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MKT TAXATION ADVISORS

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SUPERANNUATION MEASURES NOW LAW

The Government have finally passed its changes to the superannuation system, so now as advisers we are finally able to assist our clients in planning for the changes, given that most of them will now apply from 1 July 2017.

Some of the major changes that have now been passed include:

1. **$1,600,000 Balance Transfer Cap:**

The $1.6 million transfer balance cap is designed to limit the total amount of superannuation savings that can be transferred from accumulation phase into a tax-free retirement account. As at 1 July 2017, each individual will have a personal transfer balance cap reflecting the total amount they can transfer to the retirement phase, and to track this cap, each individual will have a transfer balance account. The transfer balance account is created when an individual first commences a super pension or other type of superannuation income stream.

To prepare for the transfer balance cap reforms commencing on 1 July 2017, members who are currently in Pension Phase with a balance greater than the $1.6 million cap may need to reduce amounts currently supporting superannuation income streams to comply with the new requirements. They might do this by withdrawing amounts from the superannuation environment (that is, by partially or fully commuting their superannuation interests), or by transferring value from the retirement phase to the accumulation phase. If they choose to do either of these, it will need to be done by 30 June 2017 to ensure that they remain within the cap when the law takes effect on 1 July 2017.

One implication of this change is that assets that were previously protected from CGT in Pension Phase may now not be. Where members have balances that are greater than the transfer balance cap they will be unable to have all their assets in pension phase and so a Capital Gain may result on the disposal of assets to pay out their member's entitlement.

Transitional provisions provide Capital Gains Tax (CGT) relief where a superannuation fund may elect for tax purposes to reset the cost base of assets at 30 June 2017. The conditions are that the assets must have been owned prior to 9 November 2016 and must be supporting a pension at 30 June 2017. An important issue to remember as well is that where the election is made it will be deemed that the asset is disposed of and re-acquired at market value. This will reset the cost base but more importantly it will also reset the acquisition date so the twelve month period to access the CGT discount will also restart. This may have adverse tax consequences if the asset in question is sold within 12 months of the reset acquisition date.

Another impact of the legislation is that from 1 July 2017 where ANY member of a fund has a total balance greater than $1.6 million the fund will no longer be able to use the segregated asset method to apportion earnings and taxes associated between member accounts.

2. **Lower Annual Cap on Non-Concessional Contributions:**

From 1 July 2017 the Non-Concessional Contributions Cap will be reduced from $180,000 to only $100,000 per annum. The 3 year bring forward cap will also be reduced to $300,000.

There are transitional rules which apply where a member has triggered the 3 year bring forward rule in either the 2015/16 or 2016/2017 financial years.

For members who triggered the bring forward rule in 2015/16 their total cap over the 3-year period 2016, 2017 and 2018 will be $460,000 ($180,000+$180,000+$100,000).

For members who triggered the bring forward rule in 2016/17 their total cap over the 3-year period 2017, 2018 and 2019 will be $380,000 ($180,000+$100,000+$100,000).

Where a member has only used part of the current $540,000 bring forward provisions they will be subject to the new caps from 1 July 2017. For example, a member who has made use of the current bring forward caps and contributed $250,000 in the 2016/17 financial year will be able to make an additional contribution $130,000 from 1 July 2017, assuming that their total member balance is under $1.4 million.

3. **Cap on making Non-Concessional Contributions:**

Another measure introduced as part of the overhaul of Non-Concessional Contributions is one that limits a member's ability to make contributions when their superannuation balance reaches $1.6 million. From 1 July 2017 once a member's superannuation balance reaches this amount they will be unable to make any further Non-Concessional Contributions.

Furthermore, the bring forward provisions will not be available for any member whose superannuation balance is more than $1.5 million and only a restricted bring forward amount will be available for members whose superannuation balance is greater than $1.4 million.

A welcome relief to the passing of the measures in their current form rather than as they were originally in the budget is that they don't apply until 1 July 2017. So for example, if a taxpayer made a non-concessional contribution of $540,000 in the 2016/17 financial year to utilise the 3 year bring forward provision they will not be in breach of the cap.

For any further information on these superannuation changes please call either ***Chris Schoeman*** or ***Justin McGovern***.

GST DUAL PURPOSE – RENTAL PROPERTIES STILL 'NEW RESIDENTIAL PREMISES'

In AAT Case *FKYL v FCT [2016] AATA 810* the Tribunal held that the properties where held for the dual purposes of leasing and the sale of new residential premises. As a result the 'five year rule' in S.40-75(2) of the GST Act treating a residential property as **not** being new residential premises after they had been leased for "at least" a five year period did not apply.

Thus GST applied on the sale of the four properties that had been built and leased for four years, then sold. It also held that the Taxpayer was not entitled to apply the margin scheme concession to reduce the GST payable.

Facts

Between November 2003 and August 2007, an individual taxpayer acquired four properties, built residential dwellings on these properties and leased them when construction was completed. She then sold the properties between January 2011 and August 2012.

Input tax credits (ITCs) were claimed by the Taxpayer in her March 2011 quarter BAS. Following an ATO audit the ATO determined that she was not carrying on an enterprise and her ABN and GST registration were cancelled. However, after the taxpayer objected to these decisions, the ATO determined that her GST registration should be reinstated, but that the sales of the four properties in question should be treated as taxable supplies of new residential premises.

The ATO's decision was determined on the basis that some of the dwellings had been simultaneously marketed for sale whilst being leased and that there were some periods where the dwellings were without a tenant. Due to the properties being held for a "dual purpose", the ATO argued that none of the dwellings were used **only** for making input taxed supplies (of residential rent) for a five year period.

The taxpayer's fall back argument was that if the disposals were treated as taxable supplies, they were subject to the margin scheme. However, the AAT held that the margin scheme did not apply as the Taxpayer was unable to satisfy the requirement under section 75-5 of the GST Act for written evidence of agreements between the purchasers and Taxpayer for the margin scheme to apply.

MKT Comment

Under section 40-75(2) of the GST Act (generally referred to as the 'five year rule') a sale of new premises is not subject to GST if the property is **not considered "new residential premises**". For this to apply, the residential premises need to have been applied **only** for making input taxed supplies (eg. leased) for **at least** a five year period. This five year period commences from the time the residence **is intended to be occupied** and is capable of being occupied as a residence.

In this case, the Taxpayer did not meet these conditions and the sale of the properties was held to be taxable supplies and subject to GST. She was however entitled to claim the ITCs on the construction costs of the property.

Importantly, property developers holding leased property they had initially intended to build then sell, need to review the actual current use of the property against their intended use and determine if they are holding the property for a "dual purpose". If so, GST will be payable when they eventually sell the property, however, they are entitled to retain ITCs they have claimed, subject to adjustments under Division 129 (changes of intended use).

Where a developer is not holding the property for a dual purpose, it will need to repay ITCs it has claimed and, upon the sale of the premises, determine if it will be making input taxed residential premises where no GST is payable.

If you would like to discuss any of the above further, please contact ***Mimi Ngo***.

NEW YEAR'S RESOLUTION – UPDATING MY ESTATE PLAN

For a number of years we have been pushing our own HWI clients and private groups to start the conversation on considering their Estate Plan and what they would like to see happen to their assets, their entities (including businesses) and their super before and after they die.

Believe me, it is not an easy discussion and can take some time to gain traction. But I believe it is a discussion we need to have at some point, even if it is in bite size pieces.

As your clients trusted advisor, you are perfectly placed to facilitate the process and act, primarily as the project manager, for the efficient and effective drafting of your client's Estate Plan.

So what does an efficient and effective Estate Plan look like?

In our experience, unfortunately there is no standard template of what one looks like but more so what it needs to consider. One thing is for certain is that is much more than just a Will.

It requires a full understanding of the financial and personal circumstances and wishes of your client in order to ensure that when those wishes are eventually acted upon, and they will be, that the consequences are known, expected and manageable.

A clear and powerful statement taken from Australian Succession Law: Commentary (Thomson Reuters) 2013 written by Haines QC, Englefield, Harland & Worrall is:

> *"The consequence of not having an estate plan ought to be considered so that it can be contrasted to what an estate plan can achieve.*
>
> *(a) First, a person without an estate plan is unlikely to have a will, or if they have a will, there is a high risk that they have a "simple" will that does not reflect a well-considered examination of their needs or their views. If they do not have a will, the distribution of their estate is subject to the intestacy provisions in the relevant jurisdiction or jurisdictions….*
>
> *(b) Second, in relation to Powers of Attorney, they will have no-one in the position of an*

Attorney to act for them in business and financial affairs when they are either away from their normal place of living or when they lose capacity;

(c) Third, in relation to their health, medical and lifestyle decisions, they will have no-one to act for them if they were to lose capacity;

(d) Fourth, in relation to their superannuation, family trusts, companies or other business structures, the effects on death will be unconsidered, and the effects on these structures and their family members from their death may not be what the person assumed would happen or wanted to happen if they had taken time to consider and reflect."

Christmas is a time when many clients finally have the time to think about themselves and their families, meaning the New Year can be a perfect opportunity for you to raise the effectiveness of their current Estate Plan. Why not make updating your client's Estate Plan one of your New Year's resolutions?

If you need any help in starting that conversation you can contact us to obtain a copy of our ***Estate Planning Roadmap*** or contact ***Chris Schoeman*** or ***Sean Pearce***.

MKT WEBINAR – PASSING FAMILY WEALTH TO THE NEXT GENERATION

Our latest webinar, **Passing Family Wealth to the Next Generation**, is now available to download from our website.

In this session, Sean Pearce and Chris Schoeman discuss issues including:

- Dealing with the issues of control when leaving assets to the next generation.
- What happens on death to assets owned personally?
- Dealing with company and Family Trust owned assets, especially businesses
- Dealing with superannuation and assets owned by an SMSF on the death of a member.

Please visit our website to view all of our latest webinars.

MKT CHRISTMAS MESSAGE

MKT wishes all our clients and colleagues a very Merry Christmas and Happy New year. We thank you for your continued support during 2016 and look forward to continuing to be of service to you in 2017.

Over the Christmas break our office will be closed from 12pm on Thursday 22nd December and will re-open from 8:30am on Tuesday 3rd January 2017.