

NEWSFLASH

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BAN TACS
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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

The most popular New Year's resolutions are to lose weight and gain wealth – the same principles apply to each.

Rule 1. You must have a concrete goal. It is as pointless to say "I want to lose a few kilos" as it is to say "I want to have more money in the bank". You need a specific goal and a timeframe.

Rule 2. Focus on the benefits to help you stay on track. Shedding a few kilos will improve your health and make you feel better; retiring with a substantial superannuation balance will open up a whole new world of choice.

Rule 3. It must be a permanent change. Most people who go on a diet put all the lost weight back on when the diet becomes too hard. Scrimping and saving for a month is pointless - becoming wealthy is usually the result of a process of managing your money well over the long haul.

Rule 4. Understand the 70/30 rule. Seventy per cent of a successful weight loss program will be attributable to your eating habits, and thirty per cent to exercise. Seventy per cent of building wealth consists of managing your money to spend less than you earn.

Rule 5. Don't try to do too much too soon. The trick is to start small and build on it. To lose weight you might decide to have two healthy eating days a week. To get your finances in order you could start with a simple budget coupled with moving your home repayments from monthly to fortnightly.

The great thing about having a variety of goals is the way you can make them work together. Let's face it, most of our discretionary spending these days is on food and alcohol, and cutting back on these will save you dollars as well as kilos. It may be difficult at first while you are slowly changing lifelong habits but eventually new habits will form. Then you can enjoy the results.

Noel Whittaker is the author of Making Money Made Simple and numerous other books on personal finance. His advice is general in nature and readers should seek their own professional advice before making any financial decisions. Email: noelwhit@gmail.com

LAFHA – Maintaining A Home In Australia

Readers are no doubt aware that there have been major changes to the Living Away From Home Allowance concession. The two major concerns have been that the allowance can only be paid for a maximum of 12 months per place of relocation, the employee must still maintain their original home and it must be located in Australia.

Section 31C of the FBT act defines maintaining a home in Australia as follows:

The employee satisfies this section if:

- (a) the place in Australia where the employee usually resides when in Australia:
 - (i) is a unit of accommodation in which the employee or the employee's spouse has an ownership interest (within the meaning of the *Income Tax Assessment Act 1997*); and
 - (ii) continues to be available for the employee's immediate use and enjoyment during the period that the duties of that employment require the employee to live away from it; and
- (b) it is reasonable to expect that the employee will resume living at that place when that period ends.

The term ownership interest used above is the same as the CGT definition in section 118-130 and includes a right to occupy. This means that despite what you might initially assume by reading the section above, you can rent the home you maintain in Australia, you do not have to own it.

More information is available on the ATO web site at

www.ato.gov.au/individuals/content.aspx?menuid=0&doc=/content/00333793.htm&page=5#P46_4178

This information includes the requirement that the home must be available for your immediate use and enjoyment at all times while you are living away from it and you expect to resume living at the home when you return. Note a home can include a hotel, guesthouse, bunkhouse, caravan or boat. An ownership interest will not normally exist when you live in your parents' home. The website also states that you cannot rent out or sublet your home while you are away and you must pay the ongoing costs of maintaining the home ie rates, rent or mortgage. If you do have a boarder or tenant who would normally live with you anyway they can stay as long as their presence does not prevent you also occupying the home. You can utilise a house-sitter to look after your home while you are away but they must either vacate when you return or live in a way that does not impinge on the availability to you to also use the place as your home.

PAYG Instalments – Not So Simple

The ATO have recently begun calling small businesses to discuss PAYG instalments reported on quarterly activity statements. This unusually proactive approach from the ATO indicates that there are still a lot of errors being made in the arena of Pay As You Go (PAYG) tax.

PAYG is a system for paying instalments towards your expected tax liability. When you lodge your tax return for the year your actual liability is assessed and instalment amounts that you have paid are credited against your assessment to determine your final refund or tax bill.

As a general rule the ATO will place you in the PAYG system if you have reported \$2k or more of gross business and/or investment income (excluding net capital gains) in your last tax return; your last assessment notice included tax payable of more than \$500; your notional tax is more than \$250; you are not entitled to the Senior Australian or Pensioner Tax Offset.

Most people are required to pay instalments on a quarterly basis and will receive an Instalment Activity Statement (IAS). On this statement you will have the option to pay either an instalment amount calculated by the ATO or your own instalment calculated by multiplying your instalment income by a rate provided by the ATO.

The calculation of instalment income is the area in which the majority of mistakes are made. Instalment income is generally your gross business and/or investment income, excluding GST. It includes gross sales and fees received for services, gross interest, gross rent received, unfranked and franked dividend amounts, foreign pensions and other foreign income, royalties and income from trusts and partnerships. It does not include wages, imputation credits or income that is not assessable. Nor does it include Capital Gains.

You are able to vary the instalment amount or rate but there are heavy penalties for getting it wrong so it is a good idea to seek professional advice before making any variation to your PAYG instalments and before making a decision as to which instalment option you will select.

Contributed by Lyn Gower, owner of our Tenterfield, Stanthorpe and Gold Coast offices.

Clauses In Real Estate Contracts

Not all Real Estate contracts are the same, not only should you read them before signing but you should take it to your Solicitor first. Don't let a pushy Real Estate agent talk you into signing up without professional advice. Think about the huge amount of money involved, here are just a couple of examples of what can go wrong. A client went to an auction not expecting to buy so had not had the contract checked out. She assumed it would be just like any other contract. She was buying the property to use as her home in about a year's time so was pleased to agree that the seller could continue to use it in his business for 12 months after the sale. The contract said the vendor would be providing vacant possession and that GST did not apply to the sale. But here is the kicker, have a look at this clause:

No GST Payable By Vendor

*The Purchaser warrants that the property is intended to be occupied, and is capable of being occupied, as a residence. If this warranty is false and the vendor is obliged to pay GST, **the purchaser hereby indemnifies the vendor in respect of his obligation to pay such GST and any accrued interest or penalty thereon.***

This is a typical reaction by the vendor's solicitor to uncertainty about the operation of the GST Act. They just push all the responsibility onto the purchaser rather than find an answer. Of course the poor purchaser can't even find out whether GST is likely to apply to the transaction because they don't know enough about the vendor's personal circumstances. If the ATO look into the transaction the vendor has no reason to fight the ATO and the purchaser has no right to fight the ATO.

So the moral of this story is read the contract, get advice and never ever agree to be responsible for someone else's GST even if you think it won't apply. Right or wrong, confidentiality means you will have no right to argue your case, you must just pay up another 1/11th of the purchase price, over \$50,000 in my client's case. Mind you I have my doubts that such a clause could be successfully enforced through the courts.

Ok now that the nagging is over let's have a look at the issues the solicitor should have examined to give his client the correct advice rather than just trying to dump responsibility onto the purchaser.

The first sale of a residential property is subject to GST but any sales after that are exempt from GST. This property had been sold as a residential property before so if it was still considered a residential property no GST would apply. But the house was actually being used as a medical practice. If the property is considered commercial rather than residential GST will apply to the sale. So when is a house a commercial premises?

It is all about the condition the property is in at the time of sale yet the solicitor, again in a slap dash approach of who cares about the law we will just contract our way out of any liability rather than look it up, also wanted the purchaser to sign another clause in the contract stating that she would use the premises as residential property after the sale. Effectively, now because my client didn't read the contract, by simply signing a contract agreeing to purchase the property she was committing fraud because she had already agreed to rent the premises back to the seller for commercial use for a year. Oops on the soap box again, anyway here is what GSTR 2000/20 states about residential premises:

Residential premises is defined as land or a building that:

- (a) is occupied as a residence or for residential accommodation; or*
- (b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation;*

(regardless of the term of the occupation or intended occupation)

.... It is their physical characteristics that mark them out as a residence. In turn, these characteristics determine when the use or proposed use is for residential accommodation.

..... To be residential premises as defined, a place need only provide sleeping accommodation and the basic facilities for daily living, even if for a short term.

24. The definition of 'residential premises' in section 195-1 refers to land or a building that is occupied as a residence or for residential accommodation or is intended and capable of being occupied as a residence or for residential accommodation.

26. The physical characteristics common to residential premises that provide accommodation are:

- (i) The premises provide the occupants with sleeping accommodation and at least some basic facilities for day to day living.*
- (ii) The premises may be in any form, including detached buildings, semidetached buildings, strata-title apartments, single rooms or suites of rooms within larger premises.*

28. *The definition states that residential premises must be capable of occupation as a residence. To be a residence in this sense, a place normally should have the facilities required for day to day living. These characteristics are inherent in the fabrication of the structure itself. The premises should have such things as areas for sleeping, eating and bathing, but it is not necessary that these things be arranged in a similar manner to a conventional house or apartment.*
29. *Premises that lack these basic features, may not be either residential premises or commercial residential premises. Supplies of buildings or other structures without these characteristics are subject to GST under the basic rules, regardless of whether or not they are or have been at one time, occupied as some form of residence.*

There is much more in GSTR 2000/20 if you need further clarification but the paragraph that caught my client in particular was:

31. *In some cases, the purpose for which the premises are to be used will be evident from their form or fit-out. This is most clearly the case where premises have been fabricated, or altered, to accommodate commercial or professional activities.*

The property was used to provide professional medical service before and at the time of the sale and my client had agreed to continue to use them as such. So this was not the sale of residential premises it might have all the things necessary to be a house but it was commercial premises and the supply of commercial premises is subject to GST, that is, if the seller is registered for GST.

This was her out. She asked for more information about the seller and the entity that operated the business. They were different. The medical practitioner operated his business in his own right but owned the premises in partnership with his wife. Yes, the medical practice was registered for GST. My client could find this out by doing a search on <http://abr.business.gov.au/LookupTool.aspx> She also found out that the Practitioner and his wife were not registered for GST and that their partnership that owned the premises (not the medical practice) did not have a turnover of more than \$75,000 per annum. Accordingly, they are also not required to be registered for GST. The trick here is that as the sale of the property is the sale of a capital asset, it is not part of turnover so it will not push them to register, if they are not registered they do not have to charge GST even though the sale is of an asset that would be subject to GST. Here is the important references:

Section 23-5 states that if the annual turnover of supplies you make in the normal course of your enterprise, exceed \$75,000 you must register for GST. Section 185-25 excludes from the calculation of annual turnover the supply of a capital asset.

Next Edition of Newsflash we will look at the problems a going concern clause can cause in a contract and why you must have vacant possession.

Ask BAN TACS

For \$59.95 at Ask BAN TACS, www.bantacs.com.au/QandA/index.php, 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

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With the Forum, www.bantacs.com.au/forum, and the Ask BAN TACS Notice Board, www.bantacs.com.au/QandA/index.php?section=browse, the information on the site changes daily but here is a list of significant changes in the past couple of weeks:

Capitalising Interest etc - www.bantacs.com.au/capitalising-interest.php now has a letter from the ATO saying that even the interest on borrowings to pay for predictable repairs to a rental property is not tax deductible if you have non deductible debt and the minutes of a meeting of the General Anti Avoidance Rule Panel on capitalising interest. More about this in our next newsflash.

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.