the Spry Roughley report

explanatory memorandum

July 2011

CURRENCY: This issue takes into account all developments up to and including 15 June 2011.

Tax Bill (No 5) 2011 Introduced; Trust Streaming; Car Fringe Benefit; Other Changes

The *Tax Laws Amendment (2011 Measures No 5) Bill 2011* has been introduced into the House of Reps. It contains the following amendments:

- ***Streaming of capital gains and franked distributions***: the Bill proposes to amend Subdiv 115-C and Subdiv 207-B of the ITAA 1997 to ensure that, where permitted by the trust deed, the capital gains and franked distributions (including any attached franking credits) of a trust can be effectively streamed for tax purposes to beneficiaries by making them "specifically entitled" to those amounts. The Bill also amends Div 6 of Pt III of the ITAA 1936 to include specific anti-avoidance rules to address the potential opportunities for tax manipulation that can result from the inappropriate use of exempt entities as beneficiaries. See below.
- ***FBT car valuation rules***: the Bill proposes to amend the *Fringe Benefits Tax Assessment Act 1986* to change the current statutory formula method for determining the taxable value of car fringe benefits by replacing the current four statutory rates with a single statutory rate of 20%, regardless of kilometres travelled. See below.
- ***Abolition of dependent spouse tax offset***: the Bill proposes to amend the ITAA 1936 to implement the 2011-2012 Budget measure to phase out the dependent spouse tax offset. See below.
- ***Other changes***: the Bill also proposes changes concerning: trust beneficiaries, averaging and farm management deposits (FMDs), and the National Rental Affordability Scheme (NRAS). See below.

Trust streaming – certainty almost here

The No 5 Bill proposes to amend Subdiv 115-C and Subdiv 207-B of the ITAA 1997 to ensure that, where permitted by the trust, the capital gains and franked distributions (including any attached franking credits) of a trust can be effectively streamed for tax purposes to beneficiaries by making them "specifically entitled" to those amounts. To achieve this, capital gains and franked distributions will be effectively taken out of Div 6 of Pt III of the ITAA 1936 and dealt with under Subdiv 115-C and Subdiv 207-B, respectively.

The significance of these changes is not only by virtue of their very nature, but the fact that they will begin to apply with effect for the *current financial year* i.e. the year from 1 July 2010 to 30 June 2011. Making things a little more difficult is the fact that Parliament sits until 7 July 2011. For the benefit of those who may be affected, one presumes (and hopes) the Bill will be passed as soon as possible before 30 June 2011 and that these streaming provisions are not amended. Note also that the ATO has been quick off the mark and has released details of its administrative treatment of the proposed amendments – see below.

These changes will affect trusts that have made capital gains or received franked distributions (including any attached franking credits). However, where a trust has not made particular beneficiaries specifically entitled to those amounts, these amendments generally produce the same outcome as under the current law.

Specific anti-avoidance rules will also apply to prevent the inappropriate use of exempt beneficiaries to "shelter" taxable income of a trust. They will apply where a beneficiary that is an exempt entity is not notified or paid their present entitlement to income of the trust or where an exempt beneficiary would otherwise be assessed on a share of a trust's taxable income that is disproportionate to their overall trust entitlement.

The amendments are made in the light of the High Court decision in *FCT v Bamford* (2010) 75 ATR 1 where the Court considered the meaning of "income of the trust estate" and the meaning of "share" for the purposes of s 97 of the ITAA 1936. They are intended to provide certainty in relation to the streaming of capital gains and franked distributions (including any attached franking credits) as an interim measure as part of the Government's proposal to rewrite the trust income tax provisions.

When introducing the Bill, the Assistant Treasurer said the Government had provided a "carve-out" for managed investment trusts (MITs) to ensure they could continue to use the current "proportional approach" until the Government's new tax system for MITs starts on 1 July 2012. MITs (and trusts treated like MITs) have been carved-out because these trusts, unlike other trusts, do not generally "stream" amounts to specific beneficiaries, he said. To ensure no MITs are disadvantaged, the trustees of these trusts can choose to apply these interim streaming changes if they make a valid election for the 2010-2011 or 2011-2012 income years.

Note that draft legislation was released on 13 April 2011, and the extensive measures contained in the Bill seem essentially the same as those contained in the draft legislation.

Summary of changes

A summary of the main changes contained in the Bill are as follows:

- Where a beneficiary is specifically entitled to a capital gain included in the trust's taxable income, that beneficiary will be treated as having made a capital gain (or a trustee is assessed and liable to pay tax on their behalf on an equivalent amount).
- A trustee of a resident trust can choose to be assessed on a capital gain of the trust if no amount of trust property referable to the capital gain is paid or applied for the benefit of a beneficiary.
- Where a beneficiary is specifically entitled to a franked distribution, that beneficiary (or a trustee assessed and liable to pay tax on their behalf) will be assessed on the amount of the franked distribution included in the taxable income of the trust estate and on the franking credits attached to that distribution.
- Amounts otherwise assessable to beneficiaries (and, where relevant, the trustee) under Div 6 will be adjusted (by proposed new Div 6E) to ensure that capital gains, franked distributions and franking credits dealt with under Subdiv 115-C and 207-B respectively are not taxed twice.
- An exempt entity will be taken not to be presently entitled to any amount of the trust's income unless they have either been paid or notified of their entitlement, within two months of the end of the income year. The amount that would otherwise be that beneficiary's share of taxable income will be assessed to the trustee.
- Where an exempt entity is used to "shelter" a share of the taxable income of a trust that exceeds the exempt entity's entitlement to the net accretions to the trust underlying that taxable income (whether "income" or "capital" of the trust), that excess will be assessed to the trustee.

Date of effect

Once law, the amendments will apply in relation to the 2010-2011 income year and later income years.

However, the amendments will only apply to a trust that is an early balancer for the 2010-2011 income year where the trustee makes a choice (which must be in writing and made before the end of two months after the commencement of these amendments). Likewise, the amendments will apply to a trust that is a MIT (or a trust that is treated in the same way as a MIT for the purposes of Div 275) for the 2010-2011 or 2011-2012 income years where the trustee of the MIT chooses to apply these amendments. The choice is available for the 2010-2011 or the 2011-2012 income year (and must made in writing and before the end of two months after the later of the commencement of these amendments and the end of the year in relation to which that choice is made). But a trustee's choice to apply the amendments for the 2010-2011 income year is effectively irrevocable.

ATO admin treatment of the changes

While the proposed law changes are intended to apply to the 2010-2011 and later income years, the ATO says the changes are not certain to receive Royal Assent before 30 June 2011. It has, however, released details of its administrative treatment regarding the amendments.

The ATO notes that the treatment for a specifically entitled beneficiary may occur regardless of whether the benefit they receive, or are expected to receive, is income or capital of the trust. That is, unlike the current rules, under the proposed changes in the Bill, a beneficiary may be assessed based on a specific entitlement to a capital gain or franked distribution of the trust, even though they do not have a present entitlement to income of the trust estate.

The ATO warns trustees that the changes will not allow for trustee resolutions made on or before 30 June 2011 to be amended to take account of the law as finally enacted after that date. Therefore, in framing a resolution, the ATO suggests trustees may like to consider its tax effect should the law not be enacted or not be enacted as proposed.

The ATO says if a taxpayer lodges a return on time and in accordance with the existing law at the time of lodgment, and an amendment is needed because the law is amended retrospectively which results in an increase in tax liability, then:

- no tax shortfall penalties will apply;
- any interest attributable to a shortfall will be remitted to nil up to the date of enactment of the new law. Interest will also be remitted for taxpayers who actively seek an appropriate amendment "within a reasonable time" after the enactment of the new law.

If the taxpayer does not lodge an amendment request within a reasonable time, then full interest may apply from the date of enactment. The ATO says it will consider what is a reasonable time on a case-by-case basis.

Where the amendment results in a reduction in tax liabilities, interest will be paid by the ATO on the overpayment of tax made by the taxpayer.

If a taxpayer lodges a return on the basis of the anticipated changes to the law, and an amendment is needed because those changes are not enacted as anticipated (eg because amendments were made during the Parliamentary process) which results in an increase in tax liability, then the ATO says:

- no tax shortfall penalties will apply on the basis that it was reasonable for the taxpayer to follow an announced government policy, and that the existence of the announcement represents special circumstances for remission;
- any interest accrued in respect of the amendment will be remitted to the base interest rate up to the date of enactment of the new legislative measure. In addition, the interest, in excess of the base rate, will be remitted for taxpayers who actively seek an appropriate amendment within a reasonable time after the enactment of the new law.

If a taxpayer lodges a return on the basis of the anticipated changes to the law and an amendment is needed because those changes are not ultimately enacted which results in an increase in tax liability, then the ATO says:

- no tax shortfall penalties will be applied;
- any interest accrued in respect of an amendment will be remitted to the base interest rate if the sole reason for the amendment is the measure not going ahead. The ATO says the remittance is "for a reasonable period of time" following the public announcement by the ATO (on its website) that the measure is not going ahead.

Source: "Improving the taxation of trust income", ATO website, accessed on 2 June 2011

Car fringe benefit taxation about to change

The No 5 Bill proposes to reform the current statutory formula method for determining the taxable value of car fringe benefits by replacing the current four statutory rates with a single statutory rate of 20%, regardless of kilometres travelled.

Under the proposed amendments, the formula in s 9 of the FBTAA for calculating FBT payable on a car fringe benefit using the statutory formula method will be determined by multiplying the base value of the car by the new 0.20 statutory rate, taking into consideration the number of days in the year the car fringe benefits were provided by the employer.

Application

The change will apply to all car fringe benefits provided after 7:30 pm, AEST on 10 May 2011, except where there was a pre-existing commitment in place to provide a car. The commitment needs to be financially binding on one or more of the parties.

Changes made after 7:30 pm, AEST on 10 May 2011 to commitments made before that time, such as re-financing a car, altering the duration of an existing contract or changing employers, are new commitments and will therefore be subject to the new arrangements.

If the new rules would begin to apply part way through a year (because of a change in commitment), the changes will commence from the beginning of the next FBT year.

Employers and employees who seek to end existing contracts early and immediately enter into new contracts, just to get the benefit of the new arrangements, may be caught by the general anti-avoidance provisions in s 67 of the FBTAA.

Transitional arrangements

The new 20% rate will be phased in over four years as follows:

FBT statutory formula method in phase-in years ***Statutory rate for new contracts entered into after 7:30pm (AEST) on 10 May 2011***				
Distance travelled during FBT year (km)	***From 10 May 2011***	***From 1 April 2012***	***From 1 April 2013***	***From 1 April 2014***
0 – 14,999	20%	20%	20%	20%
15,000 – 24,999	20%	20%	20%	20%
25,000 – 40,000	14%	17%	20%	20%
40,000 +	10%	13%	17%	20%

An employer can choose to skip the transitional arrangements and directly use the flat 20% rate, but only with the consent of any employees who would be worse off as a result of the employer making that choice. The way an employer's return for the relevant FBT year is prepared will be sufficient evidence of the making of the choice.

Dependent spouse offset on the chopping board

The No 5 Bill proposes to amend s 159J of the ITAA 1936 so that taxpayers will not be entitled to the dependent spouse tax offset (DSTO) in respect of a dependent spouse born on or after 1 July 1971. The changes will mean taxpayers with a dependent spouse aged less than 40 years will no longer be eligible for the DSTO from 1 July 2011.

However, the Bill will ensure that taxpayers eligible for the zone, overseas forces or overseas civilian tax offsets, or whose dependent spouse is a carer, an invalid or permanently unable to work, are not affected by the changes. Note that the maximum DSTO is $2,355 for 2011-2012.

Invalid spouse or carer spouse

The Bill provides that taxpayers maintaining a dependent spouse born on or after 1 July 1971 who is an invalid or permanently unable to work due to caring responsibilities, will remain entitled to claim an amount equivalent to the DSTO in respect of a dependent "invalid spouse" or dependent "carer spouse".

However, if a taxpayer is entitled to the DSTO in respect of a dependent spouse born before 1 July 1971, they will not be entitled to claim the equivalent amount in respect of an "invalid spouse" or a "carer spouse". Taxpayers will also not be entitled to claim an amount in respect of a "carer spouse" if they have already claimed an amount in respect of an "invalid spouse".

The Bill will amend s 159J(6) to define a "carer spouse" as a spouse of the taxpayer who is wholly engaged in providing care to an "invalid relative" (which includes an invalid relative of the taxpayer's spouse) or to whom a Carer Allowance, Carer Payment or Carer Service Pension is being paid. The "invalid relative" definition will also be expanded so that it includes a child, brother or sister aged more than 16 years of the taxpayer's spouse as well as a child, brother or sister aged more than 16 years of the taxpayer.

An "invalid spouse" will be defined in s 159(6) to mean a person that is a spouse of the taxpayer who meets the requirements for disability and continuing inability to work that are currently imposed on an invalid relative. That is, the "invalid spouse" must be receiving a Disability Support Pension or Special Needs Disability Support Pension or have a certificate from an appropriate medical officer or medical practitioner. Note that amendments proposed to s 159J(3A) will enable a taxpayer to claim an amount of offset in respect of a dependent invalid spouse or carer spouse who is not a resident of Australia.

Proposed amendments to s 159JA(1)(a) provide that if the taxpayer is a member of a Family Tax Benefit (Part B) family, or they or their invalid spouse or carer spouse is receiving parental leave pay, the taxpayer will be unable to claim an offset for that part of the year in respect of the dependant.

Zone and overseas offsets

Taxpayers with a dependent spouse born on or after 1 July 1971 who are eligible for the zone, overseas forces or overseas civilian tax offsets will remain eligible for an amount equivalent to the DSTO as a component of their zone, overseas forces or overseas civilian tax offset as though no age restriction applied.

Note that dependent spouses with children generally do not receive the DSTO because they instead receive Family Tax Benefit (Part B). However, the notional dependent spouse (with child) offset (up to a maximum of $2,736 for 2011-2012) remains relevant to determining a taxpayer's zone tax offset, overseas force tax offset and overseas civilian tax offset.

It is proposed that the proportion of DSTO entitlement that can be claimed for the zone, overseas forces or overseas civilian tax offset will continue to be higher if the taxpayer is eligible for the notional dependent spouse (with child) or student offsets. Because of their continuing eligibility for the DSTO, taxpayers with a dependent spouse born before 1 July 1971 will only be entitled to an amount equating to 50% of their DSTO entitlement as part of their zone, overseas forces or overseas civilian tax offset (or 20% if they are a resident of Zone B). However, taxpayers with a dependent spouse born on or after 1 July 1971 will be entitled to the relevant proportion of their DSTO entitlement, assuming no age restriction applied. In addition, the taxpayer will be able to claim the full amount of this DSTO entitlement as a component of their zone, overseas forces or overseas civilian tax offset.

Taxpayers eligible for more than one of the zone, overseas forces or overseas civilian tax offsets will not be able to claim more than the full amount of offset in respect of a dependent spouse across each offset. That is, a taxpayer will not be able to receive more than their maximum dependent spouse entitlement if they have eligibility for both an amount of zone and overseas forces tax offset.

Housekeepers and child-housekeepers

The Bill will amend s 159J(5D) to ensure that a child of the taxpayer will be deemed not to have been engaged in keeping house for the taxpayer for any part of the year that the taxpayer is entitled to an offset in respect of a dependent invalid spouse or a dependent carer spouse.

Amendments are also proposed to s 159L(4) to clarify that a taxpayer is not entitled to claim the housekeeper tax offset if they have a spouse unless that spouse is an "invalid spouse" or the Commissioner is of the opinion that it is just to allow an offset because of special circumstances.

Date of effect

The amendments will commence on Royal Assent, with effect from the 2011-2012 income year and later income years.

Other changes

The No 5 Bill also contains the following other changes:

- ***Trust beneficiaries and averaging and FMDs***: the Bill proposes to amend Divs 392 and 393 of the ITAA 1997 to allow trust beneficiaries to continue to use the primary production averaging and farm management deposits (FMD) provisions in an income year where the trust does not have any trust law income to which a beneficiary can be presently entitled (eg because the trust has a loss for trust law purposes).
- ***National Rental Affordability Scheme (NRAS)***: the Bill seeks to address several technical issues which have arisen from the interaction between the tax law and the *National Rental Affordability Scheme Act 2008* and the associated regulations. The amendments also seek to simplify the operation of the NRAS for participants.

Source: Tax Laws Amendment (2011 Measures No 5) Bill 2011 and Explanatory Memorandum, introduced into the House of Reps on 2 June 2011

SMSF Non-complying Status Affirmed, Despite Tragic Circumstances

The AAT has affirmed the Commissioner's decision that a self-managed super fund (SMSF) be treated as a non-complying super fund.

Background

The SMSF was created in April 2002 and its members included a husband, wife and their son. The Tribunal noted the son had a "drug addiction and took almost all of the money from the fund and spent it or gave it away". The Tribunal also noted the savings were "lost" and the fund "is now effectively a shell".

The Tribunal heard that on certain alleged advice "the trustees concealed the true nature of the use and loss of this money for five years" and that "while not entirely comfortable that it was the right thing to do, the husband and wife accepted this advice and followed it".

Following an audit, the Commissioner in October 2009 issued a notice under s 40 of the SIS Act that the fund was a non-complying super fund for the 2002 income year because: (a) the trustees had contravened ss 62, 65 and 126K of the SIS Act; and (b) the fund had not passed the test in s 42A(5) of the SIS Act (concerning contravention of regulatory provisions). The Commissioner then issued the SMSF a notice of assessment for the year ended 30 June 2002, and notices of amended assessment for the years ended 30 June 2003, 2004, 2005, 2006 and 2007.

The question before the Tribunal was whether the circumstances were sufficient to warrant exercising a discretion pursuant to s 42A(5)(b) of the SIS Act that would allow the SMSF to be treated as a complying superannuation fund.

Decision

Although acknowledging the tragic circumstances in which the couple had lost almost all of their retirement savings in the fund, the AAT found the circumstances did not warrant exercising a discretion to treat the fund as a complying fund. In the present matter, the AAT said "the breaches of the standards required of superannuation funds to be concessionally taxed, are particularly serious." The AAT said that to exercise the discretion in the circumstances "would not be consistent with the objects of the SIS Act". The AAT said: "To do so would frustrate the wider objects of the SIS Act by relieving those responsible for superannuation funds of tax imposts where all of the assets of a superannuation fund are deployed inappropriately and lost as a consequence." Accordingly, the Commissioner's decision was affirmed.

AAT Case [2011] AATA 302, Re Triway Superannuation Fund and FCT, AAT, Ref No 2010/0108, O'Loughlin SM, 10 May 2011 www.austlii.edu.au/au/cases/cth/AATA/2011/302.htm

Goods Taken from Stock for Private Use

Taxation Determination TD 2011/11, released on 18 May 2011, provides an update of the amounts the Commissioner will accept for 2010-2011 as estimates of the value of goods taken from trading stock for private use by taxpayers in certain specified industries. The amounts (which exclude GST) are:

Type of business	Adult/Child over 16 years ($)	Child 4–16 years ($)
Bakery	1,140	570
Butcher	770	385
Restaurant/cafe (licensed)	3,950	1,565
Restaurant/cafe (unlicensed)	3,130	1,565
Caterer	3,390	1,695
Delicatessen	3,130	1,565
Fruiterer/greengrocer	820	410
Takeaway food shop	2,970	1,485
Mixed business (includes milk bar, general store and convenience store)	3,750	1,875

The ATO also says it recognises that greater or lesser values may be appropriate in particular cases. Taxpayers may be able to justify a lower value for goods taken from stock than that shown in the TD. In that case, the ATO says the lower amount should be used. Where the value of goods ex-stock would be significantly greater, the actual amount should be used.

The Tax Office intends to adjust the values annually.

Source: Taxation Determination TD 2011/11 http://law.ato.gov.au/pdf/pbr/td2011-011.pdf

Travel and Study Scams on Tax Office Radar

The ATO has issued Taxpayer Alert TA 2011/4 warning taxpayers of an arrangement where a private company claims a deduction for unpaid directors' fees.

The arrangement broadly involves a private company making resolutions prior to 30 June in relation to the amounts payable to directors that reflect the company is irrevocably committed to the payment. The company claims a deduction for the payment, but the actual payment is never made (or a minimal amount is paid the following year) to the directors. The directors do not include any amount in their assessable income and may enter into loan arrangements with the company in relation to the fees.

"We are concerned that some companies may be using this arrangement to claim amounts that are never intended to be fully paid out. As the fees aren't returned as income until received, this practice results in a mismatch of deductions and income," Mr D'Ascenzo said.

Among other things, the ATO says the arrangement may be considered a sham and Pt IVA may apply to the arrangement or any part of it. Further, it says any entity involved in the arrangement may be a promoter for the purposes of Div 290 of Sch 1 of the TAA.

Source: Taxpayer Alert TA 2011/4 http://law.ato.gov.au/pdf/tpa/tpa1104.pdf, ATO media release No 2011/31, 2 June 2011 www.ato.gov.au/corporate/content.aspx?doc=/content/00281629.htm

Tax Bill (No 4) 2011: Low-income Taxpayer Offset; Other Changes

The *Tax Laws Amendment (2011 Measures No 4) Bill 2011* has passed all stages without amendment and awaits Royal Assent. It contains the following amendments:

- ***Low-income taxpayer rebate:*** the Bill amends the ITAA 1936 to remove the ability of minors (children under 18 years of age) to use the low income tax offset to offset tax due on their unearned income, such as dividends, interest, rent, royalties and other income from property. This was announced in the 2011-2012 Federal Budget on 10 May 2011. See below.
- ***Other changes***: the Bill also contains amendments concerning: reduction in 2011-2012 PAYG instalments; disability superannuation benefits; and reportable employer superannuation contributions definition. See below.

Low-income taxpayer offset to end for most minors

The No 4 Bill amends the ITAA 1936 to remove the ability of minors (children under 18 years of age) to use the low income tax offset to reduce tax on income of the taxpayer that is subject to Div 6AA of Pt III of the ITAA 1936 i.e. unearned income such as dividends, interest, rent, royalties and other income from property. The low income tax offset will still be available to reduce tax on other income of the taxpayer.

The Bill adds three new subsections to s 159N of the ITAA 1936 to provide that a taxpayer who has income subject to Div 6AA has a limited eligibility for the low income tax offset. Where a taxpayer has income subject to Div 6AA, the taxpayer will not be entitled to the low income tax offset to the extent the offset would be applied against the part of the taxpayer's basic income tax liability that is attributable to the eligible taxable income of the taxpayer for that year of income. (The eligible taxable income is that income that is taxed as unearned income of the taxpayer.)

In calculating tax on the taxpayer's income, the taxpayer will still be able to apply the tax offset listed in item 15 in the table in s 63-10(1) of the ITAA 1997 against that part of the taxpayer's basic income tax liability that is attributable to the taxpayer's eligible taxable income. This is designed to ensure that eligible taxpayers are still able to use the pensioner tax offset, where applicable, to reduce tax on their unearned income. It is only the low income tax offset that can no longer be used to reduce tax on unearned income.

Amendments are also made to s 63-10 of the ITAA 1997 which contains the priority rules for applying tax offsets against a taxpayer's basic income tax liability. One amendment provides that the low income tax offset will be the fourth offset in order of priority for applying tax offsets against a taxpayer's basic income tax liability, after the senior Australians tax offset (applied both to individuals and to trustees) and the pensioner tax offset.

Rationale for the change

The low income tax offset has been available to all taxpayers with incomes below its cut-out threshold, including minors. The Government says an increasing amount of distributions from discretionary trusts have taken advantage of this concession to direct an increasing amount of income from adults to minors in order to minimise tax.

It claims there is a "significant spike in distributions from discretionary trusts at around the point where the effective tax-free threshold for minors has applied in each recent tax year, and that spike has moved broadly in accordance with increases to the effective tax-free threshold for minors".

The Assistant Treasurer said increases in the low income tax offset had doubled the amount of non-work income that can be allocated to children tax-free. He said there was evidence that 200,000 distributions from trusts had increased in line with the increased low income tax offset, to take advantage of the opportunity to minimise tax by allocating income to children. Mr Shorten said the low income tax offset was never meant to act as a tax minimisation vehicle. He said double orphans and children with disabilities will be fully protected under the changes.

The Government considers that removing the eligibility of minors to use the low income tax offset to reduce tax payable on their unearned income "will discourage families from splitting income with their children".

Note

Put simply, from 1 July 2011, the Div 6AA rates for resident minors will be:

Resident minors – Div 6AA tax rates	
Div 6AA income (%)	***Tax payable ($)***
0 – 416	Nil
417 – 1,307	66% of excess over 416
1,308 +	45% of entire amount

Date of effect

The amendments will apply to assessments for the 2011-2012 income year and later income years.

Other changes

The No 4 Bill also contains the following other changes:

- ***Reduction in 2011-2012 PAYG instalments***: the Bill amends Sch 1 to the *Taxation Administration Act 1953* to set the GDP adjustment for PAYG instalment taxpayers who use the GDP adjustment method at 4% for the 2011-2012 income year, instead of 8%. This was announced in the 2011-2012 Federal Budget on 10 May 2011. *Date of effect:* Applies to PAYG instalment amounts for the 2011-2012 income year that become due on or after the day after the Bill receives Royal Assent.
- ***Disability superannuation benefits***: the Bill allows the percentage of insurance costs for certain total and permanent disability (TPD) policies that can be claimed as deductions by superannuation funds to be specified in regulations. The Bill also extends the current transitional relief for the deductibility of TPD insurance premiums to funds that self insure their liability to provide disability benefits. *Date of effect:* The changes allowing the deductible proportion of insurance costs for certain TPD policies to be specified in regulations will have effect from the 2011-2012 income year. The extension of transitional relief to self-insured funds will apply to the income years 2004-05 to 2010-11.
- ***Reportable employer superannuation contributions definition***: the Bill amends the *Taxation Administration Act 1953* to exclude from the "reportable employer superannuation contributions" definition certain employer contributions to superannuation made pursuant to a requirement that employees cannot influence. *Date of effect:* Applies to the 2009-2010 income year and later income years.

Source: Tax Laws Amendment (2011 Measures No 4) Bill 2011 and Explanatory Memorandum, introduced into the House of Reps on 26 May 2011, passed all stages on 15 June 2011

Commissioner's Claim to Recover GST Refunded Not Out of Time

A taxpayer has been unsuccessful before the AAT in arguing that the Commissioner's claim to recover an amount of GST refunded was ineffective on the basis that the claim was made outside of the four-year time limit.

Background

The taxpayer claimed in its September 2003 BAS input tax credits totalling $388,182 in relation to the purchase of a property.

The ATO then conducted an investigation into the amount which concluded in October 2003 at which time the amount was refunded after being credited to the running balance account first. In October 2007, more than four years after the lodgment of the relevant BAS, the ATO issued the taxpayer with a notice to repay incorrectly refunded amounts.

The taxpayer argued that s 105-50 in Sch 1 of the TAA rendered the Commissioner's notice to repay ineffective, since among other things, the section imposes a four-year time limit for the issuance of such a notice. The taxpayer also argued that the responses given by the ATO during the investigation into the amount, which included five separate conversations and the eventual posting of the amount onto the taxpayer's running balance account, constituted giving a private ruling on the issue which prevents the recovery of the amount.

Decision

The Tribunal held that s 105-50 did not apply to the circumstances of this case as the amount in question was not an "unpaid net amount" for the reasons decided in Russell v FCT (2009) 74 ATR 466. Further, it held that s 105-50 did not apply to input tax credits as they are defined as "an entitlement" rather than a tax that is payable. The Tribunal also held that posting an amount to a taxpayer's running balance account did not constitute the giving of a private ruling.

In conclusion, the Tribunal held that the taxpayer failed on both the time-limit issue and the private ruling issue and that it was necessary for the Tribunal to further consider the two substantive issues (carrying on an enterprise and entitlement to input tax credits) in relation to the case which will be listed for directions at a time convenient to both parties.

AAT Case [2011] AATA 296, Re Wynnum Holdings No 1 Pty Ltd and FCT, AAT, Ref No 2008/5986, Frost SM, 5 May 2011 www.austlii.edu.au/au/cases/cth/AATA/2011/296.html

GST and Tax Invoice Requirements

On 25 May 2011, the Tax Office released Draft GST Ruling GSTR 2011/D1. The Draft Ruling contains the Commissioner's preliminary views on:

- the minimum information requirements for a tax invoice under s 29-70(1) of the GST Act, and when a document is in the approved form for a tax invoice;
- the circumstances under s 29-70(1A) when a recipient of a supply can treat a document as a tax invoice even though the document does not meet all of the tax invoice requirements;
- the circumstances under s 48-57 when a document is taken to be a tax invoice for the purposes of a GST group even though the group member that is the recipient of the supply is not identified in the document;
- the general principles that the Commissioner will have regard to in exercising his discretion under s 29-70(1B) to treat a document yet to be issued as a tax invoice; and
- the application of the low value threshold for transactions for which a tax invoice is not required.

The Draft Ruling also includes a summary of the circumstances where the Commissioner has determined under s 29-10(3) that an entity can claim an input tax credit without a tax invoice.

Proposed application date

When finalised, the Ruling is proposed to apply on and from 1 July 2010.

Comments

ATO contact: Grant Murphy - Tel: (07) 3213 5707; Fax: (07) 3213 5061; Email: grant.murphy@ato.gov.au. Comments are due by 8 July 2011.

Withdrawal of GSTR 2000/17

On 25 May 2011, the Tax Office also withdrew GSTR 2000/17 (Tax invoices) because of legislative changes to the requirements for a document to be considered a tax invoice.

The Tax Office states that the Ruling is replaced by Draft GSTR 2011/D1. However, the Tax Office says as the Draft maintains the same outcomes as GSTR 2000/17, a document that satisfies the requirements as a tax invoice will continue to be considered as a tax invoice under the Draft Ruling.

Source: Draft GST Ruling GSTR 2011/D1
http://law.ato.gov.au/atolaw/view.htm?DocID=DGS/GSTR2011D1/NAT/ATO/00001&PiT=99991231235958,
Withdrawal notice of GSTR 2000/17
http://law.ato.gov.au/atolaw/view.htm?DocID=GST/GSTR200017/NAT/ATO/00001&PiT=99991231235958

Deductibility for Private Pilot's Licence Cost Denied for a Solicitor

The AAT has held that a solicitor who hoped to take on aviation matters for local clients was not entitled to a deduction for expenses he incurred in converting his New Zealand private pilot's licence to an Australian one.

The taxpayer is the Legal Practice Director in a firm of solicitors that specialises in rapid adjudications in building and construction disputes. The taxpayer hoped to take on aviation matters for local clients and consequently incurred expenses in converting his New Zealand private pilot's licence to an Australian one. He obtained an unfavourable private ruling from the Commissioner as to the deductibility of the expenses.

While the AAT agreed it was likely that clients seeking aviation law assistance would be attracted to a lawyer holding the skills of a pilot and experienced in flying, it said this provided only an indirect connection to the taxpayer's expertise as a lawyer. The Tribunal was also of the view that what the taxpayer proposed would amount to a new income-earning activity, and the expenses would not be deductible (applying para 15 of TR 98/9). The AAT said the taxpayer made plain that his practice is focussed on dispute resolution in building and construction, but it considered that aviation law would be a new activity.

The Tribunal was of the view there was not sufficient nexus between the outgoings claimed and gaining assessable income. The Tribunal held that the expenses were not incurred in gaining or producing assessable income in the taxpayer's practice as a solicitor specialising in rapid adjudications in building and construction law.

AAT Case [2011] AATA 318, AAT, Ref Nos: 2010/3649 and 2010/3650, Carstairs SM, 13 May 2011
www.austlii.edu.au/au/cases/cth/AATA/2011/318.html