SIMPLICITY NO CERTAINTY WHEN MAKING PLANS

We all know the old adage of the two certainties in life – death and taxes. However, while the first part may be relatively straight forward, it is the second part that causes the most confusion. Maybe the adage should be changed to 'death' and 'a continually changing environment of taxation and compliance'.

So, is it a good idea to plan for the first part, and in doing so, take into consideration the second part? Many of us do not like to consider the concept of dying and I for one would rather think about how I am going to reduce my handicap or whether the fish are biting in the river.

However, when I brush the wool from my brow I realize that if I want to make life easier for those I leave behind, and minimize the amount of tax they have to pay, I need to put in place a cunning plan now. And as there is that certainty that there will always be change I will have to occasionally review that plan.

One area I will need to address is superannuation. "What!" you say, "but superannuation is so simple now". Well yes, the government has streamlined some things and I can receive my super tax free at aged 60, yet there are still a few curly ones they have thrown in the keep us on our toes. Different super, yes – simple super, that's debatable!

When making plans for your estate there are two general principles that need to be considered in relation to super:

- Super death benefits are a non estate asset – you can't leave super in a will. The government has made it clear that it does not wish to see superannuation used as an "estate planning vehicle"; and,
- The taxable portion of a super death benefit is not taxable **only** if it is paid to a spouse or a tax dependant* of the deceased – otherwise it is subject to tax commencing from 15%.

**See 'Dependants – who is in and who is out?' below for the definition of a dependant.*

Also, although I may pay no tax on super benefits I receive this doesn't necessarily extend to my beneficiaries. And while I am still accumulating super, after tax contributions that I make can still improve the tax position of the end benefits.

Take the example of Bill who is a widower with two adult kids. He has $2.5m in his self managed superannuation fund with no undeducted contributions. The fund assets consist of a commercial property worth $1.5m with a $1m capital gain, and a share portfolio valued at $1m with a $500k capital gain.

As things stand, if Bill was to die now, Capital Gains Tax on the sale of the fund assets would be $150k ($1.5m x 10%). The remaining benefit of $2.35m is taxed at 16.5% which comes to $387,750. The total tax payable will be a shade under $540k or about 21%.

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If 50% of the fund was made up of undeducted contributions the tax payable would have been halved. Also, if all the fund assets were sold and the funds were withdrawn (assuming a pension was being paid) while Bill was alive there would have been no tax payable at all.

Now I am certainly not subscribing to the idea that everyone should withdraw all their superannuation as soon as it is available to them however, there are some important estate planning issues that need to be considered:

- Who is going to get control of my super on death or incapacity?
- What can be done to reduce or eliminate super death benefit taxes?
- Which is better – pension or lump sum?
- What can be done to enhance and protect the beneficiaries' enjoyment of the death benefit payment?
- Should I put in place a binding or non binding death nomination?

Then there is the issue of putting in place an Enduring Power of Attorney so there is always someone you can trust should a situation arise where you are no longer able to make decisions for yourself.

So, not so simple after all. I think I might need a good lie down just thinking about it.

Brian

Dependants – who is in and who is out?

Now I will attempt to give a broad explanation of who might constitute to be a dependant. And just like tax this is not necessarily straight forward and must be considered in individual circumstances.

The Tax Act defines a death benefits dependant to be:

- a spouse or former spouse; or
- a child aged less than 18; or
- a person with whom the deceased had an interdependency relationship; or
- other dependants of the deceased just before he or she died.

The concept of 'interdependency' in relation to superannuation and taxation was introduced in November 2005 as amendments to the Superannuation Industry (Supervision) Regulations, the Retirement Savings Accounts Regulations and the Income Tax Regulations.

It's significance is that the range of persons who may be characterised as a 'dependant' for superannuation and (most) taxation purposes has been expanded. Practically this means that if a recipient of a superannuation death benefit is a 'dependant' of the deceased member, the lump sum death benefit payable to the recipient is tax free.

In determining the existence of an interdependency relationship 'all of the circumstances' of the relationship between the relevant persons are to be taken into account and includes:

- duration of the relationship;
- whether or not a sexual relationship exists;
- ownership, use and acquisition of property;
- degree of mutual commitment to a shared life;
- care and support of children;
- reputation and public aspects of the relationship;
- degree of emotional support;
- the extent to which the relationship is one of mere convenience; and
- any evidence suggesting that the parties intend the relationship to be permanent.

Also considered would be a statutory declaration signed by one of the parties to the relationship which states that an interdependency relationship exists or existed with the other party.

In the case of death benefits, the relationship must have existed immediately before the death of the member.

On a practical level consideration should be given to the preparation of a statutory declaration outlining the existence of the interdependency relationship. Also the trust deed of a fund must allow for or, more importantly, not exclude the concept of interdependency.