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MONTHLY REPORT

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.

Shareholder Loan Rules

The Tax Office recently released a Taxpayer Alert, which is intended to be an 'early warning' of high risk tax planning issues. This alert concerns the avoidance of the shareholder loan (deemed dividend) rules through corporate limited partnership arrangements.

A corporate limited partnership (CLP) is an association of persons carrying on business as partners or in receipt of ordinary or statutory income, where the liability of at least one partner is limited. For taxation purposes, a CLP is treated like a company.

Broadly, the shareholder loan rules apply to payments, advances or loans made by a private company to a shareholder or associate, unless certain exclusions apply.

The Tax Office's alert applies to arrangements where a CLP is interposed or placed between a company and its shareholder or associate. The CLP is interposed to prevent any loans being made directly from the company to the shareholder or associate.

- **TIP:** Taxpayers should be aware of the Tax Office is closely examining such arrangements to determine if they contravene the shareholder loan rules and whether other anti-avoidance provisions may apply.

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.

- **TIP:** The Tax Office recently announced that it will once again be on the lookout for over-claiming of work deductions in the 2007 income tax year, and will be focussing on several occupations including:
- tourism and travel consultants;
 - fitness and sporting industry employees;
 - construction and trades people;
 - guards and security employees; and
 - a continuing focus on mining employees.

Bona Fide Redundancy

The Tax Office has released a decision impact statement, in relation to a recent AAT decision regarding whether or not a payment was made in consequence of bona fide redundancy where the terminated employee was both an employee and a director of the company.

In that case, the Commissioner amended the taxpayer's assessment to include the amount of the redundancy payment as assessable income, contending that because the taxpayer was a director of the company, the payment was not in consequence of termination of employment. The AAT disagreed with the Commissioner in this instance, finding that the payment was made as a result of the genuine closure of the business.

Following on from this decision, the Commissioner, in his decision impact statement, has indicated that the decision is limited to the facts of the particular case. In circumstances where the factual scenario is essentially the same, the Commissioner will seek to apply the decision.

The decision impact statement also indicates that where an employee consents to terminating their own employment, it can still potentially be a situation of bona fide redundancy in appropriate circumstances.

Failure to Lodge BAS on Time — Penalties Upheld

In a recent decision, the AAT held that prolonged and knowing non-compliance with the obligation to lodge Business Activity Statements (BASs) on time justifies the application of administrative penalties, unless the taxpayer can prove otherwise.

The taxpayer had registered for GST from 1 July 2000 and was due to account for GST on a quarterly basis, with his first BAS, for the September 2000 quarter due for lodgement by 28 October 2000. However, the taxpayer did not lodge any BASs until December 2004.

In this case, it was held that the reasons for non-compliance provided by the taxpayer were insufficient and, accordingly, the AAT upheld the Commissioner's decision to impose penalties of \$10,450 for prolonged late lodgement of BASs.

The result of this case serves to provide taxpayers with guidance concerning the application of late lodgement penalties.

Tax Compliance Tools

The Tax Office recently released three web-based decision tools to assist employers in understanding how to meet their tax and superannuation obligations. These tools include:

- an employee/contractor decision tool;
- a superannuation guarantee eligibility decision tool; and
- a superannuation guarantee contributions calculator.

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.

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IMPORTANT: This is not advice. Clients should not act solely on the basis of the material contained in this Bulletin. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. The Bulletin is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.