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No. 73 2001–02

Taxation Laws Amendment Bill (No. 5) 2001

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Taxation Laws Amendment Bill (No. 5) 2001

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Taxation Laws Amendment Bill (No. 5) 2001

Date Introduced: 23 August 2001

House: House of Representatives

Portfolio: Treasury

Commencement: Royal Assent. However, refer to the main Provisions section for the application dates of the measures discussed below.

Purpose

To:

- Ensure that the full value of the 50 per cent capital gains tax discount available to individuals and certain other entities will be fully passed on where the payment passes through more than one trust before being received by the final recipient, and
- Clarify the taxation treatment of pastoral and similar duties performed by a religious practitioner.

Background

As there is no central theme to the Bill the background to the various measures will be discussed below.

Main Provisions

Capital Gains Tax (CGT) and Chains of Trusts

As part of the implementation of the Review of Business Taxation (Ralph Report) a 50 per cent reduction in CGT was available to certain entities who have held the asset for at least 12 months and which do not use an indexed cost base. The entities to whom the concession is available include individuals, complying superannuation funds, trusts and life insurance companies in respect of certain assets. The concession is not generally available to companies.

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It was announced in the 2001-02 Budget that the concessional treatment would be extended to investors in managed investment companies (MICs), largely to place them in the same tax position as other managed funds, most of which work through a trust basis. This measure will be implemented by the Taxation Laws Amendment Bill (No. 6) 2001.

The Assistant Treasurer announced on 31 July 2001 that the concessional treatment in regard to trusts would be extended to situations where the gain is passed through more than one trust before being received by an individual.¹ Such a situation is likely to result where, for example, an individual invests in a managed trust which in turn invests in a wholesale investment trust. The changes in treatment are designed to place investments in the various types of managed investment vehicles in the same position regarding CGT discounts.

CGT liability arises when one or more of the events listed in Division 104 of the *Income Tax Assessment Act 1997* (ITAA97) occurs. One of these events is E4 which applies where a trust makes a payment and part of the payment is not assessable in the hands of the recipient, such as would occur where the payment is made to another fixed trust, as the components would be taxed in the hands of the ultimate recipient. However, one of the consequences of event E4 applying is that there will be a part reduction in the cost base of the asset. A reduction in the cost base has the effect of increasing the size of the capital gain and so reducing the value of the 50% discount which would arise if the trust paid the amount directly to the ultimate investor rather than through a chain of trusts.

Item 1 of Schedule 3 of the Bill will substitute a **new sections 104-70 and 104-71**, dealing with the non-assessable part of a capital gain, into the ITAA97. **Proposed subsection 104-70** provides that in determining which part of a non-assessable amount for the application of CGT event E4 any distribution subject to the discount is to be disregarded therefore effectively excluding amounts paid through a chain of trusts from the reduction in cost base described above.

Application: From 1 July 2001. However, transitional provisions also mean that the above will apply to distributions made between 21 September 1999 (the time the discount came into force) and 1 July 2001 (**items 4 and 5**).

Religious Practitioners

Determining if a person is an employee at common law is dependent on a number of matters, with the degree of control of the 'employee' over how they perform their functions being the major determining matter. In relation to this a number of matters are to be considered, including whether the 'employee' can delegate another to perform the function, who determines the hours of work, whether payment is for hours worked or completion of a task being amongst the indicative factors. The difficulties in determining the difference between 'pure contractors' and employees can be seen in the recent attempts to formulate the tax law regarding what is personal services income.²

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For religious practitioners the distinction becomes more difficult with the aspect that they are engaged for a spiritual service also being included in the factors to be taken into consideration. However, as with other determinations of whether a person is an employee the determination will ultimately depend on having regard to all the circumstances of a particular case. While it may be practicable to determine the status of a religious practitioner after a dispute has arisen in some circumstances, eg has there been an unfair dismissal, the lack of certainty gives rise to many potential problems relating to the application of taxation law:

- Are they required to register and obtain an Australian Business Number (ABN) for purposes of the GST (employees are not required to be registered but contractors with a turnover above the threshold amount are required to be registered)
- If a religious practitioner is an employee the employing religious institution will be required to deduct PAYG amounts
- If a religious practitioner is not an employee, payers will be required to withhold an amount from a payment if an ABN is not produced.

In June 2000 the Assistant Treasurer announced measures to clarify the tax treatment of religious practitioners. Principally, the Assistant Treasurer announced that:

‘that religious practitioners will not need to apply for an ABN and will not come within the GST law for their pastoral and related duties.’, and that

A PAYG withholding event will be introduced to cover payments to religious practitioners for the performance of pastoral and related duties.³

(In relation to the latter point, it should be noted that if a religious practitioner is classified as an employee they will be subject to a withholding tax event but will be taxed at a zero rate in relation to pastoral and related duties. The above change will bring non-employee religious practitioners within the regime but also apply a zero tax rate for pastoral and related duties.)

Item 4 of Schedule 1 of the Bill will introduce a **new Division 50**, dealing with the GST treatment of religious practitioners, into the *A New Tax System (Goods and Services) Tax Act 1999*. **Proposed section 50-5** provides that where a religious practitioner performs an activity in pursuit of their vocation as a religious practitioner and as a member of a religious institution and they are not performing that activity as an employee, GST law will apply as if the activity was performed by the religious institution (effectively, GST law will not apply to such activities in relation to the religious practitioner regardless of whether they are an employee or not but will apply as if the service was performed by the institution).

Application: To activities done on or after 1 July 2000 (**item 6**).

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In relation to PAYG withholding, amendments contained in **Schedule 1** provide that payments made to a religious practitioner in relation to an enterprise will be subject to PAYG withholding (**proposed section 12-47** of the *Taxation Administration Act 1953* and associated amendments to the ITAA97). Effectively this means that regardless of the employment status of a religious practitioner PAYG withholding will apply in relation to an enterprise they conduct.

Application: Payments made on or after 1 July 2002 (**item 25**).

Endnotes

- 1 Assistant Treasurer, *Press Release*, 31 July 2001.
- 2 Refer to the *Bills Digest* no. 52, 2001–02, Taxation Laws Amendment Bill (No. 6) 2001.
- 3 Assistant Treasurer, *Press Release*, 28 June 2000.

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