Tel: 08 9444 9711
Web: www.infocusaccounting.com.au

IN THIS ISSUE

TRUSTEE RESOLUTIONS NEED TO MADE BY 30 JUNE

POST-ELECTION DIVISION 7A LANDSCAPE

GST & CHANGES TO INTENDED USE OF RESIDENTIAL PROPERTY

ATO FOCUS ON UNPAID TRUST DISTRIBUTIONS

TRUSTEE RESOLUTIONS NEED TO MADE BY 30 JUNE

Why?

A written trustee resolution may be required because the terms of the Trust Deed often specify that the trustee must put in writing the discretion to "pay, apply or set aside" income in a particular year.

Where the trustee is a company, the Corporations Act requires certain decision making to be in writing, including the resolution to distribute income.

In addition, taxpayers have the burden of proof in relation to their tax affairs, especially in the event of a dispute with the ATO. A written record will provide better evidence of the resolution and avoid a later dispute with the ATO as to whether any distribution of income was effectively made by 30 June.

When?

The ATO has issued a Fact Sheet clearly titled "*Trustee resolutions must be made no later than 30 June"*, which states:

1. Trustee resolutions creating a Trust Entitlement must be made before 30 June;
2. The Trust Deed may specify that resolutions must be made at an earlier date, such as 28 June (last business day of the 2019 financial year);
3. Confirming the previous ATO administrative practice has ceased that allowed resolutions to be made up to two months *after* year end;
4. If the Trust Deed does not require a resolution to be in writing, then an unwritten decision before 30 June is valid but requires sufficient documentation to discharge the onus of proof;

5. Accounts do not have to be prepared at 30 June and a trustee resolution can prescribe a clear methodology (such as a percentage, fixed amount with or without a balance distribution); and

6. If no beneficiary has a valid Trust Entitlement, the income and gains will be taxable to the trustee at the top marginal rate plus Medicare levy, unless a valid Default beneficiary clause is present in the Deed.

As a result, making time to ensure a ***considered and effective*** resolution is made before the end of the year will be critical to ensuring you minimise your 2019 tax position. Please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711 if you would like to discuss any issues with respect to the preparation of your 2019 trustee resolutions.

POST-ELECTION DIVISION 7A LANDSCAPE

As published in our Summer Bulletin, the Government released a consultation paper in October 2018 on the proposed amendments to Division 7A of the *Income Tax Assessment Act 1936,* which deals with loans from private companies.

Most of the changes were proposed to be implemented from 1 July 2019. In the 2018/19 Federal Budget released in April 2019, the Government announced that these changes will be delayed to 1 July 2020.

With the re-election of the Coalition into Government, it will be interesting to see whether any of the previous changes announced will be further modified. The key changes, as they currently stand, are as follows:

1. Private companies making loans on or after 1 July 2020 will need to have a maximum term of 10 years.

2. Complying 25 year loans in existence as at 30 June 2021 will need to be converted to 10 year loans.

3. Pre 4 December 1997 loans in existence as at 1 July 2021 will become subject to Division 7A.

4. Unpaid present entitlements due to a private company that arose prior to 16 December 2009 ***may*** need to be placed on complying loan agreements effective 1 July 2020.

5. The interest rate applicable to Division 7A loans will be the *Small Business; Variable, Other Overdraft Indicator* lending rate from 1 July 2020. This rate is currently at 8.32% compared to the Division 7A benchmark rate currently at 5.2%.

We recommend undertaking a review of the existing Division 7A arrangements in place to commence planning for potential consequences arising from the new measures.

Please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711 if you would like to discuss how these proposed changes may impact your company and whether there are opportunities to limit its impact.

GST & Changes to Intended Use of Residential Property

As the end of financial year looms closer, now is the time to review residential property development projects and determine whether there has been a "change of intended or actual use of the property", which may require a GST adjustment.

Property developers should review projects where new residential property has been built for the purpose of immediate sale, but instead have now had to be leased due to changes in market conditions. This represents a change of intended or actual use of residential property which requires a GST adjustment.

Essentially, with the ATO continuing to actively pursue property developers who are required to repay input tax credits ("ITC"), **now** is the time to make adjustments.

The ATO requires that property developers periodically review their circumstances to determine whether there has been a change of use in property and if so, to repay ITCs based on a complicated series of adjustments.

Failure to make these adjustments, or incorrectly doing so, for the change of use can result in unplanned cash flow issues, interest charges and/or penalties from the ATO.

Basis for the Adjustment

Developers intending to sell new residential premises are generally eligible to claim the GST incurred on their costs during the project. However, ITCs are not claimable where there is a supply of a residential rental service as this is considered an input taxed supply of residential premises.

Consequently, where at the conclusion of a development project, there is a supply of residential rental of some or all of the premises/apartments built, instead of supplies of the property for sale, the developer is considered to have over-claimed their ITCs.

In these circumstances, the developer has effected a “change of intended use of the residential property”. An adjustment will arise to result in the partial/full repayment of ITC’s previously claimed insofar as it reflects the actual use of the property.

Where a developer is renting the property but is also holding the property for the purposes of selling, a “dual purpose” arises for the property thus held which will require a partial repayment of the ITCs.

A developer is required to make the first adjustment on 30 June, in the tax period that commences at least 12 months after the end of the tax period in which the purchase is attributed.

What to do?

Prior to the lodgement of the June 2019 quarter or monthly BAS, developers and their advisors should review their projects to determine where a change of intended use has occurred to ensure any GST adjustments are accounted for. Any adjustments will need to be made on a “per invoice basis” following the guidelines provided in *GSTR 2009/4 Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose*.

They should also ensure that they have appropriate evidentiary documentation to support their intention to make a taxable supply (ie. to sell the apartments/property) in the near future.

If you require assistance in these matters, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.

ATO Focus on Unpaid Trust Distributions

Over the past few years the ATO has been reviewing trust distributions made, but remaining unpaid, to beneficiaries with different tax profiles to the primary beneficiaries of the Trust. The ATO's concern has been whether these distributions form part of what is termed, a "Reimbursement Agreement".

Where the distributions are considered to be part of a "Reimbursement Agreement", the ATO is able to assess the Trustee of the Trust on that distribution. The Trustee will then be liable to tax at 45% of that distribution under s100A.

A key exclusion to the definition of a "Reimbursement Agreement" is an agreement that is made in the course of an ordinary commercial or family dealing.

In its 2016 guide[1], the ATO provides examples where arrangements do and do not constitute ordinary commercial or family dealings. Common features in the examples that **do not** satisfy "ordinary family or commercial dealing" include distributions to:

- A Beneficiary who was made presently entitled and pays a lower amount of tax than the person actually enjoying the economic benefit of that income;
- A Beneficiary that is a tax-exempt entity;
- A Beneficiary who is a non-resident of Australia and net income includes foreign source income or income subject to withholding tax in Australia;
- A Beneficiary that has tax losses or excess deductions;
- A restructure where a new class of beneficiaries are introduced with the above features.

Furthermore, senior ATO officers have recently presented a number of case studies regarding the possible application of s100A to what would be considered ordinary family tax planning, such as the distribution to adult children, where the amount remains unpaid, are loaned to other family members by the trust or is gifted back by the adult beneficiary.

The ATO are in the process of developing a Taxation Ruling dealing with the application of s100A that will focus specifically on the Commissioner's preliminary views on the exclusions from a 'reimbursement agreement' for:

  - Agreements not entered into with a purpose of eliminating or reducing someone's income tax, and

[1] https://www.ato.gov.au/General/Trusts/In-detail/Distributions/Trust-taxation---reimbursement-agreement/

- Agreements entered into in the course of ordinary family or commercial dealings.

The draft Ruling is expected in late 2019 and will be very keenly anticipated, especially now the Labor proposal of applying a 30% flat tax to Trusts will no longer proceed, ensuring the issue of tax planning through trusts remains a focus for the ATO and Treasury.

In the meantime, our recommendation is to review your trust distributions to ensure that where benefits are provided to beneficiaries, both directly and indirectly, they are correctly recorded against their entitlements.

If you do need some assistance, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.