



## The August 2009 MTUN

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# 1 INCOME TAX

## 1.1 Politicians, Boards & Statutory Authorities

### (1) \*\* Taxation of Employee Share Schemes [Sherry]

*Source: Taxation of Employee Share Schemes [Sherry] 1 July 2009 Media Release Number 11*

The Assistant Treasurer released a Policy Statement setting out the final taxation treatment of shares and rights acquired under employee share schemes, effective from 1 July 2009.

Under the arrangements outlined on Budget night, all discounts on shares and rights provided under an employee share scheme would be assessed in the income year in which the shares and rights are acquired.

The Government issued a public consultation paper on a new regime, which sought to balance industry concerns with the need to address the acknowledged problems of tax evasion and tax avoidance.

Modifications from the position announced in the consultation paper are:

- ◆ increasing the income tax threshold for eligibility for the upfront tax concessions from \$150,000 to \$180,000, to align it with the top marginal tax rate threshold;
- ◆ providing further clarity on the meaning of "real risk of forfeiture" via the use of explanatory materials and Tax Office materials, including through the use of a range of example cameos to assist industry;
- ◆ moving the deferred taxing point from a point at which the taxpayer will no longer have a real risk of losing the share or right to a point at which:
  - ~ in the case of shares, there is both no longer a real risk of the taxpayer losing the share and no restriction (present at acquisition) preventing the taxpayer from disposing of the share; and
  - ~ in the case of rights to shares (options), there is both no longer a real risk of the taxpayer losing the right and no restriction (present at acquisition) preventing the taxpayer from either disposing or exercising of the right, however, if after exercising the right, the underlying share is subject to forfeiture and restrictions preventing the taxpayer from disposing of the underlying share, it is the point at which there is both no longer a real risk of the taxpayer losing the share and no restriction (present at acquisition) preventing the taxpayer from disposing of the share;
- ◆ allowing the deferral of tax in relation to up to \$5,000 worth of shares under particular salary sacrifice based employee share schemes, where there is no real risk of forfeiture;
- ◆ removing the reporting requirement for employers to report the market value of employee share scheme benefits in the year of grant, if this is not the year in which the employee is taxed; and
- ◆ establishing a three part forward plan of consultation with industry by:
  - ~ asking the Board of Taxation to examine two remaining issues (a) how best to determine the market value of employee share scheme benefits; and, (b) whether shares and rights under an employee share scheme that are provided by start-up, research and development and speculative-type companies should be subject to a tax deferral arrangement, despite not being subject to a real risk of forfeiture;
  - ~ commit to an Exposure Draft process of the Bill to ensure the policy is accurately reflected in the application of the law, including consultation on a range of technical issues raised in submissions that will be contained in the Exposure Draft Bill; and
  - ~ supplementing this process by asking the Board of Taxation to consult with stakeholders, in particular interested members of the previous Consultative Group, to examine technical matters associated with the implementation of these reforms, and to report to Government in time to allow the Board's views to be taken into account in the draft legislation.

Under the final framework for employee share schemes, the taxation of discounts on shares and rights acquired under an employee share scheme will remain the starting principle of the regime, with concessional treatment available for particular schemes.

The upfront tax exemption will be means tested and tax deferral will only be accessible where there is a real risk that the shares or rights may be forfeited, such as due to performance hurdles or employment conditions. The pre-Budget use of cessation of employment as a taxing point will be retained and the maximum 10 year deferral period will be reduced to seven years.

A full reporting regime will also be introduced to significantly boost the integrity of the taxation of share schemes.

The combination of these final reforms and the measures out in the 5 June, 2009 consultation paper are set out in the attached Policy Statement.

As previously announced, the existing law will apply to all shares and rights acquired before 1 July 2009. The Government will introduce the legislation during the Spring Sittings of Parliament.

## (2) \*\* Australia-US International Tax Cooperation [Sherry]

*Source: [Australia-US International Tax Cooperation \[Sherry\]](#)*

The Assistant Treasurer reaffirmed the strong international partnership between Australia and the United States over tax cooperation, including on tax havens, tax evasion and other tax abuse issues currently on the G20 agenda on a recent visit to the United States where he met with:

- ◆ Senator Carl Levin, Chairman of the Senate Committee on Armed Services and Chairman of the Permanent Subcommittee on Investigations, which examines tax fraud and tax haven issues in the US.
- ◆ Congressman Richard Neal, Chairman of the House Select Revenue Measures Committee; and
- ◆ Mr Douglas Shulman, Commissioner of the United States Internal Revenue Service (IRS).
- ◆ Dr Alan Krueger, Assistant Secretary and Chief Economist of the US Treasury;
- ◆ Governor Kevin Warsh of the Federal Reserve;
- ◆ Ms Mary Shapiro, Chairman of the Securities and Exchange Commission;
- ◆ Mr Jeffrey Gutman, Vice President of the World Bank; and
- ◆ Mr Carlos Cottarelli, Director of Fiscal Affairs, at the International Monetary Fund.

The Assistant Treasurer also briefed Senator Levin on the ATO's latest briefing to Congress on the issue of US state tax secrecy havens.

Editor: Practitioners should also note the recent indications of a settlement of the at times bitter dispute involving Swiss Bank USB, the Swiss Government and the US Government.

It appears that the issue will be resolved by the Swiss government releasing all the information sought wherever the US government can establish to at least a prima facie level, fraud by the taxpayer.

It is also appropriate to note reports of the recent spike in penalty reducing admissions by residents of the US to involvement in unsavoury tax practices as they seek the protection of an amnesty for such a purpose.

## (3) \* Wickenby results ~ phoenix results [Sherry]

*Source: [Tax Crackdown Nets \\$313 Million In 2008-09 \[Sherry\]](#)*

The Assistant Treasurer, Senator Nick Sherry, announced that two high-profile tax crackdowns have this past financial year raised more than \$313 million in tax liabilities and penalties against tax cheats.

During the year ended 30 June 2009:

- ◆ Wickenby raised \$230 million in tax liabilities and collected \$40 million in cash;
- ◆ Wickenby also collected \$159 million in tax in subsequent years from people who have been subject to Wickenby action;
- ◆ Targeting of phoenix practices also raised more than \$83 million in tax and penalties within Australia.

Wickenby agencies have also been responsible for restraining \$76 million of assets under proceeds of crime legislation.

**(4) \*\* Details of further industry consultations on employee share schemes tax reforms [Sherry]**

*[Source: Details of further industry consultations on employee share schemes tax reforms \[Sherry\]](#)*

The Assistant Treasurer, Senator Nick Sherry, has released the timeframes for the final round of industry consultations on reforms to the taxation of employee share schemes, including releasing the Terms of Reference for the Board of Taxation review component.

The Government will undertake a three-stage consultation process:

- ◆ a two-week consultation period on a draft Exposure Bill beginning in August;
- ◆ a Board of Taxation consultation on technical issues to report to the Assistant Treasurer within approximately one month of the release of the draft Exposure Bill; and
- ◆ a comprehensive Board of Taxation review on two further substantive issues to report to the Assistant Treasurer by 28 February, 2010.

It is envisaged legislation based on the policy statement will be introduced into Parliament in the Spring sittings.

The Terms of Reference for the Board of Taxation's review, being the third stage of the consultation process are:

- ◆ how to best determine the market value of employee share scheme benefits; and
- ◆ whether shares and rights under an employee share scheme at a start-up, R&D or speculative focused company should have separate tax deferral arrangements.

**(5) \* More Tax Return Options for Australians [Sherry]**

*[Source: More Tax Return Options for Australians \[Sherry\] 19 July ~ Press Release Number 12](#)*

The Assistant Treasurer, Senator Nick Sherry, is encouraging Australians to take advantage of the extensive range of options to make filing their tax returns easier and more convenient.

Making it easier for taxpayers **and their agents** to complete their tax returns, *e-tax* has a pre-filing service which downloads your information into *e-tax* and completes or partially completes the relevant items. These include being able to download:

- ◆ government benefits payments;
- ◆ payment summaries;
- ◆ bank interest payments;
- ◆ dividend income details from share registries and most listed public corporations;
- ◆ medicare information;
- ◆ private health insurance details.

Another program, the Tax Volunteers Program is aimed at helping low income earners get over the line in meeting their obligations.

The ATO has also enlisted the help of Centrelink to promote tax support products in their shopfronts.

There are also improvements to communications, including expanding the use of text messaging.

Editor: It appears the pre filling system, contains some gremlins for it cannot be relied upon include deductions for GIC imposed nor include interest on overpaid tax. Or is it the design of the system?

## 1.2 Courts & Tribunals

### (a) Courts

#### (1) \* Was the trustee personally liable for \$70m tax debt? (Barkworth Olives v DC of T)

[Source Barkworth Olives v DC of T \(Chesterman JA\)](#)

##### *What is the issue?*

Where the Commissioner had a judgment in respect of a tax debt should recovery proceedings be stayed where the taxpayer, who was a trustee of four trusts which had accrued the tax debt, was appealing the issue of its liability to pay the tax debts of the four trusts?

##### *What was the outcome?*

Chesterman J decided the appeal had no prospect of success and that it should be dismissed.

##### *What were the facts?*

The taxpayer was a trustee of four trusts, the beneficiaries of which were investors in olive tree plantations.

The Commissioner had judgments for unpaid tax assessments for four trusts which in aggregate amounted to more than \$70 million.

The taxpayer denied that it had a personal liability to pay the tax debts. This

The Commissioner commenced recovery proceedings in relation to the \$70 million judgment tax update.

##### *What was the decision?*

- [12] The learned primary judge was plainly right to conclude that the [Taxpayer]'s assertion of fact that it did not receive any monies in a representative capacity is no answer to its liability to pay the tax assessed. ...
- [17] The legislation is clear and the authorities are distinct. The only recourse available to the [Taxpayer] is to object to the assessments, as it has done. There is no basis in law for disputing the debt created by the assessments in the Supreme Court proceedings.
- [18] ... Because of the conclusive nature of the assessments this Court cannot embark upon an examination of whether s 254 operates so as to exonerate the [Taxpayer] from liability to pay the tax assessed.
- [19] In my opinion the appeal cannot succeed. It is not appropriate to order that enforcement of the primary judgment be stayed. The application is dismissed.

#### (2) \*\* Valuing the shares in a related party (Confidential and C of T)

[Source: Confidential and Commissioner of Taxation \[2009\] AATA 476 \(23 June 2009\) Mr J Block, Deputy President and Mr S E Frost, Member](#)

##### *What is the issue?*

Could the taxpayer have a question be referred to the Federal Court rather than having the Tribunal deal with the question?

The questions sought to be referred all related to special income of a fund:

- ◆ Is the value, within s 273(1)(a) (sic) as it then was, of the private company shares their original paid-up value of \$1 each, or their market value?
- ◆ Is the value of the private company shares, within s 273(1)(a) (sic) that is to be taken into account, the value at the times that each of the dividends forming income were paid (in 2000 to 2003), or at the time that the private company shares were acquired (i.e. on 10 October 1995)?
- ◆ In exercising the discretion under s 273(2) must the factors set out in s 273(2) be related to the derivation of each of the dividends paid to the Applicant in its income years ended 30 June 2000 to 2003?

- ◆ If so, what relationship is required by s273(2)
- ◆ Is the taxpayer's subjective appreciation of the taxation benefits of superannuation a relevant factor within the meaning of s 273(2)(f) and therefore relevant to the exercise of the Commissioner's determination pursuant to s 273(2)

*What was the outcome?*

The balance of convenience meant that the question ought not be referred to the Federal Court

**(b) Tribunals**

**(1) \*\* Declaring dividends for psi taxpayer – does it work? (Horner and C of T)**

[Source Horner and C of T \(Mr G L McDonald, Deputy President\)](#)

*What is the issue?*

Was the entity carrying on personal services business?

Were the psi provisions enlivened if the taxpayer's treatment of the psi income did not result in a deferral or reduction of income tax? I

*What was the outcome?*

The tribunal found that the psi rules applied to the personal services entity which did not have a personal services business determination and which did not conduct a personal services business so that all of its income should be attributed to the taxpayer.

*What were the facts?*

The taxpayer, Horner, was the sole director, shareholder and employee of Torville during the relevant years.

Torville provided the following services during the relevant years:

- ◆ enterprise architecture;
- ◆ web software design and development;
- ◆ technical audits and reviews; and
- ◆ computer book technical reviews and authoring.

During the relevant years, Torville derived all of its income as a result of the services provided by Horner.

Horner included in his income tax returns for the 2004 and 2005 tax years: salary and wages; director's fees; interest; other income; and a franked dividend together with a (franking credit of \$9,514.00).

Horner later lodged an amended 2004 year tax return, in which he reduced the franked dividend. The amended return was subsequently reviewed by the Commissioner at which time the Commissioner removed the dividends and franking credits from the returns.

*What is the impact of the decision on your firm's practices?*

The decision highlights that a personal services entity cannot declare a dividend in relation to personal services income unless the personal services entity has a personal services business determination.

If the income of the personal services entity is promptly paid to the employee:

- ◆ it will not be attributed to the taxpayer;
- ◆ will not be available for payment by way of a dividend.

The outcome is that if a personal services entity attempts to minimise PAYG and SGC outflows during the course of a year and does not hold a personal services business determination the income of the entity will be attributed to the employee taxpayer.

### *What were the contentions?*

Horner asserted that:

- ◆ the issue before the Tribunal was whether there was a reduction of income tax (and other liabilities) by attributing PSI to Torville in the relevant years, and that it did not extend to deferral of income tax (and other liabilities) by attributing PSI to Torville (because there was no deferral);
- ◆ contended that s 86-10 imposed a threshold test (to determine whether the object of Division 86 is met) and that he is not caught by that threshold (because the object of Division 86 cannot be met). Horner phrased the test as follows:

*Test the fact situation to see whether there is a threat to the revenue base or equity. But a threat is only a threat when there is a reduction in the revenue base and to equity. Thus, it would follow that there is an implied obligation on the [Commissioner] to apply a threshold test to see whether the fact situation contains the threat to the revenue base and to equity ...[19]*

### *What was the decision?*

- [37] The evidence leaves the Tribunal satisfied that the income derived by Torville arose through the [Taxpayer]'s skills and personal effort. .... Section 86 of the Act results in the [Taxpayer]'s PSI being alienated from the income of Torville and applied to his income as he was the person providing the services which generated the income. Alienation of PSI does not occur when the entity providing the services is a personal services business or the income is promptly paid to the individual as salary or wages or the income is non assessable income of the entity.
- [38] The next issue to determine is whether Torville is conducting a 'personal services business.' The [Taxpayer] has not applied to the Commissioner to have a determination that Torville be determined to be a personal services business and there is no evidence which establishes Torville meets any of the [four] tests set out in s 87 ... a therefore the Tribunal is satisfied that Torville does not meet any of the tests. It then follows that s 86 applies. ...
- [40] Section 86-10 sets out the object of the section (division). Section 86-10 has no operative role. It cannot therefore have the role that the [Taxpayer] seeks to attribute to it. It contains no 'threshold' test which must be met before the balance of the section becomes effective or. In particular, it is not a requirement of the section that the [Commissioner] demonstrate that there has been a deferral or reduction of income tax as the result of the operation of the section, before the section can otherwise have effect. Once it has been determined that the [Taxpayer] was providing personal services then s 86-15 applies, and subject to any offset claimable under s 86-20, the amount is alienated to the [Taxpayer]'s individual income.

## 1.3 Featured ATO interpretations

Click here for [Listed ATO Publications for the MONTH](#)

### (b) TD Series - including TD Series in draft form

#### (1) \* TD 2009/14 ~ Stapled security

[Source TD 2009/14 previously released as TD 2008/D6](#)

#### *What is the issue?*

Is a taxpayer entitled to an income tax deduction under subsection 70B(2) if a Stapled Security of the kind described in TA 2008/1 is sold at a loss or upon the occurrence of an Assignment Event?

#### *What was the background to the determination?*

The circumstances outlined in TA 2008/D6 which centred around an Australian resident public entity (the Company) issuing Notes from one of its overseas branches or subsidiaries to an Initial Purchaser for a fixed amount. The amount was generally not repayable once the Note is stapled to the Preference Share

#### *What is the Tax Office determination?*

The Tax Office determined that in the circumstances outlined in TA 2008/1:

- ◆ a taxpayer is not entitled to an income tax deduction under subsection 70B(2) upon the sale of the Stapled Security at a loss, or upon the occurrence of an Assignment Event;
- ◆ if a taxpayer did not acquire and sell the Stapled Securities in the ordinary course of business, a profit from the disposal of the Stapled Security by way of a sale gives rise to a capital gain, rather than being assessable as statutory income under section 26BB of the ITAA 1936;
- ◆ a loss from the sale of the Stapled Security is a capital loss that can reduce capital gains of the taxpayer, rather than a loss on revenue account under section 70B of the ITAA 1936.

However the tax office concluded that absent the circumstances outlined in TA 2008/1 a taxpayer who acquires and sells Stapled Securities in the ordinary course of business will:

- ◆ be entitled to a deduction for a loss incurred on the sale of the Stapled Security under section 8-1;
- ◆ include as assessable income under section 6-5 any profit is made from the sale of the Stapled Security in the ordinary course of business.

## (2) \*\*\* TD 2009/16 ~ Benchmark interest rate

[Source TD 2009/16](#)

*What is the issue?*

What is the benchmark interest rate applicable for the year of income that commenced on 1 July 2009 for the purposes of Division 7A of Part III of the Income Tax Assessment Act 1936 and how is it used?

*What is the Tax Office determination?*

The Commissioner determined that for the income year that commenced on 1 July 2009, the benchmark interest rate for the purposes of sections 109N and 109E of the Income Tax Assessment Act 1936 is 5.75 % per annum.

## (3) \*\*\* TD 2009/17 ~ Interest deductibility on capitalising hybrid or discretionary trusts?

[Source TD 2009/17 previously released as TD 2008/D16](#)

*What is the issue?*

Is interest on a loan fully deductible under section 8-1 if the borrower settles the on trust to benefit the borrower and others?

*What is the effect of the determination on your practices?*

The ruling does not address specifically by name either hybrid trusts or discretionary trusts but it provides four examples, each of which would be described as relating to trusts that were hybridized to some extent.

There are four examples in each of which the Commissioner concludes that the interest is partially deductible:

- ◆ the first example involves a unit trust the units of which were held 50% by the borrower and 50% by the borrowers' spouse so that half of the income would be paid to the borrower's spouse.
- ◆ the second example involves a unit trust the units in which were held 100% by the borrower but the terms of the trust entitled the trustee to appoint capital gains to the borrowers spouse and the borrower's children.
- ◆ the third example involves a unit trust the units of which were held 100% by the borrower but the terms of the trust entitled the trustee to appoint capital gains to the borrower, borrowers spouse and the borrower's children.
- ◆ the fourth example involves a unit trust the units of which were held 100% by the borrower but the terms of the trust entitled, but did not compel, the trustee to appoint income of the trust to the borrower, the borrowers spouse and the borrower's children.

*What is the Tax Office determination?*

The Commissioner determined that:

- ◆ interest paid on a loan used to settle moneys on trust to benefit the borrower and others cannot be deducted in full under section 8-1;
- ◆ the taxpayer's interest expense can only be deducted to the extent to which the taxpayer has used the borrowed moneys to gain or produce assessable income *of the taxpayer*;
- ◆ will not be deductible to the extent that the taxpayer has used the borrowed moneys for the purpose of benefiting persons other than the taxpayer;
- ◆ the interest expense is not deductible at all where the terms of the trust are such that:
  - ◆ no connection is perceived between the interest outgoing and the taxpayer's assessable income;  
or
  - ◆ section 51AAA of the ITAA 1936 applies.

## 2 GST

### 2.1 Politicians, Boards & Statutory Authorities

#### (1) \*\* Release of draft GST legislation to confirm liquidator's liability to GST [Sherry]

*[Source: Release of Draft GST Legislation \[Sherry\]](#)*

The Assistant Treasurer, Senator Nick Sherry, has released for consultation an Exposure Draft Bill aimed at protecting \$655 million in revenue, put at risk as a result of a decision last year of the Federal Court concerning insolvency and the application of the GST.

The amendments contained in the Exposure Draft Bill became necessary after the Federal Court decision in Deputy Commissioner of Taxation v PM Developments Pty Ltd [2008].

The court found that the GST liability for transactions occurring during the period of a liquidator's appointment is the liability of the company in liquidation and not the liquidator.

The intention of the GST law is that the liquidator of an insolvent company is responsible for paying GST on transactions made in their capacity as the liquidator of that insolvent company.

If left to stand, the Federal Court decision result in the GST liability falling to the insolvent company, greatly reducing the likelihood of payment.

The \$655 million is made up of refunds of GST already paid and ongoing revenue costs over the forward estimates.

The amendments will apply from the commencement of the GST law on 1 July 2000.

The Exposure Draft Bill and draft Explanatory Memorandum are available on the Treasury website at [www.treasury.gov.au](http://www.treasury.gov.au). The consultation period is for four weeks, closing on Friday, 7 August, 2009.

The Government will introduce the legislation during the Spring Sittings of Parliament.

## 3 FBT ~ UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

Due to the sporadic nature of FBT developments and practitioner desire that all FBT material for an FBT year be available in one place we now publish FBT material on-line in printable form at [Taxmap™](#).

Publishing on line will also allow us to minimise paper and toner wastage.

## 4 STATE TAXES ~ UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

Generally practitioners are interested in developments in one state only. Accordingly the State Taxes are now published on line. Publishing on line will also allow us to minimise paper and toner wastage.

## 5 SUPERANNUATION, ETP'S & PENSIONS

### 5.1 Politicians, Boards & Statutory Authorities

#### (1) \*\* Simple Superannuation Advice Launched [Bowen]

*[Source: Simple Superannuation Advice Launched \[Bowen\] 1 July 2009 Media Release Number 11](#)*

The Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen and the Minister for Finance and Deregulation, Lindsay Tanner, welcomed the release of ASIC guidance and class order relief that will enable millions of Australians to access low-cost, simple advice on their superannuation investments.

To facilitate simple super advice ASIC's class order provides relief for superannuation trustees from the personal advice requirements of section 945A of the Corporations Act in limited circumstances.

ASIC has also released guidance setting out detailed, practical examples showing how superannuation funds can make simple advice available to their members under the current law.

The package will provide certainty for industry that it can confidently provide advice to its members on matters such as choosing between investment options, the best form of super contributions, or suitable levels of insurance."

For more information go to [www.asic.gov.au](http://www.asic.gov.au).

### **Intra-fund advice**

- ◆ intra fund advice is advice that is given about a superannuation member's existing interests in a superannuation fund and does not involve personal advice about any new interest that the member may wish to acquire in the superannuation fund or another superannuation fund or investment product;
- ◆ access to simple advice about a superannuation member's existing interests in a superannuation fund has been a significant area of unmet need for financial advice in superannuation;
- ◆ ASIC's guidance and relief package makes it easier for superannuation funds and financial advisers to answer member inquiries directly by providing guidance about how to provide factual information, general and personal 'scaled' advice (advice that is limited in scope) to existing superannuation fund members;
- ◆ the Government has addressed these concerns and barriers by instructing the Financial Services Working Group to examine these issues and develop policy proposals to overcome them in order to improve Australians' access to basic financial advice within their superannuation fund;
- ◆ the Financial Services Working Group recommended that the regulatory barriers to the provision of simple superannuation advice were best addressed by ASIC issuing clarification via regulatory guidance and (where necessary) class order relief;
- ◆ a superannuation fund can only provide members with personal advice under this guidance and relief package if the superannuation fund holds an AFSL to provide personal advice;
- ◆ if a superannuation fund uses the guidance and relief to provide a member with intra fund advice, the superannuation fund must:
  - ~ notify the member that they are relying on the relief to provide intra fund advice;
  - ~ advise the member that the advice is limited in scope at the time of giving them the advice;
  - ~ where personal advice results in any increased fees, costs or charges, insurance premiums, or remuneration (including commissions), the member must be notified in writing in dollar amounts.

## **5.2 Courts & Tribunals**

### **(b) Tribunals**

#### **(1) \*\*\* Was the SMSF able to retain its status after in house asset breaches? (JNVQ and C of T)**

*[Source JNVO and C of T \(M J Carstairs, Senior Member\)](#)*

*What is the issue?*

Was the SMSF able to retain its status as a regulated after in house asset breaches?

*What was the outcome?*

The Tribunal determined that the Fund, that lent money to the member's company, should have its entitlement to concessional tax treatment cancelled.

*What were the facts?*

The [Taxpayer]s, (husband and wife) are the trustees of their SMSF ("Fund"), which contravened the in house asset rules.

An "in-house asset" includes a loan to, or an investment in, a "related party" of a fund.

In the 2004/2005 year of income, the Fund made loans to a company in which he also sole director and general manager of the company.

The Commissioner as the regulator cancelled the Fund's concessional tax treatment.

The Trustee claimed that special circumstances surrounded the contravention.

*What is the impact of the decision on your firm's practices?*

The stand out feature in this case is that even after the contravention was observed the fund did nothing about fixing it for four years.

*What was the decision?*

[5] On the matters raised by this case, the Act specifically provides that a fund with in-house assets with a value of more than 5% of total superannuation assets can be declared non-complying and lose concessional tax treatment as a result. Loss of complying status means a fund will be taxed at the highest marginal tax rate.

[6] The rules ensure that the paramount consideration of superannuation investment is retirement income. ...

**THE DISCRETION**

[20] The reviewable decision, giving the notice that the Fund was no longer a complying superannuation fund, was made under s 40 of the Act: The discretion, set out at s 42A(5), allows the decision maker to consider the factors there listed, namely: the taxation consequences arising if the Fund is treated as non-complying; the seriousness of the contravention; and all other relevant circumstances; in order to decide whether, despite the contravention, the Fund should be declared complying nevertheless, and so retain its concessional taxation status.

[23] ... There was some reference in the course of the hearing to the point of time at which matters relevant to the discretion ought to be considered. The [Commissioner] submitted that the discretion was only to be exercised by reference to facts that pertained as at August 2004 when the contravention occurred. I do not agree, and would follow the approach taken by the Tribunal's President Downes J, in his dissenting judgment in *Shi v Migration Agents Registration Authority* [2007] FCAFC 59; (2007) 158 FCR 525 (as later upheld by the High Court) where the President said (at par 42):

*The appropriate basis to commence consideration of the issues is the prima facie position that administrative decisions should be made on the latest material. The question becomes whether there is anything in the legislation which requires a different conclusion.*

**TAXATION CONSEQUENCES**

[27] As to this first matter for consideration in 42A(5)(b)(i) of the Act, I recognise that adverse taxation consequences will follow for the Fund as a result of being declared non-compliant. ...their further argument, when reduced to basics, is that all the entities in which they are involved are in reality themselves, a husband-and-wife team, whether operating as the Fund, in partnership, or through company structures. Such an approach, in my view, has led them to ignore certain of the fundamental principles that underpin this supervisory legislation.

[28] The resultant taxation consequences, will be adverse to the Fund, but this factor cannot be taken on its own, as a stand-alone factor, but must be weighed with the other matters set out in section 42A(5)(b). ... In that context, I turn to the question of the seriousness of the contravention: s 42A(5)(b)(ii) of the Act.

### SERIOUSNESS OF THE CONTRAVENTION

- [30] ... it seems to me that one measure of the “seriousness” of a contravention is the extent that the loaned amount departed from the statutory figure of 5%. In that regard, I was satisfied that the proportion here was a relevant indicator of the seriousness of the contravention.
- [31] I doubt that the [Taxpayer]s even now appreciate its seriousness. ...
- [32] I also consider that this was a serious contravention because the [Taxpayer]s failed to take the steps to ensure that the loan was repaid. The loan was outstanding until 2009, when the company paid back the balance of \$86,000. This was more than four years after the initial breach of the Act. Their accountants notified the Tax Office in 2007, so at the very least, for a period of some two years, the trustees made no attempt, in any real sense, to rectify the situation. The Act required those steps be taken.
- [33] Even if I were to accept at face value the financial difficulties faced across-the-board in their business operations, the evidence was that in subsequent years opportunities were not taken to pay down the loan. Instead, they pursued other investments. In that regard, I note in particular that two investment properties were sold in 2006, and those proceeds were directed elsewhere<sup>[13]</sup>. Taken on its own, the seriousness of the contravention here militates against any exercise of the discretion. However, no factor is taken alone and I must consider the particular mitigating circumstances upon which the [Taxpayer]s rely, which are part of “all other relevant circumstances”<sup>[14]</sup>.

### ALL OTHER RELEVANT CIRCUMSTANCES

- [35] I can readily accept the [Taxpayer]’s evidence that the health issues affecting the husband, and those affecting other immediate family members, compounded the problems existing in the company’s operations in the relevant tax year, and later. So too, the cyclones that battered North Queensland in 2004 and 2005. I accept that these events served to impede whatever good intentions existed for early repayment of the loans.
- [36] However, as I interpret the evidence before me, those factors operated only up to a certain point, and not throughout. The trustees’ respective witness statements amply demonstrated that over the rather lengthy period during which the loan was not repaid, husband and wife nevertheless were able to fund other investments. For instance, they invested in the purchase of a commercial site and undertook a strata project in 2007. Yet, no serious attempt was made to rectify the breach. It might be argued that this was undertaken by another business entity. I would only observe, in that regard, that for other purposes the [Taxpayer]s rely on a lack of real distinction between the businesses, the Fund and themselves.
- [37] While I am prepared to accept that unforeseen calamities and health issues must be taken into account as considerations when taking account of “all relevant circumstances” it should be observed that “all relevant circumstances” are not simply those circumstances that might lead to a favourable exercise of the discretion.
- [38] Other relevant circumstances which I take into account include that the trustees are experienced business people, who were operating their various endeavours, including with respect to the Fund, with the assistance of professional advice from a leading accounting firm. This was not a case where there was any suggestion of inadequate or wrong professional advice. Nor is it one where action was taken in ignorance of the standards. It seems that the professional advice provided suggested that the company might be placed in administration. Instead the trustees chose the option of using the Fund as a line of credit to prop the company up, in an attempt to trade through its difficulties.
- [39] It is true that in 2008 the trustees offered the undertakings. That would ordinarily be viewed favourably in considering an exercise of the discretion. However, the year of contravention was the 2004/2005 tax year, and from 2005 until 2008, no repayment were made, and no arrangement put in place, as required by s 82(5) of the Act, to prepare a plan “before the end of the next following year of income” in order to rectify the situation the trustees had allowed to develop. In that regard, the undertakings cannot be viewed favourably, coming as they did, much too late in the day.
- [40] It was submitted on behalf of the [Taxpayer] that the Fund was now in a better position having lent the money to the company than had the money been invested in marketable securities which may have been more severely affected in the economic downturn<sup>[15]</sup>. I would not take that into account as a relevant circumstance. To do so would be to fly in the face of the plain requirements of the Act.

### WEIGHING UP THE FACTORS

- [41] As a general proposition, I would approach the exercise of the discretion in s 42A as one to be undertaken in a manner that is consistent with objects of the Act as these set out at s 3. Any exercise of discretion

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must have regard to considerations of unfairness in a particular case, but must be applied in a manner consistent with the objects of the relevant Act. It is important to have regard to whether, by exercising the discretion in a particular case, the decision-maker will be achieving or frustrating those objects.

- [42] The [Taxpayer]'s main submission about the exercise of the discretion was that the [Commissioner] gave too much weight to one factor without due regard to the other matters that are required to be addressed under s 42A(5).
- [43] Weighing up the factors as I must, I was satisfied that it was the correct decision to issue the notice of non-compliance. I was satisfied that the seriousness of the contravention here, and the length of time taken to redress it, weigh most heavily against treating the Fund as complying despite the contravention of the Act. Accordingly I am satisfied that the decision to issue the notice of non-compliance was the preferable decision.

#### **DECISION**

- [45] The Tribunal affirms the decision under review.

### **5.3 Featured ATO interpretations**

Click here for [Listed ATO Publications for the MONTH](#)

## **6 OTHER IMPOSTS, OFFSETS & REBATES**

## 7 LISTED ATO PUBLICATIONS FOR THE MONTH

Source: <http://law.ato.gov.au/atolaw/index.htm>

### 7.1 ATO Publications that can be relied upon

#### (a) Income Tax

##### (1) TD Series including draft TD's

<a href="#">TD 2009/14</a>	Income tax: is a taxpayer entitled to an income tax deduction under subsection 70B(2) of the Income Tax Assessment Act 1936 where a Stapled Security of the kind described in Taxpayer Alert TA 2008/1 is sold at a loss or upon the occurrence of an Assignment Event?
<a href="#">TD 2009/16</a>	Income tax: what is the benchmark interest rate applicable for the year of income that commenced on 1 July 2009 for the purposes of Division 7A of Part III of the Income Tax Assessment Act 1936 and how is it used?
<a href="#">TD 2009/17</a>	Income tax: is interest on a loan fully deductible under section 8-1 of the Income Tax Assessment Act 1997 when the borrowed moneys are settled by the borrower on trust to benefit the borrower and others?
<a href="#">TD 2009/D2</a>	Income tax: when is a non-share equity interest 'issued at or through a permanent establishment' for the purposes of paragraph 215-10(1)(c) of the Income Tax Assessment Act 1997?
<a href="#">TD 2009/D3</a>	Income tax: does a taker in default of trust capital have an 'interest in the trust capital' for the purposes of CGT event E8 in section 104-90 of the Income Tax Assessment Act 1997?
<a href="#">TD 2009/D4</a>	Income tax: consolidation: capital gains: does paragraph 40-880(5)(f) of the Income Tax Assessment Act 1997 prevent the deduction, under section 40-880 of that Act, of incidental costs described in subsection 110-35(2) of that Act that the head company of a consolidated group or MEC group incurs, in disposing of shares in a subsidiary member to a non-group entity, before the member leaves the group?

##### (2) Class Rulings

<a href="#">CR 2009/35</a>	Income tax: proposed return of capital: Rattoon Holdings Limited
<a href="#">CR 2009/36</a>	Income tax: capital gains tax: James Hardie Industries NV transformation and re-domicile
<a href="#">CR 2009/37</a>	Income tax: off-market share buy-back, redemption and surrender of assets comprising the Macquarie Media Group stapled securities
<a href="#">CR 2009/38</a>	Income tax: early retirement scheme - BlueScope Steel Limited and subsidiary companies
<a href="#">CR 2009/34</a>	Income tax: demutualisation of Australian Health Management Group Pty Limited

##### (3) Product Rulings

<a href="#">PR 2009/17W</a>	Income tax: KTC Mahogany Project 2009
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#### (b) GST

<a href="#">GSTR 2009/D1</a>	Goods and services tax: application of subsection 11-15(5) of the A New Tax System (Goods and Services Tax) Act 1999 to acquisitions relating to the provision of accounts by Australian authorised deposit taking institutions
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## 7.2 Addenda, Withdrawals and Errata

### (1) Income Tax

<a href="#">TD 93/82W</a>	Income tax: is roll-over relief available under section 160ZZK of the Income Tax Assessment Act 1936 where a taxpayer is forced to dispose of an asset due to an adverse change in the taxpayer's financial circumstances?
<a href="#">IT 227W - Withdrawal</a>	Forced disposal of livestock
<a href="#">TD 2005/34A1 - Addendum</a>	Income tax: what are the results for income tax purposes of entering into a profit washing arrangement as described in Taxpayer Alert TA 2005/1?
<a href="#">PR 2009/16A1 (Addendum)</a>	Income tax: Arafura Pearl Project 2009

### (2) GST

<a href="#">GSTR 2006/9A2 - Addendum</a>	Goods and services tax: supplies
<a href="#">GSTA TPP 096 (Withdrawn)</a>	Goods and services tax: Is there an increasing adjustment under Division 138 of the GST Act if an entity carrying on a farming business undertakes improvements to its farm land and subsequently cancels its GST registration?

### (3) FBT

<a href="#">SGR 94/4W</a>	Superannuation guarantee: ordinary time earnings
<a href="#">SGR 94/5W</a>	Superannuation guarantee: salary or wages
<a href="#">SMSFR 2009/D1</a>	Self Managed Superannuation Funds: the scope and operation of subparagraph 17A(3)(b)(ii) of the Superannuation Industry (Supervision) Act 1993
<a href="#">SGR 2009/2A1 - Addendum</a>	Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'

### (4) Other imposts

<a href="#">EXC 2009/3</a>	Excise (Volume of Fuels - Temperature Correction) Determination 2009 (No. 1)
<a href="#">FTR 2008/1A2 - Addendum</a>	Fuel tax: vehicle's travel on a public road that is incidental to the vehicle's main use and the road user charge

## 7.3 ATO publications that cannot be relied upon

### (a) Decision Impact Statements

<a href="#">NSD 1149 of 2007, NSD 57 of 2008; NSD 1283 of 2006 and NSD 1282 of 2006</a>	Virgin Holdings SA v Commissioner of Taxation; Undershaft (No. 1) Limited and Undershaft (No. 2) BV v Commissioner of Taxation
<a href="#">VT 2006/141</a>	VCF and Commissioner of Taxation

### (b) ATO ID's

#### (1) New

<a href="#">ATO ID 2009/48</a>	Franking Accounts: exercise of paragraph 109RB(2)(a) of the Income Tax Assessment Act 1936 discretion
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<a href="#">ATO ID 2009/49</a>	Small Business Concessions: small business entity test - annual turnover - business carried on part year only
<a href="#">ATO ID 2009/50</a>	Assessability of foreign branch income derived from New Zealand
<a href="#">ATO ID 2009/51</a>	Borrowing expenses passed on to a subsidiary
<a href="#">ATO ID 2009/52</a>	Microbrewery - legally and economically independent
<a href="#">ATO ID 2009/53</a>	Derivation of an amount received on the cash settlement of an exercised option
<a href="#">ATO ID 2009/54</a>	Deductibility of an amount paid on the cash settlement of an exercised option
<a href="#">ATO ID 2009/55</a>	Deductibility of premiums payable on the acquisition of options
<a href="#">ATO ID 2009/56</a>	Assessability of premiums receivable on the sale of options
<a href="#">ATO ID 2009/57</a>	Exchange Traded Options: derivation of premiums receivable
<a href="#">ATO ID 2009/58</a>	Exchange Traded Options: deductibility of premiums payable
<a href="#">ATO ID 2009/59</a>	Shares acquired and disposed of in an options trading business: trading stock
<a href="#">ATO ID 2009/60</a>	Capital Allowances: carbon sink forest - cost of land
<a href="#">ATO ID 2009/61</a>	Fuel Tax Credits: refrigerated trailers
<a href="#">ATO ID 2009/62</a>	Converting excess franking offsets of a Pooled Development Fund to a tax loss
<a href="#">ATO ID 2009/63</a>	Assessable Income: securitisation arrangement - profit emerging basis of returning assessable income
<a href="#">ATO ID 2009/64</a>	Consolidation: single entity rule and issue of non-share equity
<a href="#">ATO ID 2009/65</a>	Consolidations: single entity rule and payment of non-share dividends

## Ⓚ Withdrawn

<a href="#">ATO ID 2001/24 (Withdrawn)</a>	Superannuation: Eligible Termination Payments (Non-Resident, Non-Complying Fund)
<a href="#">ATO ID 2001/341 (Withdrawn)</a>	Separate Net Income - eligible termination payment
<a href="#">ATO ID 2001/5 (Withdrawn)</a>	Income tax: Exempt Foreign Income
<a href="#">ATO ID 2002/477 (Withdrawn)</a>	Superannuation, retirement & employment termination: Eligible termination payment (ETP) and Foreign superannuation payment
<a href="#">ATO ID 2009/66</a>	Energy Grants (Credits) Scheme: off-road - generation of electricity for use at particular premises
<a href="#">ATO ID 2009/67</a>	Superannuation fund for foreign residents
<a href="#">ATO ID 2009/68</a>	Capital Gains Tax: cost base modification of CGT asset acquired from exercise of put option
<a href="#">ATO ID 2009/69</a>	Capital Allowances: tax break - investment commitment time - option to delay construction
<a href="#">ATO ID 2007/132 (Withdrawn)</a>	Wine Equalisation Tax: producer rebate - producer of wine made under contract from wine
<a href="#">ATO ID 2007/206 (Withdrawn)</a>	Wine Equalisation Tax: notification of intention to make a GST-free supply
<a href="#">ATO ID 2007/211 (Withdrawn)</a>	Wine Equalisation Tax: beverage container deposit - WET taxable value
<a href="#">ATO ID 2009/70</a>	Capital Allowances: business related costs - settlement payment - in relation to

	your business
<a href="#">ATO ID 2009/71</a>	Deductions: interest expense on a loan to acquire options
<a href="#">ATO ID 2009/72</a>	Employee Share Scheme: assessability to an employer of the option exercise price paid by an employee
<a href="#">ATO ID 2009/73</a>	Capital Allowances: business related costs - when eligibility for deduction is established
<a href="#">ATO ID 2009/74</a>	Capital Allowances: legal expenses incurred after taxpayer starts to hold depreciating assets - second element of cost
<a href="#">ATO ID 2001/407</a> (Withdrawn)	Excise: Credit for wine equalisation tax (WET) on wine exported.
<a href="#">ATO ID 2002/355</a> (Withdrawn)	Income tax: 'Tainted' Share Capital: Effect of transfer of option premiums
<a href="#">ATO ID 2002/665</a> (Withdrawn)	Legal Expenses - defending disciplinary charges
<a href="#">ATO ID 2003/947</a> (Withdrawn)	Commonwealth producer rebate
<a href="#">ATO ID 2004/108</a> (Withdrawn)	Wine Equalisation Tax: calculating the amount of WET credit
<a href="#">ATO ID 2004/110</a> (Withdrawn)	Wine Equalisation Tax: wholesale liquor merchant - Commonwealth producer rebate and producer's licence
<a href="#">ATO ID 2004/16</a> (Withdrawn)	Wine Equalisation Tax: calculation of credit for WET paid on wine that is exported
<a href="#">ATO ID 2004/30</a> (Withdrawn)	Wine Equalisation Tax: calculation of credit for WET paid on wine exported as a GST-free supply
<a href="#">ATO ID 2004/88</a> (Withdrawn)	Wine Equalisation Tax: grape wine product - additives
<a href="#">ATO ID 2005/268</a> (Withdrawn)	Wine Equalisation Tax: producer rebate - meaning of 'producer of rebatable wine'
<a href="#">ATO ID 2006/87</a> (Withdrawn)	Wine Equalisation Tax: taxable value of wine sold at auction

## 8 LEGISLATION - UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

We now publish legislation updates on-line at [taxmap™](#) in a comprehensive tabular format showing summary & commencement dates. This development allows us to track developments on “as occurs basis” rather than monthly in arrears basis.

## 9 APPEALS TO THE FULL COURT OF THE FEDERAL COURT - UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

We now publish the Full Court Appeals Update on-line at [taxmap™](#). This development allows us to track developments on “as occurs basis” rather than monthly in arrears basis

## 10 UNLISTED DECISIONS

[Source: http://law.ato.gov.au/atolaw/index.htm](http://law.ato.gov.au/atolaw/index.htm)

<p>(1) <a href="#">Hua-Aus Pty Ltd v C of T (Edmonds J)</a> 13 July 2009</p>	<p>(2) What is the issue? (3) The Court granted the taxpayer an extension of time to file a Notice of Appeal from a Tribunal decision out. The Court noted that the Tribunal finding sought to be appealed against raised a question of law.</p>
<p>(4) <a href="#">DC of T v Elias (Price J)</a></p>	<p>(5) What is the issue? (6) Was a director’s penalty notice served on the director (who did not attend the hearing of the application) (7) What was the outcome? (8) The court awarded judgment against the director in the amount of \$407,040.45.</p>

## Interpretation

In these Tax Update Notes a reference to the:

- ◆ AAT is a reference to the Administrative Appeals Tribunal
- ◆ Administration Act is a reference to the Taxation Administration Act 1953
- ◆ ADJR is a reference to the Administrative Decisions Judicial Review Act
- ◆ ITAA 1936 or the 1936 Act is a reference to the Income Tax Assessment Act 1936
- ◆ ITAA 1997 or the 1997 Act is a reference to the Income Tax Assessment Act 1997
- ◆ ITR is a reference to the Income Tax Regulations
- ◆ FBTAA is a reference to the Fringe Benefits Tax Assessment Act (1986)
- ◆ GST Act means is a reference to the A New Tax System (Goods and Services Tax) Act 1999
- ◆ GST Regulations is a reference to the A New Tax System (Goods and Services Tax) Regulations 1999
- ◆ SGAA means Superannuation Guarantee (Administration) Act 1992
- ◆ The SIS Act is a reference to the Superannuation Industry (Supervision) Act
- ◆ Tribunal is a reference to the Administrative Appeals Tribunal
- ◆ The Regulations is a reference to the Income Tax Regulations

Status of ATO Documents

TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.

Status of a draft Taxation Ruling:

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the ATO. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the ATO of its stance on the particular matters covered in the Ruling.

Status of a Class Ruling:

Certain parts of a Class Ruling constitute a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953. CR 2001/1 explains Class Rulings.

Status of a Product Ruling:

The number, subject heading, and the What this Product Ruling is about (including Tax laws, Class of persons and Qualifications sections), Date of effect, Withdrawal, Previous Ruling, Arrangement and Ruling parts of products rulings will generally constitute a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953.

Product Ruling PR 1999/95 explains Product Rulings

Status of an ID and Private Binding Ruling:

ATO IDs are published on ATO law as precedential ATO views for ATO officers. ATO officers must search for, identify and apply relevant ATO IDs in resolving technical interpretative issues (see Law Administration Practice Statement PS LA 2003/3).

Accordingly, an ATO ID must be followed where:

- ◆ there is no material difference between the facts of the arrangement upon which a decision is required and a current ATO ID; and
- ◆ the decision maker considers that the outcome of the issue would be correct if the ATO ID were applied.

The database of ATO IDs serves a different purpose to the Register of Private Binding Rulings. Entries to the Register are made for purposes of integrity and transparency only and do not constitute precedential ATO views. Accordingly, entries on the Register cannot be relied upon as indicative of the ATO view.

Status of a GST Ruling

Generally a GST Ruling is expressed to be a ruling for the purposes of section 37 of the Administration Act.

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\*\*\* indicates the item is in the "must read category - will impact on your current practices" (legislation will not receive \*\*\*rating unless it has received Royal Assent.)

\*\* indicates the item is in the "should read category".

\* indicates the item is in the "read if you have plenty of time" category.

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