

## Welcome to the March 2015 Issue of InForm Accounting and Taxation. In this issue:

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### SMSF – limited recourse borrowing

Borrowings of any sort within a Self-Managed Superannuation Fund (SMSF) are generally explicitly prohibited. Funds can however borrow in order to purchase an asset. In order to do so, certain criteria must be met:

- Section 67A of the *Superannuation Industry (Supervision) Act 1993* permits a borrowing arrangement if the money borrowed is applied to a 'single acquirable asset' and the asset is held in a holding trust (legal owner).
- Under such arrangements the SMSF trustee acquires a beneficial interest in the asset and the lender's right of recourse in the default is limited to the acquirable asset held in a building trust.
- Money borrowed under limited recourse borrowing arrangements may be applied not only to acquire the single acquirable asset, but also when carrying out repairs and maintenance to the asset at the time of acquisition or at a later time.
- No amount borrowed by the SMSF trustee may be applied to improve the single acquirable asset. A breach of this rule may lead to a contravention.
- It is imperative to distinguish between maintaining, repairing and improving.

For more information talk to us.

### Travel allowance deductions

Last year an Administrative Appeals Tribunal (AAT) decision, *Gleeson and Commissioner of Taxation* [2013] AATA 920, was issued regarding a substantiation exemption for expenses incurred

by a taxpayer while travelling overnight for work purposes.

The AAT found that the taxpayer had incurred food and drink expenses while on trips away from home and had received a bona fide travel allowance to cover the expense. The taxpayer was therefore entitled to rely on the exemption from the substantiation provision when claiming deductions.

The Australian Taxation Office has now issued a decision impact statement which reminds taxpayers that this decision was based on the facts of the case and does not present any new principal of law.

Where an individual receives a bona fide travel allowance and relies on the Commissioner's reasonable amounts for claiming travel expenses, the taxpayer is still expected to be able to demonstrate that expenses have actually been incurred.

### Application for security for costs against a liquidator

Where a company in liquidation commences proceedings against a defendant, each party will inevitably incur legal fees and disbursements in order to prosecute and defend the proceedings. A liquidator would ordinarily engage solicitors and barristers on the basis that their costs would only be paid on a successful result. In most cases, once a judgment regarding the proceedings is determined, orders are subsequently made for the unsuccessful party to pay the costs of the successful party. However, in some situations, despite the cost orders being made, the unsuccessful party may be unable to satisfy the costs incurred. This is a likely scenario

for liquidators if they are unsuccessful in proceedings as companies in liquidation are often without funds.

In order to avoid the unsuccessful party being unable to satisfy any order for costs, a defendant may seek an order for the party commencing proceedings to provide security for costs. The main purpose of the order is to ensure any unsuccessful proceedings do not disadvantage the defendant.

It is important to note however, that a liquidator does not always need to provide security for costs when bringing proceedings against a defendant. The court may consider a number of factors when determining whether to order security for costs. Some factors which are particularly relevant for liquidators include:

- the prospects of success or merits of the proceedings brought by the liquidator
- the genuineness of the proceedings brought by the liquidator
- whether the administration is without funds and whether this is attributable to the defendant
- the reasons for the proceedings and the conduct of the proceedings
- where the effect of an order for security would be to stifle the liquidator's claim
- whether the proceedings involve a matter of public importance
- the overall costs of the proceedings
- proportionality of the security sought to the importance and complexity of the issues
- the timing of the application for security.

In the case *Golden Mile Property Investments Pty Ltd (In Liquidation) v Cudgegong Australia Pty Ltd [2014] NSWCA 224*, the Supreme Court of New South Wales – Court of Appeals decided against an order for security of costs to be paid by the liquidator. Some of the factors that were considered in making the decision were as follows:

- the strength and genuineness of Golden Mile's proceedings

- whether Golden Mile's inability to provide security for costs was caused by the actions of *Cudgegong Australia*
- whether security for costs would stultify the litigation.

This decision demonstrates that the court will consider the unique facts of each proceeding when exercising its discretion in making an order for security for costs. An application for security of costs against a liquidator that has limited or no funds may not be successful.

### **Is that worker really a contractor?**

Distinguishing between employees and contractors is not just a HR issue. There are tax consequences too.

In general terms, if a worker is an employee:

- PAYG withholding applies to salary
- Fringe Benefits Tax applies to non-cash benefits
- the employer must make superannuation contributions
- there could be state payroll tax.

A 'genuine' contractor on the other hand should have an Australian Business Number (ABN) which raises other issues such as Goods and Services Tax.

The tax and superannuation guarantee laws are structured in a way that, even if a worker has an ABN, the payer (employer) is still obliged to determine whether the worker is in fact a 'genuine' contractor or really an employee.

There have been many court cases on the employee-contractor distinction, and these decisions have determined numerous 'tests'.

If you use contract labour in your business, it is worth implementing a checklist approach for use at hiring time which reflects these tests. That way, you can demonstrate to the ATO and others that your business has done its best to comply with a very difficult area of tax law.

For assistance in designing a checklist talk to us.