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NATIVE TITLE AGREEMENTS

Income Tax and GST Scenarios

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Overview

OUTLINE

- Asked to present a workshop on scenarios provided by AIATSIS.
- Principal tax issues – Income tax, GST.
- Workshop the scenarios.

CONTEXT

- Payments and benefits relating to native title.
- Need to consider tax issues when negotiating agreements.
- Acknowledge the work done in this area.





INCOME TAX – THE ISSUES





Summary

How are payments under native title agreements taxed (income tax)?

1. Pre 2013 Amendments
2. Current law
3. Limitations and practical points

Working with tax to support traditional owners and their aspirations.





1. Pre 2013 amendments

- Commissioner applied a compensation analysis
- Native title payments were:
 - capital receipts
 - for a pre-CGT asset (ie. native title)
 - so not income
- Uncertainty prevailed
- Were payments income or not?
- Use of charitable trusts was common





2. Current Law

- Where a native title payment is income, in certain situations, it will not be subject to income tax.

- Section 59-50, in summary, provides:
 - i. where a payment is a **native title benefit**;
 - ii. received or derived by an **Indigenous Person** or **Indigenous Holding Entity**;
 - iii. it will be **non assessable non exempt income**;
 - iv. unless an exemption applies.

- Step through these four elements





2. Current Law (cont)

i. Where the payment is a native title benefit

- An amount or non-cash benefit that arises under a relevant agreement
 - That relates to an act that would **extinguish** native title or that would otherwise be wholly or partly **inconsistent** with the continued existence of, enjoyment or exercise of native title.
 - is compensation determined in accordance with Division 5 of Part 2 of *Native Title Act*.
- Broad nexus approach – the EM and various PBRs
- There is no requirement that native title has been determined





2. Current Law (cont)

ii. Received or derived by an Indigenous Person or an Indigenous Holding Entity.

- Indigenous person:
 - ‘a member of the Aboriginal race in Australia’; or
 - a descendant of an Indigenous habitant of the Torres Strait islands

- Indigenous holding entities
 - ‘distributing body’;
 - trust where beneficiaries **can only be** Indigenous persons or Indigenous holding entities; or
 - registered charity (registered with the ACNC).





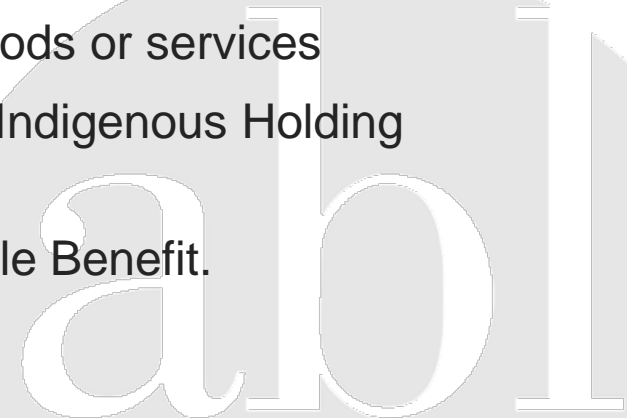
2. Current Law (cont)

iii. Will be non assessable non exempt income

- For our purposes that means no income tax is payable

iv. Unless an exemption applies

- Where a payment is to meet the provider's administrative costs
- Where the payment is for the provision of goods or services
- Where the payment has been paid to a non-Indigenous Holding Entity
- That arises from investment of the Native Title Benefit.





2. Current Law (cont)

Summary

From 1 July 2008:

- a payment or benefit that would otherwise be income
- where it is a **native title benefit**
- received or derived by an **Indigenous Person** or **Indigenous Holding Entity**.
- will be **non assessable non exempt income**
- Unless an exemption applies

If these elements are not met – apply ordinary income tax principles





3. Limitations and practical pointers

Limitations

- Corporations Act corporations are not Indigenous Holding Entities.
- Income generated does not qualify for the concessional treatment.

Practical points

- Make use of the section 59-50 native title benefits provisions if possible
- Might still choose to use income tax-exempt entities
- Be careful with structures to avoid administrative burden
- Be pro-active and challenge the law





GST – THE ISSUES





GST - Overview

- Are payments under native title agreements subject to GST?
- Parties to an agreement need to know whether payments made will have an additional amount charged for GST.
- Remitting or claiming incorrect amounts could lead to penalties and interest.
- Practical pointers.





GST – is it really an issue?

A \$1,000,000 payment is made by a mining company under a native title agreement to a native title group



1. If the payment is **not** for a taxable supply, **no** GST is payable and the native title group receives \$1,000,000



2. If the payment is a payment for a taxable supply, then:

i. if the native title agreement includes a GST “gross-up” clause;

i. the mining company pays \$1,100,000 to the native title group, claims a GST credit from the ATO of \$100,000, leaving a net payment of \$1,000,000

ii. the native title group receives \$1,100,000, pays \$100,000 to the ATO, receiving a net \$1,000,000



ii. if the native title agreement does **not** include a GST “gross-up” clause;

i. the mining company pays \$1,000,000 to the native title group, claims a GST credit from the ATO of \$90,909, leaving a net payment of \$909,091;

ii. the native title group receives \$1,000,000, pays \$90,909 to the ATO, receiving a net \$909,091



GST - the basics

- GST only attaches to taxable supplies.
- A taxable supply occurs if (see section 9-5 GST act):
 1. The supply is for consideration
 2. The supply is made in the course or furtherance of an enterprise that the supplier entity carries on
 3. The supply is connected with Australia
 4. The entity is registered or required to be registered for GST
 5. The supply is not GST free or input-taxed





GST - actions to take away

- With current agreements – check that you are correctly applying the GST laws.
- With new agreements – consider having a checklist:
 - Are the proposed payments consideration for a supply?
 - Is the nexus between consideration and supply clear? (note that stating the nexus does not necessarily make it so)
 - Is the supplier an entity?
 - Is the supplier carrying on an enterprise?
 - Is the supplier registered for GST? Is it required to be registered for GST?
- Pay attention to drafting the GST clause.
- Consider drafting GST warranties in the agreement.





SCENARIOS

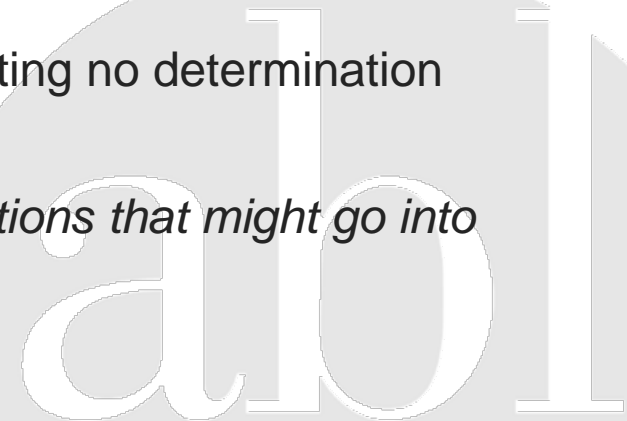




Fact Scenario 1

- Claim close to being finalised but unclear whether a consent determination will be made.
- State wants an ILUA entered into without determination of the claim.
- The claim includes native title groups both incorporated and unincorporated
- Future act agreements are signed by registered applicants on behalf of the native title group.
- Looking to understand the implications for selecting no determination and having an ILUA only.

We have been asked to consider four specific questions that might go into informing an overall strategy





Question 1: What are the main pathways for a PBC to achieve tax exempt status?

Tax exempt entity

- Registered charity:
 - Not-for-profit
 - Charitable purpose
 - Public benefit – test either does not apply or presumed to be satisfied
 - Commissioners Interpretation Statement on Indigenous Charities
- If they want to seek DGR endorsement – register as a PBI:
 - Benevolent relief
 - The benevolent relief must be its main purpose
 - There is no longer a requirement that relief be provided *directly*
- If PBC is trustee of charitable trust then exempt in capacity as trustee



Question 1: What are the main pathways for a PBC to achieve tax exempt status?

Tax exempt payment?

- Make sure it meets the requirements for section 59-50
- Consider whether a capital receipts analysis is otherwise applicable
- Draft the agreement so that the money is derived by an income tax-exempt entity





Question 2: What are the benefits and constraints of seeking tax exempt status?

Benefits

- All payments into the charity are exempt from income tax
- GST concessions, FBT rebate (or FBT exemption if PBI)
- Compliance - anecdotally, beneficial to be governed by the ACNC
- May work well for the particular native title group

Constraints

- A charity can only use its income for its charitable purposes
- Cannot distribute income to members
- Commercial activity - only in furtherance of its charitable objects
- Unlikely that a charity can have a charitable purpose of business development





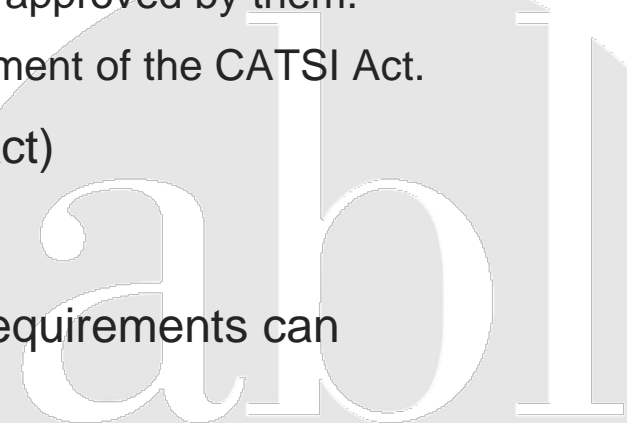
Question 3: What are the main differences between a TO corporation under CATSI and an unincorporated native title group?

	TO Corporation	Unincorporated TO Group
Native Title Party for future act negotiation?	No – this will be the applicant	No – this will be the applicant
Hold native title	No – only trustee PBC	Yes
Indigenous Holding Entity	Yes	Only as individuals
Able to receive income tax free payments	Yes	Only as individuals
Taxable supply	Possible but will not hold native title – depends on the terms of the agreement	No – not an entity
Other	?	?



Question 4: What are the Rule book requirements for a Registered Native Title Body Corporate

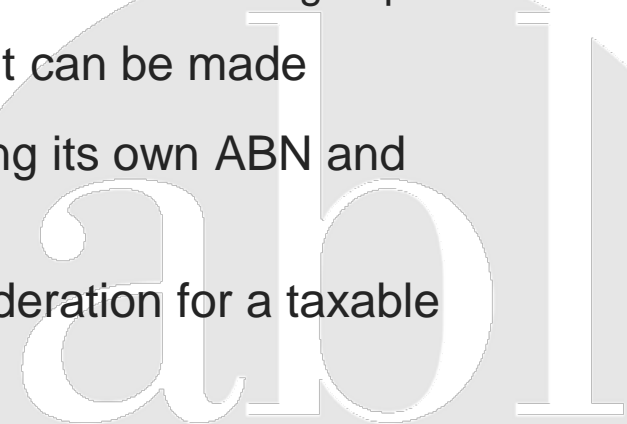
- NT PBC Regulations broadly require that an RNTBC must
 - Be a CATSI Corporation
 - Have the purpose of becoming a RNTBC and purposes to carry out the functions of an RNTBC
 - All members of the corporation must be proposed native title holders or people approved by them
 - At all times after a determination and nomination of PBC, all members of the corporation must native title holders or people approved by them.
 - the corporation must meet the Indigeneity requirement of the CATSI Act.
- Rules consistent with NTA obligations (CATSI Act)
- Have RNTBC in name
- If the CATSI Corporation does not meet these requirements can change the Rule Book by special resolution.





Fact Scenario 2

- NTRB /NTSP acts for various native title groups both incorporated and unincorporated.
- For NTA purposes, groups are represented by registered applicants.
- Future act agreements involve two forms of payments:
 - Payments to the group under the agreement (including for drill fees, cultural heritage training and monitoring)
 - Payments to individual for services performed by members of the group
- Proponents require a tax invoice before payment can be made
- The NTRB/NTSP has been issuing invoices using its own ABN and remitting GST to the ATO
- The ATO has ruled that the payments are consideration for a taxable supply





Fact Scenario 2 - Questions

- *How does an unincorporated native title group register for GST and obtain an ABN?*
- *If the unincorporated group is not able to be registered for GST, what other options are there for raising tax invoices?*
- *Whether proponents need to employ the individuals that perform services under the agreements? (What alternatives are there?)*
- *What taxes might be payable on payments to the native title group or to individuals for services performed? What reporting requirements are there?*
- *Are payments subject to income tax and can those payments impact on Centrelink payments?*





Fact Scenario 2 (cont)

Question 1: *How does an unincorporated native title group register for GST and obtain an ABN?*

- ABN: apply online www.abr.gov.au
- GST: apply online www.ato.gov.au, phone 13 28 66, through tax/BAS agent

Question 2: *If the unincorporated group is not able to be registered for GST, what other options are there for raising tax invoices?*

- an agent issue the invoice on behalf of the group (taxable supplies)
- RCTI (supplier and recipient need to be registered for GST)
- if the group has an ABN, issue the tax invoice itself (if group has an ABN, why can't it register for GST?)
- if not able to be registered, then it is not a taxable supply, issue an invoice



Fact Scenario 2 (cont)

Question 3: *Do proponents need to employ the individuals that perform services under the agreements? (What alternatives are there?)*

- Not necessarily
- Independent contractor – payroll tax issues
- Private capacity

Question 4: *What taxes might be payable on payments to the native title group or to individuals for services performed? What reporting requirements are there?*

- Native title benefits
- Income tax
- GST
- PAYG
- Superannuation
- Payroll tax





Fact Scenario 2 (cont)

Question 5: *Are payments subject to income tax and can those payments impact on Centrelink payments?*

- Potentially
- Potentially





Fact Scenario 3

- An RNTBC wants to direct income into a non-RNTBC
- The members of the non-RNTBC consist of the people who have primary cultural responsibilities for the area of country which generates the income – ie. Indigenous Persons
- The RNTBC is acting in accordance with its Rules

Question 1: What are the tax implications (if any)?

- To consider this question we need to know three main things
 1. Who derives the 'income'?
 2. What is the nature of the 'income'?
 3. What are the tax characteristics of the non-RNTBC?





Fact Scenario 3 (cont)

What are the tax implications of RNTBC directing income to non RNTBC?

1. Who derived the income?
2. What is the nature of the income?
 - > native title benefits
 - > other payments (not being native title benefits) under a native title agreement?
 - > Investment or commercial income?
3. what are the tax characteristics of the non-RNTBC?
 - > tax exempt?
 - > Indigenous Holding Entity?
 - > other?





QUESTIONS?

