Corporate tax update

1 October 2015

AAT confirms that association of persons was not a tax limited partnership

In D Marks Partnership and Commissioner of Taxation (Taxation) [2015] AATA 651, the Administrative Appeals Tribunal (AAT) was required to reconsider the view of the Commissioner that an association of two taxpayers registered as a limited partnership under Queensland legislation was not a limited partnership for the purposes of the income tax law. Under the income tax law, generally, a limited partnership is treated as a company and the partners are treated as if they were shareholders.

Briefly, the trustee of the David Marks Trust (DMT) and Quintaste Pty Ltd (Quintaste) executed a Deed of Limited Partnership. The deed recorded that Quintaste (as general partner) and the trustee for the DMT (as limited partner) agreed to form a limited partnership commencing on the date of the deed. The deed further recorded that the legislation under which the limited partnership was formed was the *Partnership (Limited Liability) Act 1988* (Qld) (PLLA). Clause 8 of the deed provided that the liability of the partners for debts of the partnership were not to exceed their respective initial contributions, which, in the case of Quintaste was $1, and in the case of the DMT was $99.

Registration of *the D Marks Partnership* (DMP) established by the deed was obtained under the PLLA.

Under section 995-1 of the Income Tax Assessment Act 1997 (ITAA 1997), a limited partnership is defined as "*an association of persons (other than a company) carrying on business as partners or in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited*". In relation to the DMP, the view of the Commissioner (which was not disputed by the taxpayer) was that the DMP did not carry on business, however, since DMT and Quintaste were in receipt of income jointly (in the form of dividend income) it was accepted by the Commissioner that the DMP was a 'tax law' partnership under the extended meaning of partnership in section 995-1.

Since the DMP was a 'tax law' partnership, and Clause 8 of the partnership deed purportedly limited the liability of the 'limited partner', the taxpayers contended that the tax law partnership was a 'limited partnership' for the purposes of the income tax law, notwithstanding that the tax law partnership did not carry on business. The taxpayers also contended that registration of the DMP under the PLLA was conclusive evidence that the DMP was a limited partnership.

In agreeing with the Commissioner that the DMP was not a limited partnership, the AAT (Deputy President Molloy) expressed the view that registration under the PLLA did not resolve the question. Relevantly, the Deputy President said that the Commissioner was "correct in contending that D Marks Partnership could not be regarded as a limited partnership, despite registration under the PLLA, unless it satisfied the requirements of a partnership under the general law". That requirement, according to the Deputy President , was that the DMP was required to satisfy the statutory definition under subsection 5(1) of the *Partnership Act 1891* (Qld) which requires a relation which subsists between persons *carrying on a business* in common with a view of profit.

Importantly, this case involved the interaction of the income tax law with the law of Queensland applying to partnerships. As a result, it does not automatically follow that the same outcome would have arisen if the DMP had obtained registration as a limited partnership in another jurisdiction. That said, it is to be noted that in *NR Allsop Holdings Pty Ltd as General Partner of Q Uniform Partnership and Commissioner of Taxation* [2015] AATA 654 involving registration of a 'limited partnership' in Victoria, the AAT (Deputy President Molloy) arrived at the same conclusion as in the D Marks Partnership decision.

Let's talk

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