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sharptax

Grant Thornton periodical reporting on taxation issues for business owners.

This edition of Sharp Tax considers the Government's recent announcement regarding the definition of **small business** and considers a recent case regarding **unremitted PAYG**...

Small Business concessions

The Government have announced an intention to standardise the definition of "small business" from 1 July 2007 in an effort to increase access to the various small business tax concessions.

Currently there are different eligibility criteria for accessing the different concessions that relate to GST, capital gains tax, fringe benefits tax, PAYG installments and income tax.

However, the Government now wish to grant automatic access to all small business tax concessions to businesses with turnover of less than $2m. We note that a business will still have the option as to whether any small business concession is utilised. The concessions that are subject to the announcement include:

- The ability to use the Simplified Tax System (STS)
- Two-year tax return amendment period
- Cash accounting for GST
- Simplified GST accounting methods
- GST installments
- Annual GST Apportionment
- Small business CGT concessions
- FBT exemption for car parking
- Ability to pay PAYG installments based upon ATO installment amount.

Now, where does this leave businesses that have turnover of more than $2m?

Well, the intention is that access to any specific tax concession will continue for businesses that meet the current specific eligibility criteria. For example, a business with a turnover of $8m may still qualify for the FBT car parking exemption and small business CGT concessions.

This announcement complements the changes to the small business CGT concessions announced during the Budget, whereby STS business can now ignore the net asset threshold, whilst the net asset threshold is to be increased from $5m to $6m for all other businesses, and the softening of the 50% controlling individual rule to a more generous 20% significant individual rule.

Director not liable for unremitted PAYG

Under the Income Tax Assessment Act, 1936 (Act), a company's directors are required to see that PAYG is remitted to the ATO by the due date. Where this is not financially possibly, the company's directors are required to seek and adhere to a payment arrangement with the ATO or to appoint a voluntary administrator or liquidator.

Failing to do this by the due date could render a company's directors personally liable for the unremitted PAYG, unless it can be demonstrated that a director was unable to participate in management (due to illness etc) or that the director took all reasonable steps to comply with the law.

The case of DC of T v Dick was recently decided in the New South Wales District Court. This case is of significance as it tested the interaction of the Act and the Corporations Act.

The defendant was an unpaid non-executive director of the Northern Sprit Football Club, a professional football club competing in the now defunct National Soccer League.

Throughout the period of June 2002 to March 2003 the club failed to remit PAYG withholdings totalling $332,000, owing to its very poor financial position.

As a result of the unremitted PAYG, the ATO sought to recover the outstanding amounts from the defendant who had been reassured by the club's shareholder that the amounts were being remitted to the ATO under an agreed upon payment arrangement.

While the District Court agreed with the ATO that the defendant's actions were not considered to be "all reasonable steps" as per the Act, the Court ruled that the defendant could seek protection from the ATO under the Corporations Act.

The Corporations Act contains a provision which seeks to protect company directors from civil proceedings arising from their directorship where it can be demonstrated that the directors acted honestly.

The Court did not agree with the ATO's argument that protection under the Corporations Act is only limited to civil proceedings arising under the Corporations Act, instead ruling that the Corporations Act defence can protect directors from director's liabilities under the Act.

CGT changes for testamentary trusts

The Assistant Treasurer, Peter Dutton, has announced a change relating to the distribution of taxable capital gains to income-only beneficiaries of testamentary trusts.

Currently a beneficiary could be assessed on a taxable gain despite being unable to share in the gain. This could happen where the terms of the trust prohibit one or more beneficiaries from sharing in any capital gains.

It is proposed that a trustee could choose to be assessed on a capital gain where a beneficiary is unable to benefit from the gain. Additionally, it is proposed that the trustee could make any choice on a beneficiary-by-beneficiary basis, allowing the trustee to take full advantage of any situation where the beneficiary would not be paying tax on the gain.

Share buy-backs

Whether a company is wishing to buyout certain shareholders or just wanting to return cash to its shareholders, share buy-backs have become a regular occurrence despite the legal and regulatory requirements for private and public companies alike.

Be mindful of the various taxation considerations involved, as a share buy-back can be treated as a return of capital, a dividend (that may be frankable) or a combination of both.

Where the return is of, capital a shareholder may be able to take advantage of:

- The general CGT discount
- Pre-CGT status of shares
- Capital losses or
- CGT exemptions for certain non-residents.

Meanwhile, the receipt of a dividend can allow a shareholder to take advantage of:

- Franking credits
- Concessional tax rates (especially for superfunds)
- A potential capital loss resulting from the buy-back as the cost base of the share is reduced by the assessable dividend component.

Although a company is able to determine the capital/dividend split of a share buy-back, the ATO has broad powers to impose harsh penalties where they deem a buy-back to be a "scheme" with a purpose to provide tax benefits to shareholders.

Therefore it is important to get the capital/dividend split right to avoid these consequences. It is for this reason that many companies, particularly listed companies, apply for class rulings to provide certainty that the capital/dividend split will not expose shareholders to unexpected tax consequences.

It is also worth noting that other tax issues, such as dividend withholding tax and dividend franking benchmarking rules, also need consideration.

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