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## AC Tax Desk

Issue No.1

### Australian corporate rate

In the 2014 Australian budget, it was indicated that the company rate would reduce by 1.5% with effect from 1 July 2015.

In early February, however, Tony Abbott made a statement that there would be a "small business tax cut" of up to 1.5%. This has been interpreted to mean the implementation of a two tier company tax rate model under which small companies will be taxed at 28.5%, while larger companies will remain at 30%.

This proposal is not popular and it will be interesting to see whether the Australian Government moves back to an overall company tax rate reduction.

### UK Pension and tax credits

Under the NZ/UK DTA, UK pension payments received by a NZ resident are taxable only in NZ. If UK tax has been paid in the UK on the pension, this will not be available as a tax credit in NZ.

You can only able to claim tax credits for tax paid in another jurisdiction to the extent you have a liability to pay that tax in that country.



### In Trusts we trust?



We have, over the past couple of years, been forced to scrutinise our use of trusts. This is primarily a result of the Law Commission's review of the Law of Trusts, but Inland Revenue's scrutiny of trusts as part of tax avoidance arrangements has also contributed to this.

What has become apparent is that while we all have trusts, many trusts are not administered appropriately. For instance, trustees do not act as independently as the position necessitates; and in many cases, the core objectives for having a trust are either forgotten or not communicated to the trustees.

Little consideration is also given to succession planning - we all have wills, but not many have a memorandum of wishes or similar document that sets out the purpose and objective of their trusts.

Outlined below are some questions that you should be considering in the context of trusts:

#### Trustees

- ◆ Do your trustees understand the terms of the trust? And are they adhering to these?

## Diamond v CIR (HC)

Mr Diamond is a former NZ soldier who worked in PNG and Iraq providing security services for the period 31 March 2004 to 31 March 2007. He and his wife were separated but their relationship remained close. He had four children and his parents/family lived in NZ.

During the years in question, he owned a half share in a number of properties and his wife held the other share. His ex wife and children lived in one property, the rest were investment properties. He did not live in any of the properties but he did stay with his ex-wife for 2 to 5 days to visit his children. Most of his foreign income was spent in NZ on mortgage payments and on his children.

The CIR took the view that while Mr Diamond was not a NZ tax resident due to the day count test (he was away for more than 325 days), he was tax resident due to the permanent place of abode (PPA) test.

The TRA agreed with the CIR.

The HC overturned that decision finding that Mr Diamond was not NZ tax resident. Clifford J made the following points:

- PPA means "to have a home in NZ". Mr Diamond did not have a home in NZ and he did not live in any of the houses that he owned as a home.
- While Mr Diamond had personal connections, as he did not have a home with PPA characteristics, these connections by themselves did not create a PPA.

While the decision is sound (and in my opinion should not have been the subject of dispute in any event), the CIR is appealing the decision.

- ◆ Who has the powers to replace or remove trustees? If it is the settlor - what happens when the settlor passes away?
- ◆ If your trust is an investment trust, do the trustees have the appropriate powers of investment? For instance, if the trust invests funds into the family business without any diversification - does this cause issues for the trustee?
- ◆ Does your trustee act independently or is there a settlor who still has control of the trust so that the trustees are simply rubber stamping decisions?
- ◆ If you have a corporate trustee, are the trustee decisions/resolutions documented properly? Alternatively, should you be using a corporate trustee? Or even a professional trustee entity?

### Succession planning

- ◆ Did you establish the trust so that the assets could be accumulated and subsequently distributed to your children? If yes, does your trust have appropriate beneficiaries?
- ◆ What happens to the assets on the death of the settlor? Are there clear instructions for the trustees?
- ◆ How and when will the assets be distributed? What happens if you, depending on the circumstances, wish to delay the distribution for a particular family member?



- ◆ Are you having a discussion with family members so that they have an understanding of how the trust is being managed and what the expectations are? Such meetings should be documented and have the trustees present.

### Management and administration

- ◆ Are the trustees preparing and passing the requisite resolutions for the trust?
- ◆ To the extent the trust is an investment trust, is there sufficient documentary evidence to support investment decisions? For instance, if the trustees have appointed a fund manager, are there documents to evidence the selection process undertaken by the trustees? Are the trustees qualified to make decisions regarding investments, and if not, are they seeking appropriate professional advice?
- ◆ Is there an on-going review of the assets held in the trust to determine whether the assets are held via the most appropriate entity within your asset ownership structure? Have you taken into account commercial and tax considerations to make this determination?

I recommend that you take the time to consider your responses to the above questions and assess whether you have identified any concerns and/or aspects that require attention. If you have any queries or require an “audit” of your structure, I can assist.

### GST - some little reminders

#### Sale of a going concern

1. The sale of a going concern is zero-rated for GST. To be a zero rated supply, however, the following criteria must be met:
  - ◆ Both parties must be GST registered;
  - ◆ The supply must be of a taxable activity or part of a taxable activity that is a going concern at the time of supply;
  - ◆ Going concern is defined as (a) a taxable activity (or part of a taxable activity that can be operated separately); and (b) all the goods and services needed to continue that activity are being supplied; and (c) the supplier must operate the taxable activity up and until the time of transfer;
  - ◆ The parties must agree in writing that the supply is a supply of a going concern; and



- ◆ The parties intend that the supply is the supply of a taxable activity that is capable of being carried on as a going concern by the purchaser.

Consider a couple of examples: (1) Mr Smith, owns a number of photocopiers and printers which he leases to a Doc Pro Ltd. The company uses the equipment to operate a document printing/binding business. A decision is made to sell the equipment to Doc Pro Ltd. Mr Smith's taxable



activity is the leasing of equipment. When he sells the equipment to the Doc Pro Ltd, he is not assigning a lease of the equipment. As such, he is not supplying everything that is required for his taxable activity to continue - and the transaction is not zero-rated as a supply of a going concern.

(2) Mr John operates a dairy business. Due to ill health, he stops the operations. He starts looking for purchasers eventually secures a sale. While he will be supplying everything required for the dairy business to continue - the

transaction will not be zero-rated as a going concern as he did not carry on the taxable activity up until the transfer.

### Land Transactions

2. Transactions involving land can also be zero-rated for GST purposes. The zero-rating applies where:

- ◆ The supply wholly or partly consists of land;
- ◆ Land is defined as including an estate or interest in land, a right that gives rise to an interest in land, an option to buy land or a right or interest in land, a share in a flat or office owning company;
- ◆ The transaction must be between GST registered persons;
- ◆ The recipient of the land acquires it with the intention to use it to make taxable supplies; and
- ◆ The land will not be used as the principal place of residence by the recipient or an associate of the recipient.



The above criteria has to be satisfied as at the time of settlement of the transaction.

If we refer to the earlier example regarding the sale of the dairy business - if Mr John was selling the land, or a right to use the land as part of the sale of the dairy business - the transaction would be zero-rated under the land provision.

### GST Offset

3. The GST Act does not provide for GST offsets, however, this is a practice that Inland Revenue can approve. A GST offset is where the GST registered parties to a transaction agree that the recipient of the supply will request the Commissioner to transfer its input tax deduction (GST refund) to offset the vendor's GST output tax (GST liability) in respect of the transaction. For the GST offset to be approved by Inland Revenue, the following should be considered:

- ◆ The request by the recipient must be made in writing. This request can be made regardless of whether or not a GST offset clause is included in the sale and purchase agreement.
- ◆ Inland Revenue will confirm that the offset can occur, but not that the transfer will actually occur. This distinction is relevant where, following the approval, it is determined that the recipient has outstanding amounts owing to Inland Revenue - in which case the GST refund will be applied against the debt rather than being transferred to the vendor.



- ◆ If the transfer of the GST refund cannot be made, the vendor remains liable for the GST liability - this is the case whether or not the GST offset clause is included in the sale and purchase agreement.

- ◆ The timing of the transfer of the GST refund has to be taken into account. This is particularly relevant where the GST return periods for the

parties to the transaction are different - the vendor could potentially be exposed to late payment penalties and interest.

While the process may sound complicated, if managed properly, the GST offset mechanism can be effectively used to eliminate the impact of GST on a transaction. This option is best considered early on in the discussions so as to have ample time to apply for and receive Inland Revenue approval etc.