

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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This Tax Talks Q & A goes through 10 questions and comments you sent to us up to April 2019.

Tax Talks Q & A

We picked one question about FBT, GST and CGT each and five questions about SMSFs and estates. And then some general questions and comments.

FBT

1 Does Coles car parking count for FBT?

This question came from Phil Moore in Melbourne in May 2018. Phil had listened to ep 29 of Tax Talks about FBT car parking benefits.

You might remember from that episode that an employer only provides a car parking fringe benefit if – among other conditions – there is commercial all day parking within a 1km radius of the employer's premises that charges a certain minimum amount. If there is no such commercial all day parking, then you don't have to worry about car parking fringe benefits at all. There are none.

So Phil's question – and a very justified question is – what does commercial all day parking actually mean. Is a Coles or Woolworth car park commercial all day parking? Here is Phil's question.

"I ...need a definition of "commercial all day parking" for FBT.

Specifically our only nearby paid parking is a Coles supermarket which charges \$50 per day for all day parking. Clearly this is a punitive fee scale to discourage long term parkers who may interfere with shoppers.

I recall the first time I encountered this legislation and the definition of what constituted "within 1km". It went on define that it had to be the most direct way on foot, public access ways were included but private access ways were not etc. I was trying to imagine the army of bureaucrats sitting around a table defining every facet of that tiny piece of legislation!"

So does the Coles car parking near Phil's business count as commercial all day car parking for FBT purposes? No, it doesn't per s136(1) FBTAA and para 81 of TR 96/26.. Para 81 of TR 96/26 states:

81. We do not regard the following parking arrangements as constituting commercial parking stations:

+ car parking facilities, with a primary purpose other than providing all-day parking, that usually charge penalty rates significantly higher than the rates chargeable for all-day parking at commercial all-day parking facilities (such as parking provided for short term shoppers or hotel guests)...

The Coles car park's primary purpose is to provide short-term car parking to shoppers and charges penalty rates for long-term parking, hence does not qualify as commercial car parking.

GST

2 Are allied health reports GST free?

Wes at Allied Health Accounting in Dubbo, NSW asks about the GST status of reports written by allied health professionals, especially psychologists. He had read the article on the Tax Talks website about GST for psychologists.

“Thanks you so much for posting your update and info on GST for Psychologists – it is incredibly helpful! I run a Bookkeeping business specifically for Psychs and I was wondering if you could help me ... The issue is around Clinical Testing/Assessment and Report writing and whether this is ever a “GST Free Health Service”.”

Wes then goes through different scenarios and the ask whether it makes a difference whether the report is covered by Medicare, got a GP referral or is paid by the patient or somebody else.

Medicare is easy. Anything covered by Medicare is GST-free. Reports written in hospitals, aged care and disability settings are also straight forward because you have other legislation backing you up.

But for the rest, there is no short answer. Because neither the GST Act nor the ATO covers allied health reports. The ATO comments on medical reports but not allied health reports.

And so you have three options. You either 1) assume that the rules for medical reports also apply to allied health reports or 2) you apply the general rules for other health services to allied health reports or 3) you do both. We do both and so the following is based on that assumption.

Allied health reports tend to be subject to GST since often written for other purposes than the actual treatment. But they are GST-free if one of the following applies.

- The allied health report is covered by Medicare. Medicare is your get-out-of-jail card. Anything covered by Medicare is GST-free.
- A medical practitioner – like a GP – or an approved pathology practitioner needs the report to provide their GST-free medical service. A referral alone is not enough.
- A member of a specified profession (s38-10) documents and then follows a process for appropriate treatment and the recipient of the supply is the patient or a party listed in s38-60. So it does matter who pays for the report.

So this the GST-status of allied health reports in a nutshell, always assuming that the rules for medical reports also apply to allied health reports and that otherwise the general rules for other health services in s38-10 apply. But of course the devil is in the detail.

CGT

3 Is plant & equipment an active asset for CGT?

Question from Matthew James Shelley.

“Is it possible for plant and equipment to be an active asset and hence apply the CGT Rollover Provision (Replacement Asset Rule)?”

And then Matt gives an example (we simplified the numbers).

“I have a transport company that are selling their business. The main asset are trucks (P&E) with a WDV of say \$2,00,000. The market value of the Trucks is \$3,000,000. We are trying to sell the business for \$4,000,000. So there is a considerable gain, obviously goodwill needs to be accounted for. If we sell the business as a going concern, how do we apply the CGT concessions?”

So there is a gain of \$2m in all this. A sales price of \$4m less a \$2m cost base. So Matt’s question is whether the trucks qualify as active assets to meet the basic conditions for the small business CGT concessions, notably the small business CGT rollover relief in Subdiv 152-E.

Asset Sale

If this is an asset sale – and it probably is since the company is selling the business – then you don’t need to worry about the trucks being active assets or not. The trucks are not treated as CGT assets. They are depreciable assets and hence, although CGT assets as such, not taxed under the CGT provisions per s128-24 ITAA97. So the difference between the market value and the written down value of the trucks would be recognised on revenue account.

What is treated as a CGT asset, however, is the goodwill. The business sells for \$4m and the market value of the trucks is \$3m so there is a \$1m capital gain for the goodwill. And this goodwill might qualify for the small business CGT concessions, but of course not for the rollover relief.

Share Sale

If this was a share deal, then the entire transaction would be handled under the CGT provisions, and then you could qualify for the small business CGT concessions. However, there are tight rules around the sale of shares. And don’t forget that companies don’t qualify for the 50% CGT discount in Div 115. So Div 152 is all you got.

What Is Sold

But then there is another issue. Matt talks about replacement assets. If the trucks are basically just replaced with new trucks, then there is a high chance that the ATO – if they ever review this transaction – won’t see this as the sale of a business but as a sale of old trucks that are replaced with new trucks. And then there would be no goodwill and hence no CGT concession.

SMSF

4 Should I tax deduct personal contributions?

Question from gsanderson75.

“I received a letter from my personal super fund manager asking if I intend to claim a tax deduction on my personal super contributions. Should I do that?”

The answer is Yes provided that a) your marginal tax rate outside of super exceeds 15% or – if you are over the Div 293 threshold – 30%. The Div 293 threshold is \$250,000 at the moment. And the answer is Yes provided that b) you still have concessional cap space left.

Another question came from K Seymour in Sydney around the same topic,

“Does it matter whether I salary-sacrifice my extra super payments or pay them later and then claim a deduction?”

Whether you salary-sacrifice super now or contribute and then claim a tax deduction within the same year makes no difference tax-wise. Your taxable income will be the same, because there is no longer a work test for claiming a tax deduction.

5 There is no legal obligation for an SMSF to have an ABN

Michelle Ziller from Tax Accountant WA in Kewdale, Perth in Western Australia made a very helpful comment about SMSFs and ABN. Michelle is an SMSF auditor and she writes,

“I’ve got a client SMSF that has never had an ABN. ...there is no legal requirement for a fund to have an ABN and the fund can’t be compelled to get one. This is annoying because it’s impossible to lodge an ACR through eSat without an ABN. And I, as auditor of the fund, can’t check the complying status of the fund without an ABN, , so it would be much more convenient for all concerned if the fund had an ABN. But the ATO says that they cannot make the fund get an ABN, The ATO’s hands are tied as there just isn’t legislation for this.”

ACR stands for auditor contravention report. And eSat is the ATO’s electronic superannuation audit tool (eSAT) that allows SMSF auditors to lodge such an ACR – among other things.

But coming back to Michelle’s comment, she is right. When you scroll the internet, everybody tells you to get an ABN for your SMSF. That your SMSF needs an ABN. And the ATO wants your SMSF to have an ABN.

But Michelle is right that there is actually no legal obligation to do that. Neither the SIS Act nor the SIS Regulations say that you have to. And the ATO can’t make you do it either if you don’t want to.

6 Why is the SMSF return called an annual return?

Lin Miller in Sydney wrote per email,

“There are individual, partnership, company and trust tax returns. But there is no SMSF tax return. Just a SMSF annual return. Why is that?”

The reason is that the ATO is not just the tax collector but also the regulator of SMSFs. And as a regulator the ATO needs a lot more data than just tax data. So the annual return is not just about tax but about this additional data as well. Hence the name ‘annual return’.

Estate

7 Can a couple use one testamentary trust?

John Tang writes in his email,

“If a testamentary trust had been established by the death of a spouse, can the estate planning of the living spouse use this established trust in the new will. That is can a couple use one testamentary trust in their wills drawn up when both are living?”

The short answer is No. Everybody in Australia has their own estate. There is no joint estate and there is also no such thing as a joint will. And so there is also no joint testamentary trust, since testamentary trusts are established through a will.

What might be possible is that the surviving spouse stipulates in their will that their estate is to go into the testamentary trust of the spouse who died first. But for that you need to involve lawyers to make sure this actually works since there are a number of legal hurdles. But even if it does work, it might no longer make sense tax-wise.

Your testamentary trust can distribute income to minors at normal tax rates but – from 1 July 2019 – normal tax rates only apply if the income is derived from assets that came through the original estate. So any income derived from assets contributed later and distributed to minors would be taxed at the penalty rates in Div 6AA.

Size of Your Estate

But testamentary trusts are not cheap, and so before you put a testamentary trust into your will, check what would actually go into your estate.

Your super might go to your SIS dependants and not your estate. Life insurance payouts go to the nominated beneficiaries and not your estate. Property held as joint tenants goes to the other tenant in survivorship and not your estate. The same applies to shares and bank accounts in joint names. And family trusts don't go into your estate either.

So your estate might be empty or minuscule and then you don't need a testamentary trust.

General

8 Does listening to Tax Talks count as CPE?

Question from Geoff Haston.

"Thank you for doing Tax Talks. Does listening count as continuing professional education?"

The short answer is: Yes. If you listen to 3 episodes and they add up to 120 minutes, you earned two CPE hours. CPE stands for continuing professional education.

The long answer is: Every association – CPA, CA ANZ, TPB, IPA and so on – has their own rules about CPE. But I haven't come across an association yet that doesn't count technical podcasts like Tax Talks as CPE. Have a look at episode 68 as well where we discuss CPE in more detail.

9 Do you publish every interview?

Question from Mal Carter in Melbourne.

"Have you ever done an interview that you didn't put on itunes?"

Yes we have.

I once did an interview with somebody who knew Mr Vanda Gould personally and had followed the case closely. But later he felt that it was too personal and I completely understand.

And once I did an interview that I would have loved to publish. It was with an SMSF auditor whom ASIC had deregistered, He went to the AAT and eventually got his registration back. The auditor spoke openly about the process, what he went through and especially the emotional turmoil and bouts of depression he suffered as a result. And I think that would have been a very helpful episode for anybody facing a similar predicament. But a few days later he changed his mind and asked me not to publish it and of course I honoured his request.

10 Is Tax Talks free?

Question from Mark Bird in Melbourne, Tax Lawyer and Tax Director of CGU.

"These are fantastic. I am listening for free but presumably I have to pay some time? Let me know the cost and will come on board."

Tax Talks is free. You don't have to sign up or pay anything. Tax Talks is not a money making venture, but a platform for all of us to share expertise and knowledge.

So this is our first Tax Talks Q & A. Thank you to all of you for writing, listening and reading. Please reach out when you can. It is always great to hear from you.

MORE

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