BAN TACS NEWSFLASH

National Accountants Group

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This edition of Newsflash shows just how interesting tax law can be - in fact when it comes to tax cases it can even be amusing. The stories can be interesting too if you want to read the full case.

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GST on Mortgagee Sale – Icehot's Case

When the Bank sells you up they are liable for the GST but of course it comes out of your money!

One of the reasons I like this case is because I am never going to forget the name Icehot Pty Ltd and FCT [2017] AATA 1505.

The Bendigo Bank as mortgagee in possession sold up two properties owned by Icehot and paid to the ATO (into Icehot's running balance account) the appropriate amount of GST. The bank is required to pay the GST on mortgagee in possession sales under section 105-5 of the GST Act.

The ATO promptly assessed Icehot for the GST and collected it out of the running balance account. Icehot objected to this saying in accordance with section 105-5 GST Act it was not liable for the GST and the ATO conceded yes Icehot was right.

Now this is where it gets interesting. Icehot then said good now hand over that money in the running balance account but the ATO promptly transferred it to the Bendigo bank's account. Nice try by Icehot but no prize - the AAT found that the ATO had done the right thing, eventually.

The AAT and the ATO accepted that the bank should have included the GST in their own BAS and that Icehot was technically not in a position to argue that the money should be refunded to them because that was not the basis of their objection. But at the root of the problem was that Icehot believed there was no GST to be paid on the sale of the properties anyway. The catch was that if the bank decided to pay the GST over to the ATO that was its choice to interpret the law that way and Icehot, not being the taxpayer, just the person who's assets were used to pay the tax under the mortgage agreement, could not argue the case as to whether GST applied or not!

Great yarn but the thing to take away from this case is if the bank sell you up, there is a risk you will unnecessarily lose 1/11th of the selling price whether GST applies or not as the banks want to make sure the ATO doesn't come chasing them. This is one of the many reasons to try and sell the property yourself before the banks take over. Also note if they do sell you up you do not have to lodge a BAS in relation to that property and the ATO cannot attempt to recover the GST from you because of section 105-5. This case is an important piece of clarity, ie it is not the case of the bank acting as your agent.

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Warning Against Fancy Trust Distribution Minutes

Lewski case 2017 FCAFC 145 is a lesson to us all on being far too tricky when it comes to the wording of trust distribution minutes. Stick to dollar amounts or a percentage of trust income - no fancy conditions - and wear the consequence if the ATO bump up the income or you could end up with the trust being taxed on all its income at the maximum tax rate because the distribution is not valid. According to the ATO decision impact statement you can't even distribute the income to the default beneficiary under these circumstances.

Here are the details of the case, as they relate to the distribution minute. The distribution of trust income was made to the taxpayer but with the condition that if the ATO were to come along and increase the taxable income of the trust then any extra income was to be paid to a bucket company. The court found that this meant the distribution resolution was contingent. For a taxpayer to be taxable on trust income they must be presently entitled to it. A contingent resolution meant that there was no clear entitlement so the profit had not been distributed. This meant it remained the income of the trust. Trusts are taxed at the maximum tax rate so the worse possible outcome, just to try to cover all eventualities. The ATO have also made it clear that they do not consider it possible for the income to have been distributed to a default beneficiary instead. A default beneficiary is usually named in the trust deed just in case. In a clause along the lines of, if no resolution on the distribution of profit is made by the 30th June then the profit shall be distributed to the primary beneficiary, who is named in the schedule to the deed.

It boils down to, if you don't need fancy because the likelihood of the ATO changing the trust's taxable income is low, then don't do fancy. That is my cost benefit analysis anyway because you just can't get worse than the maximum tax bracket and that would apply even if the ATO don't adjust the trust's taxable income. Lewski is not, by far, the final word on clever tricks in trust distributions but very relevant for those trying to get by in the real world.

Just stick to splitting the trust's income on set amount and/or a percentage of profit basis and settle for maybe not a perfect tax strategy but a lot less harmful than the maximum tax rate. The trouble with using a set amount or percentage is you have to decide what this is to be before 30th June. In many cases you may not have a very good idea of the trust's income. Doing interim accounts in June and talking with your Accountant will help.

Best Askbantacs Question – Calculating the Main Residence Exemption

A couple of Accountants disagree on how the main residence exemption works when you move in and out of your home several times over the period of ownership.
http://taxquestions.com.au/when-home-not-fully-covered-by-main-residence-exemption/

If you would like to ask a question of askbantacs go to http://taxquestions.com.au/

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