

April 2016

TaxTalk Monthly

Keeping you up to date on the latest Australian and international tax developments



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Corporate tax update

1 April 2016

Full Federal Court finds for taxpayer in dispute regarding CGT time of acquisition

In *Financial Synergy Holdings Pty Ltd v Commissioner of Taxation [2016] FCAFC 31*, the Full Federal Court, allowed the taxpayer's appeal. In the case, the taxpayer claimed a capital gains tax (CGT) roll-over to preserve the pre capital gains tax (pre-CGT) status of the asset rolled over. The appeal challenged the view of Justice Pagone at first instance, that the effect of obtaining the roll-over meant that, the *time of acquisition* of the rolled-over asset under section 110-25(2) of the Income Tax Assessment Act 1997 (ITAA 1997), was immediately before 20 September 1985 and not the actual date of contract for the acquisition.

Briefly, Financial Synergy Holdings Pty Ltd (FSH) was the head company of a tax consolidated group (TCG) which formed with effect on 1 July 2007. The TCG was comprised of the head company, the Financial Synergy Unit Trust (the Unit Trust) and three other companies. The units in the Unit Trust had been originally acquired pre-CGT and were transferred to FSH on 29 June 2007, with CGT roll-over being chosen under Subdivision 122-A of the ITAA 1997. In consideration for the transfer of the units to FSH, the transferor was issued with 30 million shares (consideration shares) in FSH, each share having a value of \$1. After this transaction, a further 25,302 units in the Unit Trust were issued to FSH in part satisfaction of \$12,423,741 owed to it. This issue of units occurred on 29 June 2007.

FSH lodged tax returns for the 2008 to 2013 income years as the head company of the TCG on the basis that the *time of acquisition* of the units, for the purposes of determining the CGT cost base of the units, was the date of contract for the acquisition which was 29 June 2007. The relevance of the *time of acquisition* was that under section 110-25(2)(b) of the ITAA 1997, the market value of the consideration shares (being property given to acquire the rolled-over units) needed to be determined at the time of acquisition. If the taxpayer's view was correct, the value of the consideration shares was substantial – ie around \$30 million, whereas, the Commissioner contended it was the value in 1985, which was, in relative terms, nominal (around \$1.560,649).

The relevance of the CGT cost base to the calculation of FSH's taxable income for the 2008 to 2013 income years was that FSH needed to take into account the CGT cost base of the units under the tax consolidation cost setting rules in Division 705 of the ITAA 1997, although it is unclear from the decision as to how the amount taken to be the CGT cost base was allocated to particular assets in the tax cost setting process.

The Commissioner's argument was that the effect of the Subdivision 122-A roll-over of the units was that the units acquired by FSH were deemed to have been acquired *before 20 September 1985* (see section 122-70(3) of the ITAA 1997), and that section 122-70(3) had effect for all purposes of the ITAA 1997, with the consequence that the units were to be treated as being acquired 'before' 20 September 1985.

The effect of the position taken by the Commissioner was that FSH's CGT cost base in the units acquired from the transferor was not \$30 million, but instead, was an amount in the order of \$1,560,649, being the value of the Financial Synergy business at 1 July 1985 (being a date proximate to 20 September 1985). Under the tax cost setting rules, the Commissioner's position was that it was this amount that FSH needed to use in the cost setting process, notwithstanding that this amount had no relevance to either the identity of or the value of the property that FSH gave to acquire the units in 2007.

At first instance, Justice Pagone agreed with the Commissioner that section 122-70(3) was a *time of acquisition* rule for all purposes of the ITAA 1997. Thus, for the purposes of determining the cost base of the units, the time of acquisition of the units was *immediately before 20 September 1985*, and based on this construction of the relevant provisions, FSH was required to determine the market value the consideration shares that it gave in 2007, at a date that was immediately before 20 September 1985.

In a unanimous finding in favour of FSH, the Court considered the 'function' of section 122-70 of the ITAA 1997 which, because section 122-70(3) applied, deemed the time of acquisition of the units in the Unit Trust to be before 20 September 1985. With respect to section 122-70, the Court said that "the function of s122-70 was to preserve the CGT characteristics of the asset in the hands of the recipient by providing, in the case of an asset acquired on or after 20 September 1985, that the

recipient takes the same cost base of the asset as the transferor's cost base at the time of disposal (s122-70(2)) and, in the case of an asset acquired by the transferor before 20 September 1985, that the company is *taken to have acquired [the asset] before that day*".

After considering the function of the provision, the Court said that there were a "number of contextual reasons against extending the effect of the provision to govern the time of the acquisition for the purposes of working out cost base under s110-25(2)(b)". Relevantly the Court made the following observations and findings:

- The reference in sub-section 122-70(3) to a time before 20 September 1985 is intended to exclude assets dealt with under sub-section 122-70(2) ie assets which are not pre-CGT assets. The purpose therefore served by sub-section 122-70(3) is to preserve the pre-CGT status of assets rolled over, and "the function of the deeming provision does not need to extend beyond that purpose in the context of Div 122: *Commissioner of Taxation v Comber* (1986) 10 FCR 88 at 96."
- The word 'acquire' in section 995-1 of the ITAA 1997 does not extend the ambit of the deeming provision and relevantly, whilst Subdivision 109-B, (which is referred to in that definition), "sets out s122-70(3) as an acquisition rule (see s109-5) [it] is not an operative part of the 1997 Act: s109-50, s950-150". Accordingly "the outcome that the pre-CGT assets are taken to have been acquired for the purposes of s110-25 before September 1985 is not mandated by Div 109 or the definition of *acquire*".
- Section 716-855 was introduced by the legislature to deal with rollovers under Subdivision 126-B, and in particular to deal with the time of acquisition where sub-section 126-60(3) applies for the purposes of allocable cost amount (ACA) cost setting. Importantly sub-section 126-60(3) is in similar terms to sub-section 122-70(3) in that the function of the provision preserves the pre-CGT status of assets rolled over, by deeming the assets to have been acquired before 20 September 1985.

The effect of section 716-855 is that, for the purposes of determining the CGT cost base and reduced cost base of the asset rolled over and to which sub-section 126-60(3) applies, the 'rule' in sub-section 126-60(2) is to be applied, notwithstanding that sub-section 126-60(3) still applies to preserve pre-CGT status. Under that 'rule', the transferor's cost base and reduced cost base is inherited by the transferee, and the market value of property given to acquire the assets is not relevant. With respect to section 716-855, the Court said that "importantly there is no such cognate provision in respect of a Div 122 roll-over", and that "the absence of a cognate provision in respect of a Div 122 roll-over is telling against the Commissioner's construction".

- The object of the ACA cost setting provisions in the tax consolidation regime is to "recognise the head company's cost of becoming the holder of the joining entity's assets as an amount reflecting the group's cost of acquiring the entity": sub-section 705-10(2). According to the Court, "the taxpayer's construction gives effect to and is consistent with that object. Section 716-855 provides an exception only in relation to pre-CGT assets acquired under Subdiv 126-B roll-overs".

PwC's Tax Controversy team ran the case for the Appellant in the Full Federal Court. For further information contact Adrian Green on +61 (2) 8266 7890 or email adrian.green@au.pwc.com; or contact Paul McNab on +61(2) 8266 5640 or email paul.mcnab@au.pwc.com.

Taxpayer appeals the decision on question of whether amount on buy-back was debited to the share capital account

The taxpayer has appealed to the Full Federal Court against the decision in the Cable & Wireless Australia & Pacific Holdings BV case which was reported March *TaxTalk Monthly*. This case concerns the application of the share buy-back provisions in the tax law and whether an amount debited to a 'Share Buy-Back Reserve Account' was debited to a share capital account and thus not a dividend for tax purposes.

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Employment tax update

1 April 2016

Reportable fringe benefit changes – Salary packaged meal and entertainment facility leasing expense benefits

A reminder for employers that the existing reportable fringe benefits exclusion for meal entertainment and entertainment facility leasing expenses is removed from 1 April 2016, which will affect any employer who allows their employees to salary package these expenses. In addition, the exclusions for not-for-profit employers for salary packaged meal and entertainment facility leasing expense benefits are wound back with effect from 1 April 2016.

Employment in the small business sector

During March 2016, the House of Representatives Standing Committee on Education and Employment tabled its report into barriers for small business employment. From a tax perspective, the report's recommendations included that:

- work be done with the Australian Taxation Office to consider aligning the definitions of *employee* and *contractor* across Government agencies, and to develop a decision tool to help correctly identify when a worker is an employee or a contractor
- the Government work with States and Territories to reduce reliance on payroll tax as a form of revenue
- the Productivity Commission investigate the impact on small business of lowering the goods and services tax (GST) threshold on the importation of physical goods

- the Government re-assess the policy case for taxing redundancy payouts of persons over 65 years of age.

Employer failed to meet superannuation guarantee obligations

In *Payne and Commissioner of Taxation [2016] AATA 104* the Administrative Appeals Tribunal confirmed that employers have a statutory obligation to ensure the appropriate level of superannuation guarantee (SG) contributions are made on behalf of employees to a complying superannuation fund. The Tribunal considered whether an employer has met its SG obligations where payments were made by an employer to an employee where there was a clear direction that the employee should use the payment to fund their superannuation contributions. It was not accepted by the Tribunal that payment of SG contributions directly to an employee, rather than into a complying superannuation fund, would be treated as superannuation contributions for the purposes of meeting an employer's SG obligations.

Amendments to the method of calculating the superannuation guarantee charge fail to pass

On 16 March 2016, the Government agreed to remove from the *Treasury Legislation Amendment (Repeal Day 2015) Bill 2015*, the relevant amending provisions designed to:

- simplify the SG charge by aligning the earnings base for calculating the SG charge with the earnings base for calculating SG contributions
- align the interest component on any SG shortfall with the period over which the contributions are outstanding

- replace the SG charge penalty with the administrative penalty applied under the *Taxation Administration Act 1953*.

These proposals were included in the Bill when it was first introduced into the House of Representatives on 12 November 2015.

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International tax update

1 April 2016

United Kingdom Budget

The United Kingdom (UK) [Budget](#): was handed down on 16 March 2016. Some of the key measures announced include:

- a reduction in the corporation tax rate to 17 per cent by 2020 (previously due to fall to 18 per cent)
- more details on the implementation of Base Erosion and Profit Shifting (BEPS) Action 4
- changes to the loss relief rules for businesses
- extension of the anti-hybrid rules to eliminate tax advantages arising from mismatch arrangements involving permanent establishments
- expanded royalty withholding tax rules and treaty abuse.

For further information refer to the [PwC UK Budget page](#) or contact Rob Hines on +61 (2) 8266 0281 or email robert.hines@au.pwc.com.

Foreign resident CGT withholding regime

The new capital gains tax (CGT) withholding tax regime, applicable to the disposal of certain property by foreign residents, is now law and will apply to acquisitions of CGT assets on or after 1 July 2016. For the majority of cases, this will be in respect of contracts for disposal entered into on or after 1 July 2016. As the new law potentially imposes a withholding obligation on the purchaser of any 'taxable Australian (real) property', any 'indirect Australian real property interest' (such as a share in a company or a membership interest in a trust) or an option or right to acquire such property or interest, it is important for both vendors and purchasers (resident and non-resident) to understand how this law will apply.

For further information on these measures, contact your usual PwC adviser.

India Budget

The India Budget 2016 was presented on 29 February 2016 and contains a number of taxation measures. For further information read our [PwC Tax Insight](#).

New Zealand tax developments

See [PwC New Zealand's Tax Tips 2016](#) for the latest New Zealand tax developments.

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Legislative update

1 April 2016

Although the Autumn sittings of Parliament ended on Friday 18 March 2016, in an interesting move by Government, Parliament will return for sitting for a three-week period from 18 April 2016 in what could be the last session of Federal Parliament this financial year. The Federal Budget will now be released on 3 May 2016, instead of 10 May as was originally scheduled. If the Parliament fails to pass two industrial reform Bills in that period, the Prime Minister has indicated that a double dissolution election would be held on 2 July 2016.

Commonwealth revenue measures introduced into Parliament or registered as legislative instruments or regulations since our previous *TaxTalk Monthly* publication include the following:

- *Treasury Laws Amendment (2016 Measures No. 1) Regulation 2016*, registered on 26 February 2016, among other things, repeals provisions in the *Income Tax Assessment Regulations 1997* relating to the 'cents per kilometre' method used for calculating a deduction for car expenses for an income year following the changes made by *Tax and Superannuation Laws (2015 Measures No. 5) Act 2015* which reformed the cents per kilometre deduction rules in the *Income Tax Assessment Act 1997* (ITAA 1997). Under the new law, the Commissioner of Taxation sets the rate of cents per kilometre deductions for the purposes of Division 28 of the ITAA 1997.
- *PAYG Withholding Variation: Company Directors and Office Holders*, registered on 2 March 2016, varies to nil the pay as you go (PAYG) withholding obligations for an individual who is a partner in a partnership or a director or employee of another entity appointed as a director, a member of a committee of management of a company, or an office holder who is required to pay those payments to the entity of which they are a partner, director or employee. The variation is effective from 1 April 2016.
- *Taxation Administration Amendment (Disclosure of Information) Regulation 2016*, registered on 26 February 2016, amends the *Taxation Administration Regulations 1976* to allow taxation officers to disclose protected information to Taskforce Cadena officers. Taskforce Cadena was established for the purposes of reducing visa fraud, illegal work and the exploitation of foreign workers in Australia.
- *Wine Equalisation Tax New Zealand Producer Rebate Foreign Exchange Conversion Determination (No. 35) 2016*, registered on 1 March 2016, sets out the manner in which a component of the approved selling price of wine expressed in a currency other than Australian currency may be converted to Australian currency for the purposes of calculating the wine equalisation tax (WET) producer rebate by eligible New Zealand wine producers.
- *Wine Equalisation Tax New Zealand Producer Rebate Claim Lodgment Determination (No. 34) 2016*, registered on 1 March 2016, sets out the time when a claim for the WET producer rebate may be made by eligible New Zealand wine producers.
- The following new goods and services tax (GST) legislative determinations were recently registered to replace previous determinations that have been repealed:
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 08) 2016 for Commission Based Services provided to a member of the Stockbrokers Association of Australia*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 09) 2016 on Loyalty Program Participation*

- *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 10) 2016 for Labour Services*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 11) 2016 on Referrals*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 12) 2016 for Construction Work*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 13) 2016 for Workers Compensation Insurance provided by Coal Mines Insurance Pty Ltd*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 14) 2016 for Selling Agent Services*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 15) 2016 for Prize Winning Events*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 16) 2016 on Licences for Copyright Material*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 17) 2016 for Publishers*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 18) 2016 for Friendly Societies*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 19) 2016 for Vending Machine Operators*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 20) 2016 for Labour Services relating to Primary Production Activities*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 21) 2016 for Vehicle Dealers*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 22) 2016 for Product Suppliers to Service Station Franchisees*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 23) 2016 for Administrators of a Superannuation Scheme*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 24) 2016 for Covered Legal Services Obligation*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 25) 2016 for Refrigerant Processors*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 26) 2016 for Electronic Pharmacy and Medical Centre Data*
 - *Goods and Services Tax: Recipient Created Tax Invoice Determination (No. 27) 2016 for Referrers, Spotters, Sub-intermediaries or Sub-agents for General Insurance*
 - *Goods and Services Tax: Particular Attribution Rules Determination (No. 28) 2016 for Prepayments of Telephone Services*
 - *Goods and Services Tax: Particular Attribution Rules Determination (No. 29) 2016 for Electricity Distribution Services*
 - *Goods and Services Tax: Foreign Currency Conversion Determination (No. 30) 2016*
 - *Goods and Services Tax: Frequency of Fund-raising Events Determination (No. 31) 2016*
 - *Goods and Services Tax: Simplified Method to Apportion Input Tax Credits Determination (No. 32) 2016 for Caravan Park Operators*
 - *Goods and Services Tax: Waiver of Tax Invoice Requirement Determination (No. 33) 2016- Choice Hotels Corporate Charge Card.*
 - *Notice of Substituted Rates of Excise Duty – Notice No. 2 (2016) and Notice of Substituted Rates of Customs Duty For Excise-Equivalent Goods – Notice (No. 2) 2016 apply to tobacco from 1 March 2016.*
 - *Superannuation Legislation Amendment (Transparency Measures) Bill 2006*, introduced into the House of Representatives on 17 March 2016, proposes amendments to the *Corporations Act 2001* (Cth) to increase the quality of information available to superannuation fund members and employers while ensuring that the current obligations in the *Corporations Act 2001* in relation to choice product dashboards and portfolio holdings disclosure are workable for industry.
 - *Superannuation Legislation Amendment (Choice of Fund) Bill 2016*, introduced into the House of Representatives on 17 March 2016, proposes to amend the *Superannuation Guarantee (Administration) Act 1992* (Cth) to ensure employees under new workplace determinations or enterprise agreements that are made from 1 July 2016 have an opportunity to separately choose their superannuation fund.
- Currently, some employees do not have the opportunity to choose their own superannuation fund to which their employer makes superannuation contributions under, or in accordance with, an enterprise agreement or workplace determination. These agreements or determinations may specify a given superannuation fund, or a number of

superannuation funds, to which an employer may make contributions for the benefit of the employee.

This Bill ensures that all employees under new workplace determinations or enterprise agreements made from 1 July 2016 will have the opportunity to choose their own superannuation fund.

- *Tax Laws Amendment (Tax Incentives for Innovation) Bill 2016*, introduced into the House of Representatives on 16 March 2016, proposes to provide investors in Australian early stage innovation companies with a tax offset and a capital gains tax exemption giving effect to part of the Government's National Innovation and Science Agenda. In addition, the Bill proposes to amend the early stage venture capital limited partnership and venture capital limited partnership regimes to improve access to venture capital investment and make the regimes more attractive to investors.
- *Tax Laws Amendment (Tougher Penalties for Country-by-Country Reporting) Bill 2016* was introduced into the House of Representatives as a private members Bill by Shadow Assistant Treasurer Andrew Leigh on 29 February 2016. The Bill proposes to increase the penalty for a 'significant global entity' failing to lodge a Country-by-Country (CbC) report from \$5,400 to a maximum \$270,000.
- *Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill 2016*, introduced into the House of Representatives, on 17 March 2016 proposes to:
 - provide the Commissioner of Taxation with a statutory remedial power to

resolve certain unforeseen or unintended outcomes in the tax and superannuation laws

- allow primary producers to access income tax averaging 10 income years after choosing to opt out with effect from the 2017 income year
- provide relief from luxury car tax to certain public institutions that import or acquire luxury cars for the sole purpose of public display
- make other miscellaneous amendments to the tax and superannuation laws including style and formatting changes, repealing redundant provisions, and correcting anomalous outcomes such as:
 - updating income tax law for name changes for deductible gift recipients
 - making consequential amendments relating to the standardisation of the definition of Australia across the tax law and Norfolk Island tax reforms
 - ensuring life insurance companies are entitled to an exploration development incentive tax offset in accordance with the policy intent
 - removing the redundant '5 share requirement' for Division 615 rollover relief in the ITAA 1997
 - making consequential amendments relating to the consolidation of the confidentiality of taxpayer information provisions
 - making consequential amendments relating to the consolidation of the evidence provisions and the Commissioner's information gathering provisions.

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Superannuation update

1 April 2016

The objective of superannuation

On 9 March 2016, the Assistant Treasurer and Minister for Small Business released a Treasury discussion paper – *The objective of superannuation* – As part of the process to develop legislation to enshrine the objective of superannuation, in response to the recommendation of the Financial System Inquiry (FSI). In her media statement, the Assistant Treasurer said that “enshrining the objective of the superannuation system in legislation will provide a guide to policy makers, regulators, industry and the community about superannuation’s fundamental purpose”.

Although the Government has accepted the primary objective of superannuation as recommended by the FSI to “provide income in retirement to substitute or supplement the Age Pension”, and proposes to enshrine this objective in legislation, the FSI also recommended the consideration of a number of other factors in supporting the primary objective.

Comments on the discussion paper are due by 6 April 2016.

Review into efficiency and effectiveness of superannuation

The Government has released the terms of reference for the first two stages of a Productivity Commission review into the efficiency and competitiveness of the entire superannuation system. Specifically, the Government has asked the Productivity Commission to:

- complete a study to develop criteria to assess the efficiency and competitiveness of the superannuation system
- undertake a public inquiry to examine alternative models for a formal competitive process for allocating default fund members to products.

Initial submissions are due by Wednesday, 20 April 2016.

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Other news

1 April 2016

Forestry managed investment

On 11 March 2016, the Commonwealth Senate Economics Committee released its final report into forestry managed investment schemes (MIS). With regards to taxation, the Committee made the following recommendations:

- The Australian Taxation Office (ATO) undertake a comprehensive review of its product rulings to understand why some investors assume that an ATO product ruling is an endorsement of the commercial viability of the product (recommendation 1).
- Treasury commission a review to better inform the policy around providing tax concessions

for agribusiness MIS (recommendations 21 and 22).

- The Government request the Productivity Commission to inquire into and report on the use of taxation incentives in agribusiness MIS (recommendation 23).

Charities and Not-for-profit sector

On 4 March 2016, the Assistant Treasurer and Minister for Small Business announced that the Government had decided to retain the Australian Charities and Not-for-profits Commission (ACNC) following extensive consultation. In the announcement, the Assistant Treasurer said that the Government will now work with the ACNC to remove duplication and increase accountability and transparency, and would continue to work with the ACNC, States and Territories and the sector to identify areas where the burden of red tape for charities and not-for-profit organisations can be reduced.

Anti-dumping review

The Productivity Commission has released the findings of its research study of the economic stocktake of recent anti-dumping activity and the changes to Australia's anti-dumping system since 2009. Among other things, it looks at the reasons for the recent increase in the usage of anti-dumping measures, analyses key recent changes to system requirements, and discusses the implications for the future evolution of the system. In its published Paper, the Commission states that a fundamental rethink on anti-dumping policy in Australia is required particularly since there is little to distinguish anti-dumping protection from other trade restrictions and arguments that the system provides other benefits to the community that would eliminate this net cost are not credible.

The Commission's Paper can be found [online](#).

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