

To: Native Title

Subject: Consultation Paper - Native Title, Indigenous Economic Development and Tax

**Is there already some clarity? What is the easiest way to get clarity?**

The consultation paper starts with a comment that the tax law is unclear as to how native title payments are taxed and that it is difficult for the Australian Taxation Office (ATO) to give advice in this area. However, the ATO has made a series of private rulings in this area and as they have used exactly the same reasoning (and pretty much the same words) for the tax years 2003 to 2011. For example:

PBR 77829 <http://www.ato.gov.au/rba/content.asp?doc=/rba/content/77829.htm>,  
PBR 83511 <http://www.ato.gov.au/rba/content.asp?doc=/rba/content/83511.htm> &  
PBR 53360 <http://www.ato.gov.au/rba/content.asp?doc=/rba/content/53360.htm> (I understand this is an application from the same taxpayer as PBR 77829).

Reading these begs the question - Does making these native title payments exempt or NANE income, or implementing a withholding tax in relation to these native title payments, achieve any great improvement over something as simple as the ATO formalising its position in private rulings by putting its position in these private rulings into a public ruling?

In these private rulings the ATO accepts the native title right is a CGT asset, the CGT asset is a pre CGT asset and the distribution through a trust structure retains its character. The question of periodic payments possibly being revenue rather than capital is answered in these private rulings as the payments in question were periodical and the ATO concluded they were capital. The ATO seems to accept that the payment for the asset can be made to a trust and there be no CGT due to the pre CGT nature of the asset (I don't know how the ATO concluded that the native title right got into the trust in the first place without their being a CGT event (E1 or E2) as I assume the right was originally held by the beneficiaries but if he is happy to ignore this so am I).

If the Commissioner would also accept that native title rights are actually a series of different rights and a suspension of the native title right for a period is actually a surrender of the rights for that period and the retention of the rights for other periods (CGT event C2 applies and the pre CGT asset treatment still applies) then most of the lack of clarity could be resolved without needing to go to legislation.

It appears that with the the desired policy outcome may be achieved if (and I understand this may be a large if) the ATO will formalise its position in these private rulings into a public ruling.

Regards

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