

F.S.T. e-bulletin

WELCOME TO THE LATEST EDITION OF THE PIPER ALDERMAN F.S.T. E-BULLETIN PROVIDING AN ACCESSIBLE AND INFORMATIVE SUMMARY OF RECENT DEVELOPMENTS IN AREAS OF FINANCIAL SERVICE AND TAXATION. WE TRUST YOU WILL FIND THE F.S.T. E-BULLETIN OF VALUE.

Consequences of late payment of compulsory superannuation contributions

The 21 September 2007 decision of the Administrative Appeals Tribunal in *Pyke v Federal Commissioner of Taxation* [2007] AATA 1784, demonstrates the pernicious effect of the superannuation guarantee charge that arises as a result of an employer paying employee superannuation payments to an employee's nominated superannuation fund after the due date. The case resulted in the employer being required to make the payments again – only this time to the Australian Tax Office.

Pyke was the proprietor of a hairdressing business. When she fell ill in 2003, management of the business suffered and she failed to pay superannuation contributions by the due date. The business was eventually sold and all outstanding superannuation payments were paid to employee superannuation funds out of the proceeds of sale and additional borrowings obtained by Pyke.

In mid-2004, the ATO conducted an audit of Pyke's business affairs and determined that she had failed to pay superannuation payments within the prescribed period. The ATO issued assessments for superannuation shortfalls in May 2006, requiring Pyke to make additional superannuation guarantee charge payments equal to the amount already paid plus a penalty of 5%.

Pyke objected on the basis that she had already made the payments (albeit late) to the employee superannuation funds and requiring her to pay the superannuation guarantee charge to the ATO would result in double payment. The Commissioner conceded the penalty, but determined that he did not have any discretion to waive the obligation that Pyke pay the superannuation guarantee charge. The superannuation guarantee charge was simply payable to the ATO because superannuation contributions were not paid on time.

The AAT upheld the Commissioner's decision. The AAT was critical of the Commissioner's delay in advising Pyke of the superannuation guarantee charge and

failed to pay superannuation payments within the prescribed period



noted that had Pyke been notified earlier, she may not have made those payments directly to the superannuation funds or may have been able to obtain a refund from those funds at the time she was notified of her obligation to pay the ATO (such opportunity having been lost in the circumstances due to many employees moving funds or retiring and withdrawing their benefits). The AAT sympathised with Pyke but ultimately held that there was no legislative power to overrule the Commissioner's decision.

Since this decision, the Assistant Treasurer has announced changes that will mean employers who make late payments will not pay the same amount twice, but will still be required to pay late fees, charges or interest on account of lost earnings due to delay. The proposed changes are to take effect from the date of Royal Assent and do not presently contemplate retrospective application. Employers should therefore be very careful to meet their obligations either on time or follow the procedures required by the Superannuation Guarantee (Administration) Act 1992 to avoid double payments and maintain a watchful eye on the proposed amending legislation.

Changes to Victorian State Revenue Office Treatment of Transfers of Water Entitlements

As a consequence of the Victorian Government's water reform program, the nature of water entitlements in Northern Victoria changed on 1 July 2007 and will in due course change in Southern Victoria.

In Northern Victoria, water rights and diversion licences on regulated water systems have been unbundled from land. Water entitlements are now divided into the following components:

- > high reliability water – which replaces stock and domestic

allowance and take and use licences on regulated streams;

- > low reliability water share – which replaces sales water;
- > delivery share – which is an entitlement to have a certain volume delivered to a property for a yearly charge; and
- > water use licences – which recognise and define an irrigator's authority to use water for irrigation on a property to which the former water right and take and use licences related.

As a consequence of the changes and unbundling of water from land, the State Revenue Office (SRO) has reviewed its approach to transfers of land where water entitlements are transferred as part of the same transaction or arrangement. The SRO is of the view that water entitlements transferred together with land are not dutiable as they do not come within the definition of dutiable property. There is an exception for stock and domestic allowance in southern Victoria, which permanently attaches to a specific parcel of land, but otherwise as water rights are independently traded, they are not considered dutiable property even when transferred in the same transaction as land.

Parties will be able to self apportion the consideration to the dutiable 'land' component and the non-dutiable 'water' component. Self apportioning is subject to the resulting values reflecting market value. Parties should also take note of the SRO view that a water entitlement sold with land is of lesser value than an entitlement sold separately from land. If there is doubt, a valuation may be needed to ensure the proper apportionment and to avoid adverse implications of over or undervaluing the dutiable portion (whether unintended or otherwise).

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