

April 2003 Newsletter

This newsletter deals with the successful High Court challenge to the Commissioner's land tax valuation method, the amendments to the payroll tax legislation to include trust distributions as wages for payroll tax purposes and the circumstances where legal professional privilege can inadvertently be waived in commercial negotiations.

LAND TAX

LAND TAX VALUATION METHOD SUCCESSFULLY CHALLENGED IN THE HIGH COURT

Land tax is assessed on the unimproved value of the land. A method adopted by the Commissioner to assess the unimproved value of land has been to determine the value of the land as though it were vacant. The High Court case of *Maurici v Chief Commissioner of State Revenue* (2003) HCA 8 supports a challenge to land tax assessments based on that methodology. The case is particularly significant for land tax valuations in areas with very few vacant blocks.

The landowner in the *Maurici* case was the owner of a parcel of waterfront land at Hunters Hill, where there are very few vacant residential sites. The Commissioner, in response to the landowner's initial challenge, revealed that the method of valuation used was to make a comparison to sales of vacant land in the area.

In *Maurici*, it was agreed that as there was a scarcity of vacant land in the area, a premium was paid for such land.

The landowner's argument was that the sales of vacant parcels of land were unduly inflated due to a 'scarcity factor' and was, therefore, unreliable for comparison purposes. It was contended that each block's unimproved value was therefore increased by a component for scarcity value even though it was not, in fact, vacant and that if every block were treated as vacant, no such component for scarcity would exist. The High Court held the Commissioner's method to be unreasonably selective in confining the comparisons to other sales of vacant land in obtaining a fair estimate of the unimproved value.

As the decision was handed down on 13 February 2003, any land tax assessments dated on or prior to that date may have been valued utilising a methodology that has now been declared incorrect by the High Court.

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PAYROLL TAX

DISTRIBUTION FROM TRUSTS

As a result of the *Pay-roll Tax Legislation Amendment (Avoidance) Act 2002*, from 1 July 2003 the Office of State Revenue will be able to determine that certain distributions by the trustee of a trust to a beneficiary are “wages” for the purposes of the *Pay-roll Tax Act 1971* (NSW). As a consequence, if the total “wages” exceed \$600,000, such distributions will be subject to payroll tax.

The new provisions apply where:

- a beneficiary of a trust performs services for the trustee;
- a distribution is made by the trustee of the trust to the beneficiary; and
- the wages paid by the trustee of the trust to the beneficiary are less than the wages that were payable at the market rate for the work done (the difference being the “wages shortfall”).

If the distribution does not exceed the “wages shortfall” in respect of the work done, the whole of the distribution is taken to be “wages”. If the distribution exceeds the “wages shortfall” in respect of the work done, the distribution is wages to the extent of the shortfall.

By way of example, if the market wage of a person is \$100,000 and that person receives a wage of \$20,000 and a trust distribution of \$80,000, prior to 1 July 2003 \$20,000 is subject to payroll tax. From 1 July 2003, \$100,000 is subject to payroll tax.

Interestingly, the provisions appear to only apply where a trust distribution is made to the beneficiary who performs the services. Where a trust distribution is

made to some other beneficiary, the provisions may not apply.

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COMMERCIAL

LEGAL PROFESSIONAL PRIVILEGE

If you are in dispute with another party over the legal interpretation of a document or certain claimed rights and you obtain favourable legal advice with respect to your rights, to gain an advantage in the negotiations you may be tempted to confidently tell your adversary “I have obtained legal advice and my solicitor tells me etc”. But to do this could adversely affect your legal position a lot more than the perceived benefit to your negotiating position by making such a statement. The damage is done not by conveying to the other party that you have had legal advice, but by disclosing the general nature of that advice.

In *Jeff Estok v Issues & Images Group Pty Limited and Others* (2002) NSWIRComm 67 (16 April 2002) an employer was forced to produce legal advice it had obtained for the reason that it had waived its right to legal professional privilege in respect of that advice by certain statements representatives of the employer had made to the employee. Schmidt J said at paragraphs 29 and 41:

...there can be no doubt, in my view, that any privilege in that advice earlier received by the respondents from [their solicitors] as to the applicant’s entitlements was waived on 31 October when that advice was revealed to the applicant by Mr Woolley at their meeting.....The summons was also directed to eliciting the second legal advice which, on 31 October, Mr Woolley revealed had been

obtained by the respondents. He revealed that it confirmed the advice which Mr Cross had given the respondents, but did not offer to provide it to the applicant. In the circumstances, while obviously more doubtful than the express waiver of Mr Cross' advice, I am inclined to the view that privilege in respect of this advice was also impliedly waived. **It was not the mere existence of a second opinion which was revealed, but what the advice in fact was.** [emphasis added]

It is important in negotiations that you do not impliedly waive your right to legal professional privilege for legal advice by

disclosing the general nature of legal advice you have obtained as the production of that advice could seriously affect the outcome of ensuing litigation. On the other hand, if the other party to a dispute makes such statements, you should bear in mind that it may be possible to require that party to produce that advice for examination by your lawyers.

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