Jordan

We refer to the Proposals Paper "Extending the roll-over for exchange of units in a unit trust for shares in a company" which was issued by Treasury in November 2011.

We welcome the proposed amendments to extend the roll-over provisions in Subdivision 124-H of the Income Tax Assessment Act 1997 and the symmetry (on the whole - refer below) in tax treatment these amendments would provide to taxpayers regardless of whether their units are held as trading stock, a revenue asset or a capital asset. At the outset, we conclude that the roll-over will remove impediments to trusts restructuring by interposing a company between itself and its unitholders.

In this respect, we are also keen to see whether the proposed amendments to extend Subdivision 124-H to revenue assets would be applicable for other forms of replacement asset roll-over relief (for example, Subdivisions 124-E, 124-F, 124-M and 124-Q).

In relation to the current proposed amendment to extend the Subdivision 124-H roll-over, it would appear that there may be limitations on its access by certain non-resident unitholders. We understand that the roll-over will operate such that "where a taxpayer is eligible to choose the Subdivision 124-H roll-over under section 124-445 (disposal case) ...they will be able to choose a revenue asset roll-over where the units they hold in the unit trust undergoing the restructure are revenue assets." (emphasis added).

Currently, in order to be able to choose to obtain a roll-over under section 124-445 an additional requirement that must be satisfied (under section 124-450) is that the exchanging member is an Australian resident or a foreign resident whose units in the unit trust and shares in the interposed company (just before and just after the transaction, respectively) are "*taxable Australian property".

This additional requirement appears to otherwise limit the ability of a foreign resident shareholder to defer any profit or loss under subdivision 124-H effectively to situations where the units / shares constitute taxable Australian real property or a CGT asset used in carrying on business through a permanent establishment. However a foreign resident holder holding their units/shares on revenue account or as trading stock may be subject to Australian income tax on gains where where the income is characterised as Australian 'sourced'. Where this is the case, the foreign resident holder would not be able to satisfy the additional requirement under paragraph 124-450(4)(b) in order to obtain deferral under under subdivision 124-H.

We respectfully submit that the proposed amendment to the operation of Subdivision 124-H adequately capture situations where a foreign resident holds their units on revenue account or as trading stock and would otherwise be taxable on gains which are considered to be Australian sourced.

In the process of considering the above we have come across a separate issue in relation to the operation of Subdivision 124-G we would like to raise. It seems unusual that the Subdivision 124-G roll-over for revenue assets/trading stock seems to only be applicable where there is a deemed roll-over in circumstances where the interposed company becomes the new head company of a former consolidated group (i.e. under paragraph 124-360 (2)(a) / section 124-370(1A)). Accordingly, we also submit that the ongoing similar limitation currently applicable to Subdivision 124-G roll-overs for non-residents holding their investment on revenue account or as trading stock should also be considered.

Should you have any queries in relation to this matter or would like to discuss further, please do not hesitate to contact me on (02) 8266 2979.

Kind regards

Mark

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