veale partners
accountants & advisers

269 Centre Road
Bentleigh Victoria 3204
PO Box 354
Bentleigh Victoria 3204
T: 03 9557 9200
F: 03 9557 9400
info@vealepartners.com.au
www.vealepartners.com.au
ABN 92 771 069 548

Welcome to our November 2009 client newsletter. With the 'hoo-ha and hulabaloo' of the global financial crisis behind us, we come close to the conclusion of the calendar year with greater hope and optimism.

November 2009 Case Update

Residency of Superannuation Funds

CBNP Superannuation Fund and Commissioner of Taxation [2009] AATA 709

A superannuation fund was made non-complying as it failed the residency test in s.6E(1) of the ITAA 1936. The sole member (and controller of the super fund) left Australia to go to New Zealand during the 2001 income tax year, and the fund was made non-complying after an ATO investigation into a reported in-house asset breach highlighted the fact that the central management and control of the fund was no longer in Australia (and the 'two year' rule could not be relied upon).

Two year Rule: Section 295-95(4) of ITAA 1997 provides a 'safe harbour rule' where the central management and control (CM&C) of a fund is temporarily outside of Australia. That is, the funds CM&C will be considered to be ordinarily in Australia provided the absence is not more that two years. Also in Taxation Ruling TR 2008/9, the Commissioner says that the CM&C of the fund can still be outside Australia for a period of more than two years and still satisfy the CM&C test provided that the fund satisfies the 'ordinarily' requirement in s.295-95(2)(b) and the absence is 'temporary'.

The Administrative Appeals Tribunal (AAT) has affirmed the Commissioner's decision to issue a non-compliance notice. The Tribunal was not satisfied the SMSF was a 'resident superannuation fund' for the year ended 30th June 2004. It found that the CM&C test was not fulfilled because the member was outside Australia for more than two years. Therefore, in the Tribunal's view, the SMSF was not a resident regulated superannuation fund at all times for the income year ended 30th June 2004. Accordingly, the Tribunal held that the SMSF was not a complying superannuation fund for that income year.

Super Guarantee Employees

Roy Morgan Research Pty Ltd and Commissioner of Taxation [2009] AATA 702

The AAT has upheld a Taxation Office Superannuation Guarantee default assessment after finding that market research interviewers were employees for superannuation guarantee purposes rather than independent contractors.

The AAT held that the interviewers were engaged by Roy Morgan as 'employees' under s.12(1) of the SGAA, according to the ordinary meaning of that word. In addition, the Tribunal also held that the interviewers were engaged under contracts that were wholly or principally for the labour of the person and therefore 'employees' within the expanded meaning of that term under s.12(3) of the SGAA.

Note: persons under contracts of labour (eg. Individual contractors engaged wholly or principally(at least 50%) for their labour are considered employees for superannuation guarantee purposes and the minimum 9% super must be paid for them.

Goods & Services Tax Determinations

GSTD 2002/2 Goods & services tax: are there GST consequences when a partner in a partnership takes goods held as trading stock for private or domestic use?

Yes, when a partner in partnership takes goods held as trading stock for private or domestic use, there is a supply by the partnership to the partner in the course or furtherance of the partnership's enterprise. If all the other necessary elements are satisfied, there will be a taxable supply by the partnership to the partner. Division 72 will apply to bring the supply within the GST system, where the partner provides no consideration or inadequate consideration for the supply.

HOT TOPIC: Use of non-commercial losses restricted

As mentioned briefly in previous newsletters, the Government has tightened the application of the non-commercial losses rules to prevent high income individuals from offsetting excess deductions from non-commercial activities against salary and other income, even where they satisfy one or more of the four objective tests.

Background to non-commercial loss rules

- Non-commercial losses rules only apply to activities carried on by individuals, whether alone or in partnership, which constitute the carrying on of a business (i.e. they don't apply to non-business activities such as renting an investment property)

- **General rule:** If deductible expenses incurred in relation to a business activity for an income year exceed assessable income from the activity for that year, the excess (i.e. a loss) cannot be claimed as a deduction against other assessable income of the individual in the income year the loss is made. Instead the loss is required to be carried forward to offset any assessable income derived from the business activity in the next income year in which the activity is conducted.

As an exception to this general rule, a loss from a business activity will be deductible against other assessable income of an individual if at least one of the following 'objective' tests is met:

1. **Assessable income test:** Assessable income from the business activity must be at least $20,000 for the income year;

2. **Profits test:** The business activity must have produced a profit in three of the last five income years, including the current income year;

3. **Real property test:** The reduced cost base (or market value, if greater) of real property used on a continuing basis to carry on the business is at least $500,000; or

4. **Other assets test:** The value of any other assets used on a continuing basis to carry on the business activity is at least $100,000.

There is also a **specific exception** from the general rule (i.e. the non-commercial loss rules do not apply) for individuals who carry on a primary production or a professional arts business, and whose total assessable income (excluding net capital gains) from sources other than the business is under $40,000.

Income Test Introduced

The Government's view is that high income earners are more easily able to satisfy one of the four 'objective' tests used to work out if an exemption from the non-commercial loss rules applies, and that they exploit these tests to avoid or reduce tax that would otherwise be payable on their other assessable income.

From 1st July 2009, only individuals with an adjusted taxable income (basically, taxable income excluding the business activity loss plus reportable fringe benefits, reportable superannuation contributions and total net investment losses) of less than $250,000 for an income year will be entitled to use the objective tests to determine if a business loss is deductible against their other income, or whether it must be quarantined and carried forward.

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