

Private equity tax uncertainty remains

David Bushy - Boardroom Radio
Dr Niv Tadmire - Partner Clayton Utz

DAVID BUSHBY

We're speaking with Dr Niv Tadmire. He's a partner of the National Tax Team at Clayton Utz in Melbourne. Welcome Niv.

NIV TADMORE

Good afternoon.

DAVID BUSHBY

Niv, the fallout from the TPG / Myer tax dispute and the ATO's Project Wickenby probe enters a new chapter today with the Federal Court hearing a dispute between the ATO and five offshore companies, with almost \$30 million in assets frozen pending the outcome. What's the issue here and what's at stake?

NIV TADMORE

I'm not familiar with the specifics of the case but what we see now is that the ATO has taken the view that investments by private equity into Australia may not necessarily be capital investments. This is important because capital investments are protected under the tax law and a foreign investor would not have to pay tax on the failed investments whereas non-capital investments are not protected and tax may apply.

DAVID BUSHBY

So in the wake of the TPG / Myer decision we saw draft rulings, but final rulings never came to fruition. However, we recently saw a new managed investment trust reform allowing trusts to elect earnings to be treated on that capital account. Has that now resolved this issue?

NIV TADMORE

No. To start with the draft rulings, as you said, are only draft and they are very specific. They do not provide a comprehensive outline I think of the ATO's view and in fairness to the ATO, the law is inherently complex and uncertain. So at the end of the day, even if you have a very comprehensive ruling those cases attend very much turn upon their own facts and that links to the second point you made about maybe we should fix this issue by legislation. The MIT reform is very specific. It only applies to managed investment trusts and it doesn't apply to the rest of the investment activity in Australia. But that could be a way to look at it, you know, to introduce certainty into the tax law.

DAVID BUSHBY

Is there any legislative reform on the cards or being spoken about? I know we don't quite have a Government in place yet but is it in the wings?

NIV TADMORE

Look, in 2006 the Government said clearly that it wants to encourage foreign investment and at that point it introduced that exemption that I mentioned before in relation to capital investments. What did not happen in 2006 is the second side of the equation, ie. to also protect revenue investments into Australia. I'm not aware of any specific intent at the moment to fix this issue and I would not be surprised if that would be on the agenda after we have a Government.

DAVID BUSHBY

Having said that, we've seen some recent action in the private equity space so in terms of these rulings and tax treatments, are we seeing more confidence in that area that's driving these deals now or is it merely market dynamics at play?

NIV TADMORE

I think that with private equity, it's quite hard to quote one view in relation to private equity because private equity involves many investors and many philosophies about investment and attitude to risk. I think you see three major groups, you see those groups that select or choose to sit on the fence until the position in Australia is clarified and that may take some time. There is though that group that says okay, there is uncertainty, I'll go to the tax office, I'll get my ruling and I will make my mind then and then there's the third group which says look, we are quite confident that we don't fall within the Australian tax net and we should just go forward and invest.

DAVID BUSHBY

Some great insights Niv. We'll have to leave it there. Thanks again for joining us.

NIV TADMORE

It's a pleasure, thank you.

DAVID BUSHBY

That was Dr Niv Tadmore, a partner in the National Tax Team at Clayton Utz in Melbourne. Listeners if you have any questions for Niv please send them through using the panel on your screen otherwise email through to bwr@bwr.com.au and we'll pass on your query.