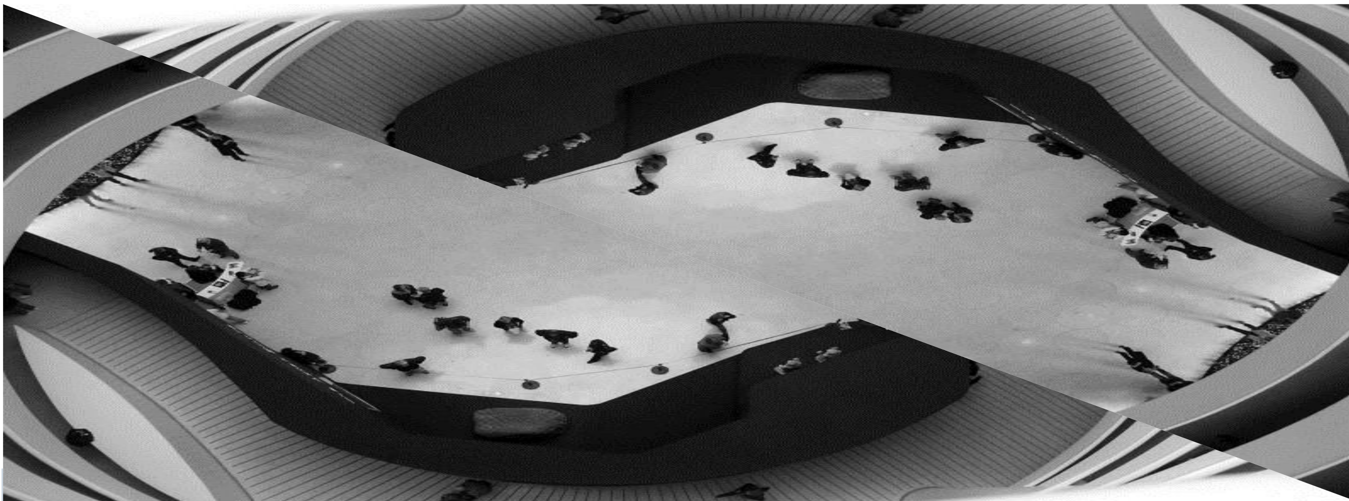

July 2015

# THE THINGS THAT MATTER

## Introduction

### *Welcome to Argyle Lawyers' July 2015 newsletter*

Through our regular newsletter "The Things that Matter", we aim to provide you with updates on what we consider are some of the latest issues in taxation law, superannuation law, trust law, estate planning law, commercial law, property law and family law that you and/or your clients should be aware of.

In this July 2015 edition, we provide our thoughts on the new foreign investment rules and the Administrative Appeals Tribunal (**AAT**) case of *OEM Supplies Pty Ltd v FC of T [2015] AATA 532* as well as our usual legal commentaries and tax updates.

If at any stage you wish to find out more about what has been outlined in this newsletter, or if you have any questions, please do not hesitate to contact one of our lawyers at your convenience.

Read on and find out more!

*Yours faithfully*

*The Argyle Lawyers Team*

### Subscription

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## KEY POINTS

- ***The ATO has taken control of the approval, monitoring and compliance process with real estate investment proposals from foreign investors.***
- ***The ATO have additional penalties that it can impose on non-complying investors.***
- ***Third parties that knowingly assist with a breach of the rules are also subject to the new penalties.***
- ***Non-complying investors can voluntarily disclose before 1 December 2015.***

# *ATO to enforce new foreign investment rules regarding real estate*

New rules have been introduced to bolster the enforcement of foreign investment ( rules regarding real estate.

In May 2015, the Abbott Government announced that the ATO will be taking control of the approval, monitoring and compliance process for foreign real estate acquisitions (instead of FIRB). The ATO will be able to utilise its advanced data matching systems to identify and address non-compliance.

The ATO can now (in addition to stricter criminal penalties and property divestment orders) also impose civil pecuniary penalties which capture any capital gains that a non-complying foreign investor made on divestments.  This appears to be quite vicarious, as the foreign investor would most likely be liable for CGT but cannot fund the tax payable from the capital gain on divestment, which has already been clawed back by the ATO.

It is also of particular concern (to real estate agents and professional advisers) that they may be caught by new rules whereby third parties who knowingly assist with a breach of the rules are also subject to the new civil and criminal penalties, including fines of $42,500 for individuals and $212,500 for companies.

The rules have also introduced a fee regime that applies to on all new foreign investment applications, starting 1 December 2015.  For starters, the application fee for residential property valued at $1 million or less is $5,000. Higher fees apply to more expensive residential properties as well as for business, agricultural and commercial real estate applications.

For any breaches of the foreign investment rules pre-1 December 2015,  the ATO have, in what appears to be "in the spirit of" of the recently past Project DO IT tax amnesty, introduced a voluntary disclosure regime (which closes on 30 November 2015) in which non-compliant property owners can come forward to avoid criminal prosecution and face lower penalties by taking pro-active measures to sell their properties without the ATO commencing formal divestiture action.

The Abbott Government will introduce legislation into Parliament in the Spring Sittings with a view of passing these reforms into law for commencement on 1 December 2015.

All foreign investors and their professional advisers looking to purchase Australian real estate, particularly residential property, should be aware of these new rules and what appears to be quite considerable consequences that arise from their breach.  Watch this space!

# *OEM Supplies Pty Ltd v FC of T [2015] AATA 532*

The AAT found in this case that a person (DH) engaged by a company to provide various website services over a five-year period was not an "employee" of the company at common law or for superannuation guarantee purposes.

**Facts:**

- DH rendered invoices for varying amounts and a monthly fee of $1,000 for "ancillary services".
- The company engaged DH to build and maintain a website.  After its completion, DH was responsible for its maintenance.
- Pursuant to a letter, it was agreed that DH will not charge an hourly rate for his services.  Instead, DH's remuneration will directly depend on the success of the websites in bringing in business.  He will then be paid a commission on online sales.
- At times DH engaged a programmer to assist him in working on the website.
- DH advertised his own business on the company's website and handed out his own business cards to customers and suppliers.
- DH continued to maintain the website from home using his own computer and invoiced the company for this work.
- DH did not attend the company's premises for the same hours as the employees.

**The Decision:**

In light of the facts, the AAT found there were several fundamental features which supported the view there was not an employee/employer relationship.

These included:

- the lack of control by the Taxpayer as to how the agreed work was to be carried out by DH;
- the limited integration of DH into the company's business as highlighted by the flexibility afforded to DH in relation to his times and manner of working; and
- DH's ability to employ others to assist him.

The AAT considered these factors in detail in light of the principles established in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No3) [2011] FCA 366.*

**Takeaway point:**

In reaching its decision, the AAT considered the evidence of the contractual relationship, including correspondence, agreements and statutory declarations between the parties.

This case highlights the importance of not only clearly establishing the parameters of your relationship with contractors, but also ensuring the relationship is clearly documented and practiced as intended.

## KEY POINTS

- ***Clearly document the relationships you have with your contractors.***
- ***Consider the principles of On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No3) [2011] FCA 366 in determining the existence of an employer/employee relationship.***

KEY POINTS

- ***Consider carefully if your matter should be heard in the Federal Court or the AAT.***
- ***Consider careful the circumstantial evidence of a lump sum payment when determining the capital/revenue treatment.***
- ***Division 7A, consider the lodgment day for the head company of that consolidated group.***

# Further Tax Updates - July 2015

***CofT v AusNet Transmission Group Pty Ltd***

This case principally concerned the application of the tax consolidation rules and the cost which should be applied to the acquisition of certain intangible assets.

Aside from the substantive consideration of the tax consolidation rules, the first issue this appeal considered is whether the Taxpayer's appeal was correctly made.

That is, does the reference of "*as the Commissioner determines*" from section 124R of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) involve the Commissioner of Taxation either:

- exercising a discretion; or
- whether it is part of the process the Commissioner of Taxation must follow to make an assessment.

The Court determined that section 124R ITAA 1936 did not involve the Commissioner of Taxation exercising a discretion as such, rather determining the allocable cost amount was a part of the process the Commissioner of Taxation was required to undertake to determine the correct amount to be assessed.

Clarifying the difference is crucial to determining if the Taxpayer should have made its appeal through the ordinary objection/appeal process in Part IVC of the ITAA 1936 via the Federal Court (*which does not have jurisdiction to review the 'merits' of a decision*) or through a judicial process challenging the administrative process the Commissioner of Taxation took in making the assessment via the AAT (*which is the proper forum, where a question about the exercise of a discretion is in dispute*). In this instance, the Taxpayer was correct in taking an objection and review process under Part IVC of the ITAA 1936.

***Senior and CofT***

This case concerned the review of a private ruling sought by the Taxpayer in respect of a lump sum finalisation payment received under a deed of release.

The AAT determined that the lump sum finalisation payment was income according to ordinary concepts within the meaning of section 6-5(1) of the ITAA 1997 for the following reasons:

- The lump sum payment replaced a stream of re-occurring payments.
- The lump sum payment was relied on by the Taxpayer for her regular expenditure.
- The lump sum payment was paid to compensate for the loss of the Taxpayer's stream of compensation payments.

***Vo & Anor v CofT***

The Taxpayers sought a review from the AAT that significant amounts of undisclosed funds which they transferred overseas were not taxable income.

The Taxpayers argued that the amounts of money which they transferred to various people in Vietnam were collections of funds from other family members, gambling winnings and gifts.

The AAT considered that the Taxpayers had not discharged their burden in proving that the assessment was excessive or otherwise incorrect and what the assessment should have been.

The Taxpayers had failed to produce credible evidence and instead relied on oral evidence. The AAT found that the evidence was "so vague, and inherently unbelievable, as to be unworthy of belief even when not directly contradicted by other evidence".

***Falk v CofT***

The principle question for the AAT in this review was whether a $500,000 payment made to the Taxpayer was assessable income, or was a non-taxable ex gratia or "art of grace" payment.

The Taxpayer had received the $500,000 payment in return for withdrawing a legal claim against his former employer.

The AAT held that the Commissioner of Taxation was correct in assessing the Taxpayer of the payment under section 20-20 (Assessable Recoupment) of the ITAA 1997. The AAT held that the payment was made by way of indemnity for the legal costs and was not an ex gratia payment.

***TD 2015/D3***

This draft Tax Determination addresses the uncertainty over what is the exact lodgment day for a private company for the purposes of section 109D(6) of ITAA 1936 (i.e. the date by which a loan has to be repaid, an amount which, if not fully repaid, would be considered a deemed dividend to the recipient of the loan under Division 7A of ITAA 1936) where the private company is a subsidiary member of a consolidated group.

Professional advisers can draw comfort from relying on the Commissioner of Taxation's preliminary view in TD 2015/D3 that the lodgment day for a private company in those circumstances is the lodgment day for the head company of that consolidated group.

***TD 2015/D2***

This draft Tax Determination addressed the following question:

*"If a retiring partner receives an amount representing their individual interest in the net income of the partnership for an income year ("the Amount"), is the Amount assessable under section 92 of the Income Tax Assessment Act 1936 (ITAA 1936)?"*

The short answer, according to the Commissioner of Taxation's preliminary view, is YES - the Amount is included in the retiring partner's assessable income under section 92 of ITAA 1936. The draft Tax Determination suggests that the character of the Amount does not change because of the way the amount of the benefit was structured or

## KEY POINTS

- ***Complete property transfers correctly, with the assistance of appropriate professional and legal support.***
- ***When in liquidation, the employer company is still responsible for superannuation guarantee payments.***

delivered to the retiring partner, such as (1) how the payment was labelled or described, (2) the timing of the partner's retirement, or (3) the timing of the payment.

It was also noted in TD 2015/D2 that whilst the Amount may also give rise to a CGT event, any capital gain that would otherwise arise will be reduced to the extent it is assessable under other provisions (namely in this instance, section 92 of ITAA 1936).

***Michaelides v Commissioner of State Revenue***

This Victorian case is another solemn reminder of the strict requirements that need to be fulfilled in order to obtain the "change in trustee" exemption for stamp duty on a property transfer.

One of the Taxpayers purchased a $1.25m property in January 2009 and later in that year, transferred it to a company (as trustee for a "trust partnership") controlled by the Taxpayers to jointly develop the property together.

Subsequently, in January 2012, the land was transferred to the Taxpayers as tenants in common.

The Taxpayers ran the argument at the Victorian Civil and Administrative Tribunal (**VCAT**) that the transfer in January 2012 was merely due to a change in trustee of an existing trust.

The VCAT noted that the company held the property on "trust" as a whole undivided interest, but that after the January 2012 transfer, each of the Taxpayers each held a half interest in the property as tenants in common. The trust was said to have been "altered" as a result of the transfer, such that the "change in trustee" exemption (in section 33(3) of the *Duties Act 2000* (Vic)) did not apply.

Further, the Tribunal Member was not convinced that were was reliable evidence that the Taxpayers were appointed as trustees of the purported "trust partnership" as a result of the transfer, as all the documentary evidence pointed otherwise. In fact, the disputed transfer document itself made clear that the transfer was made as a consequence of the dissolution of the "trust partnership".

This case emphasises the importance of completing property transfers correctly, with the assistance of appropriate professional and legal support.

***Superannuation Updates***

The ATO has this month released a number of Interpretive Decision statements (i.e. ATOIDs) in relation to superannuation.

ATOID 2015/13, 2015/14 and 2015/15 all share the same factual basis relating to the payment of superannuation contributions in respect of the unpaid wage component of a Fair Entitlements Guarantee (**FEG**) amount. The facts concern a company in liquidation which resulted in an employee being terminated and subsequently bringing a claim to the Department of Employment under the FEG scheme for unpaid wages and entitlements. The ATOIDs consider the superannuation position in this scenario.

The ATOIDs looked at who the liability to pay superannuation guarantee charge (**SGC**) rests with in the situation of a company being in liquidation.

*Is it the liquidator or the taxpayer company? And what about when a third party provider is used to make the payment?*

The Commissioner of Taxation's view as communicated in these ATOIDs is that SGC is the responsibility of the employer and that this responsibility is not changed by the company being in liquidation. The Commissioner of Taxation refers to section 16 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) which requires an employer to make superannuation contributions and to the section 1.1 broad definition of "salary" which would encapsulate a FEG amount. Accordingly, the SGC obligation does not shift when the company is in liquidation and an underpayment of SGC by either the liquidator or a third party provider will still fall back on the employer company.

ATOID 2015/17 also concerns superannuation. In this scenario a corporate trustee of a superannuation fund had sought to claim a deduction for life insurance premiums after the death of the insured member. The Commissioner of Taxation approved the deduction on the basis of there being no express provision to prevent it.

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