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Practice Update

Please read this update
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MAY 2014

Taxpayer slammed on (lack of) record keeping

The AAT has upheld the application of a 50% penalty to a taxpayer for 'recklessness' in claiming deductions that couldn't be substantiated.

Facts

In the 2011/12 tax year, the taxpayer made the following claims for tax deductions in relation to his work as a car salesman:

- work-related car expenses of \$23,065;
- work-related clothing and laundry expenses of \$645; and
- other work-related expenses, including phone expenses and a car dealer's licence expense, of \$10,605.

Following an audit, these were reduced to nil, \$150 and nil, respectively, and the ATO also imposed a penalty of \$6,092, being 50% of the tax shortfall of \$12,184 (on the basis the taxpayer was 'reckless').

Reasons for Decision

The taxpayer claimed that his conduct was unintentional and that the penalty was unfairly imposed on him, being "more severe than would be imposed in a court if he had been convicted of criminal conduct".

However, it was established during the trial that:

- the taxpayer had not maintained a log book in relation to his claim for car expenses;
- the car dealer's licence expense was not incurred in the relevant financial year;

- laundry expense records were not maintained (in any event, there was no requirement from his employer to wear specified clothing or shoes, and the taxpayer described his 'work uniform' as "merely whatever clothing he happened to be wearing on a particular day"); and
- phone records indicated that the taxpayer had two mobile phones (one used by his wife), that the account included home internet charges and that non-work related international calls were included.

Therefore, the AAT was satisfied that the taxpayer was **grossly negligent** in claiming the deductions included in his tax return, and that his conduct was more serious than mere failure to take reasonable care, so the 50% penalty was appropriate.

Are you sure your 'independent contractors' are not 'employees'?

Two recent cases have highlighted how important the distinction between 'independent contractors' and 'employees' is:

- in one case, it was held that a plumbing business did not meet its **superannuation guarantee** obligations in respect of five of its plumbers that it had treated as independent contractors; and
- in a case between a taxi driver and the owner of the taxi, the Fair Work Commission held that the relationship between them was one of employer/employee, and therefore the **unfair dismissal laws** applied to their relationship.

As a general proposition, an independent contractor provides personal services whilst working in and for **his or her own business**, whereas an employee provides personal services whilst working in the **employer's business**.

The importance of BDBNs

Two recent court cases dealing with self-managed superannuation funds (SMSFs) have highlighted the importance of making, and recognising, Binding Death Benefit Nominations (BDBNs).

Editor: A member of a superannuation fund may generally make a 'BDBN' which, if valid, requires the trustee of the fund to pay out their death benefits (i.e., after they die) exactly as set out in the BDBN.

In the first case, a member of an SMSF expressed a desire in her Will that her superannuation benefits be left to her children (and specifically not to her husband).

However, she did not make a BDBN, and the Supreme Court of Western Australia held that the preference in her Will did not affect the rights or duties of the trustee of the fund under the fund's trust deed. Consequently, the remaining trustee (i.e., the husband) had no obligation to appoint the deceased's executor as a trustee of the fund, and was also entitled to distribute the death benefits at his discretion, contrary to the direction in the deceased's Will.

In the second case, the deceased member of an SMSF **had** executed a BDBN in favour of his two children, but the trustees (basically the deceased's spouse and her son from a previous relationship) had wrongly believed that the BDBN was invalid and so had ignored it.

Nonetheless, the Supreme Court of Victoria held that the BDBN was valid and binding on the trustees of the SMSF, and ordered that **both** the current trustee of the fund **and** the deceased's spouse **personally** were liable to make payment of the full amount of the deceased's benefits as at the date of death, plus an interest component and costs, to the nominated beneficiaries under the BDBN.

Small Business Super Clearing House Reform

The Government has announced that the ATO will take over the running of the Small Business Superannuation Clearing House.

Editor: The Small Business Superannuation Clearing House is a free online service that helps small businesses with 19 or fewer employees meet their superannuation guarantee obligations by allowing employers to pay superannuation contributions in one transaction to a single location (currently administered by Medicare) to reduce red tape and compliance costs.

According to the Government, the ATO is best placed to increase the take up rate of the Clearing House, as they have access to data on who is eligible for this free service, and employers will be able to remit their compulsory superannuation payments directly to the ATO (which will then distribute contributions to individual accounts).

This move will be followed by an extensive consultation process so the Government can better understand superannuation compliance cost concerns and develop further options to reduce these costs.

SMSF trustees may soon be fined for breaches by their fund

Editor: In the ATO's latest edition of its "SMSF News", it cautions trustees of self-managed superannuation funds (SMSFs) about new penalty provisions that are coming into play on 1 July.

Newly enacted legislation will apply to impose penalties on trustees for contraventions occurring in their super fund from 1 July 2014.

They will also apply to contraventions that were made prior to 1 July 2014 and continue after that date.

For example, if a fund has lent money to a member or relative and the loan still exists on or after 1 July 2014, the trustee will be liable for a penalty.

Under the measures, penalties will vary according to the type of breach. In the example above:

- Each individual trustee would be personally liable for a penalty of \$10,200.
- For an SMSF with a corporate trustee, each director would be jointly and severally liable for a penalty of \$10,200.

The penalty cannot be paid using the resources of the SMSF.

The ATO says that if trustees are making progress in resolving contravention(s) by 1 July 2014, it would consider these circumstances in any request to remit any imposed administrative penalties.

Super caps increased for 2014/15

The ATO has announced the following changes to the superannuation contributions caps.

Concessional contributions cap
These include:

- employer contributions (including those under a salary sacrifice arrangement); and
- personal contributions claimed as a tax deduction by a self-employed person.

The amount of the cap will be increased from \$25,000 in 2013/14 to \$30,000 in 2014/15.

Non-concessional contributions cap
Non-concessional contributions include personal contributions for which taxpayers do not claim an income tax deduction.

The amount of the cap will be increased from \$150,000 in 2013/14 to \$180,000 in 2014/15.