

Although its brief would include all taxpayer disputes, we anticipate that an Appeals Group would focus on specific high value disputes (such as highly technical large business disputes) and on classes of disputes with similar fact patterns that could benefit from a consistent approach to difficult questions of law. Under this model, the Appeals Group would require technically strong leadership with significant experience in disputes.

The proposed model has clear benefits not only for taxpayers, but also for the ATO compliance team which would itself be strengthened by having a strong internal Appeals Group as opposed to the other alternative considered by the IGT - Creating an entirely independent and separate agency to manage tax disputes ♦ although it is interesting to note that the Inspector-General indicated that such an alternative should be pursued "if significant concerns persist after the recommended [separate Appeals Group] has been implemented".

The Government's response to the IGT's recommendation will be awaited with interest.

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[225] Trust-owned business succession insurance arrangements: Some clarity at long last

- by Matthew Burgess and Patrick Ellwood, Directors, View Legal

Largely due to the level of intergenerational wealth transfer, there has in recent years been an increasing emphasis on all forms of succession planning and, in particular, business succession planning.

In broad terms, a buy-sell agreement is a contractual arrangement between the ultimate owners (or "principals") of a business. The agreement is structured so that if certain events occur, such as the death or incapacity of a principal, the continuing principals are given the option to purchase the interest of the departing principal.

Most commonly, insurance is obtained to help fund buy-sell arrangements.

Since the withdrawal of the ATO's draft Buy Sell Discussion Paper in 2010 there has been some uncertainty about many aspects of insurance funded buy-sell arrangements, particularly those that utilise insurance trusts.

Recent changes introduced as part of the *Tax and Superannuation Laws Amendment (2014 Measures No 7) Bill 2014* (now awaiting Royal Assent after having been passed by Parliament without amendment ♦ see para [248] of this *Bulletin*) appear to have clarified the position (**the 2015 Changes**).

Trust ownership

The trust ownership approach generally involves the establishment of a special purpose entity, often with an independent trustee appointed, to acquire the insurance policies and then distribute proceeds, on the exit of a principal, in accordance with the terms of the trust instrument.

If the trading entity is itself a trust or owned via a trust (for example, a discretionary trust owning shares in a trading company), then it may not be necessary to establish a separate structure.

The core benefit of an insurance trust is its ability to centralise the ownership of all insurance policies and facilitate the efficient transition of an ownership interest following a triggering event.

Historically, from a tax perspective, the level of uncertainty regarding the tax treatment of the insurance proceeds (compared with that of other ownership models such as self-owned insurance) often undermined the commercial attractiveness of the trust ownership approach.

Certainly an insurance policy taken out by a trustee (who was also the beneficiary of the policy) over one or more principals, was likely to see the proceeds paid directly to the trustee and be exempt from CGT pursuant to s 118-300 of the ITAA 1997.

However, due to a lack of guidance from the ATO, many advisers believed there was a risk CGT was triggered where a new principal joined the business and there was any change to the trustee or insurance policy or on the subsequent distribution of the insurance proceeds to the beneficiary.

The concerns were largely driven by the ongoing uncertainty around the concept of "absolute entitlement", discussed later in this article.

2010 ATO ruling

The ATO released Product Ruling PR 2010/18 in relation to the CGT consequences for the beneficiary of what is generally seen as a "standard" insurance trust deed.

In many respects, the ruling reflects what most specialists in this area have advised for many years, namely, that a properly crafted insurance trust deed should provide appropriate protection for the principals of a business without any significant tax detriment, notwithstanding there might be other commercial issues to consider regarding the structure.

Unfortunately, the positive aspects of the ruling were largely undermined by the fact that the outcomes are based on the stated assumption that the insurance trust deed will in fact create "absolute entitlement" for each beneficiary in the relevant insurance policy.

As has been widely documented, the expressed views of the ATO concerning absolute entitlement are somewhat contentious and the ATO continues to refer to a draft ruling that has never been finalised ♦ despite being issued in 2004 (ie Draft TR 2004/D25).

In this regard, a significant concern was that the Product Ruling confirmed that, in order to ensure absolute entitlement, the relevant beneficiary must be able to call for the asset at any time. This largely undermined one of the main commercial reasons why advisers historically recommended insurance trusts, being that the trustee will be able to control the payment of any insurance proceeds received.

A further practical issue, given the way in which many providers traditionally structured trust arrangements, was that the Product Ruling only related to insurance trust deeds where the company acting as trustee was an entity owned and controlled by the principals involved in the business entity and the relevant insurer was not a party to the arrangements.

ATO minutes

Minutes released from a National Tax Liaison Group meeting in December 2010 (item 9) provided further insight into the apparent ATO views in relation to insurance trust deeds.

In summary the minutes stated:

- the status of the taxation ruling on absolute entitlement (Draft TR 2004/D25) is unclear;
- the ATO considers the finalisation of Draft TR 2004/D25 as intricately linked to how it will deal with bare trusts, which again remains an unresolved issue;
- the ATO believes that the Product Ruling released in relation to one provider's insurance trust arrangement is based entirely on the assumption that absolute entitlement was created. This assumption might be an unwise one to make, given the ATO's apparent attitude in this area; and
- while the ATO flags that it will further consider providing appropriate guidance, it specifically confirmed that the ATO Buy Sell Discussion Paper is not current.

Ultimately, given the complexities in this area and the uncertainty created by the ATO Buy Sell Discussion Paper, Draft TR 2004/D25, the Product Ruling and the above minutes, many advisers defaulted to recommending the obtaining of a private ruling on any proposed trust arrangement documenting an insurance funded buy-sell agreement from the ATO before implementing the approach.

Needing to seek a private ruling on what was otherwise a relatively benign arrangement was for many business owners sufficient reason to either use a different ownership approach or, more commonly, simply decide against implementing a business succession plan.

The 2015 changes

Amongst other amendments, the 2015 changes have adjusted the way insurance payments are taxed in certain circumstances.

In particular, the 2015 changes amend the ITAA 1997 to:

- remove the requirement that, in order to access the exemption under s 118-300, the insurance proceeds are received by the original "beneficial" owner of the life insurance policy. The amendment removes the reference to "beneficial" to clarify that a trustee is eligible for the exemption, where they hold the beneficial interest in the policy for a beneficiary;
- extend the exemption for compensation for injury/illness (ie total and permanent disablement and trauma insurance proceeds) in s 118-37 to apply where the proceeds are received by the trustee of a trust or superannuation fund (subject to certain policy ownership prohibitions for superannuation funds), if the injured/ill person is a beneficiary of the trust; and
- insert a CGT exemption where a trustee makes a payment to a beneficiary (or their legal personal representative) in respect of life, TPD or trauma insurance proceeds. This change also ensures that where the relevant trust is a unit trust, CGT event E4 does not apply.

The 2015 changes make it likely that trust and superannuation fund ownership of life, total and permanent disablement or trauma insurance policies will be more attractive, given the new clarity regarding the tax treatment of the insurance proceeds.

Importantly, the changes also operate to reflect the intended administrative position of the ATO in this area, and therefore apply from 1 July 2005 and taxpayers adversely impacted who would otherwise be out of time are granted an extension to amend their returns.

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[226] Digital Currency (incl bitcoin) inquiry report delayed; GST position should be clarified

- by *Matthew Cridland, Partner, DLA Piper*

The Senate referred an inquiry into Digital Currency (which includes, but is not limited to, bitcoin) to its Economics References Committee on 2 October 2014. Submissions to the inquiry closed on 28 November 2014 and the Committee was due to report by 2 March 2015. However, disappointingly, the Senate has now granted the Committee an extension of time and the report is now due on 10 August 2015. The Committee conducted further hearings on 4 March 2015.

The status of the Committee's inquiry can be found [on its main website](#).

Public hearings on 4 March 2015

Revenue specialists from Treasury and the ATO appeared before the Committee between 10.30 and 11.30 am on 4 March 2015.

I expected that particular session would have focussed on GST and the ATO's public ruling on bitcoin transactions. However, the transcripts had not been released as at the time of going to press.

Details of the Committee's Public Hearings (includes program and transcripts) are [on the Public Hearings section of its website](#).

Where does this leave us?

The delay in the release of the Senate report is unfortunate. The ATO released its draft public ruling on GST and bitcoin transactions on 20 August 2014, with the final version, GST Ruling GSTR 2014/3, being released on 17 December 2014. So it will be around 12 months between the release of the ATO's initial public guidance and the release of the Senate report. In the interim, some Australian bitcoin exchanges have already relocated overseas or changed their structures in light of the ATO's ruling.

While the ruling deals specifically with bitcoin, the principles it sets out will also be relevant for other crypto-currencies. The ATO's ruling treats bitcoins as a commodity, not as "money". Consequently, GST registered businesses which sell bitcoins in Australia, as part of an exchange transaction, are liable for GST on such sales. Further, GST registered businesses that use bitcoins to make payments are liable for GST on the supply of the bitcoins. The bitcoin payment is viewed as a barter exchange. These outcomes are impractical and place some Australian bitcoin exchanges at a price disadvantage to overseas exchanges.

In my view, the ATO's GST position is correct and the ruling is not the problem. Rather, the problem is that the GST Act does not adequately deal with bitcoin and other crypto-currencies. This is unsurprising given the GST Act was enacted in 1999 and bitcoin was not released as open-sourced software until 2009. The issues could be readily