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September quarter CPI

The CPI for the September 2005 quarter was 149.8 (up from 148.4 for the June 2005 quarter).

Data matching program

The ATO has advised that it will compulsorily acquire names, addresses and telephone numbers from Pickles Auctions Pty Ltd, Fowles Auction Group Pty Ltd and Auto Auction Group Pty Ltd.

Details obtained will be cross matched with the ATO's data bank to identify those individuals who are not lodging returns or paying their tax.

Records relating to approximately 5,000 individuals and entities that purchased or sold vehicles through these auction houses will be matched.

Ref: Commonwealth Gazette No.GN49

Practical guide to Part IVA

The Tax Office has published a practical guide outlining the basic principles of how and when Part IVA applies to tax schemes.

The former Tax Commissioner, Michael Carmody, said it provides guidance for deciding whether Part IVA is likely to apply to a particular arrangement.

"Part IVA is the general anti-avoidance provision of the income tax law."

"It protects the integrity of our income tax system by ensuring that arrangements contrived to obtain tax benefits fail," Mr Carmody said.

The ATO also released a practice statement updating advice to their staff on the application of Part IVA and the broadly equivalent general anti-avoidance provisions of other tax laws.

The practice statement provides extensive detail on the operation of these provisions and the processes leading to a decision on their application.

A statement outlining how the Tax Office will refocus its test case program on the application of Part IVA to income splitting arrangements has also been released.

The new guide – Part IVA: the general anti-avoidance rule for income tax – Basic principles about how and when it applies, the practice statement and the test case program statement on personal services income are available from www.ato.gov.au.

Hard copies of the Part IVA booklet will be available in the next few weeks and can be ordered from the website or by calling 1300 720 092.

Ref: ATO Media Release Nat – 2005/70

Part IVA Guide –

Extract from "Tax on the Couch"

Editor: The following was included in the monthly video CD Tax Update brought to you by NTAA presenters – Tax on the Couch, along with discussion with a representative from the ATO.

At the same time that it released the practice statement, the ATO released a comprehensive guide on Part IVA, entitled “Pt IVA: The general anti-avoidance rule for income tax - Basic principles about how and when it applies (Editor: as stated above)”. The guide explains the basic principles about how and when the general anti-avoidance rule for the ITAA 1936 applies.

It is intended to be a guide for anyone concerned that Part IVA may apply to an arrangement they have entered into, or are considering entering into.
It contains the following chapters:

- **How do I know if Part IVA will apply?** (including factors to consider, case studies, an example of where Part IVA does not apply, a quick guide to identifying whether Part IVA may apply and how to apply for a ruling);

- **How does the Tax Office apply Part IVA?** (what happens if the Tax Office has investigated your arrangement, and what happens if you ask the Tax Office to consider your arrangement); and

- **How does the Tax Office assure its decisions?** (which looks at the referral of Part IVA matters to the tax counsel and the general Anti-Avoidance Rules Panel, and the general Anti-Avoidance Rules Panel’s role and processes).

**TAX TIP – Husband and wife partnerships**

The guide states that Part IVA would not apply to a typical husband and wife partnership arrangement where there are no unusual features.

Under such an arrangement, a husband and wife conduct a business in partnership and, as the relevant Partnership Act provides, share equally in profits and losses, notwithstanding that only one party performs the main bulk of the work.

This arrangement has the effect of dividing income equally notwithstanding that only one of the partners is the main generator of the income of the partnership.

However, the arrangement also has the very real financial consequence of exposing each partner to full liability for the debts of the partnership.

When regard is had to the eight matters in Part IVA, it would not be objectively concluded that the dominant purpose of the partnership arrangement was to obtain a tax benefit through the equal division of profits and losses.

Entering into a partnership is an ordinary means for a husband and wife to conduct a business together.

There is nothing contrived about the manner of sharing profits and losses because that is what the Partnership Act prescribes as the normal consequence of forming a partnership.

The arrangement is a partnership in form and in substance and it is a way of the husband and wife conducting business over the longer term.

In the absence of unusual features, therefore, Part IVA would not apply to such husband and wife partnerships. The sort of unusual features that could see Part IVA apply include where the:

- income generating activity was in reality a disguised employment arrangement; or

- use of the partnership is prohibited by regulatory or other laws.

In employee-like arrangements, provisions in the income tax law which specifically deal with the alienation of personal services income may apply in any event.

This would mean that the partner performing the main bulk of the work is taxed on all of the partnership income.

In such cases, Part IVA would have no application.

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**Tax and recent bushfires**

New Tax Commissioner Michael D’Ascenzo said the Tax Office is reassuring bushfire victims throughout Australia not to worry about their tax matters at this time.

“We know this is a very difficult time for many families, especially victims of the most recent bushfires in NSW and Victoria.

“We realise they have other priorities to sort out now and it may be some time before they are able to focus on their tax matters,” Mr D’Ascenzo said.

If taxpayers in bushfire affected areas are experiencing any difficulties meeting tax obligations they can call the Tax Office on 13 11 42 during business hours.
The Tax Office can help by:

◆ fast tracking refunds for people impacted by the fires;
◆ providing extra time to pay debts – without interest charges;
◆ allowing more time to meet activity statement and other lodgment obligations;
◆ helping reconstruct their tax records where their documents have been destroyed; and
◆ offering personal visits from field officers to help reconcile lost records.

Ref: ATO Media release – Nat 2006/01

Barter exchange schemes under investigation

The Tax Office has warned barter trade exchanges and their members that schemes designed to increase GST refunds are under investigation.

Tax Commissioner Michael D’Ascenzo said the Tax Office is concerned where a barter trade exchange buys goods or services at grossly inflated prices using trade dollars.

“We are concerned the amount paid in trade dollars for the good or service is much higher than the price that would normally be paid in dollars on the open market,” Mr D’Ascenzo said.

For example, the barter exchange may buy advertising space from a member for 5,500 trade dollars when the market value is actually $550. In this case the price in trade dollars is inflated ten times its real market value.

“Members of a barter exchange who sell goods or services at inflated prices may be avoiding their tax liabilities.

“People use these inflated prices to make GST credit claims – this converts trade dollars into real dollars in the form of GST refunds.

“In some instances the goods and services claimed to have been bought either do not exist or have not taken place.

“Where we see artificially inflated prices, and the arrangements are clearly a sham designed only to increase GST refunds – criminal charges may be appropriate,” Mr D’Ascenzo said.

A taxpayer alert (TA 2005/4) has been issued and is available from the Tax Office website at www.ato.gov.au/atp

ATO Media Release Nat – 2005/72

Results & direction of the ATO’s low doc loans project

In June 2004, the Tax Office announced that it had begun to investigate whether people using low documentation loans were likely to have tax compliance issues.

Around 350 taxpayers were selected randomly from eight lenders to get a picture of the broader population using these products.

Around 50% of these people had not lodged returns – the average was three years outstanding.

Most of this group are now up to date and more than $1.3 million in tax has been raised.

Secondly, it undertook a risk based approach to uncover concealment of income.

This led them to focus more closely on the clients of certain mortgage brokers. A field of around 400 high risk clients were identified.

140 cases were chosen because the broker involved was also a tax agent who had been identified as high risk as part of their profiling of tax agents. The broker/tax agent was also subject to audit.

These audits raised over $23 million in tax and penalties.

Audits of the remaining high risk clients of selected brokers are now under way.

What’s next?
In the coming year, the Tax Office will:

◆ Systematically check the lodgment status of people obtaining finance through low documentation loans, and potentially other sources.
Because most low documentation loans are made subject to mortgage insurance, it will explore the possibility of matching insurance company records.

The ATO noted that many users of these products are fully meeting their tax responsibilities. Many are funding repayments from legitimate sources like inheritances and capital gains, often derived from investments in property.

Where income has been omitted most of it has been derived from cash economy business activities predominantly in the building and construction industry.

### Offshore avoidance structures under scrutiny

People using tax avoidance structures in other countries continue to be under the spotlight following the release of four new taxpayer alerts.

The Tax Commissioner said the ATO’s ongoing work in this area shows some people are still using inbound and outbound transactions with offshore structures to avoid Australian tax.

“We are continuing to see people using tax havens, low tax jurisdiction or bank secrecy countries to conceal ownership of assets and income, or to generate fictitious or inflated deductions,” Mr D’Ascenzo said.

“There are serious consequences for those who use other countries to avoid Australian tax and those involved can expect firm action from the Tax Office.”

The Tax Office is investigating arrangements such as:

- Use of an outbound offshore re-invoicing arrangement to avoid or evade Australian tax – TA 2005/5
- Use of an inbound offshore re-invoicing arrangement to avoid or evade Australian tax – TA 2005/6
- Asset transfer to an offshore structure at below market value with subsequent use to produce income not attributed to the taxpayer for Australian tax purposes – TA 2005/8

Some taxpayers use the arrangements to return money to Australia for private use.

For example, the Tax Office has seen instances of fictitious gifts from non-existent overseas relatives.

“I encourage those who are involved in arrangements like this to come forward and clear up their tax position,” Mr D’Ascenzo said.

Voluntary disclosure includes the provision of known details of the promoter who designed, sold or implemented the arrangements, and known details of the methodology employed.

Individuals who want to voluntarily disclose their involvement in these arrangements can call 1800 019 363 from 8am to 6pm weekdays.

The four related taxpayer alerts describing the arrangements and the Tax Office’s concerns are available at www.ato.gov.au/atp

Ref:  ATO Media release – Nat 2005/73

### Warning on prepaid service warrant arrangements

**Editor:** The ATO has issued a Taxpayer Alert in relation to an arrangement where, for a relatively small cash outlay, large losses are created by a taxpayer or their partnership by acquiring prepaid service warrants that may be redeemed for the provision of legal and other professional services.

Second Commissioner of Taxation Jennie Granger has warned taxpayers to be wary of promoters offering to reduce tax on profits through a prepaid service warrant arrangement.

Under the arrangement, a taxpayer or partnership claims to buy a series of warrants and then claims the full cost of the warrants as a deduction.
For example, a warrant offering legal services to the value of $50,000 can be purchased by paying just $7,500, with the remaining balance owing to the service provider.

“These arrangements claim to produce a tax deduction greater than the small amount paid for the warrant in the financial year they are acquired.

“We are warning taxpayers to be wary of promoters offering to reduce tax on profits through a prepaid service warrant arrangement.

“We are concerned these arrangements may breach a number of provisions of the tax law, including the general anti-avoidance provisions,” Ms Granger said.

Ref: ATO Media Release Nat – 2005/68

**Taxpayer Alert**

**Prepaid Services Warrant Arrangement – TA 2005/2**

**Description**
The alert applies to arrangements having the following features.

- The taxpayer or partnership claims to buy a series of warrants that are redeemable for professional services from a service provider.

- Prior to buying the warrants, a taxpayer or a partnership purports to enter into a ‘Business Agent Dealership’ (dealership) and may claim to be in the business of acquiring and disposing of prepaid service warrants.

- The taxpayer or partnership acquires a series of warrants by making a part payment, with the balance due when the warrants are redeemed. For example, a warrant with a stated value of legal services to be provided (a face value) of $50,000 may be acquired by paying $7,500 (15% of the face value) with the balance owing to the service provider.

- The taxpayer’s or the partnership’s claimed objective is to endorse the warrants to a client for a fee so the client can redeem the warrant for legal or other professional services from the service provider.

- The service warrants generally have a life, described as an “eligible service period” of 13 months.

- The warrants are marketed on the basis that all warrants that have not been endorsed to clients by the end of the 13 month period are cancelled and refunded by the service provider at a discount, leaving no amount outstanding by the taxpayer or the partnership.

- It is claimed that the purchase of the warrants will give rise to an allowable deduction equal to the face value of the warrants in the financial year they are acquired.

- Where the dealership is a partnership, the partners claim a share of the partnership loss in their tax returns.

- It is claimed that on endorsing the warrants to the client or on cancelling of the warrants by the service provider the taxpayer or the partnership would derive assessable income. Generally it is claimed that this assessable income would be derived in a financial year subsequent to that in which the deduction is claimed.

- The warrants are marketed on the basis that a continuing deferral of income tax may be achieved by entering into purchases of warrants in subsequent financial years.

**ATO view**

- The arrangement seems artificial and lacks an ordinary business purpose in its design and execution.

- It raises questions about:
  - whether a partnership exists;
  - whether a business is being carried on;
  - the deductibility of the cost of the warrants;
  - the application of the general
anti-avoidance provisions of Part IVA of the ITAA 1936, and other provisions; and
– a liability to GST.

The ATO is examining these arrangements.

**Date of Effect:** 28 November 2005

### Accessories for laptops

**Editor:** At the 17 November 2005 Meeting of the NTLG*, the Tax Office expanded on what accessories would, and would not, be covered by the exemption under S.58X of the FBTAA for laptops, notebook computers or similar portable computers provided to employees by employers in respect of their employment.

(*) National Tax Liaison Group.

The ATO had earlier advised that any "computer externals" which are not necessary for the basic operation of the portable computer are not covered by the exemption under S.58X.

### Exempt accessories

The following are exempt benefits under S.58X of the FBTAA:

- From 1 April 2006 (legislative change), personal digital assistants and portable printers that are designed for use with a laptop, notebook or similar portable computer.
- Built-in internals such as modem and fax cards.
- Pre-loaded software forming part of the portable computer package.
- Separate or subsequent software purchased where it was purchased for use in the employee’s employment.

Note that an item of computer software need only be for use in the employee’s employment to be exempt under S.58X(2)(f). This does not require "a predominate or primarily test" to satisfy the exemption. Therefore, software "used by" an employee in their employment is exempt.

For example, anti-virus software would be exempt, but games would not be.

- Items that are ‘bundled’ by the retailer as part of a special offer (reflected in a single invoice) such as upgraded memory, an extended warranty or a protective carry bag.

### Non-exempt accessories

- Items that are ‘bundled’ by the retailer as part of a special offer, but there is no possible business application, such as games.
- Peripheral items such as cables, modems or cradles, an upgrade to the memory or an extension to the warranty that come at an additional cost.
- A protective carry bag where an employee has chosen to upgrade the standard carry bag at an added cost.

### Minor benefit exemption, etc.

Where a particular item (i.e., a benefit) is not covered by S.58X, the employer should consider the relevant ‘otherwise deductible rule’ and/or, if appropriate, the minor benefit exemption.

### Capital allowances: copyright in a film and licences

Recent amendments to the uniform capital allowance (UCA) rules allow the cost of copyright, and certain licences relating to copyright, in a film to be written-off over their effective life.

This means that if a taxpayer acquires copyright in a film (or certain licences relating to copyright in a film) from 1 July 2004, it can choose to claim its capital allowance deductions under the UCA rules rather than the specific film provisions.

Following the amendments, the Commissioner made a determination that the effective life of copyright in a feature film (including a licence) is five years. The determination applies from 1 July 2004.

The Commissioner has not made any effective life determinations for films other than feature films.
What copyrights does this new measure apply to?
The new effective life write-off applies to copyright in a film, and to certain licences relating to copyright in a film, acquired on or after 1 July 2004. Holders of such copyright may write off their capital expenditure under the effective life regime rather than the specific film provisions.

Can the effective life be recalculated?
The effective life of a copyright (or licence) in a film can be recalculated on a prospective basis if there is a change in circumstances relating to the nature of use of the asset.

This might occur, for example, where there is an unexpected demand or lack of success for a film the subject of the copyright.

Example
On the release of a feature film, Tim, the holder of the copyright in the film chose to use the Commissioner’s estimate of effective life of five years.

It became evident within a very short time of release, however, that the film was unsuccessful in that it was unable to attract public patrons.

It was, consequently, withdrawn from public viewing with no prospects of alternative viewings.

Tim would be able to recalculate the effective life of his copyright taking into account the unsuccessful nature of the film.

The ATO and Self-managed Super Funds (SMSFs)
Editor: The following are excerpts from a speech by Ian Read, Assistant Deputy Commissioner, on 4 November 2005.

Some facts about SMSFs
- All self managed funds hold approximately $165 billion in assets.
- Roughly 580,000 individuals are involved in self managed superannuation.
- The estimated average assets of these funds has grown from $184,000 in June 2000 to $285,000 in June 2005.
- SMSFs tend to invest conservatively with the highest percentage of assets invested in cash and term deposits, followed by listed shares.
- During 2003 and 2004, growth averaged at 3,000 new funds per month. That growth rate has since slowed to around 2,000 per month, and this figure is slowly trending down.

Auditors' Contravention Reports
Approved auditors have sent in over 5,000 auditor contravention reports. They comprised:
- assets not in the name of the fund: 18%;
- loans to members or relatives: 17%;
- in-house asset breaches: 13%;
- documents requested by the auditor but not provided: 12%;
- borrowing by the fund for purposes not allowed: 11%;
- breach of sole purpose test: 7%.

Compliance by auditors
While most auditors complete a reasonable financial audit, the ATO has serious concerns about the quality of the compliance audit component.

From the 9,600 approved auditors the ATO has identified from tax returns, around 40% audit only one self managed fund per year and a further 30% audit between two and five funds per year.

SMSF compliance audits require an extensive knowledge of the SIS Act and the Tax Office has concerns that a large number of approved auditors lack the necessary knowledge to conduct an effective SMSF audit.
The Tax Office intends to conduct reviews of approved auditors in the current financial year. Where appropriate, it will refer poorly performing auditors to their professional associations and, in serious cases, will disqualify the auditor.

Over the coming year, the ATO expects to undertake compliance reviews of up to 200 auditors.

**Common compliance problems**

- **Ownership of fund's assets**
  
  A fund’s assets are held in the name of an individual trustee or a corporate trustee in their own capacity, and not as the trustee of the fund.

  The ATO has identified a number of cases where company liquidators have seized assets belonging to funds to satisfy creditors of the company.

- **Sole purpose test**
  
  Investments that provide a current-day benefit to a member or an associate, for example:
  - buying artwork and displaying it in a member’s residence;
  - golf club memberships with playing rights attached;
  - running a business as part of a fund's investment strategy; or
  - paying for children’s education through a fund.

**Digital certificates and tax agents registering as trusts**

*Editor:* With the Tax Office insisting on the use of digital certificates, we have been contacted by a number of members who have had problems getting certificates because their tax agent’s registration was held by a corporate trustee.

This question was raised in an ATPF (Australian Tax Practitioners’ Forum) meeting on 25 November last year.

**Tax Office response**

The Tax Office is currently working with the professional associations and tax practitioners to understand and resolve issues relating to digital certificates and tax agents trading through a trust.

An interim proposal has been put forward by the ATO which will allow agents trading through trusts to apply for a digital certificate based on the ABN of the Trust that is noted on the registration as the tax agent.

Tax Office registration staff will seek to substantiate the link between the applicant for the certificate, the Trust and the Trustee.

The usual Proof of Identity and substantiation processes will be used, mainly relying on Tax Office systems with a follow up call to the tax agent where further information is required.

While this will get the agents to a higher level of security, it has not fully resolved the initial issue that was raised with these registrations.

With the feedback that the ATO has received from tax agents, it intends to work with them, as well as some representatives of the Tax Agent Boards to develop a proposal that will resolve this issue within the framework of the current law, taking into account the legislative framework.

**Deductible amount for super split due to marriage breakdown**

The ATO has issued a draft determination – TD2006/D3 – to indicate how it will allow the “deductible amount” (DA) to be divided where a pension or annuity is split following a marriage breakdown.

The deductible amount in relation to the original pension or annuity is generally to be split between the member spouse (MS) and the non-member spouse (NMS) in the same proportion as the payment split.

**Example 1**

Rex commenced a lifetime superannuation pension on 1 July 2000 when he was 60.

The undeducted purchase price (UPP) was
$20,000 and there was no residual capital value.

The relevant number (being the expected number of years over which the pension is expected to be paid – refer S.27H(4)) was 20.05. The deductible amount of the pension each year was $998 ($20,000/20.05).

Rex and Martha divorce and as the rules of the superannuation fund do not allow the pension to be commuted, they agree to split the pension payments effective from 1 July 2004.

Under the terms of the superannuation agreement, Martha (the NMS) is to receive 45% of each pension payment and Rex (the MS) is to receive 55% of each pension payment.

The deductible amount of Martha’s new pension is:

Original DA  x   NMS%
=   $998   x   45%
=   $449

The deductible amount of Rex’s new pension is:

Original DA  –   DA of NMS
=   $998  –  $449
=   $549

Terms of pension change

However, the above method will not be appropriate where the terms and conditions of the pension change as a consequence of the marriage breakdown, so that the original "relevant number" is no longer appropriate.

This is most likely to occur where the original pension was reversionary and, after the marriage breakdown, the pension ceases to be reversionary so that it ceases on the death of the member spouse.

If the life expectancy of the member spouse is less than that used as the relevant number in the original calculation of the deductible amount, then a different relevant number will need to be used in calculating the deductible amount of the new pensions.

Example 2


He is the member spouse (MS).

Under the governing rules of the fund, the pension reverts to Luke’s wife on his death.

Luke was 55 when he commenced the pension and his wife, Angela, was 50. The UPP was $100,000 and residual capital value was $0. The relevant number reflecting Angela’s life expectancy was 32.32.

The deductible amount of the pension was $3,094.

Luke and Angela divorce and, as the rules of the fund do not allow the pension to be commuted, they agree to split the pension payments effective from 1 July 1994.

Under the terms of the superannuation agreement, Angela is to receive 60% of each pension payment and Luke is to receive 40%.

However, under the governing rules of the fund, the pension will no longer revert to Angela on Luke’s death because of the divorce.

Therefore, the existing relevant number based on Angela’s life expectancy is no longer appropriate. The life expectation factor to be used as the relevant number is that for Luke as at the commencement day of the original pension which is 23.13.

The deductible amount of Angela’s new pension is:

Recalculated DA  
=   ($100,000 - 0)/23.13
=   $4,323
DA of NMS (Angela)
=   Recalculated DA  x   NMS%
=   $4,323  x  60%
=   $2,593

The deductible amount of Luke’s new pension is:

DA of MS (Luke)
=   Recalculated DA – DA of NMS
=   $4,323 - $2,593
=   $1,730
Returns required to obtain beneficiaries' refunds?

Editor: The following issue was raised by a practitioner, Robert Shelton, at the last ATPF meeting.

Discretionary trusts
"Where a discretionary trust distributes income to beneficiaries under age 18, the practice used to be that assessments were issued to the trustee, with a trailing digit against the trust’s tax file number to indicate beneficiary one, two, three etc.

More recently trusts that distribute amounts including imputation credits (that are otherwise refundable) have not obtained those refunds via the trustee’s assessment(s) as above.

Instead, each individual child beneficiary has had to lodge their own tax return in order to obtain the refund.

Is this due to the Family Trust Election rules as they interact with the imputation credit holding period rules, or is it merely an administrative practice?

Regardless of the answer to the above, the new process creates situations where a TFN for the child must be obtained and tax returns must be prepared and lodged.

All this for minor amounts of refunds, creating a compliance cost for little benefit for either the ATO or practitioners. Can we go back to the pre-existing system of the trailing digit?"

Tax Office response
The Tax Office’s current practice in relation to the refund of excess imputation credits (excess franking tax offset) is not due to the Family trust election rules and is not merely an administrative practice.

The current practice is based on legislative changes that had effect from 22 May 2001. In particular, the rules governing the refund of excess imputation credits falls under the refundable tax offset provisions within Division 67 of the ITAA 1997.

S.67-25(1) provides a general rule that from 1 July 2000, tax offsets under Division 207 or subdivision 210-H of the ITAA 1997 are subject to the refundable tax offset rules.

Division 207 deals with the effect of receiving a franked distribution under the imputation system.

Prior to 22 May 2001, S.67-25(1B) stated that where the trustee was assessed under S.98 of the ITAA 1936 then the refundable tax offset rules applied and a refund of excess imputation credits was allowed under S.67-30.

A trustee is assessed under S.98 of the ITAA 1936 where a minor beneficiary is under a legal disability and is presently entitled to a trust distribution.

Therefore the previous Tax Office practice of refunding the excess imputation credit to the trustee in these circumstances was in line with the legislation at the time.

With regard to assessments for an income year ending on or after 22 May 2001, S.67-25(1B) states that a trustee is only subject to the refundable tax offset rules if the trustee entitled to the tax offset is liable to be assessed under S.99 of the ITAA 1936.

As stated above, the trustee is assessed under S.98, therefore the trustee is not entitled to the refund of excess imputation credits under S.67-30 of the ITAA 1997.

The minor beneficiary is therefore entitled to the refund.

As the provisions in Division 67 of the ITAA 1997 do not entitle the trustee to the refund of excess imputation credit (excess franking tax offset) where the trustee is assessed under S.98, it is not an administrative practice to deny the trustee the refundable tax offset.

Furthermore, the provisions in relation to the Family trust elections and the 45 holding period rules are not relevant when determining whether the trustee is entitled to the refundable tax offset.

As the minor beneficiary is entitled to the refund in the above circumstances but may not be required or does not wish to lodge a tax return, the Tax Office has provided a method for the minor beneficiary to obtain the refund.

The refund may be obtained by lodging an application over the phone or by mailing the application.
The instructions and application form are contained in “Refund of franking credits Instructions and application for individuals 2005 (NAT 4105 - 6.2005)” and are published on the ATO website at:


Although the form is designed for individuals who are not required to lodge a tax return, Item 1 on the application requests the tax file number of the individual.

Therefore the minor beneficiary may still be required to obtain a tax file number (TFN) to obtain a refund.

Superannuation split and the 15% rebate

The ATO has issued a draft determination – TD2006/D4 – in relation to taxpayers who are under 55 and receive a split of a pension or annuity following a marriage breakdown.

The ruling states that where a non-member spouse under 55 years of age receives a split of a pension or annuity following a marriage breakdown, they are not entitled to the 15% rebate under S.159SM or S.159SU of the ITAA 1936.

Explanation

Where a taxpayer is receiving a pension from a superannuation fund they are generally entitled to a 15% rebate on the assessable portion of the pension. The taxpayer must be at least 55 to get this rebate.

The assessable portion is the amount of pension received less the annual deduction for the undeducted purchase price (“UPP”).

For example: Mr X who is 60 receives $25,000 per year and his annual UPP deduction is $1,000. Therefore, $24,000 is included in his assessable income (refer S.27H).

He should then be entitled to a rebate of 15% on the tax payable on the $24,000.

Marriage breakdown

Mr X then gets divorced and the court orders that 50% of the pension be paid to his spouse, who is under 55. She receives $12,500 per year.

The legislation treats the pension paid to the spouse as a brand new pension. She must then meet the conditions for the 15% rebate based on her own circumstances.

As one of those conditions is that the recipient must be 55, she will not be entitled to the 15% rebate on the assessable amount of her pension.

New Statutory Declarations

Editor: The Attorney General’s Department has asked us to tell members that there is a new form for making a Commonwealth statutory declaration.

You can download the new statutory declaration form from:


A person wishing to use a statutory declaration in connection with a law of the Commonwealth, the Australian Capital Territory or certain other Territories must make the declaration in accordance with the Statutory Declarations Act 1959 (the Act).

The Act provides that a statutory declaration must be in the prescribed form and must be made before a prescribed witness.

The form for making a statutory declaration and the persons who can witness a statutory declaration are prescribed under the Statutory Declarations Regulations 1993 (the Regulations).

A new form for making a statutory declaration came into effect on 26 November 2004. The Regulations allow either the new form or its predecessor to be used up to and including 30 June 2006.

From 1 July 2006, the new form must be used.

Persons wishing to make a statutory declaration in relation to a matter concerning State law will need to check the procedures for making and using declarations with the relevant State.
ID2005/313 – Family trust election: death of a family member

Where a family member of a test individual dies, their spouse remains a member of the test individual’s family.

However, their spouse will cease to be a family member if they remarry or enter into a de facto relationship.

Facts
A family trust election is made after the death of the test individual’s brother. The brother had a spouse at the time of his death.

Reasons for Decision
S.272-95 of Schedule 2F to the ITAA 1936 provides that:

The “family” of an individual (the “test individual”) consists of all of the following (if applicable):

(a) any parent, grandparent, brother, sister, nephew, niece, child, or child of a child, of:
   (i) the test individual; or
   (ii) the test individual’s spouse;

(b) the spouse of the test individual or of anyone who is a member of the test individual’s family because of paragraph (a).

ID2005/332 – GST: refund for supplies cancelled after an entity ceases to be registered

The Commissioner must refund GST to a supplier that is no longer registered for goods and services tax (GST) where:

☐ the supply was cancelled after the entity ceased to be registered for GST; and

☐ the entity refunded the full amount that it received to the unregistered customer.

Facts
The entity is a supplier that is no longer registered for GST. In its final tax period, the entity entered into an agreement to make a supply to a customer.

It issued an invoice for a supply (which included GST) and received payment from the customer.

After it cancelled its GST registration, the supply was cancelled at the customer’s request. The entity refunded the total amount invoiced to the customer. The customer is neither registered nor required to be registered for GST.

Reasons for Decision
The net amount for the entity’s concluding tax period is overstated.

Therefore, to rectify this position, the entity can revise its business activity statement (BAS) for its concluding tax period to take into account the fact that this supply was never made. When the entity lodges the revised BAS, the revision will be reflected in its running balance account (RBA).

ID2005/335 – GST: post-operative care for cosmetic surgery patients

A registered private hospital is not making a GST-free supply when it supplies hospital care services to a patient recovering from cosmetic surgery.

Facts
The taxpayer is a registered private hospital. It is providing hospital care to patients recuperating from cosmetic surgery. The hospital care involves accommodation and nursing services.

The cosmetic surgery is not a professional service for which a medicare benefit is payable under Part II of the Health Insurance Act 1973. No post-operative complications, such as infection, develop in the course of supplying the hospital care.
‘Hospital treatment’ covers supplies of accommodation and nursing services made by the entity to its patients.

However, S.38-20(2) of the GST Act states that a supply of hospital treatment is not GST-free to the extent that it relates to a supply of a professional service that, because of S.38-7(2), is not GST-free.

A service is not GST-free under S.38-7(2)(b), where it is rendered for cosmetic reasons and is not a professional service for which a medicare benefit is payable under Part II of the Health Insurance Act.

Note: the term ‘cosmetic reasons’ is not defined in the GST Act and is therefore given its ordinary meaning. The Macquarie Dictionary 1997 defines ‘cosmetic’ as:

- serving to beautify; imparting or improving beauty, especially of the complexion;
- designed to effect a superficial alteration while keeping the basis unchanged.

Procedures that alter or enhance a patient’s appearance but have no medical or reconstructive purpose are considered to be cosmetic and are not GST-free.

However, a procedure that is performed for medical or reconstructive reasons is not cosmetic and may be GST-free. An example of this is skin grafting performed on a burn victim.

**ID2005/336 – GST and endoscopic brow lift**

A hospital makes a GST-free supply when it supplies hospital services to a patient undergoing an endoscopic brow lift for medical reasons.

**Facts**

The patient has severe brow ptosis, which is obscuring their visual field. The situation cannot be addressed by simple blepharoplasty, as the brow itself is responsible for the visual obstruction. Once the brow is lifted the patient will be able to see.

An endoscopic brow lift is not a professional service for which a Medicare benefit is payable under Part II of the Health Insurance Act 1973.

**Reasons for Decision**

The entity is supplying services, including accommodation and theatre services, to a patient in the hospital. These services are covered by the term ‘hospital treatment’.

However, S.38-7(2)(b) of the GST Act states that a medical service is not GST-free if it is rendered for cosmetic reasons and no medicare benefit is payable for that service.

There is no medicare benefit payable for the endoscopic brow lift. Therefore, if the service is performed for ‘cosmetic reasons’ it is not GST-free.

The endoscopic brow lift is carried out on the patient to correct the patient’s severe brow ptosis that is obscuring the patient’s visual field.

The brow lift will improve the patient’s vision. Therefore, the medical service is performed for medical reasons, not for cosmetic reasons, and S.38-7(2)(b) of the GST Act does not apply.

Therefore, the entity is making a GST-free supply of hospital treatment under S.38-20(1) of the GST Act when it supplies hospital services to a patient undergoing an endoscopic brow lift for medical reasons.

**ID2005/342 – Capital Allowances: defending against a takeover**

Capital expenditure incurred by a taxpayer in analysing a proposal made by a prospective purchaser to acquire all of its issued shares is ‘expenditure to defend their business against a takeover’.

**Facts**

The taxpayer, a company that carried on business for a taxable purpose, was approached by an unrelated entity with a proposal to buy all the taxpayer’s issued shares.

The taxpayer incurred capital expenditure on consultancy and legal fees in analysing the proposal made by the prospective purchaser.
The taxpayer rejected the proposal due to a failure to reach agreement on the acquisition price of the issued shares.

The proposed purchase of all of the taxpayer’s issued shares would have resulted in the purchaser assuming control of the company.

For the purposes of S.40-880(1)(d) of the ITAA 1997, the proposal to purchase all of the taxpayer’s issued shares is an attempt to takeover, even though the proposal did not ultimately proceed.

**ID2005/343 – Capital Allowances: unsuccessfully attempting a takeover**

Capital expenditure a taxpayer incurred in determining whether to attempt to takeover an unrelated business entity is not ‘costs to your business of unsuccessfully attempting a takeover’ because the expenditure was incurred before the taxpayer had commenced the process of attempting the takeover.

**Facts**

The taxpayer, a company that carried on business for a taxable purpose, incurred capital expenditure in engaging the services of a consultant and a solicitor to examine the prospective acquisition of another unrelated company.

The examination was intended to provide sufficient information on which the taxpayer could decide whether to attempt to takeover the other company.

The taxpayer’s Board of Directors subsequently formally approved the making of an offer for the purchase of all of the issued shares in the target company. Following that approval, the taxpayer incurred further capital expenditure on consultancy fees in negotiating a purchase price with the target company.

The taxpayer ultimately decided not to proceed with the acquisition of the company.

**Reasons for Decision**

The requirement in S.40-880(1)(e) of the ITAA 1997 that the capital expenditure be incurred attempting a takeover is satisfied where the expenditure is incurred directly for the purpose of, and as an integral part of, attempting the takeover.

The commencement of the attempted takeover in this case was objectively evidenced by the taxpayer’s formal decision to authorise the making of an offer to acquire all of the issued shares in the target company.

The takeover process commenced at the time that approval was given by the Board of Directors.

The expenditure incurred on the consultancy and legal fees in determining whether to attempt to takeover the target company was incurred before the takeover process was commenced.

It was not, therefore, incurred directly for the purpose of, and as an integral part of, attempting the takeover.

**Note:** The taxpayer also incurred expenditure on consultancy fees to negotiate a purchase price after the Board’s approval to make a takeover offer.

The expenditure was for services provided after the process of attempting a takeover began and was incurred directly to attempt the takeover which was subsequently unsuccessful.

This capital expenditure does represent costs of unsuccessfully attempting a takeover under S.40-880(1)(e) of the ITAA 1997.

**ID2005/347 – CGT: whether an improvement is a separate CGT asset**

**Editor:** Under S.108-70(2), a capital improvement to a pre-CGT asset is taken to be a separate CGT asset if its cost base is:

- more than the improvement threshold for the income year in which the event happened; and
- more than 5% of the capital proceeds from the event.

A taxpayer who makes a capital improvement to pre-CGT land must calculate its indexed cost base to determine whether the improvement is a separate CGT asset.

**Facts**

A taxpayer purchased vacant land before 20 September 1985. After this date, but before 21 September 1999, they entered into a contract to make a major improvement to the land.
The improvement cost $100,000.
The taxpayer entered into a contract to sell the improved land in the 2005/06 income year for $500,000.
The indexed cost base of the improvement at the time of entering into the contract was $110,000.
The improvement threshold for the 2005/06 income year is $109,447.

**Reasons for Decision**

To determine whether the improvement in this case is a separate CGT asset, there are two steps:

- First, its cost base must be compared with the improvement threshold for the 2005/06 income year and the proceeds from the disposal of the improved land; and

- Second, it must be determined if indexation applies to the cost base of the asset.

S.110-25(7) of the ITAA 1997 provides that the cost base of a CGT asset includes indexation where the asset was acquired before 11.45 am on 21 September 1999 and was owned for at least 12 months before the CGT event (Div.114).

As the improvement in this case was acquired before 21 September 1999 and it was owned for at least 12 months, its cost base includes indexation for the purposes of applying S.108-70(2).

As this amount is more than:

- the improvement threshold for the 2005/06 income year ($109,447), and

- 5% of the capital proceeds from the disposal of the land ($25,000),

the improvement will be a separate CGT asset.

Having established that the improvement is a separate asset from the land, the taxpayer (if eligible) can work out their capital gain from its disposal using the CGT discount method or choose that the indexed cost base method apply.

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**ID2005/354 – GST: supply of domain name registration**

A non-resident entity does not make a taxable supply when it supplies a domain name registration to an Australian resident customer through its website. The supply is not connected with Australia.

**Facts**

The entity is a non-resident registrar of .au domain names. It does not have a permanent establishment in Australia. It is not registered for GST.

It supplies domain name registrations through its website from outside Australia for Australian resident customers.

When registering a domain name, it:

- verifies the customer’s application, ensures that they are eligible to use the name and checks that the name is available;

- electronically submits their application to the .au domain name electronic registry database; and

- carries out associated activities such as:
  - maintaining the registration
  - renewing the registration after 2 years
  - from time to time, updating the customer’s details on the registry
  - where necessary, transferring the registration to another customer or domain name registrar, and
  - where necessary, cancelling that domain name registration.

The entity charges the Australian resident customer a fee for the domain name registration and the customer receives use of that domain name for two years.

**Reasons for Decision**

The entity does not carry on an enterprise in Australia. Therefore, the supply will only be "connected" with Australia to the extent that the domain name registration is done in Australia.
S.9-25(5) of the GST Act provides that a supply other than goods or real property is connected with Australia if:

- the thing is done in Australia; or
- the supply is made through an enterprise the supplier carries on in Australia.

The supply of a service is done where that service is performed. The domain name registration services are performed outside Australia where the entity carries on its enterprise.

Therefore, the supply of this service is not connected with Australia and the requirements of S.9-5 of the GST Act are not satisfied.

Therefore, the entity does not make a taxable supply under S.9-5 of the GST Act when it supplies domain name registration services to an Australian resident customer.

**ID2005/362 – Deduction for patron expenses**

The taxpayer who is the mayor of a local council, is entitled to a deduction under S.8-1 of the ITAA 1997 for patron expenses.

**Facts**

The taxpayer is the mayor of a local council and receives an assessable allowance from the local council.

Following the taxpayer’s election as mayor, he was appointed the patron of several local organisations. He intends to act as patron for these organisations only while in the position of mayor.

Donations to the local organisations were made by the taxpayer as a goodwill gesture. None of the organisations were deductible gift recipients under Div.30 of the ITAA 1997.

**Reasons for Decision**

According to Taxation Ruling TR 1999/10, patron expenses are allowable under S.8-1 where there is a direct connection between the position of a Member of Parliament as a patron and their income earning activities.

Where a Member of Parliament acts as patron for personal reasons any expenses incurred in relation to that position are not allowable deductions because they are private or domestic in nature.

In this case, the taxpayer intends to be a patron only while in the position of council mayor and has made donations to the local organisations as a goodwill gesture.

There is a direct connection between the patron expenses incurred by the taxpayer and the assessable income derived from the mayoral position.

As a result, the principle in TR 1999/10 of allowing a deduction under certain circumstances for patron expenses incurred by a Member of Parliament can be extended to the taxpayer in this case.

**ID2005/366 – FBT: gift purchased by employer and employees**

Where a gift for an employee is purchased using funds contributed by both the employer and work colleagues, the employees’ contributions are ignored in determining whether the taxable value of the gift is less than the $100 minor benefit threshold.

**Facts**

An employee and their partner have a new baby.

Employees make voluntary contributions to buy a gift for the employee and the employer contributes an amount towards the purchase of a suitable gift.

Whilst the total amount collected is in excess of $100, the amount contributed by the employer is less than $100.

**Reasons for Decision**

Under paragraph (c) of the definition of ‘cost price’ in S.136(1) of the FBTAA, the cost price of a property fringe benefit means the expenditure incurred by the provider that is directly attributable to purchasing or obtaining delivery of the property.

Under these circumstances, it is accepted that the employer is the provider and the expenditure that is ‘incurred by the provider’ is the amount that has been contributed by the employer towards the purchase of the gift.
Therefore, as the notional taxable value of the benefit is less than $100, the requirements of S.58P(1)(e) of the FBTAA would be satisfied.

**ID2005/367 – CGT: plan of consolidation**

When land owned by a taxpayer is amalgamated under a ‘not in common ownership’ plan of consolidation with adjoining land owned by another entity, CGT event A1 is not triggered.

**Facts**

The taxpayer acquired pre-CGT land.

In the 2005/06 income year, he and the owner of an adjoining property agreed to develop both properties together. Under the development agreement, they obtained approval for a not in common ownership (NICO) plan of consolidation of the two properties.

The NICO plan of consolidation was lodged with the Registrar of Titles who issued a NICO title for the lot as consolidated on the plan.

On this new title, the owners were described as the taxpayer ‘as to the land formerly contained in Certificate of Title XX’ and the other owner as ‘to the land formerly contained in Certificate of Title YY’.

The taxpayer is concerned that the issuing of a single NICO title covering both of the previous lots will result in the taxpayer being taken to have acquired their land after 20 September 1985.

**Reasons for Decision**

Generally, CGT event A1 will happen when the title to two properties owned by different entities is merged. This is because each co-owner acquires, as a result of the merger, an interest in the land previously owned by the other.

However, a NICO title does not involve co-ownership of land in the generally understood sense (that is, a tenancy in common or joint tenancy).

The NICO title recognises that each proprietor continues to own the land described in their previous title deed.

In the circumstances, there has been no change of ownership of the taxpayer’s land and, therefore, CGT event A1 in S.104-10 of the ITAA 1997 has not happened.

The land owned by the taxpayer before the issuing of the NICO title continues to be owned by the taxpayer after the issuing of the NICO title. This means the taxpayer will continue to be regarded as having acquired that land before 20 September 1985.
SGR 2005/2 – SG: Work arranged by intermediaries

This Ruling examines the terms ‘employer’ and ‘employee’ in the Super Guarantee Act in relation to working arrangements between three (or more) parties.

These tripartite employment arrangements involve various relationships (contractual or otherwise) between:

- end-user (the entity requiring the services or work of an individual);
- an intermediary firm; and
- the individual performing the work or services.

This Ruling provides the Commissioner’s view as to how to analyse these situations in light of the principles of contract law and the relevant court decisions on these arrangements.

This Ruling applies from 30 November 2005, the date of its issue.

Background

In Australia, the end-users of labour often acquire the services or labour of individuals through an intermediary rather than engaging them directly.

Such intermediaries are commonly, although not always, referred to as ‘service firms’, ‘labour hire firms’ and ‘employment or recruitment agencies’.

In contrast to the conventional working relationship between an entity and worker in which a single contract is formed, a number of contracts are often present in these tripartite working arrangements.

It can therefore sometimes be difficult to tell whether the worker is an employee of the intermediary or end-user, or neither.

Ruling

The following principles apply in determining whether there is an employment relationship for the purposes of S.12(1) and (3) of the SGAA 1992:

- **Contract.** It is first necessary to determine whether a contract for the performance of work exists and with whom it exists.
  - If there is no contract between the worker and end-user in a tripartite working arrangement, the worker cannot be an employee of the end-user.
  - Similarly, if there is no contract between the worker and the intermediary, the worker cannot be an employee of the intermediary.

  **Note:** A contract between the intermediary and the worker can still be a common law contract of employment even though the work is done for the immediate benefit of the end-user.

- **Legal control.** In tripartite working arrangements, it is the ultimate or legal control over the worker that is most relevant; not the day-to-day direction and control.

- **Agency.** In certain arrangements, the intermediary may perform an agency role to bring about a contractual relationship between the worker and end-user.

  If an agency relationship does exist between the intermediary and either the end-user or worker, and the intermediary merely brings about a contractual relationship between the end-user and worker, the worker is not an employee of the intermediary firm.
Interposed entity. If a worker is not contracted personally to perform work or services but via an interposed entity such as a company or trust, neither the end-user nor the intermediary is the employer of the worker, because any contract they have is with the interposed entity and not with the worker.

Example – Security guards

PBS Ltd is a large security company which carries on a business of supplying security guards, mobile patrols, body guards, crowd control and other similar services for commercial, industrial, and government clients.

PBS Ltd is contracted by Explosive Ltd, a company specialising in the design and manufacture of explosives and demolition equipment, to provide mobile security guards to patrol Explosive’s premises at night.

The mobile security guards are required to patrol the premises between 11 pm and 3 am every night, wear uniforms bearing the PBS Ltd logo, are remunerated by PBS Ltd and are required to inform PBS if they cannot work a particular shift.

In this scenario, there is a contract between PBS Ltd and Explosive Ltd under which PBS Ltd agrees to supply a guard service to Explosive’s premises at night.

However no contract has been entered into between Explosive Ltd and the guards. On the basis of these facts, the guards cannot be employees of Explosive Ltd as there is no contract between these parties.

However, the guards will be employees of PBS Ltd for the purposes of the SGAA 1992 as the indicators of a common law employment relationship exist. Accordingly, PBS Ltd is required to provide superannuation support for its guards under the SGAA 1992.

Example - Placement Agency

Finance Services Ltd is a recruitment agency specialising in the temporary and permanent recruitment and placement of staff in the banking and finance industry.

Employers with staffing vacancies contact Finance Services Ltd, which maintains a database of persons with relevant skills and experience who are seeking employment in this industry.

Bank Co contracts with Financial Services Ltd to refer prospective employees to fill a vacant position in its finance division.

Financial Services conducts a selection and screening process and puts forward Troy as the most suitably qualified applicant.

Bank Co accepts this recommendation and employs Troy under a contract of service (that is, as an employee). Bank Co pays a placement fee of $3,000 to Financial Services for the service provided.

Troy is the employee of Bank Co for the purposes of the SGAA 1992. There is no contractual relationship between Financial Services and Troy.

Financial Services merely facilitates the formation of a common law contract of employment between Bank Co and Troy.

TD 2005/52 – CGT: Set-off amounts

If an amount is owed on the acquisition of a CGT asset, the set-off of all or part of that liability constitutes money paid for the acquisition of the asset for cost base purposes.

Explanation

A set-off occurs if there are presently due mutual liabilities of sums owing between the same parties, which they agree to set-off, in equal amounts against each other.

Therefore, if one of the amounts due in a set-off is in respect of the acquisition of an asset, the amount of set-off constitutes money paid in respect of the acquisition of the asset for the purposes of the first element of the cost base in S.110-25(2) of the ITAA 1997 and the reduced cost base in S.110-55 of the ITAA 1997.

Example

Company X advertises for sale a CGT asset for $120,000.
Company Y, a trade creditor of Company X sees the advertisement and enters into an unconditional contract to purchase the asset for that amount.

By the time Company Y is to due to settle the contract its finance department notes that there are presently due mutual liabilities, with Company Y having a debt due to it from Company X of $50,000 for services provided.

Contact is made with Company X and it is agreed that the $50,000 debt owing to Company Y for the provision of services be set-off against the amount due for the acquisition of the CGT asset and the remaining $70,000 be paid in cash.

The first element of the cost base of the CGT asset is the money paid of $120,000.

At the conclusion of the hire period, Farm Co may exercise a right to acquire the harvester for 20% of the original purchase value of the machine.

An independent valuation suggests that the harvester is likely to have a fair market value significantly in excess of the exercise price at the end of the hire period.

Farm Co would have been the owner of the harvester if the arrangement had been a sale. It is also ‘reasonably likely’ that Farm Co will exercise its right to acquire the harvester at the end of the hire period.

The expected market value of the machine is significantly more than Farm Co’s exercise price.

There is no other evidence to suggest any contrary action by Farm Co. Therefore, S.240-20 will deem Farm Co to be the owner of the machine.

Similarly, it is also ‘reasonable to expect’ that Farm Co will exercise its right to acquire the harvester.

Farm Co will be entitled to claim a deduction for the decline in value of the harvester if the other requirements in Division 40 are satisfied.

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**TR 2005/20 – "Hold" a depreciating asset**

This Ruling considers when a taxpayer who is taken to own goods under Div.240* of the ITAA 1997 will be taken to ‘hold’ a depreciating asset for the purposes of Div.40.

*Note(*): For tax purposes, Div.240 treats a hire purchase as a sale of goods, combined with a loan.

**Ruling**

A taxpayer (‘the notional buyer’) who is taken to be the owner of goods under S.240-20(2) is not the holder of the goods for the purposes of Div.40, unless it is reasonable to conclude that they will acquire the asset, or that it will be disposed of at their direction, and for their benefit.

Where this requirement is satisfied the notional buyer will be the holder of the asset under S.40-40.

**Example**

Farm Co has entered into a hire purchase agreement with Machine Co in respect of a crop harvester. Under the terms of the agreement, Farm Co will pay monthly hire payments including an interest component over a period of 3 years.

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**TR 2005/21 – Charities**

*Editor:* This 76 page ruling sets out the Commissioner’s views on the meaning of "charitable institution" and "fund established for public charitable purposes". It is available on the ATO’s Website.

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**TR 2005/24 – Deductibility of personal superannuation contributions**

This ruling sets out the circumstances under which taxpayers are entitled to claim deductions for personal contributions to complying superannuation funds.

The following sets out some wide ranging examples that explain many of the concepts in the ruling.
Mike’s employer provided superannuation support during the period of his employment. On termination, Mike received an ETP from his employer and a payment for unused annual leave.

The sum of these payments and Mike’s wages was $10,000. Business income for the year amounted to $30,000.

Mike is not an ‘eligible person’ under S.82AAS(2) as superannuation benefits were provided. Also, Mike’s income from eligible employment is greater than 10% of his assessable income (S.82AAS(3)).

Mike is not entitled to a deduction for any personal superannuation contributions made in respect of that year.

5: Employer fails to contribute super and is then wound up

Alcoe Pty Ltd did not provide superannuation support for the benefit of their employees during the year of income.

John, an employee of Alcoe Pty Ltd, was making personal superannuation contributions into a complying superannuation fund. A review was made by the Tax Office to determine the company's liability to pay the SGC. During this review, it was discovered that the company had been wound up. Also, there were no funds to pay the SGC.

Notwithstanding this, it is reasonable to expect that superannuation benefits would be provided (S.82AAS(2)(a)) and further, those benefits would be attributable to that year of income because they would be required to be made in relation to the year of income (S.82AAS(2)(b)).

Therefore, John is not an eligible person under S.82AAS(2) and not entitled to a deduction for any personal super contributions made to a complying superannuation fund or RSA.

6: Self-employed person also receives ETP from previous employer

Matt, a self-employed plumber, received an ETP to the value of $50,000 from his former employer on 1 July 2004.

Matt’s other income for the year ending 30 June 2005 consisted of $5,000 in interest and $10,000 from his business.
No employer superannuation contributions were made on Matt’s behalf during the year ending 30 June 2005.

Under S.82AAS(2), the ETP received does not constitute the provision of superannuation benefits. Therefore, Matt is considered to be an ‘eligible person’ and may be entitled to a deduction for any personal superannuation contributions that he has made to a complying superannuation fund or RSA.

7: Pension and investment income only – and contributes to a super fund

John is aged 59 and his only income for the year ended 30 June 2005 is an employer sponsored superannuation pension and investment income. For the year ended 30 June 2005, John made contributions to a complying superannuation fund.

John is considered to be an ‘eligible person’ under S.82AAS(2) as no superannuation benefits had been provided in respect of the whole or part of that year of income ended 30 June 2005.

Therefore, John is entitled to a deduction for his personal superannuation contributions.

8: Self-employed but received payout of annual leave and LSL – 10% rule

Bronte took leave without pay to work overseas. Upon her return to Australia she was employed with the same employer for one week before resigning.

As Bronte was paid more than $450 for one week’s employment her employer is required to make superannuation contributions on her behalf or be subject to the SGC.

Upon resignation from her employer, Bronte received payment of her annual and long service leave which did not attract any employer superannuation support.

During the same year of income, she opened her business and made personal contributions to her complying superannuation fund.

For Bronte to be able to claim a deduction for personal contributions, she needs to pass the ten percent rule.

In this case, her assessable income attributable to eligible employment includes the amounts paid by her employer for annual and long service leave.

9: Self-employed + two casual jobs – super contributions paid on one

Kylie, a self-employed dressmaker, works on a casual basis as a waitress to supplement her income. She has two ‘regular’ casual employers, A & B, that is, two separate employment relationships.

Depending on the number of hours worked, she is paid from A between $500-$550 per month and from B between $250-$300.

As she is paid less than $450 per month from B, her employer is not required to provide superannuation support.

It is assumed that there is no superannuation industrial award for that industry.

However, A will be required to provide superannuation support at the going rate on the basis of the income paid to Kylie.

For the purposes of determining whether Kylie satisfied the ten percent rule, the Commissioner takes the view that only the income from A which is subject to superannuation support, will be taken into account.

The total income paid from B will not be aggregated with the income paid from A in calculating the relevant percentage.

The situation would not be different if in some months of the year Kylie had been paid less than $450 from A.

Her total income from A would still be taken into account in determining whether she satisfied the ten per cent rule because she has received some superannuation benefits from A in the other months.

10: Self-employed + two casual jobs – both with superannuation support

Sandy, a casual administrative assistant works for two employers during a year of income, as well as being self-employed. Her income details are as follows:

Employer 1 She is paid $440 per month for the months July to Oct and then is paid $500 per month for the months November till June (total income of $5,760).
Employer 2 She is paid $750 per month (total income of $9,000 in the income year).

Other income She earns $25,000 from her business.

Employers 1 and 2 both provide superannuation support for Sandy for the months in which she is paid at least $450.

For the purposes of determining whether Sandy satisfied the ten percent rule, income from both employers are aggregated. Sandy’s assessable income attributable to eligible employment income for the year of income is $14,760.

Consequently, Sandy is not an eligible person for the purposes of S.82AAS(2) as she does not satisfy the ten percent rule (S.82AAS(3)).

11: Retirement benefit + unused annual leave + casual employment
Jayne was permanently employed as a school teacher and took maternity leave without pay for 12 months from July 2002 to June 2003. During this period, superannuation contributions were required to be made by her employer.

After the 12 months maternity leave Jayne went on leave without pay, no superannuation contributions were made by her employer in respect of this period.

After 6 months, Jayne resigned and received a retirement benefit including an amount of unused holiday pay.

During the year ended 30 June 2004 Jayne made a $6,000 contribution to her own superannuation fund and later in the same income year, she obtained employment as a casual employee with her old employer.

The employer made superannuation contributions for Jayne in relation to her casual employment.

The employer treated the two periods of employment as separate and as no employer superannuation support was provided for the first period of employment when she was on leave without pay, the income from that period of employment should not be aggregated with the income from casual employment when making the ten percent calculation under S.82AAS(3).