

Rundles Report

tax news | views | clues

Merry Christmas 2013

Beware of artificial trust arrangements to avoid tax

The ATO has issued an alert to warn taxpayers that it is aware of arrangements where a discretionary trust is used to effectively funnel large capital gains to a newly incorporated company that is then wound up to avoid paying taxes.

The ATO says these arrangements concern situations where a trust has generated a small amount of income and a large capital gain during the year. The trust then distributes funds generated by the capital gain, tax free, to one beneficiary, while the newly incorporated company receives the tax liability, but does not have the funds to pay the tax. A liquidator is then appointed to wind up the company.

The ATO says such arrangements may be shams and those involved could face serious consequences under the tax law.

Extra 15% super contributions tax for high income earners

The superannuation law has recently been amended so that the effective contributions tax for certain concessional contributions (up to the concessional cap) has been doubled from 15% to 30% for "very high income earners", ie those with income (plus relevant concessional contributions) above a \$300,000 threshold.

The ATO has recently advised that it will start issuing the first assessments for the new tax in January 2014 for individuals who were above the \$300,000 high income threshold for the 2012–2013 income year.

TIP: Taxpayers who exceed the \$300,000 high income threshold should consider reviewing their superannuation contributions and salary sacrificing arrangements to take into account any impact of the additional 15% tax.

Individual found to be an Australian tax resident

An individual has been unsuccessful before the Administrative Appeals Tribunal (AAT) in arguing that he was not a resident of Australia for tax purposes during the relevant years. The individual was a mechanical engineer and worked overseas in the 2007 and 2008 income years. The taxpayer argued that in mid-2006 he had formed an intention to live in the United Kingdom, but was ultimately unable to do so due to the failing health of his mother-in-law. The taxpayer eventually returned to Australia in 2009.

The AAT held that the taxpayer had maintained a strong and continuing residency connection with Australia. The AAT noted, among other things, that the taxpayer had maintained an Australian bank account. He had also identified himself as a resident in official immigration arrival and departure cards.

A share investor, not a share trader

The AAT has held that an individual was a share investor, and not a share trader as claimed, during the relevant years. The individual was a full-time council employee and claimed that he had an arrangement with his employer where he could trade during business hours and then make up the time after hours. The Tax Commissioner argued that the individual was not carrying on a business of share trading and therefore was not entitled to deductions he had claimed on the premise that a business existed.

The AAT held that, overall, the factors pointing against the existence of a share trading business outweighed the factors that were in the taxpayer's favour. Among various things, the AAT found there was a lack of a regular routine with buying and selling shares in the individual's case, which pointed towards the transactions being made on a speculative basis. The AAT was also of the view that full-time employment went against the conduct of a share trading business.

TIP: If a taxpayer is a share trader, losses may be deductible against other income. If the taxpayer is not a share trader, indexation or the capital gains tax (CGT) 50% discount may apply to reduce the capital gain.

GST bill following hotel apartment purchases

The AAT has confirmed a decision of the Tax Commissioner that a husband and wife partnership (which was registered for GST) had an increasing adjustment resulting in a GST payable amount following the purchase of two apartments in a hotel complex.

The original owner of the apartments had previously granted leases in respect of each apartment to a hotel management company that was obliged to operate a serviced apartment business. The partnership had also elected to participate in a scheme that allowed the hotel management company to let the apartments as part of its serviced apartment business in return for income generated by the business. The supply of each apartment was treated as GST-free under the "going concern" concessions in the GST law. Since their purchase, the apartments were operated as part of the serviced apartment business.

The AAT essentially agreed with the Commissioner that the partnership had an increasing adjustment because of continuing input taxed supplies made in relation to the apartments.

No relief from excess super contributions tax bill

The AAT has affirmed the Tax Commissioner's decision to impose excess non-concessional contributions tax on an individual in relation to excess super contributions he had made in September 2009.

Essentially, the taxpayer had withdrawn and redeposited his superannuation monies in an attempt to mitigate the effects of the global financial crisis. The Commissioner claimed the individual had breached the so-called "bring forward rule", which provides a \$450,000 cap on non-concessional contributions for every three-year period for people under age 65.

The AAT did not accept the individual's argument that his super fund should have warned him of the danger of breaching the \$450,000 limit. The AAT also did not expect the individual to necessarily understand the law himself; however, it did expect that the individual "might have asked for some advice".

Departure from private ruling results in FBT assessments

The AAT has held that the Tax Commissioner was no longer bound by a private binding ruling that he had issued to a taxpayer company, because the taxpayer had implemented the scheme differently to the private ruling. As a result that the Commissioner was authorised to issue the taxpayer with fringe benefits tax (FBT) assessments for the relevant years.

Broadly, the private ruling provided that there would be no housing fringe benefit in relation to a home that was half-owned by the company (with the other half owned by a couple, who were also the directors of the company) on the basis that the business use of the home was 50%. However, the AAT considered that, in fact, less than 50% of the home had a "business use", and therefore the private ruling was no longer binding.

Tax man's refusal of tax debt compromise deal

An individual has been unsuccessful before the Federal Circuit Court in seeking a review of the Tax Commissioner's decision to refuse a tax compromise deal. The individual had taken over his father's jewellery business, but said he was not aware of the financial mismanagement of the business until unpaid creditors began calling. The taxpayer argued that the Commissioner had not taken into account the ill-health of his father and the effect the global financial crisis had on the business.

However, Court said there was no reason to believe that they were not taken into account by the Commissioner. Further, it held it could not review the Commissioner's decision as it was not a decision made "under an enactment".

GST and adjustment notes

The ATO has issued a GST ruling that sets out the requirements for adjustment notes under the GST law. An adjustment note reflects the adjustment to the amount of GST charged on a taxable supply as a result of an adjustment event. An adjustment event will result in the original tax invoice issued by the supplier being incorrect. A supplier is required to issue an adjustment note for a taxable supply unless the supply was issued under a recipient created tax invoice. In that case, the recipient of the supply must issue the adjustment note.

The GST ruling outlines:

- i. when a document is in the approved form for an adjustment note,
 - ii. the information requirements determined by the Tax Commissioner, and
 - iii. when the Commissioner will treat a particular document as an adjustment note even though that document does not meet all of the requirements.
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Residency requirement for CGT home exemption failed

The Administrative Appeals Tribunal (AAT) has denied an individual's claim that an exemption from capital gains tax (CGT) should apply to a property that he and his ex-de facto partner had sold. The individual had purchased land in 2002 with his then partner, and construction of a house on the land commenced in April 2004. However, the couple ended their relationship in September 2004.

Despite this, the individual argued that they had moved into the house in around May or June 2005 to meet the requirements under the law to sell the property without being subject to CGT. The AAT found that the evidence before it failed to establish that the house became the individual's main residence "as soon as practicable" after construction was completed, and failed to establish that the house continued to be his main residence for at least three months after that. In this case, both requirements had to be met in order for the exemption to apply.

Parent liable to CGT on half-share of townhouse

An individual has been unsuccessful before the AAT in arguing that he should not have to pay CGT on the sale of a townhouse he owned jointly with his son because, he argued, he was only holding his interest in the property to protect his inexperienced son from selling it on a whim.

The individual had purchased the property for his adult son to live in and transferred the property to himself and his son as joint tenants. After living in the townhouse for a few years, the son moved out to another property. The townhouse was then sold and all of the funds were used to pay down the mortgage on a new property. The individual argued that he received no proceeds from the sale and that he held his interest in the property in trust for his son, or alternatively, that an exemption under the CGT law should apply. The AAT did not accept the arguments and held that as a joint tenant, the individual was liable to CGT on 50 per cent of the net capital gain on the sale.

Penalty for unsubstantiated work-related deduction claims

The AAT has recently affirmed a decision of the Tax Commissioner to impose a penalty on an individual equal to 50 per cent of the tax shortfall amount arising from deduction claims for work-related expenses that were unsubstantiated.

The individual worked as a cars salesman and in his 2011–2012 tax return made various claims for work-related expenses amounting to around \$34,300. The Tax Commissioner determined

that most of the claims were unsubstantiated and imposed a penalty of around \$6,100, representing 50 per cent of the tax shortfall. The Commissioner also told the AAT that the individual had made similar claims in previous years.

The individual did not dispute that the claims were unsubstantiated, but argued that the penalty was severe and that he was unable to pay an outstanding portion of the penalty of \$1,400. The AAT noted, among other things, that the individual did not retain invoices or receipts, or provide satisfactory evidence to substantiate the claims. The AAT was of the view that the individual's conduct was more serious than mere failure to take reasonable care, and held that the penalty imposed was appropriate.

No enterprise, so GST credits refused

The AAT has refused an individual's claim for input tax credits as it found no evidence that the individual was carrying on an "enterprise". The individual claimed that before she was required to serve a term of imprisonment, she had tried to start a "services business". She claimed that she had purchased, among other things, two motor vehicles, various office equipment, and business promotional materials. The individual made claims for input tax credits totalling almost \$74,000 in respect of the various purchases over four years. However, the individual said the attempts to start the business did not succeed and straddled her term of imprisonment. The individual also claimed that any records she had of the purchases were lost or destroyed, or that she had not been asked to produce documentation by the Tax Commissioner.

The AAT said the individual was given various opportunities to produce documents to back her claims before the hearing; however, it noted that her evidence, being mostly personal testimony, did not satisfy the burden of proof that the Commissioner's assessment denying the input tax credits was excessive. The AAT found that there was no "enterprise" for the purposes of the GST law and that the decision to deny the input tax credits was correct.

Special GST clause in contract unclear

A company (a trustee of a family trust) that had sold a property to an individual has been unsuccessful before the Victorian Supreme Court in a matter concerning whether the individual was required to pay GST in addition to the purchase price on the property.

The purchase price was set out in the Particulars of Sale in the contract as \$2,250,000. The Supreme Court reviewed the contract, and in particular, a "special condition" dealing with GST. While the Court accepted that the commercial aim of the special clause may have been to allocate responsibility for any GST liability attached to the sale of the property, it considered that the contract said nothing about whether the purchase price in the Particulars of Sale was actually intended to include GST. Further, it could not discern from the special clause any particular contractual intention of the parties. In conclusion, the Court held that the special clause should be removed from the contract. As a result, it said the \$2,250,000 amount in the Particulars of Sale should be understood to be inclusive of any GST payable on the sale.

<p>TIP: This case highlights the importance of ensuring that a contract for the sale of property clearly specifies whether the sale is subject to GST and whether the price is GST-inclusive or GST-exclusive.</p>

Plumbers were full-time casuals, not contractors

The AAT has found that individuals working for a plumbing business were employees of the business and that the business was required to provide superannuation contributions for them. The business argued that the workers were independent contractors and that there was no superannuation requirement.

After reviewing the individuals' relationship with the business, the AAT was of the view that, effectively, the workers were full-time casuals paid on an hourly rate and not eligible for holiday or sick leave. The AAT considered various factors, including that the individuals all had the same contract (with the same terms) with the business. The AAT said one would expect independent contractors to have differing terms, but the fact that their contracts were the same was "extraordinary". Another key factor was that the hourly rates charged by the workers to customers were largely set by the business. Overall, the AAT concluded that the workers were employees and affirmed the requirement to pay superannuation.

ATO warns of schemes to access additional franking credits

The ATO has cautioned taxpayers against trading shares on a special market operated by the Australian Securities Exchange (ASX) with the sole purpose of obtaining additional franking credits. The ATO says these arrangements involve a taxpayer selling shares in a company on the ordinary market after a franked dividend has been announced, and retaining the franked dividends. Then, within days, the taxpayer buys back a similar parcel of shares in the same company on the special market, which also has franked dividends. The ATO says the transactions could constitute “dividend washing” and that the taxpayer could face penalties under the law.

TIP: Dividend washing occurs where shareholders seek to claim two sets of franking credits on what is effectively the same parcel of shares. Taxpayers who are unsure about their own circumstances should seek independent advice or apply for an ATO private ruling.

ATO focuses on dodgy financial products

The ATO has highlighted areas of concern in relation to certain financial products, particularly a small number of financial products that may offer the promise of tax benefits that may not actually be available to some or all investors who invest in the product.

Key factors that draw the ATO’s attention include suggestions that the investor could obtain tax advantages (that most taxpayers would not in fact receive in their individual circumstances), or that the tax law’s anti-avoidance provisions may not apply.

Tax changes following carbon tax and mining tax repeal

The Abbott government has introduced into Parliament proposed legislation to repeal the carbon tax and the mining tax.

Importantly, the Bill to remove the mining tax also proposes to repeal or revise a number of tax and superannuation measures. Key changes include:

- **capital allowances for small business entities** – the instant asset write-off threshold will be reduced to \$1,000 and the accelerated depreciation arrangements for motor vehicles will be discontinued;
- **company loss carry-back** – the repeal of the loss carry-back measure will apply from the start of the 2013–2014 income year;
- **superannuation guarantee (SG) charge** – the SG charge percentage will be paused at 9.25% for the years starting on 1 July 2014 and 1 July 2015, increase to 9.5% for the year starting on 1 July 2016, and then gradually increase by half a percentage point each year until it reaches 12% for years starting on or after 1 July 2021; and
- **low income superannuation contribution (LISC)** – the LISC will not be payable in respect of concessional contributions made from 1 July 2013.

No GST following purchase of leased apartments

A taxpayer has been successful before the Full Federal Court in a matter concerning a GST assessment following the purchase of three residential apartments. The taxpayer (a company) had purchased the apartments in a hotel complex from the vendor on a GST-free basis as supply of a going concern. The apartments were subject to leases that the vendor had previously granted to a hotel management company, which was obliged to let the apartments as part of its serviced apartment business. The taxpayer had also elected to participate in a “management rights scheme”, which provided the taxpayer a right to income in exchange for allowing its apartments to be used in the serviced apartment business.

The Commissioner assessed the taxpayer as having a GST liability of \$215,000 (i.e. an increasing adjustment), which represented 10% of the total purchase price paid by the taxpayer for the apartments. On appeal, the Full Court found that the primary judge had made an error in concluding that, following the sale of the reversion from the vendor to the taxpayer, there was a continuing supply, being the supply of residential premises by lease, by the vendor to the hotel management company. The Full Court said there was no continuing supply in relation to the

lease; rather, the supply was the grant of the lease, which did not continue for the term of the lease. As a result, the taxpayer's objection to the GST assessment was allowed.

TIP: At the time of writing it remained unclear whether the Commissioner would apply to the High Court for special leave to appeal against the decision. Assuming that the Full Court's decision will not be appealed or overturned, purchasers who have previously acquired residential premises as a going concern and then included an increasing adjustment in a subsequent GST return may want to consider whether there is potential for a refund.

Note that there are time limits that can restrict entitlement to refunds. Purchasers who are contemplating acquiring residential premises as a going concern should exercise caution until it is clear whether the decision will be appealed, or whether the government may look into introducing amending legislation.

Individual not a tax resident of Australia

An individual taxpayer has been successful before the Administrative Appeals Tribunal (AAT) in arguing that he was not an Australian resident for tax purposes for the relevant years.

In June 2006, after his release from jail for drug offences, the man decided he had no future in Australia and moved to Thailand. In 2008, he moved to Bali and obtained the right to live in Indonesia as a retired person. During 2008 and 2010, the man made regular trips back to Australia, but during his last visit he was arrested and charged with possession of a precursor to a dangerous drug. The man was convicted and sentenced to 18 months' imprisonment.

While in prison, the Commissioner commenced an audit of the taxpayer's affairs and decided that he was an Australian resident with unexplained income, and issued assessments for the 2009 to 2011 income years. The Commissioner also assessed penalties in excess of \$350,000. The Commissioner based his decision on documents showing bank interest payments to the taxpayer as well as payments he had made towards the cost of building a boat.

However, the AAT was satisfied that the man was not a resident of Australia in the years in question. It said the man had not been residing in Australia since mid-2006 and that he had established a home in Bali from early 2008.

Legal expense deductions to fight ASIC charges refused

A stockbroker has been unsuccessful before the AAT in arguing that legal expenses he had incurred in the 2011 income year were deductible.

The taxpayer had incurred legal expenses challenging an ASIC banning order in proceedings before the Federal Court and the Full Federal Court. Both courts dismissed his appeals. The banning order, which became operative from 7 May 2010, prohibited the man from providing financial services for five years. The taxpayer had also incurred legal expenses in defending 20 criminal charges for alleged insider trading; he was eventually acquitted on 17 of the charges, with the remaining three withdrawn by ASIC.

The AAT was of view that the legal expenses were not incurred by the taxpayer "in the course" of gaining or producing assessable income. The AAT found that when the taxpayer had incurred the expenses, his position as an authorised representative at the company he worked for had ceased. Accordingly, the AAT held that the expenses incurred in the 2011 income year were not deductible.

Tax debt release based on serious hardship refused

The AAT has affirmed the Commissioner's decision to refuse to release an individual from his tax liability based on serious hardship grounds. Under the Taxation Administration Act, the Commissioner has a discretion to release an individual from paying a tax liability (in whole or in part) if satisfying the liability would cause that person serious hardship.

The man argued that due to his wife's illness, he had been increasingly required to care for her and their children and that this has reduced his capacity to earn income. The AAT was satisfied that the individual was facing serious hardship in the immediate future in the sense of lacking the means to purchase food, clothing and medical supplies for his family, and other basic requirements such as accommodation. However, it said the serious hardship was not caused by him being required to meet the tax liability. Rather, the serious hardship was due to the taxpayer's liabilities, of which tax debt was just one, exceeding his assets, and the outgoings

required to service those liabilities exceeding his income. As he had not met the relevant criterion, the AAT said it did not have the power to release him from his tax debts.

TIP: Even if the Commissioner is satisfied that serious hardship will result from payment of a tax liability, the Commissioner is not obliged to exercise his discretion in favour of the individual taxpayer. Nevertheless, it is clear that the ATO is obliged to act reasonably and responsibly, and should not act arbitrarily or capriciously. An application for release from an eligible tax liability must be in the approved form.

GST refund request made too late

An individual taxpayer has been unsuccessful before the AAT in seeking a review of the Commissioner's decision to refuse a GST refund in relation to the June 2004 quarter. The Commissioner had refused the refund on the basis that the taxpayer's application was made after the four-year cut-off date for the June 2004 quarter (that is, 28 July 2008).

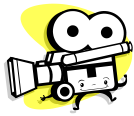
The taxpayer explained that due to his ill health and troubles with his then business, he did not get around to lodging tax returns until 2011. The Commissioner acknowledged that the man was owed a refund and had recommended that he approach the Department of Finance and Deregulation to obtain an act of grace payment, but said that because more than four years had elapsed since the time the taxpayer could have claimed the money, there was no discretion that could be exercised in the taxpayer's favour. The AAT agreed with the Commissioner. It also refused the taxpayer's request for an extension of time to apply to the AAT for review of the Commissioner's objection decision (dated 31 October 2011) refusing the GST refund for the June 2004 quarter.

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



***OUR OFFICE WILL BE CLOSED FROM
MIDDAY 20 DECEMBER 2013
AND REOPENING
THURSDAY 2 JANUARY 2014***

Noel's News



Film Review by Maria Marson

One Chance

Starring: James Corden, Julie Walters, Colm Meaney

The film is based on a true story of the rise to stardom of opera singing Welshman, Paul Potts. Even if you have never heard of Paul Potts, you're never in any doubt as to how it's going to end.

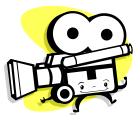
Paul is a mobile phone salesman whose love of opera singing made him a target of bullying while growing up in a little town in South Wales.

The movie focuses on Paul's failures to reach his desire to be an opera singer like Pavarotti, his bullying as a child, and a father, a sour grumpy man, who wants his son to follow him into the steelworks and stop wasting time on opera singing nonsense. Overcoming all his failures, Paul triumphs as the first winner of Britain's Got Talent.

The director took a normal rags to riches story and did not glam it up by using big name actors. Julie Walters (*Billy Elliott* fame) was the only actor of any note and her role as Paul's mother was a minor part.

I personally felt this movie to be very similar to "*Billy Elliott*".

A feel good movie that will appeal to the older generation.



Film Review by Mark Lisle

American Hustle

Starring: Christian Bale, Amy Adams, Bradley Cooper, Jennifer Lawrence

You have to see this film! It is (loosely) based on the notorious Abscam scandal from the late 70's but even the film's producers concede that "some of this actually happened". The cast is amazing – Christian Bale, Bradley Cooper, Amy Adams, Jeremy Renner and Jennifer Lawrence. The latter first makes her appearance well into the movie but ends up stealing the show. I think all of the actors enhance their reputations in this film.

American Hustle is quirky but very, very funny. Christian Bale's character, con man Irving Rosenfeld, has the best "comb over" of all time and his partner in crime, Amy Adams, playing the seductive Sydney Prosser, is captivating (thank God for double-sided tape). Bradley Cooper and Jennifer Lawrence are brilliant in their respective manic roles, reminiscent of their previous coming together in "Silver Linings Playbook".

You'll love this film.



Restaurant Review by Mark Lisle

Zia Rina's Cucina – 857 High Street, Armadale

If you are looking for an authentic Italian restaurant, you can't go past Zia Rina's Cucina. It is only open about 4 nights a week and they have a set menu at \$70 per head, which changes nightly. The night that we went there, they had an antipasto share plate for entrée, two choices for mains and two desserts. So, not a lot of choice but the food was great, with a genuine home-cooked style about it.

The atmosphere is homely, and the smell of the food is omnipresent, which just adds to the authentic feel. The wine list was good but, like the menu, not a lot of choice and not cheap. The staff were friendly and attentive and Zia Rina herself wanders around after dinner and has a chat to her patrons.

The lunch menu at Zia Rina's Cucina is *A La Carte* and I think it is open for lunch 4 or 5 days a week. It is also open for breakfast on weekends. I would say booking is essential as the restaurant is not large and is not open every night.

James Bond Exhibition – Melbourne Museum – Carlton as seen by Niall Bryant

Whether you are a hard core or casual James Bond fan, The Designing 007 Exhibition at the Melbourne Museum is a must to see.

There are designs, movie props, scripts, scenes, dresses, cars, helicopters etc etc from the Bond universe. Featuring, something from nearly every film in the series, from ***Dr No*** to ***SkyFall***, including some background information on the author Ian Fleming.

Depending upon how many people are there and how long you want to spend reading all the material, it could take you a good couple of hours to go through the exhibition and then there are more exhibits outside in the foyer. The exhibition has only just started and runs until February 2014. If you intend to visit the exhibition on the weekends a booking is a must.

I thoroughly recommend it for any James Bond fan and anyone with a passing interest in Bond will at least enjoy the two Aston Martins parked in the foyer.



Sporting Predictions as seen by Brad Roach

Cricket

The much anticipated second leg of the Ashes series has hit Australian shores with the Australian team securing an early 2-0 lead. Australia and England next head to Perth for the third test, where Australia will regain the Ashes. Australia to eventually win the series 4-1.

Twenty20 Big Bash

The domestic Twenty 20 Big Bash competition is back for another season. The Melbourne Stars will be the winners over the Hobart Hurricanes.

Tennis

The Australian Open hits off in mid January with the new year to bring in some new winners of the event. For interest value I will be hoping del Potro will win the men's championship whilst dare I say it, Sam Stosur to win the women's title.