NTAA

ADVICE

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Taxpayer subject to 'high income' tax for payment in arrears

In a recent decision of the Administrative Appeals Tribunal (AAT), it was held that a taxpayer who received a lump sum payment in arrears of over $342,000 from a previous employer was liable to the additional 'high income' 15% contributions tax for the 2013/14 income year.

Since 1 July 2012 an individual is generally liable to pay this additional tax where the individual's income, together with their concessional super contributions for an income year exceed $300,000. This means that the effective tax rate on concessional contributions made by a 'high income earner' is 30%.

In this case, the lump sum payment in arrears was made up of four separate amounts:

- 2009/10 — $126,684
- 2010/11 — $156,736
- 2011/12 — $40,407
- 2012/13 — $29,287

The taxpayer argued that as the lump sum payment related to amounts for 4 prior years of income where he earned less than $300,000 in each year, the high income threshold had not been breached. That is, the four amounts in question should be allocated to each of the years in which the relevant services had been provided.

However, the AAT dismissed the taxpayer's argument on the basis that income from employment is derived when the income is actually received, irrespective of the period in respect of which the payment occurs. That is, arrears of salary paid are assessable income in the year of receipt notwithstanding that they related to a past or a future income year.

The AAT also dismissed the taxpayer's claim that he was not a 'high income earner' as the term was specifically defined to mean any person who derives income in excess of $300,000 in a particular income year. The AAT noted that there is no statutory discretion available to read the relevant provisions differently.

It was announced as part of the 2016/17 Budget that, as from 1 July 2017, the threshold at which high income earners pay the additional contributions tax of 15% will be reduced from $300,000 to $250,000, although this is not yet law.

Refer DHDF v FC of T [2016] AATA 778

A bankrupt person must not be a trustee of an SMSF!

A bankrupt person is a 'disqualified person' as defined in the superannuation legislation, and as such, is prohibited from being a trustee (or director of a corporate trustee) of an SMSF.

Serious penalties may apply for persons who are trustees/directors of an SMSF while they are bankrupt, including imprisonment for two years and significant monetary penalties. Also, a trustee of an SMSF who is or becomes bankrupt is required to inform the ATO in writing of this immediately.

For SMSFs with a corporate trustee, that the corporate trustee itself may be a 'disqualified person' if any of its 'responsible officers' are, or become bankrupt. A 'responsible officer' is defined in the superannuation legislation to include secretaries and executive officers, as well as directors. ('Executive officer' is not defined and may include a public officer.)

Therefore, if an SMSF has a

corporate trustee, and a director (or secretary or executive officer) of that corporate trustee becomes bankrupt, it may be appropriate for the corporate trustee itself to cease to be trustee of the SMSF (in addition to the bankrupt person ceasing to be director).

Note also that the superannuation legislation specifically provides that the legal personal representative of a bankrupt person (or other disqualified person) **cannot** be a trustee (or director of a corporate trustee) of the SMSF in that person's place.

The prohibition on a bankrupt person being a trustee/director of an SMSF in effect means that they cannot be a member of the SMSF (having regard to the trustee/member rules for SMSFs), and therefore, they would also have to cease being a member of the SMSF as soon as possible.

Once a bankrupt person officially ceases to be bankrupt, they may then again be eligible to be a trustee/director of an SMSF, although detailed advice should first be sought in this regard.

The above is especially relevant for trustees/ directors of SMSFs who are in financial difficulties and may become bankrupt in the near future, and detailed advice should be sought as required as soon as possible.

Superannuation transfer balance cap – Draft guideline LCG 2016/ D9 released

On 24 November 2016, the ATO released ***Draft Law Companion Guideline LCG 2016/D9*** dealing with *Superannuation reform: transfer balance cap.*

By way of background (and as stated in this draft guideline), when an individual accesses their superannuation (for example, because they have retired), they may take it in the form of a superannuation lump sum, a superannuation income stream (such as a pension), or a combination of the two. If they commence a superannuation income stream, income earned on the ongoing investment of the capital that supports the income stream is exempt from tax. This exemption applies to the fund.

Under recently enacted legislation, a transfer balance cap is imposed as from 1 July 2017 to limit the amount of capital individuals can transfer to the retirement phase to support superannuation income streams. This, in turn, limits the amount of superannuation fund earnings that are exempt from tax. (This legislation only received Royal Assent after this Draft Guideline was released, and it is referred to in the draft guideline as proposed legislation, i.e., a Bill.)

The Draft Guideline provides guidance on how the transfer balance cap (set at $1.6 million for the 2017/18 financial year) operates for account based superannuation income stream products. It provides specific guidance on some new concepts:

- a transfer balance account, including the general transfer balance cap, and your personal transfer balance cap;
- credits (increases) and debits (decreases) to your transfer balance account; and
- the consequences of your transfer balance account exceeding your transfer balance cap, resulting in an 'excess transfer balance' including: (i) the excess transfer balance tax and how this is calculated; (ii) when the Commissioner will issue determinations, and (iii) the effect of transfers and/or commutations on your transfer balance account.

The transfer balance cap referred to above is not to be confused with a separate 'cap' (also set at $1.6 million) that applies in relation to the making of non-concessional contributions. More particularly, as from 1 July 2017, members with a total superannuation balance above $1.6 million will no longer be eligible to make non-concessional contributions.