ASPIRON CONSULTING GROUP

Management & Taxation Consultants

InfoConnect

Electronic Tax Newsletter from Aspiron Consulting Group

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Welcome to this edition of InfoConnect, the e-newsletter from the Aspiron Consulting Group.

In this edition, we will cover some topical issues about:

- **Tightening of the Division 7A non-commercial loan rules**
- **Government's responses to deductions for cost incurred for receiving Youth Allowance in the High Court decision in Anstis**
- **Is streaming of trust distribution now dead in the water?**
- **The tax obligations for hiring contractors**
- **Case Watch—no employment relationship between husband and wife**

Tightening of the Division 7A Non-Commercial Loan Rules

The Government has introduced changes to tighten the rules governing non-commercial loans as they apply to discretionary trusts and private companies. Most notably, with effect from 1 July 2009:

- a deemed unfranked dividend may arise where a shareholder (or their associate) uses their private company assets for free or for less than their market value consideration, unless at least one of the following exceptions applies:
  - ⇒ the use of the asset is "minor" (e.g. less than $300);
  - ⇒ had the shareholder (or their associate) paid for the use of such asset they would be entitled to a once-only tax deduction for that cost; or
  - ⇒ the asset used was a certain type of primary residence.
- Where a private company has an unpaid present entitlement (or distribution) to trust income and the trust makes a loan to a shareholder, an unfranked dividend may arise even if such arrangement involves the use of one or more interposed entities or where a payment is made to the shareholder (or associate) where all or part of the payment was loaned back to the trust.

In addition, the ATO has also issued a final *Practice Statement* on 14 October 2010. The Practice Statement provides guidance on the application of *Taxation Ruling* TR 2010/3 which sets out the ATO's view as to when a private company with an unpaid present entitlement (or distribution) from an associated trust is considered to have made a loan for Division 7A deemed dividend rule purposes.

The general start date for the "new rules" is 16 December 2009, which means they apply to the June 2010 distributions. However, the rule also applies retrospectively in some circumstances.

Broadly, the new rules apply where:

- the unpaid distribution has been paid that is in fact a loan between the company and the trust (whether express, implied or by virtue that the trustee exercises a power under the trust deed); and
- there is a subsisting unpaid distribution which is considered to be the provision of financial accommodation by the company to the trust.

Importantly, the ATO recognises that there may be situations that an unpaid distribution was incorrectly classified as a loan in the accounts of the trust and the private and allows some taxpayers until 31 December 2011 to self correct the accounts.

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Anstis's case—Government's response

Our readers would recall that the High Court (in the case *Anstis)* has recently held that a university student in receipt of youth allowance payments was entitled to claim various self-education expenses as income tax deductions.

The Assistant Treasurer has announced that the Government will not amend the tax law retrospectively to deny deductions against youth allowance for prior years following the High Court decision. However, the Government will consider the issue of deductibility against youth allowance for the 2010/11 income year and beyond.

The ATO will automatically amend tax assessments for eligible taxpayers who had received youth allowance payments between the 2007 and 2010 income years to include a deduction of $550 for each year they are eligible.

The deduction represents amounts that the ATO considers the taxpayers would reasonably have incurred in earning the youth allowance payments (including course fees, books, stationery, photocopying, depreciation etc). Where students believe that they had incurred expenses more than $800 (as the first $250 of the education expense is not deductible) for a year, they can seek a further amendment for that high amount, if they have records to support such claim.

Eligible taxpayers are those who lodged a tax return for each year and:

- received youth allowance to study full-time and declared it as income on their tax return;
- did not claim a deduction for their study expenses; and
- paid tax.

Further the ATO considers certain costs (eg travelling between home and the education institutions and meal expenses) are generally private in nature and thus not qualify for the deduction.

Whether the High Court ruling has wider impact to other Government benefit payment remains unclear. The ATO is only amending assessments with respect to youth allowance recipients at the moment. We understand that the ATO will provide further guidance on how the case affect other recipients of other Government benefits.

Is streaming of trust distribution now dead in the water?

Since the High Court handed down its judgment in *Bamford v FCT* in March 2010, the ATO has issued a Decision Impact Statement ("DIS") in this regard. One of the interesting observations made by the ATO, in applying the High Court decision, is that it no longer allows streaming of trust distributions of different characteristics to different beneficiaries.

By way of background, it has been long accepted that one of the key features of a discretionary trust is the ability for the trustee to (subject to the trust deed allowing), distribute different income earned by the trust (e.g. dividend, rental, business, foreign income etc) to different beneficiaries. This was particularly tax effective as beneficiaries often have different tax profiles (eg a minor might prefer not to receive franked dividends, a non-resident will not have to pay tax on non-Australian sourced income, or someone who has capital losses would benefit from receiving capital gains).

According to the DIS, the ATO considers that "*the amount included in a beneficiary's assessable income under section 97 consists of an un-dissected or un-allocated proportionate share of the entirety of the [tax] net income*". This effectively means that the trustee would no longer be able to direct (or stream) a particular type of income to a beneficiary.

If you have any queries on the issues contained in this edition of InfoConnect, or how a specific tax measure may apply to you, please contact your advisor at Aspiron Consulting Group

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For example, if a trust had earned interest income, franked dividends, capital gains, and foreign income, a beneficiary who has received, say, 1/4 of the trust's total income would automatically receive 1/4 of the franking credits, 1/4 of the foreign income and 1/4 of the capital gains earned by the trust.

The DIS provides that the new treatment will take effect from the 2010/11 income year.

The technical legality of the ATO's interpretation in the DIS is far from clear and it would appear that a test case would provide some clarity in this regard.

Does your business hire contractors?

If your business hires a worker under a contract that is wholly or principally for their labour, you would be required to make super contributions for that worker, even if the worker quotes their Australian Business Number ("ABN"). These workers are usually considered employees for super guarantee purposes.

Hiring of contractors is particularly common in certain industries such as health, transport, courier, commercial cleaning etc. Broadly, a contract may be considered wholly or principally for labour if all of the following apply to the worker:

- they are paid wholly or principally for their personal labour and skills;
- they must perform the contract work personally (i.e. cannot delegate to another worker); and
- they are paid for hours worked rather than to achieve a result.

If an employer has not made all the super contributions it is liable to make, it is required to pay a super guarantee charge, which is not deductible to the business.

Further, similar rules also apply for Pay-As-You-Go withholding obligations to these contractors.

Case Watch — No employment relationship between husband and wife

The Tribunal has in *France v FCT* affirmed the ATO's objection decision to disallow a deduction in respect of salary and wages paid by a husband to his wife, purportedly under a contract of employment in respect of work the wife did in managing a rental property owned by the husband.

In this case, the husband purchased an investment property and rented it out. During the relevant period, the husband purportedly hired his wife as an employee to perform administrative duty in connection with the rental property and paid her wages and super contributions. The husband sought to deduct the amount paid to his wife. The ATO disallowed the deduction on the basis that the husband and his wife were not involved in an employment relationship.

The Tribunal affirmed the ATO's objection as it was also not satisfied that the husband and his wife could be said to have entered into a contract of any sort. The Tribunal observed that the evidence suggested the husband was merely repackaging an domestic relationship so it took on some of the appearance of an employment relationship. The outgoings (i.e. salary and super contributions) were of a private or domestic nature. The Tribunal also satisfied that the 25% penalty was properly imposed by the ATO.

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How we are different

We believe that our **7 Points of Difference** below set us apart from our competitors:

1. **One dedicated professional** as your advisor and point of contact
2. We prefer to **agree our fees up front**, where possible, and as such you always know how much you are paying - **no surprises**
3. **Independent sounding board** for business decisions, without turning on the fee meter
4. We guarantee a **maximum initial response time of 36 hours** if we miss your call
5. We believe in a **simple and no-nonsense approach** on our advice. We aim at structuring our advice in **simple language** that you can understand
6. We take a **honest approach** in providing advice - we have the courage to tell you things you don't want to hear
7. Like many of our clients, we are also a small business and as such **we understand the challenges our clients are facing**. However, we have worked with some of the largest organisations in Australia to know the key issues that our clients are likely to face as they grow.

How our clients benefit

We deliver results. Some of the benefits we have recently delivered to businesses from our expertise include:

- **Fast tracked** capital allowance and tax depreciation claim by **more than $250,000** after a review of their fixed assets register.
- Developed a **tax risk management framework** for a Fortune 500 company
- **Identified financial & well-being issues** of potential business acquisitions.
- Project managed risk reviews by the **Australian Taxation Office** ("ATO").
- Avoided and minimised the imposition of **significant penalties** by the ATO.
- Assessed, designed and implemented changes to a finance function that had **double throughput** and reduced running cost in excess of 30%.
- Brought a client up to date with **internal control** reporting from being 2 years behind schedule

Taxation & Management Consulting Services

We offer capability and experiences for taxation and business services across the following disciplines:

- **Corporate Taxation Consulting**— beyond preparing tax returns, we proactively engage our clients to deliver effective taxation outcomes.
- **Business structuring**—assisting our clients with the establishment and financial structuring for business to enhance their operations within appropriate tax structures
- **Tax Risk Management**—we help our clients identify key tax risks, opportunities and issues and manage them real time.
- **Business Health Checks**—we help our clients undertake a reality check on the emerging issues arising from their businesses or a potential acquisition.
- **Change Management** — designing and implementing strategies on maximising buy-ins and minimising resistant for major change initiatives.
- **Finance Process Improvement** —we help our clients improve the process of their finance functions by aligning the corporate strategies with departmental directions and integrating their processes with people and technology to deliver maximum results.
- **Corporate accounting** —preparation of financial reports and tax effect accounting reports for a wide range of businesses
- **Coordination with Other Business Professionals** — coordinating with audit, legal, corporate finance, banking or other parties as may be required.
- **Succession Planning** —assisting our clients preparing options for distribution of their businesses and other financial assets to future generations.

*Our Money Back Guarantee**

We deliver results.

If, at the end of a consultation, we have not told you anything new, or clarified your doubts or queries, we will not charge you for our time.

* Refer to our Standard Terms & Conditions for detail