

12 month amnesty on shareholder loan accounts

On July 30, the Australian Taxation Office issued Practice Statement PS LA 2007/20. It provides the Commissioner's administrative approach to dealing with Division 7A of the Income Tax Act. It addresses what is commonly known as shareholder loan account problems although its reach is wider than this. Legislation introduced in 1997 caught certain loans, payments or debt forgiveness where a related shareholder may have received a benefit through a company or trust which was not taxed. Division 7A provided the mechanism to catch these transactions and tax them.

Typically, these debit loan accounts are created where shareholders draw funds from their company accounts in excess of their salary or dividend entitlements. This is most likely to occur if you are in the habit of paying private expenses or drawing lump sums out of your company account.

If your loan does not comply with the current guidelines, then the loan might be deemed an unfranked dividend with the loan amount assessable in the hands of the shareholder. In addition, the company will lose the franking credits that would otherwise attach to the deemed dividend. This can become a very expensive exercise.

Debit loan accounts can be easily overlooked and also created unintentionally.

Many small businesses were caught out by Division 7A. The breach having occurred could be remedied but not removed. The effect was a tax liability had been triggered, although in many cases taxpayers were unaware of this.

PS LA 2007/20 provides an 'amnesty period' up to 30 June 2008 where taxpayers can put in place corrective action that will avoid the tax liability that otherwise would have occurred and also the resultant penalties.

There are certain conditions that need to be met to qualify for this relief. The first requires that it is clear that the failure to comply was the result of an honest mistake or inadvertent omission (although it is unclear at this stage how the Commissioner will assess what is an honest mistake).

In the vast majority of cases small business owners have not set out to knowingly breach Division 7A. In most cases they would not even know what Division 7A is.

A further condition is that where corrective action requires you to establish a complying loan agreement, and in most cases it will, then you need to have met the minimum payments that would have been required if the loan had been put in place in the year when the debt was incurred. This is a cash flow or financing issue. It may require some planning. So, it is best not to leave this until near the end of the amnesty period. If you are affected, you need to be planning your approach as soon as possible.

If you have debit loans to shareholders or Directors (or associates), then talk to us today about safeguarding your position and ensuring you don't get caught by this tax.

Superannuation's stellar growth path

The Australian Prudential Regulation Authority released an interesting report recently looking at the growth and changes in superannuation in the last 10 years.

According to the report, total superannuation assets in Australia between 1996 and 2006 grew at an annual average rate of 14.3%, and almost quadrupled from \$245.3 billion to \$912.0 billion in June 2006. This growth increased superannuation assets as a proportion of Gross Domestic Product (GDP) from under 40% in 1996 to nearly 100% in 2006.

Small funds and industry funds experienced some of the strongest asset growth over the past decade, at rates of 22.7% and 22.5%, respectively. Retail funds (excluding eligible rollover funds - ERFs) grew by 17.5%, public sector funds by 12.8% and corporate funds by 2.2%.

If you need assistance setting up a self managed super fund (or assessing whether you should) or managing your superannuation and investments, speak to us today.

New Workchoices obligations for employers

All employers covered by the federal industrial relations system now have another obligation to fulfil.

From 20 July, all new employees must be provided with a copy of the Workplace Relations Fact Sheet within 7 days of commencing employment. Employers have 3 months (until 20 October 2007) to provide all existing employees with a copy of the fact sheet. Penalties may apply if you fail to provide the fact sheet.

The fact sheet can be distributed to your team by e-mail or by hand, or a link created to your intranet (as long as your team are e-mailed a direct link to the fact sheet).

The fact sheet covers the Australian Fair Pay and Conditions Standard, protected award conditions, the role of the Workplace Authority and the Workplace Ombudsman and the Fairness Test. The fact sheet is only currently available in English but other languages will be made available soon

Who is covered under the Federal System?

The Act applies to all employers who are "constitutional corporations" which means all trading, financial and foreign corporations within the meaning of the Australian Constitution. The reasons for such a definition are based on the limitation of the Federal Government's law making power with respect to corporations in the Australian Constitution.

A foreign corporation is a corporation that is incorporated outside of the Commonwealth of Australia.

As interpreted by the High Court, a "trading or financial corporation" is any company, incorporated association or other corporation that engages in significant trading activities. Many not-for-profit corporations have been found to be trading corporations, including local councils, public universities, hospitals, benevolent or charitable organisations, and emergency services providers. Notably, even not-for-profit associations incorporated under State or Territory incorporated associations legislation (usually indicated by "Inc" at the end of the organisation's name) may be defined as trading corporations.

As to what is actually "trading", this term has been deemed to mean any activity that involves some notion of buying or selling and that generates revenue. Corporations have been found to be trading corporations in circumstances where:

- the corporation has as its primary or dominant activity a non-trading activity;
- the corporation does not trade for profit;
- the trading activities are not motivated by private gain but purely to earn revenue; and
- the corporation is a sporting, religious or governmental body.

Unfortunately, there is no definitive answer as to whether a corporation's trading activities are sufficiently "significant" as to make it a trading or financial corporation, it is all a matter of degrees.

It is also important to note that in addition to covering constitutional corporations, the Act covers all employers in Victoria, the Northern Territory and the Australian Capital Territory. This is because Victoria referred its industrial relations powers to the Federal Government several years ago and there are specific powers in the Australian Constitution with respect to Territories.

Who is not covered by the Federal System?

Employers not covered by the Act are those operating outside Victoria and the Territories that are unincorporated, such as:

- sole traders;
- partnerships;
- non-corporate trustees; or
- State government departments.

Also excluded (outside Victoria and the Territories) are incorporated entities that do not have sufficient trading or financial activities to be characterised as a constitutional corporation.

While in most instances it will be fairly clear as to where an employer sits with respect to the Act, there will be some corporate and non-corporate entities where it will be necessary to take a closer look at the situation.

If you are uncertain about your position, contact an employment lawyer or the Workplace Info line on 1300 363 264. Copies of the Workplace relations Fact Sheet are available from Workplace Authority website (www.oea.gov.au)

Quote of the month

"Here's something to think about: How come you never see a headline like 'Psychic Wins Lottery'?"

Jay Leno