When commercial transactions attract attention

Whether it's their name or the size of the deal, there are times in life when wealthy families can attract media attention. This, in turn, may pique interest from the Australian Taxation Office's (ATO's) Commercial Deals Team. Generally, transactions of interest exceed $20m and can include traditional business sales, restructures, share buy-backs, refinancing and real estate sales.

We are often asked by clients how to best manage the tax arrangements of large, commercial transactions, along with the exposure they inevitably generate. As a modern Family Office, we help our clients look beyond traditional tax planning, developing bespoke strategies based on a holistic, multi-faceted picture of their wealth and what matters most to them, as outlined in our publication Why the Modern Family Office Matters.

Engaging in a large commercial deal – what are the options from a tax perspective?

When it comes to managing the tax arrangements of a large commercial deal, there are generally four options:

Proactively initiate a discussion with the ATO

As part of the Commercial Deals Early Engagement Program, taxpayers can elect to proactively initiate a discussion with the ATO in real time, rather than wait for an invitation or post lodgement review by the ATO. The program is focused on deals where the transactions have been completed, yet lodgement of the tax returns hasn't yet occurred.

Wait for an invitation from the ATO Commercial Deals Team

The ATO maintains awareness of commercial transactions reported by the media, with the Commercial Deals Team tasked with inviting transaction reviews. In F24, approximately 90% of the transactions reviewed by the ATO Commercial Deals Team were initiated by ATO invitation, based on intelligence that a significant transaction of more than $20m had occurred.

Taxpayers may elect to undertake the deal, and then wait for an invitation from the ATO Commercial Deals Team. An agreed tax position with the Commercial Deals Team generally happens before the taxpayer lodges the relevant tax return.

Wait to submit a tax return

A third option is to lodge a tax return and wait for this to prompt the ATO to commence a review. Reviews by the ATO can occur up to four years after the tax return was lodged. This comes with the added risk of a dispute, interest and penalties, if the ATO does not agree with the position.

Apply for a Private Binding Ruling

In circumstances where the arrangement is not a commercial deal worth more than $20m, or the tax issues involved are complex or contentious, it may be more appropriate to apply for a private ruling from the ATO.

The benefits of entering the Commercial Deals Early Engagement Program

There are numerous benefits associated with entering into the Program, as outlined below:

Greater certainty and less tax risk

Proactively seeking ATO agreement on the tax treatment of a deal, prior to lodgement of the tax return, helps prevent penalties or interest being imposed for lodging a position which the ATO may not agree with. This offers taxpayers the greatest tax certainty while lowering risk, allowing them to confidently move forward with what matters most to them.

Timeliness

On average, it takes only 60 days for the ATO and the taxpayer to strike an agreement on the tax treatment of a transaction under the program.

Reduced risk of re-review

Once a position has been agreed with the ATO, it is unlikely the ATO will seek to re-review the transaction, unless there are exceptional circumstances.

Reduced cost and burden

Over the longer-term, it is cheaper and easier to enter the program than it is to undergo a specific issues or comprehensive review by the ATO. Often, these can last for years after transaction completion, with the potential for interest and penalties to be incurred.

Mutual Trust Case Study

Last year, Ed Belmont* was invited to seek an agreement with the ATO under the Commercial Deals Early Engagement Program regarding the sale of his $30m business. Mutual Trust had helped Ed structure part of this deal.

With Ed's business rapidly rising to success over a short timeframe and offering a product which had become a household name in Australia, the deal was quick to be picked-up by the media.

In turn, the media attention triggered the ATO's Commercial Deals Team to reach out to Ed with an invitation to get agreement with the ATO on the appropriate tax treatment.

Initially, Ed felt some uncertainty about engaging upfront with the ATO. He was leaning towards an alternative option of lodging his tax return and waiting for this to prompt the ATO to commence a review. We worked with Ed to help him become aware of the benefits that can arise from engaging upfront with the ATO for greater tax certainty and peace of mind.

As the ATO presented queries about the deal structure, we helped Ed to address them. In turn, the ATO agreed with the treatment advised by Mutual Trust. Ed was able to lodge his tax return with confidence that the ATO would not review or dispute the tax structure of the deal at an unknown point of time in the future.

Importantly, Ed was able to enjoy the freedom of using the post-tax sale funds to execute his Purpose of Wealth – what matters most to him.

*Name changed to protect privacy

The right approach will depend on your unique circumstances

When it comes to managing the tax affairs of large commercial deals, there isn't a 'one size fits all' approach – it's critical to consider each client's unique circumstances, objectives and Purpose of Wealth. The modern Family Office works with families to first understand a complete picture of their wealth from a holistic perspective, followed by providing strategic advice and support throughout the end-to-end process.

If you are entering into a commercial deal above $20m that is likely to be reported in the media, or have received an invitation from the ATO to review a commercial deal, please reach out to your Relationship Manager for help in developing a strategic approach.

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