PROPERTY update

ATO data matching
PROPERTY RECORDS

The ATO has just finished a large data matching program where they have obtained 32 years of property data from Sept 1985 to June 2016. The data gathered is from every state and territory from:

- State & Territory revenue offices (stamp duty)
- Rental bond authorities; and
- Land title offices

The ATO has gathered around 31 million records for each year, and is currently matching this against 11.3 million taxpayers. The data collected includes:

- Property address and details (e.g. bedrooms, type of property etc.)
- Details on sale including vendor, purchaser, settlement date, price, stamp duty paid

This ATO program continues into the future with all states and territories reporting property transfers to the ATO quarterly. NSW has recently announced that it will be providing the following to the ATO:

- Property details (i.e. information to identify the property)
- Transactional information (i.e. contract price, settlement date, etc.), and
- Identify information for both the transferor and transferee (i.e. names, addresses, ACNs, etc.).

NSW intends to collect this information by requiring land tax clearance certificates to be obtained for every sale of land and through this mechanism, the information is provided to the titles office and subsequently, to the ATO.

The other states and territories have not released any specific details however; it is safe to assume that they will collect similar information to that collected by NSW.

Profit from Sale of property held to be Ordinary Income

In the case of WWXY and FCT, the AAT has held that the taxpayer was engaged in a business of property development and that the profit from the sale was ordinary income and not a capital gain.

The taxpayer acquired adjoining properties in Brisbane in 2006/7 with the intention of developing the land in a "joint venture" with another company. In 2009/10 negotiations for the joint venture fell through and the taxpayer decided to rent out the 2 properties in their unimproved state until they were sold in 2013/14 financial year.

The taxpayer argued that the gain made from the sale of the properties was a capital gain and thereby sought to access the 50% general CGT discount to effectively halve the taxable gain. The ATO argued the gain was not a capital gain but normal business income and fully assessable. The AAT found that the taxpayer was conducting a business of property development and agreed with the ATO so the gain made was fully assessable as business profit.

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Importance of Property Advice and Structuring

In yet another case where a taxpayer has undertaken property transactions in her own name, a taxpayer has had to remit GST on the sale of her three rental properties.

The taxpayer was a "sole trader" carrying on a house construction business in her own name. Between 2003 and 2007, she purchased four vacant blocks of land and constructed new residential premises on each of them. After construction was completed, the properties were initially rented for varying lengths of time before being sold during 2011 and 2012.

The taxpayer reported the sale of the first property in her business activity statement (BAS) for the quarter ending 31 March 2011 but did not report the sales of the other three properties which were sold during 2012. The ATO commenced an audit which resulted in assessments for a total GST liability of $55,052 and a shortfall penalty to $14,848 as the ATO argued the properties were all still "new residential premises" and therefore subject to GST. To add further insult to injury, the GST could not be reduced by using the margin scheme as there was no written agreement in her sales contracts.

Joint Ventures gone wrong

The recent case of 'Yacoub V Commission of Taxation' serves as a timely reminder of the dangers where the tax & GST considerations of a property arrangement are not considered.

In this case, the taxpayers entered into an agreement with their development partner (EJ). Their original agreement was amended by a lawyer to provide that both partners share equally all costs and proceeds derived from the sale of the property (i.e. a profit-sharing agreement).

Unfortunately, EJ went into administration and the Yacoub's were left to pay all $610,000 of GST on the sales to the ATO because the ATO successfully argued there was a partnership formed between the parties and under the Taxation Administration Act, all partners of a partnership are jointly and severally liable for the GST liabilities.

Hidden sting for property purchasers

The Federal Government passed legislation (effective from 1 July 2016) which requires the purchaser of an any Australian property to withhold 10% of the purchase price at settlement and pay this amount to the Australian Taxation Office (ATO). Whilst the withholding amount is designed to cover a "foreign resident" vendor's potential capital gains tax liability, the legislation will apply to all property transactions regardless as to whether the vendor is resident or not, unless an exception is applied (see below). A foreign resident can be both an individual or a company.

The purchaser's obligation to withhold the 10% amount will NOT apply where:

- The market value of the asset is less than $2m; or
- A clearance certificate has been obtained from the ATO by the vendor and provided to the purchaser BEFORE settlement; or
- The transaction is conducted through an approved stock exchange; or
- The transaction is a securities lending arrangement; or
- The amount is already required to be withheld as withholding tax for some other reason; or
- The vendor is under external administration or in bankruptcy

It is important to note it is the PURCHASER'S RESPONSIBILITY to withhold and remit the funds. If the purchaser fails to withhold and remit, the purchaser will be subject to a penalty equal to the amount which should have been withheld. It is also worth noting that the rules also extend to the sale of 10% or more of units in a unit trust or shares in a company when that unit trust or company owns Australian property worth $2m or more so many syndicates will be caught by these new rules.

The following example illustrates the potential costs of failing to withhold. John and Liz are purchasing a new family home in Sydney for $2.1m from Derek who is an Australian resident. John and Liz are not aware of the new withholding rules and do not ask Derek for a clearance certificate. At settlement, John and Liz hand over $2.1m to settle the property. After an ATO review, as John and Liz have failed to withhold, they will be issued with a penalty of $210,000 for failing to withhold.

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