

Fiscal Watch

Non-Forestry Managed Investment Schemes

The Commissioner of Taxation continues to maintain a position contrary to law. He has acknowledged that the matter is not free from doubt, and therefore he is looking for the matter to be clarified by the courts. However, he requires a dispute to do this.

He has issued a statement that it is up to the promoters of these arrangements to find a case and to commence such proceedings (funded by the Tax Office if necessary). The promoters could use a private binding ruling application on a real project that would be offered in the 2008/09 year as the basis for the test case.

To expedite matters, the Commissioner intends to seek (with industry consent) two motions in the Federal Court: (1) an urgency motion to have the test case resolved quickly; and (2) a request for a hearing by the Full Federal Court on the basis of importance and the public interest.

We consider the Commissioner will lose such a case and have made submissions to the ATO on TR 2007/D2 to this effect. A copy of this is available to anyone who requests it.

Any promoter who is looking to lodge a private binding ruling to have a test case run should ensure that their documents are drafted properly to take account of the previous Court decisions so that any decision is not decided on bad facts. The structure must ensure that the scheme property does

not include the Grower's business including the land upon which their horticultural plant is located and the produce from the horticultural plant.

The structure is important because the problem created in Puzey upon which the Commissioner relies involved a unit trust structure not the traditional structure of each Grower having an individual lot upon which the horticultural plant was grown.

New Australia – Japan Double Tax Agreement

Australia and Japan have agreed in principle on a new Australia-Japan double taxation agreement replacing the existing agreement signed in 1969.

Key features are:

- > royalty withholding taxes will be limited to 5% of the gross amount
- > dividend withholding taxes will be exempt for ownership interests of at least 80% or greater
- > dividend withholding taxes will be 5% where the ownership interest is at least 10% but less than 80%
- > dividend withholding taxes will be 15% in relation to distributions from Real Estate Investment Trusts (REITs) and dividends which are paid by a Japanese company which is entitled to a deduction for dividends paid to its beneficiaries in computing its taxable income in Japan



- > otherwise dividend withholding taxes will be limited to 10%
- > certain financial and governmental institutions will be exempt from the interest withholding tax of 10%
- > there will be prescribed timeframes for the creation of a permanent establishment where an enterprise is engaged in the exploration for or exploitation of natural resources
- > the “Income from Real Property” and “Alienation of Property” clauses of the OECD model convention will be included – this will mean the contracting state of the situs of land (which will include right to mine natural resources) may tax the income and gains.

New Foreign Tax Credit and Foreign Loss Provisions

In our last Fiscal Watch we indicated there was a Bill before Parliament to amend the foreign tax credit and foreign loss provisions. In particular, foreign losses are no longer subject to quarantine provisions against various classes of foreign income. The Bill was referred to a Parliamentary Committee.

The Committee has concluded that it was satisfied that the Bill’s provisions were appropriate. Therefore one should expect these new provisions to be passed in due course.

Rights Issues – Adverse Effect of McNeil’s Case to be removed retrospectively

The Federal Government has announced that it proposes to amend the tax laws to fix up the problem created by the majority decision of the High Court in McNeil’s case. The consequences of this case are that the value of any rights issues is ordinary income and not treated on capital account.

The proposed amendments will reverse the adverse effect of this case to shareholders and companies effective from 2001/2002. This will mean that there will no longer

be any income tax liability to shareholders flowing from the issue of the rights. They will continue to be considered on capital account.

Interposed Trusts - Change to Trading Trust Rules for Stapled Entity Structures

The net income of public trading trusts is taxed as if the trust was a corporation. This has led to the development of stapled securities where the eligible investment business is held by the trust to be taxed in the normal way that trusts are subject to tax and the trading business is held by a company. The trustee in this case is not permitted to control directly or indirectly the company which is carrying on the trading business or else it will be a trading trust.

However, in accordance with a previous announcement by the Australian Government, a Bill has been presented to Parliament to permit:

- > a new unit trust to be interposed between the stapled entities and the stapled security holders ie, the new trust will hold the shares in the company and the units in the trust and the holders of the stapled securities will now own units in the interposed trust
- > the existing unit trust becomes the interposed trust with it holding the interests in the stapled entities,

without the interposed trust becoming a public trading trust. Subject to certain conditions being met, CGT roll-over may apply to the owners of the stapled securities.

There may be stamp duty implications in relation to such reorganisations notwithstanding the income tax relief. Therefore any restructure needs to be carefully considered.

Investment by Public Unit Trusts in Foreign REITs

The trading trust provisions will also be amended to permit the trustee of a public unit trust to acquire ownership interests in, or control, a foreign entity whose business

consists primarily of investing in land outside Australia for the purpose, or primarily for the purpose, of deriving rent without the public unit trust becoming a trading trust.

This follows the repeal of section 601FC(4) of the Corporations Act which prevented registered schemes investing in unregistered schemes.

Therefore, investment by Australian property trusts in foreign REITs will be much easier.

Film Incentives

The current incentives offered to investors in film schemes is to be phased out. A Bill currently before Parliament proposes to amend the current tax incentive schemes to shift the incentives from the investor to the producer. This is in line with previous announcements.

The new incentives are:

1. Producers of Australian films will be entitled to a refundable tax offset of:
 - 1.1 40% of qualifying Australian production expenditure incurred on a feature film;
 - 1.2 20% of qualifying Australian production expenditure incurred on films that are not feature films; and

The offset is available in relation to qualifying Australian production expenditure incurred on or after 1 July 2007.

2. The existing refundable film tax offset for Australian production expenditure is enhanced by increasing the offset

from 12.5% to 15% of qualifying Australian production expenditure. The increased offset is available to films commencing principal photography or production of the animated image on or after 8 May 2007.

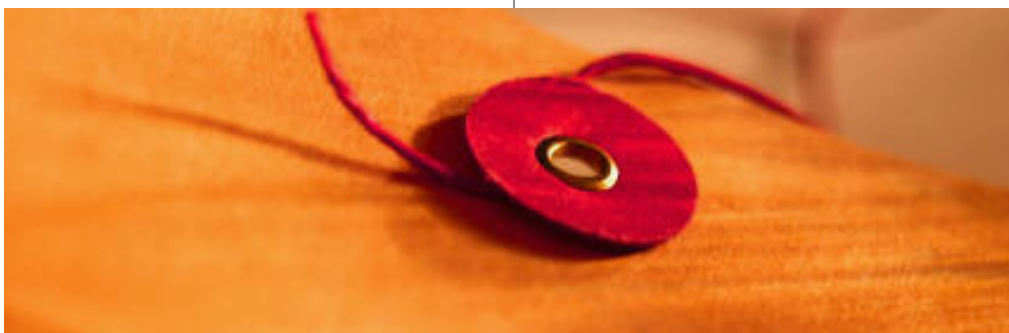
3. Introducing a refundable tax offset for post, digital and visual effects production in Australia of 15% with respect to certain Australian expenditure that is incurred in relation to post, digital and visual effects production for a film. The offset is available to a film that commences post, digital or visual effects production on or after 1 July 2007.

Foreign Countries - Assistance in Collection of Taxes

It is a general principle of private international law that the courts will not, directly or indirectly, enforce the revenue laws of another country.

However, the Australian government is gradually introducing a new article in its double tax agreements which overcomes this general principle by providing for the Contracting States to lend assistance to each other in the collection of revenue claims.

New French and Norwegian agreements have been entered into and recently become law now form part of the International Tax Agreements Act and there is currently a Bill to include a new Finnish agreement with similar terms.



New French Agreement

A new double tax agreement with France has become law with recent amendments to the International Tax Agreements Act.

Key features of this new agreement (apart from the increased international cooperation referred to above in relation to fiscal evasion and recovery of taxes) are:

- > while interest withholding tax will continue to be limited to 10 %, there will be no interest withholding tax on interest derived by a financial institution resident in the other country, or on interest derived by a government body of the other country
- > no dividend withholding tax is payable where the dividend is paid out of profits that have borne the rate of company tax (in Australia, where the dividend is franked)
- > a 5% rate limit on dividend withholding tax applies to other dividends where, in the case of Australia, the dividend recipient is a company that holds directly at least 10% of the voting power of the company paying the dividend, or, in the case of France, 10% of the capital of the company paying the dividend
- > a 15% limitation on dividend withholding tax applies to other dividends
- > the 5% and 15% dividend withholding tax limits apply to both franked and unfranked dividends
- > the general limit for royalty withholding tax is reduced from 10% to 5%.

New Norwegian Agreement

A new double tax agreement with Norway has become law with recent amendments to the International Tax Agreements Act.

Key features of this new agreement (apart from the increased international cooperation referred to above in relation to fiscal evasion and recovery of taxes) are:

- > while interest withholding tax will continue to be limited to 10 %, there will be no interest withholding tax on interest derived by a financial institution resident in the other country, or on interest derived by a government body of the other country
- > no dividend withholding tax is payable where the dividend recipient is a company that holds directly at least 80% of the voting power of the company paying the dividend, subject to certain conditions
- > a 5% dividend withholding tax rate limit applies to other dividends where the dividend recipient is a company that holds directly at least 10% of the voting power of the company paying the dividend
- > a 15% dividend withholding tax rate limit applies to other dividends
- > these limits apply to both franked and unfranked dividends
- > the general limit for royalty withholding tax is reduced from 10% to 5%.

Piper Alderman Lawyers

Sydney

Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216,
Sydney Stock Exchange
Phone: + 612 9253 9999
Facsimile: + 612 9253 9900

Melbourne

Level 9
60 Collins Street
Melbourne VIC 3000
DX 30829, Collins Street
Phone: + 613 8665 5555
Facsimile: + 613 8665 5500

Brisbane

Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
Phone: + 617 3220 7777
Facsimile: + 617 3220 7700

Adelaide

167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5000
DX 102, Adelaide
Phone: + 618 8205 3333
Facsimile: + 618 8205 3300

Email: enquiries@piper-alderman.com.au

www.piper-alderman.com.au

For further information contact:

Alan Jessup

+61 2 9253 9911
ajessup@piper-alderman.com.au

Adam Stoker

+61 2 9253 9926
astoker@piper-alderman.com.au

Dahniah Mithiran

+61 2 9253 9986
dmithiran@piper-alderman.com.au

Judy Choate

+61 8 8205 3426
jchoate@piper-alderman.com.au

Important Disclaimer: The material contained in this publication is comment of a general nature only and is not and nor is it intended to be advice on any specific professional matter. In that the effectiveness or accuracy of any professional advice depends upon the particular circumstances of each case, neither the firm nor any individual author accepts any responsibility whatsoever for any acts or omissions resulting from reliance upon the content of any articles. Before acting on the basis of any material contained in this publication, we recommend that you consult your professional adviser.