

## CLIENT ALERT

December 2006

### Tax News, Views and Clues

#### **Sale and Leaseback Arrangements**

The Tax Office recently finalised Taxation Ruling 2006/13 (TR 2006/13), previously released as Draft TR 2006/D5, concerning financing arrangements involving depreciating assets.

The ruling identifies these arrangements as having economic effects similar to providing a loan to the lessee.

When an arrangement is characterised as a sale and leaseback arrangement involving a depreciating asset, the following taxation consequences will apply:

- a balancing adjustment occurs when the lessee stops holding the asset (i.e. the asset is sold);
- the lessor is entitled to deduct an amount for the decline in value of the leased asset, or other deductions, as appropriate;
- the lessor must return the lease payments as assessable income; and
- when the lessee stops holding the depreciating asset, an amount is included in income or as an allowable deduction.

The ruling also states that certain aspects of sale and leaseback arrangements may lead the Tax Office to consider applying Part IVA. These include:

- where an appropriate balancing adjustment and/or capital gain is not included in the assessable income of the lessee or lessor where applicable; and
- at the time of entering the sale and leaseback arrangement there is an intention to assign the right to income to a third party.

#### **Non-commercial Loss Rules Deny Business Losses**

In a recent decision, the Administrative Appeals Tribunal (AAT) found that the non-commercial loss rules applied to prevent a taxpayer claiming a deduction for losses in connection with sales promotion activities undertaken by his company.

During the 2003 Rugby World Cup in Australia the taxpayer carried on a business of promotional activities on behalf of overseas clients.

The operation made substantial losses, largely a result of clients failing to pay invoiced amounts.

The taxpayer wrote off these amounts in his personal income tax return on the basis that the company could not pay him for his consultancy services.

The Commissioner issued amended assessments denying the taxpayer's losses, as the taxpayer had failed to meet the criteria to write off the debt. Furthermore, the non-commercial loss provisions denied the taxpayer a deduction for the business losses because his income for the 2002 and 2003 income years was nil.

The AAT affirmed the decision of the Commissioner in both regards, on the basis that the taxpayer had not satisfied the legislative requirements for making the original claims.

#### **PSI Provisions Apply to Consultant**

In a recent decision, the AAT found that the personal services income (PSI) provisions applied to a taxpayer who derived consultancy income through a company.

The taxpayer was the sole director, shareholder and employee of DK Consulting Pty Ltd, who entered into a contract to provide services to certain end users for a set period at an hourly rate.

Rather than returning the entire amount earned by the company as income, the taxpayer declared salary and wages paid to him in his capacity as an employee and director of DK Consulting on his income tax return.

The Commissioner sought an amended assessment contending that the income arose solely from the provision of the taxpayer's services.

The AAT rejected the arguments of the taxpayer, upholding the Commissioner's decision, concluding that the PSI rules were designed to tax income in the hands of a person whose exertion caused its receipt even if the company was technically the contracting party.

## **GST — Sale of a Going Concern**

In a recent decision, the AAT held that the GST-free going concern provisions applied to the sale of a hotel business even though separate contracts had been entered into for the sale of the business assets and land. Consequently, the purchaser was disallowed from claiming input tax credits in relation to the purchase of the land.

As a result of this decision, the AAT has clarified that the sale of the business assets and the land of a hotel business under separate contracts can still be a GST-free supply of a going concern, if:

- all of the things that are necessary for the continued operation of an enterprise (including the land from which the business is operated) are sold to the purchaser; and
- it is the intention of the parties that the sale of the business is to be the sale of a GST-free going concern.

The AAT found that the going concern clause included in the business sale contract was relevant for the sale of both the business assets and land, as 'the business or enterprise of a hotel cannot be conducted without land from which to conduct it'. Therefore, the total sale was held to be GST-free.

## **Company Tax Losses**

The Tax Office recently issued ATO ID 2006/284, explaining the taxation consequences when a company has tax losses that it incurred prior to deriving net exempt income, and whether those losses can be deducted if the company undergoes a change of ownership but satisfies the same business test.

The Tax Office accepts this position but notes that the tax losses must first be deducted from the net exempt income.

## **Consolidation — Group Restructures**

In a recent press release the Minister for Revenue and Assistant Treasurer announced a change to the consolidation regime, allowing consolidated groups and multiple entry consolidated (MEC) groups to restructure with minimal tax consequences. Such restructures may cause consolidated groups to become MEC groups and vice versa.

The press release advises that the following will take place when a change in the type of consolidated group occurs:

- the tax cost setting rules will not apply to the assets of the ongoing group members;
- tax losses of the ongoing group will not be tested and the capital losses that are apportioned over five years will not become immediately available;
- the ongoing group's history will be transferred to the new group; and
- certain notifications currently required to be given to the Commissioner will be removed.

The new rules are designed to reduce compliance costs for businesses contemplating restructuring. The new rules came into effect on 27 October 2006.

## **Beneficiaries of a Deceased Estate**

The Tax Office recently released ATO ID 2006/279, raising the issue of whether residuary beneficiaries of a deceased estate have fixed entitlements to all of the income and capital of the estate, for the purposes of determining whether the trust constituted by the estate is a fixed trust.

The ATO ID contends that as all beneficiaries have a vested and indefeasible interest in a share of the income and capital of the estate, they all have a fixed entitlement to a share of the income and capital of the estate.

As such, the trust constituted by the estate is a fixed trust.

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.