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TRANSFER DUTY ON BUSINESS ASSETS IN WESTERN AUSTRALIA

One of the largest costs of purchasing or restructuring a business in Western Australia is transfer duty. Western Australia is one of the few remaining jurisdictions, together with Queensland and the Northern Territory, where transfer duty is still applicable to the acquisition of business assets. New South Wales, Victoria, South Australia, Tasmania and the ACT have progressively moved towards a land-based duty regime, under which duty is primarily imposed on transfers of land or interests in entities that hold land.

There is relief from income tax at a Federal level for the transfer of business assets when, for example, restructuring from a discretionary trust to a company structure. While businesses in most other states can benefit from these concessions without incurring transfer duty, Western Australian businesses are often prevented from undertaking such restructures due to the significant duty impost.

Western Australia previously undertook to abolish transfer duty on business assets from 1 July 2010. This abolition was legislated for in the Duties Legislation Amendment Act 2008. However, in 2009, the impact of the global financial crisis compelled the State Government to defer the abolition date by three years to 1 July 2013. This was given effect in the Revenue Laws Amendment Act 2013.

In light of the constrained fiscal environment, low growth in the GST nationally and other funding priorities, the Duties Legislation Amendment Bill 2013 to Parliament on 22 May 2013 was introduced, which unwound the abolition of transfer duty on business assets scheduled on 1 July 2013.

As it currently stands, more than six years after the previously scheduled abolition, transfer duty continues to apply to business assets in Western Australia.

While there has been little interest by the State Government to revisit the abolition of the duty, we are seeing relevant industry bodies increasingly lobbying the change. On 20 August 2019, The Tax Institute made a submission to the Treasurer to revisit the abolition. We are also aware that the Liberal Shadow Ministry are also canvassing local business concerns with the issues we are seeing our clients experiencing due to the transfer duty on business restructures.

As the Western Australian economy is showing signs of recovery, we would like to see the State Government following the other states by revisiting the abolition of transfer duty on business assets. We will be following any development on this issue closely.

Please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711 if you have any questions in relation to the above.

PSI CAUTION FOR CONTRACTORS

The Personal Services Income (PSI) statutory rules were introduced by the Government in 2000 as an anti-avoidance measure to prevent the 'alienation' of an individual's PSI. The 'alienation' of PSI includes splitting that income with other individuals and entities or retaining that income in a company and paying tax at the company tax rate. This is typically done by providing the personal services through a partnership, company or trust. The PSI rules were introduced to counter this practice among contractors.

Where the relevant requirements are satisfied, the PSI rules apply to ensure that an individual's PSI, derived mainly as a reward for an individual's personal efforts or skills, is included in his/her assessable income regardless of the terms of arrangement entered with the third party.

The difficulties in satisfying the rules are illustrated in recent cases, *Douglass v FCT* [2019] FCA 1246 and *Ariss and FCT* [2019] AATA 2958, where both taxpayers failed in overturning the ATO's position. Both taxpayers are professionals, an electronics engineer and IT specialist respectively. In the first case, the taxpayer operated through a partnership of himself and his wife. In the second case, the taxpayer entered into an arrangement where his client paid his fees to a discretionary trust. The trust then split the income 70:30 between himself and his wife. In both cases, it was held that the PSI statutory rules applied to include all of the income received by the partnership and the trust respectively in the taxpayers' assessable income for relevant income years.

On the other hand, another taxpayer successfully appealed against the Tribunal decision in the Federal Court, *Fortunatow v FCT* [2019] FCA 1247. The taxpayer, who provided his personal services through a company, obtained most of his work through various recruitment or similar agencies. However, the taxpayer also promoted his services through his active profile on LinkedIn and his marketing by word of mouth at industry functions. Initially, the Tribunal agreed with the ATO that the promotional activities were not enough to satisfy one of the requirements under the 'unrelated client test'. On appeal, the Federal Court held that the Tribunal misconstrued the provisions, allowed the taxpayer's appeal and remitted the matter back to the Tribunal for reconsideration in accordance with the Court's reasoning.

The recent cases above demonstrate the complexity of the rules and we note that the ATO is still active in this area. This reinforces the need to seek professional tax advice in dealing with the PSI regime in general. If you have any queries about the PSI regime, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.

GST - To GROUP OR NOT

When considering whether or not to group several entities for GST purposes, it is important to consider not just the administrative and current GST position of the entities, but the overall impact that forming a GST group will have on each member entity.

A GST group consists of two or more business entities that operate as a single business for GST purposes. To form a GST group, entities must satisfy certain requirements and the nominated group representative must notify the ATO.

The consequence of forming a GST group is that the entities that make up the GST group are effectively treated as a "single entity" (Division 48 of the GST Act) for various GST purposes. The effect of forming a GST group is that:

- the representative member is responsible for lodging a single GST return on the group's behalf;
- internal transactions between group members are generally ignored for GST purposes;
- all GST transactions made by the group with external parties (i.e. taxable supplies, creditable acquisitions, taxable importations) are effectively treated as being made through the representative member. However, the Tax Office expects tax invoices to be issued in the name of the entity that makes the supply, and not the name of the representative member;
- the representative member is responsible for any GST payment and related input tax credit, and for any adjustments that are due (except where a member has since left the GST group). However, the group members are still jointly and severally liable for the group's tax debts.

For GST groups, the representative member of the GST group is liable for the GST debts of the entire group. Additionally, all members of a GST group are jointly and severally liable for the GST payable by the GST group. However, the representative member and the other group members can enter into an indirect tax sharing agreement to limit a group member's exposure to joint and several liability to GST

Importantly, GST thresholds are applied for the group as a single entity and not to each member. The turnover limits (i.e. cash accounting, monthly tax periods) apply to the group as a whole and all members must be on the same reporting basis and GST period (ie. cash/accruals, monthly/quarterly).

Administratively, although the representative member is responsible for lodging the group's GST return, each member would still prepare its own BAS to substantiate the GST claims it makes.

Finally it is important to differentiate between GST grouping and forming a tax consolidated group. The two are not the same and grouping for GST does not mean the entity members are tax consolidated.

The above provides a snapshot of the implications of grouping. If you would like to discuss the matters further, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.
