

NEWSFLASH BOOKLET

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SUB-CONTRACTORS

Important – This booklet is simply a collection of Newsflash articles relevant to sub-contractors. The articles are transferred from Newsflash into this booklet so it is best read from the back page forwards to ensure you are reading the latest article on the topic first. Note that the information contained in this booklet is not updated regularly so it is important that you seek professional advice before acting on it.

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How a discretionary trust works

Since the collapse of HIH many clients have decided to incorporate in order to put the corporate veil between themselves and their customers. The HIH catastrophe made people realise it was not enough to have paid the premium on an insurance policy, if the insurance company goes broke. The corporate veil enables them to put a barrier between the business and their personal assets providing they do not trade while insolvent or act illegally. In many cases we recommend placing a trust under the company to take advantage of the CGT concessions and more flexibility of profit distributions. On the other hand trading as a company does allow you to retain profits at the 30% but these profits, if kept in the trading entity, are vulnerable if the company is sued. If they are removed from the company they will probably be exposed to the higher marginal tax rates of the owners or fall foul of the many provisions designed to prevent the owners of companies from utilising the profits for personal purposes, such as Division 7A. For a more detailed discussion on choosing a business structure refer to our article in the Small Business Booklet. The following article is intended to explain the basics to readers that are no doubt good at their trade but have a very limited understanding of business concepts.

A Trust is not a legal entity in its own right. In simple terms the law recognises, legal entities, such as sane people over 18 and companies as having the right to enter into binding contracts. Most readers are probably aware that a deceased estate is a trust. The deceased can no-longer enter into contracts on his or her own behalf but assets still need to be sold. An executor or trustee is appointed to enter into contracts on the deceased's behalf. When the executor or trustee enters into these contracts he or she is not binding his or herself but the deceased.

When a trading trust (as opposed to a deceased estate) is set up a company is normally appointed the trustee of the trust. This means that the effective owner of the trust can become a director of the company and control the trust but not have his or her personal assets responsible for the companies debts (unless they have given personal guarantees) providing they act honestly. The company does not trade and acts simply as a figurehead. Accordingly, it is not required to lodge income tax returns but annual returns to ASIC are required. The actual trading entity is the trust but as it is not a legal entity it enters into contracts under the company name with an additional notation that the company is trustee for the trust. The trust is the trading entity and as such is required to have an ABN, TFN and lodge tax returns. From this point onwards we only address the circumstances of a discretionary trust.

It is most important that the owners of the business remember that the trust is a separate legal entity from the owners themselves. This means that what belongs to the trust belongs only to the trust. Accordingly care should be exercised when using the trust's funds for personal purposes.

If any profits remain in the trust they will be taxed at the maximum tax bracket.

While there are not any specific provision prohibiting trusts lending the profits it has retained back to the "owner" of the business, there are many traps. Therefore if you take profits from your trust without consulting your Accountant you should stick to the following methods;

- 1) Wages – Unlike a sole trader or partnership the trust being a separate legal entity from the owners allows the owners to become employees of the trust. Owners' wages should be treated exactly the same as those of other employees. For example superannuation contributions of 9% should be made, normal PAYG instalments should be deducted and included along with the wages on W1 and W2 of the Trust's BAS. If the "Owners" are not directors of the trustee company their wages should be included in workers' compensation calculation. Care should be taken to ensure these wages do not force the trust into a loss situation as this will result in the "group" paying more tax in the short term and relying on the trust to make profits before the extra tax can be recouped. As employees of the trust the "owners" can participate in fringe benefit arrangements.
- 2) Profit Distribution – Firstly ensure that there are profits to be distributed. Then create a minute declaring the profit distribution to the selected beneficiaries that are nominated either directly or indirectly by the trust deed. The minute should present as follows:

Minute of Meeting of Directors of _____ P/L as trustee for the _____ Family trust

Date:

Present:

Resolution: It was declared that the _____ Family trust distribute the profits for the financial year ending 30th June, 2003 as follows

_____ \$
_____ \$

Signed as a true and correct record:

- 3) Repayment of a Loan - The "Owners" of a business usually lend it money to get started. The trust can repay this without any complications. Make sure the loan does not topple over the other way so that the "Owners" owe the trust money without first consulting an accountant. As stated above profits left in the trust are taxed at the maximum tax bracket. Unless the trust has some tax-exempt income, it will need to retain profits in order to have the funds to repay the loan. So even if during the year the trust repays your loan, at the end of the year you may decide that it was really a distribution of profits because the owners are in a lower tax bracket.

The above should not be viewed as a comprehensive analysis of the law. It is too simplified for this and is merely intended to give the reader an easy method of understanding of the concepts.

APSI (80/20 Rule) and the building industry

From 1st July, 2002 contractors who were registered for PPS before April 2000, became subject to the Alienation of Personal Services Income measures (80/20 rule) for the first time. As the 2003 tax returns will be the first returns for many subcontractors prepared on this basis the ATO has been issuing lots of warnings. A full flow chart of how the legislation works is available in our APSI Booklet. The following is just a guideline that should cover many subcontractors in the building industry.

The main sections that subcontractors use to avoid the APSI measures are:

87-65(5)&(6) In at least 75% of the circumstances the contract is to produce a result, the contractor supplies tools and equipment and is responsible for rectifying defective work or is liable for damages. This is called the results test. In its fact sheet on the results test the ATO have stated that "the results test is not met where the client is engaged to work or provide services as directed and is paid for the work or services (often on an hourly rate) rather than for a specified result or outcome produced by the work or services." As an example they use "a carpenter who is contracted to do fit out work on a building site and is allocated tasks or jobs on a daily or regular basis. He is paid on a regular basis (e.g. weekly), which is generally calculated on the number of hours that he works." An example the ATO uses of passing the results test is a carpenter who is "engaged to complete a specified job and payment is conditional upon completion of that job."

87-25(2) Other individuals or business entities perform at least 20% of the market value of the work for that year. Note this must actually be chargeable work not administration and it cannot be performed by a associated business i.e. another company owned by the same individual.

87-25(3) An apprentice was employed for at least half of the year.

87-20(1)(b) If 80% or more of your income is from one source you need to have another source of income that is not associated with the first and you acquired that source through advertising, word of mouth etc.

There are more provisions than those listed above, they are all listed in the booklet. If you are caught by the APSI measures you will not be able to claim deductions for home to work travel if you do not carry bulky tools. If you have more than one workplace during the day you will be able to claim all travel. You can also claim travel if you have regular workplace but had to work somewhere different that day. Rent, interest and rates associated with your residence are not claimable. Payments to your spouse for work that is not directly

involved in earning the income (i.e. bookkeeping) are not deductible nor can you income split. You will only be allowed a deduction for one car other than a vehicle that is used solely in the business.

When do you become an employer?

A key case in this area is *Hollis v Vabu Pty. Limited* where the high court decided that a bicycle courier was an employee of the courier company. Note this case was not in regard to the superannuation guarantee.

The contrast between this and another Vabu case gives you an idea of how unclear the area of employee or contractor is and how little this relies on outward appearances such as an ABN. The ATO has announced that it will rule on bicycle couriers to the full extent based on *Hollis' case* (2001 ATC 4508). In other words all bicycle couriers are now considered employees of their courier company. Accordingly, the ATO ruled that as at 1st July, 2002 all bicycle couriers with an ABN for that purpose only are to cancel their ABN and GST registration if applicable and Courier companies must treat their bicycle couriers as employees including deducting PAYG withholding from their payments, paying FBT on any benefits they receive and paying the 9% superannuation surcharge. Yet the very same courier company won the right not to include its Courier drivers who supplied a purpose built car as employees for the superannuation guarantee levy. Further in the *Hollis* case the judge said that it does not matter if the courier supplies a bicycle or a car they are still employees.

In view of the above please take the following as the best guideline we can give you but nothing is black and white. Please note that the alienation of personal services income rules (80/20 rule) do not apply to make contractors employees refer TR 2005/16 paragraph 11 and 62. These rules are only intended to control how contractors deal with the payments they receive.

For PAYG Withholding Purposes – Whether a person is an employee (and therefore the Payer is required to withhold PAYG) is an issue of common law. Therefore it is not specified in legislation but by various cases over the years. The ATO has outlined its opinion in TR 2005/16. This topic is full of fine lines for example the difference between an employee and an independent contract is whether the contract is a contract of service or a contract for services. Probably the strongest indicator is the control test. Years ago this used to be called the servant master relationship. The control test looks at how much the payer has a right to direct how, where and when the work is performed. This is where the question of, is the contractor employed to perform a specific task or to provide services as directed by the payer, comes from. If a contractor is paid on an hourly rate it strongly suggest that the payer has control over their efforts and so should be withholding PAYG Instalments. Having said that you should now be aware of some direct contradictions of this situation. Solicitors and accountants may charge on an hourly rate but be contractors because they have so many other clients. A salesperson who only receives commission, so is remunerated purely on a results basis is usually still considered to be an employee.

On the other hand being paid to produce a result will normally mean the contract is not subject to PAYG withholding. This issue is covered in paragraph 36 of TR 2005/16. Does the contractor have the right to employ someone else to perform the work and does the contractor assume any risks that could result in he or she making a profit or loss on the job (payment for a result) rather than a guaranteed income. Risk includes responsibility for poor workmanship or injury to the public. The more tools and materials the contractor provides the less likely the payer will have to withhold PAYG. The more payers the contractor has the less likely that PAYG Withholding Instalments need to be deducted. Paragraph 35 states that it does not matter that the payment is based on expected reasonable hours to complete the task as long as in other ways it is a genuine results based contract and vice versa payment on the basis of performance rather than hourly rate is not enough in itself to turn an employer/employee relationship into one of contracting.

If the contractor is a partnership, company or a trust the payer does not have to withhold PAYG unless the set up is purely a sham, refer TR2005/16 para 57. The provision by a contractor of an ABN will not automatically relieve the payer of the responsibility to deduct PAYG Withholding (TR 2005/16 para 56). When the contract includes the payment of sick leave and/or annual leave the payee is most likely to be considered an employee. The higher the proportion of the gross income which the worker is required to expend in deriving that income, and the more substantial the assets which the worker brings to his or her tasks, the more likely it is that the contract is for services.

Simply writing in a contract that the payee is not an employee but a contractor will not automatically make that the case for tax law purposes. This clause is only effective if the contract has the elements of a sub contract relationship. The claim that it is not a contract of employment can only be used to clarify any ambiguity.

It helps to support the argument that the worker is a contractor if the relationship came into existence because of an advertisement by the contractor of his or her services to the public or if it was in response to a tender notice.

An oldie but a goodie in support of an independent contractor is the Worldbook Case:

'Undertaking the production of a given result has been considered to be a mark, if not the mark, of an independent contractor'.

A major factor in this case was the contractor's right to employ others to do the work and the fact that payment was only by way of commission for actual sales made. Payment was not related to the amount of work done but to the result it produced. Paying commission alone is not sufficient argument that the payee is a contractor.

For Superannuation Guarantee Purposes – Common law employees as discussed above are caught by the guarantee but contracts with individuals that are principally for their labour are also caught. The most significant case here is Vabu's case, discussed above. The court found that a courier company was not required to pay superannuation under the guarantee where the courier drivers provided their own vehicle that was designed to carry parcels. SGR 2005/1 gives the ATO's opinion of when a courier driver is considered to be acting independently of its company and therefore the courier company is not liable for the guarantee. The more the arrangement becomes a payment for more than just the personal services of the worker the less likely the payer is to be liable for superannuation. For example a payment to the owner driver of a semi trailer is not subject to the superannuation guarantee because the majority of the payment would be for the provision of the truck.

The right to control is also a major determining factor. For example, family day care providers in their own home are not entitled to have superannuation contributions made for them because they have so much independence in their daily tasks (SGD94/4) yet family day care has a large amount of rules and guidelines this is not considered to be control. The right to refuse a child was also considered relevant.

If a contract is with a company, trust or partnership there is no requirement for the superannuation guarantee levy SGR 2005/1 paragraph 99.

If the payee is a sole trader and less than 50% of the payment received is for the sole trader's own labour there is no requirement to pay superannuation. Examples of this would be supplying and installing an air conditioner where the charge for the air conditioner was more than the installation charge. Of course if a sole trader provides you with the services of one of his or her employees you are not required to make a superannuation contribution for that employee the sole trader is.

Paragraphs 43 to 47 of SGR 2005/1 examine when a contract would not be subject to the super guarantee because it is to produce a result. It includes, as in discussed in the PAYG section, consideration of whether there is the right to employ another party to perform the task and/or the provision of plant and equipment, fixed payment rather than hourly rate and a specified outcome.

Paragraph 78 sums it up well:

“Where the terms of the contract in light of the subsequent conduct of the parties indicates that:

- The individual is remunerated (either wholly or principally) for their personal labour and skills;
- The individual must perform the contractual work personally (there is no right of delegation); and
- The individual is not paid to achieve a result,

The contract is considered to be wholly or principally for the labour of the individual engaged and he or she will be an employee under subsection 12(3)”.

If you are found to have not met the requirements of the Superannuation Guarantee you will be fined, required to pay the omitted superannuation and not receive a tax deduction for it. Therefore we recommend you error in favour of caution.

For Workers' Compensation Purposes – In Queensland from 1st July, 2003 a Payer does not have to cover its subcontractors for Workers' Compensation if they have an ATO Personal Services Business determination or they satisfy the results test used in the APSI legislation (80/20 Rule). The results tests states that all the following conditions must be met:

The contract is to produce a result, supply plant and equipment or tools of trade (if it is normal in your industry to have tools) and liability for the cost of rectifying defective work or liability for damages remains with the sub contractor. APSI 87-65(5)&(6).

Further, a Payer who has a contract of service with a company or a trust is not required to cover the company or trust's employees for workers compensation, it is up to that company or trust to cover its' employees.

Directors of companies or trustees of trusts do not have to cover themselves with workers compensation. More information can be found on the Queensland Workers Compensation Board' web site at www.workcoverqld.com.au.

Note if you have not covered a worker that is injured and you should have, you will be liable for 150% of the costs associated with the injury.

Claiming company & trust losses in your personal tax return

The trick here is to find a way of failing the APSI test. It Shouldn't be too hard seeing as the legislation was designed to catch you anyway.

Finally, something positive for taxpayers out of the APSI legislation. If your company or trust made a loss you will be permitted to offset the loss against your personal income if the loss is in regard to personal services income caught by the APSI legislation. This initiative was announced in the May 2003 budget. It effectively gives taxpayers caught by APSI an advantage over other taxpayers operating through a company or trust as other taxpayers' losses are quarantined until that company or trust makes a profit and satisfies other requirements. The new concession will be backdated to losses generated in the 2000/2001 financial years and all following years. Unfortunately, the legislation is not yet through parliament and it is now time to prepare these entities tax returns for the 2003 year. Tax returns can be amended for up to four years back from the date of their original assessment. Until this law passes through Parliament the amended returns can not be lodged and any 2003 tax returns prepared before the legislation is passed will not be able to take advantage of this concession. Accordingly, they will have to wait or be amended at a later date.

Nasty sting for legitimate business expenses

If you are caught by the APSI rules you cannot claim a deduction for payments made to associates unless the work they perform directly relates to the principal work provided to customers or clients. An example of this is if I charged my brother for preparing the income tax return for his tutoring business he would not be able to claim the fee paid to me as a tax deduction, despite the size of my business. Naturally enough I don't charge him. Nevertheless, under GST legislation I am required to remit to the ATO the amount of GST that would have been applicable had I charged him! In an even further development of this double standard the ATO has taken the approach that the rules on payments to associates include payments for goods. Accordingly, if your spouse owns the business from which you purchase your stationery and your income is from personal services you cannot claim a deduction for the stationery. The legislation states:

SECTION 85-20 Deductions for payments to associates etc.

85-20(1) You cannot deduct under this Act:

(a) any payment you make to your associate; or

(b) any amount you incur arising from an obligation you have to your associate; to the extent that the payment or amount relates to gaining or producing your personal services income.

85-20(2) Subsection (1) does not stop you deducting a payment or amount to the extent that it relates to engaging your associate to perform work that forms part of the principal work for which you gain or produce your personal services income.

85-20(3) An amount or payment that you cannot deduct because of this section is neither assessable income nor exempt income of your associate.

Makes you wonder if any of our highly paid politicians read the legislation before they vote on it, doesn't it.

ATO changes its mind on unearned income

The primary purpose of printing this article is because we have advised clients on the basis of the ATO's view to date and now it has changed its mind. Or at least drafted a possible change of its mind in TD2003/D11. So if the following seems to be a contradiction of how we have told you to prepare your BASs you are absolutely right, it is! Fortunately this change of mind only applies from 1st July, 2003.

The principle is based on the Arthur Murray dance school case. Lessons were paid for in advance. The taxpayer won the right not to include in his tax return the funds received for lessons yet to be given. This

principle would apply to taxpayers regardless of whether they were on an accruals or cash basis. Despite the fact that this case was heard in 1965 the ATO still relied on it when the simplified tax system (STS) was introduced. Accordingly, it ruled that even if an election was made for the STS, which requires the taxpayer to include as income only amounts actually received there was no need to include income received if it was not yet earned. This has now changed so taxpayers in the simplified tax system must include all income actually received regardless of whether it has yet been earned.

Check list before paying invoices

Please go over the following check list for before making each payment.

<p>Is the Invoice for more than \$55 GST inclusive or \$50 excluding GST?</p> <p style="text-align: center;">Yes ↓</p>	<p>No → Pay without question. No need to withhold tax and can claim input credit.</p>
<p>Has the Supplier Provided an Invoice?</p> <p style="text-align: center;">Yes ↓</p>	<p>No → Withhold 48.5% of the total Invoice price to remit to ATO Ask Supplier for TFN</p>
<p>Does the Invoice have an ABN?</p> <p style="text-align: center;">Yes ↓</p>	<p>No → Withhold 48.5% of the total Invoice price to remit to ATO Ask Supplier for TFN</p>
<p>Does the Invoice include the words "Tax Invoice," the date, name of the supplier, the Tax inclusive price and a brief description of the goods supplied?</p> <p style="text-align: center;">Yes ↓</p>	<p>No → No input credit can be claimed so this supply should be at least 1/11th cheaper than a correctly invoiced supply.</p>
<p>Is the Invoice for more than \$1,000?</p> <p style="text-align: center;">Yes ↓</p>	<p>No → Bingo! Pay full amount of invoice & claim input credit.</p>
<p>Does the Invoice include in addition to the above - the quantity of the goods or the extent of the services supplied, your name and address or name and ABN?</p> <p style="text-align: center;">Yes ↓</p>	<p>No → No input credit can be claimed so this supply should be at least 1/11th cheaper than a correctly invoiced supply.</p>
<p>Bingo! Pay full amount of invoice and Claim input tax credit.</p>	

Cash economy audits

The ATO has released a report called The Cash Economy Under The New Tax System. In annexure 1 it sets out the procedures it will be using to detect unreported cash income. The full text is available on the ATO web site. A few items that may interest readers are:

- 1) The ATO considers the high risk industries to be Building & Construction, Cafes, Restaurants & Takeaways, Cleaning, Hairdressing & Beauty, Trucks, Smash Repairers and Taxis.
- 2) Audit activity will include
 - (a) Walkins – Intended to catch traders not registered for GST or employees who are not on the books.
 - (b) Top Down – Tracing the records of major firms down through to the contractors they pay and the contractors that the contractors pay to make sure all income has been correctly recorded.
 - (c) Statistical Norms – The ATO will be comparing each business against the average for its industry. For example they will be looking at gross margins assuming goods have been marked up at the industry average. If the margin is less they will be suspicious that the income from some of the goods sold has not been declared. Over the last year, when we have prepared a business tax return, we have provided

our clients with a letter which among other things discusses how their figures compare with the ATO industry average. So for further information on your industry please refer to this letter or contact us.

- (d) Cash Ratio – According to the ATO’s research Cafes and Restaurants receive 68% of their income as cash. In other words if credit card transactions account for more than 32% of the takings the ATO will assume some cash has not been recorded. Sound a bit extreme? Tell that to the Restaurateur who was sentenced to 3 years and 4 months jail for keeping two sets of books, non-lodgement of company tax returns and paying untaxed cash wages.
- 3) Other Areas The ATO Will Be Looking At:
- (a) Whether GST has been remitted to the ATO when equipment or a vehicle used in the business, is sold, even if the business use is only minor.
 - (b) Checking for a tax invoice for expenses where the invoice amount exceeds \$55 (GST inclusive). A tax invoice needs to include the supplier’s ABN, the words Tax Invoice, the date, the name of the supplier, a brief description of the goods, the tax inclusive price and if the invoice is for over \$1,000 it must also include the quantity or the extent of the services provided and your ABN or name and address. Surprisingly, it is the purchase of vehicles that is most likely not to be supported by a tax invoice.
 - (c) Forgetting to apportion payments between private and business use. If such a payment is over \$1,000 you need to review the portion claimed as business each adjustment period.
 - (d) Not paying GST on cash contributions employees make to reduce their fringe benefits.
 - (e) An up front GST input credit is not available on items purchased under a Hire Purchase agreement if GST is reported on a cash basis, you can only claim the GST portion of each payment made under the HP agreement when that actual payment is made.
 - (f) A GST input credit can not be claimed for land purchased under the margin scheme.
 - (g) Barter Transactions must be included.

Voluntary agreements

The ATO fact sheet NAT3063 states the following:

- 1) A voluntary agreement must be in writing and must be for the services of an individual who has an ABN.
- 2) The agreement can be terminated by either party advising the other in writing.
- 3) Providing the person who is receiving the services would normally be entitled to a full input credit for these services, the person supplying the services does not charge GST to the person receiving the services. The person receiving the services does not receive an input credit for services provided under a voluntary agreement. So you would expect to be charged 1/11th less than suppliers for whom you can claim an input credit.
- 4) The person who provides the service should be registered for GST as they can claim an input credit for any items they buy in relation to their business but do not have to charge GST to the person receiving the service under a voluntary agreement.

BANTACS Note: If the service provider is also providing services to the public and their total turnover is under \$50,000 it will probably not be in their interest to register for GST.

- 5) Basically, the rate of tax to be withheld is either 20% or the amount shown as the instalment rate at T2 on the subcontractor’s BAS.

BANTACS Note: The ATO has released a voluntary agreement form that can be used but it is not compulsory.

- 6) Appropriate records must be kept by the payer for each individual subcontractor, as a payment summary must be prepared at the end of the year.

Labour hire arrangements

Due to the amount of radio advertising about the pit falls of being an employer compared with using a Labour Hire firm I thought the following case relevant reading.

In *Damevski v Giudice* (2003) FCAFC 252 the full Federal Court found a cleaner provided in a labour hire arrangement was really an employee of the person for which they did the cleaning (principle) not the Labour Hire firm. As it was the principle that set the conditions under which the cleaner worked, the Labour Hire company was merely an administrator.

Note that the question of whether you are still liable as an employer is really an issue for a solicitor and you should consult one before shelling out higher labour rates to a Labour Hire company. Some of the important

factors are whether the contractor provides their own tools, whether they are paid by the hour or by result, whether they contract to other businesses as well, whether there is any allowance in the agreement for holiday pay and whether the principle deducts tax from the contractors pay.

Overloaded Ute insurance risk

The payload on most Ute includes the tray, bull bar, passengers, accessories, canopy and sometimes even fuel. So having a one tonne Ute does not mean that you can put one tonne in the back. After allowing for all the above you may only be able to legally carry half a tonne. If it is shown that being overloaded contributed to the accident your insurance company may not pay the claim. The answer to this problem is a lazy axle that can add another metre to your tray and up to one tonne to your payload. An extra axle can change a Landcruiser or Patrol into a dual cab with a tray area larger than the standard Ute. The extra space provided by the 6 wheel conversion gives you twice as much space as a standard ute at a lot less cost.

Having found myself overloaded by one tonne I found that the best people in the country for this type of conversion are at Dalby in Queensland. Six Wheeler Conversions Pty. Limited. They have found a solution for every problem I have thrown at them. They custom build anything and make any size trailer, even tipper trailers. They also build tipper trays for Ute.

Building & construction industry contractors or employees

The ATO has issued a fact sheet to help people in the building industry determine the fine line between an employee or sub contractor. Note this fact sheet does not cover the superannuation or work cover consequences. For more detail refer our Subcontractors Booklet under free publications on our web site.

The key points in the ATO fact sheet are:

- A warning that employers can be fined or prosecuted for incorrectly classing employees as contractors.
- Just because a worker has an ABN does not automatically make them a Contractor.
- More than one of the following factors suggest an employment relationship rather than contract:
 - How much control the employer has over how the job is done
 - The contract requires the workers personal services
 - The worker appears to the public as being part of the employers staff
 - Materials or equipment are not supplied by the worker
 - The worker is entitled to paid leave
 - The hours to be worked are determined by the employer
 - The worker is paid an hourly rate rather than to produce a result.
 - If the worker makes a mistake it is the employer's responsibility to set things right
- Apprentices are never contractors.

Tax minimisation between spouses

Before entering into an arrangement that effectively shifts income from one partner to the other or deciding whose name in which to buy an income producing asset, check the need for this considering the new tax brackets.

The way for a couple to minimise their overall tax is to arrange their affairs so that they are both in the same tax bracket. They do not need to have the same taxable income. Their combined tax bill will not benefit from any income shifting arrangement if they are already in the same tax bracket. Even if one is at the higher end and the other the lower end.

Interesting ATO rulings for partnerships

GSTA TPP 086 & 87 - A partnership can claim the input credit for a tax invoice in the name of an individual partner or even an employee.

GSTA TPP 089 – If you receive a tax invoice after you have cancelled your registration you are not entitled to an input credit and you cannot claim that input credit before you cancel your registration because you do not have a tax invoice.

ATO Guide - Part IVA – General Anti-Avoidance Rule (Principles about how and when it applies)
traditional husband and wife partnership not caught if no unusual or contrived features. Accepts that profits can be distributed equally even though only one partner performs most of the work. Though if the business of the partnership is simply providing one partners personal services the alienation of personal services income rules may apply.

PAYG summaries and annual report due on the 14th August

Unless you meet the criteria below all employers must send their PAYG summaries and an annual report to the ATO by 14th August. Very small businesses are allowed to delay this until the lodgement date of their business' income tax return if the following is applicable:

- 1) You have lodged your previous income tax return and PAYG annual report on time and
- 2) All employees must be family members, directors or shareholders of the company or a trust beneficiary, and
- 3) Your tax agent notifies the tax office that you have elected to receive this extension.

Accordingly, we ask all clients wishing to take advantage of this concession to contact us before the deadline for notifications which is 15th September. If you meet points 1) and 2) but do not notify us you must send all your PAYG summaries and the annual report to the ATO by 30th September.

Micro business - Entrepreneur's 25% tax offset

That's right the ATO will reduce the tax payable on your business income by 25% if you qualify as a small business entrepreneur. It is call the Entrepreneur's Tax Offset (ETO) and is intended to encourage people to start up small businesses on the side. As a bare basic you must meet the following criteria:

- 1) Elect to join the simplified tax system
- 2) Have a turnover of less than \$75,000 – This excludes rent and dividend income if that is not really part of the business and excludes interest income earned on non business bank accounts.
- 3) The business must have made a profit on the difference between the turnover in 2) and expenses related to earning it. Note if a company is providing personal services that are attributed to the person providing the services, the company will not have any tax payable to utilize the offset unless it has income from other sources.
- 4) Have enough taxable income for the year that you have a tax liability, as the offset can only be used to reduce your tax liability, it is not payable to you if the tax on your income from all sources is less than the offset.
- 5) You include all or part of the business profit in your income tax return.

Note if you are involved in multiple businesses their turnover, applicable to point 2) above, may be added together if they are part of a group. To be part of the same group the following must apply – note entity includes you:

- 1) Either entity controls the other
- 2) Both entities are controlled by the same third entity – ie 40% ownership or more

or

- 3) The entities are STS affiliates of each other – STS affiliates are other entities that can be expected to act in accordance with the first entities wishes in relation to all or a substantial part of the entities business (TR 2002/6). But partners in a partnership are not usually each other's STS affiliates. Likewise a husband and wife are not consider to be STS affiliates if they run separate businesses. The clause is intended to catch artificial ways of getting around point 1) and 2).

As you can see from the above a taxpayer can be a partner in a partnership and a sole trader and qualify for the ETO for both providing each businesses individual turnovers are less than \$75,000 even if combined they exceed it. On the other hand the total turnover of the partnership counts for each partner. For example if the partnership turnover is \$80,000 no matter how many partners there are they will not qualify for the ETO on their partnership income.

This offset is another nail in the coffin of forming a company compared with a discretionary trust which gives you the same asset protection if it has a corporate trustee but better access to the ETO. While companies are technically entitled to receive the offset it will only reduce the tax payable by the company not the owners of the company. So when these profits are eventually distributed to the owners of the company they are either received as wages which reduce the amount of the offset that is applicable to the company because wages reduce the company's profit. Yet the owner is not entitled to an offset on the wages because it is not business income in his or her return. Nor is the owner entitled to receive the offset on dividend income received from the company. This dividend income may not be able to be fully franked because of the reduction in the company tax payable due to the offset, so effectively the offset benefit is paid back when the owner receives the dividend. The only other way an owner of the business can receive the income from the company is by it being attributed to him or her by the personal services income rules. ID2006/28 states that the offset is not available in these circumstances.

On the other hand a trust would be able to effectively pass the offset onto a beneficiary but not if it paid the income out as wages. The personal services income rules requiring the profits of the business or a partnership or trust to be attributed to the tax return of the person who earned the income would not prevent that person claiming the offset in their personal return as the originating entities are still considered to have made a net profit (ID 2006/227).

To calculate the amount of ETO you are entitled to simply calculate the following in regard to each business that qualifies then add the offsets together to get the total tax reduction:

- 1) Divide the total turnover from the STS business by your total taxable income to calculate the percentage of your taxable income it represents
- 2) Multiply the total tax payable on your taxable income (before the offset) by 25%
- 3) If the turnover in 1) was more than \$50,000 subtract the turnover from \$75,000 and divide it by \$25,000.
- 4) Multiply the figure in 2) above by the percentage in 1) above and 3) above, if applicable, for the amount of offset you are entitled to.

Secret Plans and Clever Tricks:

The higher the business profit the higher the Entrepreneurs Tax Offset with the only negative element being the turnover of the business. Accordingly, if you are limited in a claim it is better to claim it against your income, rather than the business. For example if you can only claim 5,000kms for your motor vehicle and you have already done that in relation to your wages income, don't apportion between wages and business use. Claim it all against your wages income thus shifting profit from wages to the business.

Late lodgements, interest & other penalties

If you are late lodging your income tax return the ATO can fine you \$110 for every 28 days or part onward that the return is late, up to a maximum of \$550. Though, the late lodgement penalty is usually waived if you are due a refund. Even if you are not due a refund it is worth writing to the ATO, explaining your circumstances and asking the ATO to consider remission of the penalty under TAA Sch 1 s 298-20. If the ATO refuses to remit the penalty and it is for more than \$220 you can object.

Late lodgement of a BAS can be far more serious as the \$110 is per tax that is reported on the BAS. This means if you report your GST, PAYG withheld and FBT on your BAS the penalty is \$330 for every 28 days up to a maximum of \$1,650 (5 x \$330) The penalties also increase with the size of the business for example once the turnover exceeds \$1,000,000 the penalties at least double.

Penalties for late lodgement of income tax returns, BAS and ASIC forms are not tax deductible. A penalty for under estimating GST instalments is tax deductible (section 25-5 1997).

The interest the ATO charges for late payment of taxes is tax deductible but if you borrow the money to pay off your personal tax debt the interest on the monies borrowed is not deductible. On the other hand if you are in

business and the borrowings are connected with the business the interest on money used to pay taxes is deductible but not for the partner's in the business's personal tax. (IT2582)

This still doesn't mean it is better to owe the ATO instead of the bank, because the ATO charge a lot higher interest. The current interest rate charged by the ATO is 12.87%, after allowing for tax deductibility this is an effective rate of 8.816% if you are in the 31.5% tax bracket (\$25,000 to \$75,000). Even at the maximum tax bracket which doesn't kick in until your taxable income reaches \$150,000 the 12.87% interest charge is 6.89% after allowing for tax deductibility. So unless you are in the maximum tax bracket, if you can borrow against the equity in your house at housing loan interest rates there is a saving in doing this as soon as possible. Though for short term debt also factor in the costs of borrowing.

In conclusion it is important that you at least lodge your BAS or tax return even if you do not have the money to pay the tax and it is usually better to borrow at housing loan interest rates to pay of your tax bill than have the ATO charge you interest.

Note it is not just the penalties you should fear. The ATO also has the right to prosecute you but if they do this the penalty provisions are not applicable.

Just when do you become an employer

If you are concerned that you should be paying your contractors as employees ie deducting tax from their pay and contributing to superannuation for them, take a quick test on the ATO web site at www.ato.gov.au/businesses/content.asp?doc=/content/00095062.htm When you have completed the questionnaire you can print up a report that gives you a summary of the information you have provided and the basis for the ATO decision. The ATO has undertaken that you will not be fined if you follow the information provided in the report.

If you are concerned that the person who pays you to work for them should be paying you as an employee this test may help convince them but do not be concerned it is only the employer who will be liable if they are paying you the wrong way.

Alienation of Personal Services Income

The Results Test

At the end of 2007 IRG Technical Services Pty Ltd & Anor V DFC of T was a sharp reminder that there is more to the results test than being responsible to rectify mistakes. In this case a couple of engineers argued that they passed the results test even though they worked as part of a team where their work had to be signed off as part of the payer's quality control. They contracted to the payer through their company and trust. If they could pass the results test the entities would be entitled to distribute their income to other members of their households who were in lower tax brackets.

The relevant section number is 87-18(3) which requires at least 75% of the entity's income to pass all of the following three tests:

- a) the income is for producing a result
- b) the personal services entity is required to supply the plant and equipment, or tools of trade, needed to perform the work from which the personal services entity produces the result, and
- c) the personal services entity is, or would be, liable for the cost of rectifying any defect in the work performed.

The court found that they passed c) but not a) because they worked as part of a team and were paid an hourly rate. By simply finding that a) was not passed the court could rule but it also commented that b) was not passed either because while they had their own laptops and data base they were not required to bring them to work.

Audits

The ATO is now matching data to catch out people directing personal services income through other entities. It will be collecting data from labour hire firms, placement agencies and computer consultancies on payments they make to entities other than individuals together with the name of the individual who actually provides the services. The information will be cross matched with tax returns to easily detect those entities that are not redirecting all of their personal services income back to the individual who earned it.

If you are concerned about your circumstances our APSI booklet which is available under the free publications section of our web site has a flow chart you can use to see how these rules affect you.

Entrepreneurs' Tax Discount

This little gem has limited application and doesn't get much publicity so is an easy one to miss, here is a timely reminder. If your business turnover is more than \$75,000 excluding GST don't bother looking any further into this. When the business turnover is less than \$50,000 the full rate of the discount applies. Between \$50,000 and \$75,000 the rate shades out. Note this is turnover of the business, for example total sales not net profit. The business also has to elect to be a small business entity to qualify.

The Entrepreneurs' tax offset flows through trusts to apply to the tax payable by the beneficiary, Partners claim it in their personal tax returns too. The offset or discount is 25% of the tax payable on all your taxable income apportioned between your business income and wages income. For example if you had a total taxable income of \$80,000 the tax payable on all your income would be \$18,000. 25% of that is \$4,500, if half your taxable income was from the business (ie \$40,000) the discount or tax offset would be \$2,250 (half of the \$4,500 maximum).

When You Can Claim Super, Has Changed

A little realised trap created by the changes to superannuation means that people who have only a small wages income say less than \$450 or because you are under 18 and work less than 30 hours a week or you are over 70. Note from 1st July, 2007 you may (subject to all the normal limitations) qualify for a tax deduction for superannuation contributions you make if they are made before 28 days after your 75th birthday.

Can still not claim their superannuation contributions unless they satisfy the 10% rule. This is due to a change in the wording of the legislation so just because you could claim last year doesn't mean you will be able to this year.

For example if you are on a low wages income of less than \$450 per month but have, say, a \$35,000 capital gain you cannot get a tax deduction for any money you put into superannuation even though your employer is not required to contribute for you, because more than 10% of your income is from wages, even though those wages do not attract employer superannuation contributions. The best you can do in this situation is to ask your employer to salary sacrifice your earnings into superannuation.

Trap with Contractors Claiming Super

If you qualify for employer support you are not entitled to claim a tax deduction for any personal super contributions you make. This is the case even if your employer doesn't actually make any super contributions for you. A typical example of this would be with contractors. The employer may not think he or she has to make contributions but if the contract is for your labour they should.

The more the arrangement becomes a payment for more than just your personal services the less likely the employer is to be liable to pay super. For example a payment to the owner driver of a semi trailer is not subject to the super guarantee because the majority of the payment would be for the provision of the truck. But if a courier driver uses the family car their employer would be required to contribute to super on their behalf. More detail on this is available in SGD93/6.

If you contract through a trust or company then your "employer" is not required to contribute to super for you and you can ensure deductibility by getting your company or trust to make the contribution.

Motor Vehicle Data Matching

A very timely reminder for taxpayers driven by the investment allowance stimulus to buy motor vehicles they can't really afford. The ATO has announced that it will be obtaining details of all purchases of vehicles over \$10,000 from the motor registries in each state and matching this against the owners reported taxable income to see if maybe they are earning more than they have declared in their income tax return.

Personal Services Income and 50% Investment Allowance

According to the ATO just having an ABN is not enough if you are an individual and your business's income is from your personal services.

Partnerships, trusts and companies that are in receipt of personal services income and do not pass the alienation of personal services income rules (commonly referred to as the 80/20 rule) will still qualify to claim the investment allowance. It is just the individuals that will miss out. For this reason it is important that an asset is purchased in the name of the partnership not one of the individual partners.

Our booklet on Alienation of Personal Services Income contains a flow chart on when you are caught by these rules. It is available under the free publications section.

In short if you are a sole trader and want to take advantage of the investment allowance it would be better to contact us first to make sure you qualify.

Saving Tax on Your Investment Property – The Book

“Every investment property tax-related question you’ve ever wondered about is answered here and – perhaps more importantly – the ones you didn’t think to ask but should have! For property investors who want to refine their strategy for maximum gain, this resourceful handbook will make a great constant companion.” Eynas Brodie, Editor, Australian Property Investor magazine.

Combining Noel Whittaker’s easy reading style with Julia Hartman’s mind numbing attention to detail was a major challenge which ran way over schedule but it is finished, printed, and in the book stores. You can also purchase it online by going to: www.bantacs.com.au/property.php. The cost is \$29.95 plus \$5.95 postage – tax deductible of course!

Ask BAN TACS

For \$39.95 you can have your questions regarding Capital Gains Tax, Rental Properties and Work Related Expenses answered. For your Accountant, we will include ATO references to support our conclusion. Just go to www.bantacs.com.au and look for the Ask Bantacs link under ‘Most Popular’ on the home page.

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Subcontractors
Wage Earners

Capital Gains Tax
Claiming a Motor Vehicle
Division 35
FBT for PBIs
Miners
Professional Practices
Rental Properties
Small Business
Teachers
Year End Tax Strategies

Disclaimer: Please note in many cases the legislation referred to above has only just passed through parliament. The full effect is not clear yet but it is already necessary to make you aware of the ramifications despite the limited commentary available. On the other side of the coin by the time you read this information it may be out of date. The information is presented in summary form and intended only to draw your attention to issues you should further discuss with your accountant. Please do not act on this information without further consultation. We disclaim any responsibility for actions taken on the above without further advice as to your particular circumstances.