Super Tax News

As at 28 February 2017

Overview

The purpose of this communication is to provide you with a summary of significant superannuation tax news and announcements made as at 28 February 2017.

Please contact us if you would like to discuss or have any questions in respect of the items included in this edition of Super Tax News.

Contents

1. Current issues in investing in stapled structures

Overview

On 31 January 2017, the Australian Taxation Office (ATO) issued Taxpayer Alert TA2017/1. The Alert outlines the ATO's concerns about arrangements that fragment integrated trading businesses in order to re-characterise trading income into passive income which may be taxed more favourably. The Alert does not extend to certain privatised assets and investments in Australian property trusts.

Stapled structures are one mechanism being used in these arrangements. The Alert outlines four stapled structure arrangements of particular interest to the ATO:

1. Finance staple
2. Synthetic equity staple
3. Royalty staple
4. Rental staple

It is the ATO's view that in these structures, the trading income is being re-characterised as passive income and diverted to a flow-through trust with the result that:

- The Asset Trust is assessed on a flow-through basis (i.e. generally not taxable);
- Distributions from Asset Trust may be ultimately subject to tax at rates between 0 – 30 percent in the hands of investors; and
- Although the Operating Entity would be taxed at the corporate rate of tax, it is unlikely to have significant taxable income, largely due to the deductions in respect of the payments to Asset Trust.

The Alert states that the ATO is reviewing the effectiveness of such arrangements and specifically states that "Taxpayers and advisors who implement these types of arrangements will be subject to increased scrutiny".

Of particular concern to the ATO are the following points:

- **Deductions:** Payments to the Asset Trust may not be deductible;
- **Control:** The Asset Trust may be taken to control the Operating Entity, potentially causing the trust to be regarded as a trading trust;
- **Non-arm's length:** Income paid to the Asset Trust may be non-arm's length income for the purposes of the Managed Investment Trust (MIT) rules; and
- **Part IVA:** The arrangement may be entered into for the sole or dominant purpose of obtaining a tax benefit and therefore be subject to the general anti avoidance rules.

KPMG comments

Stapled structures have been in use for over 20 years and are a common feature of the property and infrastructure landscape. The ATO's views are wide ranging and apply to both current and future investments and investments that are widely and narrowly held. This leads to considerable uncertainty as to the amount and character of returns from investments.

Depending upon the ATO's application of the law, the ATO views may also lead to double tax for both domestic and foreign investors, which is an egregious outcome. If this were to be the case, then a legislative fix would be required.

We recommend that current investments are reviewed in light of the ATO approach set out in the Alert to understand:

- The risks inherent in the structure;
- The likelihood of ATO review;
- The approaches that may be available to mitigate any adverse outcomes; and
- The potential impact on investment returns.

KPMG is on hand to assist with reviews of new investments, as well as assess the potential risks arising from existing investments.

References

TA 2017/1

2. Tax governance: A matter of justifying trust

Overview

On 27 January 2017, the ATO released an update to its Tax Risk Management and Governance Review Guide (Guide), establishing its new approach to tax with specific guidance for board attention.

This expands what the ATO sees as Directors' duties in relation to tax and the new approach marks a paradigm shift in the way the ATO administers tax. It holds boards accountable for tax overall and moves the burden of proof from the ATO identifying risks, to taxpayers being able to demonstrate, through a formal, operational and well-evidenced tax control framework, that tax risks are identified and managed organisation-wide regardless of a taxpayer's risk rating or fact pattern.

Whilst the guide provides for an "if not, why not" approach, it sets out clear expectations:

- It splits practices specifically into board and management considerations
- The board is explicitly responsible for setting a tax risk appetite and a testing framework
- The tax risk appetite is to be articulated from both a strategic and operational perspective
- The framework covers all taxes, including those dealt with by state revenue authorities
- A focus on data, IT controls and information flows between entities, systems and reports
- Preparation of a Board endorsed tax transparency report is recommended.

This framework underpins the notion of 'justified trust'; the ATO's effort to reinstate public trust in the corporate tax system through demonstrable governance and transparency. It will ultimately also enable regulators to administer the tax system more efficiently, and is a global trend.

The ATO will commence 'justified trust' reviews imminently over the next four years with full coverage of the Top 1000 companies. The Top 100 and others in the broader population will be tested this year on how they are effectively implementing and operationalising the ATO's expectations as set out in the Guide. Many taxpayers are already taking steps to ensure they are ready for their ATO review, and that their boards are fully informed on discharging duties on tax, as this is communicated across the director community. The absence of a gap analysis and action plan will be viewed as a higher risk indicator.

KPMG comments

The update is a significant shift in the way the ATO administers tax and places the burden of proof on the taxpayer.

KPMG's Tax Performance Hub is considered to be a global leader as a tool capable of providing a gap analysis (that is supported by benchmarking data collected from industry and revenue peers) to assist in the development/refinement of a robust tax governance and control framework that meets ATO expectations.

It will be important for taxpayers to be able to demonstrate that they have considered the Guide and are in the process of operationalising their tax controls into the broader business' risk framework.

References

ATO Guide

3. Superannuation tax reforms

ATO Law Companion Guidelines

Concessional contributions - Defined benefit interests and constitutionally protected funds

On 28 February 2017, the ATO released the consolidated Law Companion Guideline (LCG) LCG 2016/11 - Superannuation reform: concessional contributions - defined benefit interests and constitutionally protected funds.

The LCG was released in draft on 9 December 2016, and clarifies how the amendments to the calculation of concessional contributions and excess concessional contributions in the Income Tax Assessment Act 1997 (ITAA 1997) apply to contributions and amounts allocated by superannuation providers for the financial years commencing on or after 1 July 2017.

Transfer Balance Cap - Superannuation death benefits

The ATO released Draft Law Companion Guideline LCG 2017/D3 on 13 February 2017 on the treatment of superannuation death benefit income streams under the $1.6m pension transfer balance cap from 1 July 2017.

Comments are due by 10 March 2017.

Committee report on Superannuation Bill

On 14 February 2017, the Senate Economics Legislation Committee released its inquiry report on the provisions contained in Superannuation (Objective) Bill 2016.

The Committee recommends that the compliance of future superannuation reforms with the legislated objective be periodically assessed and reported on as part of the Intergenerational Report.

The Committee also recommends that the Senate should pass the Bill.

The report also includes a dissenting report by the Labour Senators, recommending that the Government should withdraw the Superannuation (Objective) Bill 2016 and recommence discussions with the Opposition and with stakeholders to reach broad political and industry support for a superannuation objective.

KPMG comments

With the new superannuation changes commencing on 1 July 2017, a number of practical issues have emerged which require close attention from a fund perspective.

Funds that are unsegregated for tax purposes face particular issues in relation to applying the transitional CGT relief where members transfer part of their balance to an accumulation account prior to 1 July 2017.

In considering the CGT relief choice, funds should consider the following:

- The deemed reacquisition will reset the holding period for CGT discount purposes, giving worse outcome in some cases.
- The choice of which assets are subject to relief should take into account potential Part IVA concerns (see ATO comments in LCG 2016/D8).
- Whether custodians have functionality to carry-forward a deemed capital gain until the asset is later realised?
- The relief only applies for CGT purposes, and will not assist to provide an uplift or deferral in respect of any large unrealised revenue gains.

Finally, the relief as drafted appears to exclude Pooled Superannuation Trusts, a curious omission that appears to be an oversight.

We are currently working with our fund clientele to understand the impact of the CGT uplift for accounts above $1.6m, as well as to set out the key administrative and policy decisions the funds will need to make and embed with their administrators prior to 1 July 2017.

References

LCG 2016/11

LCG 2017/D3

Report

4. Other superannuation matters

APRA's annual superannuation statistics

On 1 February 2017, the Australian Prudential Regulation Authority (APRA) released its annual superannuation statistics for the year ended 30 June 2016. Of the $2.1 trillion in total superannuation assets held at 30 June 2016, APRA reported that $621.7bn (or 29.6 percent) was held in self-managed super funds (SMSFs). Over the 10 years to June 2016, APRA said that the number of SMSFs grew by 86.8 percent from 309,088 to 577,236, and the number of APRA-regulated funds decreased 67 percent from 7,039 to 2,324.

At 30 June 2016, there were 144 APRA-regulated RSE licensees responsible for managing 225 funds. These funds had $1,290bn in assets ($474bn of which was held in 115 MySuper products offered by 101 RSEs).

Media release

Board governance of not for profit superannuation funds report

On Thursday 16 February 2017 Bernie Fraser, the former Reserve Bank Governor and Treasury Secretary, released his report on the board governance of not for profit (NFP) superannuation funds in response to changes proposed in the Superannuation Legislation Amendment (Trustee Governance) Bill 2015. The proposed changes to the governance standards of superannuation funds would have required the boards of all superannuation funds to comprise a minimum one-third of independent directors, including an independent chair.

Mr Fraser's report found that independence is the wrong measure of value for Board members of NFP super funds and recommends that the best available candidate should be appointed Chair, regardless of whether or not that person was "independent" and irrespective of any previously established rotational arrangements.

The report makes recommendations for more appropriate reform measures, including strengthening the values, skills and experience of Boards of Directors, appointing the best of the available candidates as Chairs (irrespective of any previously established rotational arrangements) and implementing policies for regularly evaluating the performance of Boards. The report also recommends a target to achieve gender equality on Boards across the NFP sector by mid-2022.

Report

Self-Managed Superannuation Funds Association Conference

On 17 February 2017, the Minister for Revenue and Financial Services, Kelly O'Dwyer, delivered an address to the Self-Managed Superannuation Fund Association Conference in Melbourne.

The Minister stated that the SMSF sector is the fastest growing sector in the superannuation industry in terms of members, with more than a million members in total. The majority of SMSFs still have 2 members with a median age of 58 and a half, with around 47 percent of members being women.

Address

Super fund reporting of new/closed member accounts

The ATO registered a Legislative Instrument on 22 February 2017 setting out the form in which superannuation funds (other than SMSFs) are required to report new and closed member accounts to the ATO.

The Instrument requires super funds, and other persons who keep particulars on behalf of a fund (other than a SMSF), to report new member accounts and closed member accounts daily from 31 March 2017 or as soon as practicable after the event (but no later than 5 business days after the event). Administrative penalties may apply if the required details are not provided in the approved form and within the time prescribed.

Legislative Instrument

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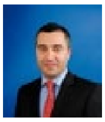

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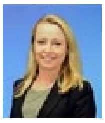

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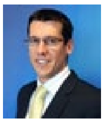

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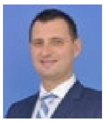

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