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

On the face of it, it's never been a better time to go for a housing loan. Interest rates are at a record low, and lenders are falling over themselves in an effort to convince us to borrow money from them. It's a far cry from the 1980's when money was tightly regulated, and even those with huge deposits and a strong family connection had to fight for a loan.

Now there's so much money about that lenders will even come to your home to process your application. The problem is that many of these people are more orientated toward sales, rather than lending. They will probably arrive with a laptop computer full of programs and with a few deft keystrokes tell you how much you can borrow. You may get a shock to find out how large a sum it is.

While I don't doubt the accuracy of these programs, the danger is that they can lead you into dangerous waters. They don't take into account individual spending habits. For example, one family may smoke and drink, another may not. One family may have children at university or boarding school, in the other the elder children may work. Unfortunately far too many borrowers think "If the bank says I can borrow that much it must be OK".

The solution is to take your future into your own hands and do a budget before you think about borrowing. After you have done your budget, and taken into account such items as car replacement, holidays, and home maintenance, you will know how much a week you can spend on a new loan. If you are buying an investment property, don't overlook the net income from that property.

Then it is only a matter of asking the lender how much you can borrow based on your nominated weekly repayments. Once you know this figure you can plan your borrowings with confidence knowing the payments fit your lifestyle, and not just the bank's computer.

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.

SMSF vs Public Superannuation Funds

It has always surprised me how much negative publicity Self-Managed Superannuation Funds (SMSFs) receive. You know the scare tactics, they are far too complicated and you risk getting into trouble with the ATO taking half the assets in tax. All tax law is complex even from a simple wage earner tax return yet the ATO try to encourage you to do that yourself on line. With a SMSF you have plenty of advisers to keep you on the right path and just to be sure the fund is audited every year. Seems to me that it is the area of compliance that the average taxpayer is least likely to get wrong as long as they seek and follow professional advi

The ASIC commissioned Rice Warner Actuaries to report on the "Costs of Operating SMSFs" this of course considered the relevant returns. Here is an interesting comparison from the report:

Financial Year	Return Gross of Fees Public Fund	Return Gross of Fees SMSF
2005	13.2%	17.4%
2006	14%	16%
2007	15.6%	20.1%
2008	-7.6%	-4%
2009	-11.9%	-4.5%
2010	9.8%	8.3%
2011	8.7%	11.2%
Average	5.4%	8.8%

I just wonder if all this scare campaign is in response to the banks and other public fund providers losing too much of their market share. 670 new SMSFs are created each week! It seems the public funds consider spin is far easier than improving performance.

Makes you wonder just what is behind the laws that will prevent Accountants discussing SMSFs with their clients unless they are licenced through these sorts of big entities. The fees for a simple licence for an Accountant to be able to discuss SMSFs with their client are higher than all the other licences and insurances combined, that they require to practice. Just who is being protected here? Regulation of the financial industry has been captured by the very entities it is required to regulate.

Share Trader or Investor?

There is more than a fine line; it is more jagged, between being considered in the business of share trading or merely investing. If you are in business then your losses may be able to be offset against your other income but there will be no 50% CGT discount on capital gains.

In Hartley's case 2013 AATA 601 despite turning over more than $900,000 in 40 transactions in a year, with the average transaction being $40,000, the taxpayer was still considered to be an investor. It appears to be the lack of business like organisation and the fact the taxpayer had a full time job that persuaded the AAT that the activities did not amount to a business.

Superannuation Guarantee and Contractors

In Hollis' case (2001 ATC 4508) bicycle couriers were considered to be employees despite the fact they signed agreements to be contractors. This meant that the courier company was required amongst other things to contribute to their superannuation.

Still employers continue to try and find a way of making their employment contracts look like contractors so that they do not have to withhold tax, pay superannuation and workers compensation. The ramifications of getting this wrong are just not worth the risk, penalties are high. It is far wiser to error in favour of accepting the employee relationship.

In a recent case, Floorplay Pty Ltd (2013 AATA 637) was a company who organised the crew for fishing vessels owned by its related company. Floorplay made the crew enter into contractor arrangements with their pay being a percentage of the catch. The AAT ruled that, despite the contract this was really an employment relationship and the superannuation guarantee was payable, out of Floorplay's share of the catch!

Both these cases looked at whether the "employee" was really running their own business or serving an employer.

The CGT Main Residence Exemption Should Never Be Taken For Granted

Section 118-150 allows you to back date your main residence exemption over vacant land and your homes during construction providing you move into it as soon as practical after completion. ID 2006/185 also states that if you live there for more or less than 3 months you can use section 118-145 (the absence rule sometimes referred to as the 6 year rule) to continue to cover the property after you move out, with your main residence exemption, as long as you still own it.

In Keep v FCT AAT 2013 709 the period of time that the taxpayer lived in his newly constructed home was not clear but the shortest period was just one week short of the 3 months required. The CGT was over $20,000 so I bet he wished he had stayed that extra week. Nevertheless, the use of the absence rule, section 118-145 was not argued. Maybe because there were doubts that he even established the property as his main residence at all. The judgement didn't even allow him a partial exemption for the period of time that it was agreed he actually lived there.

Here are the factors from the case that I feel may have influenced the decision that he did not actually establish his main residence exemption at all even though he was living there.

1) There was no evidence of any gas or electricity accounts kept in his name. Apparently they were connected in his ex-spouse's name so he could not produce evidence.
2) He had not changed his address for some items from his sister's place where he had lived before the house was finished and after he moved back out of the house.
3) He had a drivers licence in a different state.
4) As a fly in fly out miner he didn't always return home to the newly constructed house, instead staying at his sister's place on some breaks.
5) His income tax return for the relevant year showed his sister's address.
6) No one vouched for him in court that the place was used as his home, they only sent letters.
7) The biggest mistake of all, he represented himself in court. This probably explains why he didn't argue section 118-145 or at least a partial main residence exemption.

The judgement is disappointing because it lacks analysis of the law involved. Possibly the sitting AAT member may have been influenced by the credibility of the witness, something that is not clear in the judgement. I certainly hope Mr Keep appeals and argues, with the help of representation, far more strongly that he did at least establish his main residence exemption for some period of time and then section 118-145 takes over. It would be nice to have more test cases on this issue; people representing themselves give the ATO precedents to use against taxpayers that are not thoroughly tested. I feel that the ATO is pushing this area rather aggressively, for example in their capital gains calculation they only allowed him $70,000 for the cost of constructing the house when in actual fact the costs were nearly 4 times that amount.

The point I want to stress here is your main residence exemption is not an automatic right. It is your obligation to prove that you qualify.

Vendor Finance GST Trap

It is the amount that you sell the property for that determines the GST liability, even if you never end up getting that money because a vendor finance arrangement falls through.

In KFBC v C of T 2013 AATA 577, to assist the purchaser, the vendor agreed to take only part of the sale price at settlement, effectively lending the purchaser the balance and taking a second mortgage over the property. In this case the purchaser was a developer. When the developer defaulted on the loan agreement the vendor accepted that instead it would receive three blocks of land and $500,000. The $500,000 was received but the bank, holding the first mortgage sold up the land before the vendor received the three blocks. And naturally enough after the bank had finished taking its share there was nothing left for the vendor.

Nevertheless, the property was still effectively sold for the original agreed price and GST was payable on that full amount. It is not related that the loan the vendor made to the purchaser went belly up.

Spruiker Proofing – Word of Mouth

The best way to protect your self, is to ask for referrals. If your friends can't help try posting a question on our forum http://www.bantacs.com.au/forum_introduction.php. Our forum is unique in that people have to prove their identity before they can participate. This means you are a bit safer from spruikers using another identity to recommend themselves. Also have a look and see if the service you are seeking is listed in our affiliates section, where we recommend the people we trust.
http://www.affiliates.bantacs.com.au/index.php

Where is Julia?

Home in SEQ! What a lovely time of year.

Ask BAN TACS

For $69.95 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.

Winning Property Tax Strategies – The Book

Once again a brilliant combination of Noel Whittaker's easy reading style with Julia Hartman's mind numbing attention to detail. Lots and lots of new stuff plus updated basics for the first time reader so it is much bigger, 300 pages but still the same price. New chapters including young investors, SMSFs, renovators, granny flats, investment and budgeting strategies, fires and floods, mass marketing spruikers, commercial properties, subdividing and development. You can also purchase it online by going to www.bantacs.com.au/book_winning-property-tax-strategies.php The cost is still a low low $29.95 plus $5.95 postage – tax deductible of course!

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. There are over 30 topics, for example How Not To Be A Developer, Claiming Your Trip Around Australia As A Tax Deduction, Claimable Loans, Rental Properties, Overseas, Fringe Benefits Tax, Claiming a Motor Vehicle, GST etc.

With the forum and the Ask BAN TACS Notice Board the information on the site regularly changes. Threes very generous askbantacsers have allowed their questions and answers to be placed on the notice board.
http://www.bantacs.com.au/QandA/index.php?xq=490 is about an expat selling their home in Australia
http://www.bantacs.com.au/QandA/index.php?xq=492 the GST ramifications of demolishing a house and building a duplex but maybe sell one side.
http://www.bantacs.com.au/QandA/index.php?xq=495 demolish, subdivide and building 3 houses, possibly changing ownership of the property and whether to utilise non-resident family members as beneficiaries.