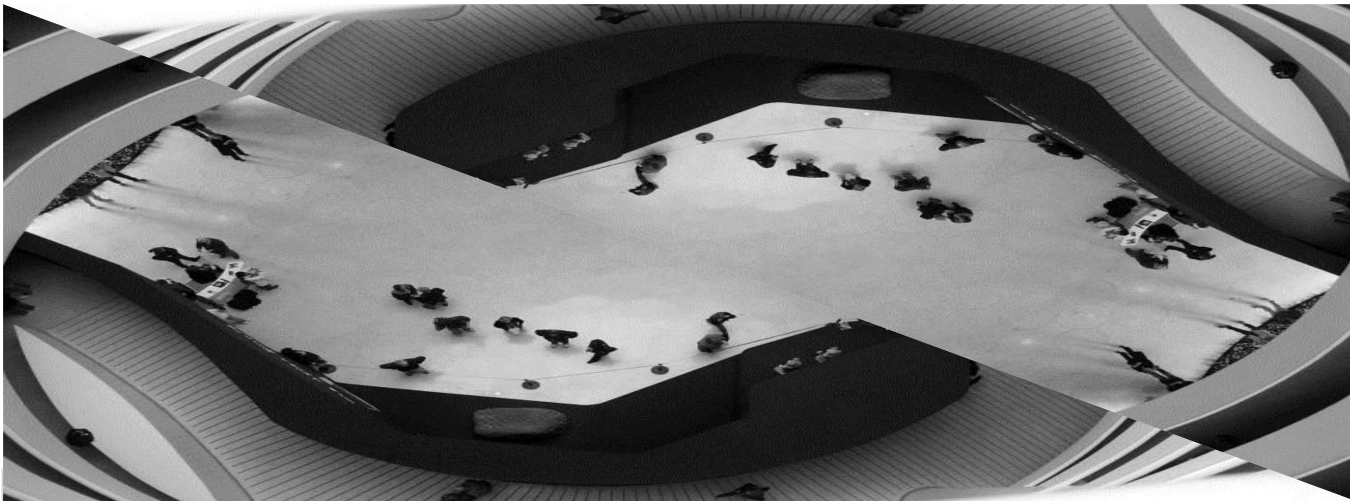

June 2015

"End of financial year" Edition

THE THINGS THAT MATTER

Introduction

Welcome to Argyle Lawyers' June 2015 newsletter

Through our regular newsletter "The Things that Matter", we aim to provide you with updates on what we consider are some of the latest issues in taxation law, superannuation law, trust law, estate planning law, commercial law, property law and family law that you and/or your clients should be aware of.

In this June 2015 edition, we provide some practical tips in managing trusts from a trust law and tax law perspective, our thoughts on the recent *Professional Investment Services Pty Ltd v Dolan* QCATA 35 AFSL decision and our usual legal commentaries and tax updates.

If at any stage you wish to find out more about what has been outlined in this newsletter, or if you have any questions, please do not hesitate to contact one of our lawyers at your convenience.

Read on and find out more!

Yours faithfully

The Argyle Lawyers Team

Subscription

If you would like to subscribe to our newsletter, please send an email titled "*subscribe newsletter*" to: acrm@argylelawyers.com.au

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KEY POINTS

- ***Remember – an effective trustee resolution must take into consideration both trust law and tax law.***
- ***Consider the terms of your trust deed.***
- ***Consider engaging your trust lawyer who also understands tax law.***

Drafting 'Effective' Trust Resolutions – Do a Review!

As we pass another financial year, now is the time to take a step back and consider carefully the terms of any trustee resolution executed for the year ended 30 June 2015.

Drafting an effective trustee resolution can be a tedious process, requiring careful consideration of both trust law and tax law principles.

Marrying the trust law and tax law principles can be a difficult exercise, particularly given the complex tax-streaming provisions and the implications arising from the *Bamford & Anor v FC of T 2010 ATC 20-170* decision.

Caution must be taken to prepare an effective trustee resolution to avoid adverse trust law and tax law implications.

Without proper consideration of both trust law and tax law, a trustee's distribution of income or capital of the trust during the year may be 'ineffective' to achieve its purpose.

Whilst recourse can be had via default beneficiary clauses, our experience is that these clauses can often fail to achieve their purpose as a safeguard.

Practical Tips:

- Is the resolution in the appropriate form? We recommend reviewing the trust deed carefully as often a resolution may be required to be presented in a prescribed format to be effective.
- Review your trust deed (especially pre-2010 trust deeds) to ensure streaming is available.
- Don't confuse your concepts! You need to consider both trust law and tax law. A trustee resolution distributes trust law income, but also has tax implications.
- Consider providing beneficiaries with a distribution statement to clarify the tax characteristics of a distribution.
- Consider the default beneficiary position and whether this is actually effective! Consider implementing other 'safeguard' measures, particularly if the income to be distributed is a significant amount.

If in doubt, consider engaging a trust lawyer who also understands tax law. An ineffective trust distribution can have unintended financial consequences. Don't risk it!

AFSL Indemnity Claim on AR Fails

Tribunal Member Dr JR Forbes in the Queensland Civil and Administrative Tribunal delivered the small (but important) judgment of *Professional Investment Services Pty Ltd v Dolan* QCATA 35. The decision focuses upon the financial services profession, in particular, the arrangements between Australian Financial Services Licensees (**AFSL**) and their Authorised Representatives (**AR**).

Why small? Because in the hierarchy of the justice system, this Queensland Civil and Administrative Tribunal is on the very low end of the scale.

Why Important? Because of what it says about the need for certainty in the dealer-representative agreement and the consequences of failing to achieve this.

The issue involved a minor contractual dispute about the construction of the dealer-representative agreement. The question was whether the indemnity clause that required the representative (**Dolan**) to pay money to their dealer (**PIS**) was void for uncertainty.

The indemnity clause stated:

You [Dolan] agree to indemnify us [PIS] in appropriate circumstances from any claims made against us or any losses suffered by us (including the payment of your portion of any insurance excess) as a result of any negligent or wilful [sic] act or omission by you.

Following complaints about advice provided by Dolan, the Financial Ombudsman Service (**FOS**) awarded payments to former clients of Dolan and PIS became obliged to pay compensation. PIS then demanded Dolan to contribute to the compensation amount. Dolan refused to make payment, arguing two points:

1. PIS failed to act reasonably and in good faith towards Dolan by failing to give Dolan any, or any adequate opportunity, to put their case to the FOS; and/or
2. The indemnity clause is void and ineffective because it is vague and uncertain.

It is a little disappointing that the first argument was not pressed, it was about an implied duty of parties to an agreement to be fair to one another.

Tribunal Member Dr JR Forbes identified that this suggested duty has been recognised in the United States and Canada, and has equivocal support in England, but its status in the common law of Australia *remains in doubt*.

But the second issue succeeded for the representative, Dolan. The indemnity clause was found to be too vague and therefore was void.

KEY POINTS

- ***Indemnity clauses in dealer-representative agreements needs to be properly drafted to ensure that it is not void for uncertainty and vagueness.***
- ***Consider inserting additional clauses to embody, mutual good faith obligations in dealer-representative agreements.***

KEY POINTS

- ***Dividend access shares may not adversely affect a Taxpayer's ability to access the SBCC.***
- ***Subsidiary members of a tax consolidated group may be issued amended assessments for the time they were a standalone entity.***
- ***Be aware of dividend stripping arrangements involving SMSFs and private company dividends.***

Further Tax Updates - June 2015

Devuba Pty Limited v CofT

*Issue: Whether a Taxpayer can satisfy the Small Business Participation Percentage Test (**SBPP**) where shares are in existence which carry a discretionary right to a dividend.*

As the SBPP looks at the percentage right each share has in relation to voting, capital and dividends pursuant to Division 152 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 97**), discretionary rights to dividends were previously not considered in the SBPP.

However, the AAT held in this case that the holding of a Dividend Access Share (**DAS**) arrangement did not affect the Taxpayer's right to access the Small Business CGT Concessions (**SBCC**) on the gain arising from the sale of shares. This is because in determining the CGT concession stakeholders of the Taxpayer, the SBCC must consider who 'just before' the CGT event 'may' be paid a dividend.

In this case, the Taxpayer could still access the SBCC as the direct SBPP of the ordinary shareholder in the Taxpayer was not diminished by the existence of discretionary entitlements in the DAS holder (to the exclusion of all others).

This case also highlights it is important for Taxpayers to consider the SBCC test in light of the AAT's view that the words 'may pay' are effectively to be read as '*may pay at any time in the future under any circumstances*'.

Channel Pastoral Holdings v CofT

The Full Federal Court (**FFC**) reconsidered the interaction between Part IVA of the ITAA 1936 and the tax consolidation rules. The main issues to be determined related to whether Part IVA determinations and assessments should be made to a head company or a subsidiary of a consolidated group, where the subsidiary has been accused of committing tax avoidance.

In this case, the Commissioner of Taxation argued that the tax consolidation of the group and the sale of the business assets by the subsidiary member (which lead to a capital loss on sale of land, derivation of income from sale of trading stock and a deduction arising from the application of the tax cost setting rules on tax consolidation of the group to the trading stock) amounted to a Part IVA scheme.

The majority of the FFC held that the Commissioner of Taxation was entitled to issue a Part IVA determination and an accompanying amended assessment to the ***subsidiary member*** (and not the head company) despite the fact that it is now part of a tax consolidated group.

This was because for the relevant assessment year in question, the subsidiary member had been a standalone entity for the first half of the year prior to becoming part of the tax consolidated group for the second half of the year.

Excellar v CofT

The Administrative Appeals Tribunal (**AAT**) clarified a number of issues that relate to whether a taxpayer could meet the 'maximum net asset value' (**MNAV**) test in section 152-15 of the ITAA 1997.

These issues related to (1) applicability of expert evidence as to market valuation (2) GST basis for liabilities and (3) whether shareholder guarantees are contingent liabilities.

Firstly, in respect of the actual sale price, the AAT rejected the Taxpayer's submission that it should adopt the valuation evidence as expert evidence. *The AAT held that the valuation evidence is not of a kind that is based on matters that are so complex that the Tribunal was unable to reach its own conclusions.*

The AAT considered that the actual selling price of the subject property was the best evidence of its market value as at the relevant date. There was nothing about the transaction which suggested that the selling price was not a reliable indication of the market value of that property.

Second, in respect of the GST issue, the AAT considered that it is the liabilities owed by the Taxpayer just before the CGT event on a GST-inclusive basis *and that the Taxpayer's entitlement to input tax credits did not have any relevant implications in these circumstances*.

Third and lastly, the AAT found that the contingent liabilities pursuant to two guarantees given by the Taxpayer's shareholder are not liabilities for the purposes of the MNAV test as they were not liabilities of the Taxpayer's shareholder that related to the shareholder's CGT assets.

TA 2015/1 – Dividend Stripping Arrangements

The Commissioner of Taxation has recently released a taxpayer alert regarding dividend stripping arrangements involving the transfer of private company shares to a SMSF.

In these instances, the Commissioner of Taxation has alerted taxpayers that he is concerned that contrived arrangements are being entered into by individuals (typically SMSF members approaching retirement) so that dividends subsequently flow to, and are purportedly treated as exempt from income tax in the SMSF because the relevant shares

Further tax updates - June 2015

KEY POINTS

- ***Liquidators should be aware of their power to recover unfair preference payments concerning associations.***
- ***GST Input Tax Credits – be aware of the 4 year time limit.***

are supporting pensions. In these cases, the intention is for the original shareholders of the private company and/or their associates to avoid "top-up" income tax on the dividend income; and for the SMSF to receive a refund of the unused franking credit tax offset, which is available for tax-free distribution to its members.

This arrangement has features of dividend stripping which could lead the Commissioner of Taxation to cancelling any tax benefit for the transferring shareholder and/or denying the SMSF the franking credit tax offset.

Taxpayers are to carefully consider their SMSF arrangements and the implications of the dividend stripping provisions under section 207-145(1)(d) ITAA 97 and sections 177E and 177EA of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**).

Growthpoint Properties Ltd v CofT

In this case, Growthpoint Trust (**Trust**) issued 50.1% of the total units in the Trust to the Taxpayer. The Commissioner of State Taxation issued the Taxpayer with a stamp duty assessment of $2.99m in respect of that transaction. The primary issue before the Full Supreme Court of South Australia was whether the land rich entity provisions contained in Part 4 of the *Stamp Duties Act 1923* (the **Act**) apply to a transaction whereby a person acquires a majority interest in a company or unit trust that is not a land rich entity before the acquisition, but becomes land rich as a result of the transaction.

The majority of the Full Court, having considered several textual and contextual factors, held that a transaction which simultaneously transforms an entity into a land rich entity, and confers on a person a significant interest in the entity, falls within subsection 95(1) of the Act and attracts stamp duty payable. The Full Court noted that the manifest purpose of Part 4 of the Act was to charge a person who has a significant interest in a private land rich entity with stamp duty. They further confirmed that the relevant test in subsection 95(2) of the Act requires an examination of the result of the transaction and to consider whether the transaction has resulted in a person or group having a significant interest in a land rich entity.

Robson & Ors v CofT

*Issue: the principal issue in this Supreme Court case was whether the Provisions of Part 5.7B of the Corporations Act 2001 (Cth) (**the Corps Act**) were picked up by the Associations Incorporations Act 1981 (QLD) (**AIA**), so that liquidators of incorporated associations could recover payments and set aside voidable transactions.*

The concern in this case was that the appointed liquidators alleged that an incorporated association which was being wound up had made unfair preference payments under the Corps Act on reducing its tax liabilities to the Commissioner of Taxation.

The Arguments

The Commissioner of Taxation:

- Part 5.7B of the Corps Act did not apply in the winding up of the incorporated association, with the result that the liquidator's claim against it should fail.

The liquidator

- Sections 582 and 583 of the Corps Act allowed them to exercise the same powers in liquidating incorporated associations, as those they could exercise when winding up companies.

The Decision

The Court held that the source of a liquidator's power to recover payments and set aside voidable transactions lies in the provisions of Part 5.7B, and not in sections 582 or 583 of the Corps Act.

Consequently, those provisions did not apply in the winding up of an Association.

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