HD (86) LAW4322 NOTES

ADVANCED TAXATION LAW

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This is to be used as a guide only, you should take your own notes, read the textbook and legislation for a better understanding of the unit

Deceased Estates & CGT Consequences

For the Deceased

s 128-10- disregard capital gains/losses from a CGT event for a CGT asset you owned just before dying.

- Unless the beneficiary is:
    - Exempt entity, trustee of a complying superannuation entity, foreign resident
    - Then CGT event K3 will arise (s 104-215) and capital gains/losses are deemed to be made by the deceased just before they died (s 104-215(3), unless the asset was acquired before 20/9/1985 (s 104-215(5).
        - In the case of a foreign resident beneficiary, further requirement:
            - Deceased must've been an Australian resident just before death, and
            - The asset is not taxable Australian property of the foreign resident.
                - This prevents tax avoidance because if the deceased sold it, they would be subject to tax as they are a resident, but once the asset is transferred to a foreign resident, if it is later sold they would no longer be subject to tax as it is not taxable Australian property.
        - Capital gain for deceased will be (market value on day of death – cost base), capital loss will be (reduced cost base – that market value) (s 104-215(4).

For the Legal Personal Representative

When a CGT asset passes to the representative, they are deemed to have acquired the asset on the date of the deceased's death (s 128-15(2).

- But, per s 115-30, for the following purposes, if pre-CGT asset- acquire at deceased's death, if post-CGT asset- acquire when the deceased acquired it (p. 509).
    - 50% Discount capital gain calculation (s 115-25)
    - Discount percentage adjustments for foreign or temporary residents (s 115-105, 110, 115)
        - These sections deny discounts to the extent the gain was accrued while the taxpayer was a foreign or temporary resident (p. 511-515)

s 128-15(3)- disregard capital gains/losses in the passing of assets from the representative to beneficiaries.

- Note this does not cover where the asset was sold to 3rd party or converted into cash

1st element of the cost base/reduced cost base (s 128-15(4):

- If deceased was foreign resident just before the deceased's death and the asset is not taxable Australian property at the time (unless it's trading stock- see below) -> market value of the asset on the day of the deceased's death (item 3A)
- CGT asset (not trading stock or main residence) acquired on or after 20/9/1985 -> cost base/reduced cost base of the asset on the day of the deceased's death (item 1)
    - Trading stock on hand just before death -> amount under s 70-105 (item 2)
    - Main residence just before death (if it was not being used to produce assessable income, and the deceased was not then an excluded foreign resident)-> market value of the dwelling on the day of the deceased's death (item 3)
        - This is particularly relevant when the conditions in s 118-195(1) for main residence exemption does not apply.
- CGT asset acquired before 20/9/1985 -> market value of the asset on the day of the deceased's death (item 4)

Fringe Benefits Tax

General Rules

FBT is assessed under the FBTAA, imposed under the FBTA, and operates in conjunction with the Fringe Benefits Tax Regulations 2018.

What is a Fringe Benefit?

Fringe Benefit (s 136(1) = in a year of tax, it means:

- A 'benefit' provided at any time during or in respect of the year of tax,
  - Benefit (s 136(1) = any right, privilege, service or facility
- Being a benefit provided to the employee/'associate' of employee
  - Associate (s 136(1) = relatives and certain related entities (refer to ITAA36 s 318)
- By the employer, employer's 'associate'/arranger (ie. 3rd party under 'arrangement' with them)
  - Employer (s 136(1) = current, former, or future employers
  - Arrangement is defined widely in s 136(1).
- In respect of the employment of the 'employee'
  - Employee (s 136(1) = current, former, or future employees
  - In respect of the employment = see s 148(1) (p. 1943, 595-6 tb)
- NOT salary or wages, exempt benefits (minor benefits less than $300- s 58P(1) and others), other exclusions (ie. deemed dividends, super contributions, benefits under employee share scheme, termination payments etc.)
  - See more p. 596-7 tb.

FBT & Income Tax (for employer)

An employer (s 66 FBTAA) has to pay FBT on their 'fringe benefits taxable amount' for the 'year of tax' (FBTA s 5) at the rate of 47% (FBTA s 6).

- Year of tax = 1 April to 31 March (FBTAA s 136(1)
- Fringe benefits taxable amount = 2-step approach below.

An employer will get a deduction equal to the FBT paid, and of course also the actual cost of the fringe benefits provided (all ITC excluded under s 27-5), under ITAA97 s 8-1.

Taxable Values of Fringe Benefits

Each fringe benefit has its own rule for calculating taxable value. Some rules may depend on whether the benefit is 'inhouse' or 'external' -> whether the benefit is also provided in the ordinary course of business to the public. Here are all the separate rules.

Individual Rules (subject to reductions)

1. Car Fringe Benefits

s 136(1)- It is a fringe benefit that is a 'car benefit'.

- Arises where a car held by a 'provider' is applied, or available for 'private use' of an employee or associate (s 7(1).
  - Provider (s 7(1) = the employer, an associate of the employer, or a 3rd party who has a relevant arrangement with the employer

Controlled Foreign Company Regime (CFC Regime)

Main Rule

ITAA36 s 456- where a 'CFC' has 'attributable income' for a 'statutory accounting period' in respect of an 'attributable taxpayer', the taxpayer's 'attribution percentage' of the attributable income is included in the taxpayer's assessable income in the income year in which the end of the statutory accounting period is.

- **Statutory Accounting Period** (s 319) = generally a period of 12 months ending 30 June (but CFC has choice).

Is there a CFC?

Controlled Foreign Company (CFC) (s 340) = a foreign company that is either:

- A group of 5 or fewer Australian entities (definition in s 336) (each with at least 1% control interest) which have aggregate 'associate-inclusive control interest' of at least 50% of the company, or
- 1 Australian entity with an 'associate-inclusive control interest' of at least 40% in the foreign company and the foreign company is not controlled by any unrelated entities, or
- A group of 5 or fewer Australian entities either alone or together with associates control the company.
    - **Associate-inclusive control interest** (s 349) = sum of the 'direct' and 'indirect' interests an entity and their associates (definition in s 318) hold in the entity.
        - Direct interest (s 351) = greatest percentage of rights to paid-up share capital, right to vote, right to distribution etc.
        - Indirect interest (s 352) = calculated through tracing interests through interposed controlled foreign entities (CFEs- which include CFC etc.) (p. 1099 tb)

Is the taxpayer an attributable taxpayer?

Attributable Taxpayer (s 361) = broadly, an Australian resident who has at least either:

- 10% 'associate-inclusive control interest' in the CFC, or
- 1% 'associate-inclusive control interest' in the CFC and is 1 of 5 or fewer entities that control it

How much is attributed to the attributable taxpayer?

Attribution Percentage (of taxpayer) (s 362) = sum of the 'direct' and 'indirect' attribution interests held by the taxpayer in the CFC.

- Direct and Indirect attribution interests defined in s 356 and s 357 (p. 1456).

Attributable Income (of CFC) (s 382) = the CFC's taxable income taking into account certain assumptions

- Calculated separately for each attributable taxpayer at the end of the statutory period (s 381)
- Assumptions (s 383):
    - CFC is a resident for the entire period
    - Taxable income is calculated in a modified way (s 388 to 431A)
    - Assessable income only consists of certain amounts:
        - Listed country (s 385): ATI that is EDCI unless 'active income test' passed, income derived from sources outside the listed country that is not EDCI but is ATI not taxed in the listed country, trust income not taxed in the listed country or is taxed in it and is designed concession income etc.
            - Note de minimis exemption in s 385(4) (relates to s 385(2)(a) (p. 1461)
        - Unlisted country (s 384): ATI unless 'active income test' passed, trust income, etc.