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# TAX matters April 2010

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## OFFSHORE INCOME - ANYTHING TO DECLARE?

The ATO recently announced that it is obtaining data relating to offshore bank accounts, held by Australian residents during the period July 2005 to June 2009 from 57 banks, credit card providers and clearing houses. The information obtained from the institutions will be compared with information disclosed in taxpayers' income tax returns. This is just one of the ATO's more recent data matching

initiatives relating to offshore transactions. It is evident that the ATO is now extending its focus from the more serious offshore tax avoidance and evasion schemes and money laundering activities which were part of its "Project Wickenby" investigations to more routine transactions. The information sharing agreements which the Federal Government has signed over the past two to three years with various recognised tax havens such as Monaco, the Bahamas and the Cayman Islands, just to mention a few, are also designed to improve the ATO's information gathering and data matching ability.

There is absolutely nothing wrong with holding an offshore bank account, controlling offshore structures, foreign companies or trusts, or being a beneficiary of a non resident trust. The critical thing is to ensure that you have been correctly disclosing in your tax returns any income which you have derived or are "deemed" to have derived from overseas transactions. If you have any concerns about the correct taxation treatment of your offshore transactions and in particular whether the complex Australian taxation provisions dealing with offshore income

have potential application, now is a good time to review them, because the ATO has an offshore voluntary disclosure initiative which ends on 30 June 2010.

Under the offshore voluntary disclosure initiative the ATO has undertaken that eligible taxpayers will have reduced penalties (additional taxable income of \$20,000 or less in a year will not result in a shortfall penalty for that year and additional income that exceeds \$20,000 will have the shortfall penalty remitted to 10% of the additional tax for that year), and interest charges remitted to varying degrees for tax years prior to the 2005 tax year.

Norton & Smailes can provide you with advice on the ATO's offshore voluntary disclosure initiative, prepare and lodge it for you, and act for you in relation to any negotiations with the ATO.

Contact: Richard Norton, Chris Smailes and Jillian Saint.

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## **SUPER GUARANTEE - IS A COMPANY OR TRUST INVISIBLE? – ROY MORGAN RESEARCH CASE**

Did you know it could be the case that if you have paid employment remuneration to a company or trust, you could still be liable for super guarantee?

In the recent decision of *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2009] AATA 702, the Administrative Appeals Tribunal appeared to be breaking new ground when it found an employer liable for the super guarantee charge on remuneration it paid to certain companies and trusts.

This decision throws doubt on the common practice of employers entering into employment contracts with intermediary companies or trusts of contractors to overcome PAYG and super guarantee obligations.

In the *Roy Morgan* case, individuals were engaged by Roy Morgan to interview the general public. The interviewers were paid according to the number of interviews completed, which were performed according to strict instruction and were not able to delegate, albeit, they had the freedom to refuse work. Some persons were engaged via a company or trust. The Commissioner issued superannuation guarantee default assessments and amended assessments to Roy Morgan in regard to super guarantee contributions not made for all such persons. The main issue in this case was whether the interviewers were employees within the meaning of section 12(1) of the Superannuation Guarantee (Administration) Act.

The tribunal dismissed Roy Morgan's argument that the interviewers were contractors engaged to produce a result and held that Roy Morgan controlled the conduct of the interviewers to such an extent that the interviewers fell within the meaning of employee.

We are of the view that this decision does not affect the current law as set out by the ATO in Superannuation Guarantee Ruling SGR 2005/2 "Superannuation Guarantee: work arranged by intermediaries". This ruling provides that in circumstances where an individual worker is not contracted personally but via an interposed entity, such as a company or trust, the contracting party is not an employer of the individual worker, and hence will not be liable for a super guarantee contributions as the contract it has is with the intermediary and not the individual worker.

Our interpretation of SGR 2005/2 is confirmed by the ATO's Superannuation Guarantee (SG) eligibility decision tool located on the ATO's website.

In this regard it appears the decision in the *Roy Morgan Research* case turned on the fact that although Roy Morgan paid remuneration to someone other than the individual interviewer for their services, it did not change the fact that on the evidence Roy Morgan engaged the individual interviewer.

Directing remuneration to an intermediary company or trust will not, of itself, determine the nature of the employment relationship or overcome a super

guarantee charge liability. The evidence of the relationship must be determined from the facts, and in particular from the terms of the contract and the arrangements themselves.

In practice, where parties enter into a contract for labour or services, appropriate weight will be given to the words used in the contract when determining the character of the relationship, the identity of contracting parties and consequently whether a super guarantee charge liability arises.

This is an opportune time to review your contractual arrangements to ensure they meet the requirements of the law.

Contact: Chris Smailes and Sean Hayes

## **DUTIES ACT AMENDMENTS – BEWARE OF TRANSFERS FROM SUPER FUNDS!**

Section 127 of the *Duties Act, 2008* ("the Act") provides in effect that nominal duty of \$20 is chargeable in respect of the transfer of dutiable property from a superannuation fund to a member of the fund if:

- The member was a member when the property first became part of the fund; and
- The unencumbered value of the property transferred does not exceed the value of the member's interest in the fund.

The *Revenue Laws Amendment Bill 2010* referred to in our article below seeks to amend the Act such that nominal duty will be chargeable under section 127 *only* where there is no consideration paid or payable for the transfer (in

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addition to the other requirements of section 127 being met).

For example, if enacted, the amendment would result in a sale of property from the trustee of a superannuation fund to a member of that fund being assessed for full ad valorem duty.

Interestingly, the Explanatory Memorandum to the Bill states that the proposed amendment “corrects an oversight” in the Act. However in our experience, the *Stamp Act, 1921* which operated up to 30 June 2008, and section 127 of the Act as currently enacted have been administered by the Office of State Revenue on the basis that the concession was generally available regardless of whether consideration was payable or not.

If enacted, the amendment will come into operation on the day after the date of Royal Assent. Accordingly, a sale of property from a superannuation fund to a member executed on or before Royal Assent may still be able to access the concession.

Contact: Daniel Fry, Chris Smailes and Johanne Thomas

## TRANSFER DUTY -

### DUTIES ACT AMENDMENTS - SO MANY CHANGES, SO LITTLE TIME

On 10 March 2010 the *Revenue Laws Amendment and Repeal Bill 2010* and the *Revenue Laws Amendment Bill 2010* were introduced into the WA Parliament. The Bills propose various amendments to WA revenue legislation, in particular the *Duties Act, 2008* (“the Act”).

Whilst many of the proposed amendments appear relatively

minor (unless of course a proposed change affects you or your clients!), a few of the amendments are significant. In particular, please refer to our article entitled “Duties Act Amendments – Beware of Transfers from Super Funds on for details of an amendment relating to the superannuation provisions of the Act.

Also of significance, it is proposed that simplified arrangements be put in place for the lodgement of documents and the payment of transfer duty under the Act. The proposed new arrangements include:

- A single lodgement period for all instruments, being within 2 months from the date that the liability to duty arises. Currently some contracts are not required to be lodged within then normal 2 month time period. However the provisions have proven to be too complicated and require certain types of contracts to be distinguished from others.
- The capacity for duty to be paid at settlement providing the instrument is assessed and endorsed by a responsible party (usually a conveyancer or lawyer) under the Revenue Online system. This proposal has been included to deal with concerns expressed over the timing of the payment of duty, which in many cases requires purchasers to obtain funds to meet their duty obligations prior to funds being released from their financial institution as part of the settlement process.

To ensure that the necessary system changes and customer

education associated with this proposal are completed prior to its commencement, these amendments, if enacted, will commence on a date to be proclaimed. It is anticipated that the commencement date will be during 2010 – 2011.

Some of the other amendments proposed pursuant to the Bills include:

- Delaying the abolition of transfer duty on non-real business assets until 1 July 2013; and

Clarifying the operation of the partnership provisions of the Act, including an amendment to ensure that duty is charged in respect of

- land that is contributed to a partnership on its formation.

Given that the proposed amendments concern a range of provisions in the Act, and the amendments are proposed to commence on various dates, it is more important than ever to ensure that advice is obtained prior to entering into transactions which may attract duty.

Contact: Chris Smailes and Johanne Thomas

## NEW EMPLOYEE AT N&S

We are pleased to announce that Jillian Saint has joined the Norton & Smailes team.

Jill brings a wealth of experience to the firm, having previously worked in both private practice and also at the Tax Office in the position of Assistant Commissioner of International Taxation for 8 years and at Arnold Bloch Leibler in Melbourne for a number of years as a Senior Associate.

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