Preview for Foreign Residents and CGT:

FOREIGN RESIDENTS AND CGT:

1. Are they an Australian resident?
2. If not, there are special rules relating to capital gains/losses made by **foreign residents.** (Division 855 ITAA97)

Foreign residents and capital gains tax:

1. Foreign residents only subject to CGT if the CGT event relates to CGT asset that is 'taxable Australian property' (s 855-10(1)(b))
2. Check if they're a share-trader/business of etc.
   - So it's general income.
   - Therefore, it will be **Australian sourced income**.

Temporary residents:

1. Generally same basis as if they were foreign residents. (s 768-915).

What is taxable Australian property?

Three main forms of CGT assets that constitute taxable Australian property (s 855-15):

1. CGT assets that are '**taxable Australian real property'**. (s 855-15 item (1))
   - This covers Australian land (s 855-20(a) and rights to mine minerals in Australia (s 855-20(b)).
2. CGT assets that are 'indirect Australian real property interests'. (s 855-15 item (2)(a))
   - This requires the individual to be a:
     - **Non-portfolio membership interests** (ie membership interests of at least 10% (eg they own at least 10% of the shares in the company); (s 855-25(1)(a)). and
     - the **value of the entity's assets is principally** (ie more than 50%) from Australian real property (s 855-25(1)).
3. This covers in an interposed entity (eg a company) where CGT assets that are used in carrying on a business through a **PE in Australia**. (855-15 item(3))
   - This covers, for example, goodwill of a business carried on by a company through a branch in Australia, S 855-15(3), page 1210
4. **Note: A right or option to acquire any of the above CGT assets is also taxable Australian property**. (855-15 item(4))

Foreign resident capital gains withholding tax

1. A 'foreign resident capital gains withholding tax' regime contained in Subdiv 14D in Sch 1 TAA operates from **1 July 2016**
2. When will a withholding tax apply?
   - A withholding tax will apply if foreign resident **disposes of:** (s 14-200(1)(c)).
     - (i) taxable Australian **real property**,
     - (ii) an **indirect Australian real property interest**, or
     - (iii) an **option or right to acquire such property or interest**
   - **Subject to exclusions** (s 14-215(1))
3. **Exclusions:**

Preview for companies

What is a corporate tax entity?

- A corporate tax entity is a company, corporate limited partnership or public trading trust (s 960-115 ITAA97).
  - (not a mutual life insurance company, or acting as a trustee, or in a partnership) (s 202-15)

Corporate tax rate

1. **Base rate entity tax rate**: 27.5% (s 23(2)(a)
   - What is a base rate entity?
     - Carries on a business (s 23AA(a) ITRA); and
     - Depending on what year:
       - For 2017/18: Aggregate turnover of an income year below prescribed threshold of $25m (s 23AA(b) ITRA).
         - **This is different for imputation purposes.**
       - For 2018/19 onwards: Aggregate turnover of an income year below prescribed threshold of $50m (s 23AA(b) ITRA).
   - What is aggregate turnover?
     - Combined 'annual turnover' of the entity + its connected entities + affiliates for the income year (s 328-115)
     - What is annual turnover?
       - Total ordinary income (excluding GST) the entity derives in the ordinary course of carrying on business (s 328-120)
     - What is a connected entity?
       - If it controls the other entity or is controlled by the other entity, or under common control (s 328-125)
     - What is an affiliate?
       - An **individual** or **company** which **acts**, or could **reasonably be expected** to **act**, in **accordance** with the **entity's directions**, or in **concert with the entity** (s 328-130).
   - Before 2017/18 income year, tax rate depended on whether they were an SBE
     - See page 539 if relevant.
2. **All other companies** pay tax at 30% (s 23(2)(b) ITRA).

Capital returns

1. Capital returns are not a dividend, they are returning money. If there is a return of capital to a shareholder, gives rise to CGT implications:
2. If shares are cancelled/buyback? (s 104-25(3)
   - **CGT event C2 applies**
   - Shareholder is deemed to make a **capital gain** if the amount returned **is more than the cost base of the shares**
     - Deemed to make a loss if the amount returned is less than the reduced cost base of the shares (s 104-25(3))
   - **Disregarded if the shares were acquired before 20 September 1985** (s 104-25(5))
   - Example
     - Facts:
       - Shares acquired for $10
       - Capital return of $17
     - Result:
       - Capital gain of $7 ($17 - $10)
3. If shares are **not cancelled**
   - If shares are **not cancelled**, **CGT event** G1 applies

- Excluding any part of the payment that is a dividend, if amount **returned** is **more than cost base**, the **share's cost base is reduced to nil** and the **excess amount** is **treated as a capital gain** (s 104-135(3))
  - Excluding any part of the payment that is a dividend, where the amount returned **is not more than the cost base** of the share, the share's cost base/reduced cost base is **reduced by such an amount** (s 104-135(4))
- **Disregarded if shares were acquired before 20 September 1985** (s 104-135(5))
- Cannot index reduced cost base
- Example:
  - Facts:
    - Shares acquired for $100
    - Capital return of $70 (less than cost base), but did not cancel the shares
    - Sold shares later for $50
  - Result:
    - Share's cost base = $30
    - Capital gain = $50 - $30 = $20

Preview for on-market share buy-back:

Tax consequences for shareholder of an on-market purchase:

What is it?

- Buy-back undertaken in the ordinary course of trading on the **stock exchange** (s 159GZZZK(c)(ii))

Are there GST issues?

- SBBs constituted input taxed financial supplies under s 40-50 GSTA, therefore:
  - NO GST is payable
  - No input tax credit entitlements

Resident: if a mere investor, not a share trader:

1. Buyback will constitute the disposal of an asset for CGT purposes, causing CGT event A1 to occur (s 104-10)
   - To consider if a capital gain or loss has occurred under s 104-10(4), must determine the capital proceeds from the disposal of the shares.
2. Seller deemed to have received as **consideration** for the sale **the purchase price paid for the shares** (s 159GZZZS).
   - For the woolworths document, this would be the **buy-back price**
   - The **purchase price does not include any dividend component,** even if the company used profits to fund the purchase (s 159GZZZR).
   - As if you've sold them to anyone else.
3. **Discounting a capital gain:**
   - Requirements:
     - **Must be a resident** s (102-5)
     - Must be made by an individual (s 115-10(a)), complying superannuation entity (s 115-10(b)) or trust (s 115-10(c))
       - **NOT** a company, but can be a small business owner
     - Capital gain must be for a CGT event happening after 11:45am 21 September 1999 (s 115-15)
     - Must not index the cost base (double benefit) (s 115-20)
     - Must acquire asset 12 months before CGT event (s 115-25)
   - **Discount percentage:**
     - Discount percentage is 50% (for individuals and trusts) and 33.3 for complying superannuation entities (s 115-100)
     - Note: can only get discount capital gains **on a gain, not a loss** under s 102-5.

Resident: share trader:

4. If they are a share trader, the amount received for the shares will be ordinary income under s 6-5.

Non-resident mere investor:

1. Are not subject to CGT for assets that are not taxable Australian property
   - Unless the shares in the company conducting the buyback is taxable Australian property per s 855-15, non-residents will not be subject to CGT (s 855-10(1)(b)).
   - What is taxable Australian real property?
     - CGT assets that are indirect real property interests (s 855-15 item (2)(a)). This requires the individual to be a:
       - **Non-portfolio membership interests** (ie membership interests of at least 10% (eg they own at least 10% of the shares in the company); (s 855-25(1)(a)). and

        - the **value of the entity's assets is principally** (ie more than 50%) from Australian real property (s 855-25(1)).
- If it is taxable Australian property per s 855-15, then a withholding tax will apply under s 14-200(1)(c)(ii)) TAA.
- The company conducting the buy-back must remit a withholding tax of 12.5% of the first element of the CGT cost base just after the acquisition (s 14-200(3)(a)(i).
    - First element is the amount paid to acquire the asset (s 110-25(2))

<u>Non-resident share trader:</u>

1. foreign residents are assessed on their ordinary income and statutory income from Australian sources (s 6-5(3)(a), s 6-10(5)(a) ITAA97).
2. Business income sourced from Australia.