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Continuation of tax groups on interposition of a holding company

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One common strategy to achieve appropriate restructuring of corporate groups to provide flexibility and manage asset protection risks is to ‘interpose’ a holding company, by inserting a company between the existing shareholders and the original company.

The approach is also sometimes referred to as a ‘top hat’ or a 'Div 122A' or ‘Div 615' rollover.

Key issues with interpositions

Some of the issues which need to be considered when implementing a holding company structure include:

(a) Determining the tax and stamp duty consequences of the restructure. Specific capital gains tax and stamp duty exemptions are usually available.

(b) Potentially establishing multiple subsidiaries to own different classes of assets, depending on the size and nature of the business owned by the original company.

(c) Obtaining any relevant third party consents, such as from any financier.

(d) Ensuring appropriate legal documentation is signed. For instance, any cash lent by the holding company to the trading company should be the subject of a secured loan agreement.

(e) Considering the impact of the structure on any future sale of the business of the original company, including the ability to achieve access to the small business capital gains tax concessions.

Key benefits of interpositions

One of the key benefits of the holding company structure can be that the operational risks of running a business are quarantined in the (original) trading company and the assets of the (interposed) holding company (such as the retained profits) are generally protected in the event a claim is made against the business.

Another key benefit of the interposition of a holding company is the ability generally to elect to continue any pre-existing tax consolidated group (**TCG**). That is, by preserving a TCG where a company is inserted as the new holding company, and nothing of substance has changed within the TCG, the taxpayer is relieved of the burden of applying the consolidation cost setting rules (known as the allocable cost amount, or 'ACA') .

Continuation of a TCG also protects the integrity of the consolidations regime, for example, by preventing the cost bases of a TCG's assets from being reallocated between assets where nothing of substance has otherwise changed within the TCG.

Continuation of TCG

In some instances however, taxpayers may wish to avoid continuation of the TCG, as highlighted in the decision of *AusNet Services Limited v Commissioner of Taxation* [2024] FCA 90 (**AusNet**).

In this case the taxpayer sought to achieve an increase in the cost bases of the assets of the former TCG, by arguing no valid election could be made under Division 615. This would have meant that the outcome normally available where a shelf company is interposed over a pre-existing head company of a TCG of the TCG continuing (and thereby avoiding all the practical and administrative costs of needing to form a new TCG when there has been no practical nor commercial change) would have in fact been denied.

In holding, as the Tax Office argued, that the TCG did continue on the rollover, the court relevantly confirmed:

1. Where, as is the case under a Division 615 (and many other tax rollovers) there are a number of steps that need to be completed, practically those steps can take place sequentially - that is they need not occur simultaneously.

2. Where the implementation steps are required to be carried out in a prescribed sequence, use of a phrase such as 'completion of the steps are interdependent' essentially only confirms that no party is obliged to perform any implementation step unless all steps will occur on or before the relevant agreed implementation date.

3. It is artificial to regard the various, sequential, steps of a restructure as having occurred as anything other than simultaneously for the purposes of accessing a tax rollover.

4. Therefore, the operation of a scheme that is dependent upon the operation of other schemes, where none could have effect independently of the other means they will all be considered as inter-conditional - that is, either all the schemes will be implemented, or none are. The overall restructure should be considered as simply different, though connected, parts of the same single transaction (see *Isles v Daily Mail Newspaper* [1912] HCA 18).

5. While the taxpayer's arguments that a conclusion that the rollover had been satisfied could in theory lead to anomalous results were potentially relevant, there were no such anomalous consequences in this case. In particular, the continuation of the TCG clearly reflected the legislative intention of not creating material burdens for taxpayers merely inserting a new holding company over a pre-existing TCG, with essentially no change in the underlying arrangements. Theoretical anomalous consequences of a particular construction should be approached with caution by the courts when they are not in fact a reality in the case before the court (see *ConnectEast Management Ltd v Commissioner of Taxation (Cth)* [2009] FCAFC 22).

6. Further, a theoretical lacuna in the interaction of different complex divisions of the income tax legislative landscape, enacted at different points in time, is not a sound basis for rejecting what otherwise seems to be the correct construction of the legislative text of a rollover (see *Peter Greensill Family Co Pty Ltd v Commissioner of Taxation* [2021] FCAFC 99).

7. Finally, when ascertaining legislative 'intention', it is the intention that is manifested by the legislation which is the starting point (see *Wik Peoples v Queensland* [1996] HCA 40). Thus, statements as to legislative intention made in explanatory memoranda or by Ministers or (as was the case here) by the Commissioner in a taxation ruling, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning (see *Mitsui & Co (Australia) Ltd v Commissioner of Taxation* [2011] FCA 1423).

Conclusion

Corporate restructures involving insertion of a new holding company are a longstanding and important tax rollover.

Following the introduction of the TCG regime changes were made to ensure that the interposition of a new holding company of a pre-existing TCG did not create an inappropriate administrative burden when the entire rollover is predicated on the fact that nothing of substance will have changed within the TCG as a result of the rollover.

A second order consequence of the changes to the ensuring that a pre-existing TCG continues following the interposition of the new holding company however was the intended protection of the integrity of the consolidations regime, by preventing the cost bases of a TCG's assets from changing – an outcome the Tax Office has successfully prevented in the AusNet case.