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client alert

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Tax changes following carbon tax and mining tax repeal

The Abbott government has introduced into Parliament proposed legislation to repeal the carbon tax and the mining tax.

Importantly, the Bill to remove the mining tax also proposes to repeal or revise a number of tax and superannuation measures. Key changes include:

- **capital allowances for small business entities** – the instant asset write-off threshold will be reduced to \$1,000 and the accelerated depreciation arrangements for motor vehicles will be discontinued;
- **company loss carry-back** – the repeal of the loss carry-back measure will apply from the start of the 2013–2014 income year;
- **superannuation guarantee (SG) charge** – the SG charge percentage will be paused at 9.25% for the years starting on 1 July 2014 and 1 July 2015, increase to 9.5% for the year starting on 1 July 2016, and then gradually increase by half a percentage point each year until it reaches 12% for years starting on or after 1 July 2021; and
- **low income superannuation contribution (LISC)** – the LISC will not be payable in respect of concessional contributions made from 1 July 2013.

No GST following purchase of leased apartments

A taxpayer has been successful before the Full Federal Court in a matter concerning a GST assessment following the purchase of three residential apartments. The taxpayer (a company) had purchased the apartments in a hotel complex from the vendor on a GST-free basis as supply of a going concern. The apartments were subject to leases that the vendor had

previously granted to a hotel management company, which was obliged to let the apartments as part of its serviced apartment business. The taxpayer had also elected to participate in a “management rights scheme”, which provided the taxpayer a right to income in exchange for allowing its apartments to be used in the serviced apartment business.

The Commissioner assessed the taxpayer as having a GST liability of \$215,000 (ie an increasing adjustment), which represented 10% of the total purchase price paid by the taxpayer for the apartments. On appeal, the Full Court found that the primary judge had made an error in concluding that, following the sale of the reversion from the vendor to the taxpayer, there was a continuing supply, being the supply of residential premises by lease, by the vendor to the hotel management company. The Full Court said there was no continuing supply in relation to the lease; rather, the supply was the grant of the lease, which did not continue for the term of the lease. As a result, the taxpayer’s objection to the GST assessment was allowed.

TIP: At the time of writing it remained unclear whether the Commissioner would apply to the High Court for special leave to appeal against the decision. Assuming that the Full Court’s decision will not be appealed or overturned, purchasers who have previously acquired residential premises as a going concern and then included an increasing adjustment in a subsequent GST return may want to consider whether there is potential for a refund.

Note that there are time limits that can restrict entitlement to refunds. Purchasers who are contemplating acquiring residential premises as a going concern should exercise caution until it is clear whether the decision will be appealed, or whether the government may look into introducing amending legislation.

Individual not a tax resident of Australia

An individual taxpayer has been successful before the Administrative Appeals Tribunal (AAT) in arguing that he was not an Australian resident for tax purposes for the relevant years.

In June 2006, after his release from jail for drug offences, the man decided he had no future in Australia and moved to Thailand. In 2008, he moved to Bali and obtained the right to live in Indonesia as a retired person. During 2008 and 2010, the man made regular trips back to Australia, but during his last visit he was arrested and charged with possession of a precursor to a dangerous drug. The man was convicted and sentenced to 18 months' imprisonment.

While in prison, the Commissioner commenced an audit of the taxpayer's affairs and decided that he was an Australian resident with unexplained income, and issued assessments for the 2009 to 2011 income years. The Commissioner also assessed penalties in excess of \$350,000. The Commissioner based his decision on documents showing bank interest payments to the taxpayer as well as payments he had made towards the cost of building a boat.

However, the AAT was satisfied that the man was not a resident of Australia in the years in question. It said the man had not been residing in Australia since mid-2006 and that he had established a home in Bali from early 2008.

Legal expense deductions to fight ASIC charges refused

A stockbroker has been unsuccessful before the AAT in arguing that legal expenses he had incurred in the 2011 income year were deductible.

The taxpayer had incurred legal expenses challenging an ASIC banning order in proceedings before the Federal Court and the Full Federal Court. Both courts dismissed his appeals. The banning order, which became operative from 7 May 2010, prohibited the man from providing financial services for five years. The taxpayer had also incurred legal expenses in defending 20 criminal charges for alleged insider trading; he was eventually acquitted on 17 of the charges, with the remaining three withdrawn by ASIC.

The AAT was of view that the legal expenses were not incurred by the taxpayer "in the course" of gaining or producing assessable income. The AAT found that when the taxpayer had incurred the expenses, his position as an authorised representative at the company he worked for had ceased. Accordingly, the AAT held that the expenses incurred in the 2011 income year were not deductible.

Tax debt release based on serious hardship refused

The AAT has affirmed the Commissioner's decision to refuse to release an individual from his tax liability based on serious hardship grounds. Under the Taxation Administration Act, the Commissioner has a discretion to release an individual from paying a tax liability (in whole or in part) if satisfying the liability would cause that person serious hardship.

The man argued that due to his wife's illness, he had been increasingly required to care for her and their children and that this has reduced his capacity to earn income. The AAT was satisfied that the individual was facing serious hardship in the immediate future in the sense of lacking the means to purchase food, clothing and medical supplies for his family, and other basic requirements such as accommodation. However, it said the serious hardship was not caused by him being required to meet the tax liability. Rather, the serious hardship was due to the taxpayer's liabilities, of which tax debt was just one, exceeding his assets, and the outgoings required to service those liabilities exceeding his income. As he had not met the relevant criterion, the AAT said it did not have the power to release him from his tax debts.

TIP: Even if the Commissioner is satisfied that serious hardship will result from payment of a tax liability, the Commissioner is not obliged to exercise his discretion in favour of the individual taxpayer. Nevertheless, it is clear that the ATO is obliged to act reasonably and responsibly, and should not act arbitrarily or capriciously. An application for release from an eligible tax liability must be in the approved form.

GST refund request made too late

An individual taxpayer has been unsuccessful before the AAT in seeking a review of the Commissioner's decision to refuse a GST refund in relation to the June 2004 quarter. The Commissioner had refused the refund on the basis that the taxpayer's application was made after the four-year cut-off date for the June 2004 quarter (that is, 28 July 2008).

The taxpayer explained that due to his ill health and troubles with his then business, he did not get around to lodging tax returns until 2011. The Commissioner acknowledged that the man was owed a refund and had recommended that he approach the Department of Finance and Deregulation to obtain an act of grace payment, but said that because more than four years had elapsed since the time the taxpayer could have claimed the money, there was no discretion that could be exercised in the taxpayer's favour. The AAT agreed with the Commissioner. It also refused the taxpayer's request for an extension of time to apply to the AAT for review of the Commissioner's objection decision (dated 31 October 2011) refusing the GST refund for the June 2004 quarter.

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