

# 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

Due to interest rates moving down, the Centrelink deeming rates have changed again. The good news is those who are income tested for pension purposes will receive a slight increase to entitlements.

The rates for a couple will be 2% on the first \$77,400 and 3.5% on the balance. For a single pensioner the first \$46,600 will be assessed at 2%, and the balance at 3.5%. The assets that are subject to deeming include bank accounts, shares, managed funds, insurance bonds, debentures, superannuation when the owner has reached pensionable age, and deprived assets such as excess gifts.

For example, if a single pensioner had financial assets totalling \$146,600 the income from these would be deemed by Centrelink to be \$4432 year made up of 2% on the first \$46,600 (\$932) and 3.5% on \$100,000 (\$3,500).

These rates apply irrespective of the amount actually earned on investments, so pensioners can gain an advantage if they can get safe returns that are higher than the deeming rates. Unfortunately, many pensioners don't understand this and leave their savings in the "deeming accounts" offered by the major banks. The problem with these is that all they pay is the rate stated above. This means pensioners are being penalised because banks and credit unions have accounts with no fees that offer around 4% on the entire balance.

Cast your minds back to the example above. If the whole \$146,600 was placed in an account paying 4% the pensioner would receive \$5864 – even though they are only deemed to be earning \$4432. That's a difference of \$1400 a year just because they were financially aware.

For pensioners who are prepared to accept stock-market volatility there are also managed funds available that target high yield stocks. They have the potential to deliver high returns, but also have a higher degree of risk. A good financial adviser should be able to recommend appropriate ones for your situation.

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](mailto:noelwhit@gmail.com)

## GST Clauses

In *Tam V Mannall* 2010 NSWSC 250 the contract read:

“Normally, if a party must pay the price or any other amount to the other party under this contract, GST is not to be added to the price or amount.”

The sale was for commercial premises by an entity registered for GST. The seller claimed that at the auction it was understood that the amount bid would be the net of GST amount, they apparently used the words “GST on top”. The purchaser denied knowledge of this and won the case based on the wording of the contract. Although the outcome could have been different if there was some independent written evidence that the price was promoted as plus GST on top, as was the case in *Ashton v Monte Leone* 2010 NSWSC 258. The seller may then have been successful in arguing that the contract wording was a common mistake.

The contract used was a standard real estate contract. That is the trouble with auctions, you are forced to sign there and then and can't run off to your solicitor and accountant for advice. If you are considering bidding at an auction, don't just go along thinking nothing will come of it so why spend the money on professional advice.

From the seller's point of view, at an auction, the roles are very much reversed, you will not be presented with an offer where you can then go and seek advice. This seller got 1/11<sup>th</sup> less than they anticipated because they were locked into whatever happened on the day, probably expecting the real estate agent to look after their interests.

Auctions might get action but it is all too fast for anyone to do their due diligence before signing. The due diligence has to be done before the auction and as seriously as if you had already decided to buy or sell. Please if you are going to sell or buy at an auction ask for a copy of the contract before the day and get advice from a Solicitor and Accountant on just what that contract says. There are plenty of other dangerous clauses to be aware of. Even if you are buying a home to live in you still need to make sure there is a vacant possession clause and that there is not a going concern clause. Buying land that was once used as part of a farm can also have its dangers. I know, I am nagging now, I just want readers to understand that whether they are buying or selling there are no real estate deals that are simple enough to just rely on what the real estate agent tells you.

## Asset Protection – PPS Register

If an entity that actually has possession of your property is placed into administration or liquidation and your interests are not listed on the Personal Property Security register then the administrator or liquidator can treat the goods as belonging to the entity in administration or liquidation and sell them to meet the debts owing to creditors. You may well be able to line up along with the other creditors for some payment but you will not be specifically entitled to recover the goods or the proceeds of the sale of those particular goods. Even worse still if someone else has registered their right then they may well be entitled to all the proceeds of the sale of your property instead of you. When a bank provides a business with an overdraft it is not uncommon for them to register an interest over all the business assets and now that includes assets simply held by the business not necessarily owned.

See our Newsflash 250 for more discussion on the PPS register. Since then there has been an alarming test case. *Maiden Civil (P&E) and others vs Queensland Excavation Services and others* 2013 NSWSC 852.

In the above case Queensland Excavation Services (QES) purchased 3 excavators under finance through Esanda and Westpac who took security over the principles home and other guarantees. Not actual security over the excavators which meant they were unencumbered as far as the PPS register was concerned. The excavators were leased to Maiden Civil.

Maiden Civil then borrowed from Fast Financial Solutions P/L who took as security for the loan a lien over the assets of Maiden Civil, including the excavators. Fast Financial registered its interest on the PPS register. When Maiden defaulted Fast Financial exercised its right to appoint a receiver manager over Maiden's assets. By this time two of the excavators were back with QES. The court accepted that QES was the legal owner of the excavators but nevertheless ordered that QES hand the excavators over to the receivers for sale with the proceeds to first meet the debt to Fast Finance. If there was any funds remaining QES had to take its turn with any of the other unsecured creditors.

## Buy Plant & Equipment Before 31<sup>st</sup> December, 2013

It is expected that the Abbott government will remove the small business depreciation concessions for any purchases after 31<sup>st</sup> December, 2013.

This means that if you qualify as a small business (turnover under \$2,000,000) and buy now you will be entitled to a full tax deduction for plant and equipment that costs you less than \$6,500, including cars. If the car costs more than \$6,500 you will be entitled to a full tax deduction for the first \$5,000 plus depreciation on the balance. But if you wait until 1<sup>st</sup> January 2014 there will be no write off at all for the first \$5,000 on a car and the immediate write off for plant and equipment will be lowered probably to only \$1,000, as it was before these changes were introduced by the Labor government.

## Making Super Contributions For Family Members

Employers are of course allowed a tax deduction for superannuation contributions it/they make for employees. When it comes to family companies or trusts making superannuation contributions for family members it is important that an employment relationship exists, referred to in section 290-70 as an employment activity condition. The ATO considers that an employment activity condition is met when the employee is engaged in producing the assessable income of the trust or is engaged in its business.

In all circumstances it is preferred that the employee or director also receive some wages from which tax is withheld, superannuation guarantee contributions made and workers compensation cover provided if applicable in your state.

If the “employee” is a director the employment activity condition does not have to be satisfied but the company’s constitution has to allow directors to be paid for their services and a minute passed by the shareholders authorising the payment. Because the employee test does not have to be met directors can still receive superannuation contributions when the company only earns its income from passive investments, the catch here is companies are not the place to hold your passive investments because they do not get the 50% CGT discount.

When the company is merely the dormant trustee of a trust the director would also have to satisfy the employment activity condition in regard to the trust in order for the trust to be able to claim the superannuation contributions against its income, reference TR 2010/1 paragraph 243.

The fact that a family member is a director of the trustee company is unlikely to help as that would simply make the deduction available to the trustee company which has no income to offset against the deduction. A dormant trustee charging the trust management fees sufficient to cover a superannuation contribution would be an artificial deduction to the trust so not deductible against the investment income.

In direct answer to the question in many readers’ minds, a passive investment trust, for example holding rental properties is unlikely to be able to make contributions for family members. Trusts don’t have directors so the problem is the employment activity test (refer end of first paragraph above). The first limb requires employees to be engaged in producing the assessable income of a trust. The ATO would consider it is the investments that produce the income not the employees. The second limb of the test cannot apply when the income of the trust is simply passive investment income because it is not a business. This leaves only the very limited situation where the investments are so numerous and the family’s involvement so relevant that the trust is considered to be in business. Many have argued this point and failed. The family would have to be involved in managing the properties instead of property managers and there to be at least 3 properties though test cases with 14 have failed.

## Another Trick Bites the Dust – Non Commercial Losses

Our Division 35 Offsetting Business Losses booklet

[http://www.bantacs.com.au/booklets/Division\\_35\\_Offsetting\\_Business\\_Losses\\_Booklet.pdf](http://www.bantacs.com.au/booklets/Division_35_Offsetting_Business_Losses_Booklet.pdf)

contains information about the tests you are required to pass before you can offset a loss from a business against your other income. The test isn’t even available to taxpayers with an adjusted taxable income of \$250,000 or more. If your income is too high or you do not pass any of the tests the losses are deferred only to be used when the business becomes profitable.

The booklet also explains the way around this was to salary sacrifice some or all of the business expenses to either make the business profitable or reduce your adjusted taxable income. The otherwise

deductible rule would mean your employer would not pay FBT on the benefit or report it in your PAYG summary. They had the same effect as being tax deductible but avoided Division 35. This approach was accepted by the ATO in its FBT subcommittee meeting held on 19<sup>th</sup> August 2004.

The ATO has brought out a draft ruling TR 2013/D13 stating that it no longer holds this opinion. The draft ruling takes the view that FBT would apply to these expenses. There is a possibility that the ATO's view is incorrect but that only means you should not undertake this strategy unless you want to fund a long and tedious test case. If you have been utilising this loop hole, we suggest you stop ASAP.

TD 2013/D4 makes it clear that even if FBT is paid these amounts to which Division 35 would have applied are to be included in the adjusted taxable income in calculating whether the \$250,000 threshold has been exceeded. They are also to be grossed up just as any other reportable fringe benefits are.

Draft rulings of course are not final. The ruling is intended to apply retrospectively. This means that people who relied on the statements of the ATO in 2004 could now be punished for following that advice. Whether you think taxpayers should have taken advantage of this loop hole or not, the point here is that it sets a dangerous precedent if the ATO is allowed to change its mind retrospectively and it is important that all taxpayers stand up to this, please consider writing a letter to your local Federal member.

## Where is Julia?

Back in SEQ, hopefully until March/April.

## 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](http://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](http://www.bantacs.com.au)

Want more? Please go to [bantacs.com.au/publications.php](http://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. Two very generous askbantacsers have allowed their questions and answers to be placed on the notice board.

<http://www.bantacs.com.au/QandA/index.php?q=498> discusses Blue Bay's Smart Families Loan where parents lend the deposit to their children so they can buy a home.

<http://www.bantacs.com.au/QandA/index.php?q=500> is about gifting a property to your child but continuing to receive the rental income.

Askbantacs is becoming quite popular; it is a shame so few allow their questions to be placed on the notice board.

**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.