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Client Information Bulletin

Unfair Dismissals

A number of employers have been penalised for dismissing employees incorrectly. Having dismissed an employee and a few months later ordered to re-hire the ex-employee and make good all of his or her back pay, plus damages is a big price to pay.

This happened to some employers in the last few months when the Industrial Relations Commission found the following dismissals fell foul of the law:

1. employee dismissed for poor performance without being given warnings or an opportunity to respond;
2. employee dismissed without warning after more than 12 months on unpaid sick leave to which she was entitled under an enterprise agreement;
3. employee selected for redundancy under a flawed selection process;
4. employee dismissed for calling in the union;
5. employee dismissed for a single absence at the time of a critical incident when poor time-keeping was the subject of performance management;
6. employee dismissed for possessing marijuana at work when the employer's drug policy was not known to employees;
7. employee dismissed for a breach of the Internet use policy when inadequate computer security meant that the accusation could not be proven.

In each of these cases the employer was ordered to reinstate the employee and make good all back pay.

It is not difficult to get rid of bad employees. You should act quickly to get rid of them because they can poison your organisation.

However, there is a right way and a wrong way to go about it. It is important to have clearly defined and documented policies and procedures in place and to adopt the verbal and written warning procedures when there are transgressions.

Depreciable Assets - New Effective Lives:

The Australian Taxation Office has released new effective lives for a range of depreciating assets.

The assets include:

- aeroplanes and helicopters;
- cars;
- gas distribution and transmission;
- gas, oil, condensate, LNG and LPG manufacturing;
- gas and oil production
- heavy mobile equipment – construction and mining;
- mobile telecommunications services and international submarine cables;
- oil refining;
- ports; and
- radiology

The Australian Taxation Office said that the new effective lives are part of a comprehensive review of the "safe harbour" depreciation schedule which was conducted in consultation with industry. It notes in particular that the effective life of cars has been increased from 6 2/3 years to 8 years, which reflects the significant improvements in technology and reliability of cars since the last review was made in 1936.

The new effective lives, which take effect from 1 July 2002 only affects assets acquired after that date. Full details of the new effective life determination is available on the Australian Taxation Office website at www.ato.gov.au.

Car Depreciation Limit

The car depreciation limit for 2002/03 is \$57,009 up from \$55,134 for 2000/01 and 2001/02. Under the depreciation rules, if the cost price of a car exceeds the depreciation limit for the financial year in which the car is first used, its depreciable cost is deemed equal to the limit. Depreciation deductions are not available for any part of the cost of a car, which exceeds the depreciation limit.

Reasonable Work Expense Claims

The Australian Taxation Office has issued a *Taxation Ruling* which sets out the amounts considered to be reasonable for certain work expense claims covered by allowances for 2002/03.

Overtime meals. Overtime meal allowance expense claims up to \$19.15 per meal are considered reasonable where the allowance is paid under an industrial instrument.

Domestic travel. A domestic travel allowance expense claim is considered reasonable if it does not exceed the relevant amounts shown in the ruling. Special rates apply to employees with annual salaries above \$129,730 and to officeholders covered by the Remuneration Tribunal

Overseas travel. The reasonable overseas travel allowance amounts (for meals and incidentals) by cost groups range from \$90 to \$245 for salary level \$72,450 and below, \$115 to \$290 for salary level \$72,451 to \$129,730 and \$145 to \$360 for salary level above \$129,730.

Truck drivers. For meal expenses of employee truck drivers who receive travel allowance and who sleep away from home, an amount of \$63.10 per day is considered reasonable. For drivers with an annual salary of \$72,478 or more, the amount is \$68.90 per day.

Double Stamp Duty Risks - Property Purchases

If a purchaser wishes to nominate an ultimate purchaser after a real estate contract has been signed, the contract must when it is first signed, contain the words "and/or nominee" after the purchaser's name.

However, even where these words are included, the ability to subsequently nominate another person, company or trustee of a trust is limited.

Otherwise, the nomination may be deemed a sub-sale and double stamp duty will be payable. One of the common nominations is a trustee of a trust.

To be effective, the trust must be established in writing before the first purchaser signs a contract.

This compares with a new company nominee where it is sufficient that the first purchaser has actually instructed a solicitor or accountant to incorporate a company or to purchase a shelf company before signing the contract.

Latest Industry Benchmarks Now Available

The Tax Office recently released Taxation Statistics 1999-2000. This contains a summary of tax data, including financial ratios for most industries.

Business owners and tax advisers can use financial ratios to compare the performance of a business with the industry average. They can then determine the reasons for any variance and identify action that should be taken to correct problems with record keeping or improve business practices.

The ratios are a key tool in the Tax Office's compliance program. They help identify industry standards and entities that may be operating outside of these standards, including those that may be active in the cash economy.

Clearly there are many valid reasons why financial data can differ from one business to another in the same industry. Therefore, the ratios should be used as a guide rather than as definitive benchmarks.

The benchmarks are available on the Tax Office website at www.ato.gov.au

Shares – Tax And The Trader

You may think you're a trader, but the tax office could see things differently.

Are you a share trader or shareholder?

A person who is not carrying on a business can only offset realised capital losses against that and future years' realised capital gains.

For tax purposes a 'business' includes 'any profession, trade, employment, vocation or calling, but does not include occupation as an employee'. This would include a business of share trading.

A person who is a share trader, genuinely carrying on a business of share trading, can claim a deduction for losses against their other income.

But the Tax Office does not accept that everyone who wants to be a share trader is one – many are merely shareholders.

These criteria from court cases over the years will help you to weigh up whether your share buying and selling activities amount to you being in the business of share trading.

- *Repetition and regularity* of buy and sell shares.
- *Turnover* (although you can carry on business activities with a relatively small amount of capital or to invest a large amount of capital without being a share trader).
- *Operating* to a plan, setting budgets and targets, keeping records. Your qualifications, expertise, training, or skills will also help to illustrate that your activities constituted a business.

- Having a *separate office*.
- Accounting for the share transactions on a gross receipts basis.
- *Not being engaged in another full-time profession* (although in Federal Court case, the taxpayer, who had relevant experience, was held to be a share trader even though he was a full time employee.)
- You can be reasonably certain that you are a share trader for tax purposes if you can answer “yes” to each of the following questions.
- Are your share market activities more than a mere hobby and so those activities involve more than mere speculation?
- Do you make decisions to buy and sell after and on the basis of considerable analysis?
- Does the *volume, size, repetition and regularity* of your buying and selling activities and the business-like systems, strategies and analysis you employ in buying and selling shares indicate that you were in a share trading business in the income year (and not merely investing in shares)?

eGrant

The Tax Office has initiated a new paperless system for transport operators to claim their entitlement for the fuel grant. Called eGrant, the new system enables operators to avoid the compliance burden of completing forms as the fuel provider automatically sends transaction details to the Australian Taxation Office when the trucker’s monthly invoice is generated.

CGT: Subdivision Of A Main Residence

The CGT legislation contains a tax trap for the unwary, subdividing a main residence; an activity that most would have assumed to be largely tax free.

The CGT exemption for a main residence only extends to a dwelling that is an individual’s main residence and to any land immediately under that dwelling.

The term *dwelling* includes a unit of accommodation that is a building, a caravan, houseboat or other mobile home.

The land under the dwelling includes a maximum area of 2 hectares adjacent to the main residence, if that land is used primarily for private or domestic purposes in association with the dwelling, but only if the land is subject to the same CGT event as the dwelling. This means that for land to be subject to the main residence CGT exemption, the CGT event in relation to the land must happen with the dwelling still attached to the land.

Consequently, where a dwelling is removed from the land and the land is sold, the land does not come within the definition of ‘dwelling’.

It is not uncommon for a taxpayer who resides in a dwelling (their main residence) located on a large inner-city block of land to subdivide that land when their family leaves home. Assuming that the taxpayer’s main residence was not used for income producing purposes and the property had been owned by the taxpayer for at least 12 months, the CGT consequences of each of these events are as follows: -

Sale of Land at rear of main residence

As the land had been sold separately from the dwelling that was the taxpayer’s main residence, the land is not exempt from CGT under the main residence provisions.

Building a new dwelling on the land at the rear of the residence and selling same.

The result would be similar to selling the land. The capital gain is 50% of the difference between the capital proceeds from the sale of dwelling (2) and the sum of the cost base of the land and cost base of erecting dwelling (2) on that land.

Build a new dwelling at rear of main residence (1) move into (2) sell (1).

On the sale of dwelling (1), a CGT event A1 (disposal of a CGT asset) happens. If the taxpayer elects not to apply (building, repairing or renovating a dwelling) for dwelling (2), the taxpayer is entitled to a main residence exemption for dwelling (1) throughout the entire period of ownership that it was the main residence.

The exemption also extends during that period to adjacent land sold with dwelling because it had been used primarily for private or domestic purposes in association with the dwelling throughout the ownership period.

Further, the taxpayer can treat both dwelling (1) and dwelling (2) as a main residence for a maximum period of six months after dwelling (2) actually becomes the main residence. If dwelling (1) is sold within that period, any capital gain will be exempt from tax.

Should the 6 month rule not be applicable there would be CGT adjustments necessary as only a partial main residence exemption would apply.

Demolish old main residence (1), erect two new dwellings (2& 3) on the site, move into (2) and sell (3).

The demolition of dwelling (1) is a CGT event (end of a CGT asset) and a capital loss can occur, however in this situation, as that loss relates to the taxpayer’s main residence, the loss would be disregarded for CGT purposes.

As the taxpayer does not have a main residence after the demolition of dwelling (1), the taxpayer can elect that the CGT provisions (about build, repair or renovate a dwelling) apply. This law enables the taxpayer to treat dwelling (2) as the main residence for the shorter of 4 years before it actually becomes the main residence or the period starting when dwelling (1) ceased to be occupied. If this election is made dwelling (2) would be the taxpayer’s main residence for its ownership period.

On the sale of dwelling (3) a CGT event will happen and a capital gain will arise if the capital proceeds of dwelling (3) exceed the sum of the cost base of dwelling (3) and the land on which it is situated. There is no provision in the

legislation to disregard from a capital gain the period that the land was adjacent to the dwelling (1) as part of that main residence or the increase in value of the land during that period.

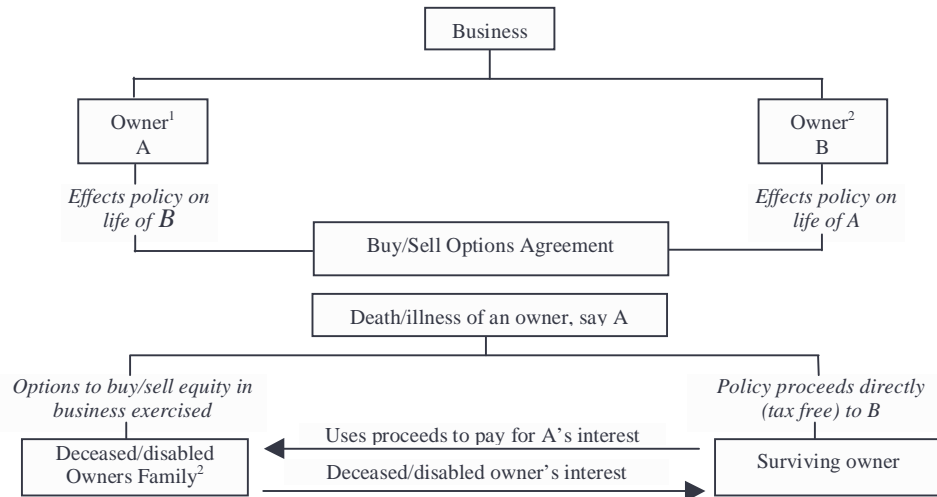
As can be seen, there are some potential CGT consequences of sub-dividing the family home property and advice should be sought prior to development to ensure minimum CGT impact.

Buy/Sell Agreements

An area that is often overlooked in business is succession planning where a partner or shareholder becomes incapacitated. Where the case arises the remaining partner/shareholder will usually be required to fund the payout/buyout of the former partner/shareholder. The quantum of the buyout figure may lead to financial hardship for the purchaser. One method to provide against such risk is to cross-insure as shown below:

The cross-ownership approach involves each business owner effecting (individually or jointly) a policy on the life of the other business owner (or on the life of that business owner’s principal). In a two owner scenario, the typical situation would involve:

Put/Call Options Agreement with Insurance Cross-Owned



Notes:
¹ The owners are assumed to be individuals who personally own their interest in the business.
² CGT is generally payable on disposal of the business interests to the surviving owner.

This approach more closely resembles the mandatory buy/sell agreements that were often used prior to the introduction of CGT. Whilst the ATO have advised that a mandatory buy/sell agreement can be utilised post CGT, the use of put and call options to effect the transfer is felt to be more appropriate. In this regard, mandatory buy/sell agreements could have adverse stamp duty implications in some States whereas this is not the case with put and call options agreements.

A disadvantage with cross-ownership, however, is the CGT consequences that are likely to arise when policy ownership needs to change as a result of changes in the owners of the business.

Where this change of policy ownership is facilitated by assignment of the existing policies, the usual CGT exemption that applies to life insurance policy proceeds may not be maintained as it could be concluded that the assignment was undertaken for consideration.

One way to overcome this potential problem is to permit a cancellation of the existing policies and reissue of new policies to reflect the new ownership structure of the business interests.

We can arrange the appropriate insurance coverage.

Disclaimer: The contents of this publication are general in nature and we accept no responsibility for persons acting on information contained herein without first consulting us.