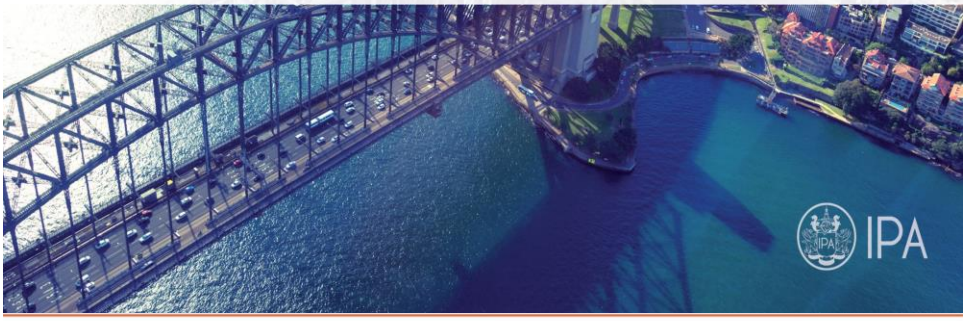
Quarterly Tax Update

2016 NSW/ACT Public Practice Symposium

Thursday 17 - Friday 18 March

Rydges World Square, Sydney NSW



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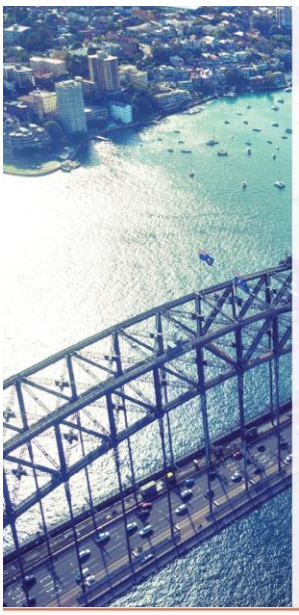

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New Developments

Blank v Commissioner of Taxation [2015] FCAFC 154

- After termination of taxpayer's employment from Glencore International (GI), he received a series of payments from GI.
- Payments related to taxpayer's profit share entitlements arising from an employee profit participation plan (EPPP), paid in instalments.
- Taxpayer had right to share in GI's future profits in form of Genusscheine (GS).
- A GS is essentially a profit sharing certificate with no par value.
- On termination of employment, taxpayer was to return GS and amount representing his profit participation was to become due 30 days after notice of termination and to be payable in 20 instalments over five years (with interest).
- Full Federal Court, in agreement with Federal Court, held that amounts represented income (reward) from services rendered and derived when received.
- Accordingly, they were assessable as ordinary income.
- The relevant instruments were merely mechanisms for calculating profit share amounts and they themselves were not a reward for service.

Bell Group Limited (in liq) v DFCT [2015] FCA 1056

- This case concerns a corporate taxpayer being wound up by court order and its tax liabilities relating to income derived after liquidation commenced.
- A bank held a sum of money in the name of the liquidator.
- Two garnishee notices were issued to the bank on behalf of the Commissioner of Taxation (the Commissioner) – one each in respect of the taxpayer and the liquidator.
- Federal Court concluded both of the garnishee notices were invalid.
- This decision (Bell Group) confirm that a garnishee notice will be void when the corporate taxpayer is in liquidation in the following fact scenarios:
  - the winding up is voluntary and the tax liabilities are pre-liquidation tax liabilities; or
  - the winding up is court-ordered and the tax liabilities are post-liquidation tax liabilities.

New Developments

ATO GUIDANCE ON CLAIMING WEBSITE COSTS

- Start-up costs
  - claim over 5 years @ 20% per year
- Depreciable assets
  - If SBE write-off assets up to $20K; Assets above $20K put in SBE pool
  - If not SBE normal depreciation rules apply
    - If less than $1K, low value pool can be used
    - If more than $1K then not pooled and DMV method or PC method used
- In-house software
  - Allocate to software development (SD) pool and depreciate over five years, or if not placed in SD pool and depreciate over five years.
- Ongoing running and maintenance costs
  - Deduct the full amount in the year incurred

New Developments

Inspector-General of Taxation: Review into ATO's employer obligations compliance activities

IGT review into ATO's employer obligations compliance activities will focus on:

- Distinction between 'employee' and 'contractor' for Federal taxation and superannuation purposes, coherence with business practices, state taxation and other legal requirements as well as interactions with ABN and GST registrations.
- Simplification reporting, withholding obligations for employers & contractors.
- Effectiveness of ATO's use of existing 3rd-party data to reduce employers' compliance burden
- Guidance and tools for employers to discharge employee-related tax and super obligations, including protection when relying on information provided.
- Information and support for employees to understand their rights, entitlements and avenues for redress where they become aware of potential non-compliance by their employers.

New Developments

Inspector-General of Taxation: Review into ATO's employer obligations compliance activities (continued)

The IGT review into the ATO's employer obligations compliance activities will focus on:

- Effectiveness of the ATO's risk assessment and verification processes to detect and address noncompliance of employer obligations in a timely manner.
- ATO's consideration of relevant employee entitlements protection and business viability impacts when undertaking compliance actions.
- ATO's conduct during employer obligations compliance activities
- ATO's administration of alienation of PSI provisions and its interaction with other compliance activities including those relating to employer obligations.
- Extent to which aspects of the administrative penalty regimes encourage or hinder voluntary compliance and self-reporting of non-compliance by employers.
- Submissions close 11/12/2015.

New Developments

Sunraysia Harvesting Contractors Pty Ltd as trustee of the Sunraysia Harvesting Contractors Trust V FCT [2015] AATA 764

- A company engaged employees and provided casual labour to third parties.
- The company accounted for PAYG deductions and payroll tax.
- The business was taken over by discretionary trust with corporate trustee.
- The trust did not engage employees, but instead, contracted with three companies which engaged the employees and it was those companies that were required to account for PAYG deductions and payroll tax.
- Commissioner concluded that the arrangements between the corporate trustee and the three companies were a "sham".
- Commissioner denied ITCs claimed by trustees on acquisitions from three companies.
- Commissioner also disallowed certain deductions to three companies and increased net income of trust (and trust distributions assessed to beneficiaries)
- AAT affirmed Commissioner's decisions and concluded that the arrangements between the entities were a sham to permit the corporate trustee to avoid remitting PAYG deductions.

New Developments

Millar v Commissioner of Taxation [2015] FCA 1104

- Federal Court dismissed the husband and wife taxpayers' appeal against AAT decision that certain deposits in a bank account by an Australian super fund, together with a loan agreement with taxpayers, constituted a sham arrangement.
- The taxpayers impermissibly had early access to their superannuation benefits after using their superannuation fund to deposit $600,000 with a bank, which was then "loaned" back to them
- This was done contrary to the payment standards contained in Pt 6 of the Superannuation Industry (Supervision) Regulations 1994.
- This arrangement attracted the operation of s26AFB of the Income Tax Assessment Act 1936 so as to include an amount in the assessable income of a person who receives a benefit as a result of a breach of those standards.

New Developments

Study and Prevention of Psychological Diseases Foundation v Commissioner of Taxation [2015] FCA 1117

- Federal Court has set aside decision of AAT that taxpayer's endorsement by the Commissioner of Taxation as a charity for income tax, GST and FBT purposes should be revoked from the date of grant.
- Court remitted the matter of effective date of revocation to AAT for consideration.

Tax Update - Legislation

Tax and super LAM No 6 Bill

- CGT treatment of the sale and purchase of businesses involving certain earnout rights, and
- New foreign resident capital gains tax withholding regime.

Tax Update - Legislation

Tax and super LAM No 6 Bill

CGT and earnout rights

- Capital gains and losses in respect of look-through earnout rights (LTERs) will be disregarded.
- Payments received or paid under LTERs will affect the capital proceeds and cost base of the underlying assets to which LTERs relates.
- Assessments can be amended up to four income years after income year in which last potential financial benefit under LTER was due to be paid.
- Capital losses arising from relevant CGT event cannot be used until they cannot be reduced by future financial benefits received under LTER
- Amendments will apply to earnout arrangements entered into on or after 24 April 2015
- ATO released details of administrative treatment of these measures https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-on-capital-gains/CGT--Look-through-treatment-for-earnout-rights/?page=2

Tax Update - Legislation

Tax and super LAM No 6 Bill

Foreign resident capital gains tax withholding regime

- Purchaser who acquires taxable Australian real property assets from foreign resident must pay 10% of purchase price to the Commissioner.
- The purchaser may withhold this amount from the vendor.
- Withheld amount will be 10% of first element of cost base of the asset
- The obligation will apply to the acquisition of an asset that is:
  - a direct or indirect interest in taxable Australian real property (TARP)
  - an indirect Australian real property interest, or
  - an option or right to acquire such property or such an interest.

Tax Update - Legislation

Tax and super LAM No 6 Bill

Foreign resident capital gains tax withholding regime

- The following situations will be exempted from the withholding obligations:
  - transactions involving TARP and certain indirect Australian real property interests valued less than $2m
  - a transaction conducted through a stock exchange or a broker-operated crossing system
  - an arrangement already subject to an existing withholding obligation
  - a securities lending arrangement, or
  - transactions involving vendors who are subject to formal insolvency or bankruptcy proceedings.
- Also, no obligation is imposed where vendor has clearance certificate from Commissioner or made declaration about their residency status or the nature of the interest in their asset.
- The amendments apply in relation to acquisitions on or after 1 July 2016.

Tax Update - Legislation

Draft legislation: Commissioner's statutory remedial power

- Remedial power will be discretionary to allow Commissioner to make legislative instrument to modify operation of law to enable timely legislative resolution of unforeseen or unintended outcomes.
- Power only exercised where modification is not inconsistent with purpose or object of relevant provision and is reasonable.
- It is last resort remedy if no other interpretative or administrative solutions
- Legislative instruments will apply to all entities or a specified class of entities or in specified circumstances.
- Modification will not apply to entity if produces less favourable result or if it affects entity's right or liability under court order made before commencement of the instrument.
- When associated primary legislation is amended, review of instrument will be required
- Commissioner can repeal or amend instrument.

Tax Update - Legislation

Draft legislation: Farm management deposit changes

- Treasury has released ED legislation that makes a number of reforms to the income tax treatment of farm management deposits (FMDs).
- Government announced changes to FMD scheme in Agricultural Competitiveness White Paper on 4 July 2015.
- Maximum amount that an individual can hold in FMDs at any time will be increased from $400,000 to $800,000
- Primary producers experiencing severe drought conditions can withdraw from FMD within 12 months of its deposit without affecting income tax treatment of the FMD in earlier income year, and
- Amounts held in an FMD will be allowed to offset (ie reduce interest charged on) a loan or other debt relating to FMD holder's primary production business.
- The amendments will apply to 2016/17 and later income years.

Tax Update - Legislation

Tax incentives in National Innovation & Science Agenda

Early stage investors in start-ups

- 20% non-refundable tax offset capped at $200,000 per investor per year, and
- CGT exemption for investments held for at least three years and less than 10 years.
- Concessions apply to investments in non-listed companies incorporated during the last three income years and have expenditure of less than $1m and income of less than $200,000 in previous income year.

Early Stage Venture capital limited partnerships

- 10% non-refundable tax offset for partners on capital invested
- increase in the maximum fund size for new ESVCLPs from $100m to $200m, and
- ESVCLPs will no longer be required to divest a company when its value exceeds $250m.

Tax Update - Legislation

Tax incentives in National Innovation & Science Agenda

Changes to same business test

- There will be changes to relax existing SBT to allow businesses to access prior year losses even if minor changes are made to operations.
- Test will be a "predominantly similar business test".
- New test not available for existing losses but for losses made from the income year in which the changes commence.

Depreciation on intangibles

- Businesses will be able to self-assess the tax effective life of acquired intangible assets where it is currently fixed by statute (eg. Patents).
- Will align depreciation treatment of intangible assets with other types of assets and allow for faster depreciation claims.
- There will also be an option to use existing statutory effective lives.

Commencement

- 1 July 2016

Tax Update – ATO Announcements

ATO data matching: real property transactions from 1985

- ATO will acquire details of real property transactions from 20 September 1985 to 30 June 2017 from state revenue offices, rental bond authorities and land title offices.
- Data will include names of landlords, lease periods, amounts of rental bond, rents payable, names of the managing agent, addresses of the rental property, dates of commencement and expiration of leases, types of dwelling, dates of property transfers, addresses of properties transferred, sale contract and settlement dates, property subdivision dates, land usage codes, names of transferors and transferees as well as land tax, stamp duty details and valuation details.
- Expected to match data with its its records of 11.3 million individuals.
- The purpose of the program is to ensure taxpayers are correctly meeting tax and other obligations in relation to their real property dealings.
- The real property transactions data matching program protocol is available on the ATO's website.

Tax Update – Court Judgements

Liquidators not required to retain tax

FCT v Australian Building Systems P/L (in liq) & Ors

Facts

- Creditors of Australian Building Systems Pty Ltd (ABS) resolved that the company be wound up and liquidators were appointed.
- In the course of the winding up, the liquidators caused ABS to enter into a contract for the sale of a property which gave rise to a capital gain
- ABS and liquidators sought PBR from Commissioner on whether liquidators were required under s 254(1)(d) of ITAA 1936 to retain money from sale of the property to cover the tax payable by ABS on capital gain
- At all material times, the Commissioner had not issued a notice of assessment to ABS for the income year in which the property was sold.
- The Commissioner ruled that s 254(1)(d) required the liquidators to retain money from the proceeds of the sale to cover any CGT liability
- ABS appealed to the Federal Court

Tax Update – Court Judgements

Liquidators not required to retain tax

FCT v Australian Building Systems P/L (in liq) & Ors

- At first instance, Federal Court held that the liquidators were not required to retain any amount from sale proceeds to pay CGT liability
- Federal court considered that payment and retention obligations in s 254 arose only on the issuing of a notice of assessment.
- Federal Court held s 254(1)(d) be construed consistently with High Court decision in Bluebottle UK Ltd & Ors v DFCT & Anor in relation to s255(1)(b) pertaining to the phrase "is or will become due".
- Subsequently Full Federal Court also dismissed Commissioner's appeals essentially on the basis of the High Court decision in Bluebottle.
- High Court has now also held that retention obligation in s 254(1)(d), similar to the retention obligation in s 255(1)(b), only arises after an assessment or deemed assessment has been made in respect of the relevant income, profits or gains.
- Commissioner's appeal was accordingly dismissed by High Court

Tax Update – Court Judgements

Liquidators not required to retain tax

FCT v Australian Building Systems P/L (in liq) & Ors

ATO DECISION IMPACT STATEMENT

- Commissioner accepts that trustee or agent has no obligation to retain money until assessment has been issued in respect of relevant income.
- DIS notes that Commissioner will consider whether now necessary to finalise draft Taxation Determinations TD 2012/D6 and TD 2012/D7, and whether any changes to the content is warranted

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Tax Update – Court Judgements

Part IVA applied to deny intra-group interest deductions

Orica Limited v FC of T

Facts

- Taxpayer was head company of Australian consolidated group with US operations
- In 2001, US business incurred a substantial loss and also had US tax losses previously recognised in accounts but written off in 2001.
- In 2002, taxpayer devised plan to generate assessable income in US to justify re-recognition in accounts of the benefit of the US tax losses in order to create a positive impact on the group's reported profits.
- Plan involved injection of equity, by way of subscription for redeemable preference shares, by one of the taxpayer's Australian subsidiaries (OEH) in the US subsidiary with the US tax losses.
- Proceeds of equity injection would be lent back to another Australian subsidiary, Offshore Finance Limited (OFL) to generate interest income assessable to the US subsidiary in US, and interest expense deductible to OFL in Australia.

Tax Update – Court Judgements

Part IVA applied to deny intra-group interest deductions

Orica Limited v FC of T

Facts (continued)

- By the end of the 2006 financial year, the US subsidiary had fully utilised the available US tax losses and the arrangements were unwound.
- The issue concerned whether, having regard to the eight matters in s 177D(b) ITAA 1936, a person who entered into or carried out the scheme did so for the *dominant purpose* of enabling the taxpayer to obtain a tax benefit in connection with the scheme.
- Taxpayer argued that the purpose of the schemes was the re-recognition for accounting purposes of the benefit of the US tax losses, resulting in a cumulative increase in the consolidated profit of the Orica group.

Tax Update – Court Judgements

Part IVA applied to deny intra-group interest deductions

Orica Limited v FC of T

Decision

- Federal Court upheld the Pt IVA assessments and concluded that, objectively, obtaining the tax benefits was the dominant purpose of the scheme.
- The transaction as a whole, when looked at from OFL's position, was not commercial, and was not intended to produce anything but a loss to OFL.
- Scheme brought no lasting advantage to group other than from tax saved by OFL's deductions for interest and was wound up when US losses were no longer available.
- Utilisation of US tax losses by the intra-group generation of income would have made little sense without tax deductions to Orica in Australia.

Tax Update – Court Judgements

Part IVA applied to deny intra-group interest deductions

Orica Limited v FC of T

Decision (continued)

- Court also upheld administrative penalties as taxpayer failed to convince the court that its view that Pt IVA did not apply was a reasonably arguable position.
- Taxpayer argued that it had taken "reasonable care" in conceiving the arrangement in that it had relied upon advice from a major international accounting firm including its two leading tax partners.
- Court observed that to the extent that reasonable care may be relevant, it is significant that none of evidence relied upon for Orica on this question concerned any specific advice about the application of Part IVA".

Tax Update – Court Judgements

Part IVA applied to deny intra-group interest deductions

Orica Limited v FC of T

Decision

- Federal Court upheld the Pt IVA assessments and concluded that, objectively, obtaining the tax benefits was the dominant purpose of the scheme.
- The transaction as a whole, when looked at from OFL's position, was not commercial, and was not intended to produce anything but a loss to OFL.
- Scheme brought no lasting advantage to group other than from tax saved by OFL's deductions for interest and was wound up when US losses were no longer available.
- Utilisation of US tax losses by the intra-group generation of income would have made little sense without tax deductions to Orica in Australia.

Tax Update – Court Judgements

Part IVA applied to deny intra-group interest deductions

Orica Limited v FC of T

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Tax Update – Court Judgements

IT services subject to tax under Australia–India DTA

Tech Mahindra Limited v FC of T

Facts

- Taxpayer was an Indian resident company that provided IT services to Australian customers through an Australian PE
- The IT services were provided partly by employees located in Australia (Australian Services) and partly by employees located in India (Indian Services).
- Taxpayer included income from both the Australian Services and Indian Services in its 2008 income tax return.
- It subsequently formed the view that the Indian Services were not subject to Australian tax because they were not attributable to the PE, and lodged an objection to the tax assessment for that income year.

Tax Update – Court Judgements

IT services subject to tax under Australia–India DTA

Tech Mahindra Limited v FC of T

Facts (continued)

- The taxpayer argued that if the Indian Services were "royalties", Art 12(4) gave priority to Art 7 because the Indian Services were "effectively connected" to the PE.
- During the proceedings, both parties agreed the Indian Services were not "attributable" to the PE and therefore, Australia did not have the right to tax that income under Art 7.
- However, the parties disagreed on whether the Indian Services were "effectively connected" to the PE.

Tax Update – Court Judgements

IT services subject to tax under Australia–India DTA

Tech Mahindra Limited v FC of T

Decision

- The court found that "effectively connected" in Art 12(4) conveyed a similar meaning to "attributable" used in Art 7.
- Accordingly, Art 12(4) only gave priority to Art 7 where Australia was able to tax the income under Art 7.
- In that situation, royalty income which was "effectively connected" to a PE would be taxed as income attributable to the PE, rather than at the applicable rate prescribed by Art 12.
- The court also found that most of the payments for the Indian Services were royalties within the meaning of Art 12(3)(g) and subject to Australian tax under s 6-5(3)(a).

Tax Update – Court Judgements

Loan to be taken into account in MNAV test

Breakwell & Anor v FC of T 2015 ATC ¶20-554

Facts

- Taxpayers were beneficiaries of the Allan Breakwell Family Trust (ABFT), which was itself a beneficiary of the East Terrace Unit Trust (ETUT).
- The ETUT operated a finance broking business which it sold in July 2007 for $500,000, giving rise to a capital gain in that amount.
- ETUT claimed small business 15 year exemption to exempt capital gain.
- Commissioner concluded that ETUT was ineligible for small business concessions and issued amended assessments to taxpayers
- Issue was whether MNAV test in s 152-15 of ITAA 1997 was satisfied.
- In the proceedings, taxpayers and Commissioner agreed as to what assets and liabilities would be included in MNAV test calculation other than in regard to a loan of $2,374,562 from the ABFT to Mr Breakwell, which comprised a pre-1998 loan of $1,144,934 and a post-1998 loan of $1,229,628.

Tax Update – Court Judgements

Loan to be taken into account in MNAV test

Breakwell & Anor v FC of T 2015 ATC ¶20-554

Facts (continued)

- At first instance AAT held that the MNAV test had not been satisfied.
- In particular, it rejected the taxpayers' contention that the effect of s 35(a) of the Limitation of Actions Act 1936 (SA) (LAA) was to bar enforcement of the pre-1998 loan so that it should be regarded as of nil value. The taxpayers appealed against the AAT decision, arguing that the pre-1998 loan was statute-barred and that it had a nil value.

Tax Update – Court Judgements

Loan to be taken into account in MNAV test

Breakwell & Anor v FC of T 2015 ATC ¶20-554

Decision

- The Federal Court has now dismissed the taxpayers' appeal, rejecting the contention that the pre-1998 loan was statute-barred and did not have to be brought into account in the MNAV test.
- If s 35(a) of the LAA did apply to the pre-1998 loan, the ABFT claim against Mr Breakwell should not be regarded as absolutely statute-barred, and the pre-1998 loan could not be regarded as having no value.
- Section 35(a) did not have the effect, on the expiry of the six-year limitation period, of barring absolutely any action to enforce a contract.
- Provisions such as section 35(a) barred the remedy, but not the cause of action - it merely created defence which could be raised by a respondent.

Tax Update – Court Judgements

Loan to be taken into account in MNAV test

Breakwell & Anor v FC of T 2015 ATC ¶20-554

Decision (continued)

- The Court further held that section 48 of the LAA empowered the courts to extend certain limitation periods, including that fixed by s 35(a).
- Court noted that in any event, in a case like the present, being an action by a trust to recover trust property, there was no limitation period.
- That was the effect of s 32(1) of the LAA.
- Accordingly, any action by the ABFT against Mr Breakwell to recover the pre-1998 loan, being an action to recover trust property, would not be subject to any limitation period.

Tax Update – Court Judgements

Payments from overseas companies were loans, not shams

Normandy Finance and Investment Asia Pty Ltd & Anor v FC of T

Facts

- The Federal Court has held that certain payments from overseas companies were loans, and not shams as claimed by the Commissioner.
- Convoluted "VG" corporate structure triggered flow of cross-border payments via a "finance house", Hua Wang Bank Berhad established in Samoa.
- Commissioner considered arrangements a sham and assessed amounts flowing into accounts as assessable income through being part of the net income of the relevant trust vehicle used in the structure.
- Taxpayer asserted amounts held were under the auspices of relevant loan arrangement and cannot held to be derived as income.

Tax Update – Court Judgements

Payments from overseas companies were loans, not shams

Normandy Finance and Investment Asia Pty Ltd & Anor v FC of T

Decision

- Court held that there was clear elements of pretence, disguise and artificiality involved in the relevant transactions
- However the Court noted that it was possible for instruments to contain, in their terms, elements of pretence, but if those elements did not impugn the intention of the parties to enter into a transaction of the kind asserted, the transaction itself would not be a sham, even if the pretended terms were.
- The fact that the loan arrangements provided for legal obligations to repay had to be recognized as fact even if could be considered to contain elements of pretence.

Tax Update – Court Judgements

Default assessments based on privileged documents upheld

FC of T v Donoghue 2015 ATC ¶20-551

- The Full Federal Court has unanimously upheld default assessments partly that were based on privileged documents obtained from an ATO informant.
- Court said that the common law of LPP operated as an immunity from the exercise of powers requiring compulsory production of documents or disclosure of information.
- It was not a rule of law conferring individual rights, the breach of which might be actionable.
- Consequently, no action lay against a party who received documents that were privileged merely because those documents were privileged.
- Where such documents were disclosed to third parties, the right to restrain their use or to compel their return was grounded in equity rather than the common law of privilege.

Tax Update – Court Judgements

Small business CGT relief confirmed despite dividend access share

FC of T v Devuba Pty Ltd

- The Full Federal Court has dismissed the Commissioner's appeal in a case concerning whether the CGT small business concessions applied to reduce a capital gain arising from the sale of shares to nil.
- The court held that the taxpayer met the conditions for a sale of shares in a company pursuant to s 152-10(2) of the Income Tax Assessment Act 1997 (ITAA 1997).
- Key condition was whether CGT concession stakeholders in company in which shares were sold together have a SBPP in taxpayer company of at least 90%.
- No dividend could be paid to dividend access shareholder immediately before CGT event
- Thus requirement 90% SBPP threshold is met and not negated by presence of special class dividend access shareholder in taxpayer company.

Tax Update – Court Judgements

Rosgoe Pty Ltd v Commissioner of Taxation [2015] FCA 1231

The Federal Court of Australia (the Court) concluded that the Administrative Appeals Tribunal (the AAT) and the courts do not have the power to redefine an "arrangement" that the Commissioner has identified in a private binding ruling.

Tax Update – ATO Ruling

TR 2015/4: UPEs and maximum net market value test

- Taxation Ruling TR 2015/4 sets out the Commissioner's views in relation to how UPEs affect the maximum net asset value (MNAV) test.
- In the Commissioner's view, the value of UPE should be counted only once in calculating the trust's net asset value (NAV).
- The way in which the value of that UPE is included will vary depending on the character of the beneficiary's entitlement and the way that funds representing the UPE are held.
- The effect is the same regardless of whether a UPE is held on sub-trust and regardless of whether the connected beneficiary is absolutely entitled to an asset of the trust as against the trustee.
- The market value of the UPE (or the funds representing it) will be included once only in the main trust's net asset value calculation under s152-15, as part of the net value of the CGT assets of either the connected beneficiary or the sub-trust.

Tax Update – ATO Ruling

TD 2015/20: Release of company's unpaid present entitlement

- TD 2015/D4 sets out the Commissioner's view that a private company that releases its UPE "credits" an amount that is taken to be a **payment** to the extent that the release represents a financial benefit to an entity.
- The consequences of this is that a deemed dividend would arise under Division 7A.
- However, if the trustee cannot satisfy the UPE due to circumstances beyond its control and the beneficiary has no cause of action against the trustee to recover that loss, the Commissioner accepts that the release of the UPE will not confer a financial benefit.

Tax Update - Legislation

TLA (Small Business Restructure Roll-over) Bill 2016

- Bill provides small businesses with new roll-over for gains and losses arising from transfer of CGT assets, trading stock and depreciating assets as part of a restructure of a small business.
- Effective date comprises CGT events and transfers on or after 1 July 2016
- Currently, roll-over relief for CGT assets and depreciating assets (regardless of business size) is limited to restructures:
  - from a sole trader or partnership to a wholly owned company
  - from a trust to a company; or
  - which involve changing shares in a company or units in a trust with shares in another company.
- The proposed roll-over is in addition to these existing roll-overs.

Tax Update - Legislation

TLA (Small Business Restructure Roll-over) Bill 2016

- In addition to rollover, certain specific consequences for CGT assets:
  - pre-CGT assets will retain their pre-CGT status in the hands of the transferee
  - for purpose of determining whether capital gain may be discounted, transferee is treated as having acquired the CGT asset at the time of the transfer
  - for purpose of determining eligibility for 15 year CGT exemption for small businesses, transferee will be taken as having acquired asset when transferor acquired it.

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Tax Update - Legislation

TLA (Small Business Restructure Roll-over) Bill 2016

Eligibility requirements:

- A small business entity for the income year during which the transfer occurs for CGT assets that are active assets.
- An affiliate of a small business entity for passively held assets that used by the small business entity in its business.
- A connected entity of a small business entity for passively held assets that are used by the small business entity in its business.
- A partner in a partnership that is a small business entity for the income year during which the transfer occurs for passively held assets that are used by the small business entity in its business.
- Both transferor and transferee must be residents of Australia
- For partnerships, at least one partner must be an Australian resident.
- **NOTE – no requirement to meet $6m NAV test also (only $2m T/O test)**

Tax Update - Legislation

TLA (Small Business Restructure Roll-over) Bill 2016

Ultimate economic ownership requirement:

- The small business restructuring transaction must not have effect of changing ultimate economic ownership of transferred assets in a material way.
- Ultimate economic owners of an asset are the individuals who, directly or indirectly, beneficially own an asset.
- Ultimate economic ownership of asset can only be held by natural persons.
- Where a company, partnership or trust owns an asset it will be the natural person owners of the interests in these interposed entities that will ultimately benefit economically from that asset.

Tax Update - Legislation

TLA (Small Business Restructure Roll-over) Bill 2016

Genuine restructure

- **Transaction must be, or part of, a genuine restructure of an ongoing business**
- **EM sets out some factors that would indicate a genuine restructure:**
  - it is a bona fide commercial arrangement undertaken to enhance business efficiency
  - business continues to operate following the transfer, through a different entity structure but under the same ultimate economic ownership
  - transferred assets continue to be used in the business
  - restructure results in a structure likely to have been adopted had the business owners obtained appropriate professional advice when setting up the business
  - restructure is not artificial or unduly tax driven; and
  - it is not divestment or preliminary step to facilitate economic realisation of assets

Tax Update - Legislation

TLA (Small Business Restructure Roll-over) Bill 2016

Genuine restructure - safe harbour:

- Bill provides a safe harbour which deems a SBE to satisfy genuine restructure requirement where, for three years following roll-over:
  - there is no change in ultimate economic ownership of assets of the business (other than trading stock) that were transferred under the transaction
  - those significant assets continue to be active assets; and
  - there is no significant or material use of those significant assets for private purposes.

Tax Update – Court Judgements

Taxpayers not entitled to ITC)s because acting as agents

Crown Estates (Sales) Pty Ltd v FCT [2015] AATA 949

- Taxpayer companies conducted a property management business.
- Taxpayers made acquisitions of goods and services for and on behalf of their clients.
- Taxpayers claimed ITCs relevant to acquisitions made for and on behalf of their clients
- ATO denied ITCs as taxpayers acted merely as agent not as principal under any of the relevant transactions
- ATO position premised on GST Ruling GSTR 2000/37

Tax Update – Court Judgements

Taxpayers not entitled to ITCs because acting as agents

Crown Estates (Sales) Pty Ltd v FCT [2015] AATA 949

- AAT concluded that standard agency relationship existed between taxpayers and clients premised on formally documented arrangement between taxpayers and clients
- Consequently, taxpayers were not entitled to claim input tax credits on the acquisitions as they operated under a standard agency arrangement
- Division 153 of GST Act contains special rules that may apply where supplies or acquisitions are made through an agent.
- Under Division 153 parties may enter into a written arrangement under which intermediaries are treated as suppliers or acquirers
- Commissioner may also make a written determination that the arrangement is to be treated as if the intermediary was the principal.
- AAT considered that neither of these exceptions applied in this case.

Tax Update – Court Judgements

Home office deductions disallowed: "home office percentage" worngly applied

Ogden v FCT [2016] AATA 32

- The taxpayer worked as a professional sales agent and performed some of his work at home.
- Taxpayer set aside an area in his family home as his "home office" and also claimed that various other parts of his home was used for work
- Based on his own analysis, taxpayer claimed home office expenses.
- He based claims on a "home office percentage" that was applied to a range of expenses.
- Commissioner disallowed various deductions claimed in taxpayer's 2010-11 and 2011-12 income tax returns.

Tax Update – Court Judgements

Home office deductions disallowed: "home office percentage" worngly applied

Ogden v FCT [2016] AATA 32

- AAT concluded that the taxpayer's claims were wildly excessive.
- The home office percentage methodology that the taxpayer used was flawed and the arithmetic was incorrect.
- Taxpayer had not analysed why each expense should be deductible and had applied the percentage to any expense with a tenuous link to his work.
- AAT also concluded that certain types of costs were not deductible at all as they wholly related to the taxpayer's ownership of his home.

Tax Update – Court Judgements

Taxpayer was not carrying on a share trading business

Devi v FCT [2016] AATA 67

- Taxpayer attempted to claim losses arising from share transactions on the basis that she was carrying on a business of share trading.
- Taxpayer engaged in a number of share transactions (including both purchases and sales) with a turnover of approximately $600,000 for relevant income year.
- She also worked as a casual employee and earned about $40,000 in wages.
- Taxpayer claimed deduction for $20,000 loss arising from the share transactions on the basis that she was carrying on a business of share trading.
- Bulk of share transactions took place in the first 6 months of the income year
- She spent 15 to 25 hours per week on research, including checking share price history, reading analyst reports and watching relevant television programs
- She had no business plan nor specific systems or processes
- Commissioner denied the deduction and concluded that taxpayer was not carrying on a business (ie. she was share investor rather than share trader).

Tax Update – Court Judgements

Taxpayer was not carrying on a share trading business

Devi v FCT [2016] AATA 67

- AAT agreed with the Commissioner.
- AAT concluded that, based on the facts and circumstances, the taxpayer was not carrying on a business.
- Key factors:
  - a) The nature of the activities and profit-making purpose
  - b) The complexity and magnitude of the undertaking
  - c) An intention to engage in trade regularly, routinely or systematically
  - d) Operating in a business-like manner and the degree of sophistication involved
  - e) Whether the profits/losses arose from a discernible pattern of trading
  - f) The volume of the taxpayer's operations and the amount of capital employed
  - g) Specific share trading factors.

Tax Update – ATO Announcements

ATO updates its personal services income (PSI) decision tool

- In August 2014, Board of Taxation made certain specific recommendations in relation to the ATO's web-based PSI decision tool
- In response, the ATO has further developed the decision tool and recently released a new version.
- The new tool will give taxpayers:
- guidance on whether their income is PSI and if the rules apply to them
- a summary of the responses they have provided; and
- information about what the result means for them.
- As before, taxpayers can access the tool for free through the ATO website
- Users who use the standard tool may also remain anonymous.

Tax Update – ATO Announcements

ATO updates its personal services income (PSI) decision tool

- ATO also provides a new service, whereby an individual taxpayer can choose to submit the result from the tool to the ATO for use in their tax return.
- In some cases, a personal services business (PSB) determination can be issued based on the result report submitted.
- To use this service, the tool needs to be accessed through the Personal services income tool – online services for individuals link.
- Note: access is via the taxpayer's myGov account.

Tax Update – ATO Announcements

Additional time to lodge for clients with overdue returns

- ATO has reminded tax professionals that they can request additional time to lodge their client's overdue returns.
- Maximum period of additional time allowed is 42 days (6 weeks) from the date of request.
- If there are clients with one or more years of overdue income tax returns to lodge, only the current year income tax return is included in the Lodgment program on-time performance measurement (85% lodgement benchmark)
- Therefore, prior years returns do not form part of the calculation to determine the 85% on-time performance percentage.
- Accordingly, a tax agent's on-time lodgment performance will only be affected if they lodge the current year return after the due date or deferred date.
- If the request is granted, the ATO will provide the agent with a deferral for the client's current year return.
- The ATO may also consider (but will not guarantee) delaying activities to secure lodgment on the overdue prior year returns.

Tax Update – ATO Announcements

Withholding tax for car allowances

- The ATO has reminded tax professionals that from 1 July 2015, car expense deductions for individuals were simplified.
- Employers who pay their employees a car allowance need to withhold tax on the amount they pay over 66c per kilometre.
- The ATO advised employers that have not been doing this to start now to avoid their employees having a tax debt.
- In addition, employers who have paid a car allowance at a higher rate should discuss whether their employees may want them to increase the withholding amount for the remainder of the financial year to cover the shortfall.

Tax Update – ATO Announcements

Travellers with student debts are required to update contact details

- ATO issued reminder that Australians with HELP debt and TSL debt and moving overseas for longer than six months are required to provide overseas contact details within seven days of leaving Australia.
- From 1 January 2016, debtors going overseas for more than six months (183 days) will be required to register with ATO, while those already living overseas will have until 1 July 2017 to register.
- Repayment obligations will commence from 1 July 2017, for income earned in the 2016-17 year.

Conclusion

Wrap up

Questions

Thank you