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# TAX matters

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### Tax – Trust Distributions – Are They a Sham?

In the recent decision of *Raftland* the High Court found that the distributions of income from a trust to a beneficiary were a sham.

In *Raftland Pty Ltd v Commissioner of Taxation* [2008] HCA 21 three brothers controlled several companies making profits through a land development business. After making enquiries with their advisors the brothers purchased a trust with tax losses which was intended to be used to absorb the profits made by the companies.

The loss trust was acquired and a new trust, the *Raftland Trust*, was established. Through a series of transactions the profits of the land development businesses were transferred to related trusts and then distributed to the *Raftland Trust*. The *Raftland Trust* resolved to set aside an amount of \$250,000 to the loss trust which was the price for the acquisition of the loss trust. This amount was physically paid. The *Raftland Trust* also resolved in several income years to distribute income to the loss trust. These distributions of income were never physically paid.

The High Court found that the distributions to the loss trust were a sham. The High Court concluded that the resolutions of *Raftland* which purported to effect the entitlement of the loss trust to income were contrary to the intentions of the three brothers and the beneficiaries of the loss trust, despite all of the documentation being legally binding.

This decision throws doubt on the common practice of making trust distributions without following up with actual payments. This could affect how family trusts are operated.

We think that in practice the effect of the decision could be limited to its facts. Nonetheless clients should be aware of the issue in this area of the tax law.

Contact: Chris Smailes and Alan Krawitz

### Superannuation – Guarantee – New Laws from 1 July 2008 – Ordinary Time Earnings

There seems to be confusion surrounding the payment of employer superannuation contributions following significant changes to the superannuation laws effective from 1 July 2008.

It is not uncommon for businesses to pay their employees one rate of pay and use another rate as the basis for calculating the 9% superannuation contributions. In these circumstances, it is likely that the level of superannuation contributions is lower than what is required by the new superannuation laws.

From 1 July 2008, the superannuation laws have changed such that “ordinary time earnings” as defined in superannuation legislation will form the basis of the minimum superannuation

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contribution obligations in all cases. This is regardless of whether the terms of employment are regulated by an award, an employment contract, or a combination of both an award and an employment contract.

Ordinary time earnings has a technical meaning and has been the subject of extensive case law. Our team has spent significant time reviewing the case authority, relevant ATO publications and extrinsic materials as to the payments that must and must not be included in calculating an employee's superannuation contributions.

Where superannuation contributions are underpaid, a superannuation guarantee charge is attracted in relation to each employee. Importantly, the payment of the superannuation guarantee charge (ie the shortfall) is not tax deductible unlike the payment of superannuation contributions themselves. In addition to the charge, a range of penalties and interest can apply.

In practice, a number of employers are currently paying many of their employees on the basis of an earnings bases less than "ordinary time earnings." Addressing this issue now could avoid significant superannuation guarantee charges accumulating which may lead to hefty penalties in the case of an audit.

This is an opportune time to review your structure to ensure it meets the requirements of the superannuation laws going forward.

Contact: Chris Smailes and Daniel Fry

## Stamp Duty – Entity Restructuring – Opportunities Post 30 June 2008

In general, transactions which take place on or after 1 July 2008 are subject to duty under the *Duties Act, 2008 (WA)* ("the Act"), rather than the *Stamp Act, 1921 (WA)*. In this regard the entity restructuring exemption ("ERE") of the Act seeks to replace the corporate reconstruction provisions under the *Stamp Act, 1921*.

The ERE provisions are a significant improvement to the former corporate reconstruction provisions, which were generally regarded as unduly complex and difficult to apply. Some of the specific improvements are as follows:

- The ERE applies to transactions involving corporations and unit trusts (the previous provisions did not apply to unit trusts);
- No pre-transaction association requirement; and
- No 5 year post-transaction association requirement.

In summary, the ERE applies to certain transactions involving related entities (refer to as a "family"). A parent entity and its subsidiaries are members of a family. A parent entity is a corporation, or the trustee of a unit trust, which directly or indirectly holds at least 90% of the securities of another entity (the subsidiary) and controls at least 90% of the maximum number of votes that may be cast at a general meeting of that other entity.

There are two types of transactions to which the ERE may apply. Firstly, a "relevant consolidation transaction" is any acquisition on which landholder duty is chargeable, that is made solely for the purposes of a corporate consolidation. A corporate consolidation means the formation of a family by the interposition of an entity, being a corporation or unit trust (the "head entity") between another entity (the "affected entity")

and the holders of the affected entity's securities.

Provided the relevant conditions are met, the ERE will be available.

For example, the shares in company A which owns \$3 million worth of land, are owned by Mr & Mrs B as to 50% each. If company C acquires all of the shares in company A from Mr & Mrs B in exchange for the issue of shares in company C, so that Mr & Mrs B hold all of the shares in company C in the same proportion that they formerly held shares in company A, then an exemption under the ERE is likely to be available in respect of the landholder duty which would otherwise apply in relation to the disposal of the shares in company A.

Secondly (and more commonly) a "relevant reconstruction transaction" is a transaction involving members of a family that would otherwise be chargeable with transfer duty, vehicle licence duty or landholder duty. For example, an agreement to transfer dutiable property from one family member to another.

The Commissioner has the ability to revoke an exemption if he is of the opinion that the exempt transaction was part of a scheme or arrangement with a purpose of avoiding duty or for the sole or dominant purpose of avoiding another WA State tax such as payroll tax or land tax.

In this regard, to assist the Commissioner in considering whether to revoke an exemption, once the ERE has been granted, there is an obligation to notify the Commissioner of certain events that may occur within 3 years following the exempt transaction. For example, where a family member is no longer owned more

than 50% within the family, in general (and subject to limited exceptions), the Commissioner must be notified.

A person considering entering into a transaction which may attract the ERE may request the Commissioner to provide a pre-transaction decision on the availability of the ERE. The Commissioner’s pre-transaction decision is binding upon the Commissioner provided full and true disclosure is made. In general, we recommend that a pre-transaction decision is sought from the Commissioner prior to entering into exempt transactions under the ERE.

Contact: Johanne Thomas or Richard Norton

**Norton & Smailes**

We advise on:

- income tax, GST, capital gains tax, FBT
- superannuation and superannuation deeds
- stamp duties, payroll tax and other State taxes
- wills, estate planning and business succession planning
- trusts and trust deeds
- objections and appeals
- tax and commercial litigation
- commercial law

**Standard Documents (24 hour turnaround)**

The following is a summary of our charges (excluding GST and disbursements) for the provision of

final documents in duplicate and attending to stamping:

**Deeds**

• **Trust Deeds**

Discretionary Trust Deeds are \$240, and Unit Trust Deeds are \$295.

• **Superannuation Fund Deeds**

We provide Superannuation Fund Deeds for \$395. This includes supporting minutes, member information statements and all relevant documentation.

**Other Documents**

• **Enduring Power of Attorney**

An Enduring Power of Attorney is \$150, and a General Power of Attorney is \$220.

• **Wills**

We also provide Wills, including Testamentary Trusts where required. Estimates of fees can be provided.

• **Buy/Sell or Business Succession Agreements**

Estimates of fees can be provided.