

## Partners

Richard Norton B.A. LL.B., B.Com. (Hons.)  
Christopher Smailes B. Juris., LL.B.  
Daniel Fry LL.B., B.Com.CA  
Craig McKie B.Juris., LL.B.

## Senior Associates

Johanne Thomas LL.B., B.Com.  
Rachael Munro LL.B., B.Com.  
Alan Krawitz LL.B.(Hons), B.Com., CA



Ground Floor  
38 Colin Street  
West Perth WA 6005

Telephone (08) 9481 8311  
Facsimile (08) 9481 8322

taxlaw@nortonsmailes.com.au  
www.nortonsmailes.com.au

# TAX matters

March 2010

## In this Issue

- ◆ **Tax - The crackdown on trusts continues – TR 2009/D8** – Page 1-2
- ◆ **Transfer Duty - So close, yet so far for WA businesses** - Page 2
- ◆ **Fuelling the future – Fuel Tax Credits** - Page 2 - 3
- ◆ **Penalty shootout: the taxpayer or the agent** - Page 3

## TAX -

### THE CRACKDOWN ON TRUSTS CONTINUES – TR2009/D8

As part of the continuing scrutiny of trusts and unpaid present entitlements the ATO released the Draft Taxation Ruling TR 2009/D8 'Income tax: Division 7A loan: trust entitlements' (TR2009/D8) on 16 December 2009.

TR2009/D8 provides the Commissioner's opinion on the circumstances where an unpaid

present entitlement (UPE) owing to a private company from an associated trust morphs into a loan to the trust for the purposes of Division 7A.

### Background

The prevailing view regarding the treatment of UPE's as loans has been that as long as the treatment in the relevant financial statements is not as a loan and the substance of the arrangements does not reflect the UPE being converted to a loan then the UPE was not a Division 7A loan.

### TR 2009/D8

The Draft Ruling analyses the arrangements under the headings:

1. loan instead of or in satisfaction of an UPE (Section two), and
2. subsisting UPEs and Division 7A loans (Section three).

### Key points regarding date of effect

Whilst only a Draft Ruling, it is expressed to apply if finalised:

1. with retrospective effect - for the circumstances regarded as causing an UPE to be regarded an actual loan, and

2. of immediate effect from 16 December 2009 - for characterisation of an UPE as financial accommodation.

However, the ruling outlines an exception to this application. If the Commissioner's view in 'section three' is less favourable (which we expect will generally be the position), then the ruling does not apply to UPE's 'arising before the date of issue of the Draft Ruling' (16 December 2009).

This would seem to mean that UPE balances arising up to and including 15 December 2009 can be (favourably) quarantined in a similar manner to what was generally done for 'pre-December 1997' loan balances as a consequence of the introduction of Division 7A.

### Conversion of UPE to an actual loan (Section two)

The Draft Ruling describes the common scenario of a company agreeing to make a loan to the trust in satisfaction of its UPE. This is far from controversial and accepted as creating a Division 7A loan.

What is of concern now is the Commissioner's opinion that a loan can result from the unilateral action of the trustee.

Broadly, it is the Commissioner's opinion that a trustee may make a loan on behalf of the company beneficiary by acting pursuant to a term of the trust deed which permits the trustee to pay or apply money to or for the benefit of the beneficiary - where an UPE is credited to a loan account.

The only exception to this is if it is outside the power of the trustee to treat the funds otherwise than as a UPE. This will require a review of each trust deed and may necessitate amendments to the trust deed to confirm that the trustee's power does not so extend, if appropriate.

#### UPE as financial accommodation (Section three)

Currently under the Income Act Assessment Act 1997 a Division 7A loan includes the provision of any form of financial accommodation.

Under the Draft Ruling, this extends to the supply or grant of some form of pecuniary assistance or favour, under a consensual agreement where a principal sum or its equivalent is ultimately payable.

What is a consensual agreement? Basically where the private company authorises (including by acquiescing) the continued use by the trust of funds representing the company's UPE by not calling for:

1. payment of that UPE, or
2. separate investment of the funds representing the UPE

for the company's absolute benefit (i.e. a sub trust for the company).

This is based on the notion that the company is providing pecuniary support to the trust by allowing it to use the relevant funds for trust purposes, rather than for the benefit of the company beneficiary absolutely.

Accordingly, where there is knowledge that funds representing the UPE are being used for trust purposes, other than for the company's absolute benefit, not calling for payment of the UPE is treated under TR 2009/D8 as the making of a Division 7A loan.

The Draft Ruling states that, as the trust and company form part of the same family group, the Commissioner will deem knowledge of the trustee's use of the funds to the company, subject to contrary evidence being produced.

#### **Conclusion**

Regardless of the methodology of the ATO, the approach reflected in the Draft Ruling is another area of uncertainty in addition to other trust developments, such as the Bamford High Court appeal. Advisers must be extremely careful to take these matters into account when managing their clients' tax affairs.

Please contact Chris Smailes or Reagan Gruenthal with any queries.

#### **TRANSFER DUTY -**

#### **SO CLOSE, YET SO FAR FOR WA BUSINESSES**

On 17 December 2009 the West Australian government delivered its Mid-Year Financial Review, and one Christmas present it gave itself was a deferral of the abolishing of duty on the transfer of West Australian non-real business assets until 1 July 2013.

Previously the government had legislated to abolish the duty from 1 July 2010. However given the budget deficit and impact of the GFC it has decided that it needs this income stream to continue, at least for the meantime.

#### **FUELLING THE FUTURE – FUEL TAX CREDITS**

Fuel tax credits are credits for the excise or customs duty imposed on fuel acquired for use in business activities, such as use in machinery and equipment. Diesel is one type of fuel covered by the scheme.

Businesses which claim fuel tax credits are increasingly being audited in relation to their claims, in particular, businesses involved in Oil & Gas or Mining which consume large quantities of fuel.

A danger with claiming fuel tax credits is that a business may, incorrectly, but in good faith, submit claims for several years without legally being eligible for the credit. It is only upon an audit that eligibility is tested by the ATO. If found ineligible,

repaying the tax can have a devastating effect on a business.

The fuel tax credit scheme is complex and the legislation has undergone several fundamental changes in the last 6 or 7 years. We can advise whether or not a business is eligible to claim credits for a previous or current financial year, and at what rate (i.e. a full credit or half credit).

To be entitled to claim a credit an entity must be registered for both GST and fuel tax credits. We can also advise on the eligibility of a business to defer payment of a GST liability or in relation to forming a GST group.

**Fuel Tax Credit Trap:** an entity must register for the Greenhouse Challenge Plus Programme if it intends to receive more than \$3 million in fuel tax credits in a financial year. This is part of the Department of Environment and Heritage's policy to improve energy efficiency and reduce greenhouse gas emissions.

The effect of the proposed Carbon Pollution Reduction Scheme ("CPRS") on fuel tax adjustment arrangements is uncertain at this time. The CPRS will place a cap on the amount of carbon pollution industry can emit. It is proposed that affected businesses will have to pay for each tonne of carbon they contribute to the atmosphere, giving them an incentive to reduce pollution. As diesel fuel emits a large amount of carbon when burnt, its cost is expected to increase considerably.

Please contact Richard Norton or Lisa Twentyman with any queries.

## PENALTY SHOOTOUT! THE TAXPAYER OR THE AGENT?

1 March 2010 signals the commencement of the Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009 and significant changes to the administrative penalties regime.

Under existing legislation, an administrative penalty may be imposed where either a taxpayer or their tax agent makes a false or misleading statement and the statement results in a shortfall amount.

Where a shortfall occurs because of a failure by the taxpayer or tax agent to take reasonable care to comply with a taxation law, a base penalty can be applied at the rate of 25% of the shortfall amount. A taxpayer does not meet the reasonable care standard simply by engaging a tax agent.

### Change

The new legislation recognises that a tax agent's failure to take reasonable care should not result in a monetary penalty for the taxpayer, provided that the taxpayer has given the tax agent all relevant information. A similar exemption from liability will apply in circumstances where previously a taxpayer would have been penalised for their tax agent's failure to lodge a document with the Commissioner in the approved form on time.

In situations where liability for the penalty is due to the recklessness or intentional disregard of a taxation law by the tax agent alone, the taxpayer will not be

immune from the imposition of penalties however the Commissioner has the power to remit all or part of the administrative penalty.

In this regard, the taxpayer still maintains a right to sue their tax agent for the amount of a penalty (including general interest charge or shortfall interest charge) where the penalty was imposed as a result of the tax agent's negligence.

**Note:** Where a shortfall amount arises due to a tax agent's lack of reasonable care, the taxpayer or the Commissioner may refer the tax agent to the Tax Practitioners Board for professional review.

Please contact Richard Norton or Lisa Twentyman with any queries.

### 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