

Welcome

# Local Tax Club Geelong

23 May 2025

Novotel Geelong



# May Tax Update

**Presenters:**

Rob Warnock, CTA, Harwood Andrews

# End of year review

**Presenter:**

Karen Goodfellow, CTA, Goodfellow Tax Advisory

# Agenda

- Tax planning in the modern age
- Year end pressures
- ATO focus areas
- Part IVA – Recent ATO successes
- Trust distributions
  - Read the deed
  - FTEs
  - SBCGT
  - UPEs to corporate bens
- New provisions
  - DDCR
  - GIC/SIC deductibility
  - Foreign resident CGT withholding rate

# Tax planning in the modern age

- Tax planning: organising taxpayer's affairs to legitimately reduce or defer tax payable
- Year round, not year end
  - Be constantly reviewing and looking for opportunities
  - Record keeping
  - Remain compliant

# Year end ‘pressures’

- Super contributions
  - Maximise contribution caps
  - Use prior year unused CC caps (if eligible)
  - Bring forward NC caps (if eligible)
- Depreciating assets:
  - must be first used, or installed ready for use, by 30 June 2025
  - Scrap obsolescent equipment
- Writing off bad debts
  - - ensure that there is physical evidence that the debt has been written-off (e.g. an accounting entry or a decision made in writing at the board meeting)
  - Don't forget the GST adjustment
- Prepay expenses (small/medium businesses and non-business expenditure of individuals)
- Approve staff bonuses (a provision is not sufficient)
- Bring forward deductions, delay derivation of income
- Restructuring

# ATO focus - individuals

- Wild 'WRE' deductions:
  - Mechanic - air fryer, microwave, 2 vacuum cleaners, a TV, gaming console and gaming accessories
  - Truck driver - swimwear because it was hot where they stopped in transit and they wanted to go for a swim
  - Fashion industry employee - \$10,000 in luxury-branded (but conventional) clothing and accessories to be well presented at work, and to attend events, dinners and functions
- Focusing on:
  - WREs
  - WFH deductions
  - Multiple income sources (side hustles)

*Assistant Commissioner, Rob Thomson*

# ATO focus – Private wealth

- Reducing the debt book
- Succession activity:
  - planning, structuring, and disposal activity in the market with mature family-controlled businesses being sold or passed onto the next generation, either as on-going businesses or the accumulated wealth from those businesses
- Tax risks associated with succession planning:
  - Div 7A loans being settled
  - Assets moving around the group
  - Family member interests being restructured
  - Trust deeds amended
  - Trusts
  - Family Trust Distribution Tax
  - Raising awareness of the interaction between Division 7A, small business tax concessions, CGT rules and provisions applying to trusts

# ATO focus – Using business money and assets for personal use or benefit

- not entering a **written complying loan agreement** before the company's lodgment day
- loan agreements being made between the wrong entities
- private companies charging interest on loans **below the benchmark interest rate**
- private companies **not declaring interest earnt on Division 7A loans** in their assessable income
- the private company **using journal entries to record repayments that haven't been made**
- shareholders or their associates **not meeting their minimum yearly repayments by the 30 June deadline**
- **incorrectly calculating their minimum yearly repayments** resulting in them paying less than the required repayment amount to the private company, for example, by applying an interest rate less than the benchmark interest rate
- **borrowing money from the private company to make a minimum yearly repayment**

# ATO focus – Small business CGT concessions

- misunderstanding or misuse of the eligibility requirements, including:
  - requirements around whether you are carrying on a business (not a hobby or personal asset)
  - whether your aggregated turnover exceeds \$2 million and the business assets owned are under \$6 million
  - your age
- incorrect reporting or application of correct concession codes
- miscalculation by
  - using the wrong dates when buying or selling an asset
  - applying a discount incorrectly
- inappropriate use of
  - CGT rollover relief
  - a CGT discount

# New or soon to be enacted measures that need to be considered in the 2024-25 tax return preparation

- Debt Deduction Creation Rules (DDCR)
- Foreign resident CGT withholding changes

# Debt Deduction Creation Rules (DDCR)

- Deems certain types of debt non-deductible where it has arisen through related party transactions
- Intra-group and asset transfer arrangements must reflect arm's length principles
- Started on 1 July 2024
- Must be inward or outward investing entity to be impacted – but \$2M de minimus test will not save you
- No grandfathering or transitional arrangement for pre-existing arrangements
- PCG 2024/D3

# Changes to foreign resident capital gains withholding rules

- Apply from 1 January 2025
- Withholding rate increased from 12.5% to 15%
- \$750,000 de minimus threshold removed

# New or soon to be enacted measures commencing on 1 July 2025

- Non-deductibility of GIC/SIC
- Div 296???
- SGC rate increase – 11.5% to 12%

# **Non-deductibility of GIC?SIC**

- From 1 July 2025
- Applies to GIC/SIC ‘incurred’ on or after 1 July 2025

# Trust distributions – Read the deed!

- Who are the beneficiaries?
- What is the definition of distributable income?
- Is streaming allowed?
- Are there any additional requirements for making an effective distribution?
  - In writing?
  - Before 30 June?
  - Approval of appointor/guardian?
  - Corps Law requirements for effective resolution? – sole director trustee companies, quorum required for multiple director companies
- When does the trust vest (if it hasn't already)?

# Trust distributions – FTEs-Family group

- Distributing to other entities in the group?
  - Are they members of the family group?
    - Trusts with same test individual
    - Entities with IEEs
    - Entities wholly owned by the family
- Has there been a death or divorce during the year?
- Beware the broader definition of distribution in s 272-45 to 60 (TD 2017/20)
- Watch the family control test for company IEEs

# Trust distributions – Small business CGT concessions

- Trust distributions:
  - Can establish connected entities for:
    - MNAV/turnover purposes
    - Active asset test purposes
  - Small business participation percentage:
    - Significant individual
    - CGT concession stakeholder
    - Non individual shareholder selling shares/units

# Trust distributions – SBCGT-Establishing a connection

Why does it matter?

- Is the MNAV test satisfied by taxpayer?
- Is the taxpayer a CGT Small business entity?
- Applying the active asset test to passively held assets
- CGT event happens to shares/trust interests
  - Object entity must satisfy MNAV or be a CGT SBE?
  - Applying the active asset test to shares/trust interests – look-through to active assets of ‘later entities’



# Connected (discretionary) trusts – what is ‘control’?

Controlled entity	Controlled by
Discretionary trust	<ul style="list-style-type: none"><li>An entity which (on its own or together with its affiliates) exercises control over the trustee</li></ul> <p><b>Who controls the trustee?</b></p> <ul style="list-style-type: none"><li>An entity which (on its own or together with its affiliates) received, or had applied for their benefit, for any of the four income years before the relevant year, at least 40% of all the income or capital distributed by the trustee in that year (unless the entity is tax exempt or a deductible gift recipient)</li></ul> <p><b>Who received income and/or capital in the four years before CGT event year?</b></p>

# Connected (discretionary) trusts – what is ‘control’?

- All beneficiaries who have received, or applied for their benefit, at least 40% of income or 40% of capital in any of the last 4 years is a controller for the current year
  - For example – a beneficiary who receives 40% or more of income or capital distributions in any of 2024, 2023, 2022, or 2021 income years is taken to control the trust for the 2025 income year.
  - Also, for example - A beneficiary who receives 40% or more of income or capital distributions for the 2024 income year will be taken to control the trust for the 2025, 2026, 2027 and 2028 income years.
- Could be 16 controllers for a given year (plus trustee controllers)

# Small business participation percentage in trusts

Why does it matter?

- 15 year exemption –
  - Must have significant individual for at least 15 years
  - Two year payment rule
- Retirement exemption – trust must make payment of exempt amount to CGT concession stakeholders
- the relevant CGT asset is a share in a company or interest in a trust - CGT concession stakeholders in the object entity must together have a SBPP in the taxpayer of at least 90%

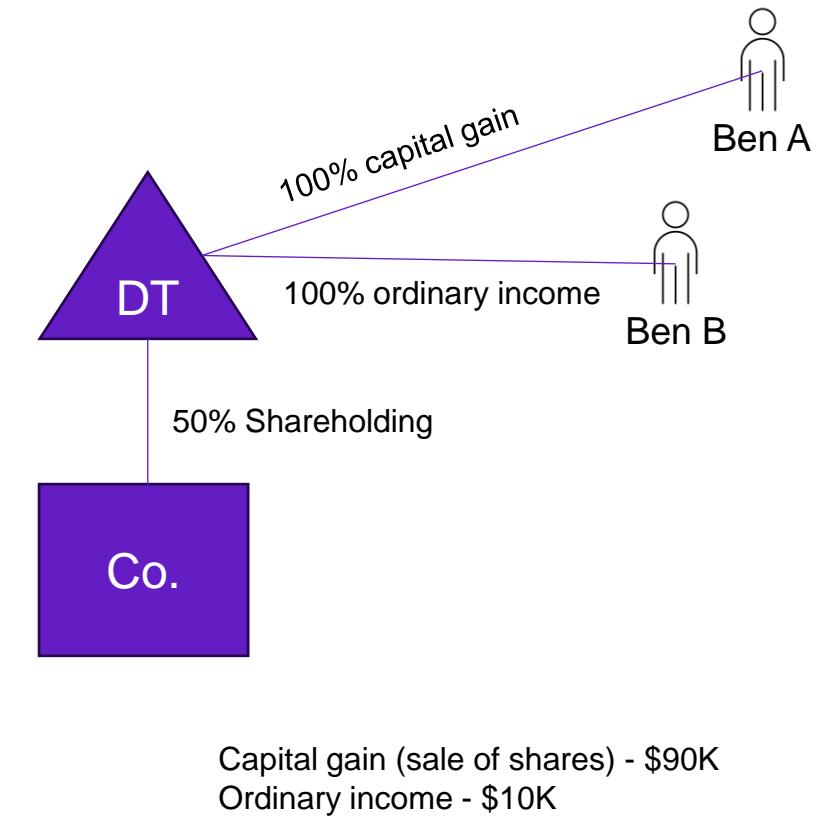


# **Discretionary trusts - SBPP**

- CGT concession stakeholder(s) in a discretionary trust can be established retrospectively
- Distributions of income AND capital in different proportions – SBPP is the lower
- Take care to distribute ‘enough’ to an individual where the discretionary trust owns shares in a company, to establish a CGT concession stakeholder in the company

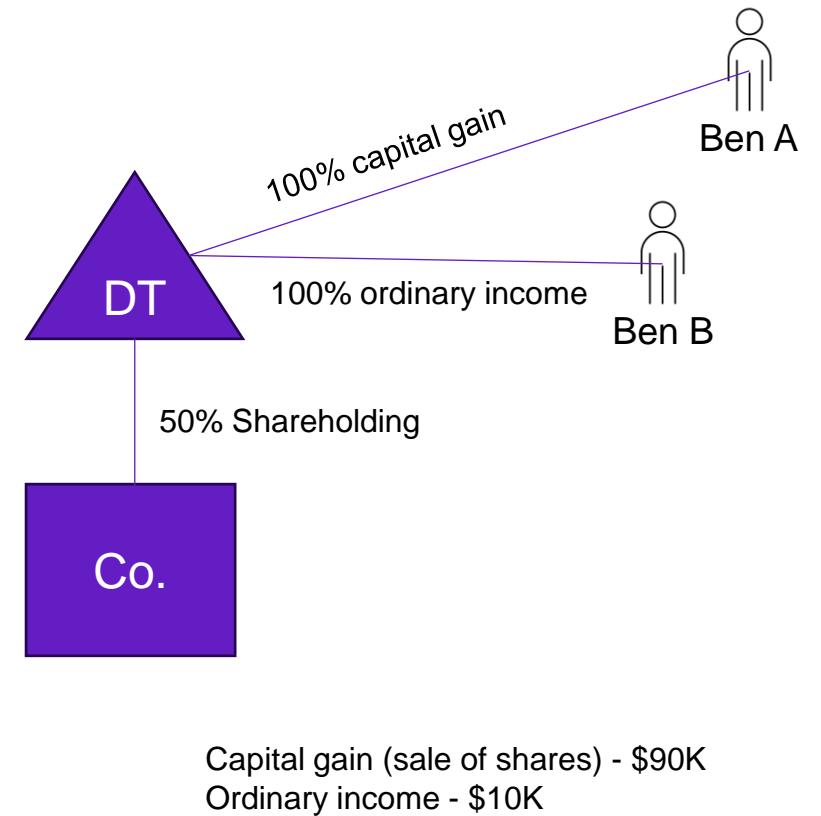
# SBPP – Trust v net (tax) income (ATO ID 2012/99)

- No definition of 'income' in deed
- Trustee has power to determine whether receipts are on capital or revenue account
- Trustee resolves to treat capital gain as income of trust
- Appoints CG to Ben A; ordinary income to Ben B
- SBPP in trust:
  - Ben A – 90%
  - Ben B – 10%
- SBPP in company:
  - Ben A – 45% (CGT CS in company)
  - Ben B – 5%
- CGT CS in company together have SBPP in trust of 90%



# SBPP – Trust v net (tax) income (ATO ID 2012/99) (cont.)

- No definition of 'income' in deed
- Trustee has power to determine whether receipts are on capital or revenue account
- Trustee DOES NOT resolve to treat capital gain as income of trust
- Appoints CG to Ben A; ordinary income to Ben B
- SBPP in trust:
  - Ben A – 0%
  - Ben B – 0%
- SBPP in company:
  - Ben A – 0%
  - Ben B – 0%
- **SBCGT concessions not available!**



# Trust distributions – Corporate beneficiaries

- Status of Bendel
- What to do?
- Louise Clarke's 'interview'
  - They stand by their position in TD 2022/11
  - No plans to grant 'blanket'
    - lodgement deferrals until HC decision is known
    - S 109RB (honest mistake or inadvertent omission) discretion if ATO wins at HC
  - Notes s 100A and Subdiv EA
  - 'Clear pathway' for taxpayers??

*If a taxpayer has been following the ATO guidance and if they continue to do so, then they will have certainty regardless of the outcome of the High Court proceedings. That is, they will not be facing the prospects of a deemed dividend or potential application of other integrity provisions.*

# **Part IVA success for ATO – Merchant**

## **Relevance**

- Relevant to private groups undertaking internal restructures

## **Facts**

- September 2014 – MFT sells 10 million shares in BBG to GMSF, realises \$57 million capital loss
- April 2015 – MFT sells 100 percent of shares in Plantic to unrelated purchaser, realises \$85 million capital gain

## **Decision**

- (2:1) BBG share sale was a scheme with dominant purpose of obtaining tax benefit

# Part IVA success for ATO – Merchant

## Takeaways

- a related party transaction which gives rise to a tax consequence but otherwise has no practical, commercial or economic consequences may attract Part IVA even if a similar transaction with a third party would not
- carefully document commercial drivers;
- ensure that related party dealings are conducted at market value and for genuine commercial purposes;
- Part IVA risk is higher when control, UEO and/or exposure to risk has not changed

# Upcoming Events

## **Local Tax Club**

20 June 2025 – Novotel Geelong

**Topic:** Estate planning - Structural implications (pre and post-death) and residency

**Speaker:** William Moore, Hall & Wilcox Lawyers

## **Next Generation Tax Discussion**

29 May 2025 – Hall & Wilcox

## **Yarra Valley Tax Retreat**

24 – 25 July 2025 - Balgownie Estate Yarra Valley

## **The Tax Summit**

3 – 5 September 2025 - MCEC Melbourne

# Thank you

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