



# Explanatory Memorandum

October 2010

## CURRENCY:

This issue of Client Alert takes into account all developments up to and including 16 September 2010.

## Tax Office Eyes Overdue Tax Lodgments

The Tax Office has recently advised that it will write to more than 19,500 tax agents about their clients (other than large businesses and super funds) who have overdue lodgment obligations. The letter will include a list of company, trust, partnership and individual taxpayers with overdue income tax returns for any period between 1 July 2005 and 30 June 2009, and overdue activity statements for any period between 1 July 2005 and 31 December 2009.

**TIP:** The Tax Office said if tax agents have any concerns about the accuracy of the client list they receive, they should contact the Tax Office on 13 72 86 Fast Key Code 1 3 2 between 8.00am and 6.00pm, Monday to Friday. It may be the case that a taxpayer does not need to lodge. The Tax Office, however, requests that it be advised immediately.

**TIP:** It should be noted that outstanding returns and activity statements will generally attract penalties. In addition, the Tax Office will charge interest where tax debts remain unpaid. However, there are circumstances where the Commissioner may remit the penalty and any interest charges.

Source: ATO publication, 31 August 2010

<[www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00254110.htm](http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00254110.htm)>

## Direct Debit for GIC-free Payment Deal

In June 2009, the Commissioner announced new measures to help small businesses with annual turnovers of less than \$2m (ie 'micro businesses') that were struggling to manage their tax debts. At that time, Mr D'Ascenzo warned that, where necessary, the Tax Office would take action to collect tax debts in relation to taxpayers who have not worked with the Tax Office to meet their payment obligations or continually default on agreed arrangements.

The concessionary measures included a 12-month general interest charge (GIC) free payment arrangement (until 30 June 2010) and a deferment for up to 2 months of the payment date for activity statements. These measures have been extended until 30 June 2011.

While the concessions remain available to businesses with a turnover under \$2m, the Tax Office says it now expects businesses entering GIC-free payment arrangements to pay by direct debit.

According to the Tax Office, payment arrangements that businesses enter into with it from 1 July 2010 to 30 June 2011 will be GIC-free for the period they are maintained, up to a maximum of 12 months. This may also apply to payment arrangements businesses entered into with the Tax Office before 1 July 2010 that were later renegotiated.

**TIP:** This concessionary measure does not extend to activity statement lodgment due dates. In other words, taxpayers must still lodge their activity statements on time, or face potential penalties.

Source: ATO publication, 8 July 2010

<[www.ato.gov.au/corporate/content.asp?doc=/content/00196536.htm](http://www.ato.gov.au/corporate/content.asp?doc=/content/00196536.htm)>

## Tax Scams on Tax Office Radar

The Tax Office has warned taxpayers to avoid being the victim of identity and tax return fraud. It reminded taxpayers that the Tax Office never sends emails asking for passwords, banking and credit card details. The Tax Office says it will contact taxpayers to request payment in relation to outstanding debts but will not request credit card details from a taxpayer to process a payment on their behalf.

**TIP:** The Tax Office recommends typing the internet address directly into the internet browser rather than clicking on links embedded in emails. The Tax Office also says taxpayers should report suspicious behaviour or incidents to their financial institutions or to the Tax Office.

## Examples of recent tax schemes

- A job aimed at international students advertised in a newspaper directs the students to call and provide their TFN and date of birth. Students are told they will be contacted a few days before they are due to start work. The number is subsequently disconnected and their details used to lodge fraudulent tax returns.
- People claiming to be from the Tax Office call people advising they are entitled to a payment of approximately \$3,600 as a bonus for paying their taxes on time. They are asked to provide their personal bank account details so the refund can be deposited. If the phone call is unanswered, a message is left providing a return contact number and a reference code. When this number is called, they are requested to make a payment to a third party bank account, usually for an amount between \$150 and \$190, to facilitate the refund which is never paid.
- People claiming to be from the Tax Office call to offer \$3,000 tax refunds and instruct the person to make a money transfer (\$150) to a specific charity in order to receive their refund. The taxpayer is generally given a NSW phone number to contact the 'Tax Office' once they have completed the transfer. Personal information, such as the address and date of birth of the taxpayer, is quoted during the conversation to show authenticity, and several private contact numbers are provided.

Source: ATO media release No 2010/23, 9 August 2010  
<[www.ato.gov.au/corporate/content.asp?doc=/content/00251704.htm](http://www.ato.gov.au/corporate/content.asp?doc=/content/00251704.htm) >

## Education Tax Refund — You Claim It, They Check It

The Tax Office has launched its Education Tax Refund Data Matching Project that will see it request and collect names and addresses of taxpayers eligible for Family Tax Benefit Part A from Centrelink. These will be electronically matched with certain sections of Tax Office data holdings to identify non-compliance with lodgment and payment obligations under taxation law. Records relating to approximately 1.5m individuals registered with Centrelink will be matched.

In basic terms, those eligible for the education tax refund (more properly, a refundable tax offset) must be receiving FTB Pt A, so the data-match will, at least in part, seek to ensure the refund is being correctly claimed.

Further information is available by writing to: Education Tax Refund Data Matching Project, Australian Taxation Office, PO Box 9990 VIC 3128 — or tel: (03) 9275 2779.

Source: Commonwealth Gazette No GN 35, 9 September 2010 [p 1997]  
<[www.ag.gov.au/portal/govgazonline.nsf/2C43959049D61398CA2577980009A422/\\$file/GN%2035.pdf](http://www.ag.gov.au/portal/govgazonline.nsf/2C43959049D61398CA2577980009A422/$file/GN%2035.pdf)>

## Deduction of Super Contributions — Ensure Paperwork Valid

The Tax Office has reminded SMSF members that if they intend to claim a tax deduction for their personal super contributions, they must complete a Notice of intent to claim or vary a deduction for personal super contributions form (NAT 71121). In addition, SMSF members must also receive an 'acknowledgment' from the fund of the valid notice they have completed.

**TIP:** The Tax Office in its compliance program for 2010-11 noted that it will look closely at individual income tax deduction claims for personal contributions to superannuation funds. In particular, the Tax Office said it will ensure that the requirements for lodging a valid notice of intent to claim or vary a deduction for personal superannuation contributions have been met.

Source: ATO publication, 30 August 2010  
<[www.ato.gov.au/superfunds/content.asp?doc=/content/00253887.htm](http://www.ato.gov.au/superfunds/content.asp?doc=/content/00253887.htm)>; ATO Compliance Program 2010-11 <[www.ato.gov.au/content/downloads/cor00248103\\_NAT7769.pdf](http://www.ato.gov.au/content/downloads/cor00248103_NAT7769.pdf)>

## Donations to New Zealand Christchurch Earthquake

The Government has announced that all donations by Australians to the Christchurch earthquake will be tax deductible. The earthquake has been recognised as a disaster for Australian tax purposes. The Assistant Treasurer said the declaration means public funds established and maintained by a public benevolent institution solely to provide money for the relief of people in New Zealand who are in distress as a result of the Christchurch earthquake can be endorsed as 'developed country relief funds'. He said donations to such funds are tax deductible for a period of two years from 4 September 2010.

**TIP:** Taxpayers should keep evidence documenting their donations (eg receipts or bank statements).

Source: Assistant Treasurer's press release No 158, 9 September 2010  
<<http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/158.htm&pageID=003&min=njsa&Year=&DocType=>>

## No Indemnity for Wound-up Corporate Trustee, Says Court

The Federal Court has held that the basic principle that a trustee is entitled to be indemnified out of trust property for liabilities incurred in administering the trust does not apply to a corporate trustee in relation to expenses incurred after it has been wound-up and at which time it merely becomes a bare trustee in relation to the assets comprising the trust fund.

In this case, the corporate trustee had sought to be indemnified for expenses it had incurred in litigation it pursued against the Commissioner after it had been wound-up. This included litigation relating to the validity of a notice served on the trustee's solicitors under s 260-5 of Sch 1 of the *Taxation Administration Act 1953* requiring the solicitors to pay to the Commissioner the sum of \$450,000 held on their trust account (in respect of an assessment for over \$7m issued by the Commissioner to the trustee after it had been wound up). In *Bruton Holdings Pty Ltd (in liq) v FCT* (2009) 72 ATR 856, the High Court held that the notice was invalid as the Commissioner's general power to issue a notice under s 260-5 was not available if a liquidator had been appointed to a company.

However, despite the trustee being successful in its High Court action, the Federal Court has now held that it was not entitled to be indemnified out of any trust funds for the costs of the litigation because, as a bare trustee in relation to those funds (from the time of its winding up), it was not part of its functions or responsibilities to institute the proceedings relating to the validity of the s 260-5 notice. As a result, the costs could not be said to have been 'properly incurred' by the trustee in the administration of the trust to enable it to be indemnified out of the trust funds. Likewise, in relation to subsequent interlocutory proceedings involving the Commissioner, the Court held that the trustee had no right of indemnification as the expenses it incurred were not incurred in the proper performance of its duties or exercise of its powers.

**TIP:** Generally, trust liabilities fall on the trustee personally since the trust assets are not an entity which in law can be regarded as a person liable. Nonetheless, the trustee may have a right to reimbursement out of the trust assets for amounts personally expended from the trustee's own funds to discharge trust liabilities, or a right to be exonerated out of the trust assets in respect of a liability properly incurred. However, if the value of the trust assets is below the amount of the liability, the trustee bears the liability to the extent of the deficiency, unless the trustee has a right of indemnity against the beneficiaries or other persons related to the trust.

**TIP:** It should be noted that under s 197(1) of the *Corporations Act 2001*, if a trustee corporation cannot discharge a liability incurred by it while acting as trustee and is not entitled to be fully indemnified against the liability out of the trust assets, each person who was a director when the liability was incurred may be liable to discharge the liability. It should also be noted that the director's exposure to liability is not affected by deregistration of the company: see, for example, *Warton v Harris* [2005] NSWSC 1168.

*FCT v Bruton Holdings Pty Limited (in liquidation)* [2010] FCA 978, Federal Court, Graham J, 3 September 2010

## Debts Result in CGT Small Business Concessions being Denied

The AAT has confirmed that debts of \$3.8m that a taxpayer was owed by related business and investment entities were unquestionably 'CGT assets' of the taxpayer that had to be taken into account under the maximum net asset value test. As a result, the taxpayer far exceeded the then \$5m threshold and therefore could not qualify for the small business concessions in relation to the capital gain made on the sale of land and improvements from which he operated a car radio business.

In doing so, the AAT dismissed the taxpayer's argument that the debts were not CGT assets as they '... could not yield anything more than (at most) an interest return and that the most which could be obtained in respect of the capital amount of the debts was their face value'. It also dismissed the taxpayer's argument that the debts were not CGT assets as they were not used in a business — noting that the money had been originally borrowed under a bill facility in relation to the operation of the business and had then been on-lent by the taxpayer to the related entities. Finally, it found that there was no evidence that the debts were worth less than their face value.

The AAT also confirmed that the Commissioner had correctly calculated the assessable capital gain in that he had appropriately apportioned the sale proceeds of over \$9m between the pre-CGT property, the post-CGT property and the improvements that comprised the business premises. It also found that the Commissioner had properly accounted for the (then) NSW vendor's tax liability as part of the cost base of the capital improvements (in a manner that was probably favourable to the taxpayer).

Finally, the AAT confirmed that the 25% shortfall penalty for false and misleading statements was appropriate, despite the taxpayer indicating that the failure was due to the taxpayer's previous agent. In this regard, the AAT noted that in penalty matters the actions of both the taxpayer and the tax agent are to be considered, and that tax agents are presumed to be aware of the law and for this matter a higher standard is expected of them.

**TIP:** If a taxpayer is a small business entity, the taxpayer does not need to satisfy the net asset value test. However, the CGT asset that gives rise to the gain must be an active asset, ie it is used, or is held ready for use, in the taxpayer's (or an affiliate's or connected entity's) business.

*Re Cannavo and FCT [2010] AATA 591, Ref Nos 2009/5626, 2010/2838, Block DP, 10 August 2010*

## Court Can't Review Tax Office Decision to Delay GST Refunds Payable

The Federal Court has dismissed a taxpayer's application for a review under the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) of a Deputy Commissioner's decision to 'withhold' GST refunds that were payable under the GST Act.

The taxpayer's BAS for the tax period 1 May to 31 May 2009 showed a refund of \$9,837. In June 2009, the Tax Office contacted the taxpayer requesting documents in order to verify the information contained in the BAS. Notwithstanding the taxpayer furnished the requested documents, the Tax Office decided to conduct a desk audit in respect of some aspects of the affairs of the taxpayer and its related entities. In early November 2009, the taxpayer received notification the audit was completed. However, in late November 2009, the taxpayer had not received the refund and contacted the Tax Office to enquire about the status of it. This resulted in a series of correspondences between the taxpayer and the Tax Office. In February 2010, the Commissioner sent a letter to the taxpayer stating that he was considering a more comprehensive audit of the taxpayer in relation to the refund and that subsequent refunds lodged by the taxpayer were held up. The taxpayer then commenced proceedings for a review of the Deputy Commissioner's decision to 'withhold' the refunds.

The Commissioner objected to the competency of the proceedings on the basis that the taxpayer's application did not identify any decision that is justiciable under the AD(JR) Act.

The Court noted the AD(JR) Act applies to a decision of an administrative character made under an enactment. It also noted the taxpayer was unable to point to any enactment under the purported decision that was made, other than s 3A of the *Taxation Administration Act 1953* (TAA). In the Court's view, the Commissioner is empowered under that section to decide not to make a payment in circumstances where the Commissioner is concerned there may be other moneys owing by the taxpayer to the Tax Office. It said the Commissioner's decision to exercise that right would not be a decision under the enactment within the AD(JR) Act but rather an exercise of a discretion in the administration of the TAA. Accordingly, the Court considered that the taxpayer had no reasonable prospect of obtaining the relief sought.

**TIP:** This case demonstrates that in such situations a taxpayer is unable to 'force' the Tax Office to release a refund. If a taxpayer is the subject of a Tax Office audit, a GST refund may be withheld. Also, the Commissioner can apply the refund against any outstanding liabilities.

*PFTF Stock Pty Ltd v DCT [2010] FCA 557, Federal Court, Emmett J, 28 May 2010*