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## Employee superannuation charged twice

Previous editions of this Business Tax News, most recently the March and April editions, have discussed the hidden costs in relation to employment taxes. One of the main employment “taxes” is superannuation, notably the superannuation guarantee charge that is payable if employee contributions are paid late. Two recent decisions highlight the costs that can arise in respect of an employee’s superannuation. In the first case, *Victorian Patient Transport Pty Ltd and Commissioner of Taxation* [2007] AATA 1239, an employee was hit with the superannuation guarantee charge on late superannuation contributions.

The second case, *Commonwealth of Australia v Cornwell* [2007] HCA 16, was slightly more interesting. In that case the employer, the Commonwealth Department of Interior, had employed a spray-painter in the transport section, initially as a “temporary employee”. The position later became permanent. The Department had advised the man that he could not make contributions to the Commonwealth Superannuation Fund while he was a temporary employee, which was incorrect. The man has now sued the Department (that is, the Commonwealth of Australia) in relation to his retirement benefit being worth less than it would have been, had he not relied upon the negligent advice.

A great deal of the case discussed the *Limitation Act* 1985, and whether this claim had been made in time. It was held that the claim had been made in time, that there was a negligent misstatement, which the man

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relied upon, and that he suffered damage from that. The Department was liable for these damages.

**BDO comment:** The provisions relating to the superannuation guarantee charge are very harsh. The charge is levied when superannuation contributions are paid late, that is, even where the contributions have been ultimately paid. There is no discretion for the Commissioner to remit the charge. Therefore, the charge can be a second cost to the employer, over and above the original (albeit late) contribution. A triple cost is that the charge is not deductible. Employers should take care that all superannuation contributions are paid on time.

The case of *Cornwell* adds another dimension to employee superannuation. Not only is an employer liable for superannuation (and/or the superannuation guarantee charge for any late contributions), but the employer could be liable in respect of any untrue statement made in respect of the superannuation. Employers should ensure that employees are fully informed of their rights in relation to superannuation.

## LAFHA upheld

A recent case demonstrates the complications that can arise in labour hire situations. In the case, *AAT Case [2007] AATA 1185*, the taxpayer was a labour hire company that supplied workers to work on offshore oil rigs. It paid the wages and an allowance to the employees. The allowance was described as a living away from home allowance (LAFHA). Even though the labourers worked for the client of the labour hire company, the Administrative Appeals Tribunal had no trouble in finding that the labour hire company was the actual employer, as it was both required to pay the wages and LAFHA and actually did make the payments.

**BDO comment:** A LAFHA is provided as compensation to an employee who is required to live away from his or her usual place of residence. It is specifically excluded from the definition of wages and salaries and, consequently, is technically a fringe benefit. However, no fringe benefits tax (FBT) is payable if the allowance fulfils the requirements of a specific exemption within the FBT law. It is a useful exemption/concession and any reader that employs a worker that may be required to live away from their usual home (usually, but not always, expatriates or interstate workers), should consider including a LAFHA into the worker's salary package.



## Will the Part IVA assault ever end?

The February and April editions of this Business Tax News listed a number of cases that involved wins by the Commissioner on the use of Part IVA, which contains the general anti-avoidance rules. In the last month, the Commissioner successfully applied Part IVA to two more schemes. In the first case, *Forward and Commissioner of Taxation [2007] AATA 1201*, Part IVA was applied to strike down a scheme relating to the cultivation of agricultural land. As with many schemes of this nature, the scheme involved large up-front charges financed by non-recourse loans, where the clear intention would be to claim these deductions before any income was earned.

In the second case, *Kho and Commissioner of Taxation [2007] AATA 1232*, Part IVA was used to strike down a tea-tree oil project. There have been several cases where tea-tree oil projects have been struck down, so this case was no surprise.

**BDO comment:** As readers would be aware, Part IVA allows the Commissioner to strike down and restructure a scheme where the sole or dominant purpose of the scheme was to avoid income tax. In the last three years, the Commissioner has been successfully applying Part IVA, with the more recent cases involving attacks on tax minimisation schemes. Readers should beware of entering into such schemes, as they are unlikely to have the tax advantages that they claim.

## BDO Kendalls national tax seminars

BDO Kendalls conducts a series of bi-monthly seminars around the country, focusing on issues topical within the tax world. July's seminar is titled "Taxation of financial arrangements – How the rules affect you". The seminars will be held in the third and fourth weeks of July. If you would like to attend or would like more information about upcoming seminars in the series, please contact your local BDO Kendalls office.

## Stamp duty still causes headaches

There were a large number of stamp duty cases in April, all of which show that this area of the law can still be a major cost to businesses. In the first case, *Lewis v Chief Commissioner of State Revenue* [2007] NSWADT 89, the “apparent purchaser” concession was denied. The “apparent purchaser” concession applies when a person (the “apparent purchaser”) buys or holds property for another (usually unnamed) person, who also supplies the funds. The property is first transferred to the apparent purchaser who then transfers it to the actual purchaser. In the current case, the transfer was made by a son and daughter-in-law to father and mother. However, the mother was not a “real” purchaser as defined for the purposes of that exemption. Therefore, full duty applied on the transfer from the “apparent purchaser” to the “real purchaser”. The case was complicated as the father had been the original transferor.

The second case, *Tourism Holdings Australia Pty Ltd v Commissioner of Taxes* [2007] NTSC 22, concerned “apportionment of goodwill” to the Northern Territory. When purchasing business goodwill within Australia, it is necessary to “apportion” it to different States and Territories, and pay duty in each jurisdiction. The apportionment is made in respect of sales made in each jurisdiction (usually over the last three years). This can lead to complicated processes, where a simple purchase of a business that operates in only one place can lead to a stamp duty liability in every State and Territory of Australia. In the current case, which deals with the acquisition of a car hire company, the arguments concerned apportionment of the goodwill and the way to deal with customers that

had “pre-booked” cars outside of the Territory. The Commissioner’s apportionment, which included such customers in the Northern Territory business, was upheld.

The third case, *Pryke v Commissioner of State Revenue* [2007] QCA 121, was an appeal from *Pryke v Commissioner of State Revenue* [2006] QSC 226, which was discussed in the September 2006 edition of the BDO Corporate Tax News. In that case, the Commissioner sought to charge duty on a transfer made to correct an error on a previous conveyance. Both the Queensland Supreme Court and the Court of Appeal disagreed with the Commissioner.

In the case of *Hoar v Commissioner of State Revenue* [2007] WASAT 83, the Western Australian State Administrative Tribunal upheld a penalty charged on a taxpayer for late lodgment of a contract for stamping. The taxpayer had purchased a property off the plan and had not lodged the contract until requested by the Commissioner. The case of *Pacific National v Chief Commissioner of State Revenue* [2007] NSWSC 332 held that the purchase of a “rail access agreement” was not a lease and, therefore, was not subject to stamp duty.

**BDO comment:** The stamp duty law is very technical and legalistic, and it is unnecessary for most readers to be on top of all the nuances that come out of the cases discussed above. The relevance of all these cases is to demonstrate the dangers arising in respect of stamp duty. Even though many State and Territory Governments have made widely publicised announcements that they will reduce and eliminate some stamp duties, it should be kept in mind that not all stamp duties will be eliminated (some, such as property transfers and land-rich entity duty, will still apply indefinitely), not all jurisdictions are abolishing stamp duties, and the removal of the stamp duties is a phased process that will not be completed for a number of years.

## Appeals update

The April edition of this Business Tax News discussed the case of *Price Street Professional Centre Pty Ltd v Commissioner of Taxation* [2007] FCA 345. In that case, the Federal Court held that a loss on the sale of land was capital in nature. The taxpayer has appealed to the Full Federal Court.

The March edition of this Business Tax News discussed the case of *Guest v Commissioner of*

*Taxation* [2007] FCA 193. In that case, the taxpayer was entitled to a deduction for interest in relation to an agricultural venture, notwithstanding that the venture had ceased ten years previously. The loan was still the same, although the taxpayer had failed to repay the loan on the due date or accepted any offer to settle the debt. The Commissioner has appealed to the Full Federal Court.

## Super trustees escape liability

In two recent cases, superannuation trustees have successfully avoided claims made by members of their superannuation funds. In the first case, *Mohandoss v AMP Superannuation Limited* [2007] FCA 497, the superannuation trustee had transferred the member's account to a non-regulated fund, at the member's request. After the funds were subsequently embezzled, the member had complained to the Superannuation Complaints Tribunal in relation to the original transfer, who found for the transferor fund. The Federal Court refused to overturn the Tribunal decision, stating that the Tribunal had taken into account all relevant facts, including that the transfer to the non-regulated fund was in breach of the superannuation industry supervision (SIS) regulations.

In the second case, *Perpetual Trustees Australia Ltd v Wallace* [2007] FCA 527, the Tribunal had initially found against the superannuation trustee but that decision was dismissed by the Federal Court. The member had suffered investment losses after the superannuation trustee had breached "investment strategy covenants" that are within the SIS legislation. The trustee refused to compensate the member when requested. The trustee won this case on a technicality, as the case was against the trustee (not the actual fund), and



the Tribunal did not have jurisdiction to review the relevant decision by the trustee.

**BDO comment:** While both cases are technical in their arguments and decisions, they do have two salient points. For superannuation trustees, they illustrate that members will attempt to hold them liable for any loss to their superannuation and will readily complain to the Tribunal if they feel that they should be compensated. This can lead to large costs (monetary, time and reputational), whether or not the cases are won. For superannuation members, they show how insecure their funds can be and how difficult it can be to claim compensation from trustees. Trustees and members should both keep on top of the affairs of the superannuation funds.

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