DLK ADVISORY

ATO WARNS AGAINST ASSET WASH SALES

With COVID-19 lockdowns and restrictions in the rear-view mirrors of most of the country, the ATO is also beginning to resume normal compliance activity levels. One of the many areas it will be paying close attention to this tax time is asset wash sales which may artificially increase tax losses and reduce gains or expected gains.

The ATO considers asset wash sales to be transactions which involve the disposal of assets just before the end of the financial year. After a “short period of time”, the taxpayer then reacquires the same or substantially similar assets. Other arrangements that achieve similar economic and tax effects using similar techniques may also be a wash sale. These include situations where:

- a taxpayer enters into an arrangement to acquire the same, or substantially the same asset at a future point in time at a price that is substantially the same as the sale proceeds received for the original asset, either shortly before, after or at the time of disposing the asset;
- an asset is transferred from one wholly owned company to another, or between two trusts with the same trustee and class of beneficiaries; and
- a taxpayer disposes of an asset to family members and an arrangement or understanding exists between the parties to the effect that the asset will be re-acquired by the taxpayer.

These transactions are viewed by the ATO to be a form of tax avoidance and are often used to create a loss to offset a gain. In terms of wash sales, an asset is considered to be "substantially the same" where it is economically equivalent to, or fungible with, the original asset, or if there are immaterial differences between the two assets such that, in substance, the assets are economically equivalent.

According to the ATO, the assets involved in these wash sales are not necessarily traditional assets such as shares. Taxpayers could also be disposing of crypto-assets and reacquiring them later as a part of a wash sale. With the price of many crypto assets at a low ebb, taxpayers looking to rid themselves of these assets need to be careful they do not inadvertently attract the attention of the ATO.

Although there may be legitimate reasons for taxpayers to be selling and then reacquiring the same or substantially similar assets, the ATO notes that a wash sale is different from normal buying and selling as it is usually undertaken for the artificial purpose of generating a tax benefit such as a capital loss in the current financial year.

To stamp out this behaviour this tax time, the ATO will be using data analytics to identify wash sales through data from various share registries and crypto asset exchanges. Where the system identifies a wash sale, the capital loss claimed by the taxpayer in their tax returns will be rejected. The commissioner may then make a determination known as a compensating adjustment to adjust the taxation situation of the taxpayer. In addition, compliance action and additional tax, interest and penalties may also be applied at the discretion of the ATO.

CONTACT

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