



# Explanatory Memorandum

## November 2011

### CURRENCY

This issue of **Client Alert** takes into account all developments up to and including 17 October 2011.

### Business tax losses under Tax Forum spotlight

In his closing remarks at the Tax Forum at Parliament House in Canberra on 5 October 2011, the Treasurer said he had asked a business tax reform working group, to be chaired by Chris Jordan, to review the treatment of business tax losses. Mr Swan said the working group will include business leaders, tax experts, unions, and will be supported by Treasury.

Mr Swan said the working group "will look at business tax responses to a patchwork economy". It is understood that the first priority is to identify options for losses and options for savings to fund them. He said "we need to consider things like loss carry back, uplifting losses, and what happens to the value of losses when business change composition or ownership". "The working group should also identify ways to fund these ideas, from business tax", Mr Swan added. It is expected that an initial report will be delivered in November 2011 and a final report by March 2012.

The Treasurer said the second priority for the working group "is to look at longer term company tax options, and report during 2012". "This should look at broader questions of working up if and how an equity allowance could work", Mr Swan said.

Other points made by Mr Swan include:

- **Small business:** The Treasurer has asked Treasury, the ATO and the Council for Small Business "to identify the best ways to reduce complexity, in the coming months".
- **Individuals:** Mr Swan proposed that the Government's "first priority in further personal tax reform will be to increase the tax-free threshold further, to at least \$21,000, and remove the Low Income Tax Offset entirely". In relation to closing so-called "tax loopholes", the Treasurer said the Living Away From Home Allowance is "definitely worth exploring". On superannuation-related issues, Mr Swan said the Government will consider "drawdown phase options like annuities and deferred annuities".
- **State taxes:** The NSW and Queensland Treasurers have agreed to work together "to develop a state tax reform plan, for further discussion with the Commonwealth".
- **Independent Tax Studies Institute:** Mr Swan said the Government will "contribute around \$1m per year to create an independent Tax Studies Institute".

Source: *Treasurer's closing remarks at Tax Forum, 5 October 2011*

[www.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2011/031.htm&pageID=005&min=wms&Year=&DocType=1](http://www.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2011/031.htm&pageID=005&min=wms&Year=&DocType=1)

### Tax Office views on SMSFs, real property and borrowing rules

Draft Self Managed Superannuation Funds Ruling SMSF 2011/D1, released on 14 September 2011, explains the Commissioner's views on the limited recourse borrowing arrangement (LRBA) provisions in ss 67A and 67B of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

The draft ruling explains the key LRBA concepts of:

- what is an "acquirable asset" and a "single acquirable asset";
- "maintaining" or "repairing" the acquirable asset as distinguished from "improving" it; and
- when a single acquirable asset is changed to such an extent that it is a different (replacement) asset.

## Background

Broadly, an SMSF is permitted to borrow money (and maintain a borrowing) provided the borrowing is made pursuant to an LRBA. An LRBA entered into from 7 July 2010 (ie the date the current ss 67A and 67B came into effect) can only be referable to a single "acquirable asset" held in a holding trust which the SMSF is not otherwise prohibited from acquiring directly: s 67A. In addition, a borrowing applied to the original acquirable asset can only be replaced with a "replacement asset" according to the circumstances in s 67B.

The draft ruling outlines where money borrowed under an LRBA can be applied in maintaining or repairing (but not improving) a single acquirable asset. While borrowings under an LRBA cannot be used to improve an acquirable asset, the ATO says money from other sources could be used to improve (or repair or maintain) that asset. However, any improvements must not result in the acquirable asset becoming a different asset (ie a "replacement asset" in circumstances not covered by s 67B).

## Acquirable asset

The draft ruling notes that an "acquirable asset" is any form of property (other than money) that the trustee is not otherwise prohibited from acquiring under the superannuation law. Although "property" can include proprietary rights or the physical objects of proprietary rights (eg land), the ATO says it is necessary to consider the meaning of property in both senses to determine whether money borrowed under an LRBA has been applied for the acquisition of a single acquirable asset.

## Single acquirable asset

While money borrowed under an LRBA can only be applied for the acquisition of a single acquirable asset (or a collection of identical assets with the same market value), the Commissioner considers that a single object of property may be acquired notwithstanding that it is comprised of two or more proprietary rights. However, this will only be so where it is reasonable to conclude that the object of the separate proprietary rights is distinctly identifiable as a single asset.

If assets can be dealt with separately, the Commissioner considers it is more than one asset for the purposes of the LRBA provisions, unless other laws of a state or territory prevent it from being dealt with separately.

## Borrowings applied for repairs (but not improvements)

To determine if an asset has been repaired or maintained (or whether it has been improved), the ATO says reference is made to the asset's qualities and characteristics at the time when the asset is acquired under the LRBA. To this end, the ATO says an asset is improved if the functional efficiency of the asset (or value) is substantially increased.

The Commissioner also warns that his views on repairs and improvements in Ruling TR 97/23 are informative (but not determinative) in the LRBA context.

If an asset is already owned by an SMSF, and thus not subject to an LRBA, the Commissioner says a borrowing to fund repairs or maintenance for that asset would not satisfy the LRBA provisions.

## Repairing the asset

According to the draft ruling, "repairing" means remedying or making good defects in, damage to, or deterioration of, an asset and contemplates the continued existence of the asset. The ATO says a repair (usually occasional and partial) restores the functional efficiency of the asset without changing its character and may include restoration to its former appearance, form, state or condition. That is, a repair merely replaces a part of something or corrects something that is already there and has become worn out or dilapidated through ordinary wear and tear, or is damaged whether accidentally or deliberately.

## Acquiring asset in need of repair

The draft ruling notes that an asset may be acquired in a state in which a part of the asset is defective, damaged or suffering some deterioration of what would be considered to be its normal level of functional efficiency. Accordingly, the ATO says a restoration of that part of the asset to its functional efficiency would be a repair (and not an improvement) for LRBA purposes.

However, the ATO warns that a substantial renovation of a run down house would improve the functional efficiency of the asset as well as substantially improve its value. Thus, the ATO says it would amount to an improvement for which borrowings under the LRBA could not be used.

## Improving the asset

In contrast to a repair, the ATO considers that an asset is improved if the functional efficiency of the asset (or value) is substantially increased through the addition of new and substantial features or rights or bringing a thing or structure into a more valuable or desirable form, state or condition than a mere repair. The ATO says this is a question of fact and degree to be determined against the state of the asset at the time when the LRBA was entered into. Minor or trifling increases in functional efficiency or value will not amount to an improvement.

The Commissioner illustrates the distinction between repairs and improvements via the following (edited) table :

Repairs/maintenance (permitted)	Improvements (not permitted with borrowed money)
Fire damages part of kitchen (cooktop, benches, walls and ceiling). Restoration of damaged part of kitchen constitutes a repair of what is a subsidiary part of the asset (house and land).	If kitchen was also extended by extension of house, this extension would be an improvement.
Guttering on house replaced and house repainted. A fence is replaced. Fire alarm installed to comply with council rules. This would be a repair or maintenance.	Addition of new pool or new garage would be an improvement.
A cyclone damages roof of house. Replacement of roof in its entirety is a repair.	Addition of second storey to house at the time of also replacing roof would be an improvement.
A farm (on a single title) is the single acquirable asset under LRBA. At time of entering into LRBA, farm includes one set of cattle yards, four bores including windmills, tanks, troughs and 3 km of fencing. Replacing a section of the cattle yards or the existing fencing is a repair. Ensuring bores, windmills, tanks and troughs continue working is repair or maintenance. This would include laying new pipes between tank and trough.	Each of the following additions is an improvement: a new set of cattle yards; new bore, tank, windmill and trough; a dam; a further 2 km of fencing.

Note that the improvements listed above could be carried out provided the SMSF uses its own money (and not borrowed money). According to the Commissioner, these improvements would not fundamentally alter the character of the asset.

## Drawdowns for repairs

The ATO accepts that subsequent drawdowns under an LRBA may be made for the purposes of maintaining or repairing an asset, provided the arrangement as a whole continues to satisfy the LRBA provisions.

## Improvements using money not borrowed

While borrowings under an LRBA cannot be used to improve a single acquirable asset that is the subject of the LRBA, the ATO says money from other sources could be used to improve (or repair or maintain) that asset. However, any improvements must not result in the acquirable asset becoming a different asset. (Note: an improvement to an asset using money from other sources may have excess contribution implications for the SMSF members as it will effectively increase the capital of the fund: see Ruling TR 2010/1.)

## Different (replacement) assets

A borrowing applied to the [original acquirable asset can only be replaced with a "replacement asset" according to the circumstances](#) in s 67B. If the acquirable asset is changed (including by way of improvements) to such an extent that it fundamentally changes the character of the asset such that it becomes a different asset, the exception in s 67A will cease to apply. However, the Commissioner says that restoring a house destroyed by fire, flood or cyclone by reconstructing a similar house would result in the restoration of the original acquirable asset rather than its replacement.

## Date of effect

When finalised, the Ruling is proposed to apply to arrangements entered into on or after 7 July 2010 (including an arrangement that is a refinancing of a borrowing of money under an arrangement entered into before, on or after 7 July 2010).

Source: *Draft Self Managed Superannuation Funds Ruling SMSF 2011/D1*  
<http://law.ato.gov.au/pdf/pbr/smsfr2011-d001.pdf>

## Tax law changes to tackle phoenix activities

The *Tax Laws Amendment (2011 Measures No 8) Bill 2011* (the No 8 Bill) and the *Pay As You Go Withholding Non-Compliance Tax Bill 2011* have been introduced in the House of Representatives.

The No 8 Bill proposes amendments to increase directors' obligations by:

- extending the director penalty regime to unpaid superannuation guarantee amounts;
- allowing the Commissioner to commence proceedings to recover director penalties three months after the company's due day where the company debt remains unpaid and unreported after the three months passes, without first issuing a director penalty notice; and
- in some instances, making directors and their associates liable to PAYG withholding non-compliance tax where the company has failed to pay amounts withheld to the Commissioner. In this regard, the tax on directors and their associates to give effect to denying their credits will be imposed by the PAYG Withholding Non-compliance Tax Bill.

The Government said the amendments aim to deter company directors from engaging in phoenix activities or using amounts for company or other purposes that should be paid to the Commissioner or superannuation funds.

### Director penalty regime

The No 8 Bill proposes to extend the director penalty regime to the superannuation guarantee charge. The purpose is to make directors personally liable for their company's failure to meet its obligations to employee superannuation. It is proposed that amounts collected under the director penalty regime that represent the superannuation guarantee charge would be dealt with in the same way as superannuation guarantee charge amounts collected under the *Superannuation Guarantee (Administration) Act 1992* (SGAA).

#### *Timing and imposition*

Under the changes, existing directors will be liable to a director penalty at the end of the lodgment day (or later day as allowed by the Commissioner under s 33 of the SGAA) if the company has not lodged its superannuation guarantee statement and paid the corresponding superannuation guarantee charge by the end of that day.

For example, say during the March 2013 quarter, a company fails to pay the relevant superannuation guarantee amounts by lodgment day (ie 28 May 2013). The directors on 28 May 2013 will be liable to a director penalty equal to the company's superannuation guarantee charge.

#### *Estimates*

The No 8 Bill also proposes to expand the estimates regime to cover unpaid superannuation guarantee. To enable the Commissioner to estimate the superannuation guarantee charge where it has not been assessed (and therefore is not due and payable under the SGAA), the estimates regime will treat the superannuation guarantee charge as being payable on the day the superannuation guarantee shortfall for the quarter should have been reported to the Commissioner in a superannuation guarantee statement. This is the lodgment day or a later day if permitted by the Commissioner under s 33 of the SGAA.

However, unlike estimates of PAYG withholding liabilities, the GIC will not accrue on estimates of superannuation guarantee charge. The GIC will accrue on any assessment of the superannuation guarantee charge that is made after the estimate.

Further, consistent with estimates of PAYG withholding liabilities, a director may submit a statutory declaration or affidavit to verify the amount of the underlying liability. The director must also verify what action has been taken to pay the superannuation guarantee charge. The effect may be that the estimate is reduced or revoked.

#### *Timing of defences*

It is proposed that the same statutory defences for directors concerning PAYG withholding liability under the TAA will be available to superannuation guarantee charge.

The Bill also proposes to amend s 269-35 of Sch 1 to the TAA to provide for a 60-day period to raise a defence which will apply to the recovery of all director penalties by methods other than by court proceedings, regardless of the character of the underlying liability.

Where the method of recovery was not through court proceedings, the director will be required to provide information to the Commissioner within 60 days of:

- receiving a notice that the recovery has occurred (eg the Commissioner has applied credits that the director was entitled to offset his/her director penalty); or
- receiving a copy of a notice issued to a third party under s 260-5 of Sch 1 to the TAA (eg a notice to a bank to recover amounts from a bank account).

That information must satisfy the Commissioner of the matters relevant to make out one of the defences.

## Recovery processes

Under the proposed amendments, the Commissioner will have access to two processes to recover a director penalty, regardless of the character of the director penalty, that is whether it relates to unpaid PAYG withholding liability, superannuation guarantee charge, or an estimate of those liabilities. These processes will apply to all methods of recovery eg commencing court proceedings, statutory offsetting, or collection under garnishee notices. The use of either process will depend on the circumstances.

- **First recovery process** – the first process will allow the Commissioner to issue a director penalty notice and wait until the end of 21 days after issuing that notice before commencing proceedings to recover a director penalty. This process must be used where: (i) the company's unpaid liability has been reported to the ATO within three months of when it was due to be paid; or (ii) the company's unpaid liability (whether reported by the company or not) is not yet three months overdue.
- **Second recovery process** – the second process will allow the Commissioner to commence proceedings to recover a director penalty, without issuing a director penalty notice. This process will be only available to the Commissioner where the liability remains unpaid and unreported three months after the due day.

Other points to note:

- Actions that do not extinguish a director penalty – under the proposed amendments, if the circumstances exist for the second recovery process to be used, the director penalty will not be remitted where the director places the company into liquidation or voluntary administration after the three months elapses. In these circumstances, even where the company is in liquidation or voluntary administration, the only way to extinguish the director penalty will be for them or a fellow director to pay the penalty. The penalty will also be extinguished to the extent that a dividend comes from the insolvency administration.
- New directors – The two recovery processes will apply to new directors as they do for existing directors. A new director would become liable if after joining the company for 14 days, the company still has not discharged its obligations:
  - If a new director becomes liable within three months of the company debt becoming due, the Commissioner will be able to commence the first recovery process; however, if the debt remains unpaid at the end of the three months, the Commissioner will be able to commence the second recovery process.
  - If a new director becomes liable more than three months after the company debt was due, the Commissioner will be able to commence the second recovery process.

## PAYG withholding non-compliance tax

The No 8 Bill and the PAYG Withholding Non-compliance Tax Bill propose to introduce "PAYG withholding non-compliance tax" (contained in proposed Subdiv 18-D of Sch 1 to the TAA). Broadly, the amendments will deny directors (and their associates) entitlement to PAYG withholding credits (through the imposition of the tax) where the company of which they are a director has failed to remit PAYG withholding amounts. The Government said the effect of these changes would "reverse the economic benefit" of a PAYG withholding credit.

Company directors and their associates will be liable to pay the tax where their company has a PAYG withholding liability for an income year and the individual is entitled to a credit for amounts withheld by that company during the income year.

Although the tax is due and payable, the tax is not recoverable unless the Commissioner issues a notice to the individual director or associate. The Commissioner should only issue a notice after determining that it is fair and reasonable for the individual to pay the tax. The Commissioner cannot issue a notice where the relevant director has a director penalty liability because of the company's failure to pay PAYG withholding for the income year.

The Explanatory Memorandum to the Bills notes that although the measure achieves similar outcomes to the exposure draft legislation, the "mechanics of achieving those outcomes have changed".

### *The amount of tax payable*

The amount of tax payable by the director will be the lesser of:

- the total amounts withheld from payments made to the individual by the company in the individual's income year (that is, the extent that the credit is attributable to amounts withheld from payments made by the company of which the individual was a director); and
- the company's PAYG withholding liability for payments made during the income year.

The tax will be due and payable on the same date as the original income tax that must be paid by the individuals for that financial year. As income tax is not due to be paid unless an assessment is made, and to account for cases where no income tax is payable by the individual, the individual will be treated as being required to pay income tax for the income year.

An individual that fails to pay some or all of an amount of the tax on time will be required to pay GIC. The GIC will accrue from the day by which the unpaid amount of tax was due to be paid and stops accruing on the later of the unpaid tax being paid or the GIC on the unpaid tax being paid.

Directors may attempt to satisfy the Commissioner that they had grounds for allowing the company not to meet its PAYG withholding obligations. Where the Commissioner is satisfied that the director had met one of the specified grounds, the Commissioner will be required to issue a notice to reduce the amount of tax payable by that director.

### ***Associates of directors***

An individual who is an associate of a company director can be liable to pay the tax for an income year if amounts withheld by the company (of which they are an associate of the director) have not been paid to the Commissioner by the last day for remitting any of the amounts withheld during the associate's income year. An "associate" is defined in s 995-1 of the ITAA 1997 (examples include relatives, partners, a spouse and children of the natural person).

To be liable to pay the tax, the associate must be entitled to a credit which can be attributed to some extent to amounts withheld from payments such as salary or wages made to them by the company during the income year.

Merely being an associate of the director does not mean that an individual will be liable to pay the tax. The Commissioner must also be satisfied that due to the associate's relationship with the director or their relationship with the company, that the associate knew, or could reasonably be expected to have known, that the company had failed to pay amounts withheld to Commissioner. In addition, the Commissioner must also be satisfied that the associate did not report the debt, or cause any reasonable action to be taken regarding the debt.

### ***Other important points***

- **Timing of notices** – there are specified time periods to allow the Commissioner to raise a notice for the tax. Broadly, the Commissioner will have two years from the notice of assessment for the individual's income tax for that income year to issue a notice to collect the tax or increase the tax payable. The Commissioner will have four years to issue a notice to reduce the tax payable. However, there will be no time limit if the notice is to give effect to a decision on review or appeal or because of an objection made by the individual pending a review or appeal.
- **Review of decisions** – a director or an associate who receives a notice enabling the Commissioner to recover an amount of the tax may object under Pt IVC of the TAA. Where a director or associate succeeds in a review, the taxpayer will be entitled to interest.

### ***Date of effect***

Broadly, these amendments are proposed to commence on the day on which the Bill receives Royal Assent. However, there are extensive transitional provisions: see below.

### ***Application and transitional provisions***

The automated recovery provisions in Pt 1 of Sch 3 to the No 8 Bill are proposed to apply to all director penalties that are due and payable at or after commencement of the amendments on the day after Royal Assent. The automated recovery provisions will also apply to director penalties that were in existence (under Div 269 of Sch 1 to the TAA) before the commencement of Pt 1, if those penalties are not extinguished before commencement.

To be extinguished, the penalty would have been paid, remitted or discharged before the provisions will come into effect. Where a company was liquidated or went into voluntary administration before the commencement of Pt 1, the director penalties that existed before that action would be taken as being extinguished. Accordingly, those penalties will not be subject to the automated recovery provisions.

The amendments to extend the director penalty regime and the estimates regime to superannuation guarantee charges, will apply if the company is originally required to lodge a quarterly superannuation guarantee statement to report unpaid and overdue superannuation guarantee shortfall on or after the day on which the amendments will formally commence. The amendments do not apply where the original requirements to report a superannuation guarantee shortfall arose before the amendments commence. The amendments will commence on the day after Royal Assent.

The amendments for reduction of credits to directors and associates will apply to amounts withheld during the 2011–2012 income year and later income years, if the company withholding the amounts is required to pay them to the Commissioner on or after the day after the Bill receives Royal Assent.

Source: Assistant Treasurer's media release No 138, 13 October 2011

[www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/138.htm&pageID=003&min=brs&Year=&DocType=](http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/138.htm&pageID=003&min=brs&Year=&DocType=); Tax Laws Amendment (2011 Measures No 8) Bill 2011

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fbillhome%2F4691%22>; Pay As You Go Withholding Non-compliance Tax Bill 2011

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fbillhome%2F4690%22>

## Small business depreciation rule changes on the horizon

The Government had released for comment exposure draft legislation which proposes to make various tax law amendments concerning the small business depreciation rules. The amendments are proposed to apply to small business entities as defined in s 328-110 of the ITAA 1997 that have an aggregated turnover of less than \$2m for an income year. Public consultation closed on 28 September 2011.

The amendments are proposed to have effect from the 2012–2013 income year. However, it should be noted that the amendments for the instant asset write-off and the simplified depreciation pooling arrangements are subject to the enactment of the Minerals Resource Rent Tax Bills (yet to be introduced into Parliament) and s 3 of the *Clean Energy Bill 2011* (introduced into the House of Representatives on 13 September 2011).

### Instant write-off of an asset

Under the proposed amendments to the ITAA 1997, the small business instant asset write-off threshold will be increased from \$1,000 to \$6,500. The proposed amendments will implement one of the Government's responses to the Henry Tax Review in May 2010. The Government had proposed an instant asset write-off threshold of \$5,000. This figure was later increased to \$6,500 when the Government announced its "Clean Energy Future Plan" in July 2011.

Broadly, the amendments will allow small businesses that choose to use the capital allowance provisions in Subdiv 328-D to write off depreciating assets costing less than \$6,500 in the income year in which they start to use the asset, or have it installed ready for use, for a taxable purpose during or before that income year. Other important points:

- The existing capital allowance rules about the taxable purpose proportion of the depreciating asset would still apply, and would affect the value of the deduction that can be claimed.
- Small businesses that choose to use the capital allowance provisions in Subdiv 328-D may also deduct the taxable purpose proportion of cost additions of less than \$6,500 for assets costing less than \$6,500.
- Existing rules for the disposal of assets that have been totally written-off would continue to apply.

### Simplified depreciation pooling arrangements

The proposed amendments will consolidate the long life small business pool and the general small business pool into a single pool to be written off at one rate. The changes will implement one of the Government's responses to the Henry Tax Review.

Generally, the proposed changes will allow small businesses that choose to use the capital allowance provisions in Subdiv 328-D to allocate depreciating assets costing \$6,500 or more to the general small business pool and depreciate at a rate of 15% in the year of allocation and 30% for other years. Currently, small businesses can allocate depreciating assets costing \$1,000 or more to either the long life small business pool or the general small business pool, depending on the effective life of the asset. The depreciation rates of these pools are 5% and 30%, respectively.

To simplify and streamline depreciation arrangements for small business, it is proposed that the long life small business pool will cease to exist after the 2011–2012 income year. The closing balance of a small business' long life pool and general small business pool for the 2011–2012 income year will then be added together to calculate the opening balance of the general small business pool for the 2012–2013 income year.

The total balance of the pool can be written off when it falls below \$6,500. However, if the pool balance becomes less than nil, the amount by which the balance is less than zero is to be added to the taxpayer's assessable income for that income year.

## Deductions for motor vehicles

The proposed amendments propose to amend the ITAA 1997 to allow small business entities to claim an accelerated initial deduction for motor vehicles acquired from the 2012–2013 income year. The proposed amendments will implement the Government's proposal announced in the 2011–2012 Budget.

Under the proposed changes, from the 2012–2013 income year, small business entities that choose to use the capital allowance provisions in Subdiv 328-D will be able to write-off up to \$5,000 for a motor vehicle costing at least \$6,500 in the year they start to use the motor vehicle for a taxable purpose. Taking into account the amount already written-off, the remainder of the purchase cost would be depreciated as part of the general small business pool, at 15% in the first year and 30% in later years. It should also be noted that, once in the pool, the deduction available in the start year would depend on the amount of the taxable purpose proportion of the adjusted value of the motor vehicle.

The proposed rules apply to any motor powered road vehicle, but do not apply to road vehicles if the main function of the road vehicle is not related to public road use or if the vehicle's ability to travel on a public road is secondary to its main function. Examples of motor vehicles that can be written-off include cars, trucks, vans, utilities, motorbikes and scooters. However, road rollers, graders, tractors, combine harvesters, earthmoving vehicles, and trailers, cannot be written off.

## Entrepreneurs' tax offset

The proposed amendments propose to abolish the entrepreneurs' tax offset by repealing Subdiv 61-J of the ITAA 1997. This would implement the Government's proposal announced in the 2011–2012 Budget.

*Source: Assistant Treasurer's and Small Business Minister's joint press release No 130, 13 September 2011 <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/130.htm&pageID=003&min=brs&Year=&DocType=0>; Treasury exposure draft legislation and associated draft explanatory memorandum [www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2147](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2147)*

## Standard deduction for work expenses next year

In the 2010–2011 Federal Budget on 11 May 2010, the Treasurer announced that the Government would provide individual taxpayers with a standard tax deduction for work-related expenses and the cost of managing tax affairs. The Government had released exposure draft legislation and explanatory material for comment. Public consultation closed on 14 October 2011.

The draft provides for a standard deduction of \$500 for 2012–2013, rising to \$1,000 for 2013–2014 and subsequent years. It would replace work-related expenses and the cost of managing tax affairs for those taxpayers whose claims for these expenses are less than the standard deduction. Taxpayers whose claims for these expenses exceed the standard deduction will still be able to claim those deductions. Note that the introduction of the standard deduction is dependent on the passage of the mining tax legislation.

## Date of effect

The amendment would commence on the latter of 1 July 2012 and the commencement of the mining resource rent tax legislation. If the mining resource rent tax legislation does not commence, the standard tax deduction amendment would not commence at all.

The amendment applies to income tax assessments for the 2012–2013 and later income years. The standard deduction amount would increase from \$500 in 2012–2013 to \$1,000 in 2013–2014 and later income years.

*Source: Treasury exposure draft legislation and explanatory material [www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=2172](http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=2172)*

## Partnership not ended, so director still liable, says Court

The NSW Court of Appeal has dismissed a taxpayer's appeal against an earlier District Court decision which had affirmed that as a director of a company, he was liable to pay monies to the Commissioner that were withheld from employees' salaries or wages per s 222AOC of the ITAA 1936.

### Background

The taxpayer was the sole director of a company (W Co). The Court heard that in November 2005, W Co (as trustee of the taxpayer's family trust) and Mr A (as trustee of another trust) entered into a partnership agreement. The partnership operated a café/bar business and it was understood that the taxpayer managed the day-to-day operations. However, the relationship between the partners deteriorated and on 7 February 2007, the Court heard the taxpayer was "excluded from the operation of the business". The taxpayer contended that from that date, the partnership was terminated and it followed that there could be no withholding by the partnership and accordingly W Co within s 222AOA(1)(b) of the ITAA 1936.

### Decision

The NSW Court of Appeal found that in the circumstances, what was done was consistent with a termination of the taxpayer's involvement in the management of the partnership, but was not a termination of the partnership itself. It further said that BASs lodged after February 2007 and on behalf of the partnership were evidence from which it could be inferred that a withholding had occurred and that the withholding had been made by the partnership.

Accordingly, the Court held the primary judge was correct to conclude there had been a withholding by the partnership entity and that each of the partners was jointly and severally liable under s 16-70(1) of Sch 1 to the TAA to pay the amounts withheld to the Commissioner on or before the date required by s 16-75 of Sch 1. It said that conclusion enlivened s 222AOC and permitted the Commissioner to recover those amounts from the taxpayer. Accordingly, the taxpayer's appeal was dismissed.

*Christis v DCT [2011] NSWCA 310, NSW Court of Appeal, Giles JA, Meagher JA, Gzell J, 27 September 2011 [www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=154857](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=154857)*

## Dutch retiree took reasonable care, finds Tribunal

The AAT has held that a taxpayer had not failed to take reasonable care when he omitted special early retirement payments from the Netherlands from his 2003 to 2006 income tax returns.

The taxpayer was born in the Netherlands and had during his working life contributed to a Dutch early retirement fund (the Vervroegde Uittreding or VUT). In 2001, the taxpayer retired and moved to Australia.

The Tribunal heard various interactions had occurred between the taxpayer and the ATO concerning the tax treatment of the foreign pension before, during, and after the relevant period. The taxpayer had initially lodged his 2003 return which declared receipt of the Dutch pension and claimed a deduction for "undeducted purchase price of foreign pension or annuity". However, after receipt of a private binding ruling stating the early retirement pension allowance from the Netherlands was subject to income tax in Australia, the taxpayer amended his 2003 return to delete the pension and UPP deduction. The taxpayer also lodged his 2004, 2005 and 2006 returns omitting the Dutch pension. The Commissioner issued amended assessments and imposed a 25% shortfall penalty for failure to take reasonable care.

The issue before the AAT concerned the imposition of penalties. It concluded that in the circumstances, the taxpayer had not failed to take reasonable care. Among various factors, the AAT accepted the taxpayer's evidence that he had received oral advice from the ATO in 2002 which was contrary to later advice contained in the private binding ruling in 2005. It also accepted the taxpayer did not understand and was confused by the ruling. In addition, the AAT noted the taxpayer had "limited grasp" of the English language. As a result, the AAT found the taxpayer was not liable to an administrative penalty in the relevant years.

*AAT Case [2011] AATA 657, Re Helbers and FCT, AAT, Ref No: 2009/3384-87, Dunne SM, 23 September 2011 [www.austlii.edu.au/au/cases/cth/AATA/2011/657.html](http://www.austlii.edu.au/au/cases/cth/AATA/2011/657.html)*

## Super guarantee charge is a valid tax, says High Court

The High Court has unanimously dismissed the taxpayer's appeal against the Full Federal Court's decision in *Roy Morgan Research Pty Ltd v FCT* (2010) 76 ATR 264. The Full Federal Court had dismissed the taxpayer's constitutional challenge to the validity of the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Guarantee Charge Act 1992*, and upheld the AAT's finding that market research interviewers were "employees" for superannuation guarantee purposes, and not independent contractors.

Broadly, the taxpayer submitted the superannuation guarantee charge (SGC) was not a "tax" within the meaning of s 51(ii) of the Constitution. The taxpayer argued the payment of the SGC into the Consolidated Revenue Fund is directly correlated with the payment out to a super fund for the benefit of the relevant employee. Specifically, the taxpayer submitted the SGC was not a "tax" because although it might be characterised as an exaction imposed in the "public interest", it was not for a "public purpose" as it conferred a "private and direct benefit" on the relevant employee.

In dismissing the taxpayer's appeal, the High Court held the imposition of the SGC for the benefit of the Consolidated Revenue Fund was made for a "public purpose" and therefore the SGC was a valid tax. It did not accept the taxpayer's argument that the SGC legislation conferred upon employees a "private and direct benefit". The High Court said the "exaction represented by the [SGC] is not of a nature which takes it outside the constitutional conception of 'taxation'".

*Roy Morgan Research Pty Ltd v FCT & Anor [2011] HCA 35, High Court, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, 28 September 2011*  
[www.austlii.edu.au/au/cases/cth/HCA/2011/35.html](http://www.austlii.edu.au/au/cases/cth/HCA/2011/35.html)