

SEPTEMBER 2016 TAX UPDATE

LEGISLATION

- Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016 –reducing the corporate tax rate, increases the tax discount for unincorporated small businesses and increases the small business entity threshold to \$10 million p.a. from 1 July 2016 (Not CGT small business discount)
- Treasury Laws Amendment (income Tax Relief) Bill 2016 –introduces the change to the third personal income tax threshold 32.5% from \$80,000 to \$87,000.
- International Tax Agreements Amendments Bill 2016–new Australia – Germany Double Tax Agreement.
- Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill - includes:Providing the Commissioner of Taxation with a statutory remedial power to allow for a more timely resolution of certain unforeseen or unintended outcomes in the taxation and superannuation law.

CASES

- Penalties for failing to lodge income tax and GST returns reduced - Bamsang Pty Ltd v FCT
- Administrative penalty for PAYG withholding failure upheld - Re T T Lam and HT Ngo and FCT [2016] AATA 552
- Penalties imposed on Trustee of SMSF for sole purpose test and other contraventions - DCT v Rodriguez

ATO ANNOUNCEMENTS

- TD 2012/21 A1 – Addendum Income tax: does CGT event E1 or E2 in sections 104-55 or 104-60 of the Income Tax Assessment Act 1997 happen if the terms of a trust are changed pursuant to a valid exercise of a power contained within the trust’s constituent document, or varied with the approval of a relevant court?
- Tax consequences of trust vesting – ATO to publish detailed information
- “Dodgy” work-related deduction claims highlighted by ATO
- Requesting non-concessional balances - new Portal functionality from late August
- SMSFs: super account info; compliance and risk areas; auditor issues: ATO speech
- SMSFs and diverting personal services income - penalty remission if act early
- ATO flags retirement planning schemes of concern: non-arm’s length LRBA’s; dividend stripping; PSI
- SMSFs buying life insurance using buy-sell agreements: ATO warning
- Deductibility of gifts to clients - Taxation Determination TD 2016/14
- Deductibility of airport lounge membership fees for employers - Taxation Determination TD 2016/15
- ATO corporate plan for 2016-17

SHARE BUYBACKS: PUBLIC V PRIVATE

What do we need to understand?

- Types of buyback
- When you would participate or implement
- Tax consequences

Different types of buyback

- **Public company**

Essentially a “special” dividend

Example in SMSF:

1. Share sale at 70. Capital gain 15% so nets about 60 (or 70 if in pension mode)
2. Buyback Dividend of 70 is franked. Grossed up dividend of 100. Gives net benefit of 85 (or 100 in pension due to refund of credits)
n.b buyback discount to listed price

Common to participate and buy back in on market.

- **Private company**

Return surplus cash to shareholders

Reduce NTA to make entry price lower for new participant

“Realign” shareholder amongst shareholders

Exit strategy for a shareholder/s instead of sale

By:

- Reducing an existing shareholder’s % holding
- Eliminating an existing shareholder’s holding
- Reducing all existing shareholders’ % holding pro rata

Commercial aspects

- A. Funding:
 1. Company own funds
 2. New funds contributed:
 - (i) External debt
 - (ii) New capital in (existing or new shareholder)

- B. Pre and post buyback

Relative percentage equity amongst shareholders
Balance sheet
Market Value

Key tax consequences

- Share buyback provisions (Div 16K 1936 ITAA)
 - At market
 - Excess over share capital is a dividend (can be franked)
- Franking provisions
- Anti avoidance provisions (s45A,45B,45C, s177EA)

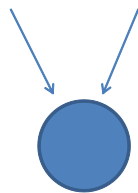
ATO guidelines

- Key issues:
 - What is market value i.e justify buyback price
 - How much of buyback price is a dividend and how much is capital
 - How much can or should be franked
- Public Company – Class Ruling from ATO
- 14% discount and tender process
- Private company - Private Ruling? Much harder.
 - What is market value?
 - How much of buyback price is a dividend and how much is capital?

Appropriate allocation example

Reduce all existing shareholders' % holding pro
rata
Pro rata

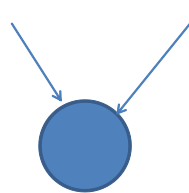
Before



A + B 50/50
NTA = \$2m

Return/buyback \$1m

After



A + B 50/50
NTA=\$1M

- Assume share capital \$1m and retained earnings \$1m
- Outcome likely 50/50 – share capital return plus franked dividend

Example 2

- MV is 2m but share capital of 1m (cash) and goodwill value of 1m. No franking.
- If do buyback would want all out of share capital but ATO probably want 50/50 resulting in unfranked dividend

CHANGES TO TRUST DEEDS

- The ATO has said looking it's looking at the vesting date issue and issues Addendum to TD2012/21
- Key considerations include:
 - Key parties
 - Key clauses
 - Changes: common examples + tax consequence

READ THE DEED!

Key parties involved in a trust

- Settlor
- Appointor
- Guardian (aka Protector)
- Trustee
- Beneficiary – general and specified (in Deed or schedule)
- Default beneficiary
- Notional Settlor(sometimes)

Key clauses in a trust deed

- Definition of income
- Definition of capital
- Distribution/retention of income
- Distribution/retention of capital
- General/specific powers of amendment
- General powers of trustee to administer the trust
- Ability to partition trust assets
- Vesting of trust

Key tax issues associated with changing a deed

1. Is there a re-settlement?
2. If there is, what are the consequences?
 - Pre CGT freshening up
 - Post CGT gains crystallised
 - Trust Losses
 - Family Trust elections
 - Stamp duty?

What is a resettlement?

- Change that is so fundamental as to create a new trust

ATO view:

No resettlement if:

- Court ordered
- Power in Deed

Common changes & resettlement risks

Categorise potential changes into:

- No resettlement risk
- Possible resettlement risk

No resettlement risk

- adding/removing trustee general powers of administration
- removing notional settlor clause
- changes to appointor/guardian
- change to trustee
- vesting date

Possible resettlement risk

- adding General power of amendment
- adding/removing particular named beneficiaries
- adding/removing classes of beneficiaries
- changing definitions e.g. income and capital
- Changing distribution/accumulation clauses
- adding non-family members

Final words

- Definitely read the deed
- Possibly get a ruling