Senate enquiry into corporate tax avoidance

On 2 October 2014 the Senate referred an inquiry into corporate tax avoidance to the Senate Economics References Committee for inquiry and report by the first sitting day in June 2015.

The Terms of Reference are as follows:

“Tax avoidance and aggressive minimisation by corporations registered in Australia and multinational corporations operating in Australia, with specific reference to:

ea. the adequacy of Australia’s current laws;
b. any need for greater transparency to deter tax avoidance and provide assurance that all companies are complying fully with Australia’s tax laws;
c. the opportunities to collaborate internationally to address the problem;
d. the performance and capability of the Australian Taxation Office (ATO) to investigate and launch litigation, in the wake of drastic budget cuts to staffing numbers;
e. the role and performance of the Australian Securities and Investments Commission in working with corporations and supporting the ATO to protect public revenue;
f. any relevant recommendations or issues arising from the Government’s White Paper process on the ‘Reform of Australia’s Tax System’; and
g. any other related matters”.

Submissions close on 2 February 2015.

Liquidator not required to retain funds from asset sale to pay tax

In Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq) [2014] FCAFC 133, the Full Federal Court has held that a company liquidator, appointed under the Corporations Act 2001, was not required under section 254 of the Income Tax Assessment Act 1936 (ITAA 1936) to retain an amount from the proceeds of sale of an asset to pay income tax that may be payable under any future assessment issued to the company. The case was on appeal from the Federal Court, the decision of which was reported in the 1 April 2014 TaxTalk Monthly.

At issue was whether, pursuant to paragraph (d) of section 254, the liquidator was authorized and required to retain money, which came to them in their representative capacity as a result of an asset sale in the 2012 tax year, for the purposes of paying the company’s resultant capital gains tax liability of $1.12 million. The Commissioner took the position that paragraph (d) of section 254 applied.

In dismissing the Commissioner’s appeal, Justice Edmonds made the observation that “it seemed to be common ground that an assessment of taxable income calculated, inter alia, by reference to such capital gain would, in the fullness of time, be issued to ABS, not to the liquidators in their capacity as such”.

His Honour referred to section 254 as a ‘collecting provision’, citing two High Court decisions for the view that the provision has no operation as an assessing provision. According to Justice Edmonds, the words in section 254 “contemplate an existing liability or a state of affairs [from which a] liability will arise in the future”, and “prior to the issue of an assessment to the liquidators (trustees), in reliance on one or more of the provisions of Div 6 of Pt III of
the 1936 Act... there can be no tax which 'is... due' by the liquidators, in the sense of 'owing'."

Additionally, his Honour was of the view that "tax 'will [not] become due' in the sense of 'owing" by the liquidators prior to the issue of an assessment "if one or more beneficiaries are presently entitled to the whole of the income of the trust estate". On this point his Honour said that the words, will 'become due', in the sense of 'owing', "predicate nothing less than certainty, and that, in my view, cannot be predicted prior to the issue of a relevant assessment; but if it can be predicted on the facts of a particular case... it cannot be predicted on the facts of this case where it was common ground that the assessment, when it did issue, would issue to ABS".

Justice Collier agreed fully with Justice Edmonds.

Justice Davies also held that the appeal be dismissed; however, his decision was based on the fact that no assessment had been issued to the liquidator, therefore, section 254 did not require the liquidator to retain an amount to be paid to the Commissioner. Justice Davies did however express the view that after appointment, "a post appointment tax liability, if any, will be assessed to the liquidator in his or her representative capacity, rather than to the company".

At present the Commissioner has not sought special leave to appeal this decision to the High Court.

For further information contact Ronen Vexler on +61 (2) 8266 0320 or at ronen.vexler@au.pwc.com.

Withdrawal of draft Taxation Determination on Forex realisation event 4

Draft Taxation Determination (TD) 2014/D10, issued on 23 April 2014, was withdrawn by the Commissioner with effect from 8 October 2014.

The Commissioner had expressed his preliminary view that Forex realisation event (FRE) 4 happens to a debtor repaying a foreign denominated loan, denominated in the same currency as its functional currency, where the loan was taken out prior to that currency becoming its functional currency. As a result, the Forex realisation gain or loss is crystallised at the time the actual loan is repaid.

TD 2014/D10 will be replaced with a new draft determination which will provide that Forex realisation event 4 does not happen in the circumstances outlined in TD 2014/D10.

Withdrawal of Taxation Determination which considers when a non-share equity interest is “issued at or through a permanent establishment”

TD 2012/19 regarding when a non-share equity interest can be said to be "issued at or through a permanent establishment" (PE) for the purposes of section 215-10(1)(c) of the Income Tax Assessment Act 1997 (ITAA 1997) has been withdrawn with effect from 8 October 2014.

During recent consultation with banking industry representatives, it became clear to the Commissioner that the view in the Determination was causing significant and unintended practical problems for banks in legitimately gaining access to the concession provided by the section. The notice then states that the ATO, after reviewing the Determination decided to withdraw it since, on balance, the Taxation Office no longer considered the view in the Determination to represent the better view of the law.

The withdrawal notice goes on to state that the Taxation Office intends to issue a replacement determination in due course, and that the replacement determination will take a considerably narrower view of the concept of 'issued'.

In the meantime, any questions as to the correct application of the provision will be addressed on a case-by-case basis.

Transparency and accountability of extractive companies

The Australian Greens introduced a Private Members' Bill into the Senate on 29 October 2014, the Corporations Amendment (Publish What You Pay) Bill 2014, which seeks to establish mandatory reporting of payments (not just income taxes) made by Australian-based extractive companies to foreign governments. This Bill intends to align Australia’s legislative response to extractive industry transparency with that in other jurisdictions, including the United States (Dodd Frank Amendments), the EU and more recently, Canada (which introduced similar legislation into its Parliament on 23 October 2014).

Although history suggests that it is rare in Australian Parliament for a Private Members' Bill to be enacted, given the global acceptance of such a reform and given that the Australia Government is currently undertaking a pilot program in relation to the Extractive Industries Transparency Initiative (EITI), it is worth
understanding the key aspects of such a proposal.

The aim of the legislation, if enacted, would be to require all Australian reporting entities, involved in extractive industries, including oil, gas, mining and native forest logging, to submit a financial report detailing all payments (including a payment in kind) made to foreign government entities over AUD 100,000 on a country-by-country and project-by-project basis. In common with the other measures enacted globally, the types of payments that would be reported under this proposal extend beyond income taxes, but also would cover:

- royalties
- payments for production entitlements
- dividends
- bonuses
- licence/rental fees
- social payments such as payments given for community projects or welfare (e.g. hospitals or schools)
- infrastructure improvements (e.g. roads, bridges, dams), and
- security services.

Whilst these measures are limited to Australian companies operating in extractive industries it continues the global trend towards higher level of disclosure by companies around their payments to government. Companies need to be prepared for these changes and to have plans in place to deal with the data capture, reporting, assurance and attestation of these payments as well as the reputational or other in-country issues that may emerge from public disclosure of these amounts.

For information contact James Strong, Partner - Global Mining Leader (Tax), +61 (3) 8603 6599

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**Let’s talk**

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

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