

Welcome to the October edition of our newsletter. This month's edition contains interesting tips for both individuals and small businesses. ENJOY and if you have any queries, please do not hesitate to contact our office.

October 2010 Case Update:

Test for small business CGT concessions

AAT Case [2010] AATA 591, Re Cannavo and FCT

The Administrative Appeals Tribunal has confirmed that debts of \$3.8m that a taxpayer was owed by related business and investment entities were 'CGT assets' of the taxpayer that had to be taken into account under the maximum net asset value test.

As a result, the taxpayer exceeded the then \$5m test threshold and therefore could not qualify for the small business CGT concessions in relation to the capital gain made on the sale of land and improvements from which he operated a car radio business.

Tip: If a taxpayer is a small business entity (ie turnover less than \$2m per annum), the taxpayer does not need to satisfy the net asset value test. However, the CGT asset that gives rise to the gain must be an active asset; ie it is used, or is held ready for use, in the taxpayer's business.

Court cannot review ATO decision to delay GST refunds payable

PFTF Stock Pty Ltd v DCT [2010] FCA 557

In a recent case, the Federal Court dismissed a taxpayer's application for a review of the Deputy Commissioner's decision to 'withhold' GST refunds that were payable under the GST Act. The Court held the taxpayer had no reasonable prospect of obtaining the relief sought.

Tip: This case demonstrates that in such situations a taxpayer is unable to 'force' the ATO to release a refund. If a taxpayer is the subject of a Tax Office audit, a GST refund may be withheld. Also, the Commissioner may apply the refund against any outstanding liabilities.

OTHER DEVELOPMENTS

Education Tax Refund — You Claim It, They Check It

The ATO will be requesting names and addresses of Family Tax Benefit Part A recipients from Centrelink in efforts to identify recipients who may be incorrectly claiming the Government's 50% education tax refund for primary and secondary

school student expenses. The Tax Office expects to match records of around 1.5m individuals registered with Centrelink.

Direct Debit for GIC-free Payment Deal

The ATO has extended the general interest charge (GIC) free payment arrangement for small business taxpayers (ie those with an annual turnover of less than \$2m) with activity statement debts for another year to 30 June 2011.

If you have an activity statement debt, you may be eligible to enter into such an arrangement with the Tax Office to pay the debt over a maximum of 12 monthly GIC free instalments. However, there are conditions which accepted taxpayers must abide by. Specifically, the Tax Office now expects a taxpayer to pay the instalments by direct debit.

HOT TOPIC: CAPITAL GAINS TAX IMPLICATIONS WHEN TEMPORARILY RESIDING OVERSEAS

In some situations, taxpayers will become non-residents of Australia for tax purposes while temporarily residing overseas. An important issue which arises is capital gains tax on existing assets, which depends on whether the asset is considered to be 'taxable Australian property'. The taxpayer needs to carefully decide whether it would be more beneficial to elect to treat all assets as taxable Australian property, or alternatively pay CGT upon leaving Australia.

Definition of taxable Australian property

Taxable Australian property primarily means an ownership in real property that is situated in Australia or a mining, quarrying or prospecting right for minerals situated in Australia. It also includes;

- An indirect interest in real property
- An asset used by the taxpayer at any time in carrying on a business through a permanent establishment in Australia.
- An option or right to acquire real property or a business asset mentioned above.

Where a taxpayer holds units in a trust or shares in a company, they will have an indirect interest in Australian real property if their interest passes both:

- The non-portfolio test, which requires that the taxpayer and their associates have a direct interest in the trust or company of 10% or more.
- The principal asset test, which requires that more than 50% of the value of the company's or trust's assets is Australian real property.

A taxpayer has the option when becoming a tax non-resident of making an election to treat all other CGT assets as taxable Australian property as well.

CGT treatment of taxable Australian property

The CGT rules continue to apply to taxable Australian property when a taxpayer leaves Australia and becomes a tax non-resident. If the asset is kept, no CGT event happens upon ceasing Australian tax residency or again becoming an Australian tax resident in the future.

However where the taxpayer sells taxable Australian property after becoming a tax non-resident, any net capital gain will be assessable income, but taxed at non-resident marginal tax rates. CGT concessions such as the ability to offset capital losses against gains, the individual 50% general discount, and in many cases the small business CGT concessions, remain available.

Treatment of other CGT assets

When a taxpayer becomes a tax non-resident, CGT assets that are not taxable Australian property (eg shares or units in managed funds) are deemed to be disposed of for CGT purposes at market value at that time.

The CGT rules will not apply where these assets are subsequently disposed of while a tax non-resident. However any dividend or trust distribution income received during this time may still be taxable.

The assets are deemed to be acquired again for CGT purposes at market value at the time if the assets are retained until tax residency is re-established. For the 50% individual discount to be then available on subsequent disposal of those assets, the taxpayer must hold them for at least another 12 months from the time they became an Australian resident again.

Election to treat all CGT assets as taxable Australian property

An election can be made by the taxpayer if they want all their CGT assets treated as taxable Australian property. This election is made in the taxpayer's income tax return for the year in which they become a non-tax resident.

The effect of this is that there is no deemed disposal or re-acquisition of any CGT assets during the period of tax non-residency.

It is not possible to make an election that applies only to a portion of the client's CGT assets.

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