

client alert | explanatory memorandum

August 2009

Proposed Tax Laws Amendments

On 25 June 2009, the Federal Government introduced the Tax Laws Amendment (2009 Measures No 4) Bill 2009 into the House of Representatives. Broadly, the Bill seeks to:

- increase the research and development (R&D) expenditure cap when determining a taxpayer's eligibility for the R&D tax offset;
- amend the tax law to improve the integrity of prescribed private funds;
- provide CGT relief to members and insured entities of friendly societies that have a life insurance business and/or private health insurance business where a friendly society demutualises to a for-profit entity;
- ensure losses transferred by a joining entity that is insolvent at the joining time to the head company of a consolidated group can be used by the head company in certain circumstances; and
- make minor technical corrections to the taxation laws, including the small business CGT concessions in Div 152 of ITAA 1997 and the application of the *Fringe Benefits Tax Assessment Act 1986* to donations made through salary sacrifice arrangements.

A discussion of some of the proposed amendments follows.

R&D expenditure cap

The Bill will increase the R&D expenditure cap from \$1 million to \$2 million when determining a taxpayer's eligibility for the R&D tax offset. The cap is one of the requirements that must be satisfied before the taxpayer is eligible to claim the offset.

Current provision

Currently, an eligible company can claim the refundable R&D tax offset for its R&D expenditure instead of deductions under s 73B, s 73BA or s 73BH of ITAA 1936. This is particularly attractive if the company is in a tax loss position and unable to immediate benefit from those deductions. This is because, if the amount of the offset exceeds the tax payable for the company, the excess is refundable to the taxpayer.

Broadly, the eligibility requirements that must be satisfied before a company can claim the offset are:

- its 'aggregate R&D amount' for the year exceeds \$20,000;
- its 'grouped aggregate R&D amount' for the year does not exceed \$1 million; and
- the 'R&D group turnover' for the group is less than \$5 million.

For the purpose of the offset, a company is grouped with another company in determining its 'grouped R&D aggregate amount' if either company controls the other (directly or indirectly) or both companies are controlled by the same third person (directly or indirectly) or the companies are 'affiliates' of one another.

The definition of ‘affiliate’ is contained in s 73M of ITAA 1936. The section states that a person is an affiliate of another person if the person acts (or could reasonably be expected to act) in accordance with the other person’s directions or wishes, or in concert with the other person, in relation to the affairs of the person’s business or R&D expenditure. It also states that partners in a partnership are not affiliates only because they act, or could reasonably be expected to act, in concert with each other in relation to the affairs of the partnership.

Section 73K of ITAA 1936 says that the aggregated R&D amount for a year of income is:

the sum of:

- (a) *the value of the supplies a company made in the year of income; and*
- (b) *the value of the supplies made in the year of income by other persons while they were grouped with the company, reduced by:*
- (c) *the value of the supplies the company made in the year of income to persons grouped with it while they were grouped with it; and*
- (d) *the value of the supplies persons grouped with the company made in the year of income to the company while the company was grouped with them; and*
- (e) *the value of the supplies another person made in the year of income to a third person while the other person and the third person were grouped with the company.*

The Explanatory Memorandum accompanying the Bill states that the lifting of the ‘grouped R&D aggregate amount’ to \$2 million will provide a further boost to small pre-profit companies in research intensive industries and mitigates the incentive for firms to keep their R&D spending under the current expenditure cap.

Date of effect

The amendment will apply to the 2009/10 and later income years.

Minor amendments

The Bill will also make various minor amendments to the taxation laws to ensure the laws operate as intended. This will be achieved by correcting technical or drafting defects, removing anomalies and addressing unintended outcomes. The Acts that will be amended include:

- *Excise Act 1901;*
- *Excise Tariff Act 1921;*
- *Fringe Benefits Tax Assessment Act 1986;*
- ITAA 1936;
- ITAA 1997;
- *Income Tax (Transitional Provisions) Act 1997;* and
- *Taxation Administration Act 1953.*

The amendments will take effect from the date of Royal Assent for the Bill unless otherwise stated.

A discussion of some of the amendments follows.

CGT and employee share schemes

The Bill will amend the CGT provisions relating to employee share schemes to clarify that there is no potential for double taxation when an employee becomes entitled to shares held in a trust as a result of exercising a right acquired under an employee share scheme.

While s 130-90(3) of ITAA 1997 disregards capital gains or capital losses arising from the above described situation, there remains potential for double taxation where an employee share scheme right is exercised and the shares remain in a trust because of restrictions that apply to the shares. Therefore, uncertainty surrounds whether the employee, on ultimately acquiring the shares from the satisfaction of a beneficial interest, has acquired the shares as a result of exercising a right acquired under the scheme.

This will be achieved by amending s 130-90(3)(a) of ITAA 1997 to:

- (a) *the individual, associate or affiliate company must have acquired the share or right:*
 - (i) ***in any case – under an *employee share scheme; or***
 - (ii) ***in the case of a share – as a result of exercising a right acquired under an employee share scheme; or***
 - (iii) ***in the case of a share – in satisfaction of a beneficial interest that was the result of exercising a right acquired under an employee share scheme.***

and amending s 130-90(3)(c) of ITAA 1997 to:

- (c) ***if the share was acquired as a result of exercising a right or in satisfaction of a beneficial interest that was the result of exercising a right, the right must, because of s 139DQ of ITAA 1936, be a right that is treated, for the purposes of Div 13A of Pt III of that Act, as if it were a continuation of a right acquired under an employee share scheme.***

(The changes to the sections are highlighted in bold.)

Small business CGT concessions

The Bill will ensure that the small business CGT concessions contained in Div 152 of ITAA 1997 interact appropriately with Div 149 of ITAA 1997 (loss of pre-CGT status) in relation to payments made by a company or a trust. That is, the amendments will allow a pre-CGT capital gain that existed on an asset before the operation of Div 149 to be distributed tax-free to a CGT concession stakeholder of the company or trust under s 152-125.

This will be achieved by amending s 149-30, s 152-110 and s 152-125. The effect of the amendments will be that, if Div 149 has treated a pre-CGT asset as a post-CGT asset, the asset retains its original cost base and time of acquisition for the purposes of s 152-125. Therefore, the total capital gain, which comprises the actual pre-CGT gain and actual post-CGT gain, is treated as a post-CGT gain for the purposes of allowing that capital gain to be an exempt amount under s 152-125.

The amendments will clarify that, in calculating the period an entity has continuously owned an asset for the purposes of s 152-110, any change in majority underlying interests in the asset is ignored. That is, the period of ownership of the CGT asset starts from the time the entity originally acquired the asset.

In addition, the amendments will ensure any change in the majority underlying interests in an asset will be ignored when testing whether an entity had a significant individual for at least 15 years for the purposes of s 152-110.

Taxable Australian property

The Bill seeks to clarify the definition of ‘taxable Australian real property’ contained in s 855-20(a) of ITAA 1997. This will be achieved by amending the section to read:

A CGT asset is taxable Australia real property if it is:

- (a) ***real property situated in Australia (including a lease of land, if the land is situated in Australia); or***
- (b) *a mining, quarrying or prospecting right (to the extent that the right is not real property), if the minerals, petroleum or quarry materials are situated in Australia.*

(The amendment to the section is highlighted in bold.)

Donations and FBT

The Bill will amend s 148 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) to ensure that donations made to deductible gift recipients through salary sacrifice arrangements do not result in an employer incurring an FBT liability.

Currently, FBT may be payable by employers who make donations to deductible gift recipients under salary sacrifice arrangements with their employees. Although a deductible gift recipient is unlikely to be an employee's associate, the anti-avoidance rule in s 148(2) of the FBTAA treats the deductible gift recipient as the employee's associate because the benefit is provided under a salary sacrifice arrangement.

Date of effect

The amendment will apply from the start of the 2008/09 FBT year (ie 1 April 2008).

Tax Office's administrative treatment

The Tax Office has issued the following notice of the administrative treatment it will adopt pending the enactment of the proposed amendment.

| If ... | then ... |
|--|---|
| A taxpayer lodges a return in accordance with the existing law, but the proposed legislation is subsequently enacted | The taxpayer should seek an amendment to adjust the FBT liability reported in their return as appropriate. Interest on an overpayment will be payable on any refund received. |
| A taxpayer chooses to anticipate the change and anticipates it correctly | The taxpayer will not need to take any further action once the legislation is enacted. |
| A taxpayer chooses to anticipate the change and does not anticipate it correctly | The taxpayer will need to seek an amendment of their earlier assessment. Where the taxpayer acted reasonably in anticipating the change, the Tax Office states that there will be no shortfall penalty. In addition, the Tax Office also states that if the taxpayer actively seeks to amend their return within a reasonable time, the Tax Office will remit any GIC attributable to the amendment to nil. |

The Tax Office has also stated that it will not undertake a specific compliance program to enforce the existing FBT law during the period between the Government's announcement in February 2009 and enactment of the proposed law.

Div 7A: Payment of Company's Debt

The AAT has confirmed that a taxpayer was liable to pay tax under Div 7A of ITAA 1936 for monies deposited into her US bank account. The taxpayer was a director and shareholder in a private company. The private company had directed its US debtors to pay debts due to the company into the taxpayer's account: [2009] AATA 357, *Re Reid and FCT*.

Background

The taxpayer and her former de facto spouse were the shareholders and directors in a private company that carried on a business of exporting and importing recycled paper and renting out shipping containers. In the 2001 income year, the company directed its US clients to pay debts owed to the company into the US bank account of the taxpayer (of which she was sole signatory). The funds in the account were used for the private expenditure of the taxpayer and her former de facto spouse.

The taxpayer argued before the Tribunal that the amounts paid into her bank account did not constitute property of the company and, therefore, s 109C of ITAA 1936 could not apply to treat the payments as deemed dividends.

Decision

The Tribunal found that s 109C applied to treat the payments as deemed dividends in the taxpayer's hand in the year the payments were made. In particular, it found that the company had 'made' the payments to the shareholder by directing its debtors to pay the monies either directly or indirectly into the taxpayer's bank account.

The Tribunal also found that, despite the 'ingenious (or perhaps more aptly ingenuous)' nature of the taxpayer's argument, it had to be rejected as it would otherwise lead to the extremely odd and unintended consequence that a company and its shareholders could escape Div 7A by simply misappropriating debts due to that company by its debtors and causing those debts to be discharged other than through payments to that company.

In arriving at its decision, the Tribunal also dismissed the taxpayer's claims that the monies did not belong to her and that she only dealt with them on behalf of her former de facto spouse. In this regard, the AAT noted the taxpayer's evidence lacked credibility and that in her own evidence she had accepted that the debts were paid into her account for an illegal purpose.

However, the Tribunal found that the amounts in the account were used both by the taxpayer and her former de facto spouse. Therefore in accordance with the decision in *MacFarlane v FCT* (1986) 13 FCR 356; 17 ATR 808, it was appropriate for the taxpayer to be liable under Div 7A only for her share of the payments. The Tribunal also maintained the rate of penalty imposed because the taxpayer was a party to conduct she knew was illegal.

Operation of Div 7A

Broadly, under s 109C a private company will be taken to pay an unfranked dividend 'to an entity' at the end of the company's income year where the company paid an amount to the entity during the year and either:

- the payment was made when the entity was a shareholder or an associate of the shareholder; or
- a reasonable person would conclude (having regard to all the circumstances) that the payment was made because the entity had been a shareholder or associate at some time during the year.

The term 'payment' is defined by s 109C(3) to include:

- a payment to the extent that it is to the entity, on behalf of the entity or for the benefit of the entity;
- a credit of an amount to the extent it is to the entity, on behalf of the entity or for the benefit of the entity; and
- a transfer of property to the entity.

Where property is transferred, the amount that is treated as a dividend is equal to the difference between the arm's length value of the property and any consideration that may have been given by the transferee for the transfer.

The amount of the dividend is restricted to the private company's distributable surplus which is calculated under s 109Y.

Certain payments are excluded from the operation of s 109C. These are:

- a repayment on an arm's length basis of a debt owed by the private company to the entity (s 109J);
- a payment by the private company to another company, other than a company in the capacity of a trustee, except where the interposed entities rule in Subdiv E in Div 7A apply (s 109K); and
- a payment by the private company (eg an annual bonus) to the extent that it is otherwise included in the entity's assessable income (s 109L).

GST and Credit Card Surcharge Fees

In a recent decision, the AAT affirmed that the GST treatment of credit card surcharge fees depended on the GST characterisation of the relevant underlying supply: [2009] AATA 442, *Re Waverly Council and FCT*.

Background

The taxpayer was a local council. It imposed a variety of fees and charges for services provided to the community. If a payment was made by credit card, it charged a fee.

The taxpayer approached the Commissioner to make an assessment of its net GST amount for the tax period 1 October 2006 to 31 October 2006. Consequently, the Commissioner assessed the net refund payable to the taxpayer was \$237,152. However, the taxpayer was dissatisfied with the assessment because it claimed that the amount to be refunded should be \$237,150. In an unusual move, the taxpayer asserted that the net refund due to them should be \$2 less, ie \$237,150. The difference of \$2 was the GST proportion of the fees attributable to fees received by the taxpayer that do not attract GST.

The taxpayer relied on the A New Tax System (Goods and Services Tax) (Exempt Taxes, Fees and Charges) Determination 2006 in support of its GST treatment of the fees. The taxpayer argued that, because the fees were not specified in the Determination, they 'must, in all cases, be treated as consideration for a taxable supply made by the Council'.

Conversely, the Commissioner contended that the fee was an adjunct to the underlying supply on which it was imposed and, therefore, it would take the same GST treatment as that supply.

The issues before the Tribunal were:

- the uncertainty as to how the taxpayer's assertion should be dealt with in terms of the 'burden of proof' provisions in the *Taxation Administration Act 1953* (TAA); and
- the proper GST treatment of the fees.

The first issue — burden of proof

In the Tribunal's view, under s 14ZZK of the TAA the taxpayer had the onus of proving the assessment was incorrect. However, it was uncertain which subsection of s 14ZZK would apply in the taxpayer's circumstances. Therefore, the Tribunal requested the Commissioner to provide written submissions on his views in relation to the appropriate subsection.

The Tribunal agreed with the Commissioner that the question of onus of proof was to be considered under s 14ZZK(b)(iii) where a taxpayer was asserting that an assessment was too low.

The second issue — proper GST treatment of the fees

The Tribunal said that the determination of the correct GST treatment of the fees depended largely on Div 81 of the GST Act. It noted that, under the Division, certain prescribed fees and charges were excluded from GST if a legislative instrument made by the Treasurer was in force. It also noted that, for the relevant tax period, the relevant instrument in force was the Determination the taxpayer relied on in making its proposition.

However, the Tribunal said that the taxpayer's proposition, if successful, would not consider the substance or the commercial reality of the imposition of the fees. It also said that this would be an outcome that did not appeal to the practical and common senses approach to the interpretation of the GST law that the courts and the Tribunal had recommended in their decisions on GST cases.

In doing so, the Tribunal agreed with the Commissioner's contention. In its view, the fees should be characterised as part of the relevant underlying supply. It said that this was the 'practical application of the tax'. It also said that this interpretation was not 'unduly technical or overly meticulous and literal'.

In conclusion, the Tribunal found that the taxpayer had failed to prove the assessment was incorrect.

Tax Office's views

The Commissioner's established view regarding the GST treatment of credit card surcharge fees is contained in Issue 15.1 in the Tax Office's Financial Services — Questions and Answers Register.

The Register states that a credit card surcharge fee is considered to form part of the price for a merchant's supply of goods or services to a cardholder. The fee is a component of the consideration payable in respect of the supply. That is, the GST characterisation of the fees will depend on the underlying supply.

The Register provides three examples explaining the Commissioner's view.

Example 1: Purchase of a shirt — Taxable supply

Anastasia is in a store and decides to purchase a shirt. The shirt's price tag indicates that the price is \$55 (inclusive of GST). There is a sign at the counter indicating that a surcharge of 3% of the price will be imposed if payment is made by credit card.

Anastasia decides to pay by credit card and the merchant imposes a surcharge of \$1.65 in respect of the sale. The price payable in respect of the shirt is now \$56.65. As the supply of the shirt is a taxable supply, the GST payable in respect of the sale is \$5.15, being 1/11 of the GST inclusive price of \$56.65.

Example 2: Purchase of fruits and vegetables — GST-free supply

Ming Ho, a fruit and vegetable retailer, purchases his stock from a wholesaler. In one particular purchase, the price for the fruits and vegetables comes to \$1,100. The wholesaler imposes a surcharge of 2% on the price if payment is made by credit card.

Ming Ho pays by credit card and incurs a surcharge of \$22. The price paid in respect of the fruits and vegetables will be \$1,122. The supply of the fruits and vegetables is a GST-free supply and GST is not payable in respect of the sale.

Example 3: Enrolment in a college course — mixed supply

Ben enrolls in a college course. There are three units in his course — one unit is taxable and the other two units are GST-free. Ben's packaged course is a mixed supply. The college charges \$1,000 (inclusive of GST) for the taxable unit, \$800 for one of the GST-free units and \$700 for the other GST-free unit. The total amount payable by Ben on the Statement of Account issued by the college is \$2,500.

The college imposes a surcharge of 4.5% if payment of the Statement of Account is made by credit card. Ben decides to pay for his course by credit card and the college imposes a surcharge of \$112.50. The price payable in respect of the course is now \$2,612.50.

The college apportions 40% of the surcharge, that is, \$45 to the taxable unit as its price amounts to 40% of the total course fee. The balance of the surcharge, amounting to \$67.50, is apportioned to the GST-free units.

The price for the taxable supply component of the course is now \$1,045. The GST payable in respect of this component is \$95, being 1/11 of the GST inclusive price of the taxable component of \$1,045.

The Commissioner's view was reiterated in ATO ID 2008/116.

- **TIP:** A business that sells taxable and GST-free supplies, and accepts credit cards and charges a surcharge fee, will need to ensure its accounting software and cash register can apportion the GST chargeable on supplies.

Superannuation Guarantee Charge

The AAT has upheld superannuation guarantee charge (SGC) default assessments against a printing partnership for failing to make minimum superannuation guarantee contributions for an individual operating within the taxpayer's business: [2009] AATA 482, *Re Griffiths & Ors and FCT*.

After examining the indicators of an employer/employee relationship, the Tribunal held that the relevant individual was clearly an ‘employee’ of the partnership according to ordinary concepts. In rejecting the taxpayer’s contention that the individual was an independent contractor, the Tribunal said he was an ‘employee’ in any event under s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) as he was clearly remunerated either wholly or principally for his personal labour.

The Tribunal also rejected the taxpayer’s argument that the individual had agreed that he would not be paid superannuation as a term of his engagement. The Tribunal noted that parties cannot ‘contract out’ of their obligations under the SGAA. Furthermore, the Tribunal upheld the Commissioner’s decision to only partially remit to 15% the additional SGC assessments under s 59 of the SGAA for failing to lodge SG statements for the respective years.

Who is an employee?

The definition of an ‘employee’ for superannuation guarantee purposes is contained in s 12 of the SGAA. The term is defined by its ordinary meaning in s 12(1), with some expansion and clarification. In addition, ss 12(2) to 12(10) extend the meaning of an ‘employee’.

However, s 12(11) states that individuals who are paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week are not regarded as employees in relation to that work.

In *Superannuation Guarantee Ruling SGR 2005/1*, the Commissioner explains when an individual is considered to be an ‘employee’ under s 12. In addition, the Commissioner discusses the various indicators the courts have considered in establishing whether an individual is an employee within the common law meaning of the term.

The ruling explains ‘whether a person is an employee of another is a question of fact to be determined by examining the terms and circumstances of the relevant contract having regard to the key indicators expressed in the relevant case law’. The ruling also specifies that no one indicator is determinative but rather the totality of the relationship between the parties must be considered.

According to the ruling, if an individual performs work for another party through an entity (eg a company or a trust), an employer-employee relationship between the individual and the other party does not arise for superannuation guarantee purposes either at common law or under the extended definition of employee.

The ruling states that, in determining whether an individual is an employee or an independent contractor, the fundamental task is to examine the way in which a contract was formed. In the Commissioner’s view, the terms and conditions of the contract will always be of considerable importance to the proper characterisation of the relationship between the parties when considered in the context of the circumstances surrounding the formation of the contract. However, it is important to note that the classification of an individual as an employee or an independent contractor is based on the economic substance of the contract and not the legal terms used in the contract.

The classic test regarding whether or not an employment relationship exists is the ‘control test’. Simply put, an employee is one who is under an obligation to obey the orders of their employer regarding the performance of a task. In recognition of a highly skilled workforce, the Commissioner says that the importance of control lies not so much in its actual exercise but rather in an employer’s retention of a prerogative to direct an employee.

It is important to note that an individual can be deemed to be an employee for superannuation guarantee purposes, even though a contract of service does not exist. This is because s 12(3) of the SGAA prescribes that if the individual works under a contract that is wholly or principally for their labour, they are an employee of the other party of the contract. In the Commissioner’s view, a contract is a contract for an individual’s labour if the work must be done by that particular individual. If the contract leaves the individual completely free to delegate or sub-contract the work, then the contract is not a contract for the labour of a particular individual.

In the ruling, the Tax Office sets out criteria which it considers are indicative of whether a contract that does not give rise to a common law employee/employer relationship can be considered a contract wholly or principally for labour once the conduct of the parties has been assessed. These criteria include:

- the individual is remunerated (wholly or principally) for their personal labour and skills;
- the individual must perform the contractual work personally (there is no right of delegation); and
- the individual is not paid to achieve a result.

Superannuation Guarantee Regulations

The Superannuation Guarantee (Administration) Amendment Regulations 2009 (No 1) were registered on the Federal Register of Legislative Instruments on 25 June 2009. The Regulations amend the Superannuation Guarantee (Administration) Regulations 1993 (SGA Regulations) to clarify that employers are not required to provide superannuation guarantee contributions for paid parental leave payments that are paid to employees on or after 1 July 2009. This is achieved by inserting new reg 7AD into the SGA Regulations.

The Regulations exclude all payments for paid parental leave, whether under current awards or agreements, or under any statutory paid parental leave scheme. Parental leave includes maternity leave, early paid leave relating to an inability to be transferred to a safe job, paternity leave and other leave taken by partners at the time of birth or adoption, pre-adoption leave and adoption leave.

The Regulations also exclude ancillary leave payments. These include payments received for service with the Defence Force Reserves, and payments for eligible community service activity.

The term 'eligible community service' is defined in s 109 of the *Fair Work Act 2009* (FWA). Eligible community service activities include:

- jury service (including attendance for jury selection); and
- a voluntary emergency management activity.

The definition of 'a voluntary emergency management activity' is contained in s 109(2) of the FWA.

(Note that the FWA came into effect on 1 July 2009.)

Technically, the Regulations operate by removing these payments from the definition of 'salary or wages' rather than directly from ordinary time earnings (OTE).

Date of effect

The Regulations commenced on 1 July 2009.

Note that the 1 July 2009 commencement date of the Regulations coincides with the date of effect of Superannuation Guarantee Ruling SGR 2009/2. This ruling explains the Commissioner's view on the meaning of OTE and 'salary or wages' as defined in ss 6(1) and 11 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA), respectively. The Regulations do not affect an employee's rights in respect of any superannuation guarantee shortfall which arose prior to 1 July 2009.

Superannuation-related Taxpayer Alert

The Tax Office has released Taxpayer Alert TA 2009/16 in which it warns self-managed superannuation fund (SMSF) trustees about people offering to set up agreements between funds and related parties to purchase assets, particularly properties.

The alert describes an arrangement where an SMSF enters into an agreement (sometimes referred to as a joint venture agreement) with a related trust to acquire assets, such as rental property, in order to obtain certain taxation and superannuation benefits.

The Tax Office warns SMSF trustees that such an arrangement may breach the in-house asset rules contained in Pt 8 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). It is also a concern that the restriction under s 66 of the SIS Act on SMSFs intentionally acquiring assets from a related party and the sole purpose test under s 62 of the SIS Act may be breached.

The taxation issues of concern to the Tax Office include whether:

- income derived by the SMSF under the agreement may be 'non-arm's length income' for the purposes of s 295-550 of ITAA 1997 and therefore is subject to a higher rate of tax;
- the borrowing expense incurred by the individual taxpayer or the trust may be deductible under s 8-1 or s 25-25 of ITAA 1997, and the extent to which it is deductible;
- any CGT consequences may arise (eg when trust interests are redeemed, new interests are issued or upon the disposal of the property);

- Pt IVA of ITAA 1936 may apply to the arrangement;
- any fee or commission received by the organiser/s of this arrangement should be included as assessable income for the relevant income year; and
- any entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purposes of Div 290 of Sch 1 to the *Taxation Administration Act 1953*.

Legal status of a superannuation-related Taxpayer Alert

A Taxpayer Alert is only intended to be an ‘early warning’ of a tax planning arrangement that the Tax Office has under risk assessment. However, it is expected that a ruling or determination will be issued by the Tax Office following the release of the alert.

Taxpayers who have entered into, or are contemplating entering into, an arrangement similar to that described in an alert may contact the Tax Office to seek guidance in relation to the superannuation regulatory issues covered in the alert.

Data Matching Program

The Tax Office has announced that it will conduct an ongoing share market transaction CGT project.

The Tax Office will seek agreement from the following organisations to provide data in accordance with an agreed delivery program:

- ASX Limited;
- Computershare Limited;
- Link Market Services Limited; and
- Registries Limited.

The Tax Office says that the aim of this project is to systematically develop an understanding of the share market and to confirm that entities are complying with their tax obligations. It also says that while income tax obligations are the primary focus, issues around GST will also be considered.

Other issues that the proposed program will consider include:

- assessing the correctness of lodged income tax returns in relation to capital gains and income from the disposal/sale of shares;
- ensuring entities that should be registered for GST are registered;
- increasing taxpayers’ and tax agents’ understanding and awareness of their compliance obligations; and
- identifying income tax returns that should have been lodged to have tax assessed on capital gains or income from share transactions.

Superannuation Rates and Thresholds

The Tax Office has announced the following superannuation rates and thresholds for 2009/10:

- *superannuation guarantee maximum contribution base* — \$40,170 for each quarterly contribution period (up from \$38,180 for 2008/09). An employer does not need to provide the minimum 9% superannuation guarantee support for an employee’s ordinary time earnings above this limit.
- *genuine redundancy payment or approved early retirement scheme payment tax free amount* — Fixed component — \$7,732 (up from \$7,350 for 2008/09); years of service factor — \$3,867 (up from \$3,676 for 2008/09).
- *superannuation co-contribution income thresholds* — The lower total income threshold to qualify for the maximum co-contribution is \$31,920 (up from \$30,342 for 2008/09). The higher income threshold where the co-contribution completely phases out is \$61,920 (up from \$60,342 for 2008/09).

Rates and Thresholds for 2009/10

The Tax Office has also released various other rates for the 2009/10 income year. These rates include:

- CGT improvement threshold;
- car depreciation limit;
- travel and overtime allowance; and
- Division 7A interest rate.

CGT Improvement Threshold

The Tax Office has released Taxation Determination TD 2009/12, in which it states the CGT improvement threshold for the 2009/10 income year (under s 108-85 of ITAA 1997) is \$124,258.

Improvements to pre-CGT assets

Where a pre-CGT asset has had an improvement of a capital nature made to it after 19 September 1985, that improvement may be treated as a post-CGT asset if:

- the cost base of the improvement would exceed the improvement threshold for the relevant income year; and
- the amount of the cost base of the improvement exceeds 5% of the capital proceeds from the disposal of the asset to which the improvement was made.

Car depreciation limit

The Tax Office has also released Taxation Determination TD 2009/13, in which it states the car depreciation limit for the 2009/10 income year. The limit is \$57,180 (the same as the previous year).

In addition, the Tax Office has released Luxury Car Tax Determination LCTD 2009/1, in which it states the luxury car threshold for the 2009/10 income year is \$57,180. The determination also states that the fuel efficient car limit for the 2009/10 income year is \$75,000.

Travel and overtime allowance

In Taxation Determination TD 2009/15, the Tax Office sets out the amounts that the Commissioner considers are reasonable for the substantiation exception in Subdiv 900-B of ITAA 1997 for the 2009/10 income year in relation to claims made for:

- overtime meal allowance expenses;
- domestic travel allowance expenses;
- travel allowance expenses for employee truck drivers; and
- overseas travel allowance expenses.

Overtime meal allowance expenses

The reasonable amount for overtime meal allowance expenses for the 2009/10 income year is \$24.95 (\$23.60 for 2008/09).

For the substantiation exception to apply, the meal allowance must be a bona fide meal allowance paid or payable under a law of the Commonwealth or of a state or territory, or an award, order, determination or industrial agreement in force under such a law.

The term 'bona fide meal allowance' is defined in TR 2004/6 as an amount that could reasonably be expected to provide for the costs of food and drink in connection with overtime worked. The amount of the overtime meal allowance must relate to the purpose for which it is said to be paid. A token amount paid without regard to likely expenses is not a bona fide overtime meal allowance.

Domestic travel allowance expenses

The ruling states the reasonable amounts for:

- accommodation at daily rates (for domestic travel only);
- meals (showing breakfast, lunch and dinner); and
- deductible expenses incidental to travel.

The applicable reasonable amount will depend on an employee's annual salary.

The reasonable amounts for meals only apply to meals that would normally be eaten within the time of day from the commencement of travel to the end of travel covered by the allowance.

The incidental expenses reasonable amount applies in full to each day of travel covered by an allowance, without the need to apportion for any part-day travel on the first and last day.

Travel allowance expenses for employee truck drivers

The reasonable travel allowance amount for employee truck drivers for the 2009/10 will depend on a driver's annual salary:

| Salary range | Food and drink | | |
|---------------------|-----------------------|------------------|-------------------|
| \$93,600 and below | Breakfast \$19.95 | Lunch \$22.80 | Dinner \$39.30 |
| | \$82.05 per day | | |
| \$93,601 and above | Breakfast \$22.30 | Lunch \$22.80 | Dinner \$44.40 |
| | \$89.50 per day | | |

Division 7A benchmark interest rate

The Tax Office has also released Taxation Determination TD 2009/16, in which it states the benchmark interest rate for the purposes of the deemed dividend provisions of Div 7A of ITAA 1936 for the 2009/10 income year. The benchmark interest rate is 5.75% (9.45% for 2008/09).

GIC and SIC Rates

The Tax Office has released the general interest charge (GIC) and shortfall interest charge (SIC) rates for the first quarter of the 2009/10 income year (ie 1 July 2009 to 30 September 2009). The rates are:

| Rate | Annual (%) | Daily (%) |
|-------------|-------------------|------------------|
| GIC | 10.13 | 0.02775342 |
| SIC | 6.13 | 0.01679452 |

At the time of publication, the Tax Office has not released the interest rate for overpayments, early payments and delays in refunds for the first quarter of the 2009/10 income year. However, Thomson Reuters has calculated the applicable interest rate to be 3.13%. Generally, the rate is 7% less than the prevailing GIC percentage rate for a quarter.

Tax Practice Update

Status of New Legislation

The following Acts have been enacted after the associated Bills received Royal Assent:

| Act | Date of Royal Assent | Amendments |
|--|----------------------|---|
| <i>Tax Laws Amendment (2009 Budget Measures No 1) Act 2009</i> | 29 June 2009 | <ul style="list-style-type: none"> ● reduces the concessional superannuation contributions cap from the 2009/10 financial year; ● temporarily reduces the matching rate and maximum co-contribution for the 2009/10, 2010/11, 2011/12, 2012/13 and 2013/14 income years; and ● amends s 23AG of ITAA 1936 to limit its scope to foreign employment income derived by Australian resident individuals |
| <i>Tax Laws Amendment (2009 Measures No 3) Act 2009</i> | 24 June 2009 | <ul style="list-style-type: none"> ● sets the GDP adjustment for the 2009/10 income year at 2%; and ● allows taxpayers who: <ul style="list-style-type: none"> — are voluntarily registered for GST; — choose to remit GST annually; and — satisfy the other eligibility tests for annual PAYG instalments, to choose to make their PAYG instalments annually |
| <i>Tax Laws Amendment (2009 Measures No 2) Act 2009</i> | 23 June 2009 | <ul style="list-style-type: none"> ● increases access to the small business CGT concessions for owners of a CGT asset that is used in a business by an affiliate or a connected entity and ‘for partners owning a CGT asset used in the partnership business’; ● provides a general exemption from CGT for capital gains arising from a right or entitlement to a tax offset, deduction or similar benefit; ● application of the income tax law to financial claims scheme entitlements; ● provides a refundable tax offset in relation to certain projects approved under the National Urban Water and Desalination Plan for the period between and including income years 2008/09 and 2012/13; ● amends the Australian Business Register; ● exempts grants to businesses affected by Victorian bushfires from income tax; ● updates the deductible gift recipients |

| Act | Date of Royal Assent | Amendments |
|--|----------------------|---|
| | | (DGRs) list to include four new entities, and extends the DGR status of three organisations; and <ul style="list-style-type: none"> removes the requirement to be registered for the Greenhouse Challenge Plus Programme to benefit from the fuel tax credits scheme |
| <i>Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Act 2009</i> | 23 June 2009 | <ul style="list-style-type: none"> increases the Medicare levy and Medicare levy surcharge low-income thresholds for 2008/09 and later income years |

SATO and Pensioner Tax Offset thresholds for 2008/09

Senior Australians (including self-funded retirees) may qualify for the Senior Australians Tax Offset (SATO) if they satisfy the relevant age, income and eligibility requirements for an age or service pension.

According to the Tax Office, the maximum SATO amounts and thresholds for 2008/09 are set out in the table below:

| Description | Maximum tax offset (\$) ¹ | Lower taxable income threshold ² (\$) | Upper taxable income threshold (\$) |
|---|--------------------------------------|--|-------------------------------------|
| Single | 2,230 | 28,867 | 46,707 |
| Couple — each ³ | 1,602 | 24,680 | 37,496 |
| Couple — illness separated ⁴ | 2,040 | 27,600 | 43,920 |

1. The lower income threshold already takes account of the combined application of the low-income tax offset to ensure that a senior Australian with a taxable income up to the lower SATO threshold does not pay income tax.
2. The offset entitlement reduces by 12.5 cents for each dollar of taxable income in excess of the lower threshold.
3. For the purposes of the SATO, the couple's combined income must be below \$74,992.
4. For the purposes of the SATO, the couple's combined income must be below \$87,840.

A taxpayer may be entitled to the pensioner tax offset if his or her assessable income includes an Australian Government pension or allowance.

Although the Tax Office has not officially released the offset amounts and thresholds for 2008/09, Thomson Reuters has calculated the relevant amounts, as set out in the table below:

| Description | Maximum tax offset (\$) ¹ | Lower taxable income threshold (\$) | Upper taxable income threshold (\$) |
|----------------------------|--------------------------------------|-------------------------------------|-------------------------------------|
| Single | 2,240 | 20,934 | 38,854 |
| Couple — each | 1,699 | 17,327 | 30,919 |
| Couple — illness separated | 2,086 | 19,907 | 36,595 |

1. Offset entitlement reduces by 12.5 cents for each dollar of taxable income in excess of the lower threshold.

At the time of publication, the Tax Office has not confirmed the pensioner tax offset rates for 2008/09.

Specific Advice for SMSFs

At the 2009 South Australia State Conference of the Taxation Institute of Australia , an Assistant Deputy Commissioner of Taxation (Mr Ian Read) said that trustees who are concerned about the particular circumstances of their SMSFs are able to obtain non-binding written advice about how the *Superannuation Industry (Supervision) Act 1993* (SIS Act) applies to their situation.

Mr Read said that advice may be given in relation to an SMSF's unique circumstances, similar to a private ruling. Alternatively, the advice may be given in relation to a particular product, which will be similar to a product ruling, although focused on the application of the SIS Act. He also said that the Tax Office is currently working with APRA to ensure that the scope and application of the advice is clearly defined.

The Assistant Deputy Commissioner said advice will not be legally binding and will not have the same review rights as a private tax ruling. However, the advice will provide guidance and a good level of practical certainty. In addition, the advice will be taken into account in event of a dispute between an SMSF and the Tax Office.

According to Mr Read, two application forms will be available:

- Request for self-managed superannuation fund specific advice (fund specific); and
- Request for self-managed superannuation fund product advice (product specific).

Mr Read said that the forms were expected to be available from June 2009. However, at the time of publication, the Tax Office has not released the forms or provided further information.

NSW Payroll Tax threshold

The NSW Commissioner of State Revenue has declared the NSW payroll tax threshold amount for the 2009/10 financial year is \$638,000. The payroll tax rate remains at 5.75% for the period 1 July 2009 to 31 December 2009. The rate will decrease to 5.65% for the calendar year commencing 1 January 2010.

Note that the payroll tax rate is adjusted on a calendar year basis whereas the payroll tax threshold amount is adjusted on a financial year basis.

Businesses operating in other states

Businesses paying payroll tax in NSW and other states will have their threshold entitlement reduced proportionately to the ratio of their total taxable NSW wages to their total taxable interstate wages. That is, a business will not be entitled to the full NSW payroll tax threshold amount of \$638,000 for the 2009/10 financial year.

Businesses commencing or closing during financial year

Businesses commencing or closing operations within a financial year are not eligible for the full payroll tax threshold amount. The threshold will be proportioned over the number of days a business operates.