



Client Alert

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Registered Proprietor:
Royal Cornell & Co Proprietary
ABN 36 806 557 703

December 2009

Financing Issues with the 50% Tax Break



This article focuses on the issues that arise with claiming the tax break on assets acquired from 1 July 2009 to 31 December 2009 under a finance arrangement with particular emphasis on cars.

Businesses have until 31 December 2009 to enter into a contract (referred to as the “investment commitment time”) to purchase a “new” asset in order to claim a deduction for the tax break and the asset must be installed by 31 December 2010.

A small business (i.e. where the turnover is less than \$2 million) is entitled to claim a 50% tax deduction for new assets costing \$1,000 or more, and larger businesses can claim a 10% deduction for assets costing \$10,000 or more. Turnover needs to be aggregated and includes the turnover of connected and associated entities of the taxpayer.

Note that the entity must be conducting a business and the asset must be acquired “principally” for use in the business in order to claim the tax break. This means that taxpayers who own rental properties and other passive investments are unlikely to qualify.

The method of financing the asset is important in relation to the contract date or “investment commitment time”, particularly as the 31 December 2009 cut-off date is approaching.

To claim the tax break, the business taxpayer must be the “holder” of the asset, which in most cases is the legal owner of the asset. This means that the asset will either need to be purchased outright, or financed under a loan, hire purchase agreement or chattel mortgage. Under a finance lease, the finance company is the “holder” of the asset unless the asset purchased is a luxury car (i.e. costing more than \$57,180 GST exclusive) where the taxpayer is deemed to be the holder of the asset.

On this basis, leasing of assets should be avoided as the taxpayer is not entitled to claim the tax break, unless a luxury car is acquired, in which case the finance method adopted is not relevant.

The maximum deduction that a small business can claim for a car is limited to \$28,590 ($\$57,180 * 50\%$).

Where an asset is financed under a hire purchase agreement, the investment commitment time is the date of signing the finance agreement and not the date of signing the purchase contract. Therefore business taxpayers need to ensure that any assets (particularly cars) are ordered well in advance of 31 December 2009 so that the hire purchase agreement can be signed by this date.

Under a chattel mortgage, the taxpayer borrows all or part of the purchase price and the financier usually takes a charge solely over the asset.

In this situation, the relevant contract or investment commitment time is the date when the taxpayer places an order for the asset with the supplier.

Accordingly this form of financing should be used where an order is placed by 31 December 2009, but delivery of the asset will likely occur after this date.

Novated leasing is a popular method for salary packaging the provision of cars to employees as the employee is liable for the full cost of the car in the event of cessation of employment. However for both luxury and non-luxury cars, the holder of the asset is not the employer. This means that the tax break is lost.

For the employer to be entitled to claim the tax break, the car would need to be financed directly by the employer under a loan, hire purchase agreement, or a chattel mortgage.

Where the employee is an owner of the business, this arrangement would be acceptable, but for external employees, the commercial risk to the employer makes it less attractive.

Subject to the above conditions, where an employer provides cars to family members as a fringe benefit, the car is taken to be used 100% for business purposes (as a cost of remuneration) even though the person may solely or mostly use the car for private purposes. This provides small businesses with an opportunity to purchase multiple “new cars” and claim the 50% tax break on each car resulting in substantial tax savings.

Non-commercial Losses

Currently, an individual who is carrying on a business either as a sole trader or a partner in a partnership can only apply losses arising from the business activity against their other income in an income year if the activity satisfies one of four objective tests. (Note special rules apply to tax payers conducting a primary production or a professional arts business.)

The Bill will amend the non-commercial losses rules to prevent individuals with an adjusted taxable income of \$250,000 or more in an income year from offsetting losses from non-commercial activities against their salary, wages or other income. That is, individuals with an adjusted taxable income above the threshold cannot access the tests. However, an individual can apply to the Commissioner to exercise the discretion not to apply the non-commercial losses rules.

The proposed amendment will apply to the 2009/10 and later income years.

GST Consequences and Partner Taking Goods for Private Use

The Tax Office has also released a GST determination in which it states when a partner takes goods held by the partnership as trading stock for private or domestic use, there is a supply by the partnership to the partner that is related to the partnership's enterprise.

The determination says a taxable supply by the partnership to the partner will arise if all the requirements for a taxable supply are satisfied. That is, the partnership will be required to remit GST on the supply to the Commissioner.



Small Business Benchmarks



The Tax Office has released a range of benchmarks, known as the small business benchmarks to assist business owners in assessing their business performance.

Two types of benchmarks for small businesses have been developed by the Tax Office:

- performance benchmarks, which are based on information small businesses report on income tax returns and business activity statements; and
- input benchmarks, which are based on information industry participants and trade associations provide to the Tax Office.

The benchmarks are grouped into categories based on the business industry codes. These categories include:

- manufacturing;
- construction;
- retail trade;
- accommodation and food services;
- transport, postal and warehousing;
- rental, hiring and real estate services;
- administrative and support services; and
- personal services;

The Tax Office says that where businesses do not report within the ranges of the benchmarks, it may be an indication a business is not recording and paying tax on all of their transactions.

SMSF Non-compliance Notice Upheld

The AAT has affirmed the Commissioner's decision to issue a non-compliance notice to a self-managed superannuation fund (SMSF) because the fund did not satisfy the definition of a 'complying superannuation fund'.

Following an audit, the Commissioner determined that the SMSF was not a complying superannuation fund and issued the notice. This was because all decisions in relation to the management and control of the SMSF were made overseas.

The Tribunal found that the central management and control (CM&C) of the fund was outside of Australia for more than two years. Accordingly, the Tribunal held that the SMSF was not a complying superannuation fund.

A fund must be an 'Australian superannuation fund' in order to be considered a complying superannuation fund and, hence, receive concessional tax treatment.

Three conditions must be satisfied before a fund can be considered an Australian superannuation fund. One of the conditions is that the CM&C of the fund is ordinarily in Australia. If the CM&C of the fund is temporarily outside of Australia for a period of not more than two years, it will be deemed to be in Australia.

In the Tax Office's Compliance Program for 2009/10, it has highlighted that ensuring SMSFs satisfy the definition of an 'Australian superannuation fund' will be one of its focus areas

Mail-out to Super Fund Members

The Tax Office has commenced sending letters directly to individuals who are most at risk of exceeding the superannuation concessional contributions cap. According to the Tax Office the aim of the letters is to prompt the individuals to review the amount of their concessional contributions for the 2009/10 income year.

Clients who have received the letter should contact us to discuss their proposed contributions to avoid triggering any adverse tax consequences.





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Estate Planning is for Everyone

One of the most commonly neglected areas of a person's life is their death. That is to say, preparing an effective estate plan. Just about everybody needs one, not just the rich and famous.

Why? An estate plan can make dealing with your estate easier for those you leave behind and can also be very tax effective. An effective estate plan should do the following:

- Deal with your assets in a timely and tax effective manner;
- Minimise the possibility of challenges or disputes
- Provide the opportunity for beneficiaries to protect the assets that they inherit
- Be easily understood and executed by the executor and beneficiaries

Some of the 'tools' that allow you to develop an effective estate plan include:

Your Will

This is the first thing that most people think of when creating an estate plan. It is a legal document that outlines your wishes for the distribution of your assets, and can also address other issues such as guardianship of children, your funeral and passing on control of trusts. For a Will to be valid it is important for it to be drafted and executed properly.

Superannuation

Not all assets are dealt with by your Will. You can nominate beneficiaries of your superannuation, which would then bypass your Will completely. Superannuation also allows for the payment of death benefits in the form of a pension, which can often be extremely tax effective, especially where either the deceased or the beneficiary are over age 60 at the time of death.

Trusts

Certain trusts can be used to maximise the tax efficiency of your estate. For instance, a testamentary trust can distribute income to your children without the penalty rates of tax normally applied to their unearned income. Trusts can also help to protect assets from creditors and from future estranged partners of your beneficiaries and can be useful to protect capital in the case of a spendthrift or disabled beneficiary. Other types of trust include post mortem trusts, superannuation proceeds trusts and inter vivos trusts.

Life Interest

A life interest allows the use of assets, such as a house, for duration of the life of the beneficiary. Upon the death of the beneficiary of the life interest, the asset may then pass to another beneficiary(ies). An example may be leaving a life interest in a family home to a second spouse, with the asset to pass to the deceased's natural children upon the death of the de facto. There are some potentially complicated tax considerations.

Power of Attorney

There are different types of Power of Attorney that allow a person (the Attorney) to act on behalf of another (the Donor). Enduring Powers of Attorney, in particular, can be useful in the event of the Donor becoming incapacitated.

Knowing what will be effective for your estate plan can be confusing and should be planned carefully. If you require assistance with your estate plan, please contact our financial planning team for a confidential discussion.





When is my business premises not business real property?

There have been instances of some properties being marketed to self managed super fund (SMSF) trustees who wish to purchase a property to be leased by a business run by the members, where the property also contains a residential component. For Example, some properties in East Perth offer mixed use and can be simultaneously used for a business, with office or retail space, and a residence, with a bedsit or flat on the same title.

The danger for a SMSF is the possible breach of the in-house assets rules and the sole purpose test, and the critical factor would be the definition of "business real property".

The in-house assets rules allow for 5% of a fund's assets to be used for the enjoyment of related parties, such as members and their relatives and associates.

The obvious issue that all SMSF trustees would be aware of is that the residence cannot be leased or used by members or their families or associates unless it is less than 5% of the fund's assets.

A less obvious problem may arise for members who wish to use such a property to run their own business. There is a well known exception to the in-house assets rule for business real property. It is quite common for a SMSF to own business premises and the members to run their own business from it. The business premises is not an in house asset if it meets the definition of a business real property, which states that it must be "used wholly and exclusively in one or more businesses".

The issue here is that a mixed use property may not be wholly and exclusively used in a business (as it has a residence attached), and therefore the use of the premises by a related party (the members' business) causes it to be an in-house asset. If the property is valued at less than 5% of the fund's assets, all is well. However it is unlikely that such a property would be less than 5% - if the property was worth, say, \$400,000, the total value of the fund's assets would have to be at least \$8 million.

SMSF trustees should be careful about their choice of property, and a chat with your professional adviser can prevent potential problems.

Christmas Break



**On Thursday 24 December 2009
Our office will be closing at 12.00 noon.**



**We will be returning from our Christmas
Break on Monday 4 January 2010**

We thank you for your support of our Business over the past twelve months.

**We take this opportunity to wish you
and your families a safe and Happy Christmas.**

**Best wishes from
Garry, Russell, David, Greg
Lynda, Ken, Lily, Lisa, Zhong, Alex, Louise, Laura and Natalie.**

See you in 2010!