

the report

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Merry Christmas 2011

Cash economy still on ATO's radar

The ATO has maintained a focus on its compliance activities in relation to small business performance benchmarking and the cash economy. In a recent speech, the Commissioner of Taxation said businesses outside the relevant benchmarks are subject to ATO review and/or audit. Where businesses do not have adequate records to substantiate their performance, the Commissioner said the ATO will make a default assessment using the relevant small business benchmark.

The ATO uses a variety of tools to help it identify potential cash economy activities which include:

- collecting and comparing significant amounts of information from a number of sources, including banks, other government agencies such as Centrelink, and industry suppliers. The ATO can even collect information about purchases of major items such as cars and property; and
- comparing the performances of businesses against other similar businesses in the industry. The ATO currently has over 100 small business benchmarks for this purpose. The benchmarks are used to identify businesses that may be avoiding their tax obligations.

TIP: Undertaking a review of business records may help to identify whether you are at risk of review by the ATO. According to the ATO, taxpayers may be given concessional treatment in relation to penalties and interest, should they make a voluntary disclosure of a mistake.

Don't take the bait on tax avoidance schemes

The ATO has recently identified a number of tax avoidance schemes which it says are a risk to small businesses. These include:

- complex arrangements involving trusts to provide loans to individuals;
- abusive labour hire schemes;
- claims by companies for a deduction for unpaid directors fees; and
- avoidance of fringe benefits tax.

TIP: Not all tax avoidance schemes are obvious and many can look legitimate. Only on close examination do higher risk features start to appear. Please contact our office if you have any questions.

Capital gains tax bills for failing test

The Administrative Appeals Tribunal has recently handed down two separate decisions concerning capital gains tax (CGT) concessions for small businesses. The tax law offers a range of tax concessions for small businesses that have made a capital gain on a "CGT asset" that has been used in the business. The concessions can reduce, eliminate or roll-over a capital gain. However, the concessions are only available if certain tests are met. The main issue before the Tribunal was whether the taxpayers satisfied the "maximum net asset value" test. The test would be satisfied if, just before the "CGT event", the value of the assets of the taxpayers and their connected entities did not exceed \$5 million.

Broadly, the Tribunal held, the taxpayers did not meet the then "maximum net asset value" test in order to qualify for the concessions. The taxpayers did not satisfy the onus of proving that the "maximum net asset value" of the assets of the taxpayers and their connected entities were less than \$5 million. In the first case, the Tribunal denied the taxpayer the concessions with respect to the sale of a marina for \$8.9 million. In the second case, the Tribunal also refused the taxpayer the concessions in respect of a gain he made on selling two \$1 shares in a company for \$4.9 million.

TIP: There have been changes to the relevant rules. For example, the amount for the "maximum net asset value" test increased to \$6 million. If you have any questions please contact our office.

Share trading business existed, says Tribunal

In an unusual decision, the Administrative Appeals Tribunal held a taxpayer was not a passive investor in relation to share trading activities and was carrying on a business of share trading for the year ended 30 June 2008. The taxpayer was a chief executive of a services company and traded shares in his own name on the share market. The Commissioner argued the taxpayer was not conducting a share trading business as he did not have a formal business plan and did not sell many shares during the relevant period. The taxpayer argued that the only reason he did not sell much of his portfolio during the period was due to the global financial crisis.

Taxpayer loses excess super contributions tax appeal

A taxpayer has been unsuccessful before the Federal Court in appealing against a decision of the Administrative Appeals Tribunal. The Tribunal had affirmed a superannuation excess non-concessional contributions tax assessment of \$86,867 against her for breaching the \$1 million non-concessional contributions cap during the transitional period to 30 June 2007 (which existed at the time). The taxpayer had argued that a \$355,000 payment from her personal superannuation fund in June 2007 was received by her in a capacity as trustee before being on-paid to her new superannuation fund and therefore should be treated as a roll-over superannuation benefit. However, the Court broadly agreed with the findings made by the Tribunal.

TIP: As part of the 2011–2012 Budget, the Government proposed that eligible individuals be given a once-only option to have excess concessional contributions up to \$10,000 refunded and assessed at their marginal tax rate for the financial year in which the contribution was made. The refund option is proposed to only apply for the first year in which the concessional contributions cap is breached, commencing from 2011–2012. If you have any questions please contact our office.

SMSFs warned on improper lending of money

The ATO says it is concerned that some self-managed superannuation fund (SMSF) trustees are lending money on favourable terms from their SMSFs to people who provide advice or assist in the running in the fund. It warns that this arrangement may lead to the loss of the complying status of the fund and concessional tax rates. The ATO says trustees should ensure that loan terms comply with the law and fit their investment strategy.

TIP: Decisions to lend money from an SMSF should be backed by the appropriate documentation such as an appropriate loan agreement. If you have any questions please contact our office.

Business tax losses under Tax Forum spotlight

The treatment of business tax losses will be reviewed by a business tax reform working group announced by the Treasurer at the Tax Forum held in October 2011. It is understood the first priority of the working group is to identify options for losses and how the Government would fund them. "We need to consider things like loss carry back, uplifting losses, and what happens to the value of losses when business change composition or ownership", said Treasurer Wayne Swan. It is expected that the working group will deliver its initial report in November 2011 and a final report to the Government by March 2012, before the next budget.

Tax Office views on SMSFs, real property and borrowing rules

The Australian Tax Office (ATO) has recently issued a draft ruling which concerns self-managed superannuation funds (SMSFs), real property and the application of certain borrowing rules under the superannuation law. The draft ruling outlines where money borrowed under a limited recourse borrowing arrangement (LRBA) can be applied in maintaining or repairing (but not improving) a single acquirable asset.

TIP: While the draft ruling provides some welcome clarification on the ATO's views on key aspects of the LRBA provisions, it only covers a few pieces of the LRBA puzzle. The rules can be complex and the penalties can be severe for getting it wrong. If you have any questions, please contact our office.

Tax law changes to tackle phoenix activities

The Government has recently introduced legislation in Parliament which aims to deter company directors from engaging in phoenix activities. Phoenix activities involve the deliberate liquidation of a company to avoid paying tax liabilities and employee superannuation. The business then "rises" again and continues operations controlled by the same person, but under another corporate entity and free of debts. The legislation also aims to encourage director compliance with tax and superannuation obligations.

The proposed tax law changes will make directors personally liable for their company's failure to pay the employees' superannuation guarantee amounts. The changes will also allow the ATO to pursue directors without issuing a "director penalty notice" where the company's pay as you go (PAYG) withholding or superannuation guarantee liability remains unpaid and unreported three months after the due date. In addition, the Government proposes to deny directors (and their associates) entitlement to PAYG withholding credits (through the imposition of a new tax) where the company they are involved in has failed to remit PAYG withholding amounts.

TIP: It is proposed that the changes commence once the legislation is formally enacted. However, there are special transitional provisions which can cover amounts that are due to the ATO or a superannuation fund at the time the legislation enters into force. Directors should ensure their company's tax risk management policies and systems are up-to-date. Please contact our office if you have any questions.

Small business depreciation rule changes on the horizon

The Government has sought comments on draft legislation which proposes to make various tax law changes concerning the small business depreciation rules that apply to small business entities. The changes are subject to the passage of the mining tax legislation as well as the carbon tax legislation in Parliament. However, should these taxes be successfully implemented, the proposed changes could improve cash flow and reduce compliance costs for small businesses. The proposed changes include increasing the instant asset write-off threshold from \$1,000 to \$6,500, and simplifying the current depreciation pooling arrangements to allow small businesses to depreciate some assets more quickly. The changes are proposed to apply from the 2012–2013 income year.

Standard deduction for work expenses next year

Public consultation has closed on the Government's draft legislation which proposes to provide individual taxpayers with a standard tax deduction to cover work-related expenses and the cost of managing their tax affairs. The standard deduction proposed is \$500 for 2012–2013, increasing to \$1,000 for 2013–2014 and thereafter. Taxpayers whose claims exceed the proposed standard deduction will still be allowed to make those claims provided receipts are kept. However, the Government has noted the deduction is dependent on the implementation of the mining tax legislation (which is yet to be introduced).

Partnership not ended, so director still liable, says Court

A businessman has been unsuccessful in appealing to the NSW Court of Appeal against an earlier District Court decision which had held that, as a director of a company, he was liable to pay monies to the ATO that were withheld from employees' wages. Under the tax law, a director of a company could face a tax penalty if amounts withheld from employee's wages are not paid to the ATO.

Broadly, the director was part of a partnership operating a café/bar restaurant with another partner. However, the Court heard the relationship between the partners had deteriorated. The director argued the partnership had terminated, so therefore there could be no withholding by his company. However, the Court found it was the director's involvement in the management of the partnership that had actually ended, not the partnership itself.

Dutch retiree took reasonable care, finds Tribunal

In a recent decision, the Administrative Appeals Tribunal held that a retiree had not failed to take reasonable care when he omitted foreign early retirement fund payments from the Netherlands from his 2003 to 2006 income tax returns. Among various factors, the Tribunal accepted the retiree's evidence that he had sought and received oral advice from the ATO in 2002 which was contrary to later advice contained in a "private binding ruling" issue by the ATO in 2005. The Tribunal also took into account in making its findings that the retiree had limited English and did not understand and was confused by the ruling.

Super guarantee charge is a valid tax, says High Court

A market research company has been unsuccessful in its constitutional challenge in the High Court against the validity of the superannuation guarantee charge. The High Court had unanimously held the charge to be valid tax. In doing so, the High Court also affirmed an earlier Tribunal's finding that market research interviewers were "employees" of the company for superannuation guarantee purposes, and not independent contractors.

Small business benchmarks under microscope

The Inspector-General of Taxation, Ali Noroozi, has advised that he will review the Australian Tax Office's use of small business performance benchmarks. The benchmarks produced by the Australian Tax Office (ATO) are used to identify taxpayers who may not be declaring all of their income and who may be involved in the cash economy. Mr Noroozi said he will investigate whether the benchmarks are an appropriate tool for identifying underreporting of income.

There has been growing concern among tax advisers about the use of benchmarks. The Inspector-General said he will also consider whether the ATO's expectations of small business in relation to record keeping are clearly communicated and reasonable. The investigation is expected to commence later this year.

Carbon tax scheme to commence on 1 July 2012

The Government's controversial carbon tax scheme has passed Parliament and will commence on 1 July 2012. From that date, the country's biggest polluters will be required to pay \$23 for each tonne of carbon pollution released into the atmosphere. As part of the scheme, tax cuts to assist households and support measures for businesses to assist them in adapting to the new carbon tax will also be implemented.

TIP: Although the carbon tax scheme will not commence until next year, businesses should consider putting some serious thought into how they may be affected, both directly and indirectly, by the scheme. Please contact our office for any assistance.

Uncertainty with private rulings system

In a recent case, the Full Federal Court unanimously affirmed assessments issued by the Commissioner to a taxpayer, a sports club, even though the assessments were inconsistent with a private ruling issued to the club. In 2004 the club had received a private ruling stating it was exempt from income tax for the 2003 to 2010 income years. However, the Commissioner in 2006 claimed the facts of the club's situation had changed and withdrew the ruling. The club claimed it should be afforded with protection under the tax law. However, the Court disagreed.

TIP: According to some commentators, the court's decision could cause taxpayers to lose confidence in the private rulings system. If you have any questions, please contact our office.

Taxpayer entitled to prompt GST refund, says Court

An exporter of mobile phone goods has been successful before the Federal Court in a case concerning GST refunds. The Federal Court ordered that the Commissioner comply with the GST and tax law and immediately pay the exporter the net amount notified in its GST returns for various tax periods covering January to May 2011. The ATO had alleged that the refunds claimed were unsubstantiated and were fraudulent. It refused to pay the amounts until an audit had concluded. However, the Court did not agree that in the circumstances the law allowed the withholding of a payment pending an investigation by the Commissioner. The Full Federal Court later also dismissed the Commissioner's appeal against the decision.

Personal services income rules apply, finds Tribunal

The Administrative Appeals Tribunal has recently held that the personal services income (PSI) rules applied to an IT professional to include in his assessable income amounts derived by his company through the provision of his IT expertise to a small number of clients from the same company group. The Tribunal also held the company was not a "personal services business".

TIP: Many consultants and contractors operate as a sole trader or through a company, partnership or trust. In many cases, the income received for the work they do may be classified as PSI if certain tests are not passed. However, the PSI rules do not apply to individuals or interposed entities carrying on a "personal services business". It should be noted that the PSI rules remain a tax compliance risk area for the ATO. Please contact our office for any assistance.

Superannuation guarantee to be increased to 12%

Legislation has been introduced into Parliament which proposes to increase the superannuation guarantee (SG) rate from 9% to 12%, phasing in from 1 July 2013. The Government also announced that it would abolish the age limit for which employers no longer need to provide superannuation guarantee.

TIP: If the SG age limit is to be abolished, then from 1 July 2013, employers will be required to make SG contributions for employees regardless of an employee's age.

Possession is now 10/10ths of the Law!

Or to be more accurate, it might be from 30 January 2012. That has recently been proclaimed as the start date for the new Personal Property Securities Act ("PPS Act").

We have drawn this to your attention previously, but now the commencement date is certain. And if the NZ experience is a guide, somebody will not appreciate how it impacts upon their business and will find their **assets sold for the benefit of someone else's creditors** because they omitted to follow the prescribed processes under the Act.

This will not only impact on clients who have assets held in the possession of third parties (eg equipment hire; retention of title clauses; consignment sales). It will also have ramifications for the conventional strategy where ownership of assets (held in one family structure) is separated from the commercial business exposures those assets are used for (conducted by a separate family structure). Unless all the above mentioned arrangements (to be known as "security interests") are "perfected" in accordance with the PPS Act, an insolvency practitioner for the possessing party will be able to sell such assets and not be required to remit the proceeds to the legal owner.

If you haven't done so already, now is the time to start identifying all your security interests and preparing to have them perfected on or before 30 January 2012. While we at Rundles can assist you with this process, it is ultimately a matter to take up with your lawyers.

Do you have a Higher Education Loan Program (HELP) debt?

From 1 January 2012, the government is changing the HELP voluntary repayment discount, applied to payments of \$500 or more, from **10%** to **5%**.

To take advantage of the 10% discount, you will need to ensure your voluntary repayments are received by the Australian Taxation Office on or before **31 December 2011**. To ensure payments are received in time, you should also check with your financial institutions for processing deadlines.

Note that the Australian Taxation Office will close during the Christmas-New Year holiday period from noon 23 December 2011 until 8.00am 3 January 2012 so it may already be too late to seek to make a payment by cheque. To confirm your payout amount and payment reference number (PRN) for an electronic payment method, you need to phone them before 23 December on **13 28 61** between 8.00am and 6.00pm, Monday to Friday

***PARTNERS AND STAFF WISH ALL OUR CLIENTS A VERY MERRY
CHRISTMAS AND A PROSPEROUS NEW YEAR***



***OUR OFFICE WILL BE CLOSED FROM
MIDDAY 22 DECEMBER 2011
AND REOPENING
TUESDAY 3 JANUARY 2012***

Noel's News



Film Review – by Mark Lisle

THE INBETWEENERS

***Starring: Simon Bird, Joe Thomas, James Buckley,
Blake Harrison***

Not being familiar with the TV series, I had no expectations for this film. My first reaction was slight shock and embarrassment at the crass language and themes, especially as I was with my 15 year old son.

However, once I got over that and relaxed a bit, I had to admit there were some very funny scenes. The dance scene early in the movie was probably worth the ticket price alone.

This film isn't for everybody but, if you know what to expect (as those who have watched the TV series will be), I think you will find it very funny.



Restaurant Review – by Mark Lisle

***TERRA ROSSA
87 Flinders Lane
Melbourne.***

There are a lot of great restaurants at the top end of the City, especially Italian restaurants.

One I hadn't been to before was *Terra Rosa*. It was hard to fault anything about this place. The atmosphere, the service and the wine list were all great, so it was only the food that needed to live up to our now soaring expectations.

We weren't let down. We started with a selection from the Tapas menu, which was fantastic, and no-one in our party was disappointed with their choice of main meal.

All in all, a great experience.

Highly recommended.



Book Review – by Lana Trounce

THE DROP - Michael Connelly

This is another novel by Michael Connelly about Detective Harry Bosch of the LAPD.

Normally in the unsolved crime area, Harry has been approached to investigate the death of George Irvings the son of his nemesis, Irvin Irvings. **“Was it murder or suicide?”**. Even though Irvin Irvings (his old Boss) and Harry have never seen eye to eye, Irvin knows Harry will be able to solve the mystery.

This is an intriguing read with lots of twists and turns for those who like a who dunnit.



Sporting Predictions – as seen by Brad Roach

Cricket

With a less than impressive result against New Zealand, it is unlikely to get any better against India. India to win the 4 match test series 3-1.

Big Bash

For entertainment value this summer in sport it would be hard to go past the national Big Bash competition. A new format has been introduced but will still include an array of international stars participating. The Melbourne Stars to be the winners over the Adelaide Strikers.

Tennis

I cannot remember the last time a winner of a men’s grand slam title was someone other than Federer, Nadal or Djokovic. This year at the Australian Open will be no different. Roger Federer will win the men’s title in what will be his final grand slam win. As for the women’s title, Sam Stosur to defeat Serena Williams.