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IN THIS ISSUE

LIFE AFTER BENEL – CORPORATE BENEFICIARY UPE'S

As many business owners would be aware, on 19 February 2025 the Full Federal Court unanimously decided that an Unpaid Present Entitlement (UPE) due from a Trust to a beneficiary was not a Loan for the purposes of Division 7A. [CoT vs Bendel [2025] FCAFC 15]

This decision, following the ATO's appeal of the 2023 AAT Decision in favour of the Taxpayer, effectively dismisses the ATO's long held view that by not calling on the UPE, a corporate beneficiary was providing financial accommodation, and therefore a loan, for the purposes of Division 7A.

The announcement by the Commissioner on 16 December 2009 of what was to become Tax Ruling TR 2010/3 effectively led to a change in how corporate beneficiaries were utilised by Trusts, and specifically Trusts that carried on a business.

The ATO's U Turn in 2009 also led to many business owners operating from Trusts seeking to restructure their affairs to transfer their business earning activities into a company.

Whilst the tax laws provided several tax effective options through the CGT Small Business Concessions and certain specific CGT Rollovers, in many cases either some tax was required to be paid or at the very least, funds had to be contributed into a taxpayer's superannuation fund. That is not to mention the impost of WA Transfer Duty on the transfer of these business assets, albeit there was effectively no change in the beneficial ownership or control of the business.

So where does Bendel leave us now?

Whilst we should celebrate the clear and concise judgement of the Court, it has created several questions for Trustees and their advisers going forward.

Can we undo Complying Division 7A Loan Agreements from prior years?

NO, the Loan Agreement is a legal document whereby what was a UPE has been converted into a loan for Division 7A purposes. It is our opinion that you must continue to comply with its terms.

What will the ATO do and can Bendel be overturned?

The ATO has until 20 March 2025 to seek Special Leave to appeal to the High Court. Until that time, we doubt the ATO will make any public comment and yes, if Special Leave is sought and obtained, the High Court could still overturn the Bendel decision.

What should we do with 2023 UPE's to corporate beneficiaries that were required under the ATO's ruling to be placed on complying loan agreements by the lodgement date of the 2024 tax return?

We recommend that you talk to us before any action is taken because the Bendel decision rules that there is no legal requirement to place these UPE's on complying loan agreements, however, see the answer to the above question as the matter may not be settled just yet!

What about 2024 UPE's?

Even under the ATO's recent position in Tax Determination TD 2022/11, no action needed to be taken in respect to these UPE's until the lodgement due date of the 2025 tax returns (likely May 2026). As a result, we will continue to record the UPE as a 2024 UPE in the accounts and wait for the judicial process to end.

Does that now mean I don't need to be concerned about UPE's due to corporate beneficiaries from my Trust?

Unfortunately, you still need to be concerned with these UPE's from at least two fronts. Firstly, if the Trust has loaned funds out to an associated, non-corporate entity (an individual or a trust) then Division 7A can still apply to this loan. Secondly, if the ATO are of the view that the trustee, when resolving to distribute income to the corporate beneficiary, intended for another party to benefit from those funds, then it may seek to tax the trustee on that distribution under section 100A.

If you would like to discuss this matter further, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.

Be conscious of the Tax Implications on Family Law settlements

The January and February period each year sees an influx of new cases into the Family Court as couples end their relationship post the Christmas Period.

Parties separating need to find a solution that satisfies both their needs but also navigate a minefield of Tax Issues which if not carefully dealt with can result in one or both parties receiving far less than they originally anticipated.

Capital Gains Tax

Unless exempted, a capital gain or loss may arise where an interest in property (an asset) is transferred from one entity (i.e. an individual, company or trust) to another, or from joint ownership to individual ownership, where that property was actually or was deemed to be acquired post 19 September 1985.

The transfer of assets will often occur for no **monetary** consideration, therefore the market value substitution rules will determine the consideration on disposal and on the corresponding acquisition.

CGT Rollover relief on marital breakdown

Rollover relief automatically applies (i.e. no election is required) to transfers of assets by either a natural person to his or her spouse, or by a company or trustee of a trust to a spouse or former spouse where the disposal is made pursuant to either:

- an order of a court made under the Family Law Act; or
- a maintenance agreement approved by a court under section 87 of the Family Law Act; or
- an order under the law of a State or Territory relating to the breakdown of de-facto relationships; or
- the transfer of assets under a binding financial agreement or arbitral award entered into under the Family Law Act.

Briefly, where the rollover provisions apply:

- the CGT provisions do not apply to the disposal of the asset;
- pre-CGT assets of the transferor are taken to be pre-CGT assets of the transferee; and
- for the purposes of determining the CGT consequences on disposal of post CGT assets of the transferor, the transferee is deemed to have paid consideration for the acquisition of the asset equal to the cost base, or reduced cost base of the asset to the transferor, as appropriate, at the time of the transferee.

Significantly, sections 126-5 and 126-15 of the 1997 Act do not deal with transfers between or into entities, yet it does deal with a transfer from an entity to an individual spouse.

Transfer Duty (WA)

In most circumstances, nominal duty (usually $20) can apply to the transfer of all dutiable property pursuant to a Family Court Order or Binding Financial Agreement ("BFA").

The WA Duties Act 2008 provides an exemption for a dutiable transaction to the extent that it is effected by certain matrimonial or de facto relationship instruments. For example, if under a BFA entered into during a marriage, a husband agrees to transfer dutiable property to his wife if the marriage ends, duty is not chargeable in respect of that dutiable transaction contained in the financial agreement.

Specifically, if the parties have entered into a BFA that satisfies all of the requirements of the Family Law Act 1975 and the property is then transferred in accordance with the BFA, nominal duty may apply to the instrument that transfers the property.

This exemption applies to both married couples and those who are in a de facto or domestic relationship.

It is incumbent on family lawyers to ensure they understand and account for tax issues when dealing with family disputes and many will seek the advice of their accountant, so it is important to ensure that all matters relevant are raised and quantified especially where a rollover is not going to be available and tax liabilities incurred in relation to a financial agreement are carefully quantified.

If you would like to discuss this matter further, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.

FOUR YEAR RULE FOR CLAIMING INPUT TAX CREDITS (ITCS)/FUEL TAX CREDITS (FTC)

A taxpayer has a four-year period in which to claim an ITC/FTC to which they are entitled.

The ATO takes a strict application of this four-year rule emphasising that there is no scope or discretion to extend this entitlement period. Once expired, the entitlement to ITC/FTC ceases and cannot be extended, so it is critical to be across these rules so that ITCs/FTCs are not unduly relinquished.

Essentially, an ITC/FTC must be "taken into account" during the entitlement period. The limiting provisions provide that your entitlement to an ITC/FTC ceases (unless an exception applies) to the extent that the tax credit has not been "taken into account" in an assessment during the 4-year entitlement period.

The ATO has recently issued *MT 2024/1- Miscellaneous tax: time limits for claiming an input tax or fuel tax credit (MT 2024/1)* which provides the Commissioner's view on how the four-year entitlement period rules operate. MT 2024/1 incorporates the Federal Court decisions in the Linfox[1] and Coles Supermarkets[2] cases and substantially updates the Commissioner's view on:

- when a credit is 'taken into account' in an assessment;
- whether that occurs within the four-year entitlement period; and
- how the rules relate to GST credits subject to an objection, amendment request and private ruling application.

The entitlement period commences from the original due date of the BAS and not the actual lodgement date/date of assessment. Importantly, there is no corresponding four-year expiry on GST liability. There have been cases where BASs were not lodged by the due date and ITC entitlements on purchases were denied on the basis that the entitlement period has expired. However, the taxpayer remains liable for any GST payable on sales included in the BAS.

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[1] Linfox Australia Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia [2019] FCAFC 131 (Linfox)

[2] Coles Supermarkets Australia Pty Ltd v Commissioner of Taxation [2019] FCA 1582 (Coles)

The ATO states that only a valid objection lodged within the four-year entitlement period will preserve and extend a taxpayer's entitlement to the ITC/FTC. To the extent that the objection decision or any subsequent review or appeal process finds that you were entitled to that tax credit and it is attributable to the period in dispute, your entitlement will not cease.

Significantly, at paragraph 69 the ATO states:

> '*Other processes such as requesting an amendment to an assessment or applying for a private ruling do not provide the protections that exist for the objection process.*'

The ATO's approach appears quite restrictive from the examples provided in MT 2024/1. For example, the ATO considers that the non-claimed portion of an ITC has not been 'taken into account'. This is of significance where there has been a conscious decision to exclude an amount because full ITCs may not available. In these instances, the Commissioner takes the view that these types of ITCs have not been "taken into account".

Crucially, where ITC/FTC claims have been held off due to uncertainty on entitlement issues, it would be best to review these decisions in light of the limitations and requirements of the four-year rule so that these claims are not inadvertently abandoned due to the passage of time and the technicalities of these rules.

If you would like to discuss these matters further, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.

SUBSTANTIATION IS NOT JUST FOR DEDUCTIONS

The Australian tax system is a self-assessment system. We prepare and lodge your returns, then pay your tax or collect your refund. It is possible to go years or even decades, without receiving any enquiry by the ATO. Should an enquiry or audit come your way, you're likely to be asked for proof around a range of transactions, and not just in relation to tax deductions.

So the question is, have you kept appropriate records to substantiate your transactions?

In relation to an income tax deduction, the rules are relatively well understood. Do you have receipts, logbooks for the private use of a car, travel diaries, and can prove you actually paid for the expenses?

What about income though?

There is a plethora of ATO data matching for individual and business income, and items like dividend statements, PAYG summaries, invoices raised should all be retained. What if we extend our view of what the ATO may look into and consider that any third-party deposit received into a bank, loan, or credit card account may be queried.

Do you have the appropriate records to show what those deposits actually are?

Where an ATO query or a notice of assessment has been raised by the ATO in relation to an unexplained deposit, the onus of proof is on the taxpayer to prove that such an assessment is excessive or otherwise incorrect.

In a recent case[3] the ATO queried $735,800 of deposits that were received by a Trust. The Trust held property investments and disclosed its income and expenses from its property investment activities, however the ATO increased its taxable income by $735,800. Unfortunately for the taxpayers, it was not up to the ATO to prove what the deposits were, it was up to the taxpayers to prove what they were and that they were not income.

While it was found that the deposits were not income from the property investments of the trust, the taxpayers could not provide sufficient evidence to prove what the deposits actually were. Consequently, the taxpayers could not prove that the deposits were not income of the trust, and the assessments stood.

As can be seen from the above case, when thinking about substantiation, broader matters must be considered. Particular attention should be given to related party transactions and how they can be proven. The ATO expects that all transactions, including those with related parties, will have supporting documentation.

Let's consider a few scenarios.

Deposits received from overseas are routinely queried by the ATO. Often these are in the form of gifts or loans and therefore would not ordinarily be assessable income. The documentation required to substantiate these transactions can include legal deeds of gift or loan, formal identification of the donor or lender, copies of the donor's bank statements and other financial records of the donor or lender. This may sound excessive, perhaps even beyond the power of the taxpayer to access, however having these items to prove the substance of the transaction could well be worth the effort to obtain them.

When dealing with inter-entity group deposits, has sufficient evidence been kept to prove what those transactions actually were? The ATO has made various public statements reminding taxpayers that all entities are required to keep appropriate records of their transactions, including those with related party entities.

Some deposits from related party entities may be for the repayment of loans the taxpayer made to the entity. These loans may be recorded in the balance sheet of the entity. During an audit though, the ATO may query the existence of the loan and ask for proof that the taxpayer actually made the loan to the entity.

This can be an issue where the loan was made many years ago, so it can be prudent to keep records such as bank statements or otherwise that show how the taxpayer funded the loan to the other entity.

The ATO has taken a number of taxpayers to court recently in matters concerning the burden of proof relating to unexplained deposits. In the majority of these cases, the taxpayer has not been able to meet their burden of proof that the deposits are not assessable income.

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[3] CoT v Liang [2025] FCAFC 4

Should the ATO make enquiries with you in relation to a deposit, you must have sufficient documentation on hand to prove that it is not assessable income. This may prevent the commencement of an audit or the raising of an amended assessment, so consider the investment of time up front to gather that substantiation as time well spent.

If you would like to discuss these matters further, please contact Andrew Lowry or Leonard Tebbutt on 08 9444 9711.