# *Corporate Tax Update*

*1 June 2015*

### *Part IVA applied to scheme involving formation of a tax consolidated group*

In *Channel Pastoral Holdings Pty Ltd v Commissioner of Taxation* [2015] FCAFC 57, the Full Federal Court considered the interaction of the general anti-avoidance tax provision (Part IVA of the *Income Tax Assessment Act 1936*) and the tax consolidation regime, in a case concerning the restructuring of shareholdings and the formation of a tax consolidated group. Under the scheme, the tax cost of a subsidiary member's trading stock and other assets was reset upon it joining the group, with the subsidiary member shortly thereafter selling the assets at arm's length to an unrelated party.

The five Judges on the Full Court bench agreed that the Commissioner was not prevented from issuing an assessment to the subsidiary member (in reliance of a Part IVA determination made to that entity) even though the sale transaction occurred at a time during which the entity was a subsidiary member of the tax consolidated group. The Commissioner's Part IVA determination was to the effect that but for the scheme, the subsidiary member, as a stand-alone entity, would have sold the assets and would have been liable for tax on the sale transaction. The Commissioner therefore determined that the subsidiary member had obtained a 'tax benefit' from participation in the scheme.

For further information contact Wayne Plummer on (02) 8266 7939.

### *Commissioner successful in Full Court appeal concerning copyright deduction claim*

In *Commissioner of Taxation v Ausnet Transmission Group Pty Limited* (formerly known as SPI PowerNet Pty Ltd) [2015] FCAFC 60, the Full Federal Court has upheld the Commissioner's appeal against the earlier decision of Justice Pagone (see *SPI PowerNet Pty Ltd v Commissioner of Taxation* [2014] FCA261) to deny certain deductions claimed by the taxpayer for amounts expensed on copyright acquired, together with other business assets. The judgement of Justice Pagone was earlier reported in the May 2014 edition of *TaxTalk*.

This first matter at issue related to tax years before the taxpayer joined a tax consolidated group (TCG) and involved consideration of sub-section 124R(5) of the *Income Tax Assessment Act 1936*. Under that sub-section, the Commissioner had determined that the cost of the copyright was nil in circumstances where the relevant purchase agreement failed to specify a separate purchase price for that copyright acquired by the taxpayer. When heard at first instance, Justice Pagone accepted that, despite being an undisected sum within the purchase agreement, the amount determined by the taxpayer (and supported by expert evidence) was the amount which should be properly regarded as having been paid to acquire the copyright, and accordingly, the deductions claimed were allowable.

In the Full Court, Justices Greenwood and Kenny held that the Commissioner's determination under sub-section 124R(5) were indeed contestable under Part IVC proceedings (Justices Edmonds disagreed), but all found that the taxpayer had nonetheless not adduced sufficient evidence to discharge their onus of proof in establishing that the Commissioner's amended assessments were excessive. As such, they considered that the Commissioner was correct in determining the value of the copyright as nil and ordered that the first decision of Justice Pagone be set aside.

The second matter at issue concerned the for tax years after the taxpayer joined a TCG where sub-section 124R(5) ceased to be relevant to the deductions claimed. For these tax years, the deductions were instead claimed by the head company of the TCG following the purported cost of copyright being 're-set' under the tax consolidation regime. Under those cost setting rules, the Commissioner had taken the position that no amount should be allocated to the copyright as it had no separately identifiable value. Justice Pagone disagreed and accepted the allocation determined by the head company and which was supported by the expert evidence permitted to be tendered at trail).

When heard on appeal, the Full Court considered it was unable to decide matters relating to the Commission's grievances on the basis that Justice Pagone had previously refused to admit into evidence certain expert reports which were relevant to determining these issues. As such, the Full Court allowed the Commissioner's appeal and remitted the second matter back to Justice Pagone for reconsideration. The ultimate outcome is likely to be known before the end this year.

For further information contact James Strong on (03) 8603 6599.

### Scrip for Scrip Roll-Over amendments

On 29 April 2015, the Commonwealth Treasury released exposure draft legislation in relation to amendments to the 'scrip-for-scrip' rollover rules, originally announced in May 2012. The amendments, which address issues raised in the Full Federal Court decision in *Commissioner of Taxation v AXA Asia Pacific Holdings Ltd* [2010] FCAFC 134, are intended to tighten the scrip for scrip roll-over rules to make it more difficult for companies and trusts to avoid capital gains tax when they sell subsidiary companies other than as part of a genuine merger or restructure of their business.

For further information contact Paul Abbey on (03) 8603 6733.

### Taxpayer Alert: Dividend stripping involving transfer of private company shares to a SMSF

On 30 April 2015, the Commissioner of Taxation published Taxpayer Alert 2015/1 in which the Commissioner describes arrangements where a private company with accumulated profits channels franked dividends to a self-managed superannuation fund (SMSF) instead of to the company's original shareholders. As a result, the original shareholders escape tax on the dividends and the original shareholders or individuals associated with the original shareholders benefit as members of the SMSF from franking credit refunds to the SMSF.

In the Alert the Commissioner that whilst a small number of private rulings (favourable to the taxpayer) were issued by the Australian Taxation Office (ATO), the Commissioner does not consider that this small number of private rulings constitutes a general administrative practice on such arrangements.

The Alert specifies the main provisions of the tax and superannuation laws that the ATO will consider in applying compliance action to arrangements of the type described in the Alert. These include:

- section 295-550 of the *Income Tax Assessment Act 1997* (ITAA 1997) which deals with non-arm's length income of a SMSF
- capital gains tax consequences, such as transfers below market value
- ordinary dividend or deemed dividend consequences
- superannuation regulatory issues, including non-arm's length dealings between members or associates and the SMSF
- excess contributions tax consequences, and/or
- the general anti avoidance provisions (Part IVA of the *Income Tax Assessment Act 1936*).

For further information contact Kel Fitzalan on (02) 8266 1600.

### Taxpayer Alert: Franked distributions funded by raising capital to release franking credits to shareholders

On 7 May 2015 the Commissioner published Taxpayer Alert 2015/2 in which the Commissioner describes arrangements under which a company with a significant franking credit balance raises new capital from existing or new shareholders and at similar time to the capital raising, the company makes franked distributions to its shareholders, in a similar amount to the amount of capital raised.

Overall there is minimal net cash inflow to or outflow from the company, the net asset position of the company remains essentially unchanged but the franking account is significantly reduced, and there is minimal impact on the shareholders, except in some cases they may receive refunds of franking credits, and in the case of buy-backs they may also get improved capital gains tax outcomes.

In the Alert the Commissioner states that the ATO is concerned that these arrangements are being used by companies for the purpose of, or for purposes which include, releasing franking credits or streaming dividends to shareholders. The Commissioner notes that this is may attract the operation of the anti-avoidance rule in section 177EA of the ITAA 1936 or other anti-avoidance rules in which case there may be adverse implications at the shareholder level and the corporate level.

For further information in respect of this Alert and on tax issues pertaining to capital raisings, contact Paul Abbey on (03) 8603 6733.

## *Let's talk*

For a deeper discussion of how these issues might affect your business, please contact:

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