

2203: SEPTEMBER 2021

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## SECTION 1 – PROFESSIONAL DEVELOPMENTS

### DANGERS FOR NON-RESIDENT BENEFICIARIES

Earlier this year, the Full Federal Court handed down its decision on the taxpayers' appeals from the decisions in *Peter Greensill Family Co Pty Ltd (trustee) v FCT*<sup>1</sup> and *N & M Holdings Pty Ltd v FCT*<sup>2</sup>. The decision of the Full Court dealt with both appeals together since the facts were largely common to both appeals. Both concerned distributions of capital gains made by the trustee of an Australian resident discretionary trust to non-resident beneficiaries. The gains arose from the sale of shares by the trustees.

#### ¶3.1 The Usual Rule for Taxable Australian Property (TAP)

The usual rule for non-residents is that Australian capital gains made by non-resident taxpayers is not subject to Australian capital gains tax<sup>3</sup> unless the property disposed of is 'taxable Australian property' as defined in Div 855 of the ITAA 97. Specifically, taxable Australian property includes:

- Australian real property, such as a house, apartment, commercial building or land
- any indirect interest in such property (e.g. through a property-holding company)
- mining, quarrying or prospecting rights in Australia
- a CGT asset used to carry on a business through a 'permanent establishment' in Australia<sup>4</sup>
- an option or right over any of the above – for example, a contract to purchase real property off the plan.

So, if a foreign resident taxpayer makes a gain from a CGT event happening to an Australian CGT asset, that gain or loss will be disregarded, provided the CGT asset is not TAP. On this basis, the trustee of an Australian discretionary family trust distributed a capital gain from the sale of shares that were not TAP to the foreign resident beneficiaries believing that the gain would be tax-free.

#### ¶3.2 The ATO Assessment

The ATO issued assessments under s 98 of the ITAA<sup>36</sup> assessing the capital gains distributed to the beneficiaries as 'attributable gains' under Subdiv 115-C of the ITAA<sup>97</sup> and were therefore assessable to the trustee under s 98(2A) of the ITAA<sup>36</sup> (on behalf of the non-resident beneficiaries). Where the trustee derives net income in the trust estate, that income is either treated as trustee income (and subject to the top rate of tax) or beneficiary income, in which case, the beneficiary generally has a liability to account for income tax on that

<sup>1</sup> [2020] FCA 559

<sup>2</sup> [2020] FCA 1186

<sup>3</sup> References to 'Australian capital gains tax' is not meant to imply a separate tax – in Australia, taxable capital gains are taxed in the same way as ordinary income, but the amount that is taxed is reduced by the various concessions available.

<sup>4</sup> The term 'permanent establishment' is defined in s 6 of the ITAA<sup>36</sup>, but (more importantly) is defined in each of the Double Tax Agreements that Australia has with our trading partner countries.