

CHRISTMAS 2009 TAX UPDATE

FRINGE BENEFITS TAX AND CHRISTMAS PARTIES

With Christmas approaching, we thought that it would be a good opportunity to remind you of the possible FBT implications to employers of providing Christmas parties to their employees or associates.

The general rules are as follows:

- costs (such as food and drink) associated with Christmas parties are exempt from FBT if they are provided on a working day on your business premises and consumed by current employees;
- if the party is not held on a working day, or on your business premises (e.g. a restaurant), then the party will be subject to FBT. Please note that these costs may be exempt under the minor benefits exemption (discussed below);
- where an associate of an employee attends the Christmas party any costs incurred in respect of the associate are taxable fringe benefits (whether the party is held on your business premises or not). Please note that these costs may be FBT exempt under the minor benefits exemption (discussed below);
- a Christmas party may be a minor benefit and FBT exempt if the cost of the party is less than \$300 (including GST) per head and certain conditions are met. The cost per employee includes the cost of any of their associates attending the party;
- all benefits provided with the Christmas party should be grouped to determine whether the total value meets or exceeds the \$300 threshold. For example, the cost of hampers or other gifts given at the party would need to be included in the total cost of the party; and
- employers can only claim a tax deduction and obtain a GST input tax credit for providing the Christmas party to the extent that it is subject to Fringe Benefits Tax (FBT). A tax deduction and a GST input tax credit are not available where FBT is not payable (e.g. the benefits are FBT exempt).

TREATMENT OF DISCOUNTS, REBATES AND OTHER TRADE INCENTIVES OFFERED BY SELLERS TO BUYERS

The Tax Office has released a ruling that clarifies the tax treatment for buyers and sellers of trading stock where a seller provides trade incentives to a buyer. Examples of trade incentives include upfront volume rebates, promotional incentives and bundled incentives.

If a trade incentive relates directly to the purchase of trading stock:

- a buyer will reduce the cost of acquiring the trading stock; and
- a seller will reduce the proceeds from the sale of the trading stock.

Conversely, where a trade incentive does not relate directly to the trading stock, or depends on satisfying a condition, a buyer and seller do not need to reduce the cost of acquisition and the sale proceeds. Instead the trade incentives will be treated as income of the buyer and a deductible expense to the seller in the year the incentive is paid.

As a general rule, trade incentives that accrue to the buyer at the time of purchase will be regarded as being directly related to the trading stock. Alternatively, if the buyer is required to provide a service or make an early payment to gain a settlement discount, the incentive is not regarded as being directly related to the trading stock.

The ATO considers the following factors to be relevant as to whether a trade incentive directly relates to trading stock:

- The terms of trading between the parties;
- Sales documentation, such as invoices, incentive claim forms and credit notes;
- An objective assessment of intention of the parties;
- Any other relevant circumstances surrounding the trade incentive.

UPDATE: UNPAID DISTRIBUTIONS TO COMPANIES

In our September 2009 update ('ATO Targets Trusts...') we advised that the ATO was reviewing their treatment of unpaid present entitlements to corporate beneficiaries for the purposes of Division 7A of the Income Tax Assessment Act 1936. Broadly, Division 7A deems loans made by a company to shareholders or associates to be unfranked dividends for taxation purposes.

On 16 December 2009, the ATO released a draft taxation ruling (TR 2009/D8) in which they have outlined their draft stance on this issue. Broadly, they will treat any distributions made to corporate beneficiaries from 16 December 2009, which are not paid, as loans for the purposes of Division 7A.

Please note that this is only a draft taxation ruling, for which comment is currently being sought by the ATO.

We will continue to be involved in the consultation process on this issue through our industry bodies in relation to the proposed change, and will keep you informed throughout the process.

AMENDMENTS TO TAX LAWS

The Government has recently passed a Bill to amend the following:

- make changes to the taxation of employee share schemes; and
- tighten the application of the non-commercial losses rules.

The bill now awaits royal assent. The important changes in the bills are:

Employee share schemes

Under the amendments, any discount to the market value of an employee share scheme (ESS) interest will be taxed upfront. A \$1,000 tax exemption will be available if an employee and the scheme satisfy the following conditions:

- the employee has an adjusted taxable income of \$180,000 or less;
- the employee is employed by the company (or its subsidiary);
- the scheme is offered to at least 75% of Australian resident permanent employees with three or more years service (a non-discriminatory scheme);
- the ESS interests provided must not be at real risk of forfeiture;
- the ESS interests offered under the scheme must relate to ordinary shares;
- the shares or rights must be held by the employee for three years; and
- the employee must not receive more than 5% ownership or control more than 5% voting rights in the company.

An employee can only defer the tax payable on share discounts if the scheme is non-discriminatory, and:

- the ESS interests relate to ordinary shares and are subject to a real risk of forfeiture; or
- the ESS interests are acquired under a salary sacrifice arrangement, and the employee receives no more than \$5,000 worth of shares in an income year.

Employers will be able to deduct an amount for shares or rights they provide to employees under an ESS if the scheme meets the conditions for employees to receive the upfront concession. The income test of \$180,000 is disregarded.

The amendments will apply to ESS interests acquired on and after 1 July 2009.

Non-commercial losses

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

The Bill amends 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 are not eligible to apply the tests. However, an individual can apply to the Commissioner to exercise his discretion not to apply the non-commercial losses rules where, based on an objective expectation, the business activity will produce assessable income greater than available deductions within a commercially viable period relevant to the industry concerned.

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

COLLAPSED MANAGED INVESTMENT SCHEMES AND TAX CONSEQUENCES FOR INVESTORS

The Tax Office has released four draft taxation determinations which set out the Commissioner's preliminary views on the tax consequences for investors with interests in collapsed managed investment schemes (MISs).

Broadly, the tax consequences are:

- a failure to plant trees intended to be established under a forestry MIS does not affect the timing of deductions for expenditure on seasonally dependent agronomic activities (eg tending seedlings prior to planting) where the requirements of the general deduction provisions and the prepayment rules relating to expenditure have previously been satisfied;
- a failure to plant all trees intended to be established under a forestry MIS means that an amount cannot be deducted under the forestry MIS provisions;
- a deduction is not allowed under the forestry MIS provisions where a CGT event happens in relation to a participant's interest in a forestry scheme within four years after the end of the income year in which the participant first pays an amount under the scheme; and
- a deduction will not remain allowable under the general deduction provisions where a CGT event happens in relation to a participant's interest in a forestry scheme within four years after the end of the income year in which the taxpayer first incurred expenditure under the agreement.
- The Government has announced that the tax laws will be amended to ensure the four-year holding period rule for forestry MISs cannot be failed for reasons genuinely outside investors' control.

From all the principals and staff at MGI Melbourne, we wish you and your families a Merry Festive Season and a safe, happy and prosperous New Year.

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