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DFK HIRN NEWWEY

Chartered Accountants

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MONTHLY REPORT

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. Furthermore, the AAT found that no CGT rollover relief was available in relation to the restructure.

➤ **TIP:** If assets held in joint names are transferred, the CGT consequences should always be considered.

Redundancy Payment to Director

In a recent test case, the AAT has held that a payment made on termination of an employee, who was also a director of the company, was a bona fide redundancy payment in the circumstances of the case.

An eligible termination payment (ETP) is any payment made in respect of the termination of employment. Excluded from an ETP is a bona fide redundancy amount which is tax-free. This amount is calculated based on a prescribed formula.

A bona fide redundancy occurs where an employer no longer requires an employee to carry on work of a particular kind and the termination is not in relation to the employee's performance.

The taxpayer in this case was a director and employee of a company, who contracted to install hardware on behalf of another company. This was the only operation of the business.

The contracting company terminated this contract and as a result the taxpayer's company was required to close its operations.

The taxpayer was paid out her salary and an amount of a redundancy payment.

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, finding that the payment was a bona fide redundancy payment paid as a result of the closure of the taxpayer's business.

➤ **TIP:** The facts and circumstances of each case will determine whether or not a taxpayer has received a bona fide redundancy.

Black Hole Expenditure

The Tax Office recently released a series of interpretive decisions which consider the principles surrounding the availability of deductions for certain 'black hole' expenditure.

Broadly, a taxpayer is entitled to a deduction over five income years for certain black hole expenditure, subject to limitations and exclusions. For example, expenditure that forms part of the cost of a depreciating asset or a CGT asset is excluded.

The taxpayer conducted a bus charter service, which involved acquiring buses. The taxpayer sought to purchase a bus, and in doing so incurred expenditure on airfares and tyres. Upon inspection of the bus, the taxpayer decided not to purchase it, and abandoned the tyres it had already purchased. Consequently, the taxpayer sought to claim a deduction as black hole expenditure for these costs.

The Tax Office held that:

- the costs incurred in relation to purchasing buses were an integral part of the taxpayer's bus charter business;
- the airfares and tyres were not excluded from black hole expenditure deductions under the depreciating asset exclusion on the basis that the taxpayer never held the bus and therefore depreciation would not be available;
- the airfares were not excluded from black hole expenditure deductions under the CGT asset exclusion as the taxpayer did not purchase the bus; and

- the tyres were excluded from black hole expenditure under the CGT asset exclusion as the tyres themselves constituted a CGT asset.

In conclusion, the Tax Office found that the taxpayer was only entitled to a black hole expenditure deduction for the airfares.

- **TIP:** Eligible black hole expenditure will be deductible over five years where it is related to the activities of the business.

Entitlement to an ABN

The AAT recently set aside a decision by the Australian Business Register to retrospectively cancel an entity's Australian Business Number (ABN).

In this case, the Registrar had cancelled the entity's ABN for the period from July 2000 to 2004 on the basis that the entity was not carrying on an enterprise as there was no reasonable expectation of profit or gain. As a result of cancelling the ABN, the entity would not have been entitled to approximately \$25,000 worth of GST input tax credits.

The AAT set aside the decision of the Registrar and substituted a decision cancelling the ABN from 31 December 2004.

The AAT held, based on the facts, that the applicant was carrying on an enterprise as shown by the sales figures on the Business Activity Statement (BAS). The AAT found that the correct time for determining whether an individual has a reasonable expectation of profit or gain is at the time that the business commences and not with hindsight when a business is subsequently unprofitable.

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 amnesty for lodging Family Trust Elections and Interposed Entity Elections for the 2004 and earlier income years expired on 31 May 2007. All requests received after this date will be assessed on a case by case basis.
- 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.

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