CLIENT ALERT

December 2012

Excess contributions case – special circumstances win for taxpayer

Editor: The case below involves a taxpayer attempting to argue that an excess contribution tax assessment should be set aside for 'special circumstances'. Somewhat against the flow, the taxpayer was unexpectedly successful.

Facts of the case

During the 2010 financial year, the taxpayer's employer made total superannuation contributions of $71,551 – $21,551 over the limit of $50,000.

The employer's super contributions were made to two different superannuation funds – $25,367 to AMP and $46,184 to Tasplan.

During the 2009 income year, the taxpayer had asked their employer to stop making any super contributions to AMP from 1 July 2009, because they were unhappy with the 4.5% commission levied by AMP, and they asked that all contributions from 1 July 2009 be forwarded to Tasplan.

Unbeknown to the taxpayer, their employer had made super contributions of $25,367 that related to the 2009 income year in July 2009 (i.e., the 2010 income year) and these contributions were made to AMP.

The taxpayer was then assessed as having excess contributions of $21,551, resulting in excess contribution tax ('ECT') of $6,788.70.

The taxpayer then sought relief from the ECT, on the basis that 'special circumstances' existed and that the contributions should be disregarded or reallocated.

AAT decision

The AAT said that the taxpayer was understandably not aware of the super contributions made to AMP in July 2009, because all super contributions from 1 July 2009 should have been paid to Tasplan.

According to the AAT, these facts amount to 'special circumstances'. As such, the AAT ordered that the $25,367 contributions paid to AMP in July 2009 (being the 2010 income year) be reallocated to the 2009 income year, resulting in no ECT being payable.

Claim the tax-free threshold with more than one employer!

The ATO has updated its document titled '*When you have income from two payers*' reminding taxpayers who receive income from two employers that they ***are*** entitled to claim the tax-free threshold for more than one payer at the same time.

This update by the ATO reflects the increase in the tax-free threshold from $6,000 to $18,200 from 1 July 2012. However, the ATO has made it clear that taxpayers considering this strategy must be certain that their taxable income for the year in question will be no more than $18,200.

GIC & SIC rates for December 2012 quarter

The GIC (General Interest Charge) and SIC (Shortfall Interest Charge) rates for the December 2012 quarter are:

GIC rate	10.62%
GIC daily compounding rate	0.02901639%
SIC rate	6.62%
SIC daily compounding rate	0.01808743%

In addition, the Interest on Overpayments, Interest on Early Payments and Delayed Refunds Interest rate is 3.62%.

Super contribution capping rules – Individuals aged 75 and over

From 1 July 2012, the super concessional contributions cap is $25,000 for everyone (i.e., that cap now relates to individuals of any age).

However, the ATO has advised that:

- superannuation funds can still only accept 'mandated employer contributions' for members aged 75 years and over;
- where 'mandated employer contributions' are made for people aged 75 or over, the concessional contributions cap will apply to them; and
- other than 'mandated employer contributions', people aged 75 years and older cannot contribute to super."

Editor: 'Mandated employer contributions' include super guarantee contributions (although these are not currently required for employees aged 70 or over, this age limit will be removed from 1 July 2013), and those required under an award.

Cars on the ATO's 'FBT radar'

This financial year, the ATO will be conducting a campaign to make sure employers who have purchased a car during the 2011 and/or 2012 fringe benefits tax (FBT) year are aware that they may have FBT obligations.

Editor: An FBT year runs from 1 April until 31 March.

Data has been obtained from various motor vehicle registering bodies to identify employers who have purchased a business registered vehicle but have not registered for FBT.

As a result, the ATO will be writing to about 5,000 employers who fall into this category, to tell them about car fringe benefits and what they need to do to comply with FBT obligations.

The ATO will particularly highlight that:

- if a car is garaged at home, it is taken to be available for private use;
- as a general rule, travel to and from work is private use of a vehicle; and
- there are only limited circumstances where an employee's private use of a car is exempt from FBT.

Changes to director obligations

Editor: The ATO has reminded company directors of recent changes to the law affecting their personal liability for certain company obligations.

On 29 June 2012, changes were made to the tax laws to reduce the scope for companies to engage in fraudulent 'phoenix activity' or to escape liabilities and payments of employee entitlements.

The changes:

- extend the director penalty regime and the estimates regime to apply to unpaid superannuation guarantee charge (SGC);
- ensure that directors cannot avoid director penalties by placing their company into administration or liquidation when PAYG withholding or SGC remains unpaid and unreported 3 months after the due date; and
- in some instances, make directors and their associates liable to 'PAYG withholding non-compliance tax' – which effectively reduces directors' PAYG credit entitlements where the company has failed to pay amounts withheld to the ATO.

ATO urges caution with SMSF property investments

The ATO has warned trustees of self-managed superannuation funds (SMSFs) to be cautious when investing in property.

The ATO is concerned that people are using their SMSFs to invest in property without fully understanding their obligations under the law, or that some people are seeking to take advantage of certain types of arrangements.

The ATO is primarily concerned with arrangements where:

- an SMSF invests in a related unit trust by acquiring units in the trust, and the unit trust acquires property, but the arrangement breaches the superannuation compliance rules in some way, such as where the property is subjected to a mortgage, or is acquired from or rented to a related party, when it would otherwise be prohibited; and
- an SMSF enters into a Limited Recourse Borrowing Arrangement (LRBA) to acquire an asset, and the arrangement does not comply with the strict conditions that must be met for SMSFs that borrow.

  In particular, these borrowings must generally be used to acquire a single asset (that the fund is not otherwise prohibited from acquiring; e.g., SMSFs are prohibited from acquiring residential property from a related party), and the asset acquired cannot be held directly by the SMSF but must be held by a separate 'holding trustee' (or 'custodian'), solely for the benefit of the SMSF.

  The ATO has also stated that:

  - the trustee of the holding trust must be in existence, and the holding trust must be established, by the time the contract to acquire the asset is signed; and
  - the SMSF cannot borrow to acquire a vacant block of land and then use the same borrowing to construct a house on the land.

According to the ATO: "The fine details are important and trustees need to be sure that property is the right investment for their SMSF and that the arrangement is legal."

"Some of these arrangements, if structured incorrectly, cannot simply be restructured or rectified. The only option may be to unwind the

arrangement which could involve forced sale of assets at an inconvenient time. This could be very expensive for the fund with potential stamp duty and tax consequences."

SMSFs that do not comply with the superannuation laws may also become 'non-complying' for tax purposes and, if the SMSF or the unit trust needs to dispose of the relevant property, they may incur a CGT liability, or the SMSF (and any other unitholders) may be required to include a capital gain in their assessable income if they need to redeem their units in the unit trust.

In addition, the ATO states that where arrangements are deliberately entered into to get around the law, the fund's trustees may be disqualified, face civil penalties or even face criminal charges.

Payments for electricity generated from solar panels

More and more homeowners are installing solar panel systems in their homes. In some cases, the solar panel system may produce more electricity than they consume. If this is the case, the homeowner can often “sell” the excess electricity back to their electricity company, which will be released into the electricity grid.

This obviously begs the question: will the payments they receive from the electricity company be included in their assessable income?

The ATO has basically confirmed that, in typical situations where payments are received from electricity retailers by homeowners for the power generated by their solar panels that is exported to the grid, the payments would generally **not** be classed as assessable income, as they would be private or domestic in nature. This conclusion takes into account the amount of equipment used to generate the electricity, the current pricing structure, and the fact the homeowner produces the electricity for a domestic purpose only.

In addition, since the payments are not assessable income and are private or domestic in nature, a homeowner in the above situation would not be able to claim a deduction for the costs associated with the solar system, such as interest and depreciation.

Note, however, that if the characteristics of the activity change (including the motivation for undertaking that activity, how the activity is undertaken and whether there is a real prospect of profit from the activity), the receipts or credits from the activity may become assessable income.

Changes to the GST treatment of Government charges

Editor: The GST treatment of government taxes and charges is changing. In the past, the Treasurer would specifically list, in an annual determination, each government tax and charge that is GST-free.

The tax laws regarding this system were amended in 2011, but a transitional period was allowed so that government charges listed on the Treasurer's determination were still exempt until 30 June 2013.

The ATO has reminded taxpayers that the Treasurer's current determination listing government charges that are exempt from GST will no longer apply from 1 July 2013.

This means that, from 1 July 2013, taxpayers must review all their government charges to self-assess whether GST is payable.

Editor: We can obviously assist, but the ATO has also provided a flowchart on their website to help taxpayers work out if a government charge is exempt from GST

Trust resettlements and CGT

The ATO has effectively confirmed that a trust deed can be varied without the trust being 'resettled' and causing CGT problems.

More specifically, they state that there should be no CGT consequences if the trustee validly exercises a power contained within the trust deed to change the terms of the trust (or the deed is varied with the approval of a relevant court), **unless**:

- the change causes the existing trust to terminate and a new trust to arise for trust law purposes; or
- the effect of the change leads to a particular trust asset being subject to separate rights and obligations, giving rise to the conclusion that the relevant asset has been settled on terms of a different trust.