Tax News & Insights

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OmniTax Professionals

YTL Power case – Division 855 and statutory severance provisions

On 30 October 2025, the Full Federal Court handed down its decision in *YTL Power Investments Limited v Commissioner of Taxation* [2025] FCA 1317 (Cth). The court ruled in favour of YTL Power, a foreign resident company, that was able to disregard a capital gain of approximately A$948 million arising from the disposal of its 33.5% shareholding in ElectraNet Pty Ltd ("ElectraNet"), a private operator of the South Australian electricity transmission network.

The key issue was whether YTL Power's membership interests were "taxable Australian property" as defined in Item 2 of the table in section 855-15 of the ITAA 1997 and in particular, whether the membership interest was an "indirect Australian real property interest". This turned on whether the membership interests passed the "principal asset test" in section 855-30 of the ITAA 1997. This test broadly considers whether more than 50% of the market value of the underlying assets of the company in which the membership interests are held are "taxable Australian real property" ("TARP"). Pursuant to section 855-20 of the ITAA 1997, TARP includes real property situated in Australia (including a lease of land if the land is situated in Australia).

The assets in consideration were rights over transmission equipment "leased" to ElectraNet by a South Australian statutory corporation ("TLC") under a lease and related agreements (the "Leased Assets"). The Leased Assets were situated on, over or under land belonging to third parties, TLC and ElectraNet.

Section 30 of the *Electricity Corporations (Restructuring and Disposal) Act 1999* (SA), which governed the privatisation arrangements, contains "severance provisions" which provide: "*Electricity infrastructure or public lighting infrastructure the subject of a transfer order, vesting order, sale/lease agreement or special order is to be taken to be transferred, vested or leased (as the case may be) by the order or agreement as if the infrastructure were personal property severed from any land to which it is affixed or annexed and owned separately from the land".*

The court found that the Leased Assets were not TARP and therefore the membership interests held by YTL Power in ElectraNet did not pass the "principal asset test". In this regard, key points arising from the case include the following:

- **Technical meaning -v- ordinary meaning of "real property"** – Hespe J rejected the Commissioner's argument that "real property" as used in Division 855 should take its "ordinary meaning" and which included immovable property. Rather, "real property" in Division 855 should assume its technical meaning in common law, which took into account the statutory severance provisions in the South Australian legislation.

- **Statutory severance legislation**

    - For the Leased Assets located on land belonging to third parties, the electricity infrastructure assets were not TARP assets on the basis that those assets were on land that was the subject of various types of easements or access rights (which did not confer a relevant interest in land).

    - For Leased Assets located on land that belonged to TLC, the effect of the statutory severance provisions in the South Australian legislation was that the Leased Assets were taken to be leased to ElectraNet "as if the infrastructure were personal property severed from any land to which it is affixed or annexed and owned separately from the land". They were held to be a lease of personal property, rather than a right to use the relevant assets arising from the lease of the land on which they were located.

    - For Leased Assets located on land that belonged to ElectraNet, these were also held to be a lease of personal property due to the statutory severance provisions in the South Australian legislation. ElectraNet did not obtain rights in relation to the Leased Assets due to being the landowner. The statutory severance provisions meant that the assets belonged to TLC.

The YTL Power case provides some welcome judicial guidance on the application of Division 855 to foreign resident investors selling membership interests in entities that operate Australian infrastructure assets. In this regard, State-based legislation can modify the "ordinary meaning" of real property for the purposes of Division 855 and it is important to analyse the specific rights held and consider whether these rights are regarded as "real property" (as defined in Division 855). This analysis should be undertaken on a case-by-case basis.

It is noted that the Commissioner may appeal the decision, especially given the case is regarded as a significant win for the taxpayer. In addition, taxpayers should also continue to monitor any Division 855 amendments (which were first announced by the Federal Government in the 2024-25 Federal Budget).

ATO focus on Family Trust Elections

One of the ATO's areas of focus for 2025-26 for privately owned and wealthy groups is family trusts that distribute outside the family group, thereby triggering hefty family trust distribution tax ("FTDT"). FTDT is payable at a rate of 47% on conferrals of present entitlement or distributions of income or capital outside the family group. In this regard, while family trust elections and interposed entity elections may offer various advantages and concessions, these elections are permanent in nature (subject to certain limited exceptions) and have long term consequences.

To mitigate FTDT risks, private groups should ensure there is strong tax governance over their tax affairs, including:

- maintaining accurate records of all elections made by all trusts (including noting the specified individual and ensuring that all requirements for making the election are satisfied)
- documenting which entities are within the family group (including analysing the control of any related entities)
- undertaking an annual (or more frequent) review of existing structures to ensure any family trust election and interposed entity election issues are identified and addressed
- prior to making distributions, confirming the recipient is a member of the family group, including considering any family trust elections and interposed entity elections, so that there is no imposition of FTDT

Thin Capitalisation – Third Party Debt Test choice for FY2024 & FY2025

Under the recently finalised thin capitalisation public ruling and practical compliance guideline, taxpayers have a window of time to retrospectively apply the third party debt test in respect of the 2024 & 2025 income years where necessary changes are made to existing arrangements so as to comply with the third party debt conditions and conduit financing conditions.

In respect of the 2024 income year, where a taxpayer did not make an election to apply the third party debt test and now wishes to do so given the finalised guidance, an application needs to be made to the ATO to seek an extension of time to make this election by 1 April 2026 (being six months after the publication date of the final ruling). The application needs to be approved by the ATO based on the relevant facts and circumstances. The application may only be made once all required changes to comply with the third party debt conditions and conduit financing conditions (if relevant) have been made.

In respect of the 2025 income year, the choice to apply the third party debt test needs to be made by the time the 2025 income tax return is due for lodgement.

Newmont case – Division 855 and Valuations

On 10 November 2025, Colvin J of the Federal Court handed down the decision in *Newmont Canada FN Holdings ULC & Anor v FC of T* [2025] FCA 1356, a long running case concerning the application of Division 855 of the ITAA 1997 to capital gains made by two non-resident taxpayers on their disposal of their shareholding in a related Australian entity as part of a restructure. The court determined a list of issues to be referred to a referee for further calculations to be undertaken.

The case involved Newmont Canada and Newmont US selling their shareholding in Newmont Australia to Newmont Australia Holdings. Newmont Australia and its subsidiaries conducted gold mining activities in Australia through various joint ventures and across four mining operations, with the main mine located in Boddington in Western Australia. The mining operations to mine, process and produce gold utilised three categories of assets: (a) plant and equipment; (b) mining information; and (c) mining tenements, a number of which were not held by Newmont Australia or its subsidiaries, but were subject to a sublease arrangement which provided the sublessee with authority to undertake mining and exploration activities.

The case addresses various key issues relevant to whether the shares in Newmont Australia passed the "principal asset test" in section 855-30 and the classification of taxable Australian real property ("TARP") and non-TARP assets. These included:

- Mining information had a certain market value which was not zero because it can be used even if unlawfully.
- Intercompany loans were not to be counted as assets under the "principal asset test".
- Deferred tax assets are to be included as assets in the "principal asset test".
- Consistent with the judicial approach to the YTL Power case in respect of the meaning of "real property" for Division 855 purposes (technical meaning at common law), plant and equipment affixed to the land were not TARP on the basis that the mining tenements did not provide Newmont Australia with a freehold or leasehold interest in the land.
- Application of market value substitution rule to determine the capital proceeds received by the taxpayers from their sale of their shares in Newmont Australia on the basis that the taxpayers and Newmont Australia were related entities.
- When it is appropriate to apply a discount for lack of control and marketability in valuing shares in a company.

Contact

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