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Transactions Template

Assignment of partnership interest

[Assignor] assigned X% of their share in the partnership to [assignee] on [date] (prior to 30 June 2022). As a result of this assignment, [assignor] holds the relevant portion of the net income on trust for [assignee] (as the beneficiary), and [assignee] is liable to pay tax on the income in the income year 2021/22 (*Everett, Galland*).

CGT: Partner's interest in a partnership is a form of property and therefore a CGT asset (s 108-5(1) ITAA97). The assignment of the interest triggers a CGT event A1 (s 104-10). The capital proceeds from the disposal are the market value of the interest because no capital proceeds received (s 116-30). Therefore, the capital gain resulting from the assignment is \$X (ie capital proceeds – cost base (s 104-10(4))).

If incoming splitting: [No control partner] does not have 'real and effective control and disposal of that share or part of a share' as [partner in control] retains control over [no control partner]'s share and merely splits income with her (s 94 ITAA36). As a result, this uncontrolled partnership income is taxed at X% (s 94 ITAA36, s 12(7) ITA).

Assignment of partnership assets

Each partner has a fractional interest in [partnership property], which can be assigned to others (eg *Everett, Rose*). Capital gain or loss made from a CGT event happening in relation to partnership CGT assets is made by partners individually (s 106-5(1) ITAA97).

As per partnership agreement, [partner] has X% interest in [partnership property], when [partnership property] is sold, [partner]'s [capital gain / capital loss] will be determined on the basis of their X% interest (s 106-5(1) ITAA97).

As the agreement is silent as to their interests in [partnership property] and profit sharing, [partner]'s [capital gain / capital loss] will be determined on the basis of their X% interest (ie equal share) (under the relevant Partnership Act) (s 106-5(1) ITAA97).

Option 1: A partner leaves the partnership

Per s 106-5(3) ITAA97, when [departing partner] leaves the partnership, he disposed of X% interest in [partnership property], triggering CGT event A1 (s 104-10). The capital gain resulting from the disposal is \$X (ie capital proceeds – cost base (s 104-10(4))).

[Remaining partners] acquire [departing partner]'s interest in the asset, namely X% (s 106-5(3)). Because it is a 'new' share of [partnership property] they acquire, that 'share' could lose its pre-CGT status. Namely, the X% interest [remaining partners] acquire is post-CGT asset.

Option 2: New partner admits to the partnership

Per s 106-5(4) ITAA97, [new partner] acquires a share of each partnership asset, and [existing partners] are treated as having disposed their interests to the extent that [new partner] has acquired it. Each [existing partners] has a cost base for that interest of \$X, and capital proceeds of \$Y, leaving them with a capital gain of \$Z each on [new partner]'s admission to the partnership.

Trust – tax liability

The trust estate's total assessable income is calculated as if the trustee were a resident taxpayer (s 95 ITAA97) - encompassing income from all sources (ss 6-5(2), 6-10(4)).

Consequently, the net income of the trust estate under s 95 is \$X (ie assessable income - deductions).

Because [trustee] exercises their discretion in favour of [beneficiaries], they shall be deemed to be presently entitled to the amount paid to them (s 101).

Beneficiary pays tax

Not under a legal disability and is presently entitled (s 97)

Given that [beneficiary] is presently entitled to a share of the income of [trust estate] (eg rent) and is not under a legal disability, [beneficiary] is assessed on their share of the net income of [trust estate] (s 97(1)) (ie net income * share).

For a period where [beneficiary] is not a resident, they are only assessable on their share of the net income that is attributable to sources in Australia.

Trustee pays tax

Under a legal disability but is presently entitled to a share of income (s 98)
Due to [beneficiary] being presently entitled to a share of the income of [trust estate] but under a legal disability (ie being a minor / bankrupt / legally incapable due to a mention condition), [trustee] is assessed on their share of the net income of [trust estate] (s 98(1)) (ie net income * share). For a period where [beneficiary] is not a resident, [trustee] is only assessable on their share of the net income that is attributable to sources in Australia (s 98(1)). [Trustee] will pay tax on this income at the penalty rates applicable to minors (45% if income > \$1,307). Additionally, given that the trust net income is higher than \$24,276, trustee is also required to pay the ML (s 6(2) MLA, s 253S(1)(b)) (see ML part).

As [beneficiary] is a beneficiary in more than one trust estate / derives income from other sources, they will also be assessed on the [\$income] (s 100(1)). [Beneficiary] gets a credit for the tax paid by [trustee] (s 100(2)).

Beneficiary is deemed presently entitled under s 95A(2) (ss 98(2))

[Beneficiary] has a vested and indefeasible interest in any of the income of a trust estate but is not presently entitled to that income (eg because beneficiary cannot demand immediate payment of the income from the trustee), [beneficiary] is still deemed to be presently entitled to the income (*Dwight*; s 95A(2)). Then [trustee] is assessed on [beneficiary]'s share of the net income (s 98(2)). For a period where [beneficiary] is not a resident, [trustee] is only assessable on their share of the net income that is attributable to sources in Australia (s 98(2)). [Trustee] will pay tax on this income at [beneficiary company's corporate tax rate or individual's marginal rate] (schs 10, 12 ITRA). Additionally, given that the trust net income is higher than \$24,276, trustee is also required to pay the ML (s 6(2) MLA, s 253S(1)(b)) (see ML part).

As [beneficiary] is a beneficiary in more than one trust estate / derives income from other sources, they will also be assessed on the [\$income] (s 100(1)). [Beneficiary] gets a credit for the tax paid by [trustee] (s 100(2)).

Beneficiary is non-resident (ss 98(2A),(3))

As [non-resident company / individual] is a non-resident, [trustee] is assessed on so much of [non-resident company / individual]'s share of the net income as is attributable to Australian sources (\$X) (s 98(2A)). [Trustee] will pay tax on such income at [the relevant corporate rate / marginal rate]. [Non-resident company / individual] is also assessed on the \$X and will tax on this amount at [the relevant corporate rate / marginal rate] (s 98A(1)). [Non-resident company / individual] will however be entitled to a credit for the tax paid by [trustee] (s 98A(2)).

Non beneficiary is presently entitled (ss 99, 99A)

S 99A

[Trustee] is a [resident company / non-resident company]. Consequently, the trust estate is a [resident trust estate / non-resident trust estate] (s 95(2)). Since no beneficiary is presently entitled to a share of the income, and the trust estate is a [resident trust estate / non-resident trust estate], the trustee is assessed on the share of the net income attributable to sources in Australia. The trustee must pay tax on this amount at the rate of 45% (s 99A; s 12(9) ITRA).

Additionally, given that the share is higher than \$24,276, [trustee] is also required to pay the ML (s 6(2) MLA, s 253S(1)(c)) (see ML part).

Alienation of personal services income

Individual earning PSE:

All of the income generated is PSI as most of the income relates to [PSI individual]'s skills, knowledge and expertise (s 84-5). Therefore, PSI rules apply to PSI earned by [PSI individual].

Option 1: the company is PSE

[Employee] is a [occupation: eg computer programmer] who is employed by their [family company / trust]. The fees paid by [client] to the [family company / trust] constitute PSI for [Employee] since they are received mainly for his personal efforts and skills (s 84-5 ITAA97). Since the company's ordinary or statutory income consist of PSI of one or more individuals, the company is a PSE (s 86-15(2)). Therefore, PSI rules apply to PSI earned by [PSE].

Option 2: the company is not PSE

[Employee] is a [occupation: eg tax driver] who is also employed by their [family company / trust]. [Family company / trust] owns [a limousine which Oscar uses to transport the clients]. The fares paid to [family company / trust] by the clients are not the PSI of [employee] since they are

produced mainly from the use of [limousine] (s 84-5). [Family company / trust] is therefore not a PSE (TR/2001/7, s 84-5).

Option 3: the company is not PSE: selling products made by taxpayer

[Taxpayer] is a carpenter who designs and constructs bespoke furniture which he sells at a local market. Although [taxpayer]'s personal efforts and skills are required to make the furniture, the amounts he receives would be treated as payments for the sale of the furniture as they are made by customers to acquire the relevant items rather than his efforts or skills. The income derived by [taxpayer] is therefore not PSI (TR/2001/7, s 84-5).

Option 4: income deriving from the business structure

[Taxpayer] operates a [business structure: eg partnership] with [his wife]. Although [his wife] does not perform any of the welding work, she assists with book-keeping, performing quotes and arranging appointments. [Taxpayer] supplies the welding work with the assistance of 4 full-time employees. The partnership has a trade name and over 100 clients. It also 2 trucks and special tools. The income is derived from the business structure of the partnership and is therefore not PSI (TR/2001/7, s 84-5).

PSB

A PSB is conducted by [PSE] because a PSB determination is in force relating to [PSI employee] whose PSI is included in [PSE]'s ordinary or statutory income (s 87-15(1)).

While it is unclear whether there is a PSB determination is in force, [PSI taxpayer / PSE] conducts a PSB if one of the following four PSB tests are satisfied (s 87-15(1)(c)-(2)):

(1) Result test: The result test is satisfied by [PSE] because at least 75% of the PSI of one or more [PSI employees] is included in [PSE]'s assessable income during the year (s 87-18(3)). The income received is for the [plumber job] completed (cf received for time worked), and [PSE] is required to supply the equipment, such as tools, to provide the service. Additionally, [PSE] is liable for the cost of rectifying any defects in the work performed (s 87-18(3)).

If result test is not satisfied: Moreover, 80% or more of [PEI employee]'s PSI comes from [the same client] (or from one entity and its associates) and [PSE] does not meet the results test, so PSI rules will apply (s 87-15(3)).

Alternatives:

In addition to meeting one of the test— the unrelated clients test, the business premises test, or the employment test — [PSE] must also adhere to the 80% rule. This rule is fulfilled because [PSI employee]'s PSI is not derived from [the same client] at more than 80% (s 87-15(3)).

(2) unrelated clients test: The unrelated clients test is satisfied by [PSE] since they received PSI from two related clients – neither of the companies is an associate of [PSE employee], nor are they associates of each other or [PSE]. Additionally, the services provided are a direct result of making offers or invitations to the public at large, such as through print advertising or maintaining a website (s 87-20).

(3) employment test: The test is satisfied by [PSE] because it engages one or more entities (other than [PSI employee], or associates of the entity who are not individuals) to perform work which is at least 20% (by market value) of [PSE]'s 'principal work' for the year (s 87-25).

(4) Business premises test: the business premises test is satisfied by by [PSE] because at all times in the income year [PSE] maintained and used a business premises which meets all of the following conditions (s 87-30):

- used mainly to gain or produce PSI
- used exclusively by [PSE]
- physically separate from [PSE]'s private premises
- physically separate from the clients' premises

PSI rules

(a) For PSE

[PSE] is not a PSB, so PSB exception (s 86-60(b) and s 86-15(3)) do not apply.

[PSE] is not entitled to deductions for amounts to the extent that they relate to earning PSI of [PSI employee] unless [PSI employee] would have been eligible to deduct the same amount under similar circumstances if the loss or outgoing had occurred directly by [PSI employee] (s 86-60).

Superannuation: per s 86-60, [PSE] is permitted to claim deductions for the contributions made to [PSI employee]'s super fund.

[PSI employee] is required to include the amount of \$100,000 (ie \$110,000 less \$10,000 GST charged by [PSE]: s 86-15(5)) in their assessable income under s 86-15(1). To prevent double

taxation, this amount is non-assessable non-exempt income of [PSE] under s 86-30. When [PSE] subsequently pays the salary to [PSI employee] for the service, [PSI employee] is not assessed again for this salary (s 86-35).

(b) PSI individual

[PSI individual] does not derive the PSI through PSB, so PSB exception (s 85-30) does not apply. S 85-10(1) provides that [PSI individual] are generally restricted to claiming only those deductions relating to their PSI that would be available to be an employee.

[PSI individual] cannot claim deductions against the PSI for [rent, mortgage interest (s 85-15) / payments to associate for non-principal work (s 85-20) / super contributions for associates for non-principal work (s 85-25)]. As [associate] provides secretarial services, which do not fall with the meaning of principal work (TR 2001/8), [PSI individual] is precluded from claiming a deduction for the salary paid to [associate] (s 85-20) or for super contributions made to [associate]'s super fund (s 85-25). As [PSI individual] cannot claim a deduction for the salary she pays to [associate], the salary [associate] receives is not included in their assessable income.

Main residence – basic case

[Taxpayer] is an excluded foreign resident at the time of disposal (s 118-110(3)).

For the purposes of main residence exemption, [taxpayer]'s 'ownership' runs from [settlement date] to [settlement date] as this was the period they had an ownership in the dwelling (ss 118-125, 118-130).

Because the dwelling has been [taxpayer]'s main residence throughout the ownership period, any capital gain or loss they make from the sale would be disregarded under s 118-110.

Although the dwelling is [taxpayer]'s main residence for only part of their ownership period, they are nevertheless entitled to a partial exemption under s 118-185. Their capital gain or capital loss is calculated as: non-main residence days / days in ownership period (s 118-185(2))

- **non-main residence days:** is the number of days in the ownership period when the dwelling was [taxpayer]'s main residence

Main residence – deceased case

As [deceased] acquired their ownership interest in [dwelling], which is a dwelling under s 118-115, as a beneficiary of a deceased estate or owned it as trustee of a deceased estate, s 118-195 may apply.

[Deceased] was an excluded foreign resident just before they died (s 118-195(1)(c)).

[Dwelling] has been [deceased]'s main residence just before death and has not been used for the purpose of producing assessable income (item 1, column 2, s 118-195).

Furthermore, from [deceased]'s death until [taxpayer]'s ownership interest ends (ie the date of disposal), [dwelling] has been the main residence of one or more of (item 2 column s 118-195):

- (a) [deceased]'s spouse (not spouse who was living permanently separately and apart from the [deceased])
- (b) an individual who had a right to occupy the dwelling under [deceased]'s will
- (c) the individual to whom the ownership interest passed as a beneficiary.

[Taxpayer] disposed of their ownership interest within 2 years of [deceased]'s death, satisfying item 1 in column 3 s 118-195(1)(b). Therefore, any capital gain or capital loss [taxpayer] makes from the sale of the dwelling is disregarded (118-195).

While 118-195 does not apply, [taxpayer] is entitled to a partial exemption under s 118-200. Their capital gain or capital loss is calculated as: non-main residence day / total days

- **Non-main residence days:** the number of days in [deceased]'s ownership period when the dwelling was not [deceased]'s main residence + the number of days in the period from [deceased]'s death until [taxpayer]'s ownership interest ends when the dwelling was not the main residence of an [taxpayer]
- **Total days:** the number of days in the period from the acquisition of the dwelling by the [deceased] until [taxpayer]'s ownership interest ends.

Foreign resident CGT

[Foreign residents], as a foreign resident, disregard capital gains and capital losses made from CGT events that happen in relation to CGT assets that are not 'taxable Australian property' (s 855-10).

The [CGT asset in question] is a taxable Australian property because:

Co-ownership – post-CGT asset

On [post-CGT asset: acquisition date], [joint tenant 1] and [joint tenant 2] purchased vacant land for \$100,000 as joint tenants and therefore each have a 50% interest in the land. The cost base of [deceased] was \$X (ie cost price: s 110-25). [Surviving joint tenant] is deemed to have acquired [deceased]'s interest in the land on [death date] for [cost base of deceased's interest] (s 128-50).

If [surviving joint tenant] subsequently sells the land on [selling date], they will be subject to CGT on any gain or loss made in respect of the interest (s 104-10). Accordingly, if the land was sold for \$Y, she is deemed to have made a gain of \$Z (ie $\$Y \times \text{deceased\% interest} - \X (cost base) + (ie $\$Y \times \text{original interest \% interest} - \X (cost base)).

For the purposes of the CGT discount rules, [surviving joint tenant] is taken to have acquired [deceased]'s interest in the land when [deceased] actually acquired it (s 115-30). This means that [surviving joint tenant] would be eligible to claim the 50% discount, even though [surviving joint tenant] only actually acquired his interest less than 12 months ago.

Co-ownership – pre-CGT asset

On [post-CGT asset: acquisition date], [joint tenant 1] and [joint tenant 2] purchased vacant land for \$100,000 as joint tenants and therefore each have a 50% interest in the land. [Deceased] died on [death date] when the market value of the land was \$X. [Surviving joint tenant] is deemed to have acquired [deceased]'s 50% interest in the land on [death date] for [market value] (s 128-50).

If [surviving join tenant] subsequently sells the land on [selling date], they will not be subject to CGT on her original 50% interest as it was acquired before 20 September 1985 (pre-CGT asset) (s 105-10(5)). [Surviving join tenant] is, however, be subject to CGT on any gain or loss made in respect of the 50% interest [surviving join tenant] is deemed to have acquired from [deceased]. Accordingly, if the land was sold for \$Y, she is deemed to have made a gain of \$Z (ie \$Y × 50% interest – \$X (market value)).

For the purposes of the CGT discount rules, [surviving join tenant] is taken to have acquired [deceased]'s interest in the land when [deceased] actually acquired it (s 115-30). This means that [surviving join tenant] would be eligible to claim the 50% discount, even though [surviving join tenant] only actually acquired his interest less than 12 months ago.

Sale of (new) residential property (with margin scheme)

S 40-65(1) GSTA provide that the sale of real property is input taxed to the extent they are residential premises to be used predominantly for residential accommodation. Examining its physical characteristics (*Sunchen, Marana Holdings*), the property is a residential premise to be used predominantly for residential accommodation because it encompasses essential facilities for daily living, including sleeping arrangements (GSTR 2000/20). Objectively, its design and construction intention indicate suitability for occupation as a residence (s 195-1, GSTR 2012/5). Additionally, the property is neither commercial nor new residential premises (s 195-1, s 40-75(1)).

Because the supply of residential premises is input taxed, [supplier] does not charge GST on the sale and not entitled to ITCs on their acquisitions that relate to making such supplies (s 40-1 GSTA). [Acquirer] is not entitled to ITCs for their payment in relation to the acquisition of the residential premises as they have not made a creditable acquisition because the sale of the residential property is not a taxable supply to them (s 11-5(2)(b) GSTA).

Because [supplier (developer)] elects to use margin scheme, they would only be required to pay GST of \$X ((selling price – price to acquire the land) × 1/11) (s 75-10(1)). [Developer] would not be required to issue a tax invoice (s 75-30) and [acquirer (purchaser)] would not be entitled to an ITC (s 75-20).

Under the GST withholding regime, [acquirer] is required to pay 7% of the contract price or price (ie \$Y) to the Commissioner (s 14-250(6)(a),(8)) on [settlement date]. [Developer] is entitled to a credit of \$Y against his net amount for the tax period in which the payment is made (ss 16-80(1),(2),(3)).

Scrip for scrip takeovers

Full roll-over

A rollover does not apply to a capital loss.

[Taxpayer] exchanged an original interest in [company / trust] (ie original entity) for a replacement interest in [another company / trust] ('replacement entity'). The exchange resulted in an [acquiring entity] (ie acquiring entity) owning 80% or more of the voting interests in the [original entity] (ie original entity). The 'replacement entity' is also the 'acquiring entity' (or the ultimate holding company in the acquiring entity's wholly-owned group) (company: s 124-780 / trust: s 124-781).

If [taxpayer] do not choose the roll-over, she will make a capital gain from the disposal of the [original entity] shares (s 104-10-1). The capital gain amounts to \$X, calculated as the market value of the [acquiring entity] shares she received (ie \$X) (s 116-20(1)), subtracted by the cost base of [original entity] shares (\$Y) (s 104-10(4)).

If [taxpayer] chooses the roll-over, a capital gain made from the disposal of original interest is disregarded (s 124-785). The cost base of the [acquiring entity] shares is \$ Y (ie \$Z per share: \$Y for [number of the new shares]). If she subsequently sells the [acquiring entity] shares for \$S per share, she will make a capital gain of \$X (ie \$(S - Z) x [number of selling shares]).

SB concession?

Partial roll-over

[Taxpayer] can obtain only a partial roll-over because the proceeds for their original interest includes ineligible proceeds (ie cash) (s 124-790). The ineligible proceeds represent X (cash / total received) of the total proceeds (ie \$X (s 116-20(1)) received for [taxpayer]'s original interest (s 124-790). The cost base of the ineligible part is \$Y (X of the cost base of [taxpayer]'s original