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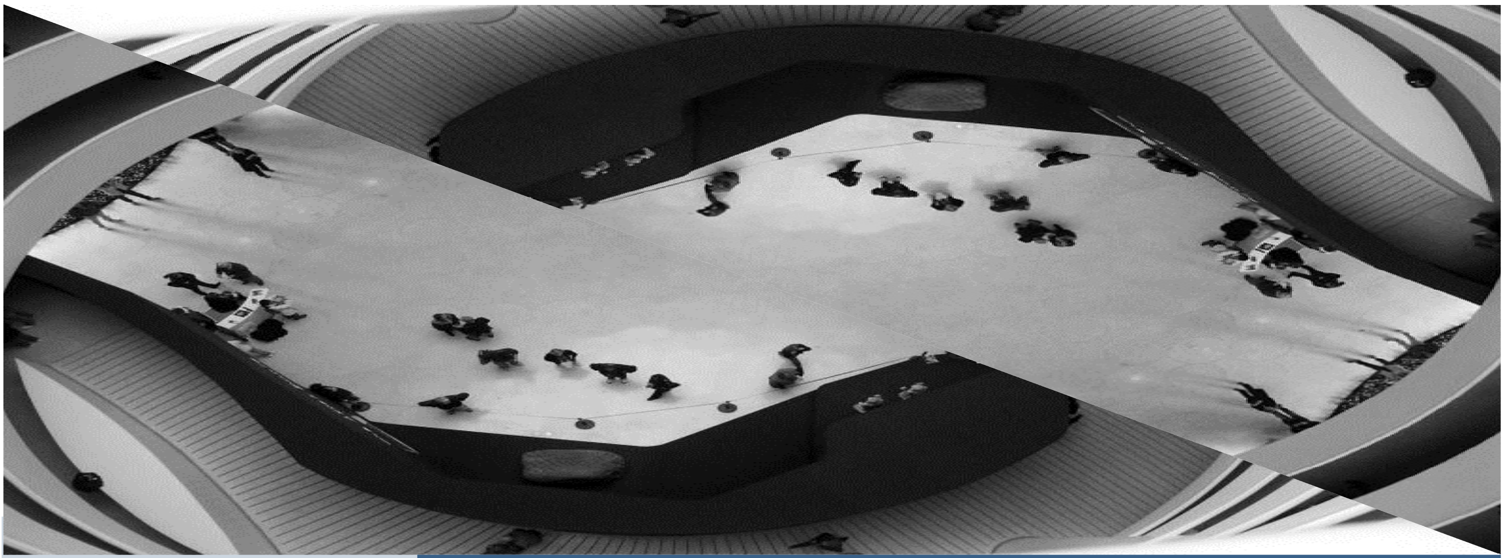

May 2015

Big
"Budget"
Edition

THE THINGS THAT MATTER

Introduction

Welcome to Argyle Lawyers' May 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 Big "Budget" Edition for the month of May 2015, we highlight aspects of the Abbott government's second Budget that we consider to be thought-provoking, along with our usual legal commentaries and tax updates.

If at any stage you wish to find out more about what has been outlined, 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

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WINNER SME TAX ADVISER OF THE YEAR 2015
THE TAX INSTITUTE

The Federal Budget 2015/16

KEY POINTS

- ***Joe Hockey's second budget had very little 'surprises' compared with his first budget in 2014.***
- ***Emphasis on small business to drive economic growth in Australia through a range of tax concessions.***
- ***A raft of discrete revenue-raising measures have been introduced.***

At a Snapshot

The Federal Treasurer, Mr. Joe Hockey, handed down his second budget at 7:30pm (AEST) on 12 May 2015.

The various proposals in this Budget is a stark contrast to the Budget 2014/15, as there is now a renewed focus primarily on small business and start-ups to drive economic growth. The Budget 2015/16 has introduced a raft of discrete revenue-raising measures to generate tax savings and contribute to the Budget bottom-line.

The highlights of the Federal Budget 2015/16 include:

- A targeted multi-national anti-avoidance law to bolster the ATO's ability to tax multi-nationals from profit-shifting and an increased scope to GST.
- A range of tax concessions for small businesses, such as the $20,000 asset write-off deduction, CGT relief for structural business changes, immediate deductions for professional costs, and ESS concessions for start-ups.
- The lower 28.5% tax rate or 5% tax discount for small business entities and accelerated depreciation for various capital assets used by primary producers.
- Deferral of the start date of the MIT regime deferred to 1 July 2016.
- Streamlining the calculation of the work-related car expenses.
- Reform in the family benefits space, such as changes to eligibility and access to the Family Tax Benefit Part A supplements, introduction of a new Child Care Subsidy scheme and the removal of the existing Parental Leave Pay scheme for certain individuals.
- There is an increased ability for early access to superannuation for people with terminal medical condition.

The Federal Budget 2015/16 – Addressing Tax Avoidance

KEY POINTS

- ***New draft legislation introduced to tackle the evasion of tax by multi-nationals on Australian-based profits diverted into offshore tax havens.***
- ***The supply of digital products are to become subject to GST.***
- ***The Government is continuing its strong stance against tax avoidance and is providing $87.6 million to the ATO over the next three years to continue the International Structuring and Profit Shifting programme.***

International Tax Avoidance

- The draft *Tax Laws Amendment (Tax Integrity Multinational Anti-Avoidance Law) Bill 2015* has been released to address the erosion of the Australian tax base by non-Australian multi-national entities (that have at least $1 billion in global turnover) that, for a principal purpose of obtaining a tax benefit and to avoid a taxable presence in Australia (and even though substantial economic activity happens in Australia), book and channel Australian revenues offshore into tax havens. Penalties for such multi-nationals avoiding Australian tax in this manner shall be set at 100%, plus interest charges.
- Where a scheme is captured by the new multi-national anti-avoidance laws, the Federal Commissioner of Taxation (**Commissioner**) has the power to look through the scheme and apply the tax laws as if the non-resident entity was treated as a permanent establishment.
- Further steps have been taken to strengthen the Government's defence against tax avoidance. The Government is providing $87.6 million to the ATO over the next three years to continue the International Structuring and Profit Shifting programme. To date this programme has raised over $250 million in tax liabilities and is estimated to raise $1.1 billion in total.
- The Budget affirms Australia as contributing to the global fight against tax avoidance and is commencing information exchange arrangements on secret tax deals provided to multi-nationals by other countries that may contribute to tax avoidance in Australia.
- In addition, the Australian Government will seek to incorporate the OECD's recommendations into tackling treaty abuse and implement new transfer pricing documentation standards from 1 January 2016.
- The *Tax Laws Amendment (Tax Integrity: GST and Digital Products) Bill 2015* was also introduced, which seeks to deem the provision of digital products, such as movies, music, apps, games, e-books and services as taxable supplies and become subject to GST.

KEY POINTS

- ***Small businesses can change their legal structure without CGT liability and either face a lower tax rate of 28.5% (if it is a company) or a 5% tax discount (if an unincorporated entity).***
- ***Tax concessions for capital expenditure for primary producers.***
- ***Calculation for work-related car expenses streamlined.***
- ***The increase in the immediate asset-write off deduction threshold for small businesses from $1,000 to $20,000.***

The Federal Budget 2015/16 – Small Business

Tax Concessions for small businesses

- For depreciating assets acquired by small business entities between 7.30pm (AEST) 12 May 2015 to 30 June 2017, to the extent they are used for a taxable purpose, the threshold cost amount of the immediate deduction increases from $1,000 to $20,000. There are some flow-on changes to small business pool depreciation rules as well.
- An immediate deduction is available from 1 July 2015 for professional expenses (e.g. legal and accounting) associated with starting a new business through a company, trust or partnership, rather than over a 4-year period as a 'black-hole' expense.
- Inclusion of additional concessions in the employee share scheme (**ESS**) reform package for start-ups - including CGT discounts on ESS interests, Commissioner discretion regarding the three-year minimum period and excluding eligible venture capital investments from aggregated turnover test and grouping rules. We note that the current *Tax and Superannuation Laws Amendment (Employee Share Schemes) Bill 2015* is read for a third time in the House of Representatives on 27 May 2015.
- It is being proposed that from 1 July 2016, small business entities have the flexibility to change their legal structure as they find suitable without attracting a capital gains tax (CGT) liability.
- The tax rate that applies to corporate small business entities will be reduced from 30% to 28.5%. For unincorporated small businesses (sole traders, trusts and partnerships), there will be a 5% tax discount. These measures apply from 1 July 2015.
- Primary producers can immediately deduct capital expenditure on fencing and water facilities and windmills from 1 July 2016 and adopt 3-year effective lives for capital expenditure on various fodder storage assets.

The Federal Budget 2015/16 – Individuals, families and others

Individuals and families

- The "12% of original value method" and the "one-third of actual car expenses" method of calculating work-related car expenses will be removed. A flat 66c per km rate will apply for the "cents per kilometer" method, such rate to be updated by the Commissioner.
- Introduction of a new Child Care Subsidy scheme, whereby qualifying families are eligible to claim a subsidy of up to 85% of actual childcare costs, and this is means-tested. Caps apply for high-income earners. Additional support for disadvantaged or vulnerable families is through the Child Care Safety Net Scheme.
- Removal of the ability for individuals to access the existing Parental Leave Pay scheme if in addition to employer-provided parental leave entitlements from 1 July 2016.
- From 1 July 2016, the Family Tax Benefit (FTB) Part A large family supplement will be removed. From 1 January 2016, the FTB Part A is only available for families for up to 6 weeks in a 12-month period whilst they are overseas, subject to extension and exception provisions.

Other measures

- The introduction of the new managed investment trusts (MITs) regime has been deferred to 1 July 2016, but existing MITs can opt into the new regime from 1 July 2015. The new MIT regime seeks to subject those trusts (widely held, engaged in primarily passive investment and with clearly defined rights) to a separate tax regime on an 'automatic' attribution basis.
- Both International Jewish Relief Limited and the National Apology Foundation have approval to be specifically listed deductible gift recipients from 1 January 2015.
- Early access to superannuation is available for people with a terminal medical condition, by way of increasing the period that two medically certified practitioners certify a person is likely to die within from one year to two years.
- Additionally, the government has announced a package of administration streamlining and removal of redundant reporting for lost and unclaimed superannuation measures designed to reduce red-tape for superannuation funds and individuals.

KEY POINTS

- ***Deferral of the MIT regime until 1 July 2016.***
- ***International Jewish Relief Limited and the National Apology Foundation are listed as deductible gift recipients.***
- ***Superannuation can be accessed early by terminally ill people.***
- ***Administrative measures to reduce government red-tape for superannuation matters introduced.***
- ***Reforms in the area of child care subsidies and Family Tax Benefit Part A.***

KEY POINTS

- ***Any buy-sell that is intrinsically part of the SMSF threatens both the SMSF and the contributions.***
- ***Any buy-sell that is intrinsically part of the multi-member super fund will not threaten the fund but it will still threaten the contributions.***
- ***Superannuation must not be intrinsically linked and part of a buy-sell arrangement.***

Buy-sell in super fails sole purpose test

Last week the ATO answered the question; *Does an SMSF contravene section 62 (sole purpose test) and paragraph 65(1)(b) (financial benefit test) of the Superannuation Industry (Supervision) Act 1993 (Cth) by purchasing a life insurance policy over the life of a member of the SMSF where the purchase is a condition and consequence of a buy-sell agreement the member has entered into with his brother as co-owners of their business?*

The ATO said **yes**, concluding that the SMSF has been utilised in an external agreement, to which the SMSF is not a party, which effectively relieves the SMSF member from having to provide his own money to pay the premiums on the member's life insurance policy and, in the event of the member's death, from the member's brother having to fund the purchase of the member's share in the business. It is clear the SMSF acts as a conduit under the agreement.

The SMSF is required to use contributions made to it in a manner that does not conflict with its investment strategy. In this arrangement, the SMSF is essentially directed to invest contributions made to it in an asset it may not otherwise choose to hold (resulting in a potential financial detriment to the SMSF as it is not able to invest contributions made to it that objectively may provide an overall higher return).

The view expressed by the ATO is in fact quite old and very well established in law. The leading commentary was expressed by Hill J in *Raymor Contractors Pty Ltd v FCT* and also by Pincus J in *FCT v Roche and Ors*, both in 1991. The concept is simple; there is a sole purpose test to running a super fund and there is a sole purpose contribution test.

The ATOID made clear that the buy-sell was so intrinsically part of the SMSF that there was a purpose being carried out other than the sole purpose. Consequently the SMSF fails the basic compliance standards and the insurance premiums are not allowable tax deductions.

SMSF Trustee disqualified for non-related offence under State law

The Administrative Appeals Tribunal (**AAT**) on 1 May 2015 delivered its decision in *Shaw v Commissioner of Taxation [2015] AATA 288 (**Shaw**). Shaw* acts as a timely reminder of the trustee's self-managed superannuation funds (**SMSF**) duties.

The AAT held that the Commissioner was correct in not waiving a former trustee's disqualified status under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**).

What was the original offence which led to the disqualification?

It was the applicant's conduct in conspiring with his wife and sister to take the blame for driving offences.

The Facts

The applicant (Mr Shaw) and his wife were the trustees of their SMSF. On 1 June 2012, Mr Shaw was convicted in the Supreme Court of Tasmania of five counts of conspiracy, contrary to section 297(1)(d) of the *Criminal Code Act 1924* (TAS).

As a result of these convictions for dishonest conduct, Mr Shaw became a disqualified person pursuant to section 120(1)(a)(i) of the SIS Act. A subsequent application for waiver of the disqualified status pursuant to section 126B of the SIS Act is the subject of the AAT decision.

The Tribunal's Decision Process

The issues which the Tribunal considered in determining whether to waive Mr Shaw's status as a disqualified person was whether he is highly unlikely to firstly, contravene the SIS Act and secondly, do anything that would result in an SMSF not complying with the SIS Act.

On the facts of the case, the Tribunal could not reach the view that Mr Shaw in light of his past convictions would satisfy the 'highly unlikely' threshold for not contravening or causing a fund to contravene the SIS Act under the criterion listed in section 126D (1A) of the SIS Act.

The Practical implications

This case highlights the serious ramifications for trustees of SMSFs who are convicted of offences under State or Federal laws.

In these instances, the onus rests with the applicant to demonstrate that they are *highly unlikely* to contravene or cause a fund to contravene the SIS Act, which of itself indicates a high level threshold.

KEY POINTS

- ***Take your duties as the trustee or directorship of a corporate trustee of an SMSF seriously.***
- ***Consider carefully your conduct in State or Federal legal matters and the wider consequences for your SMSF.***
- ***With the threshold set at "highly unlikely", in light of the facts of the case, discharging this onus may be an uphill battle.***

KEY POINTS

- ***Liquidators were not held personally liable for failing to retain sufficient funds for a tax debt arising prior to a notice of assessment.***
- ***The Commissioner has successfully sought special leave to appeal the decision to the High Court.***
- ***We will monitor this case carefully.***

Liquidators not personally liable for CGT prior to issue of notice of assessment

According to the recent Full Federal Court (**FFC**) decision in *FCT v Australian Building Systems Pty Ltd (in liq) & Ors 2014 FCAFC 133*, liquidators who dispose of real estate are not obliged to retain money out of the proceeds to meet any potential CGT liability prior to the issue of a tax assessment.

The FFC determined that the liquidators were not required by Section 254(1)(d) of the *Income Tax Assessment Act 1997* (**ITAA 1997**) to retain any amount from the proceeds of the sale of land sufficient to pay a liability for income tax that might arise in relation to the CGT event. This is because the payment and retention obligations in section 254 of the ITAA 1997 arise only on the issuing of a notice of assessment by the Commissioner.

In this regard, the FFC found that Section 254(1) of the ITAA 1997 is a provision facilitating the collection of tax, rather than one facilitating the assessment of a liability of tax.

This view was formed by both the context in which the words "*the tax which is or will become due*" were to be construed and the outcome of that construction. Section 254(1) of the ITAA 1997 contemplates an existing liability or a state of affairs of which it can be presently said a liability will arise in the future.

What does this mean for you?

Take care! The Commissioner has successfully sought special leave to appeal the decision to the High Court.

As such, liquidators should be alert to any CGT implications arising from companies in liquidation and the related tax consequences.

Earn-outs – we have clarity!

What is an earn-out?

Earn-outs are a common feature of many asset sale agreements whereby the purchaser agrees to provide the vendor with some consideration at a later date subject to set performance measures agreed to between the parties.

What is the tax consideration?

Firstly, taxpayers must determine if the consideration provided by an earn-out arrangement:

(a) is a separate CGT asset (*separate CGT asset approach*); or

(b) whether it forms part of the original sale proceeds of the asset sale (*look through earn-out right approach*).

The exposure draft legislation, *Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015: CGT treatment of earnout rights*, released by Treasury on 23 April 2015 now provides clarity on the tax treatment of earn-outs.

The current position

To the extend that the terms of an earn-out satisfy certain condition (such as requiring that all future financial benefits must be provided no later than four years after the sale date and that the future earn-out 'financial benefits' cannot be 'reasonably ascertainable' at the sale date), then the earn-out may qualify as an eligible 'look through earn-out right' and thereby forms part of the original sale proceeds.

However, where the earn-out arrangement does not satisfy the conditions for the 'look through earn-out right approach' tax treatment, then the previous tax treatment for earn-outs (as outlined in TR2007/D10) will apply.

Practical implications

You should consider carefully how these arrangements may impact your capital gains tax exposure across multiple tax years in your negotiation of an earn-out clause with the other party.

Consideration and planning your ability to access various CGT concessions must also be considered, including small business CGT concessions.

Furthermore, the ATO has adopted an administrative measure such that for those taxpayers who enter into an earn-out arrangement on or after 23 April 2015, but before the date of commencement of the legislation, taxpayers will be able to choose to apply the treatment specified in the draft legislation for their situation.

For earn-outs arising from transactions prior to 23 April 2015, taxpayers will need to review the new rules and determine what, if any, prior period amendments may be necessary.

KEY POINTS

- ***Consider if the conditions for the new look through earn-out right approach are satisfied.***
- ***If not, apply the old rules under TR2007/D10.***

KEY POINTS

- *Was a loan arrangement a 'sham'?*
- *Were default assessments excessive?*
- *Were proceeds from the sale of properties assessable as ordinary income or capital gains?*
- *When will a financing arrangements that grant debt investors become an equity interest for tax purposes?*

Further tax updates - May 2015

Morrison v CoT

Issue: Was the loan arrangement entered into by the Taxpayers a sham?

The Taxpayers purchased an apartment in Queensland. They funded half of the purchase price with their own funds and the other half with the loan in question.

The loan was from a bank, Hua Wang Bank Berhad, incorporated in Samoa ("the **Bank**"). One of the conditions of the loan was that an amount (which was equal to the whole amount they sought to borrow) be deposited with the bank. The Taxpayers took this amount from their superannuation funds and transferred it to the Bank.

The AAT held that the loan arrangement was a sham. In substance, the Taxpayers applied their own funds and dressed it up as a loan to claim tax deductions for interest.

The AAT held that the Taxpayers were not entitled to the interest deductions which were purportedly charged by the Bank.

Rigoli v CoT

Issue: Were default assessments excessive?

The Full Federal Court upheld an AAT decision, which held that the default assessments issued by the Commissioner to the Taxpayer were correct.

The Taxpayer had failed to discharge his onus of proving that the default assessments were excessive by solely relying on the report prepared by the Commissioner's expert. The Taxpayer had failed to prove that, on the balance of probabilities, his actual taxable income from all sources was less than the amount assessed by the Commissioner for the relevant period.

WWXY v CoT

Issue: Should the AAT uphold a private ruling made by the Commissioner that proceeds from a sale of properties by the taxpayer are assessable on a revenue basis as opposed to a capital basis?

The Taxpayer acquired two properties in 2006 and 2007, which were proposed to be developed as part of a joint venture with another company. However, the joint venture fell through.

The Taxpayer rented out the two properties in their unimproved state. Subsequently, the Taxpayer obtained a development application. The Taxpayer then sold the properties in the 2014 tax year.

The AAT upheld the Commissioner's private ruling that the proceeds from the sale of the properties would be assessable on a revenue basis as opposed to a capital basis.

The AAT held that the Taxpayer had acquired the properties with the objective of achieving the maximum profit and the Taxpayer was engaged in a business on the basis that:

- the directors of the Taxpayer were experienced builders and brought their experience to bear in the course of development;
- the Taxpayer organised finance and acquisition of adjoining parcels of land with the view of aggregation;
- the Taxpayer's directors engaged in negations with prospective joint venture partners on the development process and financing; and
- The Taxpayer engaged in a reasonably complex endeavour of obtaining its own development consent when negotiations failed.

For these reasons, the AAT held the sale of the property was on revenue account and was not the mere realisation of a capital asset.

TD 2015/2 and TD 2015/3

The Commissioner issued two tax determinations on s974-80 of the ITAA 1997.

Division 974 of the ITAA 1997 contains rules which classify whether an interest is treated as debt or equity for certain tax purposes.

Section 974-80 of the ITAA 1997 is an integrity provision which deals with financing arrangements that grant an investor (the ultimate recipient) an interest which, whilst may look in form like a debt interest, is effectively in substance but not in form) an equity interest in a company.

KEY POINTS

- ***When will a financing arrangements that grant debt investors become an equity interest for tax purposes?***
- ***GST Input Tax Credits – be aware of the 4 year time limit.***
- ***Attributed personal services income may attract superannuation guarantee charges***

Further tax updates - May 2015

TD 2015/2 addresses the question:

"Will paragraph 974-80(1)(d) of the Income Tax Assessment Act 1997 be satisfied merely because a non-resident entity has chosen to invest indirectly in a debt interest issued by an Australian resident company and there is one or more equity interests interposed between the non-resident entity and the entity holding the debt interest?"

The ATO's answer was **NO**, paragraph 974-80(1)(d) of the ITAA 1997 will not be satisfied in such a context.

TD 2015/3 addresses the question:

"Is the reference to 'the interest' as it appears in the phrase at the end of subsection 974-80(2) of the Income Tax Assessment Act 1997 a reference to the interest held by the 'ultimate recipient'?"

The ATO's answer was **YES**. 'The interest' referred to in the phrase at the end of subsection 974-80(2) of the ITAA 1997 is the interest held by the 'ultimate recipient' and not the interest held by the 'connected entity'.

Trustee for SBM Trust and CoT

*Issue: Section 93-5 of A New Tax System (Goods and Services Tax) Act 1999 (Cth) (**GST Act**) tested.*

This case was an appeal to the AAT on Section 93-5 of the GST Act.

Section 93-5 of the GST Act restrict a taxpayer's entitlement to input tax credits (**ITCs**) by imposing a four year time limit on the making of claims for ITCs.

It was further noted by the AAT that Section 93-5 of the GST Act was announced in 2009 and was enacted as law in 2010.

The issue: *where the ITCs are more than four years old, is the Taxpayer denied these ITCs even though they relate to creditable acquisitions occurring before the commencement date of Section 93-5 in 2010?*

The AAT found that the Taxpayer was not entitled to the ITCs because they were not included in any of the Business Activity Statements lodged by the Taxpayer since the ITCs became available.

ATO ID 2015/9

This ATO Interpretative Decision addresses the question:

*"Does attributed personal services income attract superannuation guarantee (**SG**) obligations on the part of the relevant personal services entity?"*

The ATO considers that attributed personal services income will not give rise to a SG obligation.

But there is an exception.

The exception is where:

- the personal services entity is in receipt of salary or wages in the year of income; and
- these amounts are reported as attributed personal services income;

because they were paid more than 14 days after the end of the PAYG payment period in which the relevant amount was derived as income of the personal services entity.

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