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# TAX matters

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Welcome to Tax Matters 2009. We trust 2009 won't be too unkind to you and wish you and your clients all the best this year.

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## Philanthropy, for everyone.

In 1999 the Howard Government announced the arrival of a new entity, a 'prescribed private fund' ("PPF"), a form of ancillary fund designed to encourage private philanthropy in Australia by providing private groups, such as businesses, families and individuals, with greater flexibility to start their own trust funds for philanthropic purposes.

PPFs qualify for deductible gift recipient ("DGR") status through an application process 'prescribed' in the income tax regulations. DGR status means that tax deductions may be claimed for donations to PPFs. A PPF may also be entitled to an income tax exemption if it is endorsed as a charity, or endorsed as an income tax exempt fund.

The distinguishing feature of PPFs from other charitable vehicles is that PPFs are established by individuals, families and businesses for their own philanthropic purposes, without the requirement to seek public donations or be controlled by the public. This means that individuals, families and businesses can donate to the PPF, being a trust which they control, which can then distribute these funds to other DGRs that have either been endorsed by the ATO, or are listed by name in the income tax law as a DGR.

Commonly cited reasons why people may want to establish a PPF fund include:

(a) companies and individuals wanting to (and/or wanting

to be seen to) support charities;

(b) individuals wanting a lasting legacy in their family – for example, the founder may want to encourage younger generations to contribute to charities and be involved in gift making;

(c) individuals who might otherwise intend to give moneys to charities in their will. By establishing a PPF they can claim a tax deduction and utilise that deduction while they are alive;

(d) individuals who want to reduce/not pay capital gains tax. The effect of the general 50% CGT discount is that if an individual gives to a PPF half of a discount capital gain, they will not have to pay capital gains tax; and

(e) companies and individuals wanting to control the capital they donate rather than giving away control

of the capital to unrelated charities.<sup>1</sup>

Broadly, the process to set up a PPF involves a trust deed, an accumulation plan (detailing how donations and income will be accumulated and distributed), resumes of the founder and major donors and an application which is lodged with the ATO for PPF status. The ATO has released a model trust deed and guidelines on its website. Whilst the application is lodged with the ATO, the application is actually made to the Government (the decision to prescribe the fund is made by the Minister responsible for tax law administration matters). If the ATO considers that the fund satisfies the relevant legislative requirements and the fund has the appropriate safeguards in place, the application will be forwarded to Government for consideration.

### **Proposed changes to PPFs**

In November 2008 the Assistant Treasurer released a discussion paper (available on the Treasury website [www.treasury.gov.au](http://www.treasury.gov.au)) on improving the integrity of PPFs. The government announced in its 2008 Budget that it would legislate to improve the integrity of PPFs and provide the trustees of PPFs with greater certainty as to their philanthropic obligations. These measures are to have effect from 1 July 2009.

We have had experience in these matter and if you or your clients wish to establish a PPF

or other charitable vehicle we can assist.

Contact - Richard Norton, Chris Smailes or Alan Krawitz

### **Superannuation Guarantee – Don't Get Caught Out**

On 5 November 2008 the ATO issued *Draft Superannuation Guarantee Ruling SGR 2008/D2* "Superannuation Guarantee: meaning of the terms 'ordinary time earnings' ("OTE") and 'salary or wages'".

The definition of OTE is relevant to employers for the purpose of calculating the minimum level of superannuation support required for individual employees under the *Superannuation Guarantee (Administration) Act 1992* ("SGAA"). As a consequence of amendments to the SGAA which apply from 1 July 2008 the amount against which an employer calculates the contribution necessary to meet their superannuation guarantee obligations in respect of an employee has been standardised to OTE for all employees.

The definition of "salary or wages" is relevant to employers in calculating the superannuation guarantee shortfall of individual employees where an employer has not provided the required minimum level of superannuation support.

It is proposed that once finalised, *SGR 2008/D2* will apply from 1 July 2009. Further, it is proposed that once *SGR 2008/D2* is finalised, it will replace *Superannuation Guarantee Rulings SGR 94/4* and *SGR 94/5*,

which will be withdrawn from the date of issue of the new ruling.

We note that there appear to be at least some differences between the Commissioner's views as set out in *SGR 2008/D2* when compared to *SGR 94/4* and *SGR 94/5*, including differences in relation to whether overtime payments constitute OTE for superannuation guarantee purposes.

In our experience, it is reasonably rare that the terms of a final ruling differ too much from the draft. Accordingly, we would suggest that employers seek advice in relation to their superannuation guarantee obligations in light of this draft ruling sooner rather than later.

Contact: Chris Smailes or Johanne Thomas

### **Redundancy Payments – is the ATO out of touch?**

In a new draft ruling, *TR 2008/D6*, the ATO aims to crack down on two areas regarding redundancy payments namely:

- a) project and contract workers who claim concessional tax treatment on their termination payouts; and
- b) the tightening up of rules relating to dual capacity employees who are employed as both a director and employee.

Broadly a termination payment made upon the redundancy of an individual may qualify for tax concessions. If a termination

<sup>1</sup> Duell B, "Prescribed private funds" *CCH Tax Week*, Issue 18, 8 May 2008.

payment is a genuine redundancy payment (within the meaning given by section 83-175 of the *Income Tax Assessment Act 1997*) then that part of the termination payment will be non-assessable non-exempt income of the recipient

Directors may no longer automatically assume that potential redundancy payments to themselves will be tax-free. Currently, any employee whose employment is terminated due to genuine redundancy can receive a tax-free redundancy payout (up to a certain limit) but the draft ruling seeks to restrict employees who are also directors of companies from qualifying for tax-free payments.

The main determinant for receiving a tax-free payment is that the redundancy is genuine and involuntary. Given the perceived abuse of this clause in the past the ATO has sought to clamp down in this area by providing significantly tightened guidelines. Of particular concern is that the current draft ruling determines that employees in a director role are highly unlikely to experience genuine involuntary redundancies given the likelihood that they would have been involved in business decisions to make their position redundant.

The draft ruling states that a dual capacity employee will only qualify for the tax-free redundancy payment if they do not consent to or approve the decision to terminate their own employment. The ruling does

allow one exception to this rule namely where the termination decision is dictated by legal or economic factors, leaving the employer’s decision-makers with no real or practical choice other than to terminate their own employment, in which case a dual capacity employee may qualify for a tax-free redundancy.

However, the requirement in the draft ruling that the closure of a business or business division must in effect be forced upon the directors does not take account of the current economic situation and the realities of business. Given the current economic conditions and outlook, there are many external factors which may mean that a prudent business decision to restructure and close down a division of a business before the directors are forced to may count against them.

Contact: Richard Norton 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.