

December 2012

Newsletter



Dear Santa

Thank you for the opportunity to provide advice on your Australian tax position. We are concerned by a number of areas of your operation that will no doubt come under scrutiny by the ATO. We note these below:

GST

Most goods imported into Australia with the value above \$1,000 are subject to GST. With approximately 4,329,000 children in Australia on your list, averaging \$40 per gift (depending on whether they have been naughty or nice), we estimate that you will be liable for GST in excess of \$17,317,192. We need to discuss tax structuring urgently.

We are also concerned that you may face other commercial issues from Australian retailers who will perceive your "gift" giving as a hostile attempt to gain market share (please Google recent comments by Gerry Harvey & GST).

Santa's Little Helpers- Superannuation guarantee

A review should be completed of the employment status of any "Santa's Little Helpers" based in Australia to determine if they are contractors or employees. If the helpers are deemed to be employees, you may be liable for the 9% superannuation guarantee (for this year and all other years). It may be hard to argue that they are truly independent given the level of corporate branding involved.

If the helpers are indeed "volunteers" we will need to consult with an employment lawyer regarding potential slave labour issues and discrimination of a minority group.

Living Away from Home Allowance

If any of the little helpers currently based in Australia are receiving living away from home allowances (LAFHA), we will need to review and restructure these arrangements in the new year. The Government announced in 2012 a series of significant changes to the LAFHA rules that will require all employers currently making use of these concessions to review their arrangements.

Cookies, milk and other non cash benefits

There is the potential for the "gifts" you receive from children at Christmas time to be taxed as non cash business benefits. That is the cookies, milk, scotch and other benefits you receive may be considered income by the tax office and tax applied to the value of those benefits.

Depreciating your reindeer

In the event that you are liable to pay tax under Australian law, there might be an opportunity to depreciate the cost of your reindeer over their effective lives.

There are currently no provisions within Australian tax law to allow the Commissioner discretion to ignore your tax liabilities as a goodwill gesture.

Please contact us urgently regarding these issues.

Kind Regards,

The Team at BWR Accountants & Advisers



Landlords, the ATO & Deductions

1 in 7 taxpayers in Australia are property investors. Each year we claim around \$5 billion in rental losses. So you can understand the Australian Tax Office (ATO) close scrutiny of the deductions claimed by landlords. A recent case before the Administrative Appeals Tribunal (AAT) demonstrates how far the ATO will go to test the boundaries of what is and isn't deductible.

In this case the taxpayer owned a property in country NSW. The owner stated that the property was available for rent but she had been unable to find tenants. As a result, the property did not derive any income for a number of years. The owner's however had incurred the costs of interest on the property loan, maintenance costs and rates which they claimed as a deduction.

The Tax Commissioner had a different view and denied the deductions. The central issue was whether the property was genuinely available for rent. If it was not available for rent then the expenses incurred by the taxpayer are not deductible. If the property was available for rent, then the expenses are deductible. This is because you must show that the expenses were incurred in gaining or producing income, even if no income was actually produced in that income year.

What is interesting in the case is how far the ATO will go. The ATO used electricity and telephone records to argue that the taxpayer had been living in the property and that it was not genuinely available for rent. Fortunately for the taxpayer, the AAT accepted that she had only lived in the property while carrying out repairs and maintenance work. So even if a property is not deriving rental income during the relevant income year, taxpayers may still be entitled to deductions for interest expenses, council and water rates and other holding costs. The key issue is whether the property is genuinely available for rent and whether continuing efforts are being made to improve the property to attract renters.

The AAT also accepted the taxpayer's argument that she had genuinely tried to rent the property. She had evidence of some limited newspaper advertising but stated that the most effective way to find tenants for this particular property was through word of mouth.

The case did not go all the taxpayer's way. The AAT upheld the Commissioner's decision to disallow a number of deductions because of a lack of supporting documentation.

Broadly there are two types of rental property expenses you can claim:

- Expenses you can claim in the year that you paid for them e.g. council rates, repairs, preparation of lease agreements, insurance and loan interest
- Expenses that are deductible over a number of years- these are either:
 - Depreciating assets- where deductions are claimed against income over the life of the asset e.g. if you replaced an electric hot water system in your rental property, you can claim a deduction for the hot water system over its life, the ATO calculates the life of a hot water system to be 12 years.
 - Capital works- where deductions are claimed for building construction and structural improvements e.g. remodeling a bathroom or building a pergola are considered to be capital works and written off at the rate of 2.5% per year.

If it's new, bigger and brighter than what was already there, it's likely to be capital expenditure and depreciated. But to claim a deduction, the property must be genuinely available for rent.



Insight from Entrepreneurs–Business Strategy

*an article by Carolyn Creswell Carman's Fine Foods
BRW October 25– November 21, 2012*

As I write this column from our farm, I occasionally gaze out my window at a huge towering oak tree. On one limb hangs my kids' much loved tyre swing and on another limb is our well-worn hammock. Yesterday I met the 90 year old man who planted the oak tree when he was in his 20s and building our farm house for his new wife. He told me proudly that it had cost him nothing as he dug the tiny shoot from the side of the road when he saw it once in his travels. When I questioned whether he ever thought it would be this big, he looked at me quizzically and said "of course I did, I know how big an oak tree grows!" Fair point.

It prompted me to reflect on the vision people could have for a garden half a century ago. Do we have the patience and vision for our gardens these days or moreover do we have the patience & vision for our companies these days? It is very easy to get caught up in the day to day running of our businesses but what systems are we putting into place to clarify the vision of what we hope the company could eventually look like. How are we making sure we work on getting closer to that vision.

I have a little strategy that I came up with myself a few years ago that really works for me. Each January holidays when I have some time away from the office, I ask myself, what would I like the business to achieve this year and what 3 things would I love to see greatly improved by next Christmas to get us closer to our vision? These are things that cannot be fixed in a day, such as the profitability of a whole division, culture of the organisation, succession planning issues or getting the right people in the right roles throughout the company. I then write the top 3 in the most specific, measurable way I can on a Post It note and stick it to the bottom of my computer screen. I look at it every day for the whole year. All throughout the year I am reminded how I need to be focusing on these points and invariably they are all no longer issues a year later. It is my version of bringing Jim Collins' wonderful concept to life from the book, *Good to Great*.

I talk to my team about the fact that I see myself as the bus driver. My first job is to get the right people onto the bus, the wrong people off the bus and the right people in the right seats. Then I'm driving us all towards the vision of where we want to go. I have made sure we have enough money to buy the petrol and cover the expenses along the way. My other job is to make sure everyone is aware and excited about the direction we are heading in. I'll actively watch out for the potholes along the way.

Often our vision can come down to mining the data, doing great research or knowing what numbers you need to hit day to day to make your vision a reality. For some that might mean picking up one new account each week for the next year. But to get one you need to pitch to 10, so make sure every day you know you have cold called two new accounts to reach the 10 a week you need to secure one. My retailer friends know this all too well. For example one tells me, for every person who walks through the door, 35% will buy something and the average spend is \$32. Their number 1 aim is to get more people through the door, as they know the conversion rate once they do.

For me, every Friday I receive emails with the average number of each of our products that went through Coles and Woolworths cash registers for the previous week. I take immense pride in always being able to recite these numbers off the top of my head. One of my proudest successes this year was when we released a new product and after 3 weeks it was not doing very well at the registers so we reformulated it, renamed it and we were able to increase sales by 30% when the improved version hit the shelves 2 months later.

Your strategy needs to be flexible to be both proactive and reactive to keep moving towards your vision. If we pull ourselves out of our operational mode to work out what we need to focus on and then actively nurture and care for the different aspects of our business that need the attention each year, there is no reason why our business cannot grow and flourish over time, just as my lovely oak tree has.

The Partners and Staff of BWR Accountants & Advisers wish you and your family a Merry Christmas and a safe and Happy New Year.

We would like to take this opportunity to thank you for your patronage throughout the year and look forward to serving you in 2013.

Our offices will close at 5:30pm on Friday 21st December 2012 and reopen at 9am on Tuesday 2nd of January 2013.



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Are your contracts worth the paper they are written on?

The ATO really doesn't mind what you call a particular relationship you or your business has with another party- it's the way that the relationship is conducted that is important. The ATO works on the "if it looks like a duck and walks like a duck, it's a duck" theory- even if you call it a swan in your legal document.

The main area of scrutiny is contractors. This is a big issue in the ATOs compliance program for 2012/13. Many businesses and contractors assume they are classified as contractors simply because that is what their contract says. The reality is quite different and recent case law has shown that it is very difficult to have an individual contractor working for you.

Directors Personally Liable for Employees Super

Directors are now personally liable for unpaid superannuation guarantee (SG) payments to staff. While initially designed to prevent phoenix company activity, the new laws that apply from 1 July 2012, extend well beyond phoenix company activity.

The new law extends the director penalty and estimates regime beyond PAYG withholding to the SG charge. That means that if a company fails to remit SG to the employee's fund on time, the Directors can be personally liable for the payment.

A director penalty is triggered when a company's liability for PAYG withholding or SG remains unpaid and unreported 3 months after the due date. The tax commissioner will then issue a Director penalty notice to either the Director or their Tax Agent. The director penalty applies even if the company is placed into administration.

Be careful if you use contractors, ensuring that your contractors meet the definition of an "independent contractor" is more important than ever. Remember that where a contract is principally for labour, that person might be treated as an employee and in those circumstances, superannuation guarantee will be payable regardless of what your agreements call the relationship. The director penalty regime will extend to SG payments for employees misclassified as contractors. The only out is if it was reasonably arguable that the company took reasonable care in applying the law- however, naivety is not an excuse under the law.