

NEWSFLASH

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

Column by Noel Whittaker

Recently I've received a number of emails asking about the death tax of 16.5 per cent on the taxable portion of a superannuation payout that is left to a non-dependant. In this context, a spouse is always a dependant, whether they are working or not.

One way to lessen the death tax is to reduce the taxable portion of your super. This is usually done by withdrawing funds once you reach 60 when withdrawals become tax free, and then re-contributing them as non-concessional contributions. Advice should be taken as there are heavy penalties for exceeding the caps, and it is not possible to do this once you reach 65 unless you can pass the work test.

Recently I recommended to a reader that they simply withdrew their superannuation tax free prior to death as this would avoid any death tax that would be payable on it but they wondered how this could be done in view of the fact that few people know the date they are going to die.

It's important to understand that the main purpose of superannuation is to save tax. Therefore, if you are thinking about moving your superannuation to cash you should ask your accountant or adviser to calculate what your tax position would be before and after the transaction was completed. If the amount in super was relatively small you may well find that there is no benefit in retaining the money in super.

Once the money leaves super it becomes part of your estate and can be bequeathed to whom you choose in terms of your will. If you believe there may be arguments between the beneficiaries you could always invest the money in insurance bonds - they cannot be challenged under the will.

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. His email is noelwhit@gmail.com

Selling Only Part Of Your Shares In A Company

If you are only selling a portion of your shareholding in a company and you purchased those shares over time, for example dividend reinvesting, TD 33 explains how you calculate the cost base of the sold shares.

The ATO will accept your selection of which shares you have sold if you have the records. Most acceptable to the ATO is the first in first out basis. Average cost is not acceptable unless all the shares subject to the averaging were purchased on the same day.

Note if you have pre CGT shares it is important to keep records to show it is post 85 shares you sold.

ATO Discretion To Extend 2 Year Rule on Deceased Estates

Section 118-195 allows the beneficiaries of a deceased estate up to two years from date of death to sell the deceased's home and any pre 19th September, 1985 dwellings, with absolutely no CGT consequences. But, under the letter of the law, one day past the 2 year mark (this is based on settlement date not contract date) and CGT will apply to any gain over the market value at date of death, plus holding and selling costs.

The section has now been amended to allow the ATO discretion to extend this period for sales that happen in the 2008/09 financial year and all following years. If you know of an estate that has already paid CGT under these circumstances, the estate should apply for an amendment to the tax return. As the law has been changed there is no limit on the number of years back the amendment can be but of course it cannot apply to capital gains on which a contract was signed before 1st July, 2008.

It appears this change was brought about after a submission was made by the law society that legal complications can prevent the beneficiaries from being able to sell the property within the 2 year period. So while there are no guide lines yet on how the ATO will apply this discretion, it does appear that the best argument would be that it was not possible to sell the property because of legal problems.

The actual changing to the wording of the legislation is to add "or within a longer period allowed by the commissioner".

Moving Into Your Home Straight After Settlement

If you do not move into a new property as soon as practical after settlement ie the next weekend, unless you are hospitalised, you will be subject to capital gains tax on the property on a pro rata basis. This is the case whether you rent it out or leave it vacant. There is no ability to reset the cost base because you must live there first to trigger section 118-192.

If you are caught, of course the longer you live there the less of the percentage of the gain that will be subject to CGT but it is not just the tax, it is the record keeping nightmare associated with it. If you can't move in, try and delay settlement or at least start keeping records of every single expense associated with the property as per section 110-25(4) above.

If you cannot or do not move into the property immediately after settlement, do not rent it out and cover the period by undertaking some renovations. Only section 118-150 will allow you to cover a property with your main residence exemption before you move into it and then only if it is vacant and being renovated and you move in as soon as the renovations are completed.

Did You Claim a Deduction For Superannuation Last Year?

Section 290-170(1)(b) ITAA has, since 2007, set the end of the following financial as the deadline to notify your superannuation fund that you are claiming your superannuation contribution as a tax deduction. Further, you must have advised the fund before you lodge your tax return so it really should be notified well before the end of the next financial year anyway.

The trap here is, even if you don't lodge your 2011 tax return on time you must advise the superannuation fund before 30th June 2012 that you intend to claim the contribution as an expense, or you will simply not be entitled to that tax deduction.

The ATO has no discretion to extend this time. No matter how good your excuse you simply cannot go beyond the end of the next financial year. If you miss the deadline the contribution will be treated as an undeducted contribution/ non concessional contribution, so at least it won't be taxed in the hands of the superannuation fund but it is locked away until you retire.

Check Interest Earned By Children

This is the first financial year that children under 18 years of age will not be able to use the low income tax offset to reduce the tax on their passive income. There are exceptions for married children, those working full time, orphans, disabled etc but generally, if a child has interest income exceeding \$416 it will be taxed at 66% on the amount between \$417 and \$1,307 then 45% the maximum tax rate. Time to check your children's bank balance. It may be more tax effective to hold the money in your name.

Expanding Part IVA Anti Tax Avoidance Provisions

The ATO are pushing to further increase their powers under Part IVA which is the anti tax avoidance provision of the Income Tax Assessment Act. Basically Part IVA examines a transaction and can disallow it if the dominant purpose of the transaction was a tax benefit.

Currently the ATO has to produce a counter argument that if it was not for the scheme the taxpayer would have had done something different which would have resulted in more tax being paid, note this has to be a plausible argument. The ATO cannot just say you should have made a choice that resulted in the highest tax payable, they can only argue that a reasonable person would have expected the taxpayer to have acted differently, if not for the tax benefit. This is a bit of a safety net to stop the ATO applying Part IVA to every deduction, there is a need to examine what a reasonable person would have done in those circumstances, and question if there is something artificial about the arrangement. As the law currently stands, Taxpayers can argue back that there is no way they would have handled their affairs in the way the ATO is suggesting they should have, because the tax consequences are too high so they would simply have done nothing.

Treasury has announced that the law will be changed to restrict the taxpayer's right to argue against what the ATO has decided they should have done. There is a real risk that the reasonable/plausible test will be removed.

The taxpayer's defence is already difficult because the law requires the taxpayer to argue that what a reasonable person would have done rather than why they made the choice they made. Further restrictions here could lead to the taxpayer having to accept whatever alternative action the ATO can dream up and this is on any arrangement not just marketed tax schemes. To quote the press release "this also includes steps within broader commercial arrangements".

It is time that everyday taxpayers brought this issue up with their local MP for the following reasons:

- 1) The new laws are intended to apply retrospectively from 1st March 2012 yet they have not even been written yet and are unlikely to pass through Parliament until the end of the year.
- 2) It is an abuse of power to create uncertainty for such a long period of time especially to such an already widely worded provision.
- 3) To allow the ATO to decide how a taxpayer should arrange their financial affairs will lead to further uncertainty even once the law is written and an unworkable taxation system as the ATO is not in a position to advise all taxpayers what it's opinion is of each transaction.
- 4) When evaluating the fairness of the law, parliament should consider that very few taxpayers can afford to fight the ATO in court as the ATO simply continues to appeal until the taxpayer runs out of money. Further the ATO has a history of using Part IVA on simple everyday mum and dad arrangements without sufficient testing in the court. If the ATO does not like something they simply say there is a tax benefit and they will apply Part IVA. The average taxpayer just has to accept this whereas more wealthy taxpayers can fight it. Any discretion given to the ATO is a strike to tax more heavily those that can least afford it.
- 5) It is extremely difficult to get a private ruling from the ATO on how Part IVA will be interpreted by them and certainly not possible within sufficient time to make a timely decision on "steps within broader commercial arrangements".
- 6) Part IVA is already confusing and being abused as a scare tactic by the ATO, they do not need any more powers. Taxpayers must have some rights to certainty.

If you think I am exaggerating, consider that the ATO has already used Part IVA to prevent taxpayers offsetting a capital gain they have made during the year by, before 30th June, selling off shares that have a capital loss and later buying those shares back. This simple choice is now already considered a tax scheme, what next? The first thought that comes to mind is choosing an interest only loan rather than principle and interest on your rental property.

If we allow the ATO to decide what your action should be without at least requiring them to consider what a reasonable person would do, we may as well throw out the rest of the tax law and just let them decide each year just how much they would like of your hard earned dollars.

The bottom line is that if the ATO cannot meet the requirement that a reasonable person would not consider the transaction to have been entered into for the dominant purpose of a tax benefit, then that should be the end of the matter and the ATO should not be given any powers to go beyond that to choose what other course of action the taxpayer should have taken so that they would have paid more tax. Considering

the harsh penalties the ATO has in its arsenal, taxpayers should not be forced to examine everyday transactions (or “steps within broader commercial arrangements”) for the possibility of a more tax expensive way of doing business. After all it would still be better to pay the extra tax then suffer an ATO audit and penalties. This is what will happen when clear guidelines at law are replaced by ATO discretion.

Deadline for Lodging 2011 Income Tax Returns

It's not too late to lodge your 2011 income tax return but the deadline is fast approaching. If you haven't yet lodged why not mail in your tax return? For details and checklists please go to our website at http://www.bantacs.com.au/mail-in_tax_returns.php

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This edition we profile our biggest supporter Canterbury Property Services who have been helping people find investment properties and organise their finances since 1980. More information is available on our home page and property investors page.

Seminar

Transition to Retirement – Speaker Noel Whittaker Thursday 19th April 5.45pm for 6pm start finish 7pm Maroochy RSL Club, Memorial Avenue, Maroochydore
Presented by Whittaker Macnaught, free to BAN TACS clients.
This seminar will be of particular interest to clients aged between 54 to 61.
Please RSVP by 12th April sharon.altoft@whittakermacnaught.com.au or (07) 3029 4601 with the full name and contact details of those attending.

Where is Julia?

Currently at our Tenterfield office and will be back home in SEQ in a few days.

Ask BAN TACS

For \$59.95 at [Ask BAN TACS](#) you can have your questions regarding Capital Gains Tax, Rental Properties and Work Related Expenses answered. We will include ATO references to support our conclusion.

What Is New on www.bantacs.com.au

Want more? Please go to bantacs.com.au/publications.php for back issues of newsflash or download our free booklets where past newsflash articles are collated according to their topic.

With the forum and askbantacs notice board the information on the site changes daily but here is a list of significant changes in the past couple of weeks:

Askbantacs - One askbantacser has been kind enough to allow their question to be published on the notice board. It covers many of the issues with claiming interest such as constructing a rental and redraws. <http://www.bantacs.com.au/QandA/index.php?q=372>

Age Care Who Cares? – This is Noel Whittaker's new book co authored by Rachel Lane. I haven't quite finished it but found it very relevant, not for me yet, but we all have parents and inheritances to protect. It also looks into the support available to remain in your home.

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.