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Tax Law E-alert

At the tax face

Welcome to "At the tax face" a regular note for friends of Hunt & Hunt involved in the accountancy, tax, estate and financial planning industries.

What's happening?

Division 7A

Draft Taxation Determination TD2008/D8 is interesting. It allows income tax of a private company in some circumstances to be a "present legal obligation" for the purpose of the distributable surplus calculation under section 109Y(2) of Division 7A of Part III of the *Income Tax Assessment Act 1936*. This is important in determining whether there are any potential deemed dividends to shareholders or associates, as the Division can only operate where there is a distributable surplus. It seems that unpaid tax can count to being a present legal obligation where it is unpaid and would otherwise have fallen due on a normal basis at the end of the period allowed under section 204(1A) of the *Income Tax Assessment Act*. This period, broadly speaking, is

1 December on the year following the year of income. The effect of the draft determination is that if you still have tax unpaid as at 30 June of the following income year it will be counted as a present legal obligation for the purposes of the calculation, which will no doubt lead to abuses.

GST, Partnerships and the margin scheme

On the GST front, GST draft ruling GSTR 2008/D2 is bound to cause considerable confusion as the concepts set out in the ruling are at direct odds with the Commissioner's fractional interest approach for income tax purposes as outlined in IT2540.

The GST legislation treats a partnership as an entity for GST purposes and under this draft ruling the Commissioner treats retirements of a partner from a partnership as a taxable supply made by the **partnership** to the **remaining partners** of interest in the partnership (not by the retiring partner).

The ruling has some extreme examples, e.g. it takes the view that even if partners own land together (not in partnership) and then form a partnership (and credit their capital accounts under the partnership accounts) there can be a taxable supply regardless of the fact that no transfer of legal or beneficial interest (in the land) has taken place.

An entry into the partnership's books seems to be enough to constitute a taxable supply. This is likely to generate significant debate.

The intention of the draft ruling is to provide guidance on how the margin scheme will operate when there are disposals of assets between partners.

We can see the submissions flow on this one!

Let's have a go at the Aged

Interim determination ATO ID 2008/86 deals with the supply of a residential care facility by a developer by way of a lease to an entity operating a residential care service facility.

According to the Commissioner, the developer is not making the supply of residential premises "to be used predominately as residential accommodation" (and therefore as input taxed) but is making a taxable supply. It is more a supply of "care" rather than "accommodation" even though "accommodation" is supplied.

And it all has something very vague and unspecified to do with the physical nature of the premises (really? Whether the premises were actually inspected is a moot point).

This is bound to have ramifications through the aged care industry and increase the costs of supplying these facilities to our aging population.

GST, like any value added tax is not, in theory, meant to be a tax on housing or on production and this common arrangement in the aged facility industry is both!

Recent tax issues at Hunt & Hunt

- Over the past month and (during any month) some 10 to 20 tax issues arise. The interest of late of course has centred on Division 7A and the clean up of loan accounts across multiple entities.
- Superannuation instalment warrants seem to be subject to a gold rush, but amongst planners there are diverging opinions as to their commercial value taking into account the interest rates chargeable on the limited recourse facilities, particularly by the commercial warrant providers.
- The new tax treatment of eligible termination payments on termination of employment is attracting some interest amongst employment lawyers.
- Perennial issues of interest deductibility and timing of derivation of income are regular occurrences.
- An interesting issue arose on the GST effect of a settlement deed where a discounted settlement sum was accepted. The issue involved an analysis of adjustment events and payment of goods and services tax.
- Part IVA and wash sales is in everyones minds at the moment with taxpayers wanting to crystallise losses. The Commissioner's views in Taxpayer Alert 2008/7 have been the subject of regular comment.
- Reliance Carpet seems to have caused quite a stir but its ultimate impact is likely to be minor.
- Scholarships -the universities and the tax treatment of scholarships and moneys received by the universities to pay scholarships has also cropped up.
- Tax reliefs for primary producers is a regular issue.

For further information on these or similar tax issues please contact Peter Gell, Partner.

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