

# NEWSFLASH

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## **BAN TACS** Accountants Pty Ltd

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Welcome to the BAN TACS News Flash. Our aim is to provide short but succinct updates on all tax issues

## Happy New Year

Welcome to another year of trying to stay on top of the everyday issues that affect taxpayers just trying to understand our tax and associated laws. It may interest you to know that the Newsflash started 12 years ago to help clients learn about the administration of GST. Fully expecting that after a few years tax law would settle down and it would no longer be necessary. Not only is there always plenty to write about every fortnight but we now have a web site full of resources and information to further this end. And during all that time, of course the government has been promising to simplify taxation.

## Valuations

There was a time when I used to say that it is worth paying a registered value to set any market values you may require for tax purposes as anything less than that and the ATO can argue their registered valuer's opinion is trumps.

Since the findings in *Venturi v FC of T* 2011 ATC 10-200 I have to revise that statement. In this case the ATO valuer and the taxpayer's valuer disagreed by more than \$650,000. While the AAT found (on quite reasonable grounds) that the ATO's valuer's methods to be more acceptable there was also an interesting point made in the judgement:

"The Applicant (taxpayer) has failed to discharge the onus he bears of proving that the assessment of his income tax liability for the year ended 30 June 2006 was excessive"

You see our tax law (unlike criminal law) puts the onus of proof on the taxpayer to prove (beyond reasonable doubt) that their information is correct. The ATO only has to argue that it is not irrefutable ie, there could be another opinion and unless the taxpayer can prove that other opinion is wrong and theirs' is right then the taxpayer is stuck with whatever the ATO comes up with as it takes precedent. This is very unacceptable when the law calls for the taxpayer to come up with a market value and the taxpayer pays a registered valuer to do so. Though I must stress in this case the valuation methods were dodgy.

## Column by Noel Whittaker

During the holidays one of my business partners and I went into a branch of a major bank to deposit funds into our joint bank account. The teller would have taken first prize in the incompetence and rudeness department – not only was she surly, she was also unable to handle a simple transaction.

Fortunately for us, the adjoining teller became aware of the situation and volunteered to take the transaction over. She was absolutely wonderful in every way. To cap it off, an hour later we got a telephone call from the bank manager apologising for the treatment we had received.

By this stage you may be wondering about the point of the story. It is simply this - if we had experienced only the first teller we would have said the bank offered terrible service, if we had experienced only the second teller we would have said the bank offered brilliant service.

It doesn't matter how big or small your business is, the staff that your customers encounter will be the perception they have of your business. There are many businesses that I deal with on a regular basis, and one of the main reasons I continue to return to them is that the staff treat me well and handle everything efficiently.

This coming year may be a tough one, but no matter how bad conditions are, businesses that thrive will be the ones with the best trained staff. It is well recognised that a good person on the front desk can double the turnover of a retail business.

The lesson is simple - this year make sure client relations are your main priority.

Noel Whittaker is a co-founder of Whittaker Macnaught Pty Ltd. His advice is general in nature and readers should seek their own professional advice before making any financial decisions. Noels email is [noelwhit@gmail.com](mailto:noelwhit@gmail.com)

## FBT – Living Away From Home Allowance

Employees who have to live away from home for their work can be paid cash to assist in the additional costs or be provided with associated benefits without having to pay tax on the value and FBT does not apply. Currently, this is even the case even if you give up your home to move to the new location, as long as you intend moving back to the area some day.

Apparently, these concessions are being exploited by people overseas who come to Australia to work. The government intends to change the application of the living away from home allowance concessions for workers from overseas but not for workers who have a home (that they are living away from) in Australia.

The changes will apply from 1st July 2012.

Some clients have been concerned that it will apply to them, so here is an extract from the press release off the Treasury web site.

“Under reforms announced today access to the tax exemption for temporary residents will be limited to those who maintain a residence for their own use in Australia, which they are living away from for work purposes, such as 'fly-in fly-out' workers; and individuals will be required to substantiate their actual expenditure on accommodation and food beyond a statutory amount.

No permanent resident legitimately using this tax exemption for accommodation and food expenses will lose any entitlements.

These reforms will not affect other tax concessions, such as those that apply to travel and meal allowances, and remote area fringe benefits.”

There you have it, as long as they keep their word, citizens of Australia should have nothing to worry about.

## Directors Being Held Personally Liable for PAYG

If you had been worried about the proposal put to parliament to make directors automatically personally liable for the PAYG deductions of the companies they run, you will be relieved to know that it didn't get through Parliament. Though, we are not out of the woods yet and even under current laws you can still become liable if you don't respond to ATO notices.

Matthew Joiner from PKF has provided the following comment:

*This legislative update has been removed from parliament and will be revisited in early FY12 after further consultation with stakeholders. We will advise as it progresses.*

*Under current legislation, if a director or directors of a company do not act after receiving a 21 day Director Penalty Notice (DPN) issued by the Australian Taxation Office (ATO) they become personally liable for outstanding pay-as-you-go (PAYG) deductions due by their company. If the company repays the*

*liability, enters into an instalment plan or the directors place the company into liquidation or voluntary administration during this period, the personal liability is avoided.*

*There is draft legislation issued following the FY11/12 Federal Budget that will trigger automatic director personal liability for PAYG and superannuation tax liabilities.*

*The proposed legislation encompasses:*

- *The current DPN provisions;*
- *Potential personal liability for their company's PAYG and superannuation guarantee debts;*
- *Automatic personal liability where PAYG and superannuation guarantee remains unreported and unpaid for three months after the lodgement date for a return;*
- *Withdrawal of credits for directors and associates of directors PAYG withholding amounts where a company has failed to pay all those amounts to the ATO; and*
- *Removal of notice provisions to money collected under garnishee notices.*

*If directors are unable to meet the liability, they should seek guidance on the best course of action to resolve the situation for their company.*

## **Capitalised Interest**

No, this is not the article with all the answers you have been waiting for. It is simply another angle on the draft ruling. The draft was supposed to be finalised on 11<sup>th</sup> December, 2011 but the deadline has now been extended to 7<sup>th</sup> March 2012. In the meantime tax returns need to be prepared. The ATO has advised that they should be prepared in accordance with the draft. Remembering of course that the draft says that each circumstance needs to be examined on its merits and our experience is that the ATO just won't answer private rulings on this topic. The draft is written so widely that all rental property owners with a line of credit (LOC) should be concerned.

According to TD 2011/D8 if you organise to have the loan repayments on your rental property paid from a LOC you could be caught by Part IVA as a scheme with the dominant purpose of a tax benefit. I am not talking about a fancy arrangement here just a simple LOC, in fact, even an overdraft would fit the description given in the ruling. I don't know about you but I organise for my regular payments to come out of an overdraft or LOC so that I can be sure they will be met without having to tie money up, just in case or watch the bank balance daily.

The issue with the ATO is that interest can be capitalised in a line of credit or overdraft if you organise to have the interest payment on another loan drawn from the LOC. This is a common scenario, especially when the cash flow on a rental property is negative. Taxpayers operate a separate LOC for the transactions associated with their rental property so they only need to refer to one set of statements to complete their tax return for the rental property and they do not have to worry whether there is enough money in the account to cover bills as they become due because it is a LOC so they already have a pre approved limit to which it can be overdrawn.

Do you remember Harts cases between 2002 and 2004? Well they resolved unequivocally that capitalised interest is deductible. What the ATO is trying to argue is that a LOC is a scheme set up to obtain a tax benefit, namely a deduction for interest on the interest payment.

So concerned about the ATO's approach to LOCs, are some taxpayers that they have applied to the ATO for rulings on whether their simple banking arrangements would be caught. For example are they required to put their wages and other income into the LOC to make sure interest is not charged on the interest payment on the rental property loan. Is it important which order money is placed into the account ie what if the insurance comes out before the interest payment so by accident interest is capitalised? All this despite the fact that there are several case law precedents declaring that it is not for the ATO to tell you how to manage your financial affairs, they are only entitled to tell you what is deductible and what is not and capitalised interest is deductible.

Don't go thinking that surely it will be alright if I put the rent into the LOC. No this draft ruling goes further than that, it does not even mention the word rent. It talks about taxpayers having to meet "the interest payments on the investment loan out of their own cash flow rather than use the line of credit". There you have it summed up in a direct quote from the ruling, you cannot use a LOC to make an interest payment without being caught by Part IVA according to this draft and it is intended to apply retrospectively. Bad luck if you don't have enough "own cash flow" to pay for food, they are trying to tell you propping up the cash flow short fall in your rental property must be your first priority.

Strangely enough, considering case law has found capitalised interest to be just as deductible as rates and insurance on a rental property. The ATO will allow you to use the LOC to pay these other expenses. Further, there is an ATO private ruling saying you do not have to use your wages to prop up a negative cash flow investment.

Interestingly this draft ruling only applies to rental property owners. Shareholders with margin loans capitalise interest all the time, but there is no similar ruling for shareholders or for that matter businesses who operate an overdraft. Just imagine how BHP would feel about reviewing every transaction on their overdraft to see if it effectively caused interest to be capitalised.

The ATOs argument, that it is a scheme with the dominant purpose of a tax benefit because if it didn't exist you would have paid the interest straight from your wages etc. shows just how far they think they can push Part IVA into examining every move you make. The same could apply to any loan facility, bad luck if your pay cheque wasn't big enough to cover your expenses that week no credit is to be used or Part IVA will apply. If the draft ruling wasn't meant to go this far then why is it worded this widely? The descriptive paragraph is full of catch all phrases like typically but not always.

So where to from here? Well if you are using a LOC you really need to apply to the ATO for advice on whether they think the LOC is a tax scheme. The trouble is people have done this over 2 years ago and still do not have an answer from the ATO.

If we don't challenge the ATO on this, then what is to stop them using Part IVA to ask why did you buy biscuits this week? You could have paid that off the rental property loan. No deduction, eating is just a scheme to keep the rental property loan as long as possible.

## Donations

Are you frustrated or concerned about just giving money over to professional charities? Would you like to do more? Would you like to target the care of children through their primary care givers? Would you like to support gender equality at a grassroots level. I would like to tell you about a uniquely different way to help others through Australian Women Donors Network [www.womendonors.org.au](http://www.womendonors.org.au). Here is an extract from their web site:

*"Giving circles are a new trend in Australia as women and men realise the value of working with other like-minded people to pool philanthropic investment. They have been described as a cross between a book club and an investment group, creating a low-key environment to learn about social issues. In recognition of this emerging trend, Australian Women Donors Network has drawn on the expertise and advice from around the globe to bring you this step-by-step guide, plus inspiring Australian case studies and further resources.*

*Starting a giving circle is relatively simple and anyone can do it. It doesn't matter who you are, what you know about the community sector or how much money you have to invest. We hope you find the following information helpful and look forward to hearing about your journey ..."*

If any of our readers in SEQ are interested in seeing if we can get one of these clubs up and running please email [julia@bantacs.com.au](mailto:julia@bantacs.com.au)

## Where is Julia?

Still at home and finally finished her next book which should be on the web site in a few months.

## What Is New on [www.bantacs.com.au](http://www.bantacs.com.au)

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**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.