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## Beware of artificial trust arrangements to avoid tax

The ATO has issued an alert to warn taxpayers that it is aware of arrangements where a discretionary trust is used to effectively funnel large capital gains to a newly incorporated company that is then wound up to avoid paying taxes.

The ATO says these arrangements concern situations where a trust has generated a small amount of income and a large capital gain during the year. The trust then distributes funds generated by the capital gain, tax free, to one beneficiary, while the newly incorporated company receives the tax liability, but does not have the funds to pay the tax. A liquidator is then appointed to wind up the company.

The ATO says such arrangements may be shams and those involved could face serious consequences under the tax law.

## Extra 15% super contributions tax for high income earners

The superannuation law has recently been amended so that the effective contributions tax for certain concessional contributions (up to the concessional cap) has been doubled from 15% to 30% for "very high income earners", ie those with income (plus relevant concessional contributions) above a $300,000 threshold.

The ATO has recently advised that it will start issuing the first assessments for the new tax in January 2014 for individuals who were above the $300,000 high income threshold for the 2012–2013 income year.

**TIP**: Taxpayers who exceed the $300,000 high income threshold should consider reviewing their superannuation contributions and salary sacrificing arrangements to take into account any impact of the additional 15% tax.

## Individual found to be an Australian tax resident

An individual has been unsuccessful before the Administrative Appeals Tribunal (AAT) in arguing that he was not a resident of Australia for tax purposes during the relevant years. The individual was a mechanical engineer and worked overseas in the 2007 and 2008 income years. The taxpayer argued that in mid-2006 he had formed an intention to live in the United Kingdom, but was ultimately unable to do so due to the failing health of his mother-in-law. The taxpayer eventually returned to Australia in 2009.

The AAT held that the taxpayer had maintained a strong and continuing residency connection with Australia. The AAT noted, among other things, that the taxpayer had maintained an Australian bank account. He had also identified himself as a resident in official immigration arrival and departure cards.

## A share investor, not a share trader

The AAT has held that an individual was a share investor, and not a share trader as claimed, during the relevant years. The individual was a full-time council employee and claimed that he had an arrangement with his employer where he could trade during business hours and then make up the time after hours. The Tax Commissioner argued that the individual was not carrying on a business of share trading and therefore was not entitled to deductions he had claimed on the premise that a business existed.

The AAT held that, overall, the factors pointing against the existence of a share trading business outweighed the factors that were in the taxpayer's favour. Among various things, the AAT found there was a lack of a regular routine with buying and selling shares in the individual's case, which pointed towards the transactions being made on a speculative basis. The AAT was also of the view that full-time employment went against the conduct of a share trading business.

**TIP**: If a taxpayer is a share trader, losses may be deductible against other income. If the taxpayer is not a share trader, indexation or the capital gains tax (CGT) 50% discount may apply to reduce the capital gain.

## GST bill following hotel apartment purchases

The AAT has confirmed a decision of the Tax Commissioner that a husband and wife partnership (which was registered for GST) had an increasing adjustment resulting in a GST payable amount following the purchase of two apartments in a hotel complex.

The original owner of the apartments had previously granted leases in respect of each apartment to a hotel management company that was obliged to operate a serviced apartment business. The partnership had also elected to participate in a scheme that allowed the hotel management company to let the apartments as part of its serviced apartment business in return for income generated by the business. The supply of each apartment was treated as GST-free under the "going concern" concessions in the GST law. Since their purchase, the apartments were operated as part of the serviced apartment business.

The AAT essentially agreed with the Commissioner that the partnership had an increasing adjustment because of continuing input taxed supplies made in relation to the apartments.

## No relief from excess super contributions tax bill

The AAT has affirmed the Tax Commissioner's decision to impose excess non-concessional contributions tax on an individual in relation to excess super contributions he had made in September 2009.

Essentially, the taxpayer had withdrawn and redeposited his superannuation monies in an attempt to mitigate the effects of the global financial crisis. The Commissioner claimed the individual had breached the so-called "bring forward rule", which provides a $450,000 cap on non-concessional contributions for every three-year period for people under age 65.

The AAT did not accept the individual's argument that his super fund should have warned him of the danger of breaching the $450,000 limit. The AAT also did not expect the individual to necessarily understand the law himself; however, it did expect that the individual "might have asked for some advice".

## Departure from private ruling results in FBT assessments

The AAT has held that the Tax Commissioner was no longer bound by a private binding ruling that he had issued to a taxpayer company, because the taxpayer had implemented the scheme differently to the private ruling. As a result that the Commissioner was authorised to issue the taxpayer with fringe benefits tax (FBT) assessments for the relevant years.

Broadly, the private ruling provided that there would be no housing fringe benefit in relation to a home that was half-owned by the company (with the other half owned by a couple, who were also the directors of the company) on the basis that the business use of the home was 50%. However, the AAT considered that, in fact, less than 50% of the home had a "business use", and therefore the private ruling was not longer binding.

## Tax man’s refusal of tax debt compromise deal

An individual has been unsuccessful before the Federal Circuit Court in seeking a review of the Tax Commissioner's decision to refuse a tax compromise deal. The individual had taken over his father's jewellery business, but said he was not aware of the financial mismanagement of the business until unpaid creditors began calling. The taxpayer argued that the Commissioner had not taken into account the ill-health of his father and the effect the global financial crisis had on the business.

However, Court said there was no reason to believe that they were not taken into account by the Commissioner. Further, it held it could not review the Commissioner's decision as it was not a decision made "under an enactment".

## GST and adjustment notes

The ATO has issued a GST ruling that sets out the requirements for adjustment notes under the GST law. An adjustment note reflects the adjustment to the amount of GST charged on a taxable supply as a result of an adjustment event. An adjustment event will result in the original tax invoice issued by the supplier being incorrect. A supplier is required to issue an adjustment note for a taxable supply unless the supply was issued under a recipient created tax invoice. In that case, the recipient of the supply must issue the adjustment note.

The GST ruling outlines when a document is in the approved form for an adjustment note, the information requirements determined by the Tax Commissioner, and when the Commissioner will treat a particular document as an adjustment note even though that document does not meet all of the requirements.

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