Super limit bedevilled by details

Noel Whittaker

Poorly written tax laws force reasonable people into unreasonable decisions.

IT'S been nearly 40 years since I was a law student, but one case has stuck in my mind – Hinchy v Inland Revenue Commissioners.

In 1952, a Mr Hinchy made a mistake when filling out his tax return, and forgot to include £33 of interest.

The British Tax Office immediately hit him with a penalty of £438 because the law stated that the penalties should be "treble the total amount payable . . . for the tax year".

Of course, Mr Hinchy appealed and the judge found in his favour on the grounds that the interpretation was "absurd".

The Tax Office appealed and the case was eventually decided by the House of Lords in favour of the Commissioner.

The judgment said, "the words are not ambiguous . . . and cannot mean anything but treble the whole tax which ought to be charged".

The outcome is obviously unjust but it highlights the problem any authority has in dealing with the law.

Just recently, a situation was brought to my notice which was just as ridiculous.

The taxpayer had made a non-concessional contribution to his super fund of $150,000, primarily by the transfer of shares.

Because of market fluctuations on the day, the actual contribution that was made was a few cents over the $150,000.

On the face of it that is no big deal, but because of the way the super rules work, he had triggered the bring-forward provisions that apply to people who want to put in $450,000 in one lump.

Next year when he contributed $300,000, the Tax Office, complying strictly with the letter of the law, hit him with a penalty of $44,876 because he had effectively exceeded his contribution limits by $96,509 – all for an excess contribution of a few cents!

Naturally the client appealed what was obviously an unfair outcome, but it took eight months of voluminous correspondence with the Tax Office before they finally relented and waived the penalty.

> This example is a warning of the severe penalties that can be imposed on anyone exceeding their superannuation caps.

Fortunately it was a good outcome for the taxpayer, but imagine the hundreds of hours wasted in the financial planner's office and in the Tax Office while they bargained about a few cents.

To be fair to the Tax Office, it must be admitted that these problems, now growing in number, come from the way the laws are drafted and not how the Tax Office administers them.

In this case, it acted strictly within the letter of the law, and inquiries to date would indicate it is required to do this because it is given so little discretion.

There has been such an outcry about unfair excess contribution penalties that the May budget contained a provision to give some leniency in the future. From July 2011 concessional contributions of no more than $10,000 will be able to be returned to the contributor as taxable income if it is a first offence.

This would do nothing to change the situation I have described – it was a non-concessional contribution. The proposed changes fall far short of what is needed.

This example is a warning of the severe penalties that can be imposed on anyone exceeding their superannuation caps.

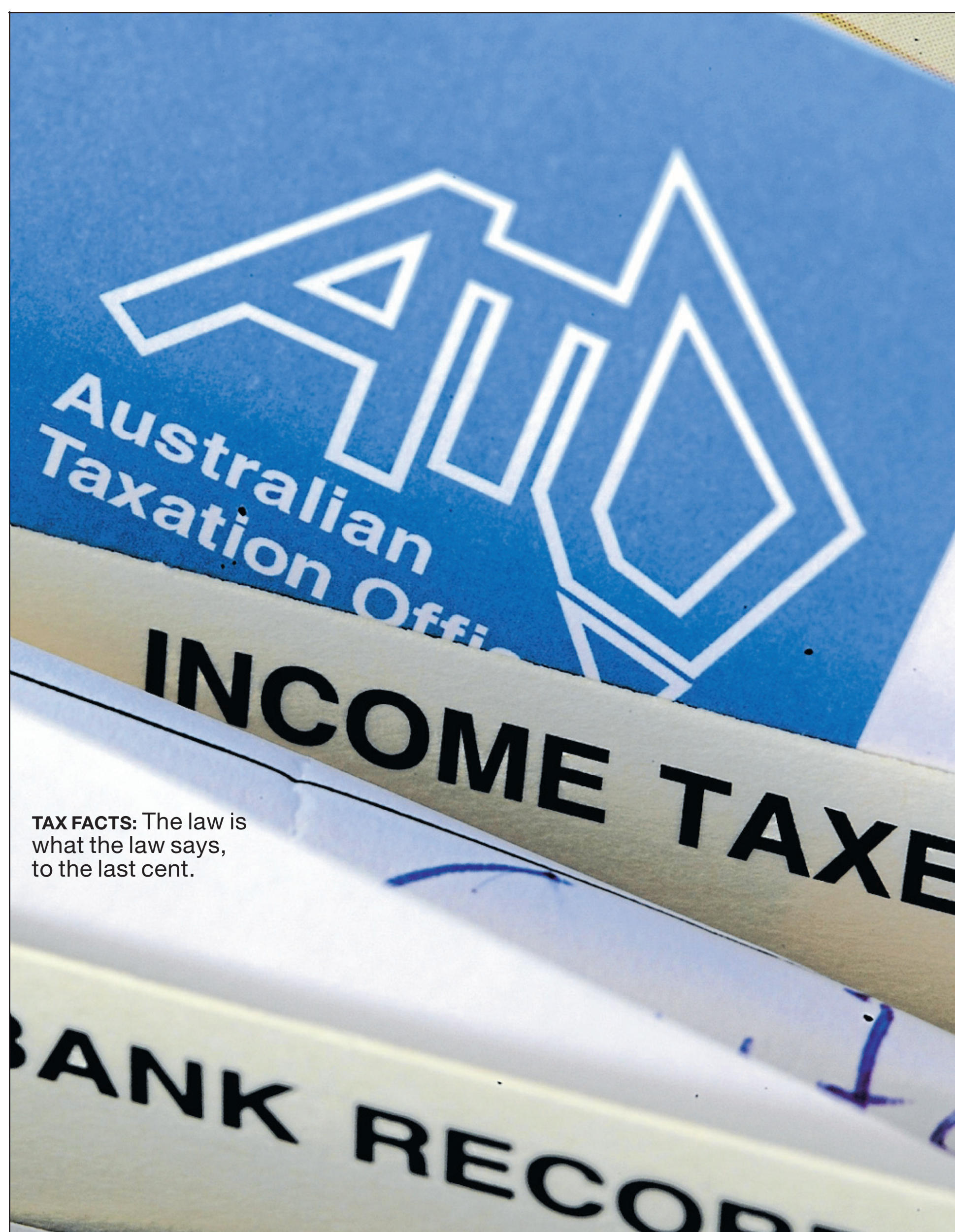
In the latest issue of *Taxagent*, published by the Tax Office, Commissioner Michael D'Ascenzo writes, "our aim is to encourage people to recognise tax and superannuation as community assets, where willing and proper participation is a part of good citizenship.

"This is an aspirational vision that challenges convention and requires meaningful change.

"I look forward to working with you to implement and foster this vision across Australia."

Based on the treatment of superannuation contributors who inadvertently exceed their caps, the government needs to change the rules so the Tax Office is able to act in accordance with its own goals.

Noel Whittaker is a co-founder of Whittaker Macnaught Pty Ltd. His advice is general in nature and readers should seek their own professional advice before making any financial decisions. His email is noelwhit@gmail.com.



TAX FACTS: The law is what the law says, to the last cent.

Q I am 69 with an income of $25,000. My wife is 59, earning $50,000. We want to sell an investment property and should end up with $200,000 capital gain. How can we use super to avoid some capital gains tax?

A If the capital gain totals $200,000, and you have owned the asset for more than a year, you will be entitled to the 50 per cent discount which means the total gain will be $100,000. If the property is in joint names, capital gains tax will be levied by adding $50,000 to the taxable income of each of you in the year the sales contract was signed. To use super to reduce CGT you will need to be eligible to contribute to super and also to claim a tax deduction to the contribution. Your wife will not be able to claim a tax deduction to super if an employer is paying super for her and you will not be able to claim a tax deduction unless you can pass the work test. Your advisor will be able to help you find out if you are eligible.

Q I am 35 years old, married, and earn $150,000 a year. My wife runs her own business and pays herself $40,000 a year. We are planning our first child in the next year. We own an apartment valued at $800,000 and the mortgage is about $400,000 – half fixed, half variable. We also have another loan/line of credit of $150,000 for the business. The business takes care of paying this loan. We have approval for about $350,000 for an investment property, and we would be comfortable buying a rental unit in the area we live. All of these loans are based solely on my salary to protect our assets against the business, so we treat my wife's income as a bonus to pay more off the mortgage and living expenses. Are we better off trying to put more money into our current home loan or should we look at a second property investment?

A The first rule is not to become overcommitted, because you do not want to put yourself in a position where you are forced to sell assets cheaply if the market is having a flat period.
The second rule is to maximise your deductible debt and minimise your non-deductible debt.
So you should be paying as much off your residence as you can afford and then using any surplus income to borrow for investment.
Because the interest on the investment loan is fully tax deductible, a major part of it is being effectively subsidised by the Tax Office.

Warranties may remain bugbear this Christmas

By **LESLEY PARKER**

QUESTIONS have been raised about whether retailers – including two of the world's biggest brands, Apple and eBay – are falling short of Australia's new consumer laws when it comes to the way they advise customers about warranties and returns.

The Consumer Action Law Centre (CALC) has contacted the Australian Consumer and Competition Commission about "outdated and potentially misleading" information on the eBay Australia website.

CALC has also looked at Apple's return policy and identified some terms it says have the potential to conflict with the Australian Consumer Law (ACL), which enshrined in law universal "consumer guarantees" for goods bought as of January 1 this year.

Legislated consumer guarantees apply regardless of what a manufacturer says in its own "express" warranty and can apply beyond the 12-month period that many manufacturers state as the limit of their liability.

These statutory guarantees provide consumers with the right to a refund or replacement where the item has a major problem, defined as something that would have stopped them buying it had they known about it; has a safety issue; is significantly different from the sample or description; or doesn't do what the trader said it would do.

In this case, the consumer – not the manufacturer or the store – gets to choose which remedy they prefer.

With regard to eBay.com.au, CALC says the website tells consumers they are entitled to a refund if the goods are faulty or not fit for purpose, but goes on to say these rights don't apply to goods bought at auction.

While eBay is commonly described as an auction website, and it's true that auctions are exempt, CALC policy officer David Leermakers says eBay doesn't appear to meet the definition of an auctioneer because it's not acting as the "agent" of a seller.

"Given the popularity of eBay.com.au, a substantial number of consumers and traders could potentially be misled" by the references to the auction exemption, Mr Leermakers says.

CALC is also concerned some terms in Apple's policy could inadvertently mislead consumers.

The group acknowledges that Apple does mention that its returns policy applies as well as consumers' statutory rights but it notes that Apple goes on to say that its terms and conditions are the full extent of its obligations.

The Apple returns policy says products must be deemed "dead on arrival" within 10 calendar days of receipt for the buyer to receive a replacement but CALC says the Australian Consumer Law sets no such limit for a fault to be discovered. It notes that Apple products bought as gifts might not be opened within 10 days.

And it tells consumers that Apple's warranty doesn't apply to non-Apple items sold with its products, while the CALC says that under the ACL, Apple is the supplier of those goods and must stand by them.

KEY POINTS

- Consumer guarantees trump anything the store or manufacturer says.
- If a fault is significant, it is the consumer's choice whether they want a refund or replacement.
- A store cannot insist on a repair, or a reconditioned replacement, if the fault is significant.

SMH