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PROPOSED SMALL BUSINESS RESTRUCTURE ROLL-OVER RELIEF

Following the 2015 Federal Budget announcement, the Government has recently introduced draft legislation to broaden the availability of roll-over relief for small businesses. The proposed legislation will provide much more flexibility for small businesses to change their existing business structures, such as from individuals or companies to family trusts, trusts to trusts, without being subjected to adverse income tax outcomes. In addition to Capital Gain Tax ('CGT') assets, the roll-over relief will also extend to trading stock, depreciating assets and revenue assets.

There are broadly two types of entities that may be eligible for the roll-over:

1. An entity that satisfies the small business entities definition (that is, the aggregated turnover is less than \$2 million) **and** the Maximum Net Asset Value ('MNAV') test in the income year in which the transfer takes place.
2. An entity that is an affiliate of, or connected with, a small business entity for the income year that satisfies the MNAV test at the time of the transfer.

The second type may access the roll-over in relation to CGT assets that satisfy the requirements relating to passively held assets that are used by the small business entity in their business.

The roll-over requirements are broadly similar to the requirements under the existing roll-over relief provisions. One key additional requirement is that the transfer must not have the effect of changing the ultimate economic ownership of the asset or assets transferred, which is the individual who, directly or indirectly, beneficially owns an asset. If there is more than one such individual, those individuals' share of that ultimate economic ownership must be unchanged, maintaining proportionate ownership in the asset.

In the case of discretionary trusts, a transaction will be taken as not having the effect of changing the ultimate economic ownership of assets where:

- immediately before or after the transaction took effect, the asset was included in the property of a discretionary trust that was a **family trust** (that is, by making a Family Trust election); and
- every individual who, just before or just after the transfer took effect, had ultimate economic ownership of the asset was a **member of the family group** of that family trust.
- The draft legislation is proposed to apply from 1 July 2016.

The proposed legislation is a welcome move and will provide more tax planning opportunities for small businesses and their tax advisers in considering their current business structures. In addition to the proposed roll-over relief, consideration should be given to the availability of existing CGT Small Business concessions as they may crystallise the capital gains and provide cost base uplifts. Finally, consideration should also be given to the transfer duty implications of undertaking such restructures.

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

WHAT DOES THE ATO DO IF YOU ARE LATE PAYING YOUR EMPLOYEE'S SUPER?

If an employer is late making the required amount of super contributions to an employee, the employer is liable for the super guarantee charge (SGC), and they may need to lodge a superannuation guarantee charge statement.

The ATO has recently released details of their "practical compliance approach" which explains the circumstances when they are unlikely to take action against generally compliant employers for the lodgment of SGC statements.

If employers are experiencing difficulties in implementing their SuperStream solution and believe they may miss a super guarantee quarterly due date, they should make paying super guarantee their first priority.

Practical compliance approach

While the law requires employers to lodge an SGC statement, if they do not make the required amount of super contributions to a super fund by the end of the contribution cut-off date, the ATO may not check the current compliance of those employers who are viewed as low risk (as a result of having a good compliance history) and who have appropriately compensated their employees. The compensation in this instance should be an additional super contribution to reflect the amount of interest similar to that which the employees could reasonably expect to have received if the super contributions had been made to the fund by the due date. As a guide, the SGC nominal interest rate is 10% per annum.

Ongoing late payment of super contributions due to cash-flow issues or other reasons would indicate a poor compliance history.

Employers who make a one-off late super contributions payment, within one month of the contribution cut-off date, are considered low risk, and therefore the ATO are unlikely to take compliance action against them, especially if the additional contribution to 'top up' the employee's super fund account includes a reasonable amount of interest.

If the late super contribution is a one-off, and the contribution was made more than one month after the contribution cut-off date, the ATO is likely to still consider this low risk and may decide not to take compliance action against those employers who fail to lodge an SGC statement if the affected employees have been appropriately compensated for lost earnings. If employers choose not to lodge SGC statements, they should consider making an additional contribution (based on a 10% p.a. interest rate) into the super fund as compensation for lost earnings on the late super contribution from the contribution cut-off date up to the date the contribution is actually made.

If you need any assistance in keeping your client's obligations on track with the ATO please call us.

TAX AND THE CHRISTMAS PARTY

The costs (such as food and drink) associated with Christmas parties are exempt from FBT if they are provided on a working day on a client's business premises and consumed by current employees.

However a taxable fringe benefit will arise in the following circumstances;

1. Where an associate of an employee who attends the party, unless the minor benefits exemption applies; and
2. Where the Christmas Party is held off premises, unless the minor benefits exemption applies;

Minor Benefits Exemption

Where you provide a Christmas party for your employees and their partners you don't add the costs together, but instead look at the cost of the benefit provided to each person. Each benefit that is less than \$300 (incl GST) may be a minor benefit and exempt if certain conditions are met.

The minor benefits exemption **can** apply provided you don't use the 50/50 method in determining your entertainment fringe benefits.

Gifts provided to employees at a Christmas party

All benefits associated with the Christmas function should be considered separately to the Christmas party when considering the minor benefits exemption. For example, the cost of gifts such as bottles of wine and hampers given at the function should be looked at separately to determine if the minor benefits exemption applies to these benefits.

Tax deductibility of a Christmas party

The cost of providing a Christmas party is income tax deductible only to the extent that it is subject to FBT. Therefore, any costs that are exempt from FBT (that is, exempt minor benefits and exempt property benefits) can't be claimed as an income tax deduction.

The costs of entertaining clients are not subject to FBT but are not income tax deductible.

Christmas party held off the business premises

The costs associated with Christmas parties held off your client's business premises (for example, a restaurant) will give rise to a taxable fringe benefit for employees and their associates unless the benefits are exempt minor benefits.

If you have any queries on the tax consequences of your upcoming Xmas Party, please contact Peter Hong.

THE ATO'S NEW RULING ON MINERAL EXPLORATION EXPENDITURE

In late October 2015 the ATO released a draft ruling on mining and petroleum exploration deductions, TR 2015/D4.

A long time in the making, the draft ruling has been welcomed as an up-to-date insight into how the ATO view exploration deductions, their last word on this being nearly 2 decades ago on the release of TR 98/23.

Analysis of the draft ruling reveals a debunking of a number of views previously held by the ATO, the profession and industry.

Probably the most significant change is the view that exploration expenditure is not necessarily capital in nature and therefore may be deductible under the ordinary deduction provision of section 8-1. It states that the capital allowance provisions in Division 40, which contain substantial slabs of exploration-related legislation governing deductibility of such costs, is not the only code to be applied in considering deductibility of exploration costs.

That ought to be welcome news to the industry but most tax advisers will recognise that the words 'may be available under the general deduction provision (section 8-1)' is not a cast-iron guarantee that section 8-1 will apply to all exploration.

The draft ruling also removes the bright line test of '*a decision to mine*' as the primary determinant of the character or nature of exploration expenditure. Broadly this test was previously used as a convenient line in the sand; anything incurred before that time will be deductible; anything after will be non-deductible.

Of course, reducing the importance of this test cuts both ways, the draft ruling noting that an amount '*incurred during what is sometimes regarded as the exploration phase of mining – that is, before a decision to mine has been made – does not determine its nature and character as*

'exploratory' ... Nor does it determine whether it is revenue or capital in nature'. But it does acknowledge that 'exploration expenditure may be incurred after a decision to mine has been made'.

In summary the draft ruling requires tax advisers when analysing deductibility under section 8-1 to go down the old fashioned and more difficult route of dealing with issues such as 'enduring benefit', 'nature and character of the advantage sought', 'does the expenditure go beyond evaluation of economic feasibility' etc. So whilst it does not necessarily make the deductibility analysis any easier, the rewards may be greater.

The draft ruling also meanders through Division 40 providing ATO views on such matters as the deductibility of economic feasibility studies and what is meant by 'operations in the course of working a mining property' including how it applies to mine extensions, expansions and augmentations. Examples 1 – 19, making up over half of the draft ruling itself, help in putting flesh on the bone by applying the ATO's views to real situations.

It will remain to be seen whether there are any significant changes post completion of the comment period (11 December 2015) but with the ATO having already extensively consulted with industry input leading up to preparation of the draft, one would expect any changes to be minor.

Please contact Walter Tieleman or Justin McGovern if you have any questions.

MKT CHARITY AND COMMUNITY PROGRAM

MKT are proud to announce the launch of our Charity and Community Program. At MKT, we are privileged to enjoy a safe and happy workplace and many other non-financial benefits. We recognise that many people, even within Perth, are not as fortunate as ourselves or do not have the same opportunities we are provided. It is for these reasons that we believe that we can make a broader contribution to our community.

As part of being responsible corporate citizens and doing our part to make our community a better place to live, we have committed to provide both monetary and non-monetary contributions to a number of charities in WA. In particular, we will offer our experience and provide free consulting and compliance services for eligible charitable organisations. The services include, but are not limited to, establishing a legal structure, applying for charity status with the ACNC, applying for various tax concessions with the ACNC and ATO, preparing and lodging the Annual Information Statements.

As you are part of our valued Accountants Network, we encourage you and your clients who are considering the establishment of a charitable fund or not-for-profit organisation or have existing organisations in need of assistance to contact us. Any request for our services under this program will be assessed by our committee for approval. Please contact Peter Hong or Sean Pearce to discuss what we can offer.

MKT'S 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 2015 and look forward to continuing to be of service to you in 2016.

Over the Christmas break our office will be closed from 12pm on Wednesday 23rd December and will re-open as normal on Monday 4th January 2016.