

M & M

Report

Editorial



by John Mullins

Not surprisingly in this newsletter we focus much of our commentary on the GST, the Ralph Report and recent

happenings in the business world.

What business hates is uncertainty. Where there is uncertainty as to interest rate movement, uncertainty as to an election, uncertainty as to changes in taxation, then traditionally business slows. At the present time there is enormous uncertainty in the market brought about by not just the GST but also the Ralph Report and the change in timing of tax payments which will mean that the people who pay provisional tax, from a cash flow perspective will pay significantly more tax over the next twelve months. We are constantly being told that the underpinning characteristics of the economy are extremely strong. Where this is the case once the uncertainty has been removed the economy quickly returns to its previous position.

GST and tax reform are certainly a worry to everyone because no one can predict with confidence what the economy will look like in six to twelve months after the introduction of the GST. Our view is that once we become accustomed to the new tax it should be business as usual.

The business sector is extremely resourceful and resilient. The business sector is used to changes in the law and taxation. The challenge for business is to adapt quickly to these changes, so as to continue to focus on business and not be distracted by management issues.

Elsewhere in this edition you will find articles on two very topical areas - the Internet and gaming.

Directors' Liability for Unpaid Group Tax



by Paul Lutvey

Many people have heard the expression "hiding behind the corporate veil". This expression is used where individuals avoid a

liability by correctly proving that the liability is properly that of a company and not a personal liability.

A company is a separate legal entity to the individuals that may own or run the company. There are circumstances where directors can be liable for the company's debts or can become liable by way of penalty equivalent to the company's debt. This can occur in relation to unpaid group tax.

Previously in a liquidation scenario the Tax Office had priority over certain other creditors for outstanding group tax. As a result of amendments to legislation the Tax Office lost this priority, however it gained the power of creating a personal liability by way of a penalty for directors for outstanding group tax.

This personal liability of directors by way of penalty arises where the Commissioner of Taxation issues a notice under section 222AOE of the *Income Tax Assessment Act* to the directors at a time when the company has failed to remit group tax.

Such a notice renders the recipient of the notice, as a director of the company, liable to pay to the Commissioner of Taxation, by way of penalty, an amount equal to the unpaid amount of the liability of the company in respect of deductions made by the company for group tax pursuant to the *Income Tax Assessment Act*.

The notice further provides that the penalty in respect of the unpaid amount will be remitted if, at the end of 14 days after the notice issued, one of four events occur. These events are:

- The company's liability in respect of that unpaid amount is discharged;
- An agreement relating to that unpaid amount is entered into pursuant to section 222ALA of the *Income Tax Assessment Act*;
- The company is under an administration within the meaning of the *Corporations Law*; or
- The company is being wound up.

The courts have determined that this last event must in fact be a winding up and a liquidator appointed. The mere fact that an application to wind up the company has been filed, or is pending, is not sufficient to satisfy this event.

If an agreement is entered into pursuant to section 222ALA there is a mandatory statutory duty imposed on the directors of the company to ensure from time to time that the company complies with the agreement.

If the company contravenes the agreement, each person who was a director of the company, at any time during the period, beginning on the day when the agreement was made and ending on the day of the contravention, is liable to pay to the Commissioner of Taxation, by way of penalty, the amount equal to the balance payable under the agreement.

There is also a statutory defence available to directors in this situation where the directors must prove that they took all reasonable steps to ensure that the company complied with the agreement or there were no such steps the director could have taken.

These are important statutory provisions whereby directors of a company will, in the course of conducting the business of a company, incur a personal liability on their own behalf.



Employers and Workers take Note: Telstra Dismisses over Internet Pornography



by Samantha Kane

Telstra's recent dismissal of 27 employees (with warnings issued to a further 35 employees) in relation to downloading internet

pornography serves as a warning to all workers using the internet or email in the workplace for personal use.

Telstra says routine maintenance of its systems revealed serious breaches of its code of conduct regarding downloading offensive material from the internet and that its code of conduct makes it clear material that might offend or harass others would not be tolerated.

Supervision of the use of email and internet by workers has become an important issue for many employers and employees alike. Employers have a duty to ensure that anti-discrimination and sexual harassment laws are complied with, and a right to expect that the organisation's resources, including employee's time, are not wasted.

Whilst employees also have a right not to be harassed or discriminated against, it is the issue of employee privacy that is of paramount concern to many. The Privacy Amendment (Privacy Sector) Bill currently before Parliament will apply to staff emails that contain personal information other than "employee records" in certain circumstances. Staff must be fully aware of the circumstances in which an employer can access staff email and browsing logs.

The Federal Privacy Commissioner has recently launched guidelines on workplace email, web browsing and privacy, which stresses the need for staff to understand the organisation's position through the development of clear policies.

Whilst workplaces may vary in their position on employee use of email and the internet, it is essential in the modern business world to develop and implement clear workplace policies on the issue of email and internet abuse, to ensure that all employees are aware of that policy, and to implement it consistently. In the event that an employee is dismissed for abuse or inappropriate use of these resources, it is essential for employers to demonstrate that its policy was made clear to all employees and that employees were warned of potential consequences for breach of the policy.

For further information on this issue, keep a look out for our soon to be released Employment Law Newsletter, "M&M at Work".

Trusts after the



by Michael Klatt

In late 1999 the Treasurer indicated that the Government would accept the majority of the recommendations of the Ralph Committee in relation to Business Tax Reform. A Bill is expected to be introduced to Federal Parliament shortly however, until legislation is passed, there will be some uncertainty as to its provisions.

Trusts and particularly Family Discretionary Trusts have commonly been used to stream income allowing for certain classes of income to be paid to different beneficiaries at the discretion of the trustee to maximise tax benefits. Trusts have also been used as an asset protection measure. The reforms attempt to restrict the ability of individuals to reduce tax by diverting the income they earn from their personal services to a trust.

Entity Taxation

Under current laws the beneficiary of a trust is taxed on income to which they are presently entitled. The Ralph reforms introduce Entity Taxation under which the trust will be taxed in a similar way to the taxation of companies. Trusts will be taxed at company tax rates. This system will commence on 1 July 2001 at which time the appropriate tax rate will be 30%. Income

will be taxed upon the trust whether or not there is a distribution to a beneficiary.

Franking Credits

Once a beneficiary receives a distribution of trust income, the gross income, ie the actual amount plus any tax paid by the trust, is included in the beneficiary's tax return for that current year as income. That gross income is added to any other income earned by the beneficiary and then the beneficiary's marginal tax rates are applied to the beneficiary's taxable income to calculate the tax payable. A franking rebate of the amount paid by the trust on the gross income distributed to that beneficiary is deducted

Confused how GST



by Anthony O'Dwyer

The threshold question for owners of commercial properties is that of registration. Entities carrying on an enterprise with an annual turnover of \$50,000.00 or more must register for an Australian Business Number. Entities with a smaller turnover may also register, however it is not compulsory. Registered entities are required to report to the Australian Taxation Office by way of a Business Activity Statement. For those of you fortunate enough to have an annual turnover of \$20 million or more, the Business Activity Statement must be lodged monthly. Others have the choice of quarterly or monthly reporting.

GST will apply to all sales of commercial properties on or after 1 July 2000 by a registered business unless the going concern exemption applies. The rules relating to sales of commercial properties are relatively straight forward, particularly when compared with those related to leasing of commercial properties including short term arrangements such as for hotels, motels, guest houses, B&B's and the like.

The timing of the sale of the commercial property is critical. For GST purposes, the question is when was the property made available to the buyer. The current thinking is

that the time the property is made available to the buyer will be upon settlement of the sale. However, allowing a buyer into early possession of the property before settlement will complicate the transaction for GST purposes and it remains to be seen whether this will bring forward the liability to account for the GST. The cashflow difficulties associated with bringing forward a GST liability could be enormous, particularly in a large transaction with a lengthy settlement period. These transactions are not unusual and generally involve the purchaser of the property doing what is necessary to get a development approval from a local council for the proposed development on the property.

A seller will be able to claim input tax credits on the sale for things such as GST on the agent's commission, advertising costs and legal fees. The input tax credits can be offset against the GST to be accounted for on the sale. Buyers registered for the GST can also claim any amount paid by them on account of GST on the purchase as an input credit, for instance when those buyers sell their property. This is subject to one important exception related to the margin scheme.

Generally, the amount of GST payable is 10% of the value of the supply, or one eleventh of the price of the supply. However, sellers of commercial properties may take advantage of the margin scheme to reduce



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contributed capital will not be taxable however, any increase in the value of capital contributed will be taxable. Non-commercial loans (eg. Interest free or very low interest rate, no terms of repayment etc.) made by the trust to a beneficiary will be deemed a distribution to that beneficiary unless the loan is repaid within the income year. Non-commercial loans made by persons associated with the trust from 22 February 1999 will be deemed to be contributed capital from 1 July 2001. This may cause difficulties in recovering the loan without causing taxation implications as a result of the Profits First Rule unless the loan is repaid before 1 July 2001.

Excluded Trusts

There are a number of trusts excluded from the entity tax system including:-

- Trusts created or settled only as a legal requirement such as trusts created by Court Order.
- Trusts where property is held for absolutely entitled beneficiaries to particular assets from the establishment of the trust;
- Constructive trusts;
- Bank accounts for minors;
- Purchaser trusts;
- Trusts established for persons who have a legal disability;
- Stakeholder arrangements;

from the tax payable. In this way, if the beneficiary is a low income earner, the beneficiary may receive a refund of taxation.

The Profits First Rule

One of the advantages in most trusts is the discretion of the trustee to determine the source of the funds used for distributions, ie profits or capital. After the reforms, profits must be distributed before capital. For example if the profit available for distribution was \$50,000 and an amount of \$100,000 (inclusive of taxation) was distributed the profit of \$50,000 would be deemed distributed first and then the remaining \$50,000 would be a distribution of capital. A distribution of

- Complying Superannuation Funds;
- Deceased estates (other than testamentary trusts) administered within two years from the date of death (or such longer period determined by the commissioner of taxation).

Testamentary trusts will be excluded if they are fixed trusts. Discretionary trusts would not be excluded. However, it appears that transfers of assets from a testamentary trust to a relative of the deceased at any time will be treated as if they were transfers by legal personal representative in the administration of a deceased estate and therefore excluded. Transfers to other persons from a testamentary trust provided they occur within two years will be treated the same.

Are Trusts Still Useful and Should Trust Deeds Be Reviewed

Trusts will still prove a useful asset protection tool to those at risk and in estate planning. They will also still in some cases provide tax benefits. It will be necessary to assess the needs of the individual in advising whether it is an appropriate structure.

Some trust deeds may require amendment. For instance, most trust deeds have default provisions by which income is deemed to be distributed to beneficiaries in the case that the trustee does not exercise its discretion. This may not be suitable to the needs of the trust post 1 July 2001. The trust deed should also be reviewed to determine whether there is power in the trust deed to accumulate profits once legislation is passed.

affects property?

their liability to the GST. The margin scheme also applies to other dealings such as long term leasing arrangements.

The margin scheme allows for the GST to be calculated on the margin between the sale price including GST less the original purchase price or, if the property was held as at 1 July 2000, the value of the property at that time. This represents somewhat of a boom for registered valuers who will no doubt be called upon to provide many valuations for commercial properties as at 1 July 2000 lest the owners run the risk of missing out on the advantages of the margin scheme. The margin scheme may only be used if, other than for properties held at 1 July 2000, the margin scheme was used on the purchase of the property or the property was acquired other than through a taxable supply. In this way GST is payable only on the increase in the value of the property. The purchaser cannot claim input tax credits when the margin scheme is used. Ultimately, the margin scheme will result in a tax neutral position for the Government coffers when compared with ordinary GST liability (assuming we operate in a perfect world).

The choice between the margin scheme and paying GST on the full supply is an important one for both parties to the



transaction and will lead to some confusion whilst the commercial world comes to grips with the different outcomes.

Auctions of commercial properties where the margin scheme is available to the seller will provide particular problems. It is envisaged that an auctioneer will declare at the outset of an auction whether the bids are to be taken to include GST or to be GST excluded. An auctioneer, whilst not being obliged to do so, may also wish to disclose whether the seller opts to take advantage of the margin scheme. This would have significance particularly for those persons who are not registered for GST purposes and could not claim input tax credits. The difficulty for all parties however is that the extent of the margin will be an unknown factor whereas a party may easily calculate 10% of the bid, if the bid is GST exclusive, or one eleventh of the bid, if the bid is GST inclusive. It would be extremely unusual that the auctioneer disclose the starting point for the calculation of GST under the margin scheme as this would disclose the purchase price paid by the seller of the property, (although a bidder could search this prior to auction), or the value of the property as at 1 July 2000. The latter is of more immediate importance as we move into the transitional phase with the GST. A bidder going into an auction whether or not the margin scheme is to be applied, and particularly when disclosure is not made, must exercise some caution to ensure that it is not exposed to an increase in the value of land by inadvertently allowing too much for the GST liability on the sale.

Gaming Update



by Matthew Stapleton

In our December issue of M & M News we advised you of the findings of the Queensland Government Gaming Review. As a result

of these findings and the subsequent public consultation, the Government released in April "Policy Direction for Gambling in Queensland".

The Policy Direction reflects the findings of the review and the Government's commitment to cap the recent rapid growth of gaming in Queensland. The policy focuses mainly on three (3) areas:

- Machine numbers;
- Licensing; and
- Responsible Gambling Strategy.

One of the key changes relates to the application for gaming machine licences. The major factor in considering all licences will now be public consultation.

The Queensland Gaming Commission (QGC) will call for and consider public comment on applications for all new gaming machine sites and will require all applicants to submit a Community Impact Statement. Members of the public will have the right to object to applications in a similar manner to the present right to object to a liquor licence. This will also occur for certain applications to increase machine numbers.

The QGC will also consider the location of the gaming site in respect to schools, child care facilities, shopping centres and other venues of community congregation.

The biggest impact of the Policy Direction will be upon the newer style licensed premises which have been established in venues such as shopping centres. The Policy Direction specifically states that gaming machines will not be permitted in "convenient gambling" venues. This includes other venues such as small bar & grills, restaurants or bowling alleys.

It is the aim of the Policy Direction that gaming machines will generally be restricted to traditional clubs and hotel type premises. For those interested in viewing a full copy of the Policy Direction it is available from www.qogr.qld.gov.au



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Postscript: The information contained herein whilst accurate is of a general nature. If you have any queries in relation to the information contained herein we ask that you consult the partners or solicitors of Mullins & Mullins with whom you usually deal. If you have any comments regarding our newsletter we would like to hear from you.

Price Exploitation and the GST



by Michelle Hurst

The introduction of the GST under the New Tax System and the abolition of a number of indirect taxes will greatly affect the prices

that businesses should charge for goods and services. In order that consumers benefit fully from reductions in indirect taxation, the Federal Government has introduced Part VB of the Trade Practices Act 1974 ("the Act") under which the Australian Competition and Consumer Commission ("ACCC") will prosecute acts of price exploitation during a transitory period of price oversight which commenced in July 1999 and extends to July 2002.

Price Exploitation

Section 75AU of the Act provides that a corporation engages in price exploitation if the price it sets for a supply is unreasonably high having regard to the new tax system changes and having factored in cost, supply and demand conditions and any other relevant matters.

Prices must not increase by more than the amount of any tax rise due to the imposition of GST and must fall by at least the amount of any tax fall. To this end, the ACCC will compare margins prevailing immediately before the imposition of GST, with those prevailing after, to ensure that net dollar margins should not increase as a result of the tax changes alone. Price adjustments must occur as soon as businesses receive the benefit of tax-change related indirect cost savings.

Misleading and Deceptive Conduct

It is also open for the ACCC to prosecute under the Act for misleading or deceptive conduct in regard to representations made to consumers about the impact of tax changes on prices or the existence of tax related obligations.

Representations that may be misleading or deceptive include:

- Claiming or implying that a consumer is required to pay an amount for GST before 1 July 2000;
- Claiming that a business is required to increase its price or that the increase in price is because of an obligation on the business to collect a tax;

- Encouraging consumers to make buying decisions now to "beat the GST" where prices may decrease as a result of the imposition of the GST; and
- Raising prices due to an anticipated effect of tax changes where such anticipation is not reasonable.

The ACCC will monitor price displays to ensure that prices, when displayed on or after 1 July 2000, are GST-inclusive. That is, the GST component of the selling price is not to be added after the sale, for example, at the cash register.

Enforcement

The enforcement framework empowers the ACCC to issue notices in connection with price exploitation. Corporations found to be engaging in price exploitation may face penalties of up to \$10 million per offence, while individuals face penalties of up to \$500,000 per offence.

Generally businesses will be provided with the opportunity to justify that a price charged for a particular good or service is not a contravention of the law before breach notices are issued.

Risk Management

There are several practices that businesses can adopt to address the risk of prosecution under the Act. These include:-

- keeping accurate records of the basis upon which pricing decisions are made during the transition period and how these decisions were impacted by the imposition of the GST;
- implementing effective price and input monitoring systems to facilitate accurate cost analyses;
- restructuring compliance systems to ensure that the public's complaints about GST are readily addressed;
- examining pricing displays, sales pitches and staff training procedures to reduce the risk of misleading and deceptive representations and pricing.

Advice on pricing and GST compliance is readily available to businesses in the market place. By adopting appropriate practices and procedures businesses can do much to reduce the risk of ACCC prosecution for price exploitation and misleading and deceptive

