

## Restructuring Jointly Held Shares

In a recent decision, the Administrative Appeals Tribunal (AAT) confirmed that where assets held in joint names are divided between the owners, CGT will apply.

In this case, two brothers owned a parcel of shares jointly and undertook a transfer so that each could own half of the shares in their own right. The taxpayers submitted that CGT would not apply to the restructure of the jointly held shares as it was always intended that the shares were held equally.

The Commissioner argued that CGT did apply on the basis that the share register showed that each share was held jointly, and therefore a part disposal of each share was required to divide the shares between the brothers.

- The AAT agreed with the Commissioner that CGT applied to the restructure, concluding that there was not sufficient evidence to suggest that the shares were not jointly held or not intended to be jointly held.

## Superannuation Rates and Thresholds

The Tax Office recently released an updated guide providing the key rates and

thresholds in relation to superannuation contributions and benefits that apply from 1 July 2007.

Some of the thresholds rates are included below:

- The concessional superannuation contributions cap for the 2007/08 year will be \$50,000 (these include contributions made under a salary sacrifice arrangement).
  - Between 1 July 2007 and 30 June 2012 a transitional concessions cap will apply to persons aged 50 and over. For persons aged 50 or over, the annual cap will be \$100,000.
  - The employment termination payment (ETP) cap for concessional tax treatment for the 2007/08 income year will be \$140,000. Any amount paid in excess of this ETP cap amount will be taxed at the top marginal rate.
- **TIP:** Superannuation is a key tax and retirement planning opportunity, and taxpayers should consider opportunities based on the thresholds.

## Other Key Issues

- The Capital Gains Tax improvement threshold for the 2007/08 income year is \$116,337 which is an increase of \$3,825 from the previous year. An improvement to an existing

pre-CGT asset is considered to be a separate CGT asset where the value of the improvement exceeds this threshold amount.

- The Tax Office has recently released a fact sheet relating to the application and calculation of the shortfall interest charge (SIC). Generally, where the Tax Office identifies a tax shortfall, SIC will apply from the date of issue of the notice of assessment. In some circumstances, the SIC may be remitted on written application to the Tax Office.

## Main Residence Exemption — Burden of Proof

In a recent decision, the Administrative Appeals Tribunal (AAT) held that a taxpayer failed to prove that a property they had constructed and used was their main residence and therefore eligible to concessional tax treatment on sale.

Broadly, any capital gain or loss from a dwelling is ignored for capital gains tax (CGT) purposes where it can be proven that the dwelling was the taxpayer's main residence throughout the ownership period, and was not used for an income producing purpose. If the property was used for an income producing purpose

during part of that period, only part of the capital gain or loss is ignored.

The taxpayer purchased a vacant block of land intending to build a house. After the house was built, the taxpayer sold the land. Three months prior to the settlement, the taxpayer moved into the house, claiming it as their residence. Upon selling the property, the taxpayer did not disclose the capital gain, relying on the main residence exemption. The Commissioner subsequently assessed the taxpayer on the net capital gain contending that the taxpayer failed to prove that the property constructed was actually their main residence.

The Commissioner indicated that while there is no set definition of 'main residence' some factors lend themselves to provide guidance with respect to the definition including:

- the length of time the taxpayer has lived at the residence;
- the connection of utility services to the residence;
- the address to which mail is directed; and
- the taxpayer's address on the electoral role.

The AAT agreed with the Commissioner indicating that the taxpayer's failed to prove that the property was their main residence.

## Work Deductions Disallowed

In a recent decision, the AAT disallowed part of a taxpayer's work expense deductions incurred during the taxpayer's time working as a fitness instructor.

Broadly, a deduction for workplace expenses is allowed where the expenditure is incurred in carrying out the

duties of the taxpayer's employment. In most instances, some degree of substantiation is required for certain expenses such as meals, accommodation, subscriptions and the like.

The taxpayer contended that as a fitness instructor it was part of her role to have a constant change of clothes due to the rigorous nature of the activity and to maintain her personal presentation. The taxpayer contended that as an employee of a prestigious resort, it was her responsibility to always be well groomed and presentable as part of building client loyalty and goodwill.

The claims were originally accepted, however, the taxpayer became the subject of an audit and as a result, the Commissioner amended the taxpayer's assessments disallowing all of the taxpayer's work expense deductions.

The AAT found that in many instances the taxpayer had over-exaggerated her work-related expenses and agreed with the Commissioner in disallowing the majority of the deductions. The issue was remitted to the Commissioner to make the appropriate amended assessments.

## Benchmark Interest Rate

The Tax Office recently released the benchmark interest rate for the 2007/08 income year for the purposes of the shareholder loan rules. The new rate is 8.05%, which is up from 7.55% for the prior year.

## Superannuation Contributions

The Tax Office recently released an interpretative decision regarding the deductibility of superannuation

contributions made by a private company for the benefit of its directors, where the private company was in the business of passive investment.

The interpretative decision indicates that a deduction can be claimed in relation to the superannuation contributions, provided that the directors are entitled to be paid for their services.

Broadly a deduction is allowed for superannuation contributions where the following apply:

- the contribution was made to a fund for the purpose of making a provision of superannuation benefits payable for another person;
- the fund is a complying superannuation fund; and
- the members are eligible employees.

The Tax Office considered whether the directors were employees of the company. A director is an employee where they are entitled to payment for the performance of their duties as a member of the executive body of the company.

The Tax Office concluded that if the company makes a determination to pay the directors for their duties, then they can be considered employees of the company. The company can then make superannuation contributions on behalf of the directors. The fact that the company was in the business of passive investment does not change the outcome.

## Commissioner's Discretion

The Tax Office recently released a practice statement that outlines how the Commissioner will exercise his

discretion in providing relief to taxpayers where they have made an inadvertent omission or honest mistake in dealing with their shareholder loans.

The amnesty will apply for the 2001 to 2006 income years, provided that the taxpayer takes corrective action by 30 June 2008.

Under the shareholder loan rules, loans or payments by private companies to shareholders or their associates may be deemed to be dividends paid by the company. The shareholder loan rules also provide the Commissioner with the discretion to disregard a deemed dividend.

The statement outlines the circumstances in which the Commissioner may exercise his discretion, including where:

- it is clear in the Commissioner's view that the taxpayer has made a genuine mistake or inadvertent omission;
- the taxpayer has sought to take corrective action prior to 30 June 2008;
- the deemed dividend from the shareholder loan occurred between 30 June 2001 and 30 June 2006; and
- the taxpayer's income tax return lodgements are up-to-date.

If the above conditions are satisfied, the taxpayer need not apply in writing seeking the Commissioner's discretion in relation to their shareholder loan. The discretion can automatically apply on a self-assessment basis.

## Rolling over ETPs from 1 July 2007

Most employer termination payments (ETPs) made from 1

July 2007 can **no longer** be rolled-over into superannuation funds, unlike pre-July 2007 employer ETPs.

Therefore, where an ETP is contributed into a fund from 1 July 2007, it will be counted towards either the concessional contributions cap of \$50,000, or the non-concessional contributions cap of \$150,000, depending on whether it is deductible or not.

### Exception

However, as an exception, a 'transitional termination payment' can be rolled-over into a superannuation fund as a 'directed termination payment' up until 30 June 2012.

### What is a transitional termination payment?

Transitional arrangements may apply to payments made between 1 July 2007 and 30 June 2012 if the taxpayer was entitled, as at 9 May 2006, to such a payment specified under:

- a written contract;
- an Australian or foreign law; or
- a workplace agreement under the Workplace Relations Act 1996.

These documents must do this by referring to the amount of the payment or a method or formula to work it out.

### Rolling over transitional termination payments after 1 July 2007

Taxpayers in receipt of a transitional termination payment on or after 1 July 2007 should consider rolling over the payment into a superannuation fund as generally:

- the 'taxable component' will be taxed in the hands of the fund (i.e., basically at

15%), and only the amount (if any) in excess of \$1 million will be counted towards the \$50,000 concessional contributions cap;

- any 'tax-free component' (e.g., pre-July 83 amount) will not be taxed in the hands of the fund, and will be excluded from the \$150,000 non-concessional contributions cap; and
- the rolled over amount can be subsequently withdrawn from the fund tax-free on or after 1 July 2007 if the member is aged 60 or more.

## "Wash sales" and Part IVA

Generally speaking, the term 'wash sale' refers to an arrangement under which a taxpayer sells an asset to realise a capital loss on the sale, and then offset this against a capital gain that they have made elsewhere.

What makes such an arrangement suspect from the ATO's point of view is where there is effectively no change in beneficial ownership of the asset, because the taxpayer either buys the asset back at the lower cost base or sells it to a related party.

The ruling states that in a wash sale situation the taxpayer would not have disposed of (or otherwise dealt with) the asset, but would have continued to beneficially own, or have an interest in, the asset during that income year.

This can be seen from the objective features of such a scheme, being that:

- the taxpayer requires the same asset or substantially the same asset; or

- the taxpayer continues to enjoy the financial benefits of the asset; or
- there is otherwise no significant change in the taxpayer's economic exposure to, or interest in, the asset.

Therefore, but for the scheme, the taxpayer would not have (or might reasonably be expected not to have) incurred a capital loss.

The commissioner is therefore likely in these circumstances to exercise his powers under S.177F of Part IVA to cancel the tax benefit and determine that the capital loss or allowable deduction was **not** incurred by the taxpayer during the income year.

## Impact of Super Simplification

The following are excerpts from a speech by Raelene Vivian, Deputy Commissioner of Taxation, on 2 August 2007 in relation to the superannuation simplification.

### Tax Office short term direction

Over the next 12 months, the Tax Office will be looking to:

- undertake 650,000 phone calls to members with lost accounts – 200,000 of these have been completed to date;

- follow up 100% of non concessional excess contribution tax cases;
- increase their audit coverage on SMSFs by a further 6,000;
- undertake an additional 600 auditor compliance cases;
- action 100% of all first year contravention reports for SMSFs; and
- follow up 100% of SMSFs that fail to lodge.

### Compliance approach

This year's expanded program of audits will also undertake checks to verify that funds are:

- only accepting personal contributions where it holds the member's tax file number (TFN);
- not accepting direct rollovers of employer termination payments (ETP) unless as a result of the transitional arrangements;
- not accepting contributions in respect of members that will breach the specified contributions caps I a financial year;
- ensuring that correct release authority practices are adhered to;
- ensuring that pre-1983 crystallisation has occurred successfully (Ed: funds are required to calculate the value of a member's pre-

July 1983 amount as at 30 June 2007, which will become a fixed tax-free component); and

- ensuring that, from 1 July 2007, any unclaimed monies are paid to the ATO rather than to the relevant state/territory authority.

### Quoting a TFN

This is becoming an important issue for superannuation. From 1 July 2007, where the fund does not hold a TFN, the fund will:

- need to pay tax at the top marginal rate plus Medicare levy (46.5%) on the concessional contributions received – subject to some grandfathering arrangements for accounts existing at 1 July 2007;
- be prohibited from accepting non-concessional contributions for accounts where no TFN has been quoted to the fund (or have 30 days to return these contributions if a TFN cannot be identified); and
- have to report TFNs on members contribution statements.

Overall, for the 13.6 million member contribution statements lodged with the Tax Office in 2006, it now has TFNs in place for 92% of them (up from 76.9%).

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