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Tax Brief

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New Tax Agents' Regime: Time to act is now!

The legislation to replace the current regulation of tax agents was introduced into Parliament in 2008 and passed along with separate transitional legislation in 2009. The regime gets underway on 1 March 2010. As with other new or revised regulatory regimes, there are borderlines that have to be established and which are currently uncertain in application. There is the potential for many corporate group service companies, funds management entities, financial advisers and others to have to register as tax agents under the new regime.

This tax brief discusses when registration is required under the new regime and how the regime may impact unexpectedly on clients. Though the current rules are problematic, some relief may be in sight following a speech by the Assistant Treasurer yesterday but the timeframe is short so action needs to be considered now.

Who needs to register?

Registration is required if an entity provides a tax agent service to another entity and charges or receives a fee or other reward for the service. A tax agent service consists of providing tax assistance of various kinds such as tax advice, filing a tax return or representing an entity in dealings with the Australian Taxation Office (**ATO**) in circumstances where the entity which is provided the service can reasonably be expected to rely on its tax content.

For corporate groups the problem this requirement poses is that each company in the group is a separate entity in terms of the definition. Hence if a service company in a group provides services such as preparing tax returns for other companies in the group in return for a fee, it would seem to come within the regime. The Tax Practitioners Board (**the Board**) which has the superintendence of the new regime is currently considering whether this is an anomaly. It has rejected the view that the new regime is only intended to cover service provision to the public to judge by the Draft Report of the Consultative Forum recently posted on its website, see www.tpb.gov.au>at a glance > Media releases. Yesterday the Assistant Treasurer indicated that relief will be forthcoming as discussed below.

The funds management industry has a similar problem and further issues as well. Typically a management company will be providing services to a managed investment scheme (**MIS**) which will include preparation of the trust tax return for the MIS. The manager will be rewarded by a fee for the various services provided to the MIS. The explanatory material for the new regime is clear that if tax services are bundled with other services, the fact that they are not separately charged for will not exclude the operation of the fee for service requirement in the rules.

In addition the management company will be assisting the MIS in preparing tax information for unitholders in the MIS which it is clearly intended the unitholders will rely on. As the unitholders pay fees for the operation of the MIS and the MIS pays fees to the management company, there is potential for registration requirements to be triggered for both the MIS and the management company in this case. Resolving this issue is not helped by an ambiguity in the legislation in third party cases (whether the management company is providing tax agent services to the MIS or to the unitholders in this example).

The same comments may apply to the extent that corporate groups advise their shareholders of the tax consequences for shareholders of actions by the group (such as payment of franked dividends, share buybacks and capital management strategies generally).

This MIS example by extension indicates that anyone providing financial advice for reward is at risk of providing tax agent services, as tax is so often integral to investment decisions. The explanatory material for the legislation has a number of examples indicating that holders of financial services licences may be required to register as tax agents also. Participants in the financial advice sector will have a feeling of déjà-vû if they were around when the financial services licence regime was introduced.

The official examples provided are unfortunately not very realistic – in the real world it will at best often be uncertain whether tax agent registration is required of a financial services licensee. The examples are clear that attempts to exclude the need for registration by inserting clauses in contracts or other documents that tax advice is not being provided or that any tax advice given should not be relied on will not be successful if tax advice is in fact being provided and can reasonably be expected to be relied on.

Transition

In recognition of the fact that the new regime is broader than the old tax agents regime, there are special transitional rules for those now required to register for the first time.

If an entity is not currently required to register, it is possible to buy two years transitional relief for meeting registration requirements under the new regime if registration will be required under that regime. This is achieved by entities self-identifying themselves as in this category and informing the new Board

accordingly by 31 May 2010. But that will not solve the problems outlined above if registration does not prove possible because registration requirement cannot be met.

Prospect of some relief from Assistant Treasurer

On 18 February 2010 Senator Sherry made the following comments in a speech:

> *During my discussions with the industry and in consultation with the Board, I have formed the view that, in at least one area, the Government will pass regulations to exclude a group from being required to register.*
>
> *I'm speaking specifically about 'in-house' advisors. These individuals often provide tax advice which would be relied upon within their corporate group for a single tax entity.*
>
> *It was not the Government's intention in developing this national regime that these advisors would be required to register if they are only providing advice within their corporate group.*
>
> *Now, I know there are one or two groups which have put a case to me to be similarly excluded. I am currently conducting discussions with the relevant parties and will make further decisions in the near future.*

This will cover off corporate groups but the reference to “single tax entity” may mean that relief will be limited to tax agent services within tax consolidated corporate groups. On the other hand the definition of tax agents services goes beyond income tax and includes GST for which there are different grouping requirements, so it is not clear why an income tax limit should be the basis for an exception. It does not yet seem to have been decided that the benefit will be extended to similar problems in joint venture and other less than 100% ownership cases. Moreover, it is not clear to what extent any exclusion will cover off tax related advice given by corporate groups to their shareholders.

Problems in the funds management and financial services areas are not specifically mentioned but the last paragraph is probably referring to these types of cases. Clients in these areas should be proactive now in bringing problems to the attention of the Assistant Treasurer and the Board through its Consultative Forum.

Who can register and what is involved in registration?

The requirements for and consequences of registration as a tax agent are significantly expanded in the new regime.

The registration regime starts with individuals (unlike the current regime which in the case of businesses conducted by legal entities starts with the legal entity). Individuals must be 18 years or older and meet fit and proper person and professional qualifications/experience tests.

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Legal entities that employ such individuals may then register in broad terms if they have sufficient numbers of registered individuals to provide tax agents services to a competent standard and to supervise the work of unregistered individuals. There are specific additional rules for partnerships and companies.

Not all individuals involved in tax advice need to register. The references to fees for service in the registration requirements are intended to exclude employees from registration, provided the employer is registered (which in turn requires having sufficient individual employees, partners or directors registered!).

It is at this point that corporate group service companies, funds management entities and financial services licensees may falter. The professional qualifications and experience required may well not be satisfied by any individual involved.

Indeed the experience requirement may operate perversely in this context. Although there are six different variants for satisfying qualification and experience requirements, it is generally necessary that an individual have one year's fulltime relevant experience in the last five years. Relevant experience is defined as work as a registered tax agent or under the supervision and control of a registered tax agent, as a legal practitioner, or as approved by the Board (none so far approved), with substantial involvement in tax agent services.

Many people working in corporate group service companies, funds management entities or financial services licensees may have experience of the type in question but not within the required timeframe. Ironically it may be more junior employees in such organisations who can satisfy the relevant experience rule rather than their supervisors. As well as the new regime possibly putting a premium on such employees, it may be difficult to show that the tax work of the more experienced employees is being supervised by the employees registered as tax agents, which is necessary for a legal entity to register as a tax agent.

Even if there are one or more individuals who do meet the registration requirements for a tax agent, the additional consideration will be whether the compliance and other obligations involved are justified for the individuals or the organisation. Registration brings with it the usual attributes of registration (including fees and potential penalties) as well as a Code of Professional Conduct and (so far unspecified) professional indemnity insurance requirements.

Outsourcing to a registered tax agent may turn out to be a solution in some cases but in other cases it is likely there will be little choice but to register unless the current reach of the new tax agents regime is cut back. As the Government has indicated through the Assistant Treasurer that these problems are under active consideration, now is the time to seek appropriate exclusions from the tax agents services regime.

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