Tax News & Insights

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OmniTax Professionals

AusNet case – AusNet's appeal dismissed; Division 615 deemed to apply

In a judgement dated 7 March 2025, a majority of the Full Federal Court in *AusNet Services Limited v Commissioner of Taxation* [2025] FCAFC 21 upheld the prior decision of Justice Hespe in concluding that a Division 615 roll-over could apply to the facts even though a literal reading of the provisions might suggest otherwise. The case is an example of the courts favouring a purposive construction of the legislation and means that roll-overs for business restructures as allowed in Division 615 can apply to a broader range of circumstances than may be construed from a literal reading of its provisions.

The taxpayer was the head company of a stapled group formerly known as AusNet Services. It had been incorporated as a shelf company. The stapled group consisted of three AusNet entities referred to as "Transmission", "Finance" and "Distribution". The effect of the stapling arrangements was that the interests in the stapled entities were to be dealt with together. Following a review by the ATO of the financing arrangements between the stapled entities and the terms of a settlement reached with the Commissioner in early 2015, the stapled structure became sub-optimal for security holders and it was decided to interpose a single holding company between the security holders and each of the stapled entities.

An implementation deed was entered into between the relevant entities that provided for the completion of interdependent steps in a specific order. Pursuant to the schemes of arrangement (which were approved by the Supreme Court of Victoria), on 18 June 2015 the taxpayer acquired all of the shares in "Transmission", the units in "Finance" and the shares in "Distribution". The former holders of the stapled securities became shareholders of the taxpayer.

In July 2015, the Commissioner issued Class Ruling CR 2015/45, which ruled that the conditions for roll-over under Division 615 of the ITAA 1997 were satisfied in relation to the disposal of each "Transmission" share, "Distribution" share and "Finance" unit to the taxpayer and therefore securityholders were eligible to choose roll-over under Division 615 in respect of their disposal of such shares and units. The taxpayer objected to its income tax assessments in respect of the years ended 31 March 2016 to 31 March 2020 on the basis that Division 615 did not apply in connection with the acquisition of its shares in "Distribution" and then appealed to the Federal Court when its objections were disallowed.

The relevant issue was whether the taxpayer was entitled to an uplift in the cost bases (and adjustable values) of the assets formerly held by "Distribution". The taxpayer's position was that Division 615 did not apply to the scheme of arrangement by which it came to be the holder of the shares in "Distribution", with the consequence that it could not have made a valid roll-over election under that Division and therefore it was entitled to an increase in the cost bases of the relevant assets.

Section 615-5 allows a taxpayer to choose a roll-over if relevant conditions are satisfied. The taxpayer contended Division 615 did not apply in respect of its shares in "Distribution" because, among other things:

- The "Distribution" scheme was not one in which the exchanging shareholders received shares in the interposed company "and nothing else" because an effect of that scheme was to increase the value of the shares in the taxpayer that those shareholders held immediately before the scheme came into effect; and
- The market value ratio requirements (i.e., the market value of the interests in the interposed entity are proportionate to the market value of the interests in the original entity) were not satisfied. That is, the ratios were not equal because the individual shareholder's interest at the completion time included the shares already issued to that shareholder in exchange for their "Transmission" shares and "Finance" units.

The majority of the Full Federal Court drew on the operation of the predecessor section, the explanatory memorandum to Division 615 and other extrinsic materials to conclude Division 615 could apply and dismissed the taxpayer's appeal.

The outcome of the case seems to broaden the potential availability of the Division 615 roll-over because, for example:

- The roll-over does not necessarily require the interposed company to be a dormant / shelf company;
- The roll-over may be available in multiple instances using the same interposed entity; and
- It would not seem to matter that the interposed company did not actually choose to apply the roll-over – rather, the taxpayer was taken to have chosen to apply the roll-over.

For stapled structures where the staple is no longer beneficial or desired (e.g., after the transitional period expires under the stapled structure provisions, or due to the application of settlement arrangements), this case provides clarity (subject to any further appeal to the High Court) on the availability of a Division 615 roll-over on interposition (i.e. top-hatting) of a holding company for the stapled structure for commercial simplicity. Such a Division 615 roll-over may be preferred to other possible roll-overs in the income tax law, as outcomes under a Division 615 roll-over can be different. Of course, the tax consolidation impacts of undertaking a Division 615 roll-over where the original entity was not a consolidated group will need to be considered. Stamp duty and various non-tax matters will also need to be considered for any such top-hatting.

Restructures to access the MIT withholding regime

On 7 March 2025, the Commissioner issued Taxpayer Alert TA 2025/1, noting the ATO is currently reviewing arrangements that inappropriately seek to take advantage of the managed investment trust ("MIT") withholding regime and deemed CGT treatment through a restructure of inward investment structures. The MIT withholding regime enables a MIT to apply a final 15% withholding tax rate on certain fund payment distributions (including gains on sale) to foreign investors. Further, a MIT is able to make an election to deem a disposal of eligible investments to be on capital account.

The Taxpayer Alert notes that problematic arrangements generally involve an Australian entity which holds passive assets but does not *prima facie* meet the requirements to access the MIT withholding regime because, for example,

- it is not a trust (it may be a company which is not a corporate collective investment vehicle)
- it is a unit trust directly owned by a single unitholder, or
- the management of the trust does not satisfy the licensing requirements of section 275-35,

and restructure steps are undertaken to correct these shortcomings for the purpose of accessing the MIT withholding regime.

Notably, the Taxpayer Alert states the ATO "will not apply compliance resources to these structures if they were established prior to the publication of this alert unless there is a material new investment or ownership change", but this alert will be relevant to any restructures going forward. It may therefore be prudent to quarantine any historical MIT structures from new investment or rebalancing (e.g., by using new or alternative vehicles).

The Taxpayer Alert also highlights that any change to management arrangements to satisfy the licensing requirements must be for a commercial purpose (and not for the sole or dominant purpose of achieving MIT status). In our view, such a commercial purpose can include the transition of the investment vehicle from startup / construction / development phase to an operational phase for the passive asset held by the MIT.

Following the release of the Taxpayer Alert, on 13 March 2025, the Assistant Treasurer announced that the income tax law will be amended to make clear that trusts that are ultimately owned by a single widely held investor (such as a foreign pension fund) will be able to access the MIT withholding tax concessions through a 'captive' MIT with effect from 13 March 2025. This announcement provides assurance to the established practice of eligible non-resident investors using 'captive' MITs to hold eligible Australian investments. Note, the announcement by the Assistant Treasurer makes it clear that the ATO will still have the power to apply Part IVA if 'captive' MIT structures involve other characteristics set out in TA 2025/1.

FBT Exemption for plug-in hybrid electric vehicles ends 31 March 2025

While an FBT exemption for employers providing staff with eligible electric vehicles (EVs) has been available from 1 July 2022 and will continue to apply beyond 31 March 2025, the FBT exemption applicable to the provision of eligible plug-in hybrid electric vehicles (PHEVs) ends on 31 March 2025. There is currently no extension to this end date for PHEVs (though this may be considered in the upcoming Federal Budget).

Note, an employer can continue to apply the exemption to PHEVs if:

- that PHEV was used, or available for use, before 1 April 2025 (and that use was exempt),
- they have a financially binding commitment to continue providing private use of the vehicle on or after 1 April 2025, and
- there is no change on or after 1 April 2025 to the pre-existing commitment to provide a PHEV.

FBT Reminder - Commissioner allowing alternative record keeping options

From 1 April 2024, the Commissioner allows employers to use alternative record keeping options for travel diaries and employee declarations for certain benefits. This is likely to be helpful when substantiating records for the 2025 FBT year and beyond. Further ATO guidance can be found here.

Government Assistance – Queensland Ex-Tropical Cyclone Alfred

The Australian Government has released information on Disaster Recovery Payments and Disaster Recovery Allowances available to those affected by Queensland's Ex-Tropical Cyclone Alfred. Further details can be found here.

Federal Budget Reminder - 25 March 2025

As a Federal Election has not yet been called and will now occur in May 2025, the 2025-26 Federal Budget will be handed down by the Treasurer on Tuesday, 25 March 2025. We will cover key tax-related takeaways in the next edition of this publication.

Contact

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