Corporate tax update

1 April 2015

**ATO arrangements for reporting company tax information**

Under changes to the *Taxation Administration Act 1953*, the Commissioner of Taxation is required to publish certain tax information (i.e. total income, taxable income and income tax payable) about corporate tax entities with a total income of $100 million or more, from the 2013-14 income year. Information about Minerals Resource Rent Tax (MRRT) and Petroleum Resource Rent Tax (PRRT) payable by an entity is also required to be published.

With respect to these statutory obligations, the ATO has issued a consultation paper which outlines the proposed administrative arrangements for the reporting by the Commissioner of this information. The ATO is seeking comments on the process of reporting, timing and manner of its report, matters relevant to amended assessments and guidance materials.

For further information, contact Ashley King on (03) 8603 1363.

**ATO Tax Determinations on equity over-ride rule**

On 18 March 2015, the Commissioner of Taxation published the following Taxation Determinations on section 974-80 of the *Income Tax Assessment Act 1997* (ITAA 1997):

- **TD 2015/2:** *Income tax: will paragraph 974-80(1)(d) of the Income Tax Assessment Act 1997 be satisfied merely because a non-resident entity has chosen to invest indirectly in a debt interest issued by an Australian resident company and there is one or more equity interests interposed between the non-resident entity and the entity holding the debt interest?*

- **TD 2015/3:** *Income tax: is the reference to 'the interest' as it appears in the phrase at the end of subsection 974-80(2) of the Income Tax Assessment Act 1997 a reference to the interest held by the 'ultimate recipient'?

These were previously published as draft TD 2014/D18 and draft TD 2014/D19 respectively, and the final Determinations are substantially the same as the drafts.

Section 974-80 is an integrity provision within Division 974 of the ITAA 1997 (the 'debt and equity rules'). Generally, it deals with arrangements whereby returns paid by a company ('funded company') to a 'connected entity' ('connected funding entity') on an interest which, but for section 974-80 would not be an equity interest, are to be used to provide returns to an investor ('ultimate recipient') where either:

- the return to the ultimate recipient is in substance or effect contingent on economic performance of the funded company (or part of its activities) or of a connected entity of the funded company (or part of its activities), or
- the right to the return, or the amount of the return to the ultimate recipient, is at the discretion of the funded company or a connected entity of the funded company, or
the interest held by the ultimate recipient, or another interest that arises under the scheme, gives the ultimate recipient (or a connected entity of the ultimate recipient) the right to be issued with an interest in the funded company or a connected entity of the funded company, or is an interest that will or may convert into such an equity interest.

Where section 974-80 applies, the interest issued by the funded company to the connected funding entity will be classified under Division 974 as an ‘equity interest’. An effect of this is that under section 26-26 of the ITAA 1997, the returns paid by the funded company on the interest will not be tax deductible.

The interpretation and application of section 974-80 has long been an issue of contention between the ATO and taxpayers. In the 2011-12 Federal Budget, the former Government announced that the provision would be amended to ensure that it only applies to arrangements where both the purpose and effect is that the ultimate recipient has, in substance, an equity interest in the issuer company, and to provide the Commissioner with discretion to disregard the integrity provision where he considers that it would be unreasonable for the provision to apply. On 14 December 2013, the current Government confirmed that it will proceed with this amendment. The design of this measure is being considered as part of a post-implementation review of the debt/equity provisions currently being conducted by the Board of Taxation.

Taxation Determination TD 2015/2 deals with the pre-condition to the application of section 974-80, i.e. that there is a scheme or series of schemes designed to operate so that the return to the connected entity (on the interest issued by the company) is to be used to fund (directly or indirectly) a return to the ultimate recipient. The Determination provides two examples which each deal with the funding of a wholly owned Australian subsidiary of a ‘foreign corporate group’. The Determination provides some ‘comfort’ to corporate groups with similar structures, in that the Determination states that “the fact that a non-resident entity has decided to invest indirectly in an Australian resident company through one or more interposed entities, and the final leg in the chain is a debt interest will not itself be sufficient to attract the application of section 974-80 if the interest held by the ultimate recipient is a debt interest (including a share classified as a debt interest under Division 974).

Prior to publishing draft TD 2014/D19 (the pre-cursor to TD 2015/3), the Commissioner had not publicly accepted that the ‘interest’ referred to in the exception was the interest held by the ultimate recipient. TD 2015/3 now publicly records the Commissioner’s acceptance of this view which, having regard to the EM referred to above, is in harmony with the legislative intention.

For further information, contact Peter Collins on (03) 8603 6247.

Taxpayer lodges appeal in consolidation cost base dispute

The taxpayer has appealed to the Full Federal Court against the decision of Justice Pagone in Financial Synergy Holdings Pty Ltd v Commissioner of Taxation [2015] FCA 53. In this case, Justice Pagone found that for the purposes of determining the
’allocable cost amount’ of units in a unit trust that joined a tax consolidated group, the first element of the cost base of the ‘pre-CGT’ units that was subject to a ‘Division 122-A rollover’ was to be determined by reference to the date of deemed acquisition (being 19 September 1985) and not by reference to the time that the units were actually acquired under the rollover transaction. The effect of this construction of the law was that the market value of the shares issued as consideration for acquisition of the units was required to be determined at a date which was more than 20 years before the shares were actually issued.

For further details this case, see last month’s edition of TaxTalk Monthly Corporate Tax [link TBC], or contact Adrian Green on (02) 8266 7890.

Consultation on residual MEC issues
On 16 March 2015, the Commonwealth Treasury released a Proposal Paper which considers some issues identified as part of the Multiple Entry Consolidated (MEC) group tripartite review (a measure announced in the 2014-15 Federal Budget) including reforms to extend a modified form of the unrealised loss rules to MECs; amendments to deal with the PAYG instalment rules and tax sharing agreements; and modifications to capital gains tax event J1. Submissions close on 20 April 2015.

Modernising the Offshore Banking Unit Regime
On 12 March 2015, the Commonwealth Treasury released exposure draft legislation and explanatory materials to modernise the Offshore Banking Unit (OBU) regime. The proposed amendments include measures implementing recommendations of the Australia as a Financial Centre – Building on Our Strengths report by the Australian Financial Centre Forum chaired by Mark Johnson. The proposal also includes targeted amendments to address a number of integrity concerns with the existing regime. Submissions on the exposure draft legislation close on 8 April 2015.

R&D Tax Incentive
See our R&D Tax Talk Alert which comments on the Senate’s rejection of the previously announced reduction in the tax offset rate under the Research & Development (R&D) tax incentive scheme.

Let’s talk
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