did not adjust or alter the consideration for either supply. As a result, the wholesaler was not able to claim an input tax credit or adjustment for the cash back payments made to the consumers.

The Government proposes to fix this anomaly in the legislation by allowing wholesalers to make a decreasing adjustment in these circumstances (refer to the "From Government" section above).

More information

- [The Electrical Goods Importer and Commissioner of Taxation](#)

Did a resettlement occur?

Clark v Commissioner of Taxation [2009] FCA 1401 (30 November 2009)

Facts

1. The taxpayers, a husband and wife, were the beneficiaries of a trust estate that acquired shares in a company in 1988.
2. The trustee disposed of the shares in the 1993 income year, suffering a capital loss.
3. In the 2001 income year, the trustee sold two properties making a significant capital gain.
4. In between the 1993 income year and the 2001 income year the following had occurred:
 - The trustee of the trust had changed;
 - There was a change of control of the trust;
 - There was a change of the unit holders of the trust.

Issue

The Commissioner rejected the availability of the capital losses arguing that there was a lack of continuity of the trust estate. That is, a trust resettlement had been triggered between the two income years and that we were dealing with different trust estates.

Decision

The Court ruled that the capital losses were available.

The Court rejected the Commissioner's arguments, finding that the arrangements of June 1993 (involving a change of trustee) did not bring about a break in the continuity of the trust fund. This is because there was no extinguishment of the right of indemnity nor was there a release or discharge which were said to result in a new trust fund on appointment of a new trustee.

The Court also concluded that despite a suspension arrangement, the interests of the holders of the issued units in the 1993 income year were the same as the interests of the holders of the issued units in the 2001 income year.

More information

- [Clark v Commissioner of Taxation](#)

Is vacant land residential premises? Surely not!

Vidler v Commissioner of Taxation [2009] FCA 1426 (3 December 2009)

Facts

The taxpayer sought to treat the sale of two blocks of vacant residential land as an input tax supply under section 40-65(1) of the GST Act 1999. This section provides that the sale of real property is input taxed if the property is residential premises to be used predominantly for residential accommodation.

Decision

The Court dismissed the taxpayer's appeal stating that a vacant block of land could never be considered to be residential premises.

For the definition of residential premises to be satisfied it required that the land contain an element of shelter and basic living facilities, such as a bedroom and bathroom.

More information

- [Vidler v Commissioner of Taxation](#)

TAX ROUNDUP

KNOWLEDGE SHOP – JANUARY 2010

Finance companies and bad debt deductions

Ashwick (Qld) No 127 Pty Ltd (ACN 010 577 456) v Commissioner of Taxation [2009] FCA 1388 (26 November 2009)

Facts

The companies in the Foster's Group were principally responsible for the Group's treasury activities.

They sought to undertake the following:

- Write off as bad debts unpaid intra-group loans and claim them as deductions under section 25-35 of the ITAA 1997 or alternatively under section 8-1 of the ITAA 1997.
- Claim under section 8-1 of the ITAA 1997 interest expenses incurred in relation to intra-group loans

Issue

The Commissioner sought to deny a deduction for the outgoings incurred for the interest expense and bad debts.

Decision

The Court ruled:

- Two of the Group's companies had operated money lending businesses and therefore were entitled to claim a deduction for the entire amount of the bad debt that had been written-off.
- All other companies involved in the process had not been carrying on money lending businesses and the bad debts they had written off were deductible only to the extent that they contained a component representing unpaid interest.

More information

- [Ashwick \(Qld\) No 127 Pty Ltd \(ACN 010 577 456\) v Commissioner of Taxation](#)

LEGISLATION

Parliament does not sit until 2 February 2010.

Non-commercial loss changes receive Royal Assent

Tax Laws Amendment (2009 Budget measures no. 2) Act 2009 received Royal Assent on 14 December 2009.

From 1 July 2009, a new income test will apply. Under the income test, taxpayers with income for non-commercial loss purposes of \$250,000 or more in an income year will have excess deductions quarantined in relation to the particular business activity.

Taxpayers that do not satisfy the new income test will still have:

1. Access to the exceptions for primary production or professional arts businesses
2. The ability to apply to the Commissioner for relief from the rules if there are exceptional circumstances or because the nature of the activities means that they are temporarily carrying on an unprofitable business but the activities they are undertaking are nonetheless independently assessed as commercially viable.

A new exception, applicable to all taxpayers, has also been introduced for losses solely due to deductions claimed for the small business and general business tax break (the investment allowance) in the 2009-10 and 2010-11 income years.

The Act also contained the new Employee Share Scheme rules that will be now contained in Division 83A of the ITAA 1997.

More information

- [Tax Laws Amendment \(2009 Budget measures no. 2\) Act 2009](#)

TAX ROUNDUP

KNOWLEDGE SHOP – JANUARY 2010

Tax Laws Amendments (2009 measures No. 5) Act 2009

Tax Laws Amendments (2009 measures No. 5) Act 2009 received Royal Assent on 26 November 2009.

The main measures of this Bill are as follows:

1. Liquidators of an insolvent company will be responsible for paying Goods and Services Tax (GST) on transactions made in their capacity as the liquidator of that insolvent company.
2. The new Taxation of Financial Arrangements (TOFA) legislation does not unintentionally lead to a reduction in Pay As You Go (PAYG) instalments.

More information

- [Tax Laws Amendments \(2009 measures No. 5\) Act 2009](#)