INFORMATION EXCHANGE
Step Up to Advice

AUSTRALIAN TAX ADVISER

2304 : OCTOBER 2022

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SECTION 1 – PROFESSIONAL DEVELOPMENTS

UNPAID PRESENT ENTITLEMENTS

Trust arrangements are again in the spotlight with the release of Tax Determination TD 2022/11, which finalises Draft Determination TD 2022/D1. It also sees the withdrawal of Taxation Ruling TR 2010/3 and Practice Statement PSLA 2010/4, with effect from 1 July 2022.

For those readers who do not regularly deal with trust structures, these developments involve the use of trusts with corporate beneficiaries where a present entitlement (in favour of the corporate beneficiary) remains unpaid at the end of the tax year.

So, the new Taxation Determination – TD 2022/11 – applies to trust entitlements that arose or will arise on or after 1 July 2022. For arrangements that arose on or before 30 June 2022, Taxation Ruling TR 2010/3 and Practice Statement PS LA 2010/4 (PSLA 2010/4) continue to apply.

Several Determinations were also updated to include references to TD 2022/11 after the ATO released Addenda to them on 10 August 2022. These include:

- TD 2011/15, which addresses Div 7A Unpaid Present Entitlements. The Determination covers the factors that the Commissioner will consider when determining the amount of any deemed dividend that may arise.
- TD 2015/20, which considers whether the release from a debt owing to a private company arising from its unpaid present entitlement (UPE) constitutes a ‘payment’ within the meaning of Div 7A.
- TR 2015/4, which deals with the CGT small business concessions, and considers whether a UPE is counted when working out whether a company meets or exceeds the maximum net asset value test.

¶4.1 The beginning

Practitioners with a few miles on the clock will recall those pre-2010 trust arrangements where the total tax in any trust structure could be reduced to the company tax rate of 30%: this was achieved by simply including a private company among the beneficiaries. Distributions that would result in the individual beneficiaries paying marginal tax of more than 30% were simply diverted to the corporate beneficiaries resulting in an overall tax rate of 30% – no changes there. However, the amounts allocated to the corporate beneficiary remained unpaid and remained in the trust for future investment.

Of course, integrity measures prevented those funds from being distributed to individual beneficiaries[1], but there was no requirement for the trustee to make any actual distribution to the corporate beneficiary.

1 Readers will be aware of the integrity measures in s 109XA and 109XB (and their predecessor 109UB) of the ITAA36.