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March Newsletter

This newsletter deals with geared unit trusts post 30 June 2009 and clarity in pricing

SUPERANNUATION

GEARED UNIT TRUSTS POST 30 JUNE 2009

(a) Background

Prior to 11 August 1999, the trustee of a self managed superannuation fund ("SMSF") could hold units in a unit trust, the trustee of which borrowed monies from a financier to purchase real property. The units held by the trustee of the SMSF were not considered "in house assets" (under the relevant definition). In particular, units in a unit trust were not an investment in an "associate" of a "standard employer sponsor" as required (*Trevisan and Anor v FCT* 91 ATC 4416).

The amended and now current definition of "in house asset" includes as an "in house asset" an investment in a "related trust". Where the trustee the SMSF and "Part 8 Associates" hold the majority of units in the unit trust, that unit trust is a "related trust" and, hence, the units held by the trustee of the SMSF are "in house assets". In view of the problem this caused to existing unit trust structures, two transitional provisions were enacted:

- the grandfathering of units acquired by the trustee of the SMSF in the unit trust prior to 11 August 1999 provided such units were not "in house assets" under the old rules (Section 71A of *Superannuation Industry (Supervision) Act* ("SIS")); and
- the ability of the trustee of the SMSF to subscribe for further units in the unit trust until 30 June 2009 equal in quantum to the principal of any loan outstanding by the trustee of the unit trust to the financier as at 11 August 1999 (provided the requisite written election had been made) (Section 71E of *SIS*).

(b) What needs now to be considered

In many cases, the trustee of the SMSF made the requisite written election and subscribed for sufficient units in the unit trust post 11 August 1999 in order to enable the trustee of the unit trust to repay the loan outstanding as at 11 August 1999. In this case, the unit trust is no longer geared and the trustee of the SMSF may well be able to subscribe for further units in the unit trust on the basis that the unit trust satisfies the "non-geared unit trust" exception found in Division 13.3A of the *SIS Regulations*.

On the other hand, if the trustee of the unit trust still owes monies to a financier, consideration has to be given as to the ability of the unit trust to pay back that loan. A number of scenarios can be considered:

- concessional/non-concessional contributions are made to the trustee of the SMSF which, in turn, on or before 30 June 2009 subscribes for further units in the unit trust. The trustee of the unit trust then uses the monies received to pay back the loan owing to the financier;
- a related entity subscribes for further units in the unit trust either using its own funds or borrowed funds. If funds are borrowed, the property held by the trustee of the unit trust cannot be used as collateral security. The trustee of unit trust uses the monies received to pay back monies owing to the financier;
- trustee of unit trust sells property to related party which, in turn, borrows the required funds. Trustee of the unit trust can then repay the loan owing to the financier. If there are no other assets in the unit trust, the unit trust can be wound up.

When the trustee of the unit trust has repaid the loan, the trustee of the SMSF may be able to rely on the "non-g geared unit trust" exception found in Division 13.3A of the SIS to subscribe for further units in the unit trust.

The issues that arise from the above are:

- what are the stamp duty consequences for the trustee of the SMSF subscribing for further units in the unit trust;
- if there is the redemption of units in the unit trust, or the winding up of the unit trust, what are the CGT consequences;
- if there is the sale by the trustee of the unit trust of the property to a related party:
 - can the trustee of the unit trust claim one or more of the CGT concessions;
 - if part of the purchase price is funded by way of issue and redemption of units in the unit trust, what are the:
 - o CGT consequences;
 - o stamp duty consequences.
- what is required to satisfy the "non-g geared unit trust" exception found in Division 13.3A of the *SIS Regulations*.

It should be apparent from the above that, at the very least, consideration has to be given to the status of pre 11 August 1999 unit trusts post 30 June 2009. In many cases, it will be worthwhile restructuring those unit trusts prior to that date.

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COMMERCIAL LAW

CLARITY IN PRICING

At the end of last year, the Federal Government enacted the *Trade Practices Amendment (Clarity in Pricing) Act 2008*. The purpose of the new *Act* is to require corporations to prominently specify a **single price** that a consumer must pay to obtain goods or services. It does this by replacing Section 536A of the *Trade Practices Act 1974* to prohibit the practice of hiding, or omitting to clearly state, fees and charges.

The new legislation is in response to a number of cases involving the supply of air fares, mobile phones, computers and motor vehicles, where it appeared to the Federal Government that further consumer protection is required.

The new legislation is due to come into force on the 25 May 2009. From that date, every corporate supplier of goods and services to consumers will need to ensure that its practices comply. Failure to comply will expose a corporate supplier to a fine in the event of a successful prosecution by the ACCC.

The provisions only apply where the goods or services supplied or offered are of a kind "ordinarily acquired for personal, domestic or household use or consumption" to a customer who is not a corporation. The provisions do not apply where a corporation is making a supply of goods or services to another corporation.

The expression "single price" is defined to mean *"the minimum quantifiable consideration for the supply concerned at the time of the representation concerned, including each of the following amounts (if any) that is quantifiable at that time:*

- (a) *a charge of any description ... (other than a charge that is payable at the option of the purchaser);*
- (b) *the amount which reflects any tax, duty, fee, levy or charge imposed,... in relation to the supply concerned;..."*

A price advertised as \$2,000 + GST, but where there is a service fee of \$100 plus GST which is not disclosed, would not comply. The correct way of disclosing the required "single price" would be to say "\$2,000 + GST of \$200 plus a service fee of \$100.00 + GST being a total price of \$2,310."

It is not necessary to include items in the single price, where the purchaser has an option to either take or not take the item. An example of this is a car supplied with metallic paint for an additional price.

It remains possible for a corporate supplier to specify components of its price if it wishes to do so. However, it must also prominently specify a "single price".

The concept of specifying in a "prominent" way is defined to mean *at least as prominent as the*

most prominent of the parts of the consideration for the supply. In other words, fine print will not suffice.

The provisions do not require that the cost of sending goods from the supplier to a customer (for example postage and handling) be included in the single price. However, where a corporation knows the minimum amount of the charges for sending the goods from the supplier to the customer, it must specify that minimum amount. Equally, if the minimum amount of charges for sending goods from the supplier to the customer is not known, it is sufficient to simply say "plus postage and handling". It will remain lawful to state a price as \$100 + \$5 postage and handling. It is not necessary to say \$105.

Where services are offered or supplied under a contract for a term, where there are periodic payments for the services, then the requirement to state a single price does not apply. This is also the case where there are some goods supplied that are incidental to the services supplied.

The new legislation does not deal specifically with the question of a supply which depends on the quantity of goods or services being supplied. The Explanatory Memorandum that accompanied the Bill when it was being considered by the Federal Parliament stated that a "single price" should be specified as a "per quantity" amount. This suggests that the price for goods may be stated as a price per kilogram. It is interesting, and possibly significant, that this concept did not find its way into the legislation.

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