
Allworths

VIEWPOINT



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Superannuation funds and borrowing

With an amendment to the *Superannuation Industry (Supervision) Act 1993* (Cwlth), superannuation funds are now able to borrow money. The rules regarding the circumstances of borrowing are specific and are an instalment warrant.

This means the fund has the right (but not an obligation) to acquire the legal ownership of the asset through the payment of instalments. The borrowing must be of limited recourse – the loan can only be secured against the asset being purchased.

Given this amendment SMSFs are able to borrow money to buy a property if the purchase is structured correctly. There are no restrictions on who the lender may be which means that you may loan the superannuation fund the money directly.

Gearing in superannuation funds is a complex area and you should call one of our Partners to discuss your particular options.

Personal services income

A recent case involving Personal Services Income (*Taneja and Commissioner of Taxation [2009]*) highlights the importance of ensuring that you comply with the personal services income legislation. In this case the focus was on the 'results test'.

If, in a given income year, 75 per cent or more of your personal services income meets all three of the following conditions, you pass the results test for that year.

Under the terms of your contract or agreement:-

- Is the income paid to achieve a specified result or outcome?
- Do you have to provide any necessary tools or equipment to do the work?, and
- Are you liable for rectifying defects in the work?

In this case, the taxpayer was paid an hourly rate for consulting services and provided their own plant and equipment. They argued that the results test was passed because the entity was liable for rectifying defects in the work.

The Administrative Appeals tribunal held that, based on the facts, there was nothing to suggest that the taxpayer was being paid to produce a result and therefore the case failed the results test.

Further matters were raised regarding the protection provided by Public Rulings as issued by the Australian Taxation Office and the ability to rely on those to argue your case. Fundamental to obtaining protection from Public Rulings is the concept of 'reasonable care'.

If you have failed to reach the right conclusion it is important you have taken reasonable care in arriving at your conclusion. The ATO can impose a 25 per cent Administrative Penalty on the basis that the taxpayer or tax agent failed to take reasonable care.

In this case, the taxpayer was not required to pay the 25 per cent penalty because he had consulted a tax agent for advice and had been given incorrect advice. The Tribunal found that a failure to understand fully the effect of the law was not a failure to take reasonable care.

If you are concerned about whether you may be affected by the Personal Services Income Legislation, please contact us.

Declare your offshore income

On 13 November, two men from Sydney were sentenced to 18 months jail for charges arising from the Operation Wickenby tax evasion investigation.

The men pleaded guilty to eight charges for their part in a Vanuatu-based money-laundering scheme. In handing down her sentence, the judge said that but for the plea and past and future assistance, the sentence would have been imprisonment for three years.

The scheme involved:-

- Round-robins
- False invoices
- Sham loans
- International bank accounts
- Entities operating in New Zealand and Vanuatu.

The Australian Taxation Office (ATO) has an offshore voluntary disclosure initiative that is available until 30 June 2010. It offers reduced penalties for taxpayers who have unreported income from offshore activities and want to come forward to set things right.

In the example above, the unreported offshore income was found to be an intentionally fraudulent act, however in most cases the unreported offshore income may have arisen due to a change in country of residence, or the taxpayer being unsure of how to deal with offshore funds or bank accounts.

The tax office initiative described as the 'offshore voluntary disclosure initiative' provides an important opportunity for taxpayers who have unreported offshore income.

Be patient - ATO installing new computer system

Over the Australia Day long weekend the ATO converted to a new tax processing system. This has resulted in delays in processing activity statements and income tax returns.

The ATO are planning to have cleared the backlog by the end of February. However, the result may be that your PAYG instalment rate may be based on the prior year's income tax return.

If this is the case and you feel you would be paying too much or too little contact your Chartered Accountant and they can assist in varying your instalment amount. If you are waiting for your refund please be patient as we have no control over when it will be processed.

Enforcement of judgement debts

When all alternative avenues for collecting long outstanding debts have failed, organisations will need to decide whether it is commercially viable to take legal recourse against a debtor to recover an outstanding amount. Legal action will ordinarily take the form of obtaining a judgement against the debtor.

Obtaining a judgement prior to taking any other form of action will ensure that any disputes regarding the amount outstanding are resolved.

Once a judgement is obtained, there are a number of ways that it may be enforced. These include:-

- Obtaining a warrant from the Court to seize property. This procedure entitles the Sheriff to attend the debtor's premises and seize assets, which are then sold to satisfy the judgement debt.
- Summons for oral examination. The judgement debtor may be summonsed to appear before the Registrar of the Court to be examined regarding what income, assets and available cash the debtor has to satisfy the judgement debt.
- Attachment of earnings order. The Court may make an order that the debtor's employer make payments to the creditor from the debtor's earnings in satisfaction of the judgement debt.
- Attachment of debt (garnishee). The Court may order that all debts due to the judgement debtor from another party be paid directly to the creditor in satisfaction of the judgment debt. This may also include money in a bank account.

In relation to debts due by corporations, judgement debts may also be enforced by way of obtaining a winding up order from either the Supreme or Federal Court, provided the debt is for an amount of at least \$2,000.

The first step is to issue a Statutory Demand against the debtor company. The onus is on the debtor company to either pay the debt, come to a suitable arrangement with the creditor, or to apply to the Court to have the Statutory Demand set aside. One of these options must be taken within 21 days of service of the Demand, failing which the debtor will be deemed insolvent and the creditor may go ahead with winding up proceedings.

A Statutory Demand may be set aside, by application to the Court, if there is a genuine dispute over the debt or if the demand notice is defective.

A creditor may nominate the Official Liquidator of his or her choice. However, should no Official Liquidator be nominated, the Court will choose a Liquidator based on a rotation basis.

Once the application to wind up the company is filed with the Court, it ordinarily takes between four to eight weeks for the application to be heard. In certain circumstances, a Provisional Liquidator may be appointed at any time after the filing of the application, should the Court consider that the company's assets are at risk.

Members' Voluntary Liquidations

Should you be facing the prospect of winding down your company, there are several factors to consider.

A company which is no longer required and has assets of less than \$1,000 and no liabilities may simply be deregistered by making the appropriate application to the Australian Securities and Investments Commission.

If, however, your company has assets of greater than \$1,000, these may be realised to extinguish any liabilities and the surplus may be distributed amongst its members. In some circumstances however, there will be taxation advantages to winding up the company as a 'members' voluntary liquidation' and have the Liquidator distribute the surplus.

Any distribution made to shareholders from a company not in liquidation will be considered a dividend for taxation purposes. Whether revenue or capital, these distributions will be considered part of the company's profits.

When a company is in liquidation however, any dividend distribution must be paid out of reserves that were previously income. Any distribution such as a 'disregarded capital gain' under these circumstances will not be considered as a dividend because it is not income.

There are a limited number of disregarded capital gains to be found within the income tax legislation. They include:-

- Gains derived from the disposal of assets acquired pre 20 September 1985
- Small business CGT concessions including the small business 50 per cent reduction.

Another important factor to consider when liquidating your business involves analysing the capital gains tax status of the company's shares and whether they are pre or post CGT assets.

In the case of a final Liquidator's distribution, or an interim distribution which is followed within 18 months by the dissolution of the company, the distribution by the Liquidator of the 'exempt' small business 50 per cent component represents capital proceeds for the cancellation of the shares.

In the case of post CGT shares, it is possible for shares in a company to be an active asset under the small business CGT concessions. It is therefore possible that upon liquidation of the company, a shareholder may be entitled to claim the general 50 per cent CGT discount together with the small business CGT concessions.

For more information regarding how to best wind up your company please talk to us as we have considerable expertise in this area.

Plan Ahead – Now

2010 is the start of a new decade and is an appropriate time to pause and consider what you need to do financially for personal and business reasons.

Some things to consider include:-

- When did you last update your will?
- Do you need to put in place a testamentary trust if you have dependants who may be in rocky relationships?
- Do you have a valid power of attorney and medical power of attorney?
- When did you last review your retirement goals – how much super do you need in retirement?
- How will you accumulate the super to achieve a satisfactory lifestyle when retired?
- Do you have adequate insurance cover on your home, contents and income?
- Would you benefit from setting a budget annually?

- What is your preferred financial situation ten years from now:-
 - Own your home?
 - \$1m in super?
 - Both?
- Where is your business heading – what will it look like in five to ten years?
- Who will acquire it from you?
- Does the business have sufficient internal funding and working capital or will you need to borrow to achieve its potential? How best do you do this?

Now is a good time for us to work with you to ensure your goals are met over the next ten years.

Cost cutting

During the recent down turn, many businesses started reducing their expenses.

It is easy to cut costs in areas of the business without giving much thought to the medium and long-term impact.

Reducing staff costs must be carefully undertaken, so as not to put off those staff with a large knowledge base, or sought after skills.

Sales and marketing staff are normally the first to be made redundant, but this limits a business' future growth prospects and market share growth. These are often the best staff to retain customers and help find new ones.

Careful decision making is required when cost cutting.

Talk to your Partner at Allworths for their valued expertise.

Strategies to optimise your business

The following checklist offers strategies to optimise your business' profitability:

- Discuss with Peter, Stephen or Mark your tax and business planning, to minimise any legal taxation liabilities.
- Identify your competitive advantage or point of differentiation, and develop a marketing plan to promote this advantage to your existing customers and the market place.
- Make sure your sales force is focused on providing real value to your customers.
- Identify low margin products/services and either reduce their costs to improve the margins, or repackage the product, or dump it.
- Identify your competitors and consider acquiring their complementary business if they are struggling under large debt, in order to gain economies of scale for yourself.
- Consider whether any services can be outsourced at a lower cost to contractors with more skills.

Ask your Partner for their input in developing these and other profit improvement strategies.

Fraud – Have you employed a thief?

As financial circumstances become tighter, some employees may be tempted to turn to committing fraud in your organisation.

Most business owners believe that appropriate internal controls are in place, particularly with regards to bank accounts.

The increasing use of internet banking and electronic payments however does give rise to situations where employees, who would not normally be cheque signatories, have access to those electronic systems.

Electronic payment fraud is easier to commit, and less likely to be uncovered, than the changing of details on a cheque. Make sure appropriate controls are in place over electronic payments. Such controls include:-

- Ensuring two separate signatories are responsible for payments, including the transmission and password access.
- Having the proprietor/owner checking payments and authoring their transmission
- Increasing fraud awareness in the office.

We at Allworths are experienced in accounting systems and can offer advice in order to reduce fraud in your organisation.

Accumulating wealth the Warren Buffett way

Warren Buffett, one of the richest men in the world and a remarkable investor for over 50 years, has revealed his formula when making investment decisions and considering a potential company to invest in:

- Has the potential business:-
 - A track record of success?
 - A growth market which it can expand into?
 - Stable, committed and quality management?
 - An asking price that is attractive considering its long term potential?

As an example of his thinking, Buffett recently invested substantially in a US railroad company. His logic was as follows:-

- Railways use one third less fuel than trucks
- Railways are far less pollutant than trucks
- Railways move more people and move more goods – railways are the way of the future.

DISCLAIMER: The contents of this publication are general in nature and we accept no responsibility for persons acting on information contained herein.