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IN THIS ISSUE**Am I operating my business from the right structure?****Proposed Restrictions to GST Refunds****CGT events occurred on transfer of land pursuant to joint venture - Taras Nominees****LAFHA Transitional Period Ending on 30 June 2014****2014 FBT Package****MKT Accountant's Network 2014 Footy Tipping****MKT'S Premium Accountants Network**

AM I OPERATING MY BUSINESS FROM THE RIGHT STRUCTURE?

There are a number of reasons why a business owner may need to reconsider their current business structure.

The most important is asset protection, whereby a business structure set up years ago, such as a sole trader or a partnership, may now pose unnecessary risks to the proprietor or partners.

It is not unusual for businesses to outgrow their existing structures. An existing structure may no longer be appropriate because the growing business is accumulating significant/valuable assets which may be put at risk due to unexpected events, such as litigation or creditor action. Restructuring an existing structure into a company may also be a preliminary step to access to a broader range of equity participants, including new business partners or key employees. It may also be a pre-exit step for an owner as part of a succession plan and the selling down of the business.

Recent changes in tax law as well as the ATO's changed interpretations also mean some existing business structures may no longer be appropriate. In particular, for a trust, the ATO's changed approach in treating unpaid present entitlements in favour of corporate beneficiaries as loans subject to Division 7A has caused many clients who operate their business through a trust to reconsider using a trust and consider moving the business to a company.

Managing trust cash flow, particularly during a growth phase where working capital is in short supply, has become significantly more complex under the ATO's new view, and this together

with the Government's ongoing reform of the taxation of trusts has caused many trust structures to seek to question whether the trust structure is still suitable.

If you would like to discuss the issues currently faced by your current business structure please contact Sean Pearce

PROPOSED RESTRICTIONS TO GST REFUNDS

On 17 February 2014 the Government released exposure draft legislation on the proposed changes to restrict refunds of overpaid GST. The proposed restrictions were previously announced on 26 June 2013 by the previous Government.

Essentially, the draft legislation proposes to amend the GST Act and the Tax Administration Act to ensure that excess GST paid by a taxpayer is only refundable in certain circumstances. The changes apply in situations where a taxpayer's net amount for a tax period includes an excess GST payable as a result of:

- Error in calculating the GST payable;
- Mischaracterising a supply or arrangement; and
- Any other reason,

if the overpaid GST was passed onto the recipient of the supply.

The Commissioner would have discretion to refund overpaid GST in exceptional circumstances. The key features of the proposed law are as follows:

- Restrictions on refunds - The restriction will apply to excess GST, including as a result of incorrectly: treating a supply as fully or partly taxable; or calculating the amount of GST payable on a supply. However, the restriction on GST refunds will not apply unless the excess GST is also passed on to another entity. Where the restriction does not apply a refund of the excess GST will be available;
- GST always payable - An amount of excess GST will be taken to have always been payable and on a taxable supply if it has been passed on to another entity. There will be no restriction on refunding excess GST where the overpayment has not been passed on to another entity. If the taxpayer has not passed on that amount to the recipient, excess GST will not be taken to have always been payable and will therefore be refundable;
- Commissioner's discretion - Taxpayers determine their entitlement to a refund of excess GST under specified conditions. If these conditions are not satisfied, taxpayers are not entitled to a refund of the excess GST. However, the Commissioner will retain a

discretion to refund an amount if the denial of a refund would be inconsistent with the principle that excess GST should not be refunded if this gives an entity a windfall gain. The discretion will only be able to be exercised on application by the supplier in an approved form;

- Review of Commissioner's decision - Taxpayers will be able to seek a merits review of the Commissioner's decisions made under s 105-65. Taxpayers will also be able to seek a merits review under the new provisions of any assessment which includes an amount of excess GST.
- Where the recipient is reimbursed - Where a taxpayer reimburses excess GST to the recipient, the provision will stop deeming the excess GST to be payable. This will be accounted for as an adjustment event for the supplier. If the recipient is registered, there may also be an adjustment event for the recipient.

We will keep you informed of any proposed changes as and when they are passed.

If you would like to discuss any GST refunds or current GST issues you may have, please contact Mimi Ngo.

CGT EVENTS OCCURRED ON TRANSFER OF LAND PURSUANT TO JOINT VENTURE - TARAS NOMINEES

The Federal Court (Kenny J) has held that a taxpayer made a capital gain under CGT event E1 and A1 when it transferred land to a trust. The taxpayer and two adjoining landholders executed a joint venture agreement by which they each agreed to transfer land to the trustee of the joint venture, to develop the whole of the land by building retail, commercial, industrial and residential premises.

Upon the sale or other disposal of any part of the land, a landholding party was entitled to be credited with an amount based on agreed prices. The parties were not entitled to a transfer back of their respective portions of the land.

Contrary to the stated intention of the taxpayer that there was to be no change in beneficial ownership of the land, the Court held that the effect of the transfer was that the company held the land upon trust for the taxpayer and the two other parties equally and collectively.

In holding that CGT event E1 occurred, Kenny J dismissed the taxpayer's argument that it did not create a trust over the land that it had transferred by "settlement". The taxpayer was also unsuccessful in arguing that the exception in s 104-55(5) applied because it was the sole beneficiary of the trust over the land that it had transferred and that it was absolutely entitled to that land against the trustee of the trust. Kenny J also considered that CGT event A1 had occurred (but not CGT event E2), although CGT event E1 was to be used as it was more specific to the taxpayer's circumstances.

Accordingly, the taxpayer made a capital gain at the date of transfer, notwithstanding that there was no monetary proceeds received at that time.

Taras Nominees Pty Ltd as Trustee for the Burnley Street Trust v FCT [2014] FCA 1 (Federal Court, Kenny J, 14 January 2014).

LAFHA TRANSITIONAL PERIOD ENDING ON 30 JUNE 2014

As you may be aware, there were major changes to the FBT treatment of living-away-from-home allowance ("**LAFHA**") or LAFH-related benefits, which were first announced on 8 May 2012 as part of the 2102 Federal Budget. The new rules apply to arrangements entered into on or after 1 October 2012¹.

However, transitional rules apply to existing arrangements entered into on or before 8 May 2012 and there has not been any material variation or renewal to the employment arrangement since. The transitional rules effectively postpone the application of the new rules until **1 July 2014**. This means affected employers now only have several months left to prepare until the new rules kick in.

Under the new rules, employees are required to maintain a home in Australia for their immediate use and enjoyment **at all times** whilst they are living away from home. This means:

- the employee must have a place where they usually reside **in Australia**,
- the employee (or their spouse) must have an **ownership interest** in the residence, and
- the residence must be available for **immediate use and enjoyment** at all times during the relevant period.

Where the above requirements are satisfied, the concessional FBT treatment applies for a further 12 months (e.g. from 1 July 2014 to 30 June 2015).

Affected employers should consider the following to minimise the adverse impacts of the new rules:

- whether the employees satisfy the requirements under the new rules and, thus, are able to extend the concessional treatment for a further 12 months,
- whether changes can be made to the employment arrangement to satisfy the FIFO or DIDO criteria,
- whether the existing arrangements can be re-arranged to utilise other FBT concessions, such as remote area housing, board fringe benefits and exempt property benefits, and
- whether the employees should be paid allowances in the form of salary/wages and deduct withholding tax on the allowances.

¹ Employees under FIFO or DIDO arrangements are exempt from the new rules.

Finally, any tax planning should also consider the potential application of the general anti-avoidance rules.

If you have any queries on the subject, please contact Peter Hong or Sean Pearce.

2014 FBT PACKAGE

MKT has prepared a number of documents that can assist you and your clients in identifying any potential fringe benefits provided to their employees, directors or their associates.

These documents are available for purchase directly from our website. As an added benefit, members of our Premium Accountant's Network will be able to download this package free of charge. Please contact Peter Hong for more information

MKT ACCOUNTANT'S NETWORK 2014 FOOTY TIPPING

MKT - Taxation Advisors would like to invite you to join our AFL Footy Tipping competition for the 2014 season.

The competition is free to enter and available to yourself and any member of your firm. Prizes are available for weekly winners as well as those who finish in the final top 3

Please visit the News section of our homepage at www.mkttax.com.au for details on how to join.

Season starts this Friday March 14 so register ASAP in order to get those first round tips in!

MKT'S PREMIUM ACCOUNTANTS NETWORK

Would you like Priority Access to Tax Advisors that spend every day dealing with Business Tax matters?

MKT Tax Advisors has been providing specialist tax support to Accountants, Lawyers and Financial Planners for over 20 years through our Accountant's Network and are proud to offer our Premium subscription that elevates the services and value we provide to you and your clients.

If you would like to know more, please contact Sean Pearce or Nigel Kingston on 9481 8448 or contact Janine for the Subscription Flyer.