The 29th Noosa Tax Intensive: ATO Hot Topics

On Friday the 19th of November, I spoke at the Tax Institute's 29th Noosa Tax Intensive on ATO hot topics.

I covered a few topical issues, affecting the private groups market including the imminent release of the **ATO's practical compliance guideline (PCG) on the allocation of professional firm profits**. I explained that the PCG sets out the ATO's compliance approach concerning arrangements that some professional practitioners put in place to ensure that not all income of a firm is taxed to them but is shared with related entities such as spouses and family trusts (where the individual professional may ultimately benefit).

The PCG will enable professional practitioners to self-assess whether their arrangement has a low, medium or high risk of the ATO applying compliance resources to review their arrangement.

Our guideline applies from 30 June 2021 meaning the first tax return we will look at will be 30 June 2022, and 30 June 2024 when the transitional period is applied. Importantly, transitional arrangements apply for practitioners whose arrangements were low or moderate risk under the suspended guidelines but are high risk under the new PCG.

I also spoke about our **draft section 100A guidance**, which has been in the pipeline for a while now. The ATO had the draft taxation ruling and the accompanying PCG ready to issue for public comment a few months ago but we deferred releasing it because of feedback from the tax profession that they were fatigued from the impact of COVID-19 and new important ATO guidance was a burden to consider at this time. We plan to release the guidance early in the new year.

Division 7A is always a hot topic at the Noosa Intensive and this year was no different. I gave a heads up that the ATO is undertaking a review of the existing public advice in Taxation Ruling TR 2010/3 and Law Administration Practice Statement PSLA 2010/4 about when a private company beneficiary's entitlement to trust income that is either unpaid or placed on sub-trust will result in 'any other form of financial accommodation' and a loan for the purposes of Division 7A. I noted that the review is not about preventing a trust from leaving a private company's present entitlement unpaid. We are looking to clarify our view and simplify what is becoming a very complex area of administration.

Any change in views that result from the review of Taxation Ruling TR 2010/3 and Law Administration Practice Statement PSLA 2010/4 will be prospective only. The Commissioner will provide guidance for taxpayers and their advisors that allows sufficient time for taxpayers to adjust their affairs.

The section 100A and Division 7A public advice and guidance will likely be released as a single package because the two topics intersect as a result of the prevalence of trusts retaining trust income appointed to corporate beneficiaries.

Another topic I briefly mentioned was our intention to publish guidance on assessing amounts of **accumulated foreign source income** from (mostly) non-resident trusts under **section 99B** of the ITAA 1936. We have a number of cases on foot where we are considering the application of section 99B and we suspect that it may come up a bit more as a result of our data matching programs. To finish, I mentioned CGT concessions and observed that my teams in Private Wealth were looking at small business CGT concession claims because we do see some clients claiming access to the concessions when they are not eligible.

I received some great questions during the session, and as such I have shared some of them below as you may be interested in the discussion.

In relation to Taxation Ruling TR 2010/3 and Law Administration Practice Statement PSLA 2010/4, and, given we continue to wait for the reforms, why is the ATO now deciding to update the Division 7A guidance?

ATO: We are not sure when the reforms will be legislated. We are doing this work now to provide certainty to the market. We do not propose to publish guidance which would run counter to any proposed reforms that are expected to become law down the track.

The ATO has indicated in previous presentations that compliance resources will not be allocated to arrangements entered into before 1 July 2014 except where the Commissioner is otherwise considering the affairs of the taxpayer; the arrangement was entered into before 1 July 2014 but continued after that date; or where the trust and beneficiary tax returns that were required to be lodged for those years were not lodged before 1 July 2017. What is the ATO position for arrangements entered into after 1 July 2014 and before 1 July 2021?

ATO: The ATO taxation ruling will not be grandfathering existing arrangements. However, the accompanying PCG outlines our compliance approach in detail. The PCG confirms the position made in previous presentations about pre-1 July 2014 arrangements and it also states that to the extent that the ATO's existing website guidance is more concessional than the view expressed in the Ruling and Guidelines, the website guidance will continue to apply until 30 June 2022 (I did say 30 June 2021 in the webinar as that is the date currently in the PCG, however we intend to change it to 30 June 2022 given the delay in issuing the guidance). This is to ensure that the community has certainty about our administration leading into tax time. Taxpayers will be able to self asses their risk rating, similar to the Professional Firms PCG, and see if their arrangement is high risk or low risk and if the Commissioner would be interested in reviewing those arrangements.

There is concern around the scope of 100A, can you give a greater sense of the scope of what types of arrangements the ATO will be looking at?

ATO: I suspect that you are not talking about the egregious examples that were presented at the earlier session but instead at family arrangements and when will the ATO take the view that a family arrangement is not an ordinary family or commercial dealing. While I can’t comment on every arrangement, there are some high risk scenarios in the PCG, such as where there is a family trust and the beneficiaries include adult children who are made presently entitled to net income of the trust but the children are not paid the amounts but rather the amounts are provided to the parents in recognition of school fees and holiday expenses incurred before the children turned 18 years of age. This is a family dealing but not an ordinary family dealing in our view because the parents would ordinarily bear the expense of those costs.

What are you seeing in the market that has prompted this move for the ATO to provide section 99B guidance now?

ATO: We are seeing an increase in money being transferred onshore, and it is not readily documented where it is coming from. We have also seen a cluster of cases relating to 99B going through the system, and an increase in advice requests, objections, and litigation. Our data matching programs have also seen an increase in the number of matters where section 99B might apply.

Nothing in the wording limits the operation of the provision to foreign trusts, so does 99B have a role to play in assessing amounts from resident trusts?

ATO: You’re right it does not have any limitation in the provision. I do note though that there is a clear statement in the Explanatory Memorandum for the Bill which introduced the section which explained that the provision was intended to apply to accumulated foreign source income distributed from non-resident trusts that has not previously been taxed (and resident trusts where the amount had not previously been taxed because of the Union Fidelity case). The risk we are currently addressing concerns accumulated foreign source income so our current focus does not extend to whether the section applies to resident trusts.

The amendments made on shares and units in s 152-10 are not well understood. Is the ATO seeing any trends on the errors being picked up in this regard?

ATO: We have a case at the moment, which has given the Commissioner cause to consider how the amendments apply. It has raised my interest in the arguments being put by the Commissioner and the taxpayer so I am keeping an eye on that case. We are currently not seeing any trends, however we are keeping a close eye on this space.

Does the ATO have concerns around taxpayers restructuring to get under the $6m (MNAV test) threshold?

ATO: We do see it, and it is on our list of risks when we look at the Medium & Emerging and Next 5000 markets. It's fair to say that we are looking because we have some concern.

At its simplest level, we need to know if the (Div 7A) loans are 7 years, 10 years or 25 years – will the ATO provide certainty around this?

ATO: Yes. We intend to provide guidance so that there is certainty.

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