

After returning rejuvenated from our Christmas/New Year holidays, now is the ideal time to come and talk to us about your financial situation, both personal and business. Let us help you put strategies in place to improve your financial position and achieve your financial goals.

Jan/Feb 2010 Case Update

Capital losses & continuity of trust

Clark v Commissioner of Taxation [2009] FCA 1401

Husband and wife taxpayers have been successful before the Federal Court in arguing that the net capital gain arising out of a disposal of properties by the trust could be reduced by previously unapplied net capital losses.

The Commissioner argued that the capital gains could not be reduced by the carried forward net capital losses because there was discontinuity in the trust estate.

The Court said that neither the ITAA 1936 nor the TAA 1997 require a continuity in the trust estate, the structure of the trust or in the rights, duties and obligations arising under the trust instrument, in the year of the net capital gain and the income year of the net capital loss. It noted that there are no similar provisions as to the continuity of ownership and business comparable with those governing companies.

The Court rejected that a discontinuity had occurred because of the change in the interests of the unit holders in the trust. It said when comparing the trust estate in the income year of the capital loss with the trust estate in the income year of the capital gain, the interests of the holders of the issued units were the same even though the ownership of the units had changed.

Also, after examining the clauses in the trust deed, the Court was satisfied that a change in trustee was not inconsistent with the continuity

of the trust or trust estate. In doing so, the Court rejected the Commissioner's submission that the appointment of the current trustee effected a change in the individuals who controlled the discretionary power of application of the net income of the trust fund. The Court said a change in control in the exercise of the powers conferred on the trustee by the deed logically flows from a change of trustee.

Self education expenses

Appeal: Commissioner of Taxation v Anstis [2009] FCAFC 154

The Commissioner has applied for special leave to appeal to the High Court against the decision of the Full Federal Court which upheld the Federal Court decision in *Anstis v FCT [2009] FCA 286* to allow a deduction under s.8-1 for self education expenses incurred by a taxpayer whilst undertaking a university degree as an outgoing incurred in gaining assessable Youth Allowance.

In so doing, the Full Court dismissed the Commissioner's appeal against the Federal Court decision. The Full Court held that the taxpayer was paid to undertake the course in which she was enrolled on the condition that she did so in a particular manner, and to a particular standard, to satisfy the Social Security Secretary that she was making satisfactory progress towards completing the course.

In the court's view, there was nothing in the evidence to suggest that any part of the expenditure claimed was incurred prior to, or as a condition of, enrolment so as to lack a nexus with income.

GST and sale of vacant land

Vidler v FCT [2009] FCA 1426

The Federal Court has affirmed that the sale of vacant land is a taxable supply despite a taxpayer receiving zoning permission from a council classifying the land for residential use. This was because the land lacked the “element of shelter and basic living facilities such as provided by a bedroom and bathroom” to be considered residential premises.

- The Commissioner’s established view is that vacant land cannot constitute residential premises.
- Generally, the sale of residential premises is input taxed to the extent the premises are used predominately for residential accommodation.

OTHER DEVELOPMENTS:

GIC and SIC Rates Released

The Tax Office has released the general interest charge(GIC) and shortfall interest charge(SIC) rates for the third quarter of the 2009/10 income year (i.e. 1 January 2010 to 31 March 2010):

Rate	Annual (%)	Daily (%)
GIC	10.95	0.03
SIC	6.95	0.01904110

The Tax Office has also released the interest rate for overpayments, early payments and delays in refund for the third quarter of the 2009/10 income year. The applicable interest rate is 3.95%.

Meeting Minimum Pension Payments

Superannuation guidance: NTLG Superannuation Sub-group meeting – Meeting minimum pension payments

If a fund trustee fails to physically pay sufficient pension payments to meet the minimum pension obligations under SIS Regulation 1.06, is it acceptable for the fund to accrue the shortfall in its financial statements and ensure that this additional amount is paid in the following year?

While this has always been a potential problem for funds, resulting in a breach of the requisite subsection of Superannuation Industry (Supervision) Regulations 1994 (SISR) 1.06, the new provisions of TAA 1997 make the issue a more significant one. In particular, failure to pay the minimum pension jeopardizes the fund’s ability to claim exempt current pension income as this is only available to funds paying pensions that meet requisite SIS provisions.

According to the Tax Office, ‘there is no scope within sub-regulation 1.06(9A) of the SISR whereby the definition of a pension would be met if a pension payment was made in the following year. The definition of a pension will only be satisfied where the total payments in any year meets the SISR standards.’

Ref: NTLG Superannuation Technical Sub-group minutes – 8 September 2009

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