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### September 2014

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### Share transfer to family partnership ineffective

A husband and wife have been unsuccessful before the Administrative Appeals Tribunal (AAT) in arguing that they had transferred shares in a family company to a family partnership, and that therefore they should not be assessed on dividends issued by the company to themselves. The AAT examined the partnership agreement and was of the view that, under the terms of the agreement, the couple was not required to actually transfer their shares in the family company to the family partnership. It was also emphasised that the couple remained the full registered owners of the shares. In doing so, the AAT affirmed the Tax Commissioner's decision that the couple were each assessable on the dividends of some \$1.8 million. The taxpayers are seeking to appeal the decision in the Federal Court.

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### Property developers and use of trusts under scrutiny

The ATO is examining arrangements where property developers use trusts to return the proceeds from property development as capital gains instead of income on revenue account. ATO Deputy Commissioner Tim Dyce said the ATO has "begun auditing property developers who are carrying out activities which conflict with their stated purpose of capital investment". He said a "growing number of property developers are using trusts to suggest a development is a capital asset to generate rental income and claim the 50% capital gains discount". Mr Dyce warned that penalties of up to 75% of the tax avoided can apply to those found to be deliberately using special purpose trusts to mischaracterise the proceeds of property developments. The ATO said it has made adjustments to increase the net income of a number of trusts. It said penalties will be significantly reduced if taxpayers make a voluntary disclosure.

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### Residency depends on facts and circumstances of each case

The ATO has issued a Decision Impact Statement following an individual's legal win in arguing that he

was not a tax resident of Australia during the 2009 to 2010 income years. The taxpayer had moved to Saudi Arabia to work on a project for a number of years before moving back to Australia. Key factors that were taken into account by the AAT in deciding in favour of the taxpayer were the man's intentions at the relevant time to live and work indefinitely in Saudi Arabia. The ATO said the decision was reasonably open to the AAT. However, it said the decision does not change its approach to residency cases. It said these matters involve questions of fact and degree and different facts may result in different conclusions as to residency. The ATO said it will continue to approach residency cases by weighing all the relevant facts and circumstances and applying the relevant tax law and authorities to those facts.

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### Billions in lost super waiting to be claimed

According to the ATO, more than \$14 billion in lost super is waiting to be claimed. The ATO said \$8 billion in super was sitting in accounts that have not received a contribution in five years. A further \$6 billion in super was sitting in accounts where funds have not been kept up-to-date with changes to personal details. ATO Assistant Commissioner John Shepherd said it was "easy for this to happen because when people get married or move house, the last thing on their mind is updating their name and address details with a super fund". However, he said it was important to provide funds with tax file numbers (TFNs) which can help individuals be reunited with their super.

**TIP:** The ATO's Superseeker service enables individuals to enter their name, TFN and date of birth to conduct an online search of the Tax Office's Lost Members' Register available at [www.ato.gov.au/Calculators-and-tools/SuperSeeker](http://www.ato.gov.au/Calculators-and-tools/SuperSeeker).

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### ASIC eye on SMSF property investment advice

The Australian Securities and Investments Commission (ASIC) has raised concerns about advice being given to self managed superannuation funds (SMSFs) to invest in property. ASIC Commissioner Greg Tanzer said the regulatory body was aware there





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had been a sharp rise in promoters recommending that investors either set up or use an existing SMSF to invest in property. ASIC is concerned these promoters may not be complying with the law. Mr Tanzer said ASIC was concerned that, with the increased popularity of SMSFs and property investment, real estate agents and property advisers may not realise they may be carrying on a business of providing financial product advice and may need an Australian financial services (AFS) licence, or authorisation under an AFS licence, when making recommendations or statements of opinion to a person to use an SMSF to invest in property. Mr Tanzer said ASIC is now working with individual businesses suspected of engaging in unlicensed conduct to help them understand their obligations.

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### Bad debt deduction for “unpaid trust entitlements” refused

A taxpayer has been unsuccessful before the AAT in a matter concerning bad debt deduction claims for the 2012 income year in relation to certain trust distributions. The taxpayer, a beneficiary of a trust, had claimed bad debt deductions under the tax law for debts he argued were unpaid trust entitlements. He argued the debt written off had the same character as the trust distributions included in his assessable income in the 2005 and 2007 income years. Following analysis of the distribution transaction and the trust deed, the AAT was of the view the taxpayer’s entitlement was paid in the manner prescribed by the deed, and once paid, lost its character as unpaid entitlement. The AAT concluded the debt written off was different in character to the income included in the taxpayer’s assessable income in the 2005 and 2007 income years.

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### Family fails to prove assessments excessive

Six members of a family have been unsuccessful before the AAT in arguing that various amended and default tax assessments were excessive. The AAT heard details of unexplained moneys flowing through family bank accounts, sums paid from an overseas business arrangement, as well as the acquisition of various residential properties in the names of family members, despite the taxpayers’ claim they earned very little income. The Tax Commissioner used the “asset betterment” analysis to raise the assessments. Despite acknowledging inherent flaws in the method

used by the Commissioner to derive the tax assessments, the AAT found the family members had failed to establish that the assessments were incorrect and that the amount of money for which tax was levied by the assessment exceeded the actual substantive liability of the taxpayers.

**TIP:** In making a default assessment, the Commissioner is not required to follow the ordinary processes of ascertaining assessable income and allowable deductions and need not make inquiries of the taxpayer (or the taxpayer’s agent). However, the assessment may be invalid if the Commissioner estimates the taxpayer’s assessable income upon no intelligible basis or simply plucks a figure out of the air.

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### Tax consequences following marriage break-up

The ATO has recently released a taxation ruling on the tax effects of matrimonial money or property transfers. According to some commentators, the game-changing ruling may affect the manner in which property settlements are able to be arranged for family groups under s 79 of the *Family Law Act 1975*.

In Taxation Ruling TR 2014/5, the ATO confirmed that payments or transfers of property under Family Court orders to a husband or wife from a private company will be considered a distribution of profits from the company. Such transactions will therefore be assessed as dividends either pursuant to the ordinary dividend assessing provisions (s 44 of the *Income Tax Assessment Act 1936*) or Div 7A in almost every matrimonial property or cash settlement, regardless of whether the parties are shareholders (or associates of the shareholders) in the private company or whether the private company is a party to the Family Court order.

**TIP:** The rules can be complex and various different taxation consequences could arise depending on the type of Family Court order that has been made. Please contact our office if you have any questions.

**Important:** Clients should not act solely on the basis of the material contained in Client Alert. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. Client Alert is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.