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Let's chat

Miscellaneous topical tax issues – February 2021

With:

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Information provided is general in nature; precise application depends on specific circumstances



Topics

- Tax effects of COVID-19 cash flow boosts – Stephen Page & Co
- When international tax meets the family trust – Nolan Sharkey



Tax effects of cash flow-boosts

- Retention v extracting
- Where retention:
 - Wages
 - Operating costs
- Listed as an expense on the profit loss statement



Tax effects of cash flow-boosts

- But what of the treatment of the cash flow boost?
- NANE income
- Effected via offsetting of PAYG liabilities
- Could also be sitting as a capital asset on the balance sheet
- Timing to reconcile cash flow boost?
- BDO suggested in financial year ending 30 June 2020
- Stephen Page, CTA, suggests otherwise
 - Record cash flow boost as specially denominated revenue item in the profit and loss statement
 - After deriving operating result but before arriving at the statutory trust profit -
> transfer the amount to the cash flow boost reserve, reported in the balance sheet's capital area
- Cash flow boost \neq distributable/trust law profit



Companies

- Director's signing resolutions authorising treatment of cash flow boost as capital
- Cash flow boost is part of the company's profit (or loss, if a loss is incurred)
- Doing so separates cash flow boost into a separate part of the company



Trusts

- Review the deed to determine what 'cash flow boost' would fall under
- If 'distributable income' equals 'tax income', then cash flow boost would be excluded
- If 'distributable income' includes 'accounting income'; then determine if cash flow boost is considered as income for accounting purposes
- It may be required to classify such cash flow boost as a 'cash flow boost reserve':
 - Cash flow boost received means debit cash at bank whilst crediting balance sheet's capital area
 - Evidence by retaining pdf of client tax portal report showing cash flow boost credit, with a note of the tax law background at the time.



Retention over extraction

- Benefits of ability to now have working capital in a discretionary trust without risk of
 - 100A
 - Beneficiary demands
 - Division 7A
- Company issues with extracting cash flow boost (no franking credits)
- Public perception



Extraction - trusts

- Cash flow boost as non-assessable non-exempt income
- Sits as capital (provided previous slides adhered to; hence a capital distribution)
- Where a unit trust, consider CGT event E4
 - Extraction of cash flow boost not relevant as E4 disregards NANE income
- For all trusts, consider section 99B
 - Subsection (1) brings in amount into beneficiary assessable income
 - Subsection (2) has exception to disregard 'if it had been derived by a taxpayer being a resident, would not have been included in the assessable income of that taxpayer of a year of income'
 - Stress the need to evidence now



Extraction - trusts

- Failure to extract via capital beings income streaming issues – *Bamford*
 - Cash flow boost considered income
 - Bamford says income is shared proportionate between all beneficiaries
 - Streaming only possible for franked dividends and capital gains

	Accounting	Taxable	Cash boost	Total
<i>Profit:</i>	<i>\$60,000</i>	<i>\$45,000</i>	<i>\$15,000</i>	<i>\$60,000</i>
Beneficiary 1	\$24,000			
Minor 1	\$416			
Minor 2	\$416			
DGR	\$9,000			
Company	\$20,000			
Spouse	\$6,168			



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Extraction - trusts

- Beware if distributing to:
 - intermediary trusts
 - companies



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Extraction - companies

- Assessable dividend



When international tax meets the family trust

- What is a trust?
- Trust law v tax law treatments
 - Trust law – no ‘entity’; but rather trustee acts as legal owner
 - Tax law – accepts trust as an ‘entity’
- South African trusts – administered by legislation and founder is different from the trustees and beneficiaries; failure to separate founder from trustee and beneficiaries means a trust may not exist
- American trusts – revocable v irrevocable trusts and grantor is responsible with funding the trust
- Chinese society – placing property in another’s name is common, although trust term is not used.



Trust residence

- A resident trust for CGT purposes:
*...if, at any time during the income year:
For a trustee that is not a unit trust, **a trustee** is an Australian resident **or** the central management and control of the trust is in Australia”*
- See section 955-1 1997 Tax Act and section 95(2) 1936 Tax Act
- Consider issue with central management and control for companies
- Consider role of ‘guardians/principals/protectors’ in terms of central management and control for trusts
- Note extended definition of trustee in section 6(1) 1936 Tax Act
(b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability



Listed country trust

- Non-resident trust: listed country or non-listed country
- If listed country - majority of listed country trust income not included in transferor trust regime (next slide)
- Listed countries include: UK, US, France, Germany, Canada, Japan and New Zealand
- Being a listed country trust does not mean the management is in that country; rather, it is ensuring all items of income or profit must be subject to tax in a listed country or be designated concession income in relation to a listed country
- E.g. Cayman Islands trust can be a listed country if all of its income is taxed in a listed country (e.g. US)



Transferor trust regime

- Division 6AAA of Part III of 1936 Tax Act
- The provisions of this Division are more specialist taxing provisions that focus on removing tax deferral opportunities that are available through the use of foreign trusts by Australian resident taxpayers. The provisions of this Division are however very broad and may encompass arrangements that would not ordinarily be regarded as giving rise to inappropriate tax deferral opportunities.
- The transferor trust provisions generally comprise two main types of operative provisions. The first of these, contained in subdivision 6AAA-B, provide for Australian resident beneficiaries to pay interest on any tax payable in respect of certain amounts on which they are assessed under section 99B of the 1936 Act in respect of a non-resident trust estate to the extent that the relevant amounts have not been subject to tax in the residence jurisdiction of the non-resident trust estate.
- Aside from the deemed interest provisions, the other main set of operative provisions that form part of the transferor trust rules in Division 6AAA of Part III of the 1936 Act are the attributable taxpayer rules. These rules attribute a share of the income of certain non-resident discretionary trust estates to an Australian resident controller of the discretionary trust estate.

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