



BDJ NEWS



Barnes Dowell James
Chartered Accountants and Business Advisers

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TAX NEWS, VIEWS & CLUES

PERSONAL SERVICES INCOME

In a recent case, the Administrative Appeals Tribunal (AAT) has found that an IT consulting services company did not satisfy the 'personal services business' test and, as such, the company's income was assessable income for each of the individual contractors.

The taxpayer established a company to provide IT consulting services and technicians. The company's four technicians were contracted to external entities to work on a full-time basis. For the income years ended 30 June 2002 and 30 June 2003, the company derived total fee income of almost \$1 million.

As the result of an audit in 2004, the Tax Office declared that the company was not a personal services business, as it did not pass any of the personal services business tests. The Tax Office subsequently reassessed the company's fee income for each of the company's four technicians.

The personal services income (PSI) tests are designed to prevent individuals from alienating income generated from personal services through another entity.

In order to be outside the PSI measures, a company can satisfy certain tests as outlined below:

results test
a contract is measured by an outcome or product and the contractor is liable to rectify any problems; or

no more than 80% of the business income is derived from a single source and you satisfy one of the following:

unrelated clients test
you derive income from two or more unrelated clients and advertise available services; or

employment test
you engage an individual(s) to perform 20% or more of the principal work; or

business premises test
you exclusively use business premises that are physically separate from your home, or from the premises of the person for whom you are working.

The AAT held that the relevant service contracts did not pass the results test as they were more in line with employment contracts, as each technician was paid an hourly rate and there was no contracted result or outcome.

None of the remaining three tests could be satisfied as each consultant derived 100% of their income from one source, thus not satisfying the 80% requirement. Consequently, the AAT affirmed the Tax Office's amended assessments and the taxpayer's appeal was dismissed.



The Partners and Staff at Barnes Dowell James would like to wish everyone a happy and safe christmas.

our office will close on 23 December, 2005 and reopen on 3 January, 2006.



FINANCIAL PLANNING

Mel James, Partner and Bob Kolevski, Manager are Authorised Representatives for Professional Investment Services Pty Ltd Australian Financial Services Licence No. 234951 A.B.N. 11 074 608 558. For an independent review of your savings, retirement and asset protection strategies, please contact either Mel or Bob.

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CAR PARKING EXPENSES

Generally, individual taxpayers are not entitled to a tax deduction for car parking expenses incurred while at their primary place of employment.

However, a recent interpretative decision provides that where a taxpayer travels from an unrelated place of employment to their primary place of employment and incurs a car parking expense, the expense will be an allowable deduction.

'TAX ADVICE' DEDUCTION DENIED

In a recent case, the federal court held that a taxpayer was not entitled to a deduction of \$49,550 for tax advice provided by a solicitor in establishing a superannuation fund.

In December 1998, the taxpayer was advised by his accountant that he could make a contribution to a non-complying superannuation fund and claim a tax deduction for that contribution.

A solicitor was engaged to set up the superannuation fund and prepare the associated documents.

The taxpayer and the solicitor agreed that the superannuation fund would be set up for \$450 and that his total charge would be 10% of the \$500,000 contribution made by the taxpayer to the superannuation fund (a balance of \$49,550).

However, the taxpayer was ultimately unable to claim a deduction for the \$500,000 contribution following decisions in subsequent tax cases. Nevertheless, the taxpayer claimed a deduction for the \$49,550 paid to the solicitor for tax advice provided.

The AAT denied the deduction on the grounds that no tax advice had been provided.

The federal court concluded that the solicitor was a recognised tax adviser and had in fact provided tax advice to the taxpayer when implementing the recommended structure.

However, no deduction could ultimately be granted as the taxpayer failed to produce evidence of what proportion of the fee directly related to tax advice, as opposed to other services.

CAUTION: Taxpayers should take care to thoroughly apportion expenses incurred where amounts are only partly deductible.

LODGMET RESPONSIBILITY

In a recent interpretative decision, the Tax Office has stated that an appointed liquidator is the entity responsible for lodging a company's income tax return when it has control of the tax and financial records of the company.

A liquidator is responsible for the income tax requirements and liabilities of a company from their time of appointment.

For further clarification, Taxation Determination TD 94/68 outlines where the responsibility lies in situations where a receiver and/or an administrator has also been appointed to the company.



DEFENDING AGAINST A TAKEOVER

In a recent interpretative decision, the Tax Office has confirmed that capital expenditure incurred by a taxpayer in defending their business against a possible takeover qualifies as expenditure that is deductible over time, even if the takeover does not eventuate.

The target company incurred capital expenditure by evaluating a takeover proposal, including legal fees, valuation costs and shareholder notification expenses. The proposal was ultimately unsuccessful.

Capital expenditure incurred by a taxpayer in defending their business against a possible takeover is deductible over time where the target company carries on a business for a taxable purpose.

CAUTION: Expenditure of this type can be deducted over five years, including the year in which it is incurred. Similar types of capital expenditure that qualify for a deduction over five years include setting up a business structure, changing a business structure and certain equity-raising activities.

GST - GUARANTEES AND INDEMNITIES

The Tax Office recently released a draft GST ruling in relation to guarantees and indemnities, explaining what is a guarantee and what is an indemnity, and the treatment of these for GST purposes (they are both input taxed financial supplies).

Further, the draft ruling (which may only be used as guidance) explains the following arrangements and their GST treatment:



warranties for goods, contracts of insurance and contracts of reinsurance (not financial supplies); and

surety bonds that are guarantees, reinsurance of surety bonds, indemnities that are not contracts of insurance and performance bonds (financial supplies).

The above supplies are often made within a business environment. For example, an entity (the guarantor) may agree to make good the obligation of a debtor to a creditor if the debtor defaults. This is a guarantee for GST purposes and involves a financial supply.

Although the above terms are included in the GST legislation, they are not defined and an explanation of these did not previously exist.

GST: GOING CONCERN CLAUSES

The GST Act provides that the supply of a going concern is GST-free. The seller of the business does not have to account for GST on the sale and the buyer does not have to fund the GST component. Further, as stamp duty usually applies to the GST-inclusive sale price, the stamp duty liability is reduced.

In a recent case, the seller of commercial property (subject to a lease) was required by the Tax Office to account for GST on the sale. Although the buyer and seller were registered for GST, the contract signed between the parties did not state that the parties had agreed that the sale was the supply of a going concern. The GST Act requires that both parties must 'agree in writing' that a supply is a going concern. The absence of such a clause resulted

in the seller having to account for GST on the sale. Consequently, the seller had to remit GST to the Tax Office and was not in a position to recover this cost from the purchaser, as the contract did not contain any 'GST recovery' clauses.

The case highlights the importance of considering and documenting GST implications when negotiating a sale price, so that the exemption will apply. Parties to a contract should not presume that oral communications, intentions and post-contractual actions will make up for the absence of an agreement in writing.

TIP: In order to ensure that the seller isn't left with a GST liability, it is vital that the taxpayer negotiating a sale of a going concern ensures that the agreement is in writing.

SUPERANNUATION CONTRIBUTION SPLITTING

In October 2005 the Federal Government released draft regulations which will see the introduction of superannuation contribution splitting from 1 January 2006.

The new regulations, once introduced, will allow people to split up to 100% of superannuation contributions made on or after 1 January 2006, with their spouse. Contributions that can be split include employer contributions (super guarantee contributions and salary sacrificed contributions), personal contributions (both undeducted and deductible contributions), and spouse contributions. As the name implies, the splitting regime only applies to superannuation contributions made in a financial year and not to previously accrued superannuation account balances.

Contributions may be split with a spouse (including a de-facto, but not including same-sex partners) provided the spouse receiving the contribution split is not retired, permanently incapacitated, or over 65 years of age.

The contribution splitting model adopted by the Government involves an "annual split". That is, after the end of the financial year a person wishing to split all or part of their contributions made during the previous financial year* will need to advise their super fund of their wish to split. To effect a contribution split, superannuation fund members will need to approach their own particular superannuation fund and request a split be made. It is not mandatory the superannuation fund trustees agree to a contribution split so it would be advisable to check with your superannuation fund prior to making contributions that are intended to be split.

Where you operate your own self managed superannuation fund, it is likely that the fund's trust deed will need to be updated before a contribution split can be effected.

Once the relevant legislation is gazetted, contribution splitting will enable many couples to build up superannuation in both partners names which, in turn, will lead to tax effective structuring of income streams in retirement.

Given the complexities of superannuation contribution splitting, people considering using this are encouraged to get appropriate advice from a qualified financial planner prior to acting.

* Between 1 January 2006 and 30 June 2006 for the 2005/06 financial year.

Source: Peter Kelly – Professional Investment Services



ARE YOU OVER 55 AND STILL WORKING???
 Want to know how to increase the amount of super you will have in retirement without changing your current net income level or the riskiness of your investments?

Well we have the solution...
 And no, this is not a gimmick (nor are there any free steak knives).

You may think this sounds too good to be true but it's the real deal. In fact it's law.

Over the past year or so the Government has introduced a number of initiatives aimed at maintaining workforce participation and promoting self-funding in retirement with the hope of lessening demand for Age Pension benefits – a real problem for Government and one that's worsening with our ageing population.

Historically, to access your super benefits you needed to retire after the age of 55. However, recent changes to super law allow anyone aged 55 or over to access a non-commutable pension from their super while still working.

The change allows you to replace salaried income – taxed at marginal tax rates – with a more tax-effective pension income drawn from your super. This replaced salaried income can then be salary sacrificed back to superannuation - dramatically increasing your total benefits in retirement.

For more information or to determine your eligibility for this fantastic new opportunity, contact us today.

SETTLEMENT WAS TAXABLE ETP

In a recent decision, the AAT has found that a payment made to a taxpayer by his former employer was an eligible termination payment (ETP) as the payment resulted from the termination of the taxpayer's employment.

The taxpayer had entered into a deed of release with his former employer, and received a \$3.1 million termination payment in relation to continual hurt and abuse suffered during the period of his employment. The Tax Office held that this amount was assessable income.

The taxpayer argued that despite the wording of the deed, the payment was not made as a result of his termination, but rather as compensation for the hurt and humiliation caused by the former employer. The taxpayer argued that the amount was a capital payment, not an ETP, and was not assessable income.

The AAT held that the hurt and humiliation described did not meet the definition of 'personal injury' required to exclude the amount from the ETP definition.

In addition, the AAT rejected the taxpayer's appeal on the basis that the purpose of the payment was to secure the taxpayer's resignation. Consequently the payment was considered to be a taxable ETP.

MORTGAGEPORT
 We would like to remind clients that we are able to provide competitive residential mortgages via our alliance with Mortgageport.
 Our firm works with Mortgageport in providing fully featured mortgage products, that are structured to reduce the after tax cost of debt. We are in many cases able to process your application from our office ensuring quick responses to all inquiries.
 This service has been a great benefit to many of our clients already and we encourage all clients to call for more information.

Barnes Dowell James Chartered Accountants and Business Advisers
 specialising in business services, tax, audit and wealth creation.

Level 13 122 Arthur Street NORTH SYDNEY NSW 2060	Partners:	CH Barnes	FCA
		AJ Dowell	CA
Level 5, 22 Central Avenue Manly National Building MANLY NSW 2095		M W James	CA
	Associates:	MANakkan	CA
Correspondence: PO Box 1664 NORTH SYDNEY NSW 2059		Professional Investment Services Pty Ltd Australian Financial Services Licence No. 234951	
Phone: 61 2 9956 8500 Fax: 61 2 9929 7428 Email: bdj@bdj.com.au Website: www.bdj.com.au		Authorised Representatives Mel James Bob Kolevski	

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