Other news

1 October 2015

**Inquiry into financial related crime**

On 7 September 2015 the Parliamentary Joint Committee on Law Enforcement tabled its report - *Report on Inquiry into financial related crime* – on its examination of the effectiveness of current Commonwealth law enforcement legislation and administrative arrangements that target serious and organised financial related crime, including money laundering and identity fraud. Included in the report is a recommendation that, subject to appropriate safeguards (including adequate privacy and oversight arrangements), the Government designate the Australian Taxation Office as a ‘criminal law-enforcement agency’ under the *Telecommunications (Interception and Access) Act 1979*, for the purpose of protecting public finances from serious criminal activities such as major tax fraud.

**Data matching program: credit and debit cards**

On 26 August 2015, the Australian Taxation Office (ATO) published a Notice advising that it will request and collect data relating to credit and debit card payments to merchants for the periods from 1 July 2014 to 30 June 2015 from financial institutions. The data requested will include information that enables the ATO to match merchant accounts to a taxpayer, including name, address and contact information as well as information on the number and value of transactions processed for each merchant account. This acquired data will be electronically matched with ATO data holdings to identify possible non-compliance with taxation law.

**Superannuation Guarantee Charge**

On 21 August 2015, the Commonwealth Treasury released exposure draft legislation regarding previously announced changes to simplify and reduce the harshness of the superannuation guarantee (SG) charge from 1 July 2016. As a part of announced changes, the SG charge will be simplified by aligning the earnings base for calculating the SG charge (currently total salary and wages) with the earnings base for calculating SG contributions (ordinary time earnings).

**Federal Court decides that franking credits were not income of a trust for distribution purposes**

In *Thomas v Commissioner of Taxation [2015] FCA 968* (Thomas) Justice Greenwood was required to determine whether a resolution of the trustee of a trust to distribute franking credits attach to franked dividends received by the trust was effective, such that the franking credits were ‘streamed’ to particular beneficiaries.

The decision involved a consideration of the tax law that applied before the enactment of the ‘interim trust streaming measures’ in 2011. The purpose of those measures, which commenced to apply from the start of the 2011 tax year, is to ensure that for tax purposes, capital gains and franked distributions of a trust estate are allocated to those beneficiaries specifically entitled to the underlying (trust law) capital gains and franked distributions (respectively).

In Thomas, the trustee did not directly allocate (‘stream’) the franked dividends received by the trust to beneficiaries, but instead, attempted to ‘stream’ franking credits by treating the
franking credits as income of the trust under provisions in the trust deed. Those provisions in the deed were clearly designed to allow different types of income to be ‘streamed’ to particular beneficiaries.

In deciding that the trustee resolution ‘streaming’ franking credits was not effective, Justice Greenwood said that the franking credits were not income of the trust, notwithstanding that they represented statutory income for the purposes of the franking ‘gross-up’ requirements of the Income Tax Assessment Act 1997 (1997 Act). In this respect his Honour said that “the franking credits were never received by the trustee itself (since they represent imputation credits that might be utilised by the beneficiaries in the relevant circumstances according to the 1997 Act)”. Those circumstances as explained by Justice Greenwood were that “a beneficiary’s entitlement to a share of offsetting franking credits under s207-57(2) of the 1997 Act arises as a function of a beneficiary’s share of the franked distribution”.

As mentioned above, the interim trust streaming measures now apply in respect of franked distributions received by a trust. Under those measures, there is an express requirement that franking credits be excluded when determining the income of the trust for the purposes of determining a beneficiary’s liability to tax via the application of Division 6 of the Income Tax Assessment Act 1936. This requirement means that the decision in Thomas has only historic relevance.

**Asia Region Funds Passport**

On 11 September 2015, the then Assistant Treasurer announced that Finance Ministers from Australia, Japan, Korea, New Zealand, the Philippines and Thailand had signed the Asia Region Funds Passport Statement of Understanding signalling their commitment to join the Passport ahead of its commencement in 2016. The Passport aims to create a regional market and reduce red tape for managed funds, while providing Australian investors with greater choice of investment products from well-regulated foreign funds.

Members of the Asia Region Funds Passport Working Group (Australia, Japan, Korea, New Zealand, the Philippines, Singapore and Thailand) and the funds management industry are now working on aspects of the region’s tax regimes to ensure the international competitiveness of the Passport.

**Draft ruling on TOFA and the application of the accruals/realisation method to swaps**

On 23 September 2015 the Commissioner of Taxation published Draft Taxation Ruling TR 2015/D3 which sets out the Commissioner’s preliminary view regarding how section 230-120 of the Income Tax Assessment Act 1997 (ITAA 1997) applies to the taxation of swaps under the accruals and realisation method which applies under the taxation of financial arrangements (TOFA) rules. The Draft Ruling does not address the application of the TOFA hedging elective method which can apply to a swap contract in certain circumstances.

By way of background, Division 230 of the ITAA 1997 provides a specific rule in section 230-120 which sets out how the accruals and realisation methods apply to financial arrangements with notional principal. Where a financial arrangement satisfies the conditions set out in subsection 230-120(1), the gains and losses from the financial arrangement are to be worked out in accordance with subsection 230-120(3) when applying the accruals and realisation methods in Subdivision 230-B.

Note that the Draft Ruling states that although section 230-120 will generally apply to swaps, the provision does not operate on the basis of what a particular arrangement is called, but rather whether the arrangement satisfies the test in sub-section 230-120(1).

Four examples of swap contracts are considered by the Draft Ruling to illustrate the principles identified. The examples are:

- **Example 1:** Interest rate swap with a non-periodic lump sum payment
- **Example 2:** Cross currency swap
- **Example 3:** Total return swap
- **Example 4:** Credit default swap

Broadly, a financial arrangement will satisfy the conditions in sub-section 230-120(1) if, in substance or effect, and having regard to the pricing, terms and conditions of the arrangement:

- The arrangement consists of two ‘legs’ and if the arrangement includes one or more ‘things’, those ‘things’
• The financial benefits to be provided or received in respect of each leg are calculated with reference to, or are reasonably related to, a notional principal.

• At the start of the arrangement, the value of the notional principal in relation to one leg is equal to the value of the notional principal in relation to the other leg, and

• All or part of the notional principal in relation to each leg is provided or received at a time, regardless of whether that time is different in relation to each leg.

It is the Commissioner’s preliminary view that (amongst other things):

• The test in sub-section 230-120(1) will be satisfied where, having regard to the actual pricing, terms and conditions of the actual financial arrangement, there is, in substance or effect, a notional arrangement (referred to in the Draft Ruling as the ‘notional construct’) that has specific characteristics that consists of two legs and possibly one or more other things.

• Where a financial benefit is in substance the result of an equation that contains the notional principal as a term, the financial benefit is calculated by reference to the notional principal.

• In terms of the legal form of the actual financial arrangement, the notional principal need not be actually provided or received.

• A ‘thing’ is anything else of which the notional construct consists which is not a leg. The Draft Ruling does not provide any further detail or examples in this regard but notes that anything not relevantly related to the notional principal will not form part of a leg.

• The financial benefits from each leg of the notional construct and any other ‘thing’ are worked out separately.

• The accruals and realisation methods of Subdivision 230-B apply at each level of each leg or ‘thing’, and the gains and losses produced by applying Subdivision 230-B at the level of each leg or thing are treated as being the gains and losses from the financial arrangement.

• In working out the gains or losses of each element of the notional construct, and when they ought to be recognised, the result must properly reflect the financial substance of the financial arrangement.

Once finalised, the Ruling is proposed to apply both before and after the date of issue.

Comments of the Draft Ruling can be made by 6 November 2015.

If you would like to discuss any issues relating to the Draft Ruling, contact Gavin Marjoram on +61 (2) 8266 0576 or at gavin.marjoram@au.pwc.com

Wine Equalisation Tax

On 21 August 2015, the then Assistant Treasurer announced the release of a Discussion Paper on the Wine Equalisation Tax (WET) rebate, and the establishment of a WET Rebate Consultative Group which will consider submissions and provide advice to the Government later this year on options for reform of the WET rebate. The Discussion Paper provides an overview of the Australian wine industry and raises issues facing the industry, including the current operation of the WET Rebate. This paper forms part of the Tax White Paper process and will help inform the conversation on taxation reform. Submissions have now closed.
Let’s talk
For a deeper discussion of how these issues might affect your business, please contact:

Tom Seymour, Managing Partner  Adam Davis, Melbourne  Warren Dick, Sydney  
+61 (7) 3257 8623  +61 (3) 8603 3022  +61 (2) 8266 2935  
tom.seymour@au.pwc.com  adam.davis@au.pwc.com  warren.dick@au.pwc.com

Murray Evans, Newcastle  Alistair Hutson, Adelaide  David Ireland, Sydney  
+61 (2) 4925 1139  +61 (8) 8218 7467  +61 (2) 8266 2883  
murray.evans@au.pwc.com  alistair.hutson@au.pwc.com  david.irland@au.pwc.com

Anthony Klein, Melbourne  David Lewis, Perth  Julian Myers, Brisbane  
+61 (3) 8603 6829  +61 (8) 9238 3336  +61 (7) 3257 8711  
anthony.klein@au.pwc.com  david.r.lewis@au.pwc.com  julian.myers@au.pwc.com