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WHAT A COALITION GOVERNMENT MEANS FOR SMALL BUSINESS TAXPAYERS

With the Coalition winning the recent Federal Election, small businesses need to be aware of the ramifications to their bottom line of the tax changes that will follow. Some are good, others not so!

Let's start with the Good:

1. Car Fringe Benefits to stay as they are – the former Governments proposal to remove the Statutory Method for calculating the FBT liability of a car provided to an employee will not be introduced by the Coalition Government.
2. There will not be any “unexpected detrimental changes” to Superannuation during its first term;
3. The corporate tax rate will be cut to 28.5% from 1 July 2015;
4. Allow investors and shareholders to claim a tax deduction for exploration expenditure incurred by small exploration companies from 1 July 2014;
5. Repeal both the Carbon Tax and the Mining Tax.
6. Potentially “Scrap the Cap” being the \$2,000 self-education deduction cap proposed by the former Government – as per former Shadow Minister for Education, Christopher Pyne.

And then the Bad:

1. Abolish the \$6,500 instant asset write-off for Small Business entities – we expect the abolition to be tied to when the Mining Tax is actually repealed but are still awaiting confirmation from the new Government;
2. Abolish the immediate \$5,000 deduction for motor vehicles – timing as above;
3. Abolish the Loss carry back rules which currently allow companies to carry back up to \$1 million of 2013 losses to refund tax paid in 2012 – we expect the abolition to be for 2014 and subsequent years.
4. Paid Parental Leave levy of 1.5% for companies with taxable incomes in excess of \$5 million from 1 July 2015.

If you would like to discuss any of the new Government's proposed tax measures and how they may affect you, please contact Sean Pearce.

AMENDMENT PERIOD FOR INDIVIDUAL BENEFICIARIES

As a general rule, an individual taxpayer's income tax assessment may be amended within 2 years after the day the notice of the assessment ("**NoA**") is issued to the individual¹. However, this does not apply if the individual is a beneficiary of a trust that is not a small business entity for that year, or the trustee of the trust is not a full self-assessment taxpayer for the income year (e.g. public trading trusts). In this case, the amendment period is 4 years from the issue of the original NoA.

In *Yazbek v Commissioner of Taxation* [2013] FCA 39, the Federal Court upheld the Tribunal's view that a person who has received no income or benefit from the trust in a given year is still a beneficiary of that trust provided the deed states so.

Most discretionary trust deeds are widely drafted and include a broad range of individuals and related entities as "potential beneficiaries". Where the trust is not a small business entity or the trustee of the trust is not a full self-assessment taxpayer, the individual beneficiaries may inadvertently have a 4-year amendment period, instead of the standard 2-year period.

In addition, if individual taxpayers invest in managed funds or managed investment schemes which commonly use unit trusts as the investment vehicles, they are likely to be beneficiaries and, therefore, fall under the 4-year amendment period.

This acts as a double-edge sword for the Australian Taxation Office ("**ATO**") as well as individual taxpayers. Whilst this may allow the ATO more time to make amended assessments, it will also have the consequence of allowing more time for taxpayers to amend their prior year assessments.

This is particularly relevant in the more complex cases involving an individual who is a beneficiary of a trust where the ATO may require additional time to examine the taxpayer's affairs. Such cases may arise, for example:

- in audits of high wealth individuals and family groups (whether or not the individual received a distribution from the trust in that income year), particularly where there is a close familial relationship between the beneficiary and the trust, the beneficiary is actively involved in the administration of the trust and/or the beneficiary is able to influence the distribution of income or capital from the trust;
- where there is an adjustment to the taxable income of the individual emanating from compliance action in respect of the trust; or
- in other circumstances involving complexity, including complex audits relating to claims for work-related expenses which cannot be concluded within two years.

In those cases, the ATO may then take advantage of the fact that the taxpayer is a beneficiary of a trust and, thus, have a 4-year amendment period.

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

MARKET VALUE AND SMALL BUSINESS CGT CONCESSIONS

The Small Business CGT Concessions are one of the most generous tax concessions available to small businesses. However, the rules surrounding the concessions are complex. Given the magnitude of the concessions and the complexity of the rules, the ATO has been focusing its audit activities on small businesses claiming these concessions over the past few years.

One of the basic conditions to access the concessions is the \$6 million maximum net asset value test ("**the \$6 million test**"). According to the ATO, this test is the area where they find the most common mistakes made by small businesses. In particular, some taxpayers do not include the assets of related entities (e.g. affiliates and connected entities) in the calculation. If they do include the relevant assets in the calculation, they may have wrongly estimated the market values of the assets.

¹ s. 170(1) of the *Income Tax Assessment Act 1936* ("**ITAA 1936**")

Market value for the purposes of applying the small business CGT concessions is not defined in the Income Tax Acts. Under an established case law principle, market value means the price that would be negotiated in an open and unrestricted market between a willing but not anxious buyer and a willing but not anxious seller, acting at arm's length, who are both aware of current market conditions².

In practice, the ATO consider that market value should be assessed at the "highest and best use" of the asset as recognised in the market. This means where comparable arm's length sales data is available, this is generally considered the most appropriate method. Where a market exists for an asset, that market is widely considered to be the best evidence of market value of the asset.

The ATO also state that there is no one best valuation method. A particular valuation method may be more appropriate for some valuations than others, although each instance needs to be considered in light of the information available. In practice, it is common to use one or more secondary methods to cross-check or confirm the value derived from the primary method.

When the ATO undertake compliance activities or a tax audit, they particularly look for the following valuation process and documentation risk:

- appropriateness of the valuation methodologies used given the nature of the assets or business;
- qualifications of the person undertaking the valuation;
- use of other supporting valuation methods for cross-checking where appropriate;
- integrity of the process where the person undertaking the valuation can demonstrate appropriate experience, a documented basis of engagement subject to external regulation, and access to information;
- information supplied in the market valuation report to enable the ATO to understand the market valuation report; and
- other relevant documentation as required.

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

TIME LIMITS FOR GST REFUNDS

The guidelines for determining how and in what periods to correct GST errors changed on 10 May 2013. The new rules allow you to correct a 'credit error' (ie, under-claimed input tax credits (ITCs)) in a later period activity statement if:

- The credit error is corrected within the credit error time limit; (four years)
- You are not subject to GST compliance activity; and
- You have not corrected the GST error in another reporting period

We note that under the new rules credit errors are no longer subject to value limits so you can amend a GST error of any quantum, as long as the correction occurs within four years of the BAS period in which the error occurred.

However, if your client has an unclaimed refund that is more than 4 years old, there are stricter guidelines under which a GST refund will be paid.

Under section 105-55 in Schedule 1 to the Tax Administration Act, a taxpayer's entitlement to a refund ceases within 4 years after the end of the tax period to which an ITC is attributed, unless the taxpayer notifies the Commissioner of its entitlement to the refund. The notification can be by any means, including a GST return: s105-55(1)(a). The 4-year time limit also does not apply if within that period the Commissioner notifies the taxpayer ("in a notice of assessment or otherwise") that it is entitled to the refund: s105-55(1)(b).

In very limited circumstances, a refund may be payable even if the above rules are not satisfied if the Commissioner exercises his discretion.

Section 105-65 does not specify what factors are relevant to the exercise of this discretion. However Miscellaneous Taxation Ruling MT 2010/1 states that in exercising the discretion, the Commissioner will have regard to the following guiding principles:

² Spencer v The Commonwealth of Australia (1907) 5 CLR 418

1. The Commissioner must consider each case based on all the relevant facts and circumstances.
2. The Commissioner needs to follow administrative law principles such as not fettering the discretion or taking into account irrelevant considerations.
3. The Commissioner must have regard to the subject matter, scope and purpose of section 105-65.
4. The discretion should be exercised where it is fair and reasonable to do so and must not be exercised arbitrarily. The circumstances in which the Commissioner considers it may be fair and reasonable to exercise the discretion include, but are not limited to, the following:
 - (i) The overpayment of GST occurs as a result of an arithmetic or recording error made by the supplier. For instance, an entity correctly treated its supply as GST-free when making the supply to the customer. However, when filling out its activity statement the entity incorrectly included the supply as a taxable supply in the calculation of the net amount returned on the activity statement. In such circumstances it would not be necessary for the supplier to refund the recipient of the supply whether the recipient is registered or unregistered.
 - (ii) The overpayment of GST arises as a direct result of the actions of the Commissioner and the taxpayer has not had the opportunity to factor in the cost of the GST or otherwise pass on the GST, for instance through a gross up clause.
 - (iii) The supplier is able to satisfy the Commissioner that an amount corresponding to the refund will be, or has been, passed on to the party that ultimately bore the cost of the overpaid GST.
5. The discretion would generally not be exercised where it produces an unreasonable result, for example an asymmetrical revenue outcome. This could occur where, for example, a supplier reimburses a registered recipient for the overpaid GST but the Commissioner is unable to reclaim the over-claimed ITC from the recipient.

We are of the view that it is best to correct and claim unclaimed GST refunds within the 4 year time limit. In circumstances where the 4 year period is exceeded, evidence that the Commissioner was notified that the entity was entitled to a refund must adhere to strict administrative guidelines.

If you would like assistance in regard to claiming an unclaimed GST refund or any other GST matters, please contact Mimi Ngo.

GST FUNDAMENTALS COURSE

We are excited to announce and offer our new course in the GST Fundamentals. The course will provide participants with a detailed understanding of the GST system, how to prepare a BAS as well as focus on specialist topics on GST and property and contracts. This course is ideal for those:

- New to GST;
- Preparers of BASs; and
- All professionals who need to identify GST risks in client transactions to maximize their service delivery for clients.

We provide a "hands on" guide to accounting for, reporting and dealing with GST so that all facets of GST in business transactions are covered. At the completion of GST Fundamentals, participants will understand:

- Core concepts such as; Taxable sales, GST Free sales, input taxed sales, claiming GST credit;
- How to prepare a BAS
- Correcting GST mistakes
- GST & Property concepts
- What is a GST free Sale of a Going Concern
- GST Free sale of Farmland

We envisage delivering two 2-hour sessions in our boardroom on the 15th November 2013 and 22nd November 2013, from 11am to 1pm - lunch will be provided.

The total cost for the 2 sessions is \$500 (inc. GST)

Savings to PAN Members

For the GST inclusive price of \$300 for both sessions, PAN Members receive a \$100 discount per seminar off the full price charged to non-members.

Places are limited, so enrol now by emailing Rebecca.Drake@mkttax.com.au

The Presenter

The Program is presented by Mimi Ngo a Chartered Tax Advisor and CPA, who has over 12 years' experience in providing GST tax advisory and training support services to our corporate clients and accountants network firms. She has been regularly involved in presenting our Tax Q & A program and has presented to the CPA's North of the River CPA national convention.

If you have any queries regarding the Program, please contact Mimi Ngo on 9481 8448

PREMIUM ACCOUNTANT'S NETWORK - NEW SUBSCRIPTION PERIOD

Do You Need More Tax Support?

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

The MKT Premium Accountant's Network now has over 30 firms as members, who enjoy premium tax support from the team at MKT. If you would like to join them, our next 6 month subscription period starts 1 October 2013.

If you would like to know more, please contact Sean Pearce or Nigel Kingston on 9481 8448 or visit our Premium Accountant's Network page of our website to download the subscription flyer.

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.