MONTHLY TAX UPDATE SERIES

Presented by:

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MONTHLY TAXATION UPDATE

To 31st July 2005

PLEASE NOTE: - **Items marked # will be discussed in the training session time permitting**

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1 LEGISLATION UPDATE

1000 Legislation update

#1001 Legislation Status

Set out below is a summary of the status of various bills as at 31st July, 2005.

BILL	HOUSE OR REPS				SENATE				ROYAL ASSENT
	A	B	C	D	A	B	C	D	
New International Tax Arrangements (Foreign owned branches and Other Measures) Bill 2005	I	P			I	P			A – 26/06/05
Family Law Amendment Bill 2005	A	I	P		I	P			A – 26/06/05
New International Tax Arrangements (Foreign Income Account and Other Measures) Bill 2004	A								
Tax Laws Amendment (2005 Measures No 1) Bill 2005	I	A	P		I	SC	P		A – 29/06/05
Tax Laws Amendment (2005 Measures No 2) Bill 2005	I	P	IA	P	I	A	P		A – 29/06/05
International Tax Agreements Amendment Bill 2004	A								
Superannuation Legislation Amendment Bill 2004	I	P			I	SC			
Tax Laws Amendment (Improvements to self assessment) Bill (No. 1) 2005	I	P			I	SC	P		A – 29/06/05
Shortfall Imposition Charge (Imposition) Bill 2005	I	P			I	SC	P		A – 29/06/05
The Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004	I	P			I	SC			
Tax Laws Amendment (Personal Income Tax Reduction) Bill 2005	I	P			I				
Tax Laws Amendment (2005 Measures No 3) Bill 2005	I	P	IA	P	I	A	P		A – 26/06/05
Tax Laws Amendment (2005 Measures No 4) Bill 2005	I								
Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2005	I	P			I	P			A – 26/06/05
Superannuation Laws Amendment (Abolition of Surcharge) Bill 2005.	I	P			I				
Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2005	I	P			I	P			A – 29/06/05
Superannuation Bill 2005	I	P			I	P			A – 29/06/05
Superannuation (Consequential Amendments) Bill 2005	I	P			I	P			A – 29/06/05
Superannuation Legislation Amendment (Superannuation Safety and Other Measures) Bill 2005	I								

LEGEND
A – Announced but not yet introduced
C – Approved by the Senate Committee for passage
D – Bill defeated and rejected
I – Introduced into House of Representatives
P - Passed
A xx/xx/xxxx- Royal assented with date received assent
SC – Currently in a Senate Committee
W – Waiting Assent

Please note that not all bills are listed. Only those with a direct connection to mainstream tax or superannuation issues are listed. As well, some private members bills and opposition bills that have no chance of being passed by the House of Representatives have not been listed.

1500 Legislation by Press Release

#1501 Outstanding Announcements – Waiting on legislation

Of some importance are those announcements that our Parliamentarians (and others) have made which already have an effective date in place but have not been codified into law. A brief summary of the more important announcements is set out below: -

ANNOUNCEMENT	DATE OF EFFECT
▪ Simplification of company loss rules – Exposure draft now released	1st July 2002 & 1st July 2004
▪ TOFA – Currency re-translations	1st January 2005
▪ Legislation re Scheme promoters	1st July 2004
▪ Capital protected loan products (Firth)	16th April 2003
▪ Tax exempt leasing	1st July 2004
▪ New General anti-avoidance rules	Date introduced
▪ Debt / Equity permanent small business loan carve out – changed to $20 million turnover test	By 1st July 2005 to match transitional rules
▪ STS 2 year assessment amendment period	1st July 2005
▪ CGT Marriage breakdown rollovers	Date introduced
▪ New business black hole rules	1st July 2005
▪ Imputation deficit changes	1st July 2002
▪ Late super guarantee payments relief	1st January 2006
▪ Depreciation of film copyright	1st July 2004
▪ Splitting of superannuation contributions	1st July 2006
▪ 4 year foreign employee exemption	Date of assent
▪ Quarantining of foreign losses/tax credits	Date of assent
▪ CGT treatment of options	27th May 2005
▪ No tax deductions for illegal activities	29th April 2005
▪ $3,000 tax rebate for certain land holders	Date of assent
▪ Restoring mutuality principal	Date of amendment

It should be noted that there are numerous other announcements that have an imminent start date or the Government has not yet indicated a start date. Some of these announcements will commence when the legislation is introduced into Parliament.

The items in bold italics are included in bills released or introduced in this update.

#1511 Small business Debt / Equity carve out amended

Proposed changes to the debt/equity rules in Division 974 of the ITAA 1997 have been announced by the Assistant Treasurer and will take effect from the 1st July 2005. These changes include:-

- The use of only one test to determine if debt/equity rules apply to small businesses with at-call loans.
- The ability to treat at-call loans as debt interests for income tax purposes by small businesses.

- An increased threshold enabling companies with an annual turnover of less than $20 million to access these changes. Originally only companies with a net value in CGT assets of $5m or less (under the CGT Small Business asset test) and annual deductions relating to the loan of $100,000 were entitled.

- For those private companies with an annual turnover of $20 million or more, the Government is proposing to reduce their compliance costs so long as:-

    - The at-call loan terms are amended to enable it to be treated as a debt for income tax purposes;

    - If the company exceeds the turnover limit during the year, the terms must be changed between the end of that income year, and the earlier of the company's tax return due date for lodgement, and the actual lodgement date. Such changes will make the interest a debt interest from the commencement of the year in which the company exceeded the threshold.

- In addition, where companies altered the terms and conditions of an "at call" loan prior to 30th June 2005 to ensure it was a debt interest, it will continue to have that status after that date.

Editor's Comment – Whilst we must await the actual legislation for these changes, the Government must be congratulated for increasing the threshold to $20 million turnover companies. However, there are still some issues to consider here: -

- ***High turnover small businesses traded through companies like service stations will struggle or fail to meet this exemption.***

- ***There is no word as of yet in relation to grouping rules here. Could a group of companies with combined turnover well in excess of $20 million receive this exemption purely because each individual company's turnover was below $20 million?***

- ***It is clear that the Government is purely in a reactionary state in relation to this area. We need the legislation ASAP so taxpayers and advisors know exactly what they are dealing with and can ensure all companies appropriately deal with this matter.***

1512 Regulations for beneficiary and senior Australian tax offsets

The senior Australians tax offset rebate threshold for 2005-6 has been amended to reflect the decrease in the lowest personal income tax rate, i.e. from 17% to 15%. Single seniors have a threshold of $21,968, whilst a member of a couple is $18,247, and for a member of an illness-separated couple it is now $21,167.

1513 Four approved employee benefit funds regulated

The FBT regulations have been amended to ensure that the following four employment benefit funds will be considered approved funds for the purpose of the FBT exemption for employers contributing to these funds.

- AMCA ACT Industry Development Training and Redundancy Trust;

- The Port Kembla Coal Terminal Employees' Entitlements Trust;
- The Austral Refrigeration Employees' Entitlement Trust; and
- The Alsynite Employees' Entitlement Trust.

The changes are effective from 1st April 2005.

2 CASES

2000 GST Cases

#2007 HP Mercantile Pty Ltd v FCT – Recovery of input tax credits

The ATO has been successful in the Full Federal Court in overturning an earlier AAT decision in relation to the entitlement to input tax credits. We understand that this is a test case as the taxpayer actually has the protection of a ruling in respect of some of the matters in contention. Following this result, we expect the GST ruling to be revised.

The Commissioner has been successful in denying input tax credits relating to feasibility costs incurred in relation to the acquisition of debts as well as input tax credits associated with costs incurred after the making of input taxed supplies.

Initial decision - AAT

Under GST Ruling GSTR 2002/2 a registered entity can claim a full input tax credit for the cost of due diligence services in relation to the acquisition of shares, as at the time of due diligence the intention to acquire the shares has not occurred or arisen. The taxpayer relied upon this ruling and claimed input tax credits on the due diligence costs incurred in relation to the acquisition of debts as a result. It subsequently proceeded with the acquisition.

The taxpayer also incurred costs after making the acquisition and claimed GST back on those costs. They argued here that as these costs were incurred after making the acquisition, they were not in relation to making that acquisition (as it had already occurred) and therefore the GST was recoverable as it was part of their enterprise.

The ATO ignored its own ruling and proceeded to disallow the input tax credit claimed by the taxpayer. The taxpayer took the Commissioner to Court as a result arguing that the ruling was binding on the Commissioner and the input credits had to be granted.

The Court concurred with the taxpayer and concluded that the ATO was bound by its ruling and the input tax credits were available. However it came to this conclusion not because of the protection the ruling provided, but because the position taken in the ruling more correctly summarised the position at law. Basically at the time the due diligence costs were incurred, there was no intention to make the acquisition of the financial supply. The due diligence costs were incurred to assist in making that decision. Therefore they were not for a non-creditable purpose.

However in relation to the costs incurred subsequent to the acquisition, the Court ruled against the taxpayer in favour of the Commissioner. This GST position was not covered by the ruling and it did not matter when the acquisition was made, the GST on costs associated with the acquisition were input taxed. The section was not forward looking in that it only applied to acquisitions made prior to the making of the financial supply. The acquisitions in relation to past financial

supplies were equally non-creditable under the section.

Full Federal Court Decision

The Full Federal Court has concluded that the input tax credits in relation to the feasibility study did have a connection or nexus to subsequent financial supplies made by the taxpayer and has denied the input tax credits. Whilst acknowledging that the meaning of creditable purpose was quite wide, the Court concluded that the expenditure was in respect of making financial supplies and therefore input taxed. In addition, it upheld the previous AAT decision in relation to expenses incurred after the making of the financial supplies noting that it would be a ridiculous result if the timing of the income and expense resulted in input tax credits on the expense being available.

#2008 Coles Supermarkets Australia Pty Ltd v Westley Nominees Pty Ltd – GST review had already occurred – no one had told the landlord!

Coles Supermarkets has managed to avoid the long-term contract transitional rules by proving a "review opportunity" for a pre-GST lease agreement had arisen in March 2004.

The Facts

In 1987 Coles entered a lease, due to expire in 2009, for supermarket space in a Brisbane shopping centre. In September 2004 Coles requested tax invoices notifying Westley Nominees that a review opportunity had passed in March of that year and the lease was therefore subject to GST from that date. Westley responded via email stating that the rent would be correspondingly incremented by the GST. Coles argued that the existing amount was GST inclusive and no increment was required. As no tax invoices were forthcoming and the rent had not been increased, Coles then sought and obtained a determination from the Tax Office stating that it was making a creditable acquisition under the lease, and absolving Coles of the need to obtain formal tax invoices from Westley. It would appear that neither the ATO nor Coles advised Westley of the change in GST status and Westley continued on without adding GST and without remitting GST.

In March 2005 Westley, seeking to pass on the GST liability for what it thought was a long-term non-reviewable contract, forwarded Coles a Notice of Initial Offer as required under the GST Transitional Act. Coles, already having the benefit of the input credits, applied to the Federal Court for "declaratory and injunctive relief" against the Notice claiming no subsequent review opportunity had arisen and more importantly, GST already applied to the lease under the previous review opportunity. The Full Federal Court agreed with this position.

There was some discussion of what actually occurred in March 2004 to determine whether a review opportunity had actually occurred and the Courts concluded that it had as there had been an adjustment to the turnover portion of the rental.

This case is currently under appeal to the Full Federal Court.

2009 Re Midford and DCT – Supply not a going concern

The AAT has agreed with the Commissioner's decision to treat a supply of a going concern as a taxable supply considering the parties had not agreed the supply was a going concern in writing as required by s 38-325(1)(c) of the GST Act. As this is a basic and essential requirement that must be met to access the going concern concession, it is not surprising that the AAT quickly came to this conclusion.

2200 Income Tax Cases

2241 Rd VBI and FCT – No deduction for psychologist expenses

The AAT has upheld the Commissioner's rejection of a taxpayer's claim for psychologist expenses incurred. The taxpayer, an acute care nurse dealing with seriously ill children, had attempted to claim psychologist expenses on the basis that it assisted him to deal with the stresses of his occupation. The AAT rejected this claim for the following reasons:-

- The taxpayer was primarily seeking treatment to rectify his substance abuse.
- There was no direct relationship between the expenses and the improvement or maintenance of the taxpayer's professional skill or knowledge.
- The expense was private / domestic in nature.

The taxpayer was unable to claim under s 159 of the ITAA 1936 as the psychologist was not considered a "legally qualified medical practitioner", and the taxpayer's general practitioner had not referred him to the psychologist. The claim may have been possible if the taxpayer had visited a psychiatrist instead.

2242 Calder and FCT – Another tax effective scheme disallowed under Part IVA

The Federal Court has deemed deductions claimed by a taxpayer involved in a tea-tree investment scheme to be Part IVA. The Court rejected the claims of deductibility after taking into account various factors:-

- The timing and manner in which the scheme was entered into and structured.
- The existence of round robin arrangements.
- The structuring of investments to self-fund the taxpayer's obligations.
- Substance over form.

The taxpayer has appealed to the Full Federal Court.

#2243 Re Lee and McKeand and Son Pty Ltd and FCT – No derivation of management fees under quantified, charged and accepted

This taxpayer succeeded in overturning the Commissioner's amended assessments as the AAT found the subsidiary was unable to quantify the cost of services provided to its parent company until a number of years after the event. The services supporting these management fees were provided in the 1999 and 2000 years. The Commissioner argued that payment for services provided during 1999 and 2000 were legally enforceable during those years even though the

taxpayer did not charge the management fee until 2001. Therefore the ATO wanted to include in the assessable income $234,000 per year for the 1999 and 2000 years. The AAT however ruled that the fee was not assessable until the relevant financial statements and records were finalised, i.e. 2002. As the AAT had no power to look at the 2002 year, it could not amend the assessment for that year. Therefore considering the taxpayer had included the amount in its 2001 return when it could have legitimately waited to 2002 the AAT found in favour of the taxpayer and left the amount in income for the 2001 year.

Editor's Comment – It has always been a contentious issue whether management fees for prior years could be charged and declared as income (and presumably claimed as a deduction) in a subsequent year under a catch up adjustment. Whilst this case does not address the issue of when the deduction was available, it has identified that the income does not arise until the management fee has been determined and actually charged. Provided the taxpayer can prove that the services supporting the fee have actually been delivered, catch up fees seem to be possible under this decision. Clearly the deduction was also claimed in the 2001 year in the holding company and we wait to see if that deduction is contested (assuming the Commissioner is not out of time.)

#2244 Metaskills Pty Ltd and FCT – No PSB as contracts in personal name

This is the final instalment in the long running saga in relation to a company trying to force the Courts to over-rule the ATO and grant the company a personal service business determination. Unfortunately the taxpayer has failed but the company has no one else to blame but the director and main income earner. As the contracts leading to the income where in the name of the director and shareholder personally in his own capacity, the income could never be considered income of the company and therefore the company could not get a PSB.

Facts

The company generated income from one client only in the 2001 year and could not pass the employment test or separate business premises tests in the that year. It sought a PSB based on unusual circumstances and was disallowed by the ATO.

Decisions

In the AAT (AAT Case (2002) AATA 1204, Re Metaskills Pty Ltd and FCT 51 ATR 1165), the company obtained a PSB based on not meeting the separate business premises test due to unusual circumstances. Although the AAT did note that the contracts were not in the name of the company it failed to take this into account when making its decision. The ATO appealed to the Federal Court and the matter was remitted back to the AAT to reconsider the request for a PSB in light of the fact that the contracts were not in the name of the company.

Clearly the AAT had no choice but to reverse the original decision as the company could not get a PSB when it is not in receipt of income.

#2245 Re Jones and FCT – No deduction for novated car expenses

In what is a totally unsurprising decision, an employee has been denied tax deductions incurred in relation to car expenses relating to a car that was novated to his employer under a salary packaging arrangement. The reasons for this decision are twofold:-

- The car was subject to FBT in the employer's hands and therefore no deduction was available under section 51AF of the 1936 Tax Act as a result.
- Under the novation, the expenses were rightfully the responsibility of the employer who had taken up full responsibility for these expenses under the novation. This was despite the fact that the employee would be responsible for some items under the novation (for example the lease residual) or where the employer defaulted. As these were costs of the employer, they were not incurred by the employee.

It seems that some of the expenses were paid by the employee despite the novation and these would form an employee contribution where the right documentation was maintained and would therefore reduce the FBT liability of the employer. These costs would not be deductible in any event (ignoring Section 51AF) as they were not incurred in earning income. They bore no relationship to the generation of the net salary income of the employee. In addition, some of the claims were capital in nature in any event.

Editor's Comment – It is pleasing to see a case result on this issue as even though the result was obvious. Too many employees fail to understand the nature of the salary packaging arrangement and the interaction of the various tax provisions. They feel a tax deduction is available for costs incurred personally by them in relation to a novated salary packaging arrangement.

2246 No deduction for costs of contesting mayoral election

An unsuccessful first time candidate running for mayor has failed in her attempt to claim election expenses. Arguing she was carrying on a business of running for mayor, the Federal Magistrates Court dismissed the appeal on the basis that at the time of incurring the expenses a business was not being run, and there was no nexus between the expenses and the derivation of assessable income.

2500 Superannuation Cases

2514 Re "VBJ" and APRA – Publication of name suspended until APRA review completed

The AAT (AAT case (2005) AATA 642) has held that the identity of a disqualified trustee or investment manager's is not to be published in the Commonwealth Government Gazette until the result of APRA's review of his disqualification has been finalised. Although the AAT found it did not have jurisdiction to deal with APRA's disqualification until the review was complete, it did have the ability to suspend the implementation of the disqualification until the final result was determined.

2800 Other Tax Cases

#2821 Re Henderson and FCT – Default assessment partially overturned despite lack of evidence

Lucky Phil!! – at least for the time being!

The AAT has substantially reduced a taxpayer's amended assessments accepting that funds in his significant cash holdings and bank accounts were sourced from the sale of family jewellery, Powerball winnings and a loan from his mother, now deceased. After being raided by the Queensland Police for drugs, the taxpayer was found to have $592,000 in a bag stowed in his vehicle. Through further investigations the ATO found monies also deposited in various bank accounts and as a result raised amendment assessments stating his assessable income over the period 1998 to 2002 to equate to $878,011. The AAT reduced this amount to $188,089.

Editor's Comment - It seems that the AAT were very generous in this reduction as the evidence provided by the taxpayer was flimsy to say the least. We would expect an appeal from the ATO on this case and we are somewhat surprised by the current outcome.

2822 Peldon & Anor v DCT – Director's penalty amount is still a payment of tax

The payment of unremitted PAYG instalments by a company director under a Directors' Penalty Notice has been deemed by the Federal Magistrates Court to be payment of a "tax". Therefore a trustee in bankruptcy of a director was unsuccessful in claiming the payment was void under section 120 of the Bankruptcy Act 1966.

#2823 AAT case 2005 AATA 622 – Default assessments confirmed

Once again we find taxpayers miraculously becoming wealthy with no real explanation. The AAT has upheld the Commissioner's amended assessments for a taxpayer during the periods 1983 to 1993 and 1995 to 1997. The taxpayer having no real evidence to prove the source of his millions was held liable for the amended assessments. The moral of the story is if its real keep records to substantiate you good fortune at the horses etc, but don't try to claim it was 'hidden in a piano to avoid the ex-wife finding out'.

2824 Two companies fined for claiming to be registered tax agents

Two companies have been fined for falsely advertising themselves as being tax agents and charging clients for preparing tax returns.

This case in itself is of no real interest other than it highlights the ability of taxpayers to now verify their proposed tax agent is registered via the ATO website.

#2825 Penalties for late lodgement of BAS returns

The AAT obviously jumped out of the right side of the bed this month as it remitted penalties in 2 cases.

The first related to a self-employed legal practitioner who whilst remitting cheques to the ATO on a monthly basis happily ignored the ATO's reminders and continued to lodge the paperwork quarterly. He used the excuse that initial publicity had made him believe that the GST and BAS systems would be simple to understand and use. This combined with an increase in business activity, ill health and various other factors resulted in his misunderstanding of the ATO's requirements.

In the second case, which is a little more justifiable, the manager of a small enterprise suffered a stroke which rendered him incapable of working or speaking for 9 months. The remaining employee, a part time bookkeeper, found themselves needing to cover all operational duties during this period.

The AAT found to varying degrees the taxpayers where in special circumstances and the failure to lodge was due to factors outside their control, and remedial steps had been taken.

Editor's Comment – What a wonderful precedent the first case is if only it could be used as such! No penalties because the simple tax system ended up being complicated. Based on this result, every single tax lodgement can now be delayed without penalty. If only it was true! How the first decision can be justified given that the taxpayer was a lawyer and has the skill base to understand the tax system (unlike many other taxpayers) is hard to fathom!

2826 Oak Arrow Pty Ltd & Ors v DCT – No extension for returns under Section 162

A taxpayer has failed in his attempts to have his rejected extension application revisited. The Federal Magistrates Court refused the application's review based on the fact that the request was lodged after the Section 162 notice had expired. The Court found the Commissioner had no power to grant the extension as the breach had already occurred.

Section 162 requires taxpayers to lodge additional information in their return or additional returns when required to do so by the Commissioner. The important point to note here is that if you need an extension in relation to such additional returns, you need to apply for the extension before the due date of lodgement of those additional returns. Otherwise no extension is possible.

2827 GST Penalties upheld for intentional disregard to GST law.

Due to the blatant flouting of GST law, the AAT has confirmed the Commissioner's decision to apply penalties against a company lodging erroneous BAS returns. The sole director and shareholder had asserted that the company was carrying on a business however investigation by the ATO revealed credits claimed could not be substantiated by either invoices or bank statements. Upon admission that the claims appeared erroneous and seemingly excessive, the taxpayer, also registered as a tax agent, was found to have wilfully deceived.

Editor's Comment – The registered tax agent should have known better!

2900 Appeal News

2924 Samba v FCT – Receipts from undisclosed sources held to be assessable

The taxpayer has appealed to the Full Federal Court against the Federal Court's decision to include income from an undisclosed source as assessable. Amended assessments raised for the 1996 to 1998 financial years were held by the Federal Court to be correct due to insufficient evidence to refute them.

3 TAXATION RULINGS

3000 GST RULINGS

3008 GSTR 2005/3 – Arrangements with second hand goods

This final ruling remains substantially unchanged from its draft GSTR 2004/D4. It has application back to 1st July 2000, and deals with schemes in relation to second hand goods and the avoidance of GST. It is effectively a follow up from Taxpayer Alert TA 2004/9 which also addressed this issue. The ruling is of interest as it sets down three different arrangements under attack as well as providing some guidance on how Division 165 will apply against these arrangements.

In relation to two of the arrangements, it makes reference to an additional first step where certain tax advisors promote the benefits of the arrangement to the taxpayers. The third arrangement has two variations as well. In all cases, the arrangement uses an interposed entity. Under the second hand goods provisions in Division 66 dealers in second hand goods can obtain a notional GST input credit on acquisitions made from un-registered parties subject to certain conditions being met. Division 165 contains anti-avoidance provisions in relation to GST.

The first arrangement

The first arrangement involves a GST group. Entity A ceases to be part of the GST group and ceases its registration. It then transfers all of its equipment to entity B who then enters into a sale and lease back of the equipment with entity A. Entity B claims a notional input tax credit as the equipment is second hand and has been acquired from an unregistered party.

As the second hand goods provisions in Division 66 apply only to second hand goods dealers, it is unlikely that entity B will be considered a second hand dealer. Should Division 66 still apply, the Commissioner will then apply Division 165.

Editor's Comment – There may also be an adjustment event on Entity A upon cessation of registration under Division 138. However, this is considered in these arrangements in any event.

The second arrangement

This arrangement is far more complicated and is set out in eight different steps.

- The taxpayer becomes aware of the arrangement from a tax advisor promoting the benefits of the arrangement.

- Entity E which is non-resident and located off-shore, leases goods of significant value to an Australian third party (ATP). These goods are not installed or assembled in Australia.
- The leased goods are shifted off-shore and then entity E transfers the goods to entity D who is also off-shore but is registered for GST in Australia. This supply is argued to be GST-free or has no GST applicable.
- Entity D sells the goods to Entity F who is located in Australia and registered for GST. Even though the sale is made off-shore, it is argued that it is a taxable supply as the goods are to be delivered in Australia.
- Entity D does not import the goods into Australia and does not attend to the custom formalities. However the goods are returned to Australia.
- Entity E novates the lease of the goods to entity F.
- Entity D claims a notional input tax credit on the acquisition of the goods under Division 66.
- Entities D, E and F form part of the same corporate group but are not grouped for GST purposes.

Basically even though entity D effectively acquired the goods GST-free, they get to acquire an input tax credit under Division 66. However the ATO contends that the sale of the goods from D to Entity F is a taxable supply, it is in fact GST-free precluding the application of Division 66. As well, Division 66 does not apply to GST-free acquisitions. Otherwise Division 165 is argued to apply in any event.

The third arrangement

This arrangement interposes an entity between a second hand dealer and their offshore customers. Basically Division 66 will only allow an input tax credit where the goods are sold as a taxable supply. Where second hand goods are sold GST-free as exports, no Division 66 credit is available. However, should the second hand dealer sell the goods to an interposed entity in Australia, an entitlement to an input tax credit will arise. The interposed entity will then make a GST-free supply and claim back the GST charged by the second hand dealer. The variation on this arrangement changes the roles of entity H and Entity G.

The ATO acknowledges that Division 66 will clearly apply here. They will seek to apply Division 165 instead.

Application of Div 165

The main difference between Part IVA and Division 165 is that the tax benefit can arise from part of a scheme under Division 165 where as Part IVA requires identification of the whole scheme. Therefore the Commissioner does not need to identify the scheme specifically as long as he can show that the offending transaction forms part of an overall scheme. This means that the Commissioner will have far less difficulty in applying this Division.

There are various matters to be considered when determining whether there is a scheme. The Commissioner's approach in this ruling is to consider the principal effect of the scheme in relation to each matter. The law requires all matters to be considered together. However, this is

unlikely to impact the effectiveness of the analysis as it is in more detail than is required in the Division.

The Commissioner also seems to interchange the use of the word scheme and arrangement through out this ruling. Whilst an arrangement may well be a scheme, a scheme does not need to be an arrangement. However, as these schemes also look like they are also arrangements, this inter-changed use of terminology is likely to be irrelevant.

3000A GST ADVICES

The ATO has released a new classification of ruling called "GST Advice". These are rulings for the purposes of Section 37 of the Taxation Administration Act 1953, and provide advice on the GST system's operation. These new public rulings will systematically replace the Tax Practitioner Industry Partnership Issues Register. The following were released during the month.

GSTA TPP 010	Goods and services tax: What are the registration requirements for resident agents acting for non-residents?	6 July 2005
GSTA TPP 059	Goods and services tax: Will the Tax Office refund overpaid GST if a supplier makes a mistake in preparing its activity statement and incorrectly includes a supply as a taxable supply?	6 July 2005
GSTA TPP 074	Goods and services tax: Can an entity that acquires a car for $80,000 and uses it purely for business purposes claim input tax credits for the cost of a tow bar fitted to the car six months later?	6 July 2005
GSTA TPP 077	Goods and services tax: Can an entity that purchases a rally car with a market value that exceeds the car limit claim input tax credits in excess of 1/11th of the car limit?	6 July 2005

3100 GST Determinations

#3106 GSTD 2005/5 – Supplies made by trade exchanges to its members

This determination was released on 13th July 2005 and sets out the GST treatment of supplies of membership and associated services between a trade exchange and its members. Due to the recent amendment to the GST financial supply regulations which come into effect from 15th July 2004, these supplies will now be ordinarily considered taxable supplies. Prior to the change, they may have been input taxed as financial supplies depending on how they were levied. As the GST status has changed due to a regulation change, this ruling was not previously released in draft. It applies from the regulation change being 15th July 2004.

Trade exchanges usually operate barter arrangements and keep records on the level of credit or indebtedness of a member based on transactions between members. The services provided by the exchange to the members usually fit either of the following categories:-

- Fees to become a member of the exchange.
- Administration fees to monitor the trading position of the member.

Prior to the regulation change, these fees were usually input taxed supplies as they were connected with monitoring the indebtedness of the member. Now all of these supplies are

generally taxable. The exception will be where the membership is obtained by the issue of share capital and this takes the form of a shareholder entitlement.

#3107 GSTD 2005/4 – GST implications on holdback payments made to motor vehicle dealerships

This final GST determination, with no prior draft, was released on the 29th June 2005. It deals with holdback payments made to dealerships by care manufacturers and wholesalers under floor-plan arrangements.

Floor-plan arrangements involve the dealership financing the trading stock of cars held in their sales yard via a finance company. Basically they do not pay for the car until they sell it to a customer and instead borrow funds from a finance company under a bailment agreement. The holdback arrangements are in two forms being wholesale and retail holdbacks. Basically the dealership keeps a portion of the value of the car as a holdback when the sale of the car from the manufacturer to the finance company occurs (wholesale holdback) or when the sale of the car to the final customer occurs (retail holdback). Whilst they finance virtually the full purchase cost of the car, they only need to repay a lesser amount on the loan and the holdback forms part of the profit on sale.

The ATO has determined that the holdback is not consideration for any supply and therefore GST does not apply to the holdback. This is a logical conclusion due to the nature of the financing arrangement. The conclusion is also based on case decisions arising in New Zealand.

3108 GSTD 2005/6 – Fines imposed for breach of membership rules

This final determination deals with the GST status of fines imposed by various clubs, associations, trade unions and co-operatives that have the power under their constitutions to impose such fines on their members for breaches of membership rules. It is important to note that these fines are not statutory fines under the law. Thus the conclusion is that they are not subject to GST. The reason for this is that nothing has been supplied in return. It is usually applied as a punishment or deterrent.

However fines for late return of goods and for contract breaches are likely to be subject to GST as something is being supplied in return. In relation to late return of goods like videos, the member has the use of the video for an extended period. In relation to contracts there must be consideration for the contract to be effective.

This final determination remains unchanged from its draft GSTD 2005 / D1.

#3109 MSV 2005/2 - Extension of costs for completion method past 30th June 2005

This determination was released on 27th June 2005 and extends the ability of taxpayers to use the cost of completion method when applying the margin scheme to supplies of real property. The cost of completion method is set out in A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination (No 2) 2000 and allows the margin scheme to apply to partially completed premises. In some cases, developers that had developments in place as at 30th June 2000 are still involved in those developments and were involved as at 30th June 2005. This determination enables those developers to continue to use the cost of completion

method but only for those developments rather than now obtaining back-dated valuations as at 1st July 2000. The determination was released after consultation with industry bodies representing these developers.

#3110 RCTI - sellers of reconditioned motor vehicles parts

The ATO has issued a legislative instrument allowing sellers of reconditioned motor vehicle parts to issue recipient created tax invoices in relation to exchange parts provided certain requirements are met. The need to be able to issue these recipient created tax invoices is obvious due to the nature of the transaction as the following example shows.

A car dealership removes a gear box from a car and sends it to a specialist transmission repairer for reconditioning. In reality, the old transmission is handed over and replacement reconditioned transmission received in return with a net amount payable. Therefore two supplies have been made and an offset has occurred. The dealership has supplied a broken gearbox to the repairer (which the repairer will recondition and sell to some one else) and the repairer has supplied a reconditioned gearbox to the dealership. The repairer must determine the amount they paid for the broken gear box and will now be able to issue a recipient created tax invoice for this purchase / acquisition. At the same time they will issue a tax invoice for the sale of the replacement gearbox. The net of the two invoices will be the net amount payable.

The requirements to be met before a recipient created tax invoice can be issued are as follows:-

- The recipient of the worn part is registered for GST.
- The recipient sells a reconditioned part to a customer.
- The recipient of the worn part issues an invoice for the sale of the reconditioned part to a customer that separately itemises a deposit (generally referred to as a "core deposit") for the supply of the worn part.
- The customer later supplies a worn part to the recipient who pays the "core deposit" to the customer.
- If the customer does not supply the worn part, the "core deposit" is retained by the supplier of the reconditioned part.
- The recipient establishes the value of worn parts.
- The recipient satisfies the other requirements set out in the Determination.

The seller of the part will have the option of issuing their own tax invoice or have the recipient issue the tax invoice on their behalf.

The determination commences from the 1st July 2005.

3200 Draft GST Rulings

There were no draft GST rulings issued during the period.

3300 Draft GST determinations

There were no draft GST determinations issued during the period.

3400 GST Bulletins

There were no GST bulletins issued during the period.

3500 Income tax rulings

#3516 TR 2005/12 – Interest deductions on funds borrowed to pay out trust distributions

This final Ruling was released on the 6th July 2005 and will replace TR 2003/9 (which was withdrawn on the 2nd March 2005) when the ruling's draft (TR 2005/D4) was finalised. It addresses the issue of tax deductibility of borrowings by a trust when the borrowings are used to enable the trust to pay out trust distributions. It provides more precision than the earlier ruling on this matter.

The ruling addresses a variety of issues including the concept of "returnable amount" as well as tracing and maintaining nexus in relation to borrowings and earning income / carrying on a business.

The concept of "returnable amount"

A returnable amount is defined to mean money or property which forms part of the trust estate. This definition covers off cash distributions, draw down of entitlements as well as in specie distributions. However, for the purpose of this ruling, a returnable amount must meet all of the following as well:-

- It is used in gaining or producing assessable income or in carrying on a business for that purpose;
- The beneficiary is entitled to require that the amount is returned to them; and
- It represents monies or property transferred to the trustee by the beneficiary or allowed to be retained by the trustee to be used as stated earlier.

Returnable amounts however do not include internally generated goodwill and asset revaluation amounts.

Maintaining "nexus"

Clearly the ruling is about proving a nexus between the income earning activities of the trust and the borrowing from the beneficiaries so that when that borrowing from the beneficiaries is replaced with another borrowing (and the beneficiary entitlements are paid out), interest on the other borrowing will be deductible.

It is clear from this ruling that the beneficiary must allow the trustee to use the funds for the requisite purpose by leaving the funds available to the trustee. Borrowing in a trust to pay out an entitlement arising at the same time the entitlement arose will clearly not meet this test. Further, where this is income of the trust, it will not have a nexus to other trust borrowings and borrowing to pay these amounts will never be deductible.

The ruling then provides examples where interest deductions will and will not be allowed.

Examples

Example where interest is deductible

- Unit subscriptions by beneficiaries where there is a right of redemption on the units and the trustee uses the undistributed amounts to produce income producing assets.
- Unpaid beneficiary entitlements are retained and used by the trustee to buy income producing assets or in carrying on a business in the trust.
- The beneficiary actually makes a loan of monies to the trustee to be used for the requisite purposes.

Examples where the interest would not be deductible include:-

- The borrowing is made by the trust merely to discharge an obligation to make a distribution to a beneficiary. This is irrespective of whether the borrowing allows the trustee to keep in the trust income producing assets.
- Borrowings to pay distributions which arise contemporaneously (or nearly so) with the entitlement to the distributions.

The ruling concedes that in some circumstances, the trustee may need to return funds to the beneficiary earlier than expected due to unforeseen circumstances. This in itself may not jeopardise the deductibility of the borrowing.

Tracing

The ruling concedes that tracing the use of the funds may sometimes be difficult particularly where there are a combination of income producing and non-income producing activities. Rigid tracing may not be required here where it is evident that all of the funds have been applied and used to the recurrent operations of the trust estate.

Editor's Comment – This ruling is less stringent in some respects to the one it replaces and more stringent in other areas. The need for a specific agreement has gone, whilst the concept of the returnable amount has been introduced. At first instance, the tracing requirements seem to be relaxed. However, we believe that this ruling is far more stringent (and unfortunately a better reflex of the law). Clearly, trustees will now need to show that unpaid entitlements have been reinvested into the income earning activities before borrowings to repay these entitlement amounts will be deductible.

3517 TR 2005/13 – What is a gift in relation to tax deductible gifts

This ruling, which is primarily unchanged from its draft (TR 2004/D19), seeks to provide guidance on what constitutes a gift for the purposes of obtaining a tax deduction under both the 1997 Tax Act and the 1936 Tax Act. It looks at both:-

- Transfers of money
- Transfers of property

It does not address recent amendments made in relation to contributions to fund raising events which had effect from 1st July 2004. The ruling includes numerous examples to demonstrate the concepts explored in the ruling.

There is no definition of what is a gift in the income tax legislation and we need to explore its normal meaning and the meaning given to it by the courts. Basically gifts normally have the following features and characteristics though not all of these features are required or required to the degree explained.

- ***There must be a transfer of the beneficial interest in the property gifted.***

  Basically the gift deductible recipient must receive full and immediate title and right of custody and control of the property transferred. This transfer must be made to the full extent the law requires in relation to similar property. Where less than full title passes, the gift will be ineffective for taxation purposes.

- ***The transfer must occur on a voluntary basis.***

  This requirement is fairly self explanatory. Where the gift is made due to a contractual obligation or imposed by statute, it will not be voluntary. Where the gift results in an extinguishment or reduction in a liability of obligation to the gift deductible recipient or one of their associates, it will not be voluntary. Gifts made under a moral but not legal obligation can still meet the voluntary status. Benefactors can enter into contractual agreements to provide gifts over time and these will still be voluntary where there is no legal obligation to do so.

- ***The transfer occurs by way of benefaction.***

  The gift deductible recipient must receive an advantage from the giving of the gift. If there are strings or detriments arising to the recipient and these are significant with regard to the gift, no deduction will be available. The benefits received need to be weighed in proportion to the detriments taken over in assessing this requirement.

- ***The giver receives no material benefit or advantage in return.***

  The mere fact that the person making the gift is motivated by the tax deduction that will arise from the gift will not invalidate the gift. As well, benefits received in return for the gift will be insignificant where:-

  - The benefit is not linked to the transfer.
  - The benefit is insignificant in relation to the value of the transfer.
  - The benefit is only in the form of advertising for the gift deductible recipient.
  - The benefit is not marketable and cannot be used.
  - The benefit does not create rights or entitlements.
  - The benefit is only an accountability of the use of the funds.
  - The benefit is only a recognition of the generosity of the giver.

- The benefit is membership of the deductible gift recipient and this was not sought or known at the time of the gift.

Problems will arise where benefits are clearly expected in return either from the gift deductible recipient, an associated party or under an arrangement with another party. Arrangements which lead to advertising and sponsorship benefits or to the funds being expended for the benefit of the giver or an associate will not meet this criteria.

Basically the ATO concludes that all of these issues must be considered as well as all of the circumstances surrounding the gift.

Anti-avoidance provisions of Section 78A

These provisions continue to apply and can deny a deduction for a gift where any of the following occur:-

- Significant obligations are placed on the Deductible Gift Recipient out of the transfer of property.
- Another fund incurs obligations as a result of the gift.
- The gifted property is transferred back to the giver or their associates in part or in full.

There have been numerous cases where gifts have been disallowed under such arrangements.

This ruling will allow numerous earlier rulings to be withdrawn:-

- IT 2071 - School building funds
- IT 2265 - Donations of policies of life insurance
- IT 2443 - Gifts
- TD 92/110 - Is the cost of attending a fundraising function tax deductible as a gift?
- TD 93/57 - Are compulsory school enrolment fees deductible under paragraph 78(1)(a)(xv) of the 1936 Tax Act if paid or transferred to a school building fund?
- TD 93/139 - Is a payment of money to an eligible "umbrella" organisation under a "preferred donation arrangement" a tax deductible gift if the donor taxpayer or an associate obtains a collateral benefit?
- TD 93/185 - Is expenditure incurred by a taxpayer in the course of undertaking unpaid work for a charitable organisation deductible?

3518 TR 2005/11 – Multi-national banks and branch funding

This ruling addresses various income tax issues relating to the funding of permanent establishments of multi-national banks. Due to its narrow application, it is not discussed in detail in these notes. It remains substantially unchanged from its draft TR2005/D1 with the exemption of a new analysis on the inter-relationship between Division 820 and s 8-1(2) of ITAA 1997.

3519 TR 2004/D24 - Application of the Australian/NZ DTA to NZ resident trustees of NZ foreign trusts

This ruling is a response to the proliferation of trusts being established in New Zealand with a New Zealand trustee but which generates income not sourced in New Zealand for the benefit of non-New Zealand tax residents. In most of these scenarios, the beneficiaries are Australian and the foreign source income is being sheltered from tax both in Australia and New Zealand. The reason for this is that the trusts and trustees hide behind a term in the Australian / New Zealand Double Tax Agreement which exempts them from tax in both countries.

The ruling comes to the conclusion that the trusts do not have the protection of the double tax treaty as the residency of the trustee has to be determined in relation to their capacity of how and who they act for. Whilst the trustee in their own capacity may be a resident of New Zealand, they will not be considered a resident of New Zealand in their capacity as trustee.

Without analyzing New Zealand tax law, we cannot conclude if that logic is correct or not. However, under Australian tax law, the residency of the trust is normally determined based on the residency of the trustee and therefore would not be correct.

The importance of this clause in the DTA is real and apparent. Under Australian and International Tax law, the double tax treaties have priority in application over domestic tax laws where there is a conflict between the two. Therefore the transfer trust rules, foreign investment fund rules and other trust rules in Australia can have no application if the income is exempted under the DTA.

This final ruling is unchanged from its draft TR 2004/D24.

3600 Income tax determinations

#3654 TD 2005/28 – Managed investment schemes – net income of a trust

This Determination concludes that income derived from a property syndicate operating as a managed investment scheme is taxable as net income of a trust estate under Div 6 of Pt III of the ITAA 1936. It recognises that many property syndicates may have lodged partnership tax returns in the past and provides guidance on how to rectify past disclosures and when these rectifications will be provided.

The ATO concludes that where a property syndicate is a "registered managed investment scheme" (MIS syndicate) under the *Corporations Act 2001*, the responsible entity that operates the managed investment scheme holds the scheme property on trust for the scheme members.

"Scheme property" is defined widely and will include the following:-

- contributions to the scheme of cash or equivalents to cash;
- borrowings made by the responsible entity in relation to the scheme;
- any property acquired with these contributions, borrowings and any other money that forms part of the scheme; and
- Income and property generated or derived from any of the above.

Basically the ATO has concluded that the role of the responsible entity is to act as trustee and that the taxation rules for trusts apply to these investments. This includes the requirement to lodge trust returns and to determine the net income of the trust for the members in accordance with the trust taxing provisions.

This Determination remains unchanged in principle from its Draft TD 2004/D78.

Transitional arrangements

The ATO acknowledges and accepts that many MIS schemes have accounted for their activities and lodged their income tax returns based on the MIS being a partnership and not a trust. As long as the taxable income determined this way in the past is or would be identical to the net income under the trust provisions, there will be no need to lodge amended prior year returns. This should be the case for most affected MIS schemes.

The real problem will arise where these partnerships generated losses and distributed these losses to their participants. On the basis that a trust exists, the losses cannot be distributed and will be trapped in the trust. Affected MIS should contact the ATO to discuss the matter. The ATO will not contemplate prior year adjustments where those losses would have already been recouped by subsequent profits even had they been retained. Basically, the ATO is willing and prepared to broker an appropriate settlement in all other cases.

Editors Comment – This change in heart may cause serious problems for many product investments as crop sales are usually dealt with under a MIS arrangement. Where losses accumulate rather than distribute to members, this could change the whole tax profile of the investment. The burning question is whether the product ruling protects investors against this exposure?

The GST position may change as well as the MIS will probably need to register for GST. The investors will now be receiving trust distributions and will not have creditable purpose in relation to recovering GST on their management fees etc. paid upfront!

#3655 TD 2005/30 and LCTD 2005/1 – Car luxury limit – 2005/06 year

These determinations detail the indexed depreciation car limit and luxury car tax threshold as $57,009 for 2005/06 year. This limit remains unchanged from 2004/05 year due to the indexation factor being less than 1, thus as per s 960-270(2) of the ITAA 1997 no indexation is required.

#3656 TD 2005/32 - 2005/06 - Travel and meal reasonable allowance limits

The following are the 2005/06 limits which the Commissioner has listed as reasonable and do not require substantiation:-

- Overtime meal allowance claims up to $21.10 where the bona fide overtime meal allowance is paid under an award, order or industrial agreement.

- Daily travel allowance for all capital cities

Employee's Salary (pa)	Food & Drink	Incidentals
Less than or equal to $81,400	$76.45	$14.55
$81,401 - $144,690	$90.25	$20.75
Greater than $144,691	$116.00	$20.75

A reasonable amount for accommodation is dependent upon the location, and employee's salary. The employee must stay in commercial establishments such as a hotel, motel or serviced apartment.

- Employee truck drivers receiving a travel allowance and are required to sleep away from home are entitled to:-

Employee's Salary (pa)	Food & Drink
Less than or equal to $81,400	$69.45
Greater than $81,401	$75.75

Those owner drivers not receiving a travel allowance are required to substantiate their claims for accommodation, meal and other traveling expenses.

- The limits for food, drink or incidents incurred whilst overseas is dependent on the country, and city visited and salary range of the employee involved. We suggest you refer to the determination for specific details.

3700 Draft Income Tax Rulings

There were no draft income tax rulings issued during the period.

3800 Draft Taxation Determinations

#3832 TD 2005/D20 – Resettable interest bearing instruments

This draft determination relates to the debt /equity rules and was released on 20th July 2005. Basically it concludes that where the issuer of an interest bearing security has the ability to vary the interest rate on that security purely at the issuer's discretion, the interest will not be considered a debt interest (and therefore will almost certainly be an equity interest) under the debt/equity rules. There is an exception to this conclusion. Where the recipient of the security (holder of the security) can compel the issuer to repay the security in full at the point in time the issuer exercises the discretion to alter the interest rate, the security may still be considered a debt interest.

The reasoning for this conclusion is that the issuer's responsibility to pay interest is contingent and fails the effectively non-contingent obligation requirement.

Editor's Comment - We note that provided the interest must be repaid within 10 years or less of its issue and there is nothing contingent in relation to the repayment, the ability to vary the interest will not compromise the debt test. The amount received by the company will equal the obligations to pay by the company on a nominal basis. Where the interest runs longer than 10 years, the determination is absolutely correct as the comparison of amounts received to

obligations to pay are made on a present value basis and therefore interest equal to 75% of the benchmark rate of interest must always be payable under the security without discretion.

3833 TD 2005/D24 – Calculation of ACA for entity leaving a consolidated group

When an entity leaves a consolidated group and takes various assets and liabilities with it, the allocated cost amount of those assets is calculated in much the same way as was the case for assets entering a group. In fact, the same sections authorising the calculation are used. For trading stock, depreciable assets, traditional securities and CGT assets, Section 705-30 should be consulted. Assets like knowledge, know-how, FITBs are treated as if they were CGT assets for the purpose of the calculation.
The CGT cost base of these assets (if there is one) will be the cost base allocated or inherited by the asset on entering into the group plus any additions and reductions to that cost base arising whilst the asset was in the consolidated group.

3834 TD 2005/D25– Calculation of ACA for entity leaving a consolidated group – FITBs leaving the group

This draft determination follows on from the one above and notes that some tax benefits do leave the group with the departing entity and may therefore result in an FITB asset leaving the group. Assets with tax benefits that can leave the group include:-

- Undeducted borrowing expenses
- Attribution credits (CFCs)
- Infrastructure offsets

However it is the conclusion of the ruling that in almost all cases, there will be no CGT cost base for these assets.

3835 TD 2005/D19 – Exit cost setting rules – Liabilities

This draft determination deals with the treatment of accounting liabilities of an entity leaving a consolidated group. The rules for setting these amounts are in Section 711-45. Adjustments may be required to the carrying value of these accounting liabilities for amounts of future tax deductions associated with those liabilities.

3836 TD 2005/D21 - Identifying the tax cost of goodwill departing a group

This determination applies to working out the cost base of the membership interests in an entity leaving a MEC group. It involves the following process:-

- Determine the termination value (ACA) of all assets in the entity leaving the group and add these amounts up.
- Were goodwill is leaving the group, a portion of the allocated cost amount of the goodwill of the group is then allocated to the departing goodwill and added to the other termination amounts in the earlier step.

3837 TD 2005/D22 - The meaning of "liabilities owed" between group entities

When an entity leaves a group, the accounting records may record loan and trading account assets and liabilities between the two entities. Whilst the two entities are members of a group, these amounts are not recognised as an asset or liability of the head entity. They effectively consolidate out for income tax purposes under the single entity rule. They must be identified and taken into account as an asset and liability of the leaving entity and remaining consolidated group (as appropriate).

3838 TD 2005/D23 - Tax cost of asset of entity that is only recognised on exit from group

Having identified these assets from the previous draft determination, the cost base of the assets arising on departure is their market value.

*#3839 TD 2005/D17 – Employer re-imbursements and depreciation claims

This draft determination effectively replaces TD 93/145 and was issued on 29th June 2005. It is poorly drafted and does not canvas the issue discussed in the ruling properly. It deals with reimbursements of the cost of assets received by an employee and their impact on depreciation claims of the employee in relation to that asset.

The draft determination concludes that reimbursement of the cost of assets depreciated by an employee will not reduce the deductions available to the employee in relation to the depreciation of the asset. This is in fact the case where the depreciation claim is made over more than one tax year. However (and not addressed in the draft determination), it is not the case where a 100% deduction is available in the year of reimbursement. Therefore, the depreciation deduction is not available in the following situations:-

- Employees also registered for STS and entitled to a 100% deduction on an asset as its cost is less than $1,000.
- Employees who acquire assets with a cost of less than $300 relating to passive income and can obtain a 100% tax deduction.
- For assets which are self-assessed as having a useful life of 1 year or less and the depreciation write off occurs in the one tax year.

In those cases, Section 51AH is effective in assessing the recoupment amount as the loss or out-going is deductible in full. However where the depreciation claim straddles more than one year and an out-right deduction is not available, Section 51AH cannot apply by technicality.

In addition and also not canvassed in the ruling, the recoupment is not apparently captured under Division 20 of the 1997 Tax Act as the recoupment is a fringe benefit (be it an exempt fringe benefit under Section 58X) and therefore is exempt income to the employee under Section 23L. Division 20 cannot assess an exempt income amount as the exemption provision would appear to over-rule Division 20. This interpretation is a little controversial as the later law (Division 20) has priority over Section 23L which exempts the benefit.

Editor's Comment – This draft ruling and the previous ruling seem to be quite generous but in fact correctly summarise the law. The apparent double dipping available here is a common tax

advantage obtained by many employees including allegedly many ATO employees. This is apparently part of the reason why the ATO has left the rulings in place to date and not sought to have the law amended. Taxpayers should note however that this arrangement is technically no longer protected by ruling as TD 93/145 has now been withdrawn and the above ruling is only a draft at this time.

*#3840 TD 2005/D18 – Energy saving Government rebate is assessable income

This draft determination was also released on 29th June 2005 and concludes that the government rebate received by taxpayers in relation to the acquisition of energy saving appliances used in a rental property is an assessable income amount to the taxpayer under Division 20 of the 1997 Tax Act. This will always be the case unless the taxpayer is carrying on a business of holding rental properties which is not addressed in the ruling. (The rebate will probably be assessed as ordinary income where a business is being conducted by the taxpayer. However, the size and scale of the rental property operations would need to be significant for there to be a business).

The amount is assessable under Division 20 as it satisfies the three relevant requirements:-

- The rebate does not form ordinary income to the taxpayer. It is not captured under Section 15-10 or Division 6 as there is no business.
- The rebate is a recoupment of a rental property outgoing.
- A Division 40 deduction is available to the property owner for the purchase of the energy saving appliance and the rebate is a recoupment of that capital expenditure.

It should be noted at this time that recoupment of deductions under Division 40 are specifically covered in the recoupment provisions of Division 20. As well, the provision was drafted and included to capture precisely these types of recoupments.

Taxpayers should note the recoupments by way of expense payment fringe benefits would also be captured under this Division apart from the specific exempting provision of Section 23L discussed in the earlier draft determination.

3900 Miscellaneous Tax Rulings

3904 MT 2024 – FBT exemption for dual cab vehicles

Miscellaneous Tax Ruling MT 2024 has been amended to clarify the eligibility of dual cab vehicles for the exemption where private usage is limited to certain work related travel.

4 ANNOUNCEMENTS

4135 2005/06 ATO Lodgement Program 2005-06

The 2005/06 Lodgement Program has been released by the ATO and can be accessed at:-

http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/60621.htm&page=1&H1.

The site enables users to search the deadlines by client or obligation type, as well as key date. A number of changes have been made to the program including:-

- A comprehensive list of superannuation obligations.

- The inclusion of three new lodgement categories (26, 27 and 28) within the companies and superannuation funds client type. These relate to following entities:-
  - Not for profit.
  - Those required to lodge early.
  - Full self-assessing not for profit entities which operate on an approved substituted accounting period.

- The granting of an extension for the lodgement of franking account returns to the 31st October 2005 where no liability or no amount is payable and the entity is June balancing. However if a liability or amount payable does exist, the 31st July 2005 still applies.

- The strengthening of the compliance test within the PAYG withholding payment summary annual report. To receive the concession the payer entity which has only closely held payees must have lodged both its 2003/04 income tax return, and 2003/04 PAYG withholding payment summary annual report by the 30th June 2005 and not received a failure to lodge on time penalty. A list of clients identified by the ATO as passing the compliance test, and having three payees or less will be forwarded to the applicable tax agent by the end of July 2005. The ATO must be advised of entities wishing to receive the concession by the 15th September 2005. Where lodgement of the annual report occurs after the 30th September 2005 and you have failed to lodge the concession list, a failure to lodge on time penalty will apply.

*#4136 ATO will focus on deductions and CGT in 2005/06

The Commissioner has reminded taxpayers that the ATO will be focusing on work and property related expense deductions, as well as capital gains from asset sales. Data matching between financial institutions, property sales, and ASX information will occur. The targeted occupations for this year are:-

- Construction.
- Food preparation and processing.
- Dance, drama and music instructors.
- Health-care professionals.
- Teachers.

It is believed completion of returns will be simpler with the new E-tax facility which enables taxpayers to lodge electronically, as well as have on-line access to Tax Rulings and publications, and their Centrelink payment data. 2005 TaxPacks can be requested by calling 1 300 720 092.

4137 New personal tax scales applied from 1st July 2005

Effective from the 1st July 2005 the new personal income tax rates apply. New weekly and fortnightly income tax tables were mailed by the ATO to all employers, and the updated Tax Withheld Calculator is available at:-

http://www.ato.gov.au/businesses/content.asp?doc=/content/33279.htm.

#4138 Guidance document on service trusts is released

In what must be described as a total anti-climax, the guidance document in relation to service trusts has now been released by the ATO. It sets out some guidelines in relation to appropriate mark ups for service trusts as well as a methodology in checking the health of any service trust arrangement. The document describes a typical service trust arrangement and provides plenty of examples of acceptable and perceived unacceptable practices.

Method of appraising the health of a service trust arrangement

The document suggests the following issues need to be considered when reviewing the service trust arrangement:-

- Step 1 – Can you explain how the service trust arrangement helps you run your business?
- Step 2 – Are the service fees and charges commercially realistic?
  - Comparable market prices
  - Comparable profits
- Step 3 – What documentation do you need?

The document provides some guidance on each of the above issues.

Suggested commercial mark ups

The ATO has suggested that the following mark ups be used depending on the actual service provided.

- Labour hire – temporary staff – 5% on the direct and indirect operating costs
- Labour hire – permanent staff – 3.5% on the direct and indirect operating costs
- Recruitment – 5% of the direct and indirect operating costs
- Equipment hire – 9% return on assets (maximum)
- Rental – market prices plus finder fee where applicable (no mark up!)

Moratorium Period

Apart from specific target areas listed below, the ATO has confirmed in this document that service trusts will have twelve months to put their house in order and provided they do this, they will not be the target of audit activity in the future. The ATO has also effectively rubber-stamped the use of service trusts as acceptable business practice where they are run on a commercial basis and established for the right reasons. The service entities that are immediately targeted include:-

- Those with service fees in excess of $1 million per annum
- Those where the service fees exceed 50% of the turnover of the professional practice.
- Arrangements where there is little or no documentation and where the arrangements are not commercial.

Interestingly enough, the ATO indicated that 40 audits had been conducted and an additional 40 audits were likely to arise from the above group of service trust arrangements. Although obviously sample checking will occur, we note that this is a very low number of audits.

Included in the guidance document are various case studies identifying arrangements which would and would not be targeted. As well, a decision matrix to assist in evaluating the service trust arrangement is included.

Editor's Comment – This document is disappointing to say the least and inconsistent. The mark ups recommended by the ATO are in our view unrealistically low. The ATO needs to get a better understanding of what is accepted commercial practice. On the other hand, the moratorium seems ridiculously generous considering some of the aggressive tax practices that have occurred in the past and are still in place. Many accountants trying to do the right thing and put in place commercial arrangements have lost clients to aggressive practitioners who are now effectively being rewarded with a moratorium for their non-commercial practices. This approach is totally inconsistent with the ATO approach taken in relation to aggressive tax schemes.

#4139 Website re Australia & New Zealand tax information for businesses

The ATO and New Zealand Inland Revenue have consolidated information regarding tax obligations when dealing with Australia and New Zealand and released it onto one website site, i.e.:-

> **http://www.ato.gov.au/businesses/pathway.asp?pc=001/003/074&mfp=001/003&mnu=26730#001_003_074.**

Issues covered include GST, WET, income, employment, and withholding taxes, as well as the ATO's view on tax havens. Tax rulings and other legislation is also available.

Editor's Comment – This is a very positive initiative from the ATO. Whilst we have not yet had a chance to review the site to see how effective it is, it still is a logical pro-active approach from the ATO. Refreshing!

4140 Updated Determination on GST exempt taxes, fees and charges

The New Tax System (Goods and Services Tax) (Exempt Taxes, Fees and Charges) Determination 2005 has been updated and is available at:-

> **http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/asmade/bytitle/0B6C5B16028C0563CA25702F00258099?OpenDocument.**

This determination lists all the government fees and charges that are deemed to be for no consideration for the purposes of levying GST. Therefore GST does not apply to these charges (10% of nil equals nil). However it should be noted that these supplies are still technically taxable supplies and creditable acquisitions. They are not GST-free supplies.

#4141 ATO Lodgement concessions – PAYG withholding payment summary annual report

Tax agents can request an extension to the deadline for the lodgement of annual PAYG withholding payment summary reports if the report is dependent on information contained in the taxpayer's income tax return and the following conditions are met:-

- The taxpayer only has closely held employees, and is not a superannuation fund.
- The taxpayer has lodged his/her 2004 income tax return and payment summary annual report by the 30th June 2005.
- No failure to lodge on time penalty has been received by the taxpayer.
- The tax agent is involved in preparing the taxpayer's annual report, and has lodged the request for lodgement concession by the 15th September 2005.

Where an extension is required it is critical that tax agents request these by 15th September 2005 or no extension will be granted.

#4142 Real Estate auctioneers to make clear whether bids GST exclusive

Due to a recent court case the ACCC has reminded real estate auctioneers to ensure all bidders are aware of each property's GST status. It is essential, by law, not only for auctioneers but all persons providing goods or services to ensure buyers are aware of the GST status of the product or service.

Editor's Comment – It is good to see that ACCC follow up on this issue. Auctioneers have been remiss in the past in making it clear before an auction commences of the GST status of the auction and therefore the bids.

4143 DTA negotiations commence with Chile

Double tax agreement negotiations have commenced between Australia and Chile.

#4144 National umbrella for professional indemnity liability now in place

With the final passing of legislation in Tasmania and South Australia we now have a nationally consistent system of professional standards legislation. This will hopefully assist with the cost of professional indemnity insurance.

Editor's Comment – We eagerly await the outcome from this situation. Basically there is now no impediment to caps being placed on professional indemnity claims to the higher of:-

- ***$500,000 per claim***
- ***Ten times the fee charged for the advice***

All of the accounting bodies need to push this issue hard so this capping of liability is introduced as soon as possible.

#4145 Tax Portal security to be beefed up

As mentioned in last month's update, the ATO is tightening security around the Tax Agent Portal as a result of increased frauds, and unauthorised access. In its endeavours to improve security passwords to access the ELS software will increase from 6 to 8 digits from the 1st August 2005. In addition, the system will limit the number of reusable characters in a password to 2 from the previous password. The ATO encourages tax agents to convert to the PKI (Public Key Infrastructure or digital certificate) system which is inherently more robust in its logon / password security.

Some tax agents may have also noticed a computer virus alert issued by the ATO on the 25th July 2005. Apparently the Trojan virus (Bancos Z) "appeared to be compromising the user ID and password details of a small number of tax agents who use the Tax Agent Portal". This virus can capture information such as financial and banking data and transmit it to a third party. The affected agents' portal access has been restricted until their systems have been checked and new logons issued. The ATO has advised that if you believe your computer has been infected, you should remove the virus immediately via anti-viral software, and reset your portal password by the "change password" option. The ATO requests you report any infection as soon as possible via 13 72 86 Fast Key Code 3.

Editor's Comment – We have heard reports that using a digital certificate on a stand alone machine can be established fairly easily but is quite difficult in relation to networked systems. As well, tax agents that log onto the tax portal from various machines at different locations (home, work and at clients) may find that the digital certificate limits them to one machine access only. One possible solution to this is that they use the one machine (a notebook) at all different locations. Finally we have also heard that digital certificates can be down-loaded to memory sticks and therefore be just as vulnerable. Clearly there will be some teething problems but changing passwords every 28 days to virtually a completely new password has its downsides as well. There is no way these passwords will be remembered and recording them only introduces additional security risks. Is fingerprint recognition an answer - we've always wanted to give the ATO the finger!

*#4146 ATO identifies significant levels of non-compliance among low doc loans borrowers

Since June 2004 the Tax Office has been conducting various investigations into people using low documentation loans and found a high level of understated income or non-lodgement of income tax returns. Through the use of access powers under tax law the ATO identified approximately 50% of the 350 randomly selected taxpayers had failed to lodge returns. In addition, by targeting high risk tax agents who were also brokers, and high risk taxpayers, the ATO identified the tendency of low documentation loan users to be concealing income. The Commissioner stated that although many users fully meet their tax obligations, where income was omitted it was primarily as a result of cash economy sources.

As a result of its success the ATO will be systematically verifying the lodgement status of taxpayers obtaining finance through low documentation loans during 2005/06.

Editor's Comment – Should anyone be surprised by these results!

4147 Time for ATO to complete compliance activities – IGOT report

The review into the Length of Time to Complete Tax Office Active Compliance Activities has been completed and the report submitted to the Minister. Included in the review was an examination of the fine balance between protecting Revenue, and the extent and impact of compliance activities on businesses. We eagerly await its public release.

4148 CPI – June quarter for indexation factor

The CPI indexation factor for the June 2005 quarter is 148.4, up from 147.5 from the March 2005 quarter.

4149 ATO updates Access Manual re access to Professional Accounting Advisors' Papers

Chapter 7 of the ATO's Access Manual (Access to Professional Accounting Advisors' Papers) has been updated. This chapter acknowledges the Commissioner has access to most documents, however accepts access to some is restricted to the taxpayer and advisor in all but exceptional circumstances. The definition of exceptional circumstances is then explained.

4150 ATO issues replacement endorsement notices to all charities

Replacement endorsement notices were forwarded to all endorsed charities on the 19th July 2005. These notices state the charity's type which defines its ability to access concessions under income tax, GST and FBT laws. The organisation's deductible gift recipient status is not shown, and remains unchanged as a result of the endorsement notice. If an expectant charity does not receive its notice within 14 days it should contact the ATO.

#4151 Parliamentary Committee recommends property investment advice be regulated but exemption for accountants

A report detailing the findings of a Parliamentary Committee investigating the need for regulation of property investment advice has been released. Some of its recommendations include that:-

- The regulation of property investment advice, but not real property, should fall under the Commonwealth's jurisdiction.
- The Corporations Act 2001 should include a definition of "property investment advice".
- Advice providers should hold an AFS licence unless they are an accountant, solicitor or valuer providing information in the course of their professional activities.
- A 14 day cooling off period should be introduced where loans for investment in property are secured by home equity.

Editor's Comment – The alarm bells should already be going off in relation to this report and the accounting bodies should take notice. Accountants were stitched up in relation to the introduction of the financial services regime and should not have their capacity to provide services in the property investment area similarly curtailed. An exemption is fine provided it is a full exemption.

4152 New Zealand to close imputation credit loophole for Australian Companies

With the introduction of the trans-Tasman imputation system, some Australian companies have discovered a loophole where they could pass out New Zealand franked dividends to their New Zealand shareholders and obtain an income tax deduction in Australia for the payment at the same time. The schemes which achieved this apparently used a redeemable preference share which was considered to be a debt interest under Australian law. This loophole is being closed down by legislative amendment so the franking credit will no longer be available where a deduction has also been obtained for the payment or will be obtained in Australia.

Whilst the trans-Tasman arrangements were designed to allow proportional tax credits to be passed on to the shareholders who could use those credits, the particular arrangement involved streaming of the New Zealand imputation credits and also provided a double tax advantage. It is alleged that it was eroding the New Zealand tax base.

The law change will be effective to new share issues arising from 21st July 2005 and dividends paid from 1st April 2006 (in relation to shares held within the same group of companies at that time). It would appear that shares already issued to non-group shareholders will be able to continue to take advantage of these schemes until the existing arrangements end.

4153 Annual GST reporting elections - ATO notifications to tax agents

Two types of letters were forwarded out by the ATO to tax agents notifying them of clients potentially eligible to report and remit / claim GST annually. The first relates to clients who have lodged nil activity statements on a monthly or quarterly basis. The ATO suggests they may need to revisit their need to be registered, and cancel if appropriate. However if they wish to continue they do have the option of converting to annual lodgement.

The second letter relates to clients also currently lodging on a monthly or quarterly basis. These clients are either newly registered or have only recently become eligible for annual lodgement and therefore qualify.

Elections to become an annual GST reporting entity for the 2005-6 year must be lodged by:-

- 21st August 2005 for current monthly BAS lodgers
- 28th October 2005 for quarterly BAS lodgers.

4154 Capital deductions for buildings to remain as is – for the time being

Moves to bring capital expenditure write offs on buildings and structures under the uniform capital allowance system have ceased until a number of "extremely difficult practical issues" are resolved. The Government had previously indicated that it had accepted the proposal and would seek to implementation on the 1st July 2005, however the Minister for Revenue and Assistant Treasurer announced further investigation was required to ensure the changes did not disadvantage home buyers or those renting amongst other things.

#4155 Legislation allowing NZ wine producers to access Australian WET rebate introduced in New Zealand

Legislation has been introduced into the New Zealand Parliament to enable their wine producers to access the Australian WET rebate. Whilst the legislation has already been introduced in Australia and has a back-dated commencement date from 1st July 2005, legislation is also required to be passed in New Zealand.

Editor's Comment – This may place these wine producers in a difficult position as prices will need to be reduced and from 1st July 2005. However until the law is passed, the WET rebate is still in doubt.

#4156 ATO to improve services to tax agents

The ATO is expecting to launch its client relationship management system into its call centres around September this year. This will enable tax officers to call up on screen an individual taxpayer's history when communicating with a tax agent. In addition, the Commissioner expects the new national case management system to be established early 2006. This will enable better tracking and management of cases to ensure they are completed in a timely manner.

4157 ATO steps up processing of quick tax refunds

The Tax Office has recognised the importance of a fast turnaround for tax refunds and is taking the following steps to maintain its current 14 days from lodgement standard by:-

- Systematically reducing the time a credit balance is held.
- Initiating contact with taxpayers within 2 working days where further information is required to facilitate a refund.
- The removal of indicators and notations on taxpayer accounts which may delay processing times.
- Notifying taxpayers where refunds are delayed due to the lack of banking details or the ATO awaiting outstanding activity statements.

#4158 ATO focuses on private company loans and payments

The ATO is reminding tax agents that it is taking an increasing interest in private company loans and payments. For companies with a turnover between $2 and $10 million the Tax Office will be embarking on a strong educational approach to ensure both tax agents and their clients are aware of compliance requirements. Companies with a turnover between $10 and $100 million will find themselves under increased scrutiny to ensure no aggressive tax planning exists.

Some of the most common errors found by the ATO are:-

- The failure to establish appropriate loan agreements.
- The existence of debit loans.
- The failure to remit minimum annual loan repayments.
- The use of the FBT benchmark rates instead of the private company loan rate.
- Failure by the company to declare the interest received on loans.

Editor's Comment - Please remember if loans created during the 30th June 2005 year are not repaid in full by the day the company return is lodged or is due for lodgement, the loan will need to be on commercial terms to avoid Division 7A.

Please also note the tax return disclosures in the company and trust 2005 tax returns require the following:-

- ***Disclosure of whether there are pre-4th December 1997 loans still in existence and their balance – Company return financial information section.***

- ***Disclosure of unpaid present entitlement amounts owed to a company beneficiary by a trust – Trust return financial information section***

Clearly the ATO is collecting information with a view of undertaking audit activity in the area of Division 7A compliance.

4159 Data matching – Workcover Corporate SA

Business names and addresses will be collected from Workcover Corporate SA in an endeavour to identify failure to register, and other tax non-compliance issues.

5 MATTERS OF INTEREST

5000 R & D Matters

There were no matters of significance noted during the period.

5100 ACCC Matters

There were no matters of significance noted during the period.

5500 Taxpayer Alerts

There were no taxpayer alerts noted during the period.

5800 Tax Office Practice Statements

#5815 PS LA 2005/12 - Donations to Tsunami appeal bucket collections

The ATO has stated that it will accept a tax deduction for donations made to a deductible gift recipient's Boxing Day 2004 Tsunami appeal even where no receipt or other evidence has been received so long as a "reasonable standard of care" has been exercised by the taxpayer when fulfilling his/her tax obligations. Donations of less than $10 will be accepted without evidence.

Editor's Comment – What is a reasonable standard of care? Well, for less than $10, a carte blanche deduction seems to be available. Donations above this amount will still need to have some evidence like a diary note, cheque butt etc. Evidence of payment will greatly assist. The greater the donation, the higher the level of care that should be exercised here. Finally, we

hope that taxpayers exercise some moral fortitude and only make claims where donations have actually been made.!

6 SUPERANNUATION NEWS

6000 Superannuation Contribution Determinations & Rulings

There were no superannuation contribution determinations and rulings noted during the period.

6200 Superannuation Guarantee Determinations & Rulings

#6204 SGD 2005/D1- Superannuation contributions to clearing houses

This draft determination concludes that where employers pay their superannuation contributions for their employees to a "clearing house" who subsequently pays the superannuation contributions to the nominated fund of the employee, the superannuation guarantee requirements will only be met when the contributions ultimately end up in the hands of the trustee of the superannuation fund and not when they are received by the clearing house. Implicitly, if the clearing house fails to pass on the contribution to the trustee of the complying superannuation fund within 28 days of the end of the quarter to which the contribution relates, the employer will have not met their superannuation guarantee requirements and will be liable for surcharge.

Arrangements involving clearing houses have sprung up over time and are becoming very prevalent with the introduction of the choice of superannuation fund rules. Basically this clearing house enters into an arrangement with the employer to pass on all of the superannuation contributions to the various individual funds thus saving the employer significant administration. Most clearing houses are superannuation funds in their own right though they will clearly not be the choice fund of the employee. They charge the employer a fee for undertaking this administration on the employer's behalf. The administration services can include distributing the choice forms to employees of the employer and the subsequent administration of the choice rules.

In some cases, the clearing house, which is a superannuation fund in its own right, enters into an agency arrangement with the trustee of the superfund of choice. In these cases, technical compliance of the rules probably occurs as receipt by the clearing house is effectively receipt by the choice fund. Such arrangements should keep in mind all SIS Act requirements including the requirement that contributions are banked to the benefit of the member within three days of receipt.

Employers and clearing houses should keep in mind the following:-

- Where an administration fee is charged, clearly the contribution made is net of any administration fees.
- Contributions made by cheque are not effective at all if the cheque is dishonoured.
- Post dated cheques are only effective contributions from the date on the cheque.

Editor's Comment – For these arrangements to be bullet-proof, the clearing house will need to be a superfund in its own right and also enter into an agency arrangement with every single superannuation fund that it receives contributions for. This will be possible but very

bureaucratic. Clearly, any clearing house arrangements will need to be documented very carefully and the employer and clearing house will need to specify if agency arrangements are in place and the timing of payments where they are not. Failure for the contributions to be in the hands of the trustee in time has significant adverse consequences including loss of tax deductions and the imposition of superannuation guarantee surcharge, interest and penalties.

6500 Other Superannuation News

6545 Choice of fund rules commenced by 28th July 2005

Just a quick reminder that all employers should have already provided standard choice forms to eligible employees by the 29th July 2005. The employer then has 2 months to remit the superannuation guarantee contributions to the chosen fund from the date of choice. It is important to ensure the employee's chosen fund is a complying one and this can be checked on line on the ATO website. Where the employer does not make a choice, the employer must pay the eligible superannuation contributions to the default fund.

#6546 IFSA fact sheet on Self managed superannuation funds

Considering the warnings of evaluating SMSF viability etc that have been posted by the ATO in recent months it is timely that the Investment and Financial Services Association has released a fact sheet which provides information regarding the primary differences when investigating the option of establishing a SMSF. This document can be accessed via the IFSA's media centre website at:-

http://202.92.75.45/public/content/ViewCategory.aspx?id=69.

#6547 Update on super changes effective from 1st July 2005

Just a quick reminder of the major changes effecting superannuation from the 1st July 2005:-

- The choice of fund regime in now effective.
- Although still waiting enactment, the surcharge is expected to be abolished when the Senate resumes in August 2005.
- The ability to access super as a non-commutable income stream once preservation age is reached has commenced.
- Increased disclosure requirements for fees and charges in product disclosure statements and periodic statements is now required for APRA funds.
- RBL, ETP low rate part, age based deduction limit and redundancy thresholds have been indexed.
- The transitional rules for compulsory cashing of benefits have now ceased.
- All SMSF assets should now be held in the fund's name.
- The transitional rules for paying defined benefit pensions from a SMSF have been restrictively extended to 31st December 2005.
- The superannuation splitting rules were deferred until 1st July 2006.
- The superannuation portability rules are being amended to eliminate the six month dormant rule.

#6548 Super choice guide released by ASIC

A guide to assist employers, superannuation trustees and financial advisors meet their obligations under the choice of super regime has been released by ASIC. This guide can be accessed at:-

http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=superchoice_obligations_pdf.

7 SPECIAL ARTICLES

#7002 Vic land tax – Recent court decisions

Worrying land tax findings have been handed down by the Victorian Supreme Court in recent months.

In the Lygon Nominees Pty Ltd v Commissioner of State Revenue case the trustee of 11 separately constituted discretionary trusts and 1 unit trust connected with the same family was held to be liable for land tax on an aggregate basis. In a second case a retirement village developer was forced to pay land tax on the proportion of land purchased for the purpose of constructing a retirement village but which was at that stage undeveloped. Three out of the 14 development stages had been completed and the Victorian Civil and Administration Tribunal had determined that the developer was entitled to a full exemption, however the Commissioner appealed resulting in the Supreme Court finding only 3/14th of the land was subject to the exemption.

The NTAA has weighed into the argument stating that proposed changes to land tax measures will dramatically impact on families, small businesses, and other property investors from the 1st January 2006.

8 ATO Website Updates

8000 ATOassist Website – http://www.ato.gov.au

As indicated in August 2003, the Tax Reform website closed on 14th August 2003 and the documents on that site were incorporated into the normal ATO website. They are not easy to locate and you should look in the left hand menu of the Tax Professionals Home Page to locate these items.
The following documents were added to the ATOassist website during the period:-

Tax – General

2005 Virtualplus Holdings Ltd demerger (NAT 13994)
AMP 2005 return capital
Australian Gas Light Company (AGL) return of capital
Activity statement refunds
BHP Billiton 2004 off-market share buy-back
BlueScope Steel Ltd 2005 off-market share buy-back
Business portal maintenance schedule
Changes to the simplified tax system (STS) from 1/7/05

Coles Myer Ltd 2005 off-market share buy-back
CPI changes for Alcohol and tobacco – 1/8/04
Guide to online services – for business
Henderson Group PLC (formerly HHG PLC) restructure
International Financial Reporting Standards: guidelines for reporting activity statement obligations affected by IFRS
Key dates for businesses
List of product rulings issued from 1/7/05 to 30/6/06
Review of International Taxation Arrangements (introduction and history)
Residency status and tax relief
Rio Tinto 2005 off-market share buy-back
Tax concessions for philanthropy
Telstra 2004 off market share buy-back
The agreement between Australia and Mexico
TA 2002/7 Living Away from home allowance – interposed Company – Withdrawn
Tax Office financial services industry partnership minutes
User research sessions: Large corporates and multinationals website
WMC Resources Ltd 2005 takeover by BHP Billiton

GST

GST and Australian travel packages sold by foreign tour operators
GST registration information for a non-resident
GST and the Great Barrier Reef Marine Park structural adjustment package 2004
GST for the racing industry

Superannuation

Does a SMSF suit me?
CGT superannuation rollover relief
ETP rollover statement = superannuation fund instructions
Instrument and explanatory statement for lodgement of Superannuation tax returns and statements for year ending 30/6/05
Key superannuation rates
Meeting the obligations for super choice
New superannuation industry supervision (SIS) measures
SuperUpdate newsletter June 2005
SuperUpdate newsletter July 2005
What is superannuation?

Tax Agent

2005 tagged ELS return forms
ATPF minutes for meeting 24/2/05
Capital expenditure incurred in acquiring rights in an Australian film
Changes to the ELS password
Client reports update

CGT trust distributions
Deleting a client using the portal
Employee share schemes – rollover relief on a corporate restructure (introduction)
ELS Dial IP network charges update
Improving the Tax Agent Portal for annual GST reporting
Key dates for tax agents July – September 2005
New arrangements for notifying taxpayers of annual lodgement obligations
Tax agent portal – scheduled maintenance for July 2005
Tax agent portal – adding a new client
TA 2003-3 – avoidance of capital gains tax utilising a trust structure

Other

Non-profit news service No 0102 – Victorian Supreme Court decision in Central Bayside Division of General Practice Ltd
Non-profit news service No 0105 – GST Determination released GSTD 2005/6 – non-statutory fines and penalties
Non-profit news service No 0104 – Charity endorsement applications – time limits for providing information to the Tax Office
Non-profit news service No 0103 – Charity status details now publicly available
Non-profit news service No 0107 – News version of GiftPack for deductible gift recipients and donors
Perth RTPF minutes for meeting on 9/5/05

Returns and Instructions

2005 standard trust distribution statement – guidance notes for fund managers
Annual PAYG instalment notice - instructions
Application form to move excisable goods – Single transaction (alcohol)
Business and professional items schedule instructions 2004-5 (NAT 2543-6.2005)
Business and professional items schedule 2004-5 (NAT 2816-6.2005)
Baby bonus – adoptive parents
Capital gains tax update 2004-5 income year
Completing item L1 on the 2004-5 individual return
Consolidation issues process pro-forma and instructions
Foreign income return form guide 2004-5
Foreign exchange (forex) – translation of foreign currency rental income, expenses and rental property acquisition cost
Guide to CGT 2004-5 (NAT 4151-6.2005)
Individual income tax rates
Instrument and explanatory statement for lodgement of income tax returns and statements for year ending 30/6/05
Life insurance companies taxation schedule and explanatory notes 2005

Life insurance companies taxation schedule 2005 – consolidated groups (NAT 7334CON-6.2005)
Losses schedule instructions 2005 (NAT 4088-6.2005)
Lodge TFN declaration reports
PAYGW tax table – back payments including lump sum payments in arrears table
PAYGW tax table – bonuses and similar payments
PAYG withholding for trustees of bankrupt estates
PAYG withholding for external administrators
PAYG withholding annual report – payments to foreign residents
Research and development tax concession schedule and instructions 2005 (NAT 6709)
Reportable fringe benefits – facts for employees (NAT 2836)
Retirees Taxpack 2004-5 (Nat 2596-6.2005)
Rental properties 2004-5 (NAT 1729-6.2005)
Simplified imputation – franking deficit tax offset
Strata title body corporate tax return 2004-5 (NAT 4125-6.2005)
Taxtime 2005 – English
Tax return for individuals 2004-5 (NAT 2541-6.2005)
The building and construction industry – Status of workers – Employee or independent contractor? – (NAT 13823)
What's new for 2005?

8200 New Gift Deductible Recipients

The following organisations were added to or maintained on the list of gift deductible recipients during the period:-

None

The following organisations were removed from the list of gift deductible recipients during the period.

None

The following organisations had their names changed but remain on the list of gift deductible recipients:-

None

9 LIST OF PUBLISHED SPECIFIC RULINGS

9100 Class rulings

The following class rulings were issued during the period. They all relate to various approved retirement schemes, healthcare arrangements, share buybacks, share issues, traditional securities etc.

CR 2005/52	Income tax: assessable income: basketball referees: Townsville Basketball Inc. receipts	29 June 2005
CR 2005/53	Income tax: assessable income: Department of Finance and Administration and Department of the Treasury employees deployed to Nauru	29 June 2005
CR 2005/54	Income tax: assessable income: Australian Federal Police employees - International Deployment Group deployed to Nauru as Assisting Australian Police	29 June 2005
CR 2005/55	Income tax: share buy-back: Rio Tinto Limited	29 June 2005
CR 2005/56	Income tax: Promina Group Limited - Employee Share Purchase Plan (Deferral 2003)	29 June 2005
CR 2005/57	Income tax: Promina Group Limited - Employee Share Purchase Plan (Exemption 2003)	29 June 2005
CR 2005/58	Income tax: Promina Group Limited - Senior Management Performance Share Plan	29 June 2005
CR 2005/59	Income tax: Endeavour Asia Awards	29 June 2005
CR 2005/60	Income tax: Endeavour Europe Awards	29 June 2005
CR 2005/61	Income tax: CGT event K6: Tattersall's Group Restructure: Beneficiaries of the Estate of the Late George Adams	29 June 2005
CR 2005/63	Income tax: scrip for scrip roll-over: merger of James Fielding Group and Mirvac Group	29 June 2005
CR 2005/62	Income tax: assessability of income: Australian Public Service employees deployed to the Solomon Islands	13 July 2005
CR 2005/64	Income tax: return of capital: Endeavour HealthCare Ltd	13 July 2005
CR 2005/65	Income tax: scrip for scrip roll-over: merger of CI Resources Limited and Phosphate Resources Limited	13 July 2005
CR 2005/66	Income tax: HHG PLC: return of capital	13 July 2005

9200 Product rulings

The following product rulings were released during the period.

PR 2005/96	Income tax: tax consequences of investing in ABN AMRO Rolling Instalment Warrants IZY Series 2005 Product Disclosure Statement - Cash Applicants and Secondary Market Purchasers	29 June 2005
PR 2005/97	Income tax: tax consequences of investing in ABN AMRO Rolling Instalment Warrants IZZ Series 2005 Product Disclosure Statement - Cash Applicants and Secondary Market Purchasers	29 June 2005
PR 2005/98	Income tax: film investment - Becker Filmed Entertainment Fund	29 June 2005
PR 2005/99	Income tax: tax consequences of investing in	29 June 2005

	Westpac 'SWZ' Series Self-Funding Instalments 2005 Product Disclosure Statement - cash applicants and on-market purchasers	
PR 2005/100	Income tax: Willmott Forests Project - 2006 Product Disclosure Statement	6 July 2005
PR 2005/101	Income tax: Peppermint Springs Vineyard Project (post 30 June 2005 Growers)	13 July 2005
PR 2005/102	Income tax: Multimedia Investment - 'Indigenous Australians'	20 July 2005

9300 Product Grant and Benefit Rulings

No product grant and benefit rulings were released this month.

9400 Withdrawn & Amended Rulings etc.

Class Ruling		
CR 2004/139A - Addendum	Income tax: Endeavour Australia - Asia Postgraduate Student Awards	29 June 2005
CR 2004/140A - Addendum	Income tax: Endeavour Australia - Europe Postgraduate Student Awards	29 June 2005
CR 2005/13W - Withdrawal	Income tax: return of capital: WMC Resources Limited	29 June 2005
Miscellaneous Tax Ruling		
MT 2024A2 - Addendum	Fringe benefits tax: dual cab vehicles eligibility for exemption where private use is limited to certain work-related travel	13 July 2005
Income Tax Ruling		
IT 2071W - Notice of Withdrawal	Income tax: school building funds	20 July 2005
IT 2265W - Notice of Withdrawal	Income tax: donations of policies of life insurance	
IT 2443W - Notice of Withdrawal	Income tax: gifts	20 July 2005
Taxation Determination		
TD 93/145W - Withdrawal	Income tax: is an employee entitled to a deduction for depreciation in relation to an item of plant used for income producing activities when he or she is subsequently reimbursed for the cost of the item?	29 June 2005
TD 92/110W - Withdrawal	Income tax: is the cost of attending a fundraising function tax deductible as a gift?	20 July 2005
TD 93/57W - Withdrawal	Income tax: are compulsory school enrolment fees deductible under paragraph 78(1)(a)(xv) of the Income Tax Assessment Act 1936 if paid or transferred to a school building fund?	20 July 2005
TD 93/139W - Withdrawal	Income tax: is a payment of money to an eligible 'umbrella' organisation under a 'preferred donation	20 July 2005

	arrangement' a tax deductible gift if the donor taxpayer or an associate obtains a collateral benefit?	
TD 93/185W - Withdrawal	Income tax: is expenditure incurred by a taxpayer in the course of undertaking unpaid work for a charitable organisation deductible?	20 July 2005
Product Ruling		
PR 2004/94A - Addendum	Income tax: Burbank Film and Television Fund	29 June 2005
PR 2004/114A2 - Addendum	Income tax: Great Southern Plantations 2005 Project - (Pre 30 June Growers)	29 June 2005
PR 2005/3A - Addendum	Income tax: TFS Sandalwood Project 2005 (Pre 30 June Growers)	29 June 2005
PR 2005/36A - Addendum	Income tax: Macquarie Forestry Investment 2005 (Pre 1 July 2005 Growers)	29 June 2005
PR 2004/28 - Erratum of Addendum	Income tax: 2004 Tumut Softwood Project	6 July 2005
PR 2004/33 - Erratum of Addendum	Income tax: 2004 Tumut Softwood - Wholesale Project	6 July 2005
PR 2005/37A - Addendum	Income tax: Macquarie Forestry Investment 2005 (Post 30 June 2005 Growers)	6 July 2005
PR 2005/88W - Withdrawal	Income tax: Peppermint Springs Vineyard Project (pre 1 July 2005 Growers)	27 July 2005

9500 Interpretative Decisions

The ATO regularly releases interpretative decisions in relation to GST and other taxation issues and these can be located on the ATO Legal Database. These decisions cover a wide range of issues and are identified as ATO ID 2004/number. These decisions set out an issue that has been questioned by a taxpayer, provide a brief summary of the facts of each case and then the decision given by the ATO in relation to those facts. They cannot be relied upon like rulings, however they provide further guidance on the position taken by the ATO on various issues.

A summary of the interpretative decisions released by the ATO during the period is set out below:-

ATO ID 2005/182	GST and supply of a call option over commercial property	1 July 2005
ATO ID 2005/183	GST and supply of a call option over residential premises	1 July 2005
ATO ID 2005/185	GST and supply of air ambulance	1 July 2005
ATO ID 2005/186	GST and refinancing hire purchase agreements as leases	1 July 2005
ATO ID 2005/187	Employee share scheme: provision of financial assistance by a trustee to acquire shares - sole activities test	1 July 2005
ATO ID 2005/188	Non Commercial Losses: 'other assets tests' - truck with carrying capacity of two tonnes	1 July 2005
ATO ID 2005/189	GST and supply of student accommodation by a hostel whose primary purpose is to accommodate overseas students	1 July 2005
ATO ID 2005/190	Capital Allowances: balancing adjustment event-depreciating asset that failed to work - attempts to make the asset work	1 July 2005

	were abandoned	
ATO ID 2005/191	Right to tax dividends paid to non-resident company: application of Article 10(7) of the Australia-United States Double Tax Convention	8 July 2005
ATO ID 2005/192	Assessability of payments received by an Australian resident from an Income Protection Policy where the payments replace income that would have been exempt foreign employment income	8 July 2005
ATO ID 2005/193	Assessability of employment income received by an Australian Defence Force (ADF) member from serving in Kosovo with Operation OSIER as part of the NATO Stabilisation Force (SFOR)	8 July 2005
ATO ID 2005/194	GST and a credit arrangement by way of an instalment contract for the sale of residential premises	8 July 2005
ATO ID 2005/195	Fringe benefits tax: issue of shares to a trust by a franchisor for the benefit of franchisee employees	8 July 2005
ATO ID 2005/196	Energy Grants (Credits) Scheme: off-road credit - mining operations - mining construction activity	8 July 2005
ATO ID 2005/197	Capital Allowances: cost - novation of luxury car lease immediately following termination of earlier novation	8 July 2005
ATO ID 2005/198	Capital Gains Tax: scrip for scrip roll-over - significant stake	8 July 2005
ATO ID 2005/199	Assessability of employment income received by Australian Defence Force member serving in the Republic of Kiribati with the Pacific Patrol Boat project	15 July 2005
ATO ID 2005/200	Trustee: assessability of foreign investment fund income - subsection 99A(4A)	15 July 2005
ATO ID 2005/201	GST and increasing adjustment where previously written off bad debts are sold to a debt factor	15 July 2005
ATO ID 2005/202	Capital Allowances: balancing adjustments - roll-over relief - transfer of assets from a discretionary trust to a unit trust	15 July 2005
ATO ID 2005/203	Non Commercial Losses: 'other assets test' - all terrain vehicles and agricultural motorcycles	15 July 2005
ATO ID 2005/204	Deductions: telephone expenses and input tax credit	15 July 2005
ATO ID 2005/205	Deductions: car expenses and input tax credit	15 July 2005
ATO ID 2005/206	GST and acquisition of a salvaged motor vehicle on settlement of an insurance claim	15 July 2005
ATO ID 2005/207	Assessability of rental income received from real property situated in the United Kingdom (UK) by a dual resident of Australia and the UK	15 July 2005
ATO ID 2005/208	Assessability of employment income earned by a non-resident Australian citizen working in China for an Australian Government organisation	15 July 2005
ATO ID 2005/209	Market linked income stream: relevant number	15 July 2005
TO ID 2005/210	Employee contributions: excess contributions used in a later FBT year	29 July 2005
ATO ID 2005/211	Capital gains tax - cost base/reduced cost base - debt	29 July 2005
ATO ID 2005/212	Non-Portfolio Dividends: optional convertible notes - non-	29 July 2005

	assessable non-exempt income under section 23AJ of the ITAA 1936	
ATO ID 2005/213	Excise: collections - petroleum - diesel fuel recovered from waste oils	29 July 2005
ATO ID 2005/214	Consolidation: subsidiary member	29 July 2005
ATO ID 2005/215	Assessability of employment income received by an Australian resident working in the United Kingdom as a medical practitioner	29 July 2005
ATO ID 2005/216	Capital gains tax: CGT event B1: right to use property before title passes	29 July 2005
ATO ID 2005/217	Capital gains tax: roll-over relief: exchange of share owned jointly for shares owned individually in an interposed company	29 July 2005
ATO ID 2005/218	Capital gains tax: roll-over to wholly owned company - business asset - part use	29 July 2005
ATO ID 2005/219	Loan Fringe Benefits: otherwise deductible rule - joint loans and the National Australia Bank decision	29 July 2005
ATO ID 2005/220	Fuel Sales Grants - Fuel sales - Comparable Locations	29 July 2005
ATO ID 2005/221	Excise: Goods destroyed in transit to, or at, a place of export	29 July 2005
ATO ID 2005/222	Energy Grants (Credits) Scheme - Off-road credit - Mining transport activity	29 July 2005

Withdrawn ATO Interpretative Decisions		
ATO ID 2001/539 (Withdrawn)	CGT: Options: effect of exercise	1 July 2005
ATO ID 2001/540 (Withdrawn)	CGT: Options: effect of expiry	1 July 2005
ATO ID 2003/457 (Withdrawn)	Capital Allowances: balancing adjustment event for a depreciating asset never used	1 July 2005
ATO ID 2002/575 (Withdrawn)	Dependant Tax Offset - separate net income - non commercial losses	8 July 2005
ATO ID 2003/569 (Withdrawn)	Non Commercial Losses: is exempt foreign employment income included as income 'from' a business activity	8 July 2005
ATO ID 2003/570 (Withdrawn)	Non Commercial Losses: is exempt foreign employment income included as assessable income from an unrelated source	8 July 2005
ATO ID 2003/963 (Withdrawn)	Non Commercial Losses: artist exception - does incidental arts work in a business qualify the activity for the exception?	8 July 2005
ATO ID 2004/506 (Withdrawn)	Non Commercial Losses: Other Assets test - valuation of trading stock	8 July 2005
ATO ID 2004/642 (Withdrawn)	Non-commercial losses: do the beneficiaries of a discretionary trading trust carry on a business activity?	8 July 2005
ATO ID 2001/153 (Withdrawn)	GST and web site marketing services to non-residents	15 July 2005

ATO ID 2001/287 (Withdrawn)	GST and travel agent organising an overseas conference	15 July 2005
ATO ID 2001/463 (Withdrawn)	GST and software down loaded from the Internet (recipient not registered nor required to be registered for GST)	15 July 2005
ATO ID 2001/490 (Withdrawn)	GST and surveying services connected with real property	15 July 2005
ATO ID 2001/491 (Withdrawn)	GST and training services supplied to a non-resident	15 July 2005
ATO ID 2002/407 (Withdrawn)	Superannuation guarantee scheme: Ordinary time earnings	15 July 2005
ATO ID 2001/573 (Withdrawn)	GST and supply of software products to a non-resident recipients outside Australia	29 July 2005
ATO ID 2001/576 (Withdrawn)	GST and sale of a right to a non-resident	29 July 2005
ATO ID 2001/583 (Withdrawn)	GST and legal services to a non-resident company that has a subsidiary situated in Australia	29 July 2005
ATO ID 2001/598 (Withdrawn)	GST and supplies of marketing support services by a resident to a non-resident outside Australia	29 July 2005
ATO ID 2001/644 (Withdrawn)	GST and engineering services provided overseas	29 July 2005
ATO ID 2002/698 (Withdrawn)	Retirement income entities - in-specie payment	29 July 2005