

Client Alert October 2011

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Don't take the bait on tax avoidance schemes

The ATO has recently identified a number of tax avoidance schemes which it says are a risk to small businesses. These include:

- complex arrangements involving trusts to provide loans to individuals;
- labour hire schemes;
- claims by companies for a deduction for unpaid directors fees; and
- avoidance of fringe benefits tax.

TIP: Not all tax avoidance schemes are obvious. Only on close examination do higher risk features start to appear. Please contact our office if you have any questions.

Capital gains tax bills for failing test

The Administrative Appeals Tribunal has recently handed down two separate decisions concerning capital gains tax (CGT) concessions for small businesses. The tax law offers a range of tax concessions for small businesses that have made a capital gain on a "CGT asset" that has been used in the business. The concessions can reduce, eliminate or roll-over a capital gain. However, the concessions are only available if certain tests are met. The main issue before the Tribunal was whether the taxpayers satisfied the "maximum net asset value" test. The test would be satisfied if, just before the "CGT event", the value of the assets of the taxpayers and their connected entities did not exceed \$5 million.

Broadly, the Tribunal held the taxpayers did not meet the then "maximum net asset value" test in order to qualify for the concessions. The taxpayers did not satisfy the onus of proving that the "maximum net asset value" of the assets of the taxpayers and their connected entities were less than \$5 million.

In the first case, the Tribunal denied the taxpayer the concessions with respect to the sale of a marina for \$8.9 million. In the second case, the Tribunal also refused the taxpayer the concessions in respect of a gain he made on selling two \$1 shares in a company for \$4.9 million.

TIP: There have been changes to the relevant rules, including the amount for the "maximum net asset value" test has increased to \$6 million. If you have any questions please contact our office.

Cash economy still on ATO's radar

The ATO has maintained a focus on its compliance activities in relation to small business performance benchmarking and the cash economy. In a recent speech, the Commissioner of Taxation said businesses outside the relevant benchmarks are subject to ATO review and/or audit. Where businesses do not have adequate records to substantiate their performance, the Commissioner said the ATO will make a default assessment using the relevant small business benchmark.

The ATO uses a variety of tools to help it identify potential cash economy activities which include:

- collecting and comparing significant amounts of information from a number of sources, including banks, other government agencies such as Centrelink, and industry suppliers. The ATO can even collect information about purchases of major items such as cars and property; and
- comparing the performances of businesses against other similar businesses in the industry. The ATO currently has over 100 small business benchmarks for this purpose. The benchmarks are used to identify businesses that may be avoiding their tax obligations.

TIP: Undertaking a review of business records may help to identify whether you are at risk of review by the ATO.

Taxpayer loses excess super contributions tax appeal

A taxpayer has been unsuccessful before the Federal Court in appealing against a decision of the Administrative Appeals Tribunal. The Tribunal had affirmed a superannuation excess non-concessional contributions tax assessment of \$86,867 against her for breaching the \$1 million non-concessional contributions cap during the transitional period to 30 June 2007 (which existed at the time). The taxpayer had argued that a \$355,000 payment from her personal superannuation fund in June 2007 was received by her in a capacity as trustee before being on-paid to her new superannuation fund and therefore should be treated as a roll-over superannuation benefit. However, the Court broadly agreed with the findings made by the Tribunal.

TIP: As part of the 2011-2012 Budget, the Government proposed that eligible individuals be given a once-only option to have excess concessional contributions up to \$10,000 refunded and assessed at their marginal tax rate for the financial year in which the contribution was made. The refund option is proposed to only apply for the first year in which the concessional contributions cap is breached, commencing from 2011-2012. If you have any questions please contact our office.

Share trading business existed, says tribunal

In an unusual decision, the Administrative Appeals Tribunal held a taxpayer was not a passive investor in relation to share trading activities and was carrying on a business of share trading for the year ended 30 June 2008. The taxpayer was a chief executive of a services company and traded shares in his own name on the share market. The Commissioner argued the taxpayer was not conducting a share trading business as he did not have a formal business plan and did not sell many shares during the relevant period. The taxpayer argued that the only reason he did not sell much of his portfolio during the period was due to the global financial crisis.

SMSFs warned on improper lending of money

The ATO says it is concerned that some self-managed superannuation fund (SMSF) trustees are lending money on favourable terms from their SMSFs to people who provide advice or assist in the running in the fund. It warns that this arrangement may lead to the loss of the complying status of the fund and concessional tax rates. The ATO says trustees should ensure that loan terms comply with the law and fit their investment strategy.

TIP: Decisions to lend money from an SMSF should be backed by the appropriate documentation such as an appropriate loan agreement. If you have any questions please contact our office.

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