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# TAX matters

March 2009

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## Deceased Estates, plain sailing or rough waters?

Did you know that Norton & Smailes advises on deceased Estate administration and disputed Estates?

Increasingly we are seeing a willingness for family members to find a way to dispute a deceased Estate, usually where a proper Estate plan is not in place.

Claims under the *Inheritance (Family and Dependents) Provision Act 1972 (WA)*, can

be brought by certain family members including children.

*TIP: A claim must be commenced within 6 months of date of grant of probate or the leave (permission of the Supreme Court) is required and is by no means a given.*

There has been a recent line of Supreme Court cases following the High Court case of *Vigolo v Bostin [2005] HCA 11* (originating out of Albany, WA), which indicate a trend that the wealthier the claimant, the less the prospects of success. This assumes that (potentially many) other factors are, more or less equal between the claimant and the defendants – see *Andre v Perpetual Trustees (WA) Ltd 2009 WASCA 14*.

Conversely, the less wealthy the claimant, the greater the prospects of success. Often a claimant is a child. Even if that child has received substantial sums from his or her parent in the lifetime of the parent and then squanders the money, the Court is more likely to look at his or her circumstances at the date of death of the parent. If at that time the child is lacking in wealth, then this is likely to be a significant factor which may

persuade the Court to order more of the estate be distributed to that child. Often parents will, in these circumstances, want to leave less to that child and more to the other children, who did not receive as much from the parents during their lifetime. The effect of a successful claim could be to create a modern version of the “prodigal child”. The potential for an *Inheritance Act* claim highlights the need for proper Estate planning. Norton & Smailes can also assist in advising on and representation in disputed Estate matters, where the validity of the Will is in issue or an *Inheritance Act* claim arises. Depending on the outcome, tax advice is usually required for the administration of an Estate or, for the resolution of any dispute, to avoid any unnecessary surprises.

Contact: Craig McKie

## Offshore tax arrangements under siege by the ATO!

The ATO is concerned that the “abusive” use of tax havens has increased, particularly among individuals and small

IMPORTANT: The articles in this newsletter are in summary form and should not be relied on as a substitute for detailed advice.

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businesses. In recent years the Commonwealth Government has committed in excess of \$300 million to fund Project Wickenby (the investigation into tax haven abuse), which is headed by the ATO.

The ATO is continually expanding with the use of technology and increased co-operation from overseas regulatory authorities its methods of identifying Australian taxpayers who have used offshore bank accounts, financial products, or structures. These types of arrangements include accounts or other arrangements that are not in the taxpayer's name, including for example accounts held in the name of company or trust for the benefit of an Australian resident taxpayer.

The ATO has the ability to identify using AUSTRAC data those persons having significant transactions overseas, or having an offshore debit or credit card issued by a financial institution in a tax haven, or in a low tax jurisdiction. Other sources of information used by the ATO include financial institutions and international information exchanges (remember the "whistleblower" former employee of a Liechtenstein bank who stole the records of 1,400 clients and sold them, and the recent release of client information from UBS!).

The ATO has put in place an offshore compliance program to ensure that Australian taxpayers have complied with their Australian tax obligations. As part of the program, the ATO is

encouraging all taxpayers with such arrangements who have not been meeting their tax obligations (by omitting offshore income or overstating offshore deductions) to come forward and lodge an offshore voluntary disclosure statement.

The benefit of making an offshore voluntary disclosure is that penalties for tax shortfalls will be significantly reduced, and in some cases reduced to nil.

Please contact us if you would like to enquire about these matters or to make an offshore voluntary disclosure or are unsure of whether you have been meeting your Australian income tax obligations.

Contacts: Chris Smailes and Rachael Munro

### **Employee share plans making the most of your remuneration in a recession.**

In these economic times it is becoming more and more important to squeeze every tax saving cent out of one's salary. Employers should be awake to the benefits and pitfalls of issuing shares to employees and employees should be equally alive to how various decisions may impact their tax position.

Division 13A of the *Income Tax Assessment Act 1936* provides that shares or rights acquired under an employee share acquisition plan (ESAP) by an employee in respect of their employment for a price that is less than market value (the discount) are either qualifying or non-qualifying shares.

### *Qualifying share or rights*

There are significant advantages to ensuring that shares acquired under an ESAP are qualifying.

For shares or rights to acquire shares to be classified as 'qualifying' and therefore able to attract the tax benefits they must:

- 1) be acquired at a discount;
- 2) be shares or rights in the employer or holding company of the employer
- 3) be ordinary shares or rights to acquire ordinary shares;
- 4) be offered to at least 75% of the company's Australian employees. (Note this fourth requirement does not have to be met for option plans, which can be selective and therefore more attractive to some employers); and
- 5) no employee participants are entitled to hold more than 5% of the shares or rights in the company.

Once it is established that any shares or rights issued under a ESAP are qualifying then one can explore the possible tax benefits to the employee. The employee can elect to either use the Upfront Method or the Deferred Method of taxation in regards the discount.

### *Upfront Method*

An employee may elect to include in their assessable income the discount value of the shares or rights in the year they are received and thereafter any growth or reduction in value is taxed as a capital gain or loss at

the time the shares are disposed of (the Upfront Method); or

*Deferred Method*

The alternative to the Upfront Method is to recognise the discount on the shares or rights in the employee’s assessable income when the first of anyone of the following trigger event occurs:

- ✓ the shares or rights are sold;
- ✓ the restrictions on disposal and forfeiture conditions are removed;
- ✓ the employee’s employment ends; or
- ✓ at the expiration of ten years after the shares or rights are received.

If the employee then chooses to sell the shares or options after a trigger event there is no capital gains tax implications, provided the shares are not held for more than 30 days after the trigger event.

Where this is the case the employee, on disposal of the share or right, will be taxed as a capital gain in respect of any increase or decrease in the value of the shares or rights from the date of the trigger event.

*Fringe Benefits Tax (FBT)*

A benefit provided by an employer to an employee or an associate, in respect of employment, is usually subject to FBT. However, Division 13A ESAP benefits are excluded. FBT may arise in respect of certain other plans not governed by Division 13A.

If you are considering issuing shares to your employees as part of their remuneration package or you have received shares from your employer a little forward planning can save you a lot of headaches down the track.

Contact: Chris Smailes or Reagan Gruenthal.

**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 on request.