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Introducing....

Timothy Chemaly joined us at the beginning of the year. He is a solicitor and has a background in civil and commercial litigation. He recently spent six years in the Legal and Technical Services Unit of Inland Revenue at Manukau. He has a special interest in taxation dispute resolution proceedings.

Maggie Jaques joined us in April 2007. Maggie is a Chartered Accountant with experience in advising clients on general tax and commercial tax issues. Maggie has previously worked as a Senior Tax Consultant in one of the "big four" accounting firms and prior to that as an Investigator in both the Corporates Segment and Manukau office of the Inland Revenue Department. She has general tax experience, but is interested in the property sector, company restructures and significant transactions.

Charities Commission

Earlier this month the Charities Commission released its latest newsletter. The Commission advises that it processes applications in the order in which they are received, that is no queue jumping is permitted and at that time they were processing applications made as at 29 August 2007.

Recent Changes to Shortfall Penalties Applying to Voluntary Disclosures

As many of you may be aware, IRD has recently relaxed its rules about imposing shortfall penalties for lack of reasonable care and taking an unacceptable tax position when a voluntary disclosure has been made prior to audit notification.

IRD now has the discretion to not apply the shortfall penalty (or rather reduce it by 100%), rather than previously where potential shortfall penalties could only be reduced by up to 75% when a voluntary disclosure is made. This applies to voluntary disclosures made from 17 May 2007.

The lack of reasonable care and unacceptable tax position penalties impose a penalty of 20% of the resulting tax shortfall where the IRD deems that either:

- A taxpayer has not taken the required reasonable level of care in taking their tax position; or
- The tax position taken relies on a tax interpretation that IRD deems to not be "about as likely or not to be correct" and results in a tax shortfall of \$20,000 or greater.

In addition, changes have been made to the unacceptable tax position penalty. For tax positions taken from 1 April 2008:

- The tax shortfall threshold is increasing from \$20,000 to \$50,000; and
- The penalty will only apply to income tax shortfalls; and

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- The IRD will no longer have discretion to not impose the penalty.

In our experience the unacceptable tax position penalty in particular has resulted in unfairly harsh outcomes for clients who wish to correct errors (that are beyond transposition errors) of a significant amount (i.e. more than \$20,000 tax). This has created particular problems with errors in GST returns which can easily breach the threshold due to a significant asset purchase or similar transaction.

While we would have liked to see IRD's discretion to not impose the unacceptable tax position penalty retained, removing GST from its ambit is a very positive change and goes a long way to alleviate some of the current problems with this penalty.

We therefore welcome the changes and believe they are long overdue. It is also good to see that IRD views a total reduction in penalties as a move in the right direction to encouraging voluntary compliance, a fact we are sure your clients' are already well aware of!

If you wish to discuss whether the changes would apply to you or your clients, please contact one of our Tax Consultants, we would be happy to assist.

Maggie Jaques

NZ / Australia Double Tax Agreement – Government Seeks Feedback

In an unusual move the Government has sought public input / feedback regarding the NZ / Australia DTA which is due to be re-negotiated from 31 March 2008.

The government is seeking public views as to matters which should be raised in its treaty negotiations, stating that the economic importance of the Australian market to NZ warrants the additional feedback sought.

However, it is stated that the negotiation will review "all matters covered by the agreement" which tends to indicate areas that are not currently covered by the DTA will not be discussed in the negotiation. Trans-Tasman imputation for example is an area we would have expected significant gains could be made in the negotiations, but is not covered in the current DTA.

If you have views as to matters which should be raised in the upcoming negotiations, we encourage you to provide your comments to the government.

Comments are due by 22 March 2008. If you have any questions or require assistance in providing your views to the government, please contact us.

Maggie Jaques

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Inland Revenue Withholding GST Refunds

This matter continues to be an issue with the Department. A client of ours had refunds of \$225,000 withheld for a period of three and a half years.

The law in this respect is clear. The Commissioner may withhold a refund if within 15 days of the return being provided issues a letter to the requested person advising that the Department wishes to investigate the return or request further information concerning the return (section 46 of the GST Act). If notice is not provided then the Commission is bound to release the refund. This will not affect the Commissioners right to undertake an audit.

Many Departmental auditors hold refunds up pending the resolution of other GST return periods. There is no lawful basis for them to do so. Once a refund is cleared for a GST it should be released to the client.

If you have GST refunds being wrongly withheld contact us.

Norm Latimer

Filing Documents with the Companies Office

From 1 July 2008 it will become mandatory to electronically file certain documents with the Companies Office via their online services. This service supports faxing and uploading of either original or scanned documents. Documents affected are:

- Approval of name
- Annual return
- Change of company address
- Change of company name
- Adoption/amendment of constitution (includes adoption and revocation)
- New company incorporations
- Director and shareholder consents for new incorporation
- Purchase/acquisition of shares
- Issue of shares
- Shareholder consents
- Particulars of directors
- Director consents for registered company.

Step-by-step instructions for completion of the above processes are available on the Companies Office website. There will be some exceptions where documents may still need to be filed manually. The Companies Office will be posting further information regarding these exceptions to the Customer Support section of their website prior to the 1 July implementation date.

Kim Lawrence

Payment of Director/Shareholder Salaries

Section 161 of the Companies Act 1993 provides that Director remuneration may be authorised so long as to do so is fair to the

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company. The particulars of the remuneration must be entered into the interests register and the Directors must sign a certificate stating that, in their opinion, the remuneration is fair to the company and they must also state the grounds for that opinion.

Where these provisions have not been complied with, or reasonable grounds did not exist for the opinion set out in the certificate, the director (to whom the remuneration has been paid) is personally liable to the company for the amount of the benefit, except to the extent that the benefit was fair to the company at the time it was made.

While the standard of 'fairness' is not defined in the statute, it appears to concern equivalence between the value of services rendered and the amount of payment received ie: less than or equal to the fair market value of the services to be rendered. Under the fairness standard, it is possible for a payment to be 'fair', yet for the company to be in contravention of the Solvency Test. On the other hand, a payment may not be fair, yet the company may still meet the Solvency Test.

Where a Director is also a Shareholder, any excess salary above market value could be deemed to be a distribution, requiring application of the Solvency Test. Another area of risk is where a Liquidator could request repayment of an overdrawn current account resulting from shareholder drawings if a shareholder salary had not previously been approved.

We therefore recommend that at the beginning of each financial year, the Directors review the level of remuneration paid to company shareholders and directors, and in particular, identify what the 'market' rate is for the services rendered. The appropriate documentation can then be prepared approving the Director/Shareholder remuneration.

Kim Lawrence**ATO Gets Tough on Tax Defaulters**

Two recent examples show the Australian Tax Office is more than willing to take all necessary steps to seek recovery of unpaid tax. Both delinquent taxpayers were English, which may have given the Aussies even more motivation to pursue the defaulters!

Troughton v DCT [2008]

In January this year the Australian Federal Court heard an application for judicial review of the ATO's decision not to revoke a departure prohibition order (DPO) they had sought against a UK individual. The order had been issued against the UK citizen who had worked in NZ and Australia between 1988 and 2002.

He visited Australia again in April 2007, intending to stay just a few weeks. The Commissioner issued assessments for the years 1996 to 2000 for A\$5.6M in tax, nearly all of which remained unpaid.

The taxpayer argued the DPO should be revoked as the tax debt was "completely irrecoverable". The ATO believed the taxpayer had interests in NZ trusts and Swiss bank accounts/trusts, which the ATO contended could be used by the taxpayer to settle the debt.

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The Federal Court noted that whilst the ATO officer had misconstrued the NZ trust deeds, the existence, or otherwise, of the trusts/bank accounts were relevant to the decision. The decision to uphold the DPO had therefore been lawfully made. Various other contentions made by the taxpayer justifying the necessity to leave Australia – such as improper purpose (duress against taxpayer to force trustees to discharge tax liability) and family obligations in the UK, were rejected.

DCT v Barnes [2008]

In this case the ATO obtained an order to serve a creditors petition outside Australia against husband and wife taxpayers who had an unpaid tax debt of A\$7M. The taxpayers had originally migrated to Perth from the UK in the 90s, then returned to the UK, stating they would only be absent for six months.

The Australian Court noted that an English Court would not enforce a foreign judgment to pay Australian taxes, but considered the taxpayer had committed an act of bankruptcy by remaining outside Australia with the intent to defeat or delay creditors. A bankruptcy judgment meant the ATO could get access to any remaining Australian assets.

Relevant factors in reaching the decision to grant the petition were that the taxpayers knew the ATO were seeking to recover debts due; they stayed outside Australia for longer than their solicitor said they would and remained out of Australia; the husband transferred A\$1M from Australia to the UK shortly after the ATO interview; and they failed to provide details of A\$2M in Australian assets they claimed to own.

The Commissioner obtained a Mareva type order to freeze the disposition of the remaining Australian assets (motor vehicle and chattels) and apply them against the tax debt, having already set off the proceeds of the sale of the family home against a portion of the debt.

Keith Turner**Seminars**

A reminder that our first round of 2008 seminars are now scheduled with the following topics:

- Advanced Trust;
- Beginners Trust;
- Depreciation;
- Quirky Land Issue; and
- Company Tax Issues.

These begin in March. If you wish to register please see the registration form attached within our newsletter e-mail.

Lara Hartmann