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THE REPORT

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Tax News, Views & Clues

MONTHLY REPORT

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Season's Greetings

from the Partners & Staff of DFK Hirn Newey

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'Cloning' of Trusts

A capital gains tax event (disposal) occurs if a trust is created over a CGT asset or an asset is transferred to an existing trust.

However, an exemption is available where an asset is transferred and the beneficiaries and terms of both the transfer trust and the recipient trust are the same.

It may be possible, therefore, to avoid CGT on the transfer of an asset between two related trusts, provided the trusts are almost identical.

The Tax Office has recently released a draft tax ruling which explains what is required in order for the 'beneficiaries and terms' of two trusts to be considered the same so as to be exempt from CGT events E1 and E2.

Broadly, the following features **must** be the same for the two trusts at the time of transfer:

- the beneficiaries must be the same;
- the beneficiaries must benefit in the same way;
- both trusts must have the same vesting date;
- both trusts must be governed by the same state laws; and
- the terms of the trusts must be the same.

The features of the two trusts that **do not** need to be the same include:

- the trustee;
- the names of the trusts;
- the commencement dates of the trusts;
- the settlor; and
- the trust property.

If the trusts have an appointor or guardian, the Tax Office takes the view that the identity of those parties must be the same for both trusts. Consistency is also required in relation to family trust elections.

- **CAUTION:** Taxpayers need to consider the application of other taxes such as stamp duty when transferring assets between trusts. A detailed review of the relevant deeds will also be required to ensure that the CGT exemption is available.

Trust Distributions of Income or Capital

The Tax Office has recently issued a replacement practice statement that describes how net capital gains derived by a resident trust estate will be taxed.

The rules concerning the tax treatment of trust income have not been updated since CGT was introduced in 1985 and, therefore, there has been significant confusion.

The practice statement explains the following approaches that may be used in certain circumstances:

- **Proportionate approach:** Requires that a beneficiary be assessed on trust capital gains in proportion to their share of the trust income.
- **Capital beneficiary approach:** Broadly, allows the capital gain to be assessable to a beneficiary who has the entitlement to the capital gain.
- **Trustee approach:** If the capital gain is not included in the share of the net income of a beneficiary, the trustee will be assessed on the capital gain.

Each approach requires satisfaction of additional conditions, and beneficiaries and the trustee will be required to agree on the approach to be followed.

Super Contributions and Part IVA

The Tax Office has recently released a tax determination indicating that general anti-avoidance rules (Part IVA) will generally not apply to a situation where a taxpayer pays excessive superannuation contributions for a related employee.

The deductibility of superannuation contributions for employees is covered by specific provisions and is subject to age-based limits.

Unlike excessive remuneration payments to shareholders and associates, there are no specific rules which require that superannuation contributions are reasonable in amount having regard to the value of the services rendered.

The current age-based limits per income year are as follows:

- under 35 — \$14,603;
 - 35 to 49 — \$40,560; and
 - 50+ — \$100,587.
- **TIP:** Subject to all of the relevant circumstances, superannuation contributions should be considered as a useful tax and retirement planning tool.

Amended Assessments Not Excessive

In a recent case, the Administrative Appeals Tribunal (AAT) held that, while a company didn't derive certain payments until the services were performed, the taxpayer failed to prove that the amended assessments were excessive.

The AAT agreed that the taxpayer had a valid point in arguing that amounts received in advance from the government should not be treated as income until the time that the services were provided, but found that the taxpayer had not discharged their burden of proof that the assessments were excessive.

Assessability of NZ Company Income

In a recent interpretative decision, the Tax Office has indicated its view that a home office maintained by an Australian employee of a New Zealand company would amount to an Australian permanent establishment. This would mean that the New Zealand company would be subject to Australian tax.

Foreign tax authorities may draw similar conclusions in relation to Australian taxpayers with a presence offshore.

In the case under review, the taxpayer was a New Zealand resident company that was not a resident of Australia for tax purposes. The company sold goods in Australia through two employees who operated from rooms in their respective residences. The company did not rent or own any business premises in Australia of its own.

Under Australian tax law, the assessable income of a non-resident taxpayer includes all income directly or indirectly from Australian sources during the income year, and this includes income from the sale of goods.

Under the Australia–New Zealand Double Tax Agreement, the business profits of a New Zealand enterprise shall only be taxable in New Zealand unless the enterprise carries on a business in Australia through a permanent establishment.

Based on a US court decision, the Tax Office held that a home office was a fixed place of business through which an enterprise is carried on and, as such, constituted a permanent establishment.

Consequently, the income was held to be assessable in Australia.

- **CAUTION:** Taxpayers with even a very minor presence offshore should carefully consider any potential foreign tax liabilities and seek professional advice.

GST — Creditable Purpose and Adjustments

The Tax Office recently released a draft GST ruling in relation to determining the extent of a taxpayer's creditable purpose. A creditable purpose is defined as the **purpose of carrying on its enterprise**. This is important in relation to claiming input tax credits.

In the draft ruling, the Tax Office explains its view on the meaning of 'creditable purpose' and 'extent of creditable purpose'.

As a result of the draft ruling, taxpayers will be able to more accurately determine the extent of their creditable purpose in making acquisitions and importations, thus enabling them to claim the correct amount of input tax credits.

This draft ruling also provides examples of apportionment methods that can be used in determining input tax credits plus any adjustments if there is a change in the extent of creditable purpose at a later point in time.

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