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Welcome to the March edition of our newsletter. This month we have set out ATO rulings which may be pertinent for small-medium business or in the case of the deductible gifts or donations, those you may wish to consider prior to 30th June this year. Should you wish to discuss any of the areas in our newsletter further, please do not hesitate to contact our office.

March 2010 Case Update

Deductions for Misappropriation of Money

Lean v FCT [2010] FCAFC 1

In a recent case, the Full Federal Court dismissed a taxpayer's appeal against the denial of his claimed deduction of $2.3 million for money misappropriated by his investment manager.

The taxpayer sold a parcel of shares and transferred the proceeds to the manager. However, the funds were misappropriated by the manager.

In his 2002 tax return, the taxpayer included a net capital gain of $2.3 million from the sale of the shares. However, he also claimed a deduction for the misappropriation, which was disallowed.

The court confirmed the Federal Court decision that the act of the taxpayer applying money towards expenses or investment was sufficient to break any necessary connection between money included in assessable income and any subsequent misappropriation.

Accordingly, the Full Court said the money that was misappropriated from the bank account in the name of the taxpayer was not the money that had been included in the assessable income of the taxpayer. Therefore, the primary judge did not err in concluding that the taxpayer was not entitled to a deduction under s 25-45 for the money that was misappropriated.

Deductions for losses by theft

Under s 25-45 of ITAA 1997, a loss incurred by a taxpayer is deductible in the income year in which the loss is discovered if:

- the loss was through theft, embezzlement, larceny, defalcation or misappropriation of money by an employee or agent (other than a person employed solely for private purposes); and
- the money was included in the taxpayer's assessable income for the income year, or for an earlier income year.

- ***TIP:*** *A loss need not occur in the same income year as that in which the income is derived.*

- ***TIP:*** *Where a loss was a result of theft by a person other than an employee or agent, a deduction for the loss may be available under s 8-1 of ITAA 1997: see ATO ID 2001/318.*

March 2010 Rulings Update

Value of Goods taken from Stock for Private Use

In Taxation Determination TD 2009/22, the Tax Office states the amounts that the Commissioner will accept for the 2009/10 income year as estimates of the value of goods taken from trading for private use by taxpayers in certain specified industries.

The determination should be read in conjunction with Taxation Ruling IT 2659. In IT 2659, the Tax Office notes that a greater or lesser value may be appropriate in certain cases. It says where the actual amount is lower than prescribed for an income year the lower amount should be used. Conversely, where the actual amount is greater, the actual amount should be used.

It is important to note that taxpayers should be able to demonstrate that the value attributed to goods taken from stock for private use is fair and reasonable. Therefore, taxpayers should always have regard to their own circumstances when determining the appropriate value.

The amounts (which exclude GST) for the 2009/10 income year are:

Type of business	Adult/Child over 16 years[1] ($)	Child 4–16 years[1] ($)
Bakery	1,130	565
Butcher	760	380
Restaurant/café (licensed)	3,860	1,540
Restaurant/café (unlicensed)	3,080	1,540
Caterer	3,330	1,665
Delicatessen	3,080	1,540
Fruiterer/greengrocer	810	405
Takeaway food shop	2,920	1,460
Mixed business (includes milk bar, general store and convenience store)	3,680	1,840

1. The amounts are per adult or per child.

Other Developments:

Haiti and Deductible Gift Recipients

Reminders have been made to ensure those wanting to make any financial donations to the Haiti relief ensure that they make a contribution to a Deductible Gift Recipient (DGR) if they wish to also claim a tax deduction for these amounts.

R&D Tax Offset Abuse

The Tax Office has issued a Taxpayer Alert warning taxpayers to be cautious of investment schemes that abuse the research and development (R&D) tax offset.

The Tax Office says the schemes involve a company structuring contracts with a registered research agency (RRA) to take advantage of the prepayment concessions in the tax laws.

The Tax Office is concerned the schemes may give rise to various taxation issues, including whether:

- the prepayments rules will apply;
- the expenditure has been incurred; and
- the company and the RRA are dealing with each other at arm's length.

Deductions and Refinancing Home Loans

The Tax Office has also issued a Taxpayer Alert in which it alerts taxpayers about sham arrangements being promoted as 'mortgage management plans'.

The arrangements involve homeowners refinancing their home loans and establishing investment loans to fund the purchase of shares in bogus companies. Homeowners then claim tax deductions for interest incurred on the loans.

The Tax Office says the arrangements may give rise to various taxation issues, including whether:

- the general anti-avoidance provisions may apply to the arrangements; and
- any interest incurred on the investment loans is deductible.

Superannuation Funds and Illegal Early Release

New steps to prevent the rollover of funds to self-managed superannuation funds (SMSFs) created for the purpose of illegal early release of benefits have been implemented by the Tax Office.

The steps are being implemented in two stages.

The first stage commenced in January 2010 and introduced improvements to the SMSF registration process to help prevent non-legitimate SMSFs from being displayed on the Super Fund Lookup (SFLU) web page.

As a result of improvements to the registration process, trustees of SMSFs should be aware that:

- a new SMSF application will take seven days to be assessed by the Tax Office and to appear on the SFLU; and
- a superannuation fund will not process a rollover request by an SMSF unless the SMSF is listed on the SFLU.

Payment from Transition to Retirement Pensions

The Tax Office has also stated its view on whether a member of an SMSF with a transition to retirement account based pension, where the entire balance of the pension is preserved money, can make an election such that a payment from the pension is taxed as a superannuation lump sum rather than a superannuation income stream benefit.

The Tax Office says an election can be made to tax a payment as a superannuation lump sum if the pension is commuted, where the necessary conditions are satisfied.

TIP: *The tax treatment of a superannuation lump sum and a superannuation income stream benefit is different. Generally, less tax is paid on lump sums than income payments.*

Reference: NTGL Superannuation Technical Sub-Group minutes for 24 November 2009.