

# MILLER NOYCE

## LAWYERS

MILLER NOYCE HOUSE, THIRD FLOOR, 45-47 HUNTER STREET, HORNSBY 2077

Tel: (02)9987 4855 Facsimile: (02) 477 7107 Email: auslaw@millernoyce.com.au

### DOUG SPENCER'S LEGAL POTPOURRI – MAY 2007 (2)

**CO-OWNERS – EQUITABLE DOCTRINES OF TRUST** – The rights of co-owners (and mortgage co-contributors) are a confused combination of legal and equitable entitlements. There have been a number of recent decisions where the Courts have re-confirmed the basic principles, some of which are counter intuitive and liable to mislead the unwary. There is a good article by Lee Aitken on the interplay of principles concerning resulting and constructive trusts. Factually, the matter may be difficult involving as it does an accounting between parties of various expenses and outgoings which may have occurred at a considerable time in the past. The constant flow of cases in the area demonstrates that although statute now has a large part to play, depending on the relationship between the parties, basic matters of doctrine are still of fundamental importance. – *Law Society Journal February 2007*

**COMPANIES – DIVISION 7A – DEEMED DIVIDENDS** – On 6<sup>th</sup> December 2006, the Minister for Finance and Assistant Treasurer announced several measures would be enacted which would reduce the compliance burden of private companies under the payment, loan and debt forgiveness provisions (Div 7A). In particular, the amendments provide the Commissioner with a discretion to disregard a deemed dividend where there is evidence that a taxpayer has attempted to comply with Div 7A, but they have made an honest mistake and efforts have been made to rectify the mistake. – *Lawyers Tax Companion December 2006*

**LAND TAX – UNIT TRUST AMENDMENTS** – Amendments have been made which received Royal Assent on 2<sup>nd</sup> November 2006. Broadly, under the amendments, if a trust satisfies relevant criteria, the beneficiaries of the trust will be taken to be owners of the land and, accordingly, the trust will be taken to be a fixed trust and entitled to the land tax free threshold. In short, the trust deed must specifically provide that the beneficiaries are “presently entitled” to the income (subject only to the payment of the trustee’s proper expenses), and are “presently entitled” to the capital. The amendments allow a unit trust that is restructured to comply with the relevant criteria before 1 January 2008 to be treated as a fixed trust in respect of the land tax year commencing 1 January 2006 and subsequent land tax years.

Consideration should be given to terms of Unit Trust Deeds to see if they need amendment to ensure compliance with these provisions. – *Lawyers Tax Companion December 2006*

**SALE OF BUSINESS – GST – GOING CONCERN** – There was an interesting decision of the AAT (*Debonne Holdings Pty Limited v. FC of T 2006 ATC 2467*) where it was held that the sale was the supply of a going concern and the purchaser was not entitled to claim an input tax credit. The facts were of interest because there were effectively two contracts; one contract related to the sale of the land and improvements (hotel) and the other contract related to the sale of the business, including goodwill, plant, fixtures etc. The business sale contract stated that the sale was the supply of a going concern. The contract in relation to the hotel simply indicated that “*unless otherwise agreed the Purchase Price includes any GST liability of the Vendor*”. It was held that when one considered the whole transaction

(meaning both contracts and what occurred) the sale constituted the supply of a going concern. The provision in the business sale contract, which expressly used the phrase “*going concern*” within the meaning it had in the GSTA, was a statement which satisfied Sections 38-325 of the GSTA for the supply of both the land and the business, making the totality of the sale GST free, notwithstanding that the land sale was covered by a separate contract document which contained provisions contemplating that GST may be payable.

The above case is a useful reference if a dispute or uncertainty arises as to whether or not a transaction will satisfy the requirements. However, in these instances where there are separate transactions that make up the whole “*deal*”, the safest way is to try and ensure that each transaction satisfies the requirements and each contract specifies that the sale is a going concern. – ***Lawyers Tax Companion December 2006***

**CGT – SMALL BUSINESS AMENDMENTS** – An important amendment was enacted at the end of 2006 which affected the provisions regarding the CGT small business concessions. These concessions can of course, apply not only where a business is being sold, but also potentially where a CGT event happens in relation to a business asset. The more important changes are:-

- A significant (20%) individual test is replacing the controlling (50%) individual test, which greatly expands the number of individuals who can potentially benefit from the CGT concessions where a company or trust has made the capital gain or a share or trust interest in the relevant CGT asset.
- The maximum nett asset value test takes into account a negative nett asset value of an entity
- The maximum nett asset value test includes liabilities for annual leave, long service leave, unearned income and tax liabilities
- The maximum nett asset value test in relation to a partnership only applies to individual partners
- The active asset test requires the asset to be active for the lesser of 7½ years or ½ of the period of ownership
- A payment of an amount by a company or trust exempted under the retirement exemption will be either deemed to be an eligible termination payment or to have been paid in respect of employment
- The retirement exemption will also apply to gifts of property
- The legal personal representative of the deceased or a beneficiary of the deceased’s estate can access the concessions

- ***Lawyers Tax Companion December 2006***