

# October 2009

## Client Alert

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### Tax Office Compliance Program 2009/10

The Tax Office has released its compliance activities for 2009/10. The key activities for the different taxpayer segments are discussed below.

#### Individuals

The key compliance activities the Tax Office will focus on include:

- capital gains from the sale of shares and properties;
- deductions for investment products; and
- work-related expense claims. In particular, claims made by truck drivers, sales and marketing managers, sales representatives and electricians.

#### Micro enterprises

Micro enterprises are businesses with an annual turnover of less than \$2 million and self-managed superannuation funds (SMSFs).

Key compliance issues include:

- GST and CGT compliance risks associated with property transactions;
- losses on the disposal of shares;

- claims for GST refunds and the research and development tax offset, which will be subject to credibility checks;
- correct disclosure of distributions from trusts and partnerships in beneficiaries' tax returns; and
- early warning to participants of the potential tax issues involved in tax exploitation schemes.

#### Small-to-medium enterprises

Small-to-medium enterprises are businesses with an annual turnover of between \$2 million and \$250 million. This segment includes highly wealthy people who, with their associates, control \$30 million or more in net wealth.

Key focus areas include:

- private company loans and payments to shareholders (or associates) to ensure compliance with the taxation laws;
- correct FBT treatment of motor vehicles;
- superannuation guarantee issues such as late payments and incorrect calculations;
- CGT, in particular to ensure capital losses are not offset against income;

- claims for GST refunds, which will be subject to credibility checks;
- GST and property transactions; and
- remuneration of highly paid company directors and executives.

#### Self-managed superannuation funds

Key compliance activities include:

- adherence to superannuation regulations;
- satisfaction of the definition of an 'Australian superannuation fund'; and
- illegal early access to superannuation.

#### International dealings

International dealings of taxpayers will be a focus of the Tax Office. Data matching programs will be carried out to identify unreported foreign income such as bank interest and dividends.

## New Advice Program for SMSFs

The Tax Office has introduced a new non-binding advisory program for SMSFs.

### SMSF specific advice

Trustees of SMSFs can apply for self-managed superannuation fund specific advice (SMSFSA).

Broadly, an SMSFSA is a written expression of the Commissioner's opinion, in his role as the Regulator of SMSFs, of how the superannuation law applies to a particular transaction or arrangement that has been, or might be, entered into by the trustees of an SMSF.

An application for an SMSFSA must be submitted in writing. Generally, an SMSFSA will only be provided if there is a precedential view of the law or if the particular transaction or arrangement raised in an application involves a straightforward application of the law.

The advice contained in an SMSFSA only applies to the SMSF named in the application. In addition, if the operation of the particular transaction or arrangement entered into by the trustees of the SMSF departs from that stated in the SMSFSA, the advice will not apply.

### SMSF guidance

If the trustees of an SMSF are seeking general guidance on the operation of the superannuation law, they can approach the Tax Office for SMSF guidance.

SMSF guidance does not cover all possibilities or individual circumstances of an SMSF. If the trustees of an SMSF require specific advice, they should consider applying for either an

SMSFSA or self-managed superannuation funds product ruling (SMSFPR): see below.

The guidance may be given in writing or orally. Written guidance is available in different forms, including current Tax Office publications and material available on the Tax Office website.

### SMSF product ruling

An SMSFPR sets out the Commissioner's opinion as to the application of the superannuation law to particular products where an SMSF is a potential investor.

An SMSFPR will have no application to superannuation funds other than SMSFs (and former SMSFs where they remain regulated by the Commissioner).

An application for an SMSFPR must be submitted in writing. In addition, an SMSF must also sign and give the Commissioner an assurance regarding the operation of the product.

### Legal status of SMSF advice

SMSF advice provided by the Tax Office in the form of an SMSFSA, SMSFPR or SMSF guidance is not legally or administratively binding on the Commissioner.

- An SMSF relying on an advice will remain responsible for its actions under the superannuation law.

## SMSF and Disposal of Shares

The Tax Office has released an interpretative decision in which it states that where a trustee of a complying superannuation fund realises losses on the disposal of shares, the losses are to be calculated under the CGT provisions.

Superannuation funds are required to calculate any gains or losses on the disposal of CGT assets (eg shares and units in trusts) using the CGT provisions.

An exception may apply where a CGT asset is a 'security'. However, the Commissioner notes the definition of a security excludes a share. Therefore, the exception does not apply.

## Victory for Sham Victim

In a recent case, the AAT held that a taxpayer who was the victim of a sham was entitled to deduct interest and bank charges incurred on loans.

The taxpayer was a guarantor for a loan extended to a company. The company defaulted on the loan. The taxpayer then realised that he was the victim of a scam. To fulfil his obligations under the guarantee, the taxpayer took out two loans secured against his property.

The Tribunal said the guarantee was a liability the taxpayer accepted for the purpose of deriving assessable income. Therefore, it allowed the taxpayer's claim for deductions.

## Director Liable to Indemnify Commissioner

The NSW Supreme Court has held that payments made to the Tax Office by a company when it was insolvent were voidable transactions. Therefore, the Court ordered the Commissioner to repay the company those amounts.

In addition, the Court ordered a director of the company to indemnify the Commissioner for a portion of the repayment.

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.