

# client alert

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## Business tax losses under Tax Forum spotlight

The treatment of business tax losses will be reviewed by a business tax reform working group announced by the Treasurer at the Tax Forum held in October 2011. It is understood the first priority of the working group is to identify options for losses and how the Government would fund them. "We need to consider things like loss carry back, uplifting losses, and what happens to the value of losses when business change composition or ownership", said Treasurer Wayne Swan. It is expected that the working group will deliver its initial report in November 2011 and a final report to the Government by March 2012, before the next budget.

## Tax Office views on SMSFs, real property and borrowing rules

The Australian Tax Office (ATO) has recently issued a draft ruling which concerns self-managed superannuation funds (SMSFs), real property and the application of certain borrowing rules under the superannuation law. The draft ruling outlines where money borrowed under a limited recourse borrowing arrangement (LRBA) can be applied in maintaining or repairing (but not improving) a single acquirable asset.

**TIP:** While the draft ruling provides some welcome clarification on the ATO's views on key aspects of the LRBA provisions, it only covers a few pieces of the LRBA puzzle. The rules can be complex and the penalties can be severe for getting it wrong. If you have any questions, please contact our office.

## Tax law changes to tackle phoenix activities

The Government has recently introduced legislation in Parliament which aims to deter company directors from engaging in phoenix activities. Phoenix activities involve the deliberate liquidation of a company to avoid paying tax liabilities and employee superannuation. The business then "rises" again and continues operations controlled by the same person, but under another corporate entity and free of debts. The

legislation also aims to encourage director compliance with tax and superannuation obligations.

The proposed tax law changes will make directors personally liable for their company's failure to pay the employees' superannuation guarantee amounts. The changes will also allow the ATO to pursue directors without issuing a "director penalty notice" where the company's pay as you go (PAYG) withholding or superannuation guarantee liability remains unpaid and unreported three months after the due day. In addition, the Government proposes to deny directors (and their associates) entitlement to PAYG withholding credits (through the imposition of a new tax) where the company they are involved in has failed to remit PAYG withholding amounts.

**TIP:** It is proposed that the changes commence once the legislation is formally enacted. However, there are special transitional provisions which can cover amounts that are due to the ATO or a superannuation fund at the time the legislation enters into force. Directors should ensure their company's tax risk management policies and systems are up-to-date. Please contact our office if you have any questions.

## Small business depreciation rule changes on the horizon

The Government has sought comments on draft legislation which proposes to make various tax law changes concerning the small business depreciation rules that apply to small business entities. The changes are subject to the passage of the mining tax legislation as well as the carbon tax legislation in Parliament. However, should these taxes be successfully implemented, the proposed changes could improve cash flow and reduce compliance costs for small businesses. The proposed changes include increasing the instant asset write-off threshold from \$1,000 to \$6,500, and simplifying the current depreciation pooling arrangements to allow small businesses to depreciate some assets more quickly. The changes are proposed to apply from the 2012-2013 income year.

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## **Standard deduction for work expenses next year**

Public consultation has closed on the Government's draft legislation which proposes to provide individual taxpayers with a standard tax deduction to cover work-related expenses and the cost of managing their tax affairs. The standard deduction proposed is \$500 for 2012–2013, increasing to \$1,000 for 2013–2014 and thereafter. Taxpayers whose claims exceed the proposed standard deduction will still be allowed to make those claims provided receipts are kept. However, the Government has noted the deduction is dependent on the implementation of the mining tax legislation (which is yet to be introduced).

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## **Super guarantee charge is a valid tax, says High Court**

A market research company has been unsuccessful in its constitutional challenge in the High Court against the validity of the superannuation guarantee charge. The High Court had unanimously held the charge to be valid tax. In doing so, the High Court also affirmed an earlier Tribunal's finding that market research interviewers were "employees" of the company for superannuation guarantee purposes, and not independent contractors.

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## **Partnership not ended, so director still liable, says Court**

A businessman has been unsuccessful in appealing to the NSW Court of Appeal against an earlier District Court decision which had held that, as a director of a company, he was liable to pay monies to the ATO that were withheld from employees' wages. Under the tax law, a director of a company could face a tax penalty if amounts withheld from employee's wages are not paid to the ATO.

Broadly, the director was part of a partnership operating a café/bar restaurant with another partner. However, the Court heard the relationship between the partners had deteriorated. The director argued the partnership had terminated, so therefore there could be no withholding by his company. However, the Court found it was the director's involvement in the management of the partnership that had actually ended, not the partnership itself.

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## **Dutch retiree took reasonable care, finds Tribunal**

In a recent decision, the Administrative Appeals Tribunal held that a retiree had not failed to take reasonable care when he omitted foreign early retirement fund payments from the Netherlands from his 2003 to 2006 income tax returns. Among various factors, the Tribunal accepted the retiree's evidence that he had sought and received oral advice from the ATO in 2002 which was contrary to later advice contained in a "private binding ruling" issue by the ATO in 2005. The Tribunal also took into account in making its findings that the retiree had limited English and did not understand and was confused by the ruling.

**Important:** Clients should not act solely on the basis of the material contained in Client Alert. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. Client Alert is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.