

## **NEWSLETTER – SEPTEMBER 2014**

### **Superannuation – What Happens To It When You Die?**

The general rule is that superannuation is not part of your estate unless you expressly make it part of your will, right? Well, maybe not. A recent case before the courts serves as a warning to make sure that you take care of the details.

Generally, superannuation is passed directly to your nominated beneficiaries and not to your estate. However, a recent case before the Supreme Court may change current belief and convention on what happens to your superannuation when you die.

In this case, an unmarried son, James, tragically dies at the age of 40. His mother and father had an acrimonious relationship since separating when James was 5 (divorcing just under 2 years later).

At the time of his death, James did not have a valid will in place (intestate). Generally, when a child dies intestate, the estate is divided equally between the parents. James' estate was worth about \$80,000 and his superannuation over \$450,000.

James lived with his mother at the time of his death. She applied for Letters of Administration and Probate to manage his estate as there was no will. As administrator of his estate, her obligation was to "use her best endeavours to maximise the size of the estate."

The mother received advice from her lawyers that superannuation does not form part of the estate. As such, she sought to have James' superannuation distributed to her in her personal capacity (and not to the estate). While James' mother was not a nominated beneficiary for James superannuation, she was a non-binding beneficiary because of their interdependent relationship.

The superannuation benefits were eventually paid to the mother by three different funds because she had a relationship of financial and emotional dependency with James (James was bipolar and had lived with her 30 of his 40 years and they shared the household expenses).

During this time, the father's lawyers queried the mother's intentions for the superannuation benefits stating that to have the superannuation transferred to her in person was a breach of her fiduciary duties as administrator of the estate. The response they received was that superannuation is not an asset of the estate. And so it went to court.

The court agreed with the father's lawyers, ordering that the superannuation benefits form part of the estate, that the mother (having been granted Letters of Administration to deal with the estate) had a duty to maximise the value of the estate, and that her self-interest in the superannuation benefits should not have come before her responsibilities as administrator.

By becoming an asset of the estate, the superannuation benefits were to be split between the mother and father.

The outcome of this case would have been different had James had a binding death benefit nomination in place for his superannuation in favour of his mother, and made a will naming his mother as executor. While these factors do not guarantee that the payment of superannuation benefits will not be contested (and there are a number of self-managed superannuation fund related cases that do), the measures will go a long way.

### **The Top Three Things You Must Do**

1. Check your superannuation death benefit nominations - who is nominated and do you want them to receive your superannuation benefits if you die?
2. Review your will to make sure it is up-to-date for your current circumstances.
3. Check nominations for the legal representative of your estate and whether this nomination is current and appropriate.

*If you need help structuring your assets and managing your superannuation, please call us today. Don't leave these important issues.*

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## Tax Treatment of Virtual Currencies

If you have a digital coin, is it real? And if it's real do you have to pay tax on it? According to the Australian Taxation Office (ATO), the answer depends on how you are using it and why.

The ATO recently released its position on the tax treatment of the virtual coin "bitcoin" and other virtual currencies - much to the chagrin of proponents. The ATO's view is that bitcoin is not money or a foreign currency, and the supply of bitcoin is not a financial supply for GST purposes. However, bitcoin is a CGT asset.

So, what does all this mean?

### Impact on Businesses Using Bitcoin

If you are in business bitcoin, like the barter systems that sprang up a few years ago, needs to be treated in the same way as any other form of payment. However, the additional work now required by business to administer bitcoin might be a major disincentive to continuing to use it.

If you receive bitcoin for goods or services you provide as part of your business, you need to record the fair market value in Australian dollars as part of your ordinary income.

If your business is registered for GST and you are paid for goods and services you supply using bitcoin, like any other transaction you need to add GST to the price of the goods and services. If you pay for goods and services you receive using bitcoin and are registered for GST, you will have a GST liability in relation to bitcoin you used to pay for the goods and services. The other party to the transaction may be able to claim GST credits for the GST that relates to the use of bitcoin to pay for the transaction.

### Impact on Individuals Using Bitcoin

If you use bitcoin for your own personal use there is no tax impact unless you make a gain on trading bitcoin. If you make a gain on bitcoin, capital gains tax can apply although there is no need to recognise the gain in your tax return if the cost of the bitcoin you used was \$10,000 or less.

### So What is Bitcoin?

Bitcoin is a cryptocurrency.

Bitcoin transactions are recorded in a public ledger called a block chain. They can be bought at an exchange

platform or 'mined'. In an oversimplification, bitcoin mining is where you maintain a block chain and become part of the payment processing system validating individual payments by adding them to the block chain. Those that maintain block chains are rewarded with newly created bitcoin and transaction fees. The supply of new bitcoins is fixed and the volume released diminishes over time.

The digital coins, whether acquired or mined, are then transferred to your digital wallet (personalised bitcoin account). These bitcoins can then be used to purchase goods and services like any other form of currency.

There are around 13 million bitcoins in circulation at present with a reported cap of 21 million.

## Why the ATO Might Think You Are Not in Business

There are some businesses that the ATO does not really think should be taxed like a businesses. Unfortunately, just having a company or other structure setup does not protect you.

If you earn income mostly from your own personal skill or effort, like many contractors, then you are in danger of the ATO preventing you from accessing the 30% company tax rate and deducting some business expenses.

So, how do you know if you are caught? If you are the person responsible for the income produced by your business, and it's from your personal efforts – not the use of machinery or trucks, the sale of goods, etc. – then you might be earning personal services income (PSI). The ATO then applies a series of tests to work out if you should be taxed like a business or more like an employee – like whether you work to achieve a specific result or are paid an hourly rate, whether you have multiple clients or just one, if you have an apprentice, where you operate from, etc.

If you earn PSI and you pass all the tests to be taxed like a business, there are still a few catches. For example, the ATO believes that when PSI is derived through a company or a trust, all of this income should generally be paid to the individual who performs the services as salary or as a distribution of profits.