International tax and estate planning

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Abstract: Increases in globalisation, trade and technology have meant that it is now common for Australians to have assets and business interests in multiple jurisdictions and to be based overseas for extended periods of time, making them non-residents for tax purposes. Due to the nature of international law, potential conflicts of laws, different taxation rules in each country and (in some instances) double tax agreements, it is generally no longer possible for one adviser to provide holistic advice in relation to all aspects of international estate planning. Given the complexity in the laws in different jurisdictions, best practice is generally achieved by advisers developing a methodical, checklist-based approach and engaging with specialist foreign advisers to advise on specific aspects of an international or cross-border estate plan.

Introduction

Significant increases in globalisation, trade and technology have opened up worldwide opportunities for many Australian businesses and individuals. As such, it is not uncommon for baby boomers, Australia's wealthiest generation yet, to have assets and business interests in multiple jurisdictions. Similarly, it is not uncommon for their children and other beneficiaries to be based overseas, often for extended periods of time, making them non-residents for tax purposes.

Due to the nature of international law, potential conflicts of laws when using trusts, different taxation rules in each country and (in some instances) double tax agreements, it is generally no longer possible for one adviser to provide holistic advice in relation to all aspects of international estate planning.

Best practice is generally achieved by advisers developing methodical checklists of potential issues and working collaboratively with specialist lawyers and accountants in overseas jurisdictions.

Assets in multiple jurisdictions

Generally, an estate involving cross-border assets or beneficiaries (or both) will contain a number of different types of property. For example, there will be a combination of real property, tangible assets such as cars, jewellery and boats, shares (both listed and unlisted), choses in action, including debts, loans and other rights, and intangible property including patents, trademarks or copyright.

Determining the process and proper law through which these assets can be distributed under an estate plan will depend primarily on the following:

- whether the property is movable or immovable;
- the jurisdiction in which the property is held; and
- where the individual is domiciled.

Given the abovementioned issues, it is inevitable that conflict of laws issues will arise. While some aspects of conflict of laws are considered below in the context of trusts, an in-depth consideration of the competing issues is outside the scope of this article. For those interested, *Nygh's conflict of laws in Australia* (*Nygh's*) is generally regarded as the leading Australian textbook in this area.

Movable and immovable property

Broadly speaking, there are three relevant sets of laws which could apply in international estate planning, namely:

- the law of the country in which the property is located;
- the law of the court determining issues in relation to the estate, for example, a family provision application; and
- the law in which a deceased is domiciled.

Before considering which laws apply to the distribution of property under an estate plan, the starting point is determining whether the property is movable or immovable.

Thus, where an individual owns property in multiple jurisdictions, the laws of each of those jurisdictions apply when classifying the property as movable or immovable. This in turn affects the laws governing the distribution of property under any will.

Set out below are the principles relating to property where the property is located in Australia. However, where property is owned in foreign jurisdictions, the law of that country will ultimately determine whether property is movable or immovable. While it is likely that in most jurisdictions the classifications will be similar, particularly in common law countries, this will not always be the case.

Traditionally, immovable property was classified using a "connection test" such that the country where the property was located had "all rights over things which cannot be moved, whatever be the nature of such rights or interest".[1] Therefore, even interests in land less than fee simple were treated as immovable, so long as the underlying interest was in real property. However, after the High Court's decision in *Haque v Haque (No. 2)*[2] (*Haque*), Australia has moved away from the connection test and focused on the interest and nature of the right itself.

Generally, where the classification of property is not clear-cut, advice from a specialist in the foreign jurisdiction where the asset is located should be obtained.

Real property

It is uncontroversial that land is immovable and regulated by the laws of the country where it lies. However, whether an interest in land less than fee simple is immovable is less clear. For example, it has been held in a number of cases involving land in Australia (including in *Haque*)[2] that a mortgage securing a debt is classified as movable property because its primary function is the securing of a debt, and not security over land. However, in contrast, in England, a mortgage securing a debt has been classified as immovable.

Tangible goods

Again, it is uncontroversial that chattels, including copyrights, trademarks and patents, are movable, all of which were confirmed in *Haque*.[2]

Other interests

Difficulties arise in the context of other interests such as choses in action because the application of "situs" is artificial.

In the context of choses in action, the position in Australia is best summarised in *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)*[3] as follows:

> "For present purposes, the common law principles of conflict of laws locating a liability can be assumed to be sufficiently summarised as follows.
>
> A debt is generally situated where the debtor resides. If a debtor has two or more places of residence and the creditor stipulates for payment at one of those places, the debt will be situated there.
>
> If a debtor has more than one place of residence, but there is no express or implied promise to pay at one of them, the debt will be situated where it would be paid in the ordinary course of business."

In relation to shares in private companies, they are "located where they can effectively be dealt with, namely the place and incorporation of a company where the share register is kept".[4] However, an exception appears to apply in relation to negotiable instruments and bearer shares, such that their situs is where the physical pieces of paper are at the time of transfer.[5]

In relation to listed shares, the authors of *Nygh's* argue the situs will be the principal place where the intermediary carries on its business, which due to technology advances, has become an increasingly complex task.[6]

Recognition of foreign wills

Under the common law, difficulties often arose due to the different countries prescribing different requirements for creating a valid will. Through the succession or wills Acts in each state and territory, Australia has ratified three conventions, with the aim of simplifying the recognition of international wills in Australia:

- *Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* (1961) (Hague Convention);
- *Convention providing a Uniform Law on the Form of an International Will* (1973) (Washington Convention); and
- *Convention providing a Uniform Law on the Form of an International Will* (2013) (Unidroit Convention).

Hague Convention

The Hague Convention has been ratified by most major nations except the United States and sets out formal rules as to when a testamentary instrument will be valid.

> *"Difficulties often arose due to the different countries prescribing different requirements for creating a valid will."*

Washington Convention

Unlike The Hague Convention which prescribes validity of wills in accordance with requirements in certain jurisdictions, the Washington Convention sets out universal principles to determine the validity of a will, regardless of where it was signed.

Unidroit

Unidroit introduces the concept of an "international will", with the aim of addressing conflict of laws issues that can arise where a will maker dies with assets in both Australia and another jurisdiction.

Where a will satisfies the rules, it is recognised as valid by courts in every country that has adopted Unidroit, regardless of where the will was signed, the location of the assets or the will maker's place of residence, domicile or nationality.

Laws governing the distribution of property

If an Australian will or foreign will is not formally valid, the intestacy rules will apply. In this regard, movable property is governed by the laws of the deceased's domicile.[7]

The intestacy rules for immovable property can be problematic, as a number of jurisdictions strictly limit the manner in which real property can be passed on.

Movables

Where a will is valid, the disposing of movable assets will also be governed by the laws of the deceased's domicile. The key issues in relation to domicile are considered further below. However, it may nonetheless be possible to expressly stipulate in the will which law will be the proper jurisdiction for movable assets. For example, in the case of *Public Trustee v Vodjdani*,[8] an Australian domiciled deceased expressly intended the will to be construed by German law. This approach was approved by the court because:

- the will was written in German;
- the executors were permanent residents of Germany;
- the will expressly specified Germany as the governing jurisdiction; and
- the language and format of the will was consistent with the relevant German legislation.

Immovables

In relation to immovable assets, while the issue has not yet been considered by any Australian court, the authors of *Nygh's* suggest that immovables should be governed by the laws where the property is located.[6] However, the effectiveness of any purported foreign property distributions in a will are argued to be likely to depend on the consistency of both the rules of the will maker's domicile and the laws of the jurisdiction where the property is located.

In this regard, particular difficulties arise where foreign property is purported to be held on trust via a will valid in another jurisdiction where the jurisdiction in which the land is located does not itself recognise the concept of a trust. This issue is also considered in detail below.

One will or two (or more)?

Given the complexity and, at times, uncertainty surrounding international laws applying to estate planning, it is often seen as best practice to have separate wills in each jurisdiction where there are substantive assets. In summary, the key issues that generally need to be considered in relation to whether to use multiple wills include:

- whether trust relationships over foreign property are recognised. In this regard, since the trust is a creature of common law, a number of civil law countries do not recognise the concept;
- if the assets can be discretely divided up between beneficiaries within separate jurisdictions;
- efficiency in administering the estate. Generally, grants of probate (or the equivalent) cannot be done simultaneously when a deceased has only one will;
- the enforceability of an Australian will in a foreign jurisdiction. For example, difficulties often arise in various Asian and Middle East countries where, anecdotally, courts will often resist applying Western accepted rules relating to domicile, meaning that movable property will be governed by local succession laws regardless of any valid Australian or international will; and
- where multiple wills are used, there is always the residual risk that all assets and contingencies are not in fact properly accounted for, potentially creating a partial intestacy.

Using testamentary trusts for foreign property

The Hague *Convention on the Law Applicable to Trusts and on their Recognition* (Trusts Convention)[9] aims to regulate the recognition and characteristics of trusts and the appropriate governing jurisdiction, which has been ratified and implemented in Australia by the *Trusts (Hague Convention) Act 1991* (Cth). Unlike other conventions, the Trusts Convention has not been universally ratified.

While a detailed consideration of the Trusts Convention is outside the scope of this article, it is worth noting that it does not deal with issues relating to the administration of trusts.

Difficulties may therefore arise when testamentary trusts are created over foreign assets in countries which do not recognise the concept of a trust. For example, if property was distributed to a trustee in a country that does not recognise a trust relationship, there can at law in fact be no trust relationship and the trust will fail. The consequences of such a failure will depend on the laws of the country where the property is located, and may result in:

- the property being taken absolutely by the trustee once transferred; or
- the property effectively being gifted to the beneficiaries directly.

Despite this, the laws of Australia may provide some relief in situations where:

- the trust has a substantial connection to Australia; or
- the trustee is in Australia, such that a Supreme Court would have the requisite authority to assist.

For example, in *Re Dion Investments Pty Ltd*,[10] it was held as follows:

> "However, this Court has two sources of jurisdiction to deal with the matter. The first is that if there is a statute which is wide enough to cover trusts which have a substantial connection with NSW then that statutory power may be exercised notwithstanding that the proper law of the trust is not NSW. Perhaps the classic example for the exercise of this jurisdiction is Re Webb; Webb v Rogers (1992) 57 SASR 193 where the Full Court of the Supreme Court of South Australia held it had jurisdiction to order accounts in the case where the trustees were administering the trusts in South Australia even though the proper law of the trust was the Northern Territory.
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> In Re BTA Institutional Services Australia Ltd [2009] NSWSC 1294; (2009) 3 ASTLR 207 Brereton J followed Webb v Rogers and held that, whilst the governing law of one of the trusts was the law of England, as the trusts under it were administered in NSW, the Trustee Act of New South Wales was able to be used to give judicial advice.
>
> The second source of jurisdiction is where the trustee is within the jurisdiction so that the court has an in personam jurisdiction over the trustee.
>
> An illustration of the in personam jurisdiction is Re Constantinou [2012] QSC 332; [2013] 2 Qd R 219; (2012) 271 FLR 276. In that case the proper law of the trust was Papua New Guinea however a Papua New Guinea resident had asked the Supreme Court of Queensland for orders. Everyone else had submitted and Dalton J held that he had in personam jurisdiction and exercised it to give advice to the trustees."

While the case was appealed, the summary above in relation to jurisdictional matters was not challenged.

Beneficiaries in multiple jurisdictions

From an estate planning perspective, the predominate focus for most Australian advisers is ensuring the residency of beneficiaries is ascertained, to ensure no adverse taxation consequences occur when assets pass under an estate plan to particular beneficiaries.

For Australian taxation purposes, individuals are deemed to be either residents or non-residents. Section 6 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) states that a resident is:

> "(a) a person, other than a company, who resides in Australia and includes a person:
>
> (i) whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia; or
>
> (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia."

In other words, for Australian tax purposes, there are three main tests for residency:

- the ordinary concepts test;
- the domicile test; and
- the 183-day test.

Ordinary concepts test

The Australian Tax Office (ATO) in TR 98/17 summarises what it believes is the position in relation to whether a person is a resident for tax purposes. Relevantly, TR 98/17 states that:

> "As there is no definition of the word 'reside' in Australian income tax law, the ordinary meaning of the word needs to be ascertained from a dictionary …
>
> The ordinary meaning of the word 'reside' is wide enough to encompass an individual who comes to Australia permanently (e.g., a migrant) and an individual who is dwelling here for a considerable time.
>
> A migrant who comes to Australia intending to reside here permanently is a resident from arrival.
>
> When an individual arrives in Australia not intending to reside here permanently, all the facts about his or her presence must be considered in determining residency status.
>
> The period of physical presence or length of time in Australia is not, by itself, decisive when

determining whether an individual resides here. However, an individual's behaviour over the time spent in Australia may reflect a degree of continuity, routine or habit that is consistent with residing here.

Behaviour while in Australia

The quality and character of an individual's behaviour while in Australia assist in determining whether the individual resides here.

All the facts and circumstances that describe an individual's behaviour in Australia are relevant. In particular, the following factors are useful in describing the quality and character of an individual's behaviour:

(a) intention or purpose of presence;

(b) family and business/employment ties;

(c) maintenance and location of assets; and

(d) social and living arrangements.

No single factor is necessarily decisive and many are interrelated. The weight given to each factor varies depending on individual circumstances."

Domicile test

IT 2650 provides guidance on when a person is a non-resident by virtue of the domicile test. This test also applies in determining where a will maker is domiciled. Relevantly, paras 8 to 10 of IT 2650 provide that:

"'Domicile' is a legal concept to be determined according to the Domicile Act 1982 and to the common law rules which the courts have developed in the field of private international law.

The primary common law rule is that a person acquires at birth a domicile of origin, being the country of his or her father's permanent home. This rule is subject to some exceptions.

For example, a child takes the domicile of his or her mother if the father is deceased or his identity is unknown.

A person retains the domicile of origin unless and until he or she acquires a domicile of choice in another country, or until he or she acquires another domicile by operation of law (Henderson v. Henderson [1965] 1 All E.R.179; Udny v. Udny [1869] L.R.1 Sc.& Div. 441; Bell v. Kennedy [1868] L.R.1 Sc.& Div. 307 (H.L.)).

The common law test of domicile of choice has now been restated in section 10 of the Domicile Act which provides:

> 'The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.'

In addition, that Act abolished the former common law rule whereby a married woman had at all times the domicile of her husband.

In determining a person's domicile for the purposes of the definition of "resident" in subsection 6(1), it is necessary to consider the person's intention as to the country in which he or she is to make his or her home indefinitely.

Thus, a person with an Australian domicile but living outside Australia will retain that domicile if he or she intends to return to Australia on a clearly foreseen and reasonably anticipated contingency e.g., the end of his or her employment.

On the other hand, if that person has in mind only a vague possibility of returning to Australia, such as making a fortune (a modern example might be winning a football pool) or some sentiment about dying in the land of his or her forebears, such a state of mind is consistent with the intention required by law to acquire a domicile of choice in the foreign country – see In the Estate of Fuld (No. 3)(1968) p. 675 per Scarman J at pp. 684-685 and Buswell v. I.R.C (1974) 2 All E.R. 520 at p. 526."

> *"The predominate focus for most Australian advisers is ensuring the residency of beneficiaries is ascertained."*

183-day test

Finally, in relation to the 183-day test, the ATO confirms in TR 98/17 that:

"This test enables the Commissioner to consider usual place of abode and intention to take up residence in Australia so that individuals who are enjoying an extended holiday in Australia are not treated as residents.

In most cases, if individuals are not residing in Australia under ordinary concepts, their usual place of abode is outside Australia.

There may be situations where an individual does not reside in Australia during a particular year but is present in Australia for more than one-half of the income year (perhaps intermittently) and intends to take up residence in Australia. This individual is treated as a resident under the 183 day test."

Taxation consequences of Australian property transfers to non-residents

CGT event K3 operates to ensure that, where assets pass to a tax-advantaged entity such as a non-resident beneficiary from a deceased estate, a capital gain or loss is recognised in the deceased's final tax return. This effectively prevents assets with embedded capital gains from avoiding CGT when they are later disposed of by the concessionally taxed entity. CGT event K3 has, in the past, been avoided by ensuring an asset does not pass to a concessionally taxed entity until after the decease's standard amendment period (generally four years after the assessment) has expired.

As part of the 2011-12 Budget measures, it was announced that amendments would be made to ensure that, where CGT event K3 happened outside of the deceased's standard amendment period, a CGT liability still arose in the deceased's tax return. It was proposed this could be achieved by excluding CGT event K3 from the standard amendment period.

In particular, the CGT event would have been deemed to happen to the relevant entity that passed the asset to the concessionally taxed entity (rather than with the beneficiary), avoiding the need to amend the deceased's tax return. This change would have also allowed the entity to which CGT event K3 applied to be able to utilise its realised capital losses against CGT event K3, instead of the deceased utilising their capital losses against their capital gain from CGT event K3.

The change would have been consistent with how Div 128 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) operates under PS LA 2003/12 in relation to the wider approach to the taxation of deceased estates where a legal personal representative or testamentary trust trustee sells an asset to a third party, rather than passing the asset to the intended beneficiary of the estate. However, as with many other proposed amendments from around this time, the announced changes to CGT event K3 were abandoned in late 2013.

Using testamentary trusts to avoid CGT event K3

CGT event K3 can be avoided where the asset is transferred to an Australian resident testamentary trust. As noted below, there are different tests depending on if the trustee of the testamentary trust is an individual or a company.

Section 95(2) ITAA36 states a trust estate is taken to be a resident trust estate in relation to a year of income if:

> "(a) a trustee of the trust estate was a resident at any time during the year of income; or
>
> (b) the central management and control of the trust estate was in Australia at any time during the year of income."

Individual trustee(s)

On this basis, in order to qualify as a resident trust, the trustee of a testamentary trust should be an Australian resident. Alternatively, the wording of s 95(2) suggests that only one of the trustees needs to be a resident. On this basis, a non-resident could be appointed as an individual trustee of a testamentary trust as long as a co-trustee is an Australian resident.

Given that s 95(2) seems to be an "or" test, only para (a) needs to be satisfied for an individual trustee.

Corporate trustee – central management and control

If the trustee of a testamentary trust is a company, to ensure that the testamentary trust remains a resident, the "central management and control" rules should be applied. Specifically, a company will be an Australian resident if:

- it is incorporated in Australia or it carries on business in Australia; and
- its central management and control is in Australia or its voting power is controlled by shareholders in Australia.

Accordingly, as long as the trustee company of a testamentary trust's central management remains in Australia, the CGT event K3 may be avoided.

Traditionally, the central management test has revolved around assessing where important decision-making and strategic direction choices are made.

The general view appears to be that the location of board meetings and residency of directors remain the primary test, and subject to an analysis of any other compelling factors to the contrary will often be determinative.

The case of *Hua Wang Bank Berhad v FCT*[11] (*Hua Wang*) is a useful summary of the position in this regard. It confirms that there are two principles to be applied, namely:

> "(a) a *company* is resident where its real business is carried on, and its real business is carried on where the central management and control abides; and
>
> (b) the question of where a company is resident is one of fact and degree." (emphasis added)

In this case, most directors of a number of companies in a corporate group lived outside Australia and there was evidence to suggest board meetings were not held in Australia. The court determined, however, that:

> "… the directors of the taxpayers exercised no independent judgment in the discharge of their offices but instead merely carried into effect Mr Gould's wishes in a mechanical fashion. *The taxpayers' places of central management and control were in Sydney.*" (emphasis added)

The decision in *Hua Wang*[11] was affirmed on appeal in *Bywater Investments Ltd v FCT*[12] and subsequently in the High Court in *Bywater Investments Ltd v FCT*.[13] Importantly, the High Court concluded that the question is one of substance over form, such that it will not always be the case that a company is a resident in the place where board meetings are held. In particular, after considering a number of historical authorities, the majority concluded that:

> "… none of those decisions support the idea that a company is taken to be resident where its board meetings are held even if the meetings are mere window dressing comprised of rubber-stamping decisions actually made elsewhere by others and held in that place in the hope of avoiding tax liability in the place where the decisions are actually made.
>
> It is true that Esquire Nominees involved a contrived tax avoidance scheme, and it is also true that the company in that case was held to be resident where its board chose to meet as part of that scheme.
>
> But, despite what the appellants described as factual similarities between these appeals and Esquire Nominees, and what was submitted to be the improbability that the Norfolk Island directors in Esquire Nominees exercised any independent judgment, it is clear that Gibbs J found as a fact that the board meetings were held on Norfolk Island and that substantive decisions were made by the board."

Generally, the above tests will also apply in relation to individual trustees.

Distributions from a resident trust to non-resident beneficiaries

When making trust distributions to non-resident beneficiaries, it is important to consider the interaction between s 128A ITAA36 in relation to withholding tax for non-residents and the general provisions of Div 6 ITAA36 in relation to the taxation of trust distributions.

Withholding tax will be payable on all dividends, interest or royalties included in the income paid by a resident trust to a non-resident beneficiary to the extent that the non-resident beneficiary is presently entitled to the relevant amount, even if the trust estate incurs a loss for income tax purposes.

To the extent income is caught by the withholding tax provisions, s 128D ITAA36 excludes it from being treated as assessable income, which will potentially impact the Div 6 treatment of the relevant trust distributions. For example, if a resident trust distributes income to beneficiaries in the US (who are non-resident beneficiaries):

- under the withholding tax system, a flat rate is deducted from the source of the income before the income is sent overseas;
- each part of the income (depending on whether it is interest, dividends or royalty distribution) will be taxed on the relevant withholding tax rate, ranging between 10% and 15%; and
- often this can mean that the recipient beneficiary will not be subject to any other tax.

For trust income distributions to non-residents where withholding tax does not apply, the amount will be taxed to the trustee under s 99 or 99A ITAA36. In other words, in these circumstances, where the withholding tax rules do not apply, the trustee will be taxed at the top marginal rate.

Non-resident trusts

Division 6AAA ITAA36 contains a number of measures to ensure that Australian tax cannot be deferred on trust income accumulated in a non-resident trust where it is ultimately for the benefit of an Australian resident beneficiary. Importantly, among other rules, any income of an Australian controlled non-resident trust must be assessed on an accruals basis to the resident taxpayer who has directly (or indirectly) transfers of value to the non-resident trust.

Relatively limited exceptions can apply to this regime where transfers take place at arm's length or are part of a matrimonial settlement.

The income assessed under Div 6AAA is also dependent on whether the non-resident trust was established in a listed or unlisted country.

Beneficiary of a non-resident trust

While resident beneficiaries are liable for tax on the Australian sourced trust income to which they are presently entitled, the trustee is taxed on these amounts with the actual distribution to the beneficiary receiving a credit for tax paid.

Under s 99B ITAA36, where a beneficiary is made presently entitled to foreign sourced income, the beneficiary can, in some instances, be assessed on that amount if they were a resident in Australia at any time during the income year that the amount is paid, subject to some limitations. Furthermore, under s 99D ITAA36, if a resident trust derives foreign income and there is no beneficiary presently entitled, the trustee will be assessed on that income.

Any ultimate distribution to a beneficiary can trigger a refund of the tax paid, so long as the income is clearly referable to a period when the beneficiary was a non-resident.

In order to access the refund, a formal application must be made in writing and, among other things, it must be demonstrated that the arrangement does not breach the reimbursement provisions under s 100A ITAA36.

Non-resident beneficiaries at year end

As noted above, where a beneficiary is presently entitled to trust income and is a non-tax resident at the end of the relevant income year, the trustee is liable to pay the tax on that amount.

The tax payable by the trustee relates to the share of net income attributable to any period where the beneficiary was a resident, regardless of the source of income, together with a share of net income attributable to any period where the beneficiary was a non-resident and the income was Australian sourced.

Again as noted above, the tax paid by the trustee effectively creates a credit for the beneficiary under s 98A ITAA36 for the tax paid.

Importantly, where net income of a trust is wholly or even partly attributable to foreign sources, a trustee will only be liable to tax on that income if the trust is a resident trust. Conversely, a non-resident is liable to tax only in relation to the net income that is attributable to Australian sources, subject to the provisions of Div 6AAA.

Distribution of shares to non-resident beneficiaries

Another common method that can be used to avoid the operation of CGT event K3 in estate planning exercises involving non-resident beneficiaries is to transfer shares in private companies. This is because shares in private companies, if they are principally invested in real property, are taxable Australian property, and therefore K3 will not occur when they are transferred to non-resident beneficiaries.

This in turn creates opportunities where, for example, bucket companies are utilised to transfer wealth effectively to non-resident beneficiaries. In particular:

- a company is incorporated with the shares owned 100% by the will maker;
- where a family trust is already established, distributions can be made over a number of years to the company, building up its retained property holdings; and
- on the death of the will maker, the shares in the company can be transferred directly to the non-resident beneficiary.

While this is a relatively simple strategy, it is unconventional in the sense that it requires the ignoring of a standard asset protection strategy for the will maker (ie not owning assets such as shares personally).

An iteration of the above approach involves liquidating the company following the transfer of the shares to the non-resident beneficiary.

Land tax surcharges

In situations where real property, located in Victoria, New South Wales or Queensland, is transferred directly to non-residents, there may be land tax surcharge payable every year. Furthermore, in some contexts, even if an Australian resident trust is used to receive the property, land tax surcharges may nonetheless be payable.

At a federal level, they can potentially be the requirement to receive Foreign Investment Review Board approval. At the state level, there is the possible impost of a stamp duty surcharge on property acquisitions in Queensland, NSW, Victoria and South Australia for foreign owners, including foreign trusts (with similar rules commencing in Western Australia on 1 January 2019).

A brief overview of the land tax surcharge rules is set out below. It is important to note that South Australia and Western Australia, at this stage, are not implementing a land tax surcharge in addition to the foreign ownership stamp duty surcharge.

New South Wales provisions

In NSW, a land tax surcharge of 2% is levied on all residential land owned by foreign persons. For the purposes of the surcharge, foreign persons include, among others:

- non-residents;
- individual trustees who do not ordinarily reside in Australia and who hold a 20% interest in the income of the trust;
- trustees not ordinarily residing in Australia who hold a total 40% interest in the income of the trust; and
- corporations where interests of more than 40% are owned by persons not ordinarily residing in Australia.

Victorian provisions

Victoria has a land tax surcharge of 1.5%. The levy is imposed on all land ordinarily subject to land tax owned by an absentee person, corporation or trust. A person will be an absentee person if they:

- are not an Australian citizen or resident;
- do not ordinarily reside in Australia;
- were absent on 31 December each year; and
- were absent for more than 183 days during the tax year.

A corporation is an absentee corporation if it is incorporated outside of Australia or an absentee person has a controlling interest in the company.

The levy applies to absentee trusts if:

- for discretionary trusts – a specified beneficiary is an absentee person;
- for unit trusts – at least one unitholder is an absentee person; and
- for fixed trusts – at least one beneficiary is an absentee person.

Queensland provisions

In Queensland, the land tax surcharge for absentee owners is 1.5%. An individual will be an absentee if they were absent from Australia on 30 June in the relevant year or have been away from Australia for more than six months in the relevant financial year.

Common Reporting Standard

With the continued increase in cooperation between international revenue agencies, Australia became a member of the Organisation for Economic Co-operation and Development's *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (Common Reporting Standard (CRS)) from 1 July 2017.

A substantive discussion of the application of the CRS is outside the scope of this article. However, it is useful to note that most of the additional requirements imposed by the CRS are placed on financial institutions.

In relation to family discretionary trusts, the ATO guidance provides that a family discretionary trust will be a non-financial entity, meaning that practically the only requirements under the CRS should be the provision of additional information to banks and other financial institutions. The first exchange of information pursuant to the CRS is due to occur in 2018.

Conclusion

As evident from the issues set out above, when preparing estate plans that incorporate assets in multiple jurisdictions, a methodical, checklist-based approach is required. Furthermore, given the complexity and differences in the laws in different jurisdictions, best practice is generally for specialist foreign advisers to be engaged to advise on specific aspects of an international or cross-border estate plan.

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