



# NEWSLETTER

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## Inside this edition

**GST and Nominees**..... 1

**Employers Beware – Employees are not Chattels**..... 2

**When “Better Late Than Never” Is Not Good Enough**..... 2

    Qualifying Companies..... 2

    Livestock..... 2

    GST ..... 3

    FBT ..... 3

    Amalgamations ..... 3

    Taxable Bonus Issues..... 3

**Provisional Tax and GST**..... 3

    Due Dates – From 1 April 2006..... 3

    Aligning Provisional Tax And GST – From 1 April 2006 ..... 3

    Ratio Method Of Calculating Provisional Tax – From 1 April 2007 4

    Miscellaneous Matters ..... 4

    Conclusion..... 4

**Little Snippets**..... 4

    Dairy Industry Depreciation ..... 4

    Christmas Is Coming ..... 4

## GST and Nominees

It is common practice to enter into a sale and purchase agreement where a right to nominate another purchaser is included. The final purchaser may not be listed at the time a contract is signed for a variety of reasons, for example, the form of the ownership structure may not have been finalised. Strictly speaking, including reference to a nominee is not required as it is a common law right to nominate in this context.

Mistakes can often occur with transactions involving the supply of a going concern where a nominee completes the purchase.

For a supply to qualify as a going concern the GST Act requires the recipient to be registered at the time of supply. The time of supply is the earlier of the time an invoice is issued or the time when any payment is made. It is not uncommon for a person to enter into a transaction intending for a nominee to complete settlement but not realising that GST registration of the nominee at the time of supply is imperative for it to qualify as a going concern.

If the purchaser or nominee is not registered, there will not be a going concern transaction and a dispute between the purchaser and vendor could arise. The vendor will have to sacrifice a portion of the consideration as GST payable if the agreement is “inclusive of GST” or the purchaser will have to pay GST and possibly interest if the agreement is “plus GST if any”. It is therefore important to ensure that the recipient of the supply is registered at the time of supply.

What happens if the recipient is not registered? Depending on the circumstances a going concern may still be possible. The Act deems a person to be registered for GST, if their turnover is more than \$40,000 from when the person first became liable to register. If the business being supplied under the sale and purchase agreement has a turnover of more than \$40,000, by virtue of that turnover, the purchaser will be deemed to be registered from the time of supply. Accordingly, provided the recipient is in existence at the time of supply the transaction will qualify as a going concern.

Problems will arise if the person nominated to complete the transaction completes settlement, but was not in existence at the time of supply. For example, if a company is incorporated between the time of supply and settlement dates.

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In this situation it is not possible to rely on the deeming provisions to deem the entity to be registered prior to its coming into existence. The transaction would not be a going concern.

So tread carefully when dealing with a nominee situation in a “going concern” transaction.

## Employers Beware – Employees are not Chattels

In a recent decision of the Employment Relations Authority, two employees were awarded a total of \$20,000 for hurt and humiliation after their former employer failed to advise them of its plans to sell its business and consult with them about the impact on them of the sale.

Anesone Elisara had worked for Alford's Door Centre Limited for 26 years by the time of the sale; his fellow joiner, Salamita Nimo, had worked there for 15 years. The sale of the business took place shortly before Christmas 2002. The two joiners first became aware of the sale when a comment was made by a staff member who worked in the office.

When Elisara and Nimo tried to speak with Robert Alford, the company's director, to find out what was happening with the company and their jobs, he refused to say anything. Then the men engaged a solicitor. The solicitor's attempts to gain information also fell on deaf ears.

At the time of the Authority's investigation, two and a half years after the company's sale, it was evident that both Elisara and Nimo were still deeply hurt by the company's actions. As it had turned out, they had gone into work to clear up thinking their jobs were gone but had been offered employment by the new owners. Unfortunately, the new owner offered them jobs on less favourable terms.

The Authority found that Elisara and Nimo had been both unjustifiably disadvantaged and dismissed by their former employer's failure to consult them about the prospective redundancies and to act in good faith by talking to two very longstanding employees about what their future might be. The uncertainty of the situation and whether they would be entitled to compensation for redundancy had significantly distressed them. The Authority awarded them \$10,000.00 each as compensation for both grievances.

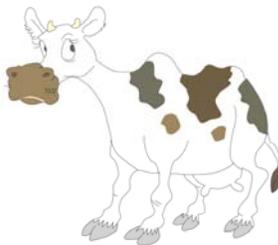
## When “Better Late Than Never” Is Not Good Enough

At various times and for various reasons, the Income Tax Act requires certain actions or elections to be completed within specific time frames. The following is a summary of the more common situations and applicable time frames. Invariably, these time frames do not give the Commissioner much room for discretion.

### Qualifying Companies

To enter into the qualifying company regime all Directors and “sui juris” shareholders must elect to do so. “Sui juris” persons are those aged 20 and older. A shareholder election is deemed revoked upon:

- the sale or other disposal of shares to a new shareholder
- the first beneficiary of a trust shareholder becoming sui juris where there was previously no sui juris beneficiary
- a minority shareholder subsequently acquiring 50% or more shares where a majority shareholder has previously elected



- the shareholding of a majority shareholder, who has elected on behalf of a minor shareholder, falls below 50%

Where any of the above occurs, a new election in respect of the revoked shareholding is required within 63 days of the revocation. Where a shareholder in a company dies, a new election in respect of the shareholding must be made within 12 months of the death.

### Livestock

An election to value livestock under a chosen method will continue to apply until superseded by a further election.

There are a number of time frame requirements depending on the choice of valuation method:

- same-year written notice is required for an election to value livestock under the herd scheme.
- two-year written notice is required for:
  - ≈ withdrawal from the herd scheme of a type of livestock

- ≈ a change from the national standard cost scheme to the self assessed cost scheme or vice versa.

### **GST**

A person must apply for GST registration within 21 days of becoming liable to register, ie earning more than \$40,000 annual turnover. Likewise a person is also required to de-register for GST within 21 days of the cessation of a taxable activity. It is generally not fatal to a taxpayer's registration or de-registration if the time frames are not adhered to.

### **FBT**

An employer may elect to pay fringe benefit tax on an annual basis if:

- their annual gross tax deductions (including specified superannuation contribution withholding tax) in the preceding tax year were not more than \$100,000 or
- if they were not employing in the previous tax year.

If the employer was under the \$100,000 threshold, the election must be filed by 30 June of the tax year in which the election first applies. If the employer was not employing in the previous year, the election must be filed by the last day of the quarter in which the employer commences employing.

### **Amalgamations**

Where an amalgamation occurs, the amalgamated company must within 63 days of the date of amalgamation give notice of the amalgamation to the Commissioner.

### **Taxable Bonus Issues**

Where a company makes a taxable bonus issue in any year it must provide the Commissioner with the particulars of the bonus issue within the time allowed for a company to file its income tax return for that year. This will be 7 July following year end for companies without extension of time arrangements and 31 March of the following year for companies with extension of time arrangements.

## **Provisional Tax and GST**

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Proposed changes to existing rules will result in a number of alterations to the method and manner in which provisional tax and GST is paid.

The changes are discussed below:

- due dates
- aligning GST and provisional tax
- ratio method of calculating provisional tax payable
- miscellaneous matters

### **Due Dates – From 1 April 2006**

Provisional taxpayers currently pay provisional tax three times a year, on the 7th day of the 4th, 8th, and 12th months after balance date. GST is currently due on the final working day of the month following a return period. In order to reduce the number of tax payments required, the due dates for payment of GST and provisional tax will be shifted to the 28th day of an applicable month. The exact details are dependent on a person's taxable period.

Monthly and two monthly GST filers will still be required to pay provisional tax three times a year, but they will simply combine their provisional tax payment with their GST payment for the periods that cover the 4th, 8th and 12th months after balance date. Although if monthly or two monthly filers adopt the ratio method (discussed below) of calculating their provisional tax, provisional tax

payments will be due every second month after balance date with their GST payments.

Six monthly GST filers will only be required to make two provisional tax payments, due at the same time as their GST payments.

Where payments are due on 28 December, the payment due date is now shifted to 20 January. Where a taxpayer's balance date results in terminal tax being due on 15 January, the due date to pay will also be shifted to 20 January.

Where a taxpayer is not registered for GST, provisional tax will be due on the 5th, 9th, and 13th month after their balance date.

### **Aligning Provisional Tax And GST – From 1 April 2006**

In order for the proposed system to work properly, taxpayers will have their GST taxable period aligned with their balance date. For example, a taxpayer with a 31 March balance date that files their GST on a two monthly "even" basis will shift to a two monthly "odd" basis. From the 2006 – 2007 year where a taxpayer's GST period overlaps the 2006 balance date, that GST period will be truncated to align with the balance date. For example, the taxable period is March/April and the balance date is 31 March 2006. The taxable period will be for one month to March 2006. The new period will start in April 2006 to align with the new income year.

Taxpayers wanting to change their GST periods will need to keep these proposed changes in mind. For example someone who wants to change from a two monthly to a six monthly filing frequency must make the change effective from their balance date or six months later.

### Ratio Method Of Calculating Provisional Tax – From 1 April 2007

If a provisional taxpayer (residual income tax exceeds \$2,500) files their GST on a monthly or two monthly basis and their residual income tax is less than \$150,000 they may choose to calculate their provisional tax payments as a proportion of their taxable supplies.

Each provisional tax payment will be calculated according to the following formula:

$$\frac{\text{Prior Year Residual Income Tax}}{\text{Prior Year GST Taxable Supplies}} \times \text{Current Period Taxable Supplies}$$

The fraction representing the previous year's residual income tax to GST supplies is the taxpayer's GST ratio. If the taxpayer wishes to use the ratio method, the taxpayer must inform the Inland Revenue. The Commissioner will then calculate the ratio and notify the taxpayer. A monthly GST filer must add their current and previous month's taxable supplies together and

apply the ratio to calculate the provisional tax due. The sale of a capital asset may be excluded from the calculation if its value is greater than either \$1,000 or 5% of the taxable supplies for the previous twelve months. The Commissioner must be notified of the sale of the asset and its value.

### Miscellaneous Matters

The option to make a provisional tax payment at any time, ie a voluntary payment, remains regardless of a taxpayer's circumstances. The GST return will also include a prompt for people to make a voluntary provisional tax payment in periods that it is not due.

If a taxpayer correctly uses the ratio method and they underpay their provisional tax, late payment penalties, shortfall penalties and use of money interest will not apply.

### Conclusion

The new rules are quite complex and detailed, and it is not appropriate to provide a comprehensive summary of how they will work, in this newsletter. Despite the complexity of the rules, hopefully the summarised information above will provide some useful guidelines when the time comes to grapple with them.



## Little Snippets

### Dairy Industry Depreciation

There have been changes to the dairy industry depreciation rates and categories applying to depreciable assets purchased on or after 14 September 2005.

The generic asset "milking machinery" (depreciation at 22% DV) in the "Agriculture, Horticulture and Aquaculture" industry category has been removed and replaced with various categories of milking machinery components. The depreciation rates for the different components vary, with the maximum rate of 50% for a portable wash down unit.

Two new asset classes for milk storage vats and compressors have been inserted into the "Dairy Plant" industry category.

### Christmas Is Coming

The festive season is fast approaching, along with the expenses that typically go with it, Christmas gifts, staff lunches and parties, making it a good time to have a short refresher on the applicable entertainment and FBT rules.

Expenditure incurred on food and drink off the business premises is limited to a 50% deduction. Where food and drink is provided on the premises for the purpose of a Christmas party it will also be subject to a 50% limitation. Incidental expenses such as hireage of crockery and waiting staff will also be only 50% deductible.

Where a Christmas gift is provided to staff it may be subject to FBT. FBT may not be payable if the value of the gift falls below the thresholds for provision of "unclassified benefits":

- \$75 per employee per quarter, and
- \$450 per employer per quarter

These thresholds apply to all "unclassified benefits", not just Christmas gifts. If the Christmas gift consists of food or beverages such as Christmas hams they would typically be subject to entertainment and not FBT. However where a benefit is not received or used in the course of their employment and the employee may choose when to use the benefit, it is subject to FBT.