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No more CGT discount for non-residents

The Government has issued for comment draft legislation proposing to implement its 2012 Budget announcement that it will remove the capital gains tax (CGT) discount for non-resident individuals on taxable Australian property, such as residential and commercial real estate and mining assets.

Under the current law, individual taxpayers are generally entitled to a 50% discount on capital gains made from assets they have held for at least 12 months, regardless of the individual's residency status. The proposed changes will introduce new residency requirements.

Under the changes, non-residents will still be entitled to a discount on capital gains that accrued prior to 9 May 2012 (ie, the day after the Government's announcement), provided they obtain a market valuation of the asset as at 8 May 2012.

Note that, if implemented, the changes will apply to affected individuals irrespective of whether the gain resulted from an asset owned by the individual or was a gain from an asset held by a trust and attributed to the individual.

In summary, the effect of the measure will be to:

- retain the full CGT discount for discount capital gains of foreign resident individuals to the extent that the increase in value of the CGT asset occurred prior to 9 May 2012;
- remove the CGT discount for discount capital gains of foreign and temporary resident individuals that accrued after 8 May 2012; and
- apportion the CGT discount for discount capital gains where an individual has been an Australian resident *and* a foreign or temporary resident during the period after 8 May 2012. The discount percentage will be apportioned to ensure the full 50% discount is applied to periods where the individual was an Australian resident.

Tax certainty for beneficiaries of superannuation death benefits

The Government has released draft regulations that propose to give effect to an earlier announcement made in October 2012 that it will provide certainty to the beneficiaries of superannuation death benefits. The changes will allow the tax exemption for earnings on assets supporting superannuation income streams to continue following the death of a fund member who was in the pension phase until the deceased member's benefits have been paid out of the fund. If implemented, the changes will apply from 1 July 2012.

The proposed changes appear to be a response to industry concern with the Tax Commissioner's draft ruling on superannuation income streams issued in a 2011. In that draft ruling, the Commissioner took the position that a superannuation income stream ceases as soon as the member in receipt of the income stream dies, unless a dependent beneficiary of the deceased is automatically entitled to receive an income stream.

According to the Commissioner's preliminary view, tax would generally apply to a fund's investment earnings, including realised capital gains, following the death of a pension member. However, the proposed new regulations will ensure that this is not the case.

Disposal date critical for CGT small business concessions

In a recent decision, the Administrative Appeals Tribunal (AAT) decided that a taxpayer's interest in a business was disposed of when a "heads of agreement was executed", and not when the formal contract of sale was executed.

An agent had testified that it was long-standing practice in the industry for an intending purchaser and vendor to enter into an "in-confidence" period of

exclusivity during which the intending purchaser would use professional advisers to carry out due diligence.

Despite evidence suggesting that the industry did not regard the heads of agreement as a binding contract, the AAT was of the view that the parties to the heads of agreement had agreed to the sale and purchase of the business in question. As a result, as it was found that it was the date of the heads of agreement that was the applicable date of the transaction for CGT purposes.

As a result, the taxpayer was not entitled to access the CGT small business concessions because he did not satisfy the relevant test for the concessions just before that date.

Car expenses – Rates per kilometre for 2012–2013

The Government has announced the "cents per kilometre" rates for calculating tax deductions for car expenses for the 2012–2013 income year. Note that they are unchanged from 2011–2012 and are as follows:

- Small car (non-rotary engine up to 1600cc, or rotary engine up to 800cc): 63c/km.
- Medium car (non-rotary engine 1601–2600cc, or rotary engine 801–1300cc): 74c/km.
- Large car (non-rotary engine 2601cc and above, or rotary engine 1300cc and above): 75c/km.

LAFHA reasonable amounts for food and drink 2013

With the changes to the living-away-from-home rules (effective from 1 October 2012) affecting employees who are required by their employers to live away from home for work, greater care needs to be taken in assessing the fringe benefits tax (FBT) implications of living-away-from-home allowances (LAFHAs). With a narrower scope for eligibility for concessional treatment and increased substantiation requirements, the level of risk is greater.

The Commissioner has recently determined the amounts that he considers reasonable for food and drink expenses incurred by employees receiving a LAFHA fringe benefit for the FBT year commencing on 1 April 2013. Broadly, if an employee's food or drink expenses exceed the amount the Commissioner considers reasonable, the employee will have to substantiate all the expenses incurred, or the employer will be liable to FBT on the amount of LAFHA paid to the employee that is in excess of the reasonable amount.

TIP: The new rules will require careful consideration when planning for and preparing the 2013 FBT return – this may include identifying whether the transitional rules apply, obtaining evidence if substantiation is required, and checking contracts to see if food and drink is clearly identified. Where food and drink is greater than the ATO reasonable amounts, future restructuring should be contemplated. Please contact our office for further information.

Tax anti-avoidance law to be amended

In response to a number of high profile cases lost by the Tax Commissioner, the Government has introduced legislation into Parliament that proposes to ensure the effective operation of the income tax general anti-avoidance law. In those cases, the taxpayers successfully argued that the income tax general anti-avoidance law did not apply as tax was a legitimate consideration in commercial decision-making, and where the tax cost of a transaction was considerable the taxpayer would have done nothing. The changes, once enacted, will apply retrospectively from 16 November 2012.

The changes aim, among other things, to rectify what the Government considers to be perceived weaknesses in the "tax benefit" concept, which have reduced the effectiveness of the law in countering tax avoidance arrangements. Broadly, the amended law will continue to apply where a taxpayer enters into a scheme with a sole or dominant purpose of obtaining a tax benefit. However, in considering alternative postulates (ie what the taxpayers might otherwise have done), tax costs will be disregarded under the amended law.

Consequently, it will be necessary to compare the scheme entered into with other ways of achieving the same commercial outcome, regardless of the tax cost. Eliminating the defence that the taxpayer would otherwise have done nothing will broaden the potential application of the rules significantly.

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