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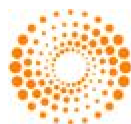

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relation to the capital gain, as its net assets exceed $6 million immediately prior to the CGT event happening (being in excess of $100 million for the entire income year).

Integrity improvement, but retrospectivity and compliance burden

In summary, the Draft Legislation will provide a significant integrity improvement to the SBCGT Concessions. Specifically, the requirement for an Object Entity to be a CGT small business entity or satisfy the MNAVT would make it more difficult for taxpayers to arrange their affairs so that their ownership interests in larger businesses do not count towards the tests for determining eligibility for the SBCGT Concessions.

For the time being however, it appears that this will come at the cost of retrospectivity, and also an added degree of complexity to provisions which are intended to reduce the tax cost and compliance burden for small business. There are also likely to be possible unintended victims of the changes.

Is there an alternative?

An alternative, and perhaps simpler, approach to that proposed in the Draft Legislation may be to amend the current SBCGT Concession rules to require that the relevant CGT asset have a sufficient link to the relevant small business carried on by the taxpayer. This solution would likely have required less amendment to the current legislation, resulted in a significant integrity improvement and perhaps also provided the Government with an opportunity to simplify the rules - and therefore reduce the tax cost and compliance burden for small business.

The Government is seeking stakeholders' views on the Draft Legislation, and responses are open until 28 February 2018.

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[158] **Yet another reminder - read the deed; even SMSF deeds**

- by Matthew Burgess and Patrick Ellwood, Directors, View Legal

The "read the deed" mantra has been regularly highlighted by us and many others in this *Bulletin* (see for example 2013 WTB 38 [1642] and 2014 WTB 43 [1426]).

The need to embrace this mantra, even in relation to relatively "simple" transactions such as changes of trusteeship, has also been highlighted this year, see 2017 WTB 6 [160].

With hindsight, each of our earlier articles have focussed on discretionary trust deeds. The "read the deed" mantra is however at least as important, if not more so, in relation to SMSF trust deeds.

Nothing new

In the context of an SMSF, the fact that the starting point for changing a trustee must be the trust instrument is not a recent concept.

Arguably the leading case in this regard is the decision in *Moss Super Pty Ltd v Hayne* [2008] VSC 158.

In that case, a dispute arose in relation to an attempted change of trustee of an SMSF following the death of a member.

In particular, the surviving member purported to change the trusteeship of the SMSF, so that a company of which she was the sole shareholder and director would be appointed.

The trust deed set out the process by which a change of trusteeship could take place and specifically required the "founder" to appoint any new trustee.

While the sole director of the new trustee company was also the founder, she did not in fact sign the change of trustee documentation in her capacity as founder.

In other words, while she signed in her capacity as the sole director of the new trustee, there was no provision where she also signed in her founder role.

Critically, the Court found that where structures are created in which individuals have multiple roles to play, the requirements around those roles must be respected and complied with.

This meant that here, the attempted change of trusteeship was invalid.

A 2017 reminder

The recent decision in *Perry v Nicholson* [2017] QSC 163 (**Perry**), reported at 2017 WTB 34 [1194], further highlights the importance of trustees and their advisers complying with the terms of SMSF trust deed.

The key threshold issue in this case was whether the trustee of an SMSF was validly changed, and then in turn whether a binding death benefit nomination (**BDBN**) was valid.

If the change of trusteeship was valid, the BDBN would also be valid, as 1 of the requirements under the deed was that a copy of the BDBN be provided to the trustee for the time being.

If the change of trusteeship was invalid, the BDBN would also fail as it had not been provided to the retired trustee.

In a blended family factual matrix which is becoming increasingly common, if the BDBN was valid, the deceased's current spouse would receive the death benefit payment. If the BDBN was invalid, the children of an earlier relationship of the deceased would likely have benefited.

The accountants who originally prepared documents purporting to evidence the change of trustee, on review of the material 2 years later, decided it was likely not in accordance with the deed. They therefore proceeded to produce a new change of trustee deed, that was backdated to the date of the original attempted change.

All parties acknowledged that the change of trustee deed produced 2 years after the original documents were signed had been backdated, probably at the direction of the accountants, although it was the incoming trustee who in fact had inserted the offending date.

As should be well understood, backdating documents is never permissible, however fortunately for the advisers, it

was decided that nothing turned on this issue or indeed, the backdated document.

Instead, the Court found that despite the significant confusion caused by the documents originally produced, none of which clearly complied with the requirements in the deed, they were in fact sufficient to substantiate the intended change of trustee.

Some lessons

Given the prevalence of changes of trusteeship and BDBNs, there are a number of key points from these cases that must be taken into account.

In no particular order, these include:

- There is every likelihood that the courts will apply a strict approach to interpretation of the requirements of a trust deed - indeed the decision in *Perry* is, with the aid of hindsight, arguably due to good fortune rather than good management, given a (backdated) deed of change of trustee was prepared 2 years after the original attempted change documents.
- If the documents prepared are not valid, they cannot be subsequently remedied by correctly prepared backdated documents. In some instances, a deed, dated when signed, that "rectifies" or "clarifies" the original documents may be effective. This approach may however be subject to challenge, particularly if aggrieved parties refuse to sign it.
- The use of template documents that are not designed specifically for the relevant trust deed is at best risky - at worst, they may see the relevant adviser held liable if the documents are not effective.
- While in each of the above decisions 1 party "won" and another "lost", the reality arguably is that both parties were losers given the time, energy and costs borne ... with the advisers (or lawyers at least) the only "winners".
- Even though most changes of trusteeship should not cause a stamp duty (nor tax) cost, this does not alleviate the need to stamp the relevant documents. Interestingly, the *Perry* decision does not appear to address this aspect at all, despite the fact that unstamped documents are generally inadmissible in legal proceedings (see 2017 WTB 37 [1277] for a detailed analysis of the key issues in this regard).

Conclusion

As explained regularly in this *Bulletin*, given the range of significantly adverse consequences that can result where a purported change to a trust is subsequently found to be invalid, advisers should proactively invest in processes and systems to minimise the risk of such an outcome.

Invariably, best practice dictates that the starting point must be to read the trust deed - even where the intended transaction is as "simple" as a change of trustee.

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[159] **FWC rules Uber not an employer in Australia…Yet**

- by Stephen Booth, Principal and Freya Booth, Legal Clerk, Coleman Greig Lawyers

The tension between traditional employment law frameworks and the gig economy has come to the fore once