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WHEN WAS THE LAST TIME YOU REVIEWED YOUR CLIENTS WILL?

Estate Planning is often just ensuring that your client's Will remains relevant and effective when it is needed.

No doubt you and your Client's lawyer thought long and hard about the implications for your Client, their family and their Estate when the Will was drafted. You reviewed their assets, their liabilities and those of the entities they control. You even considered what the Estate would do on your Client's passing and the specific assets that family members would receive. Importantly the tax implications of these asset transfers was also considered to ensure the family received exactly what was intended.

How long ago was that?

If it was more than 3 years ago chances are the implications and consequences you carefully considered back then are very different to what would happen now. The addition or removal of assets, liabilities, entities and even family members, can have a major impact on how an estate is dealt with where the Will does not address or contemplate these changes.

It is important that Clients regularly review their Will to ensure that it still provides the outcomes expected on your Client's passing and that assets tax effectively pass to beneficiaries. Whilst your Client's lawyer is best placed to draft and revise a Will, as an accountant you are best placed to assist the lawyer in understanding your Client's current financial position and ensuring that is tax effectively dealt with through the Will.

We encourage you to review your Client's Will against their current financial position and business structures to ensure that their wishes can still achieved efficiently and tax effectively.

If you require any assistance on reviewing the tax implications and effectiveness of your Client's Will or require a referral to an appropriate solicitor, please contact Sean Pearce or Chris Schoeman.

DETERMINING MARKET VALUE FOR THE CGT SMALL BUSINESS CONCESSIONS

The Capital Gain Tax ('CGT') Small Business concessions are one of the most generous income tax concessions available to small business owners. To access the concessions, taxpayers must satisfy a set of requirements. One of the basic conditions is that the net assets of the taxpayer and its associated entities must not exceed $6 million.

The values of the assets must be determined by reference to their market values. In most cases, the market value of an asset is the actual sale price of the asset. However, this is not always the case. For example, in Syttadel Holdings Pty Ltd and Commissioner of Taxation [2011] AATA 589, the Tribunal accepted that the market value of a marina was $5.3 million rather than the actual sale price of $8.9 million. In the case, the taxpayer submitted an independent valuation report of $4.5 million for the market value of the asset and, on the other hand, the Commissioner submitted that the market value of the asset was $5.3million. Interestingly, both parties agreed that the market value of the asset was significantly lower than the actual sale price of the asset, being $8.9 million. In the end, the Tribunal adopted the market value provided by the Commissioner and rejected the taxpayer's valuation.

However, in Excellar Pty Ltd and Commissioner of Taxation [2015] AATA 282, the Tribunal held that the appropriate market of the asset sold, a boarding house, was the actual sale price of the asset. The taxpayer argued that the market value of the property was $3.72 million based on an expert valuer's evidence of comparable sales in the area, rather than the actual sale price of $5.5 million. However, the Tribunal found that the buyer and seller were a willing but not anxious seller and purchaser of the property and, therefore, the selling price was the most relevant information that reflected the market value of the property.

Where the sale of the business assets involves an earnout arrangement, the task becomes more complicated. Earnout arrangements are commonly used in the sale of businesses whereby the buyer and seller agree that subsequent financial benefits (e.g. cash) may be provided, based on the future performance of the business or the related business in which the assets are used. Although the Government has recently released an Exposure Draft on the CGT treatment of earnout rights to address the uncertainty in this area, the Draft did not adequately address how the market value of the earnout rights are determined for the purpose of the $6 million test. We recommend taxpayers who are party to an earnout arrangement or are planning to use such arrangements seek professional advice.

If you have any queries in relation to this, please contact Peter Hong or Sean Pearce.

RIO TINTO LOSES APPEAL IN CLAIMING ITCS CASE

On 24 August 2015, the Full Federal Court dismissed Rio Tinto Services Ltd's (Rio Tinto) appeal against the decision of Davies J in Rio Tinto Services Ltd v FCT [2015] FCA 94. The case concerned a claim for input tax credits (ITCs) in respect of remote mining accommodation provided by Rio.

The Federal Court in its initial decision on February 2015, had dismissed Rio's appeal concerning its entitlement to ITCs for certain acquisitions relating to the provision of mining accommodation (employee/contractor housing) in remote areas of Western Australia.

This was a test case and the taxpayer, Rio Tinto Services Ltd, was the representative member for the Rio Tinto Ltd GST group, which includes Hamersley Iron Pty Ltd and Pilbara Iron Company (Services) Pty Ltd (PICS). Davies J noted that an acquisition was not a "creditable acquisition" to the extent it "relates to" making supplies that would be input taxed. Rio contended that it was entitled to ITCs of some $600k for acquisitions made by Hamersley (which owns around 2,300 houses and apartments in towns in the Pilbara) and PICS in providing and maintaining, residential accommodation for Hamersley's workforce in the Pilbara region.

Rio Tinto accepted that the provision of the accommodation was an input taxed supply and that there was a connection between the acquisitions and the provision of that accommodation. However, the company argued that the connection was not a relevant connection for s 11-15 purposes to determining whether there was a "creditable purpose" to claiming the ITCs related to the provision of that accommodation. Effectively Rio argued the accommodation was provided as part of its mining operations and not an "end commercial objective" in itself.

The Court disagreed. In the Court's view, the acquisitions in question all had a direct connection with Hamersley's provision of leased accommodation and that connection constituted a sufficient material relationship for the purposes of s 11-15(2)(a). It held the acquisitions were not made for a "creditable purpose" as the provision of residential accommodation was an input taxed supply.

This case again reinforces the Tax Office view that the supply of residential accommodation is input taxed regardless of the reasons or purpose for making the supply and as such, acquisitions related to this type of supply will not be "creditable acquisitions". It follows that ITCs on these acquisitions will not be claimable.

If you would like to discuss these matters further, please contact Mimi Ngo.

TIME TO ACT ON LICENSING REGIME RUNNING OUT

The current Accountant's exemption is due to run out in 9 months' time meaning practices have now got a very limited timeframe with which to not only decide how they wish to act, but also implement their strategy prior to 30 June 2016.

Accountants are currently allowed to provide recommendations to set up and administer a SMSF, provided no other form of financial advice is provided. This is specifically permitted under Reg 7.1.29A for recognised accountants to advise a client who is likely to become a trustee, a director of corporate trustee or a person who controls the management of the SMSF. Accountants are also generally able to provide factual information on different superannuation options available, which must not be specific to a client's circumstances. However, if the factual information is presented in a manner that may be interpreted to suggest a recommendation, it will still constitute financial advice.

If remuneration is paid for the communication, it would further establish the fact that it is financial advice. However, Reg 7.1.29A will be repealed and is only effective until 30 June

2016. Accountants will not be able to provide advice on the acquisition or disposal of any super product from 1 July 2016. Not obtaining a licence would mean walking on eggshells when you communicate with your clients on superannuation and risking breaches of the Corporations Act. This will have significant ramifications for many practices and they will need to consider and act on their options quickly.

If you wish not to become licensed you will need to keep in mind when talking with clients that certain areas will be off limits. Among other things, you should:
Recognise and avoid dangerous client questions that tempt 'advice' answers;
Understand how to change opinions into factual information that still provide value;
Identify which part of the accountant's current SMSF services is not financial product advice e.g. advising on SMSF tax requirements;
Know when to refer clients on to a financial planner for advice;
If you don't, you could be at risk of a breach of the Corporations Act requirements that prevent you from providing advice without a licence. Accountants also should not be fooled into thinking they can establish SMSFs on an execution-only basis, without advising clients about the suitability of an SMSF. While SMSF establishment is exempt, ASIC is likely to scrutinise this activity closely to find accountants who are still recommending SMSFs off the books or by implication.

Accountants who wish to act and be compliant with the new regime will need to either become an authorised representative of a dealer group or have their application for a limited licence approved by ASIC.

If you wish to get your own licence ASIC has warned that the application should not be left to the last minute. They have indicated that if they do not receive your completed application by 1 March 2016, you risk not having the application assessed prior to the June 30 deadline.

This means that you need to ensure that any required training to become RG 146 compliant is completed as soon as possible so your application and any additional requirements can be made and the completed application lodge prior to the deadline.

ASIC have indicated that of the license applications lodged so far, 50% have been rejected due to insufficient information being provided, so it is important that sufficient time is available to prepare the application and ensure it meets all of ASIC's requirements.

If you are yet to decide how you will tackle the expiration of the accountant's exemption now is the time to "get cracking" as you are rapidly running out of time.

If you have any queries in relation to this, please contact Chris Schoeman.