NEWSFLASH

Visit us at www.bantacs.com.au

BAN TACS National Accountants Group

BAN TACS Accountants Pty Ltd is a CPA Practice

For website technical support email technicalservices@bantacs.com.au

For all accounting & tax support contact one of our offices or just go to Ask BAN TACS

Issue Number: 318 **Pages: 4** **Date: 15th March, 2017**

New South Wales

Burwood ***CPA***
Phone: 1300 367 688
E-mail: burwood@bantacs.com.au

Central Coast ***MNIA***
Phone: (02) 4390 8512
E-mail: centralcoast@bantacs.com.au

Tenterfield ***PNA***
Phone: (02) 6736 5383
E-mail: tenterfield@bantacs.com.au

Sydney ***CPA***
Phone: 1300 367 688
E-mail: sydney@bantacs.com.au

Chatswood ***CA***
Phone: (02) 9410 1366
E-mail: chatswood@bantacs.com.au

Queensland

Gold Coast ***PNA***
Phone : (07) 4681 4288
E-mail: goldcoast@bantacs.com.au

Bribie Island Road , Ningi ***CPA***
Phone: (07) 5497 6777
E-mail: ningi@bantacs.com.au

Brisbane (Morningside) ***CPA***
Phone: 1300 911 227
E-mail: brisbane@bantacs.com.au

Mackay ***CA***
Phone: (07) 4951 1848
E-mail: mackay@bantacs.com.au

Stanthorpe ***PNA***
Phone: (07) 4681 4288
E-mail:stanthorpe@bantacs.com.au

Toowoomba ***CPA***
Phone: (07) 4638 2022
E-mail: toowoomba@bantacs.com.au

South Australia

Adelaide ***CPA***
Phone: (08) 8352 7588
E-mail: adelaide@bantacs.com.au

*Visit **Bantacs.com.au**About Us section to view office location details and information about BAN TACS practitioners.*

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

Decision in Travelling Workers Case

The full transcript of this decision can be found at http://www.austlii.edu.au/au/cases/cth/AATA/2017/324.html

Mr Walker has been a farm worker all his life. He established a seasonal routine of 3 different farms north, west and south of his home base on the Sunshine Coast. When working, he lived in a small caravan with limited facilities relying on the amenities provided in caravan parks or on the farms where he stayed.

Basically, Mr Walker lost his case because the AAT member Deputy President Molloy found that he was not itinerant. Only two reference cases regarding itinerancy were consider by Deputy President Molloy. That was Genys case 1987 17 FCR 495 which is about an agency nurse who worked at a different hospital each day but went home each night and Wiener 78 ATC 4006 8 ATR 335 which relates to a school teacher who worked at more than one school each day before returning to her home at night. Our submission included references to Gaydon v DFC of T 1998 AAT and S29 85 ATC 276 both of which are cases where shearers were found to be itinerant. Mr Walker's circumstances as a fruit picker who worked a circuit of 3 farms according to the seasons were a much closer fit to shearers than teachers and nurses. Neither Gaydon nor S29 were covered or listed as reference in Deputy President Molloy's decision despite them being part of our submission. This was very disappointing because we really felt that Deputy President Molloy would give us a fair hearing.

Deputy President Molloy's decision starts with an examination of various cases that found home to work travel is not tax deductible but then pointing out that there is an exception to this rule and that is when the taxpayer is itinerant. The reasons Deputy President Molloy found Mr Walker not to be itinerant were: Paragraph 43 "The travel was not a requirement of his employer or of his employment, but a product of his choice to work in other locations". "Such travel was not a fundamental part of his work."

Paragraph 44 "Each work location may be regarded as a regular or fixed place of employment"
Paragraph 45 "Benyenda Citrus was only a few weeks. Otherwise, however, his employment at each location has been longer, regularly for three or four months; and in one case six months, amounting I think to his having fixed places of employment."
Paragraph 46 "The Sunshine Coast home has been little more than a location for Mr Walker and his wife to visit occasionally on holiday."

Paragraph 44 is a conundrum, to be itinerant you need a circuit of places you work before you return to your home base but each place on Mr Walker's circuit was considered a fixed place of employment and that meant he wasn't itinerant.

We argued that if Mr Walker was found not to be itinerant then he should still be entitled to his travel and accommodation expenses based on Roads and Traffic Authority of NSW and FCT 1993 FCA 314 26 ATR 76 where employees who had to live temporarily at their worksite were entitled to deduct these expenses. Deputy President Molloy's response to this was:
Paragraph 51 "employees who in the course of their employment are compelled by their employer, and not by choice, to spend money on accommodation and other expenses. It was Mr Walker's choice to live and work where he did."
Paragraph 52 "I think home for him was his caravan. Even if the Sunshine Coast property was his home, I do not think his absences could be described as short-term."

We further argued that section 25-100 ITAA 1997 allowed a tax deduction for travel between two places of work. Subsection 4 of this section states that it "is not travel between workplaces if, at the time of your travel to the second place (a) the arrangement under which you gained or produced assessable income at the first place had ceased". Now I would have thought this would prevent you from quitting your job in Sydney and claiming all your moving costs to your new job in Perth. Further, I would have thought that section 25-100 was intended exactly for people with more than one employer that they travel between. Deputy President Molloy found at paragraphs 54 and 55 that as Mr Walker "had a non-binding understanding" (there was not a written contract just verbal agreement) that he would be re-employed upon his return. As a result, he considered that Mr Walker's employment had ceased each time he left a farm so was not deductible under this section.

Now two of Mr Walkers employers had more than one farm. On many occasions, Mr Walker was required to travel between these farms in the one day. Deputy President Molloy agreed that these trips would be tax deductible but as his log book entries included the other travel he did on the day ie between his caravan and the first farm he worked at, the between farms travel could not be dissected so absolutely nothing was deductible despite the fact the legislation only required a detailed reasonable estimate to make the claim. Further, in Weiner's case she was found to be itinerant because she had more than one work place during the day before returning home, just as Mr Walker did. Once Weiner was found to be itinerant she was entitled to claim her travel from her home to the first workplace.
"On four of the five working days, the taxpayer's contract of employment required her to teach at not less than four different schools and to comply with an exacting timetable which kept her on the move throughout each of those days. The nature of the job itself made travel in the performance of its duties essential, and it was a necessary element of the employment that on those working days transport be available at whichever school the taxpayer commenced her teaching duties and that transport remained at her disposal throughout each of those days. It was not said by the taxpayer in evidence that it was an express term of her employment that she provide her own means of transport, but it appears to have been tacitly understood that she would do so, as she was paid an allowance by her employer for the use of her motor vehicle in travelling between schools. The evidence as to the necessary use of a motor vehicle is not as strong in relation to the single working day on which the taxpayer was not required to attend at more than one school, but it would seem that performance of administrative tasks on that day was facilitated by the use of the motor vehicle. In any event, no separate issue was raised as to the expense of travelling between home and school on that day. In all the circumstances, it seems to me, that the travelling expenses claimed by the taxpayer fall into the first of the two categories described by Lord *Simon* of *Glaisdale* in *Taylor v. Provan* i.e. where the office or employment is of itself

inherently an itinerant one, and that the taxpayer may be said to be travelling in the performance of her duties from the moment of leaving home to the moment of return there."
Accordingly, the fact that the daily entries in Mr Walker's log book included travel from his caravan to his first place of work for the day should not prevent the kilometres recorded from being used.

Mr Walker also kept records of his tax-deductible phone calls. Many of these were made to his employer while on the farm, and some were to confirm work before moving from one employer's farm to the next. Because Mr Walker was found not to be itinerant then he could not rely on Gaydon's case to be entitled to claim his phone calls, when moving on to the next farm. Again, even though he would have been entitled to a tax deduction for the vast majority of his calls, because some of the calls recorded were not deductible, then the whole lot was thrown out on the basis they could not be separated.

If we are to accept this decision as the new definition of itinerancy, then the chances of any worker qualifying would be very slim. Mr Walker's caravan was small and with limited facilities, yet it was considered his home because he was only free from work to return to his Sunshine Coast home on holidays. On the other hand, in order to be itinerant, there is a requirement that travel must be a fundamental part of his occupation. It even brings into doubt whether any occupation can be itinerant including shearers who have long been accepted as such.

There is also the implication that as Mr Walker made a choice to be a seasonal worker, that somehow prevented him from being considered itinerant. This conundrum suggests that only indentured seasonal workers could be itinerant. The choice was also implied because instead of accepting work closer to home which was only available for one season per year and where because the area was so populated there was strong competition for jobs, he chose to travel between regular locations most of the year where he knew he would be employed. Then there is the requirement to have a written contract to claim travel between two places of employment under section 25-100 even though the evidence of the same regular circuit is there over the years.

Until recently our interpretation of itinerancy has been accepted by the ATO and a Deputy Commission of Taxation for over a decade. The ATO approach has changed and changed in an aggressive way. Generally, you can expect them to disallow all claims so it would be wise to seek a ruling on your particular circumstances before claiming to be itinerant. It is also important that you keep your log book records beyond what is normally required and how traditional log books are laid out. You need to detail for each day every segment of the journey and its purpose. Your diary for phone calls will need to detail what exactly was discussed not just to whom you made the call.

Not being able to claim travelling costs puts seasonal workers on the minimum wage in a position where, after tax they are on the bottom rung of the working poor.

The taxpayer does have the right to appeal this decision to a higher court; but as he is a minimum wage earner he does not have the means. The only level of justice that the average taxpayer can afford to access is the AAT. We would be interested in taking another case before the AAT if anyone is feeling brave, has good records and impeccable circumstances. By brave I am referring to the grilling Mr Walker received from the ATO barrister. For example, he was asked to quote off the top of his head the distance between places, and when this didn't match his log book he was accused of fraudulently preparing his log book.

With the ATO disallowing all claims by itinerant workers across the board, the following Tandberg cartoon is just oh so true.

Property SMSF Issues Needing Attention Before 30 June 2017

Buying a Property in Super - The contribution caps will reduce considerably on 1st July 2017. If you want to buy residential property in a SMSF you need to have at least 20% deposit sitting in cash in the fund. Of course, you also have to cover purchase, set up and borrowing costs; not to mention having a responsible level of liquidity and diversification. My point here is that the restrictions on making contributions to superannuation could make it difficult in future years to have enough money in your SMSF to buy a property, even though you have cash outside of super. The 20% cash deposit requirement applies even if you are going to lend the other 80% to your SMSF. You cannot use equity in other properties the SMSF owns to cover this deposit.

If you are thinking of buying property in your own SMSF you need to see your Accountant or a Licenced Financial Advisor well before 30th June, 2017 for advice on your contributions strategy.

If you borrow to make the larger non-concessional (non tax deductible) contributions you will not be entitled to claim a tax deduction for the interest on the borrowings (you can't for tax deductible contributions either). You may be able to roll across into your SMSF money you have in other superannuation funds. If this is not enough you may be able to get a little more in there using your ongoing employer contributions and salary sacrificing but the real money is probably going to have to come for a non-deductible contribution.

The limits on non-deductible contributions will change dramatically on 1st July, 2017.

As it currently stands you can contribute $180,000 in one year. If you are under 65 years of age you can also bring forward the next two years cap. Now next year the cap is only $100,000 but if you bring forward 2 years before 1st July, 2017 you can bring forward $180,000 for each year, not the $100,000 for each year that you would be allowed after 30th June, 2017.

In short if you get organised before the 30th June 2017 you will be able to put $540,000 into super which is going to be a good deposit for a few houses but if you wait till 1st July, 2017 or later you can only contribute $300,000 in one go. This means less houses. Though I have got to say it would still be a nice problem to have. If you have this sort of cash don't delay.

Maintaining A Property in your SMSF – With the tax-deductible contributions cap dropping from $35,000 to $25,000 some SMSFs may be heading for a liquidity trap.

If you need to put more cash into your SMSF to help with a property this year you are entitled to claim a tax deduction for $30,000 if you are under 50, over 50 (up to 75) it is $35,000. This includes the amount your employer contributes under the superannuation guarantee.

From 1st July, 2017 that will drop to $25,000, **so you need to make sure your properties in your SMSF do not need more than this to support them**. You also need to make sure your employer will contribute directly into your own SMSF. No detour via their preferred fund or the tax advantage of negatively geared properties will be lost.

Where is Julia?

I am really getting around over the next two months. We have offices in Melbourne and Canberra coming on board. I will also be in Sydney and the Central Coast to do some recordings and a live webinar with Margaret Lomas.

Askbantacs Free Notice Board

For $79.95 at Ask BAN TACS you can have your questions regarding Capital Gains Tax, Rental Properties and Work Related Expenses answered by Julia. They will include ATO references to support the conclusion, answers are generally 300 to 700 words long depending on the complexity. First check the Notice Board, your question may have already been answered at someone else's expense. Two very generous askbantacsers have allowed their question and answer to be posted on the notice board.

http://www.bantacs.com.au/QandA/index.php?xq=797 Small business CGT concessions & renting farm to child

http://www.bantacs.com.au/QandA/index.php?xq=798 Subdividing home so daughter can also have a home on the block.