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AUSTRALIAN TAX ADVISER

2209: MAY 2022

Tony Westhuysen

Principal, Solutions in Taxation

INFORMATION EXCHANGE CORPORATION

L17, 40 Mount Street,
North Sydney NSW, 2060

E: admin@ifx.com

T: 61 2 9956 7775

W: www.ifx.com.au

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IN THIS ISSUE

SECTION 1 – PROFESSIONAL DEVELOPMENTS.....	1
SECURITY DEPOSITS – DOES SIZE MATTER?	1
¶8.1 Background to Reliance Carpet company case	1
¶8.2 The ATO response — GSTR 2006/2	2
¶8.3 What is a reasonable value for a security deposit?	3
¶8.4 And so it goes	4
SECTION 2 – PROFESSIONAL DEVELOPMENTS	5
BILLS AND LEGISLATION.....	5
¶8.5 Updated Tax Agent Services Regulations registered.....	5
¶8.6 Super contributions work test repealed for under 75s.....	5
¶8.7 Tax, Super and Corporations Law changes now law	6
¶8.8 Public Ancillary Fund Guidelines – legislative instrument made.....	8
¶8.9 Financial accountability and compensation scheme Bills	8
CASES AND DECISIONS	9
¶8.10 Trustee for B & J Chung Trust and FCT	9
¶8.11 Partial release from tax debts on grounds of serious hardship	9
¶8.12 Tax agent's registration terminated for breaching conditions.....	11
¶8.13 Excess non-concessional super contributions assessment upheld	12
¶8.14 Five-year ban on tax agent re-application for registration upheld.....	13
APPEALS NEWS.....	15
¶8.15 Peter Greensill Family Co Pty Ltd (taxpayers' special leave refused)	15
RULINGS AND GUIDELINES.....	15
¶8.16 Draft effective lives for clothing manufacturing industry assets released	15
¶8.17 Exchange of shares, return of capital	15
¶8.18 Division 7A: revised ATO view on UPEs and sub-trusts	16
¶8.19 Trust reimbursement agreements.....	19
¶8.20 Parents benefitting from trust entitlements of adult children.....	20

Continued



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IN THIS ISSUE

¶8.21	Expenses incurred in establishing and administering employee share schemes	21
¶8.22	Luxury car tax	21
¶8.23	Administrative penalties for offences relating to electronic sales suppression tools	22
STATE TAXES		23
¶8.24	Tasmania	23
SECTION 3 – QUESTIONS AND ANSWERS		23
¶8.25	Consolidated revenue	23
¶8.26	Car registered in incorrect name	24
¶8.27	Victoria land tax	25
¶8.28	402 Visa temporary changing to skills shortage — residency	25
¶8.29	Calculation for indexing transfer balance cap	26
¶8.30	Small business concessions	27
¶8.31	Foreign income tax offset	28
¶8.32	Applying margin scheme	29
¶8.33	Unit trust and related party	30

SECTION 1 – PROFESSIONAL DEVELOPMENTS

SECURITY DEPOSITS – DOES SIZE MATTER?

Readers will be aware that for a supply to be a taxable supply under the GST Act¹, the supply must *inter alia* be made for consideration. Without consideration, the supply will default to being an out-of-scope supply. Supplies that meet the conditions outlined in section 9-5², will not attract GST if the supply is either a GST free or input taxed supply under Divisions 38 and 40 respectively.

It follows therefore that if a supply meets the conditions outlined in s 9-5, it can only be taxable, GST-free or input taxed. Supplies that do **not** meet these conditions are generally referred to as ‘out-of-scope’ supplies.

This is the way that our legislature addressed the issue of exempting supplies from the operation of the GST Act without those supplies being either GST-free or input taxed. The legislators came up with the idea of treating the payment³ for those supplies as not being the provision of consideration⁴. This approach is not without its complications, as illustrated in at least the two High Court decisions on the matter.⁵

The exemption for the payment of a security deposit in s 99-5 was the subject of a High Court decision in the *Reliance Carpet Company* case⁶, which examined the GST consequences of a forfeited deposit.

¶8.1 Background to Reliance Carpet company case

By way of background, the rules outlined in subdivision 99-A say that the payment of a security deposit will not be treated as the provision of consideration until it is either forfeited for non-compliance or applied against the purchase price. Only at that point will the payment become ‘consideration’. In other words, the ‘mere’ payment of a security deposit will not be the provision of consideration unless (and until) it is forfeited or applied against the purchase price. If the amount was (say) refunded, it would not (and never could be) the provision of consideration.

The *Reliance Carpet Company* was about the payment and forfeiture of a security deposit. The taxpayer in that case was trying to sell a commercial property situated in Camberwell Junction in Melbourne. A potential buyer had paid a security deposit to the taxpayer, but despite repeated extensions of time, the buyer was unable

¹ A New Tax System (Goods and Services Tax) Act 1999

² For a supply to be taxable under s 9-5 of the GST Act, the supply must be:

- (a) made for consideration
- (b) made in the course or furtherance of an enterprise carried on by the supplier
- (c) connected with the indirect tax zone and
- (d) made by an entity that is registered or required to be registered for GST.

³ The term ‘consideration’ is defined to include a payment as well as any act or any forbearance.

⁴ See for example s 9-17, Div 81 and s 99-5 of the GST Act.

⁵ The two cases were the *Reliance Carpet Company* case and the *Qantas* case. The *Qantas* case is beyond the scope of this piece, so will not be examined.

⁶ [2008] HCA 22