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ATO SUPPORT FOR BUSINESSES IN FINANCIAL DISTRESS

The ATO has announced measures to assist businesses which are in financial distress including:

- a 12 month general interest charge (**GIC**) free payment arrangement for struggling businesses; and
- deferral of the payment due date on activity statement liabilities.

If the ATO agrees to a GIC free payment arrangement, GIC will be remitted for a maximum period of 12 months. There is no limit on the amount of debt permitted under the arrangement.

Who is eligible?

To be eligible a business must have an annual turnover of less than \$2 million and have an activity statement debt.

How to apply?

Until 30 June 2010, businesses can apply to the ATO for a GIC free payment arrangement. Eligible businesses will need to negotiate a payment arrangement with the ATO.

What does the arrangement apply to?

The GIC free payment arrangement can apply to activity statement debts (eg GST, PAYG).

The arrangement can apply for a maximum of 12 months from the day on which the arrangement is entered into.

The GIC-free period:

- starts on the day on which the agreement was made with the ATO; and
- finishes on the day the final instalment is due (unless there is a default under the arrangement).

TIP

Businesses that are struggling in the current economic climate may want to approach the ATO to negotiate a payment arrangement.

ATO COMPLIANCE PROGRAM 2009/10 – TARGET AREAS

The ATO recently released its compliance program for 2009/10.

In relation to tax compliance for small and medium enterprises the ATO will be focusing on a variety of issues, including the following issues:

Business restructures – the ATO will be focusing on business exits and succession planning arrangements.

Capital management – the ATO will be focusing on the use of loans, payments and debt forgiveness to distribute private company profits to shareholders or their associates without paying the correct amount of tax.

CGT record keeping requirements – the ATO will be focusing on attempts to offset capital losses against other income. There will be a focus on checking property transactions to ensure correct reporting for capital gains.

GST treatment of property – the ATO will be focusing on unreported property sales, incorrect application of the margin scheme and businesses that try to avoid their obligations by not lodging activity statements or registering in the system.

International transactions – the ATO will be focusing on foreign source income and deductions relating to cross border transactions and the application of the thin capitalisation and transfer pricing provisions.

Partnership and trust distributions – the ATO will be monitoring whether distributions from partnerships and trusts are correctly recorded.

Recording 'cash in hand' work in business records as income – the ATO will be monitoring businesses to ensure that all cash income received for work performed is correctly recorded for tax purposes.

Recording assets and income held offshore – Australian residents are liable to tax on their worldwide income regardless of source (unless an exemption applies). The ATO will be monitoring international transactions with a focus on concealment of assets and income offshore.

Satisfying employer obligations – the ATO will be monitoring employers' compliance with their PAYG withholding obligations, superannuation guarantee obligations and FBT obligations. In relation to superannuation, the ATO will be focusing on road freight transport, automotive repair and electrical service industries. In relation to FBT, there will be a focus on the treatment of motor vehicles.

Self managed superannuation funds (SMSFs) – the ATO will be focussing on loans, in house assets, borrowing and non-arm's length transactions in relation to SMSFs.

Share classification as capital or revenue assets – the ATO will be focusing on the treatment of share losses. Specifically, the focus will be on whether such losses are treated as being on revenue account or capital account.

TIP

Although the ATO is targeting the areas mentioned above, businesses should not think that this means that the ATO will not be looking at other areas too. They will!

AUSTRALIANS WORKING OVERSEAS

The changes announced to the exemption for foreign income (ie s 23AG of the *Income Tax Assessment Act 1997*) have now been enacted.

As a result, the foreign income of Australians working overseas will no longer be exempt unless their foreign income is in respect of certain types of employment (ie certain aid and charity workers and members of disciplined forces).

These changes may increase the cost of employing Australians to work overseas if the employees are to maintain an equivalent wage level. In addition to these costs, employers employing Australian residents to work overseas will face increased compliance costs.

These costs will arise as employers will now have to comply with obligations arising under the pay-as-you-go (**PAYG**) withholding provisions and the fringe benefits tax (**FBT**) provisions, which may not previously have been applicable in relation to such employees. Further, employers may have to review employees' residency status.

Some things employers who employ Australian resident employees to work overseas will need to watch out for are:

- From 1 July 2009, employers will need to withhold amounts from salary, wages, commission, bonuses or allowances they pay to an Australian resident individual as an employee who is working overseas;
- From 1 July 2009, employers who provide fringe benefits (eg accommodation, cars etc) to Australian resident employees working overseas will now be subject to the FBT provisions.
- From 1 July 2009, employers will need to make an assessment of whether their Australian resident employees who are working overseas are in fact Australian residents for tax purposes. This is not as simple as following a two year rule of thumb! There is no such rule for tax purposes.

TIP

Employers who employ Australians to work overseas should consider the residency status of these employees to ensure that they are complying with their tax obligations in respect of these employees.

Further, the employers should re-visit the employment contracts of these employees to see if any changes need to be made. For example, employers may wish to consider providing cash benefits rather than fringe benefits.

TRUSTS AND BAMFORD

The long awaited Full Federal Court decision in *Bamford v FCT* [2009] FCAFC 66 was handed down on 3 June 2009.

It now seems clear that the proportionate approach (as opposed to the quantum approach) has prevailed. The more controversial aspect of the case relates to the finding that the income of a trust

estate is dependant on the terms of the relevant trust deed. It will be interesting to see whether the High Court grants the Commissioner of Taxation special leave to appeal this decision.

In the meantime, it appears that the Commissioner intends to administer the law in accordance with his view of the legislation rather than in accordance with the decision of the Full Federal Court. However, the Commissioner has indicated in a Practice Statement that he will not impose interest or penalties if a taxpayer is conducting his/her affairs in accordance with the Full Federal Court decision.

RISK AREA

Taxpayers whose affairs involve the use of trusts should carefully consider their position pending the outcome of any appeal of this case.

EMPLOYEE SHARE PLANS

There has been much concern since the 2009/10 Budget regarding the changes to the tax treatment of shares or rights (ie options) obtained under an employee share plan.

The new draft rules have been released for public consultation. The new rules will apply to shares or rights that are issued after 1 July 2009.

Under the new draft rules (which are still to be enacted), taxpayers no longer have a choice whether to be taxed upfront or choose deferral tax treatment in relation to any discount on shares or rights acquired under an employee share scheme.

Taxation will be upfront unless the conditions for deferral are satisfied. This will depend on the terms of the scheme itself.

Deferral has been limited to schemes where there is a 'real risk' of forfeiture. Unless more guidance is provided about what constitutes a "real risk", this will result in uncertainty and confusion about how these rules are to be applied.

Limited deferral will also be available for certain salary sacrifice schemes offering no more than \$5,000 worth of shares

If the deferral conditions are satisfied, the deferred taxing point will be the earliest point at which:

- for shares – the ending of risk of forfeiture and restrictions on disposal;
- for rights – the ending of the risk of forfeiture and restrictions on exercise or disposal of the option and disposal of the underlying share acquired on exercise;
- cessation of employment; or
- 7 years.

Taxpayers with an adjusted taxable income of less than \$180,000 who are taxed upfront will be eligible for a concession and not pay tax on the first \$1,000 of discounts received provided that the scheme satisfies certain conditions.

Taxpayers who are going to acquire shares or rights under an employee share scheme should consider the impact of these new rules before acquisition. Taxpayers may be faced with upfront taxation even though they cannot sell the rights or shares to fund the tax!

EARNOUTS

Earnouts are common in relation to buying and selling a business. A standard earnout arrangement is any transaction in which a business asset is sold for consideration that includes an earnout right in the seller of the asset.

For example, a business may be sold for \$2 million cash upfront with the seller being entitled to a further \$500,000 in 12 months time depending on the profits of the business in the next financial year.

Two years after the ATO issued a draft ruling in relation to the taxation of earnout arrangements (which is still only in draft form – refer TR 2007/D10), it appears that Treasury is looking at this issue.

Since the ATO published their view on the taxation of earnouts, there has been confusion about this issue. This seems to have led to a reluctance to structure a sale using earnouts.

Hopefully, the Treasury will be able to resolve the tax treatment of earnouts in the near future so that taxpayers will at least have certainty.

SUPERANNUATION – CONCESSIONAL CONTRIBUTIONS CAP

From 1 July 2009, the concessional contribution cap has been reduced from \$50,000 to \$25,000 per person. Further, the transitional concessional contribution cap until 30 June 2012 for persons aged 50 or over has been reduced from \$100,000 to \$50,000.

This is likely to have an adverse impact on the ability of many Australians saving for their retirement.

Under the current taxation regime, concessional contributions are initially subject to 15% tax and non-concessional contributions 0% when received by a complying superannuation fund.

If the level of contributions exceeds either the concessional cap, the non-concessional cap or both, then the relevant fund member is subject to excess contributions tax as follows:

- The amount of concessional contributions in excess of the concessional contributions cap is subject to penalty tax at the rate of 31.5%. This excess then also counts towards the non concessional contributions cap.
- The amount of non-concessional contributions in excess of the non-concessional contributions cap is subject to penalty tax at the rate of 46.5%.

Areas of concern

The first area of concern is where a member is already close to both the concessional contributions cap and also the non-concessional contributions cap.

This could occur where the person has more than one position of employment and has salary sacrificed to the \$25,000 limit with one position and then is subject to compulsory superannuation guarantee contributions with one or more other positions.

The person may also have contributed close to the non-concessional cap amount (being currently \$150,000 p.a. or \$450,000 if the person is 65 years or younger and the three year average rule is utilised). This might be a result of contributing funds available from an inheritance or sale of a business or investment.

The additional superannuation guarantee amounts may be subject to a total tax of 93% (ie the initial 15% tax on contributions at the superannuation fund level, plus a personal excess concessional contributions tax of 31.5%, plus a personal excess non-concessional contributions tax of 46.5%).

The second area of concern is simply where the new concessional contributions cap of \$25,000 is inadvertently exceeded as a result of a person having employer contributions in excess of this amount.

This could occur if there are two or more unrelated employers meeting their respective superannuation guarantee responsibilities in respect of the person, pre existing salary sacrifice arrangements and/or fixed contribution arrangements to meet the cost of ancillary benefits such as death and permanent disablement insurance.

As a result the member might be subject to penalty tax of 31.5% as a result of matters largely outside their control.

TIP

Taxpayers should watch their super contributions so that they do not breach the caps and subject themselves to penalty tax rates – possibly as high as 93%!

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