Introduction

This paper deals with taxation and specifically with the taxation aspects of all transactional elements of intellectual property.

As has been discussed in the webinars held in 2015, the process of creating intellectual property and transactions involving intellectual property should be undertaken by a ‘business team’ and ‘project managed’ by the accountant as the central facilitator. That said, economic transactions relating to intellectual property should be the focus of the client’s accountant advisor and the client’s business team in the context of the three stages of the intellectual property life cycle:

- **Stage 1**: Intellectual property creation and development
- **Stage 2**: Income generating application of the intellectual property
- **Stage 3**: Disposal of intellectual property.

Critically, each intellectual property life cycle stage has significant and different taxation implications for which a lack of knowledge will lead to potentially highly adverse financial outcomes.

For the purposes of this paper, the taxation commentary is limited to a taxpayer who exhibits the following characteristics:

- the creation of intellectual property is not the core trading activity of the taxpayer
- the taxpayer does not create the intellectual property for profit making purposes (i.e., it is not trading stock but intended to be a capital asset)
- the taxpayer is a SME
- the taxpayer is an Australian tax resident.
Stage 1: creation and development

At an early stage of IP creation, there are multiple taxation conundrums for accountants to deal with:

- Is the expenditure capital or revenue?
- What are the circumstances that led to the creation of the IP?
- Is the IP asset a depreciating asset?
- Are there any specific provision dealing with the particular item of intellectual property?
- Could the IP be regarded as trading stock?

In a theoretical sense, expenditure to research and create new intellectual property is a matter of capital. That is, the purpose of the expenditure on the creation of new intellectual property is the creation of an asset, unless the taxpayer is creating trading stock, there is little doubt that the expenditure is of a capital nature.

There is an overly simplistic accounting and taxation treatment of business expenditure incurred for early stage intellectual property which masks a whole range of accounting and taxation issues that require more extensive understanding, investigation, and a critical program of forward planning. Namely, the following issues require specific consideration.

Characterisation of expenditure

In the first instance it is necessary to characterise the nature of the expenses and the expected economic outcome attributable to those items of expenditure. There are a series of general questions that need to be answered.

- What is the purpose of the expenditure?
- What benefits are expected to be achieved as a consequence of the expenditure?
- In terms of the nature and character of the purpose of the expenditure, does the outcome of the expenditure have an expected enduring benefit to the business?
- Does the outcome of the activities and expenditure result in some intellectual property rights?
- Further, is it anticipated that the expenditure will create future economic benefits for the business?

CAPITAL OR REVENUE?

In the first instance, as with most items of business expenditure, the taxation deduction of the expense must be first considered in the context of section 8-1 ITAA 1997 and whilst this is not the forum to discuss in detail the taxation distinction between expenditure of a capital or revenue nature, the issue is relevant and to that extent the questions that need to be considered with regard to whether the expenditure is capital were stated by Fullagar J in Colonial Mutual Life Assurance Society Ltd v FCT (1953) 89 CLR 428, at p 454, as follows:

- What is the expenditure or loss really for?
- Is the expenditure really for, in truth and in substance, a capital asset?

That is, the essential determinants of the issue is the purpose of the expenditure.

To further assist with the distinguishing the character of the expenditure, I wish to refer to the leading authority is Sun Newspapers Ltd & Associated Newspapers Ltd v FCT (1938) 61 CLR 337. In that case Dixon J observed that the “distinction between expenditure and outgoings on revenue account and on capital account corresponds with the distinction between the business entity, structure, or organization set up or established for the earning of profit and the process by which such an organization operates to obtain regular returns by means of regular outlay, the difference between the outlay and returns representing profit or loss.” (61 CLR at p 359. Emphasis added).

His Honour added at pp 359-360:

“The business structure or entity or organization may assume any of an almost infinite variety of shapes and it may be difficult to comprehend under one description all the forms in which it may be manifested ... But in spite of the entirely different forms, material and immaterial, in which it may be expressed, such sources of income contain or consist in what has been called a ‘profit-yielding subject’ ... As general conceptions it may not be difficult to distinguish between the profit-yielding subject and the...
process of operating it. In the same way expenditure and outlay upon establishing, replacing and enlarging the profit-yielding subject may in a general way appear to be of a nature entirely different from the continual flow of working expenses which are or ought to be supplied continually out of the returns or revenue."

In applying the test Dixon J referred to three matters which were to be examined. He said (at p 363):

"There are, I think, three matters to be considered:

(a) the character of the advantage sought, and in this its lasting qualities may play a part
(b) the manner which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part
(c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment."

Relevantly for the purposes of determining whether expenditure incurred in the creation of IP is either capital or revenue, the distinction made by Dixon J in relation to:

(a) profit yielding subject
(b) profit process

is an important factor.

For example, if the taxpayer’s purpose is to innovate some new product, or new process for a different business and in so doing creates a new IP asset, it is more likely the expenditure will be capital. Whereas if the new IP asset is an incidental product of the usual operating process then the expenditure in relation to the creation of IP is more likely to be revenue.

This latter point is illustrated in the case of Goodman Fielder Wattie Ltd v FCT 91 ATC 4438. Hill J refers to the judgment in Sun Newspapers and states:

"The judgment in the Sun Newspapers case makes it clear that it is necessary to consider carefully the nature of the business which is carried on, so as to be able to distinguish between recurrent expenditure, that is to say "expenditure which is made to meet a continuous demand" (per Rowlatt J in Ounsworth v Vickers Ltd [1915] 3 KB 267 at 273) and that expenditure which is made once and for all. A pharmaceutical company, the business of which includes continuing research and development as part of the continuous or constant demand for expenditure in its business, does not each time that expenditure is incurred make an outlay of capital or of a capital nature. Its business, when properly analysed, includes its research and development, at least in the ordinary case. No doubt, there are matters of degree involved, and in a particular case the research and development may be concentrated on a product so far removed from the day to day products of the taxpayer, that the expenditure cannot be properly seen as part of its working expenditure."

He concluded in this case that:

"A company engaged in an enterprise involving new technology such as the applicant, where the nature of its activity requires as part of its business ongoing research into product development incurs expenditure which is recurrent, expenditure which is part of the regular cost of its trading operations. That expenditure is, to adopt the words of Dixon J in Sun Newspapers, part of the process by which the organisation (being an organisation where research is part of its business activity) operates to obtain regular returns by means of regular outlays."

In relation to the characterisation of labour costs in the context of research activities, Hill J observed that:

"There is a question of fact and degree involved. Where a person is employed for the specific purpose of carrying out an affair of capital, the mere fact that that person is remunerated by a form of periodical outgoing would not make the salary or wages on revenue account. On the other hand, where an
employee is employed and engaged in activities which are part of the recurring business of a company, the fact that he may, on a particular day, be engaged in an activity which viewed alone would be of a capital kind, does not operate to convert the periodical outgoing for salary and wages into an outgoing of a capital nature. In between, there will be cases where it may be difficult to determine whether the expenditure should properly be regarded as on capital account or as on revenue account. Each case will depend upon its facts but the answer will not be derived merely by counting the number of hours in which the employee is engaged in activities which themselves may be said to involve matters of capital. Further, it will be necessary to determine whether the essential character of the expenditure is that it is a working expense. If it is, then it will ordinarily be on revenue account. In the present circumstances, however, I think that the salary of Dr Watson can be seen to be clearly part of the recurring outgoings of the company on its business activities. The fact that he spent some time dealing with patent attorneys does not, in my view, convert that expenditure to expenditure of a capital nature."

OTHER MATTERS THAT INFLUENCE ACCOUNTING AND TAX TREATMENT OF INTELLECTUAL PROPERTY

There are some other important matters that influence the accounting and tax treatment of intellectual property:

(a) a properly prepared business plan should outline the intended application of intellectual property and any longer term intellectual property strategy

(b) accounting standards (in particular the highly restrictive, International Financial Reporting Statement - IAS 38 Intangible Assets) which leads to mandatory immediate expensing of all expenditures on early stage internally generated intellectual property

(c) taxation imperatives that dictate research expenditure is more tax effective if treated as a revenue expense (i.e., the taxation perspective of accountants for small business is to focus on immediate tax issues rather than the longer term and more uncertain value proposition

(d) the allowance (in specific instances) for research and development expenditure to be claimed as a special tax deduction earmarks the expenditure as an expense rather than capital and precludes the business reality that an intellectual property asset has been created.

Statutory forms of intellectual property

Whereas it is usual accounting and taxation practice to identifying all items of intellectual property has merely being an intangible asset, not all items of intellectual property have the same all-embracing taxation characteristics.

There are specific taxation issues that need to be fully understood when we are dealing with intellectual property and the taxation implications.

(i) All forms of intellectual property rights are CGT assets. Section 108-5(1) defines a CGT asset in the following manner:

Section 108-5(1) A CGT asset is:

(a) any kind of property or

(b) a legal or equitable right that is not property.

Relevantly there are other CGT provisions which identifying and bring to assessment transactions that create a CGT asset. For example, CGT event D1:

Section 104-35(1) CGT event D1 happens if you create a contractual right or other legal or equitable right in another entity.
(ii) Certain types of intellectual property will have their taxation treatment governed by Division 40 ITAA 1997. The point to note is that not every type of intellectual property comes within Division 40.

That being the case, an understanding of the impact of the specific provisions within Division 40 ITAA 1997 that identifies certain intellectual property rights as a depreciating asset is a critical taxation issue:

**Section 40-30 What a depreciating asset is:**

(1) A depreciating asset is an asset that has a limited *effective life and can reasonably be expected to decline in value over the time it is used, except:

- land
- an item of *trading stock or
- an intangible asset, unless it is mentioned in subsection (2).

(2) These intangible assets are depreciating assets if they are not *trading stock:

i. *mining, quarrying or prospecting rights
ii. *mining, quarrying or prospecting information
iii. items of *intellectual property
iv. *in-house software
v. *IRUs
vi. *spectrum licences
vii. *datacasting transmitter licences
viii. *telecommunications site access rights.

The definition of intellectual property is provided by section 995 in the following manner:

**Intellectual property:** an item of intellectual property consists of the rights (including equitable rights) that an entity has under a *Commonwealth law as:

a) the patentee, or a licensee, of a patent or
b) the owner, or a licensee, of a registered design or
c) the owner, or a licensee, of a copyright.

or of equivalent rights under a *foreign law.

From a taxation perspective, there a few matters of significance as a consequence of the above characterisation of the asset as defined “intellectual property”:

i. to the extent that there are capital costs associated with the creation of the of the Division 40 item of intellectual property, the costs incurred to create the depreciating asset, in accordance with subdivision 40-C, will form the basis of future depreciation claims in respect of the asset
ii. any transaction relating to the disposal or granting of a licence to use the intellectual property will be assessed pursuant to Division 40 (subdivision 40-D) and accordingly assessable as a revenue transaction, not a capital gain (refer section 118-24).

This latter point has profound implications for the application of the small business CGT concessions for small business taxpayers. This issue will be discussed in greater detail later in this paper.

Inter alia, there are other special taxation treatment for certain items of intellectual property, included in which for example is the treatment of "in house software" (Division 40 ITAA 1997).

"*In-house software*" is computer software, or a "right to use computer software, that you acquire, develop or have another entity develop:

a) that is mainly for you to use in performing the functions for which the software was developed
b) for which you cannot deduct amounts under a provision of this Act outside Divisions 40 and 328.
The taxpayer is able to pursuant to section 40-450 to allocate amounts of expenditure incurred on the development of “in-house software” to a software development pool, if the taxpayer intends to use the software solely for the production of assessable income (“taxable purpose”). The amount of the deduction is calculated under s 40-455 rather than Subdivision 40-B (s 40-50(2)).

What this pooling mechanism effectively achieves is the replacement of the deduction which would otherwise be available for the decline in value of individual items of software under Subdivision 40-B once the software project is finished and the items of software have come into existence and are used for taxable purposes (s 40-30(2)(d)). Importantly, s 40-450 provides a deduction for expenditure on in-house software even if no depreciating asset has been developed.

Research and development activities

The implications of a taxpayer undertaking research & development activities is mentioned here in the context of the broader discussion of the taxation implications of intellectual property, however a more detailed discussion will be the subject matter of a separate webinar.

DIVISION 355 ITAA 1997

The object section of Division 355 (section 355-1) outlines the basic points of the R&D Tax Incentive. These are:

- it is an entitlement to encourage businesses to increase R&D activities of the benefit of the Australian economy
- it is only available for R&D entities
- it provides a tax offset:
  - if the R&D entity’s aggregated turnover is less than $20m, then the offset rate may be 45% and it may be refundable
  - otherwise, it is 40% and non-refundable (s 355-100)
- the offset replaces notional allowable deductions (s 355-105) meaning that these deductions once claimed as an offset are no longer allowable through other tax provisions (s 355-715)
- the offset applies to R&D activities (s 355-20)
- to be entitled to the offset, the R&D entity must have notional deductions for expenditure on R&D activities or for the decline in value of tangible depreciating assets used for R&D activities. The value of the amounts for which the R&D entity is entitled to an offset is determined through s 355-100.

There is a checklist of factors that need to be considered to determine a taxpayer’s entitlement to the offset.

- Are the activities of the research activities experimental in nature and thus involving an investigation of causal relationships among relevant variables to test a hypothesis or to determine the efficacy of something previously untried?
- Is the purpose of the expenditure the acquisition of new knowledge or information?
- Who is conducting the R & D activities?
- What level of expenditure is being incurred?
- What is the annual turnover of the business?
- Has the business developed an R & D plan before the commencement of the R & D activities?
- Who will be entitled to the economic benefits attributable to the outcome of the R & D activities?

Other than the above issue, there are other provisions that specifically deal with various items of intellectual property and costs incurred in the pursuit of creating intellectual property. These will be discussed later.

For example section 73A ITAA 1936 applies where the taxpayer incurs expenditure related to scientific research. The section provides:

Section 73A(1) The following payments made, and expenditure incurred, during the year of income (other than any amount which is allowable as a deduction under any other section of this Act) by a person carrying on a business for the purpose of gaining or producing assessable income shall be allowable deductions:
a) Payments to:
   i. an approved research institute for scientific research related to that business or
   ii. an approved research institute, the object of which is the undertaking of scientific research related to the class of business to which that business belongs

b) Expenditure of a capital nature on scientific research related to that business (except to the extent that it is expenditure on plant, machinery, land or buildings or on alterations, additions or extensions to buildings or in the acquisition of rights in or arising out of scientific research).

Asset protection strategies (use of structures and legal documentation)

To the extent that the taxpayer is adverse to business risk and puts an economic value on their intellectual property, there are a number of important commercial and taxation strategies to achieve asset protection and maximum taxation efficiencies:

- establishment of separate intellectual holding entities
- linkages created to ensure potential access to CGT concessions
- proper documentation of arrangements to ensure intellectual property asset is secure if the user of the intellectual property suffers some financial distress.

As has been discussed in the webinars dealing with intellectual property there are discrete rules concerning the ownership of statutory intellectual property.

If you are considering the “transfer” of intellectual property for asset protection purposes, the taxation implications are most critical. The following matters should be considered:

- Who owns the intellectual property
- What type of intellectual property needs to be transferred
- What is the market value of the intellectual property
- What are the risks that you are trying to guard against
- What type of entity best provides the asset protection being sought
- Are there any longer term implications (such as future sale of intellectual property) by using a risk preferred
- What methods can be used to “move” the at risk intellectual property.

TRANSFER OF OWNERSHIP OR INTERESTS IN OWNERSHIP OF INTELLECTUAL PROPERTY

The economic benefits of intellectual property can be “moved” either:

i. assigning all interests in the intellectual property title to the destination entity or
ii. assigning an interest in the intellectual property and leave the title with the existing owner.

In both instances it is necessary to consider the implications of Division 40 which:

- requires an assessment of the market value of the intellectual property
- assesses the difference between the market value of the intellectual property and the cost base of the asset.

As will be discussed in greater detail below, notwithstanding the intellectual property is a CGT asset, any gain is assessed pursuant to Division 40.

A strategy that might be considered to mitigate any immediate taxation consequences involves the use of the subdivision 122-A rollover and its interaction with section 40-340. If all of the assets of a business are transferred pursuant to a subdivision 122-A rollover (including “precluded assets” i.e., depreciable assets), section 40-340 provides for a rollover of depreciable assets.

On the assumption the intellectual property has more than a nominal value, the asset protection strategy can be exampled by using the following facts:

Discretionary trust conducts a light manufacturing business with assets consisting of goodwill ($2 m) plant & equipment (wdv $0.5 m) and intellectual property (say a patent) (wdv zero market value $0.5m)
STRATEGY AND ACTIONS
i. Trust transfers all of its assets to a company in exchange for ordinary shares in the company (Newco)
ii. Transferor (Trust) and transferee (Newco) elect to apply subdivision 122-A rollover
iii. Newco establishes wholly owned subsidiary entities – IP Hold Co and Trade Co
iv. Newco elects to enter into the tax consolidation regime
v. Newco transfers IP to IP Hold Co and is issued further shares in IP Co in consideration for the transfer
vi. Newco transfers the business goodwill and plant & equipment to Trade Co and is issued further shares in Trade Co as consideration for the transfer of assets.

TAX AND COMMERCIAL CONSEQUENCES
i. No tax implications in relation to the trust’s transfer of assets to Newco pursuant to both subdivision 122-A and section 40-340
ii. The transfer of assets to the subsidiary companies do not raise any tax implications pursuant to the effect of the tax consolidation single entity rule
iii. IP Company licences the right to use the intellectual property to Trade Company. The licence agreement would have a term that terminates the licence if Trade Company suffers some nominated financial stress
iv. The structure creates the required division between risk and ownership
v. The structure facilitates future access to R & D concessions
vi. The structure does not disadvantage any subsequent sale of the entire business. The trust would potentially have access to both Division 115 and Division 152.

The transactions need proper documentation to ensure that mitigate any financial impediment in the future.

Corporate structures
Inherent in all of the above matters, it is essential that the accountant as the project manager and the business team governs the taxation issues related to intellectual property in a holistic manner. The current, the immediate and future needs and objectives of the business and the management of intellectual property necessitates a careful understanding of the business strategy and a critical program of forward planning.

With the introduction of the taxation consolidation regime, corporate structures are best able to achieve most of the business objectives in dealing with intellectual property.

Stage 2: application of intellectual property for income producing purposes

How the business is able to most appropriately commercialise and maximise the application of intellectual property and inherently related asset requires an appropriate balance between:

- creation of statutory rights by registration (patents, trade-marks and registered designs being the most usual) to ensure exclusive market opportunities
- the risks associated with “copy-cat” opportunism competitors using the publication of the intellectual property (e.g., some intellectual property may be more valuable to the creator if it is kept a trade secret)
- leveraging of the intellectual property rights by granting licence rights into different and non-competitive geographical markets.

From a taxation perspective, the implications of a grant of a licence are:

- is there any lump sum received when the licence is granted – assessable pursuant to Division 40
- the granting of a licence in relation to intellectual property requires a “splitting” of the asset’s cost base to determine the assessable amount (section 40-115(3))
- amounts received in relation to use made of the intellectual property by the licensee will be a royalty and assessable pursuant to section 15-20
• if the licensee is located in a foreign jurisdiction in most situations the license income will be subject to withholding tax (ordinarily at 10%) in that foreign jurisdiction. Note that the foreign tax paid is creditable as a foreign tax offset against the Australian tax applicable.

Stage 3: disposal of intellectual property

An awareness of what is or are the key economic objective of the business is an important consideration as to how the intellectual property is owned, structured and used. In this regard understanding the following factors represents a critical pre-requisite to determining how the intellectual property is optimally structured.

i. Is the intellectual property principally to generate “annuity” income from the use of the intellectual property and/or
ii. Is it anticipated that the intellectual property will be disposed of in the future and/or
iii. Is it anticipated that the business plus the intellectual property will be disposed in the future.

With regard to these alternative objectives, how the intellectual property is held (i.e., structured) and used will have significant taxation implications.

To the extent that patents, copyright and registered design are taxed in accordance with Division 40, the gain on the disposal of these assets will not attracting any CGT concessions (including the small business CGT concessions).

However, if the intellectual property is held by an entity, the disposal of the entity or an interest there that entity might provide an opportunity to apply the CGT concessions - subject to the taxpayer satisfying the basic conditions in section 152-10.

The following simple example highlights the important taxation outcomes by having the business and the assets appropriately structured.

Facts

• An Australian discretionary trust was established in 2010 with Mr & Mrs Smith being the primary beneficiaries.
• The Trust incorporated Hold Co Pty Ltd for the purposes of being the head entity of a manufacturing business.
• The trust holds all of the shares in Hold Co Pty Ltd.
• The business goodwill and the intellectual property were all internally generated (that is they have no cost base). The plant & equipment has a written down value of $0.3 million.
• Hold Co Pty Ltd has two wholly owned subsidiary entities:
  o IP Hold Pty Ltd
  o Manufacturing Pty Ltd
• The trust intends to sell the entire business and all of the business assets which are valued as follows:
  o Business goodwill $2 million
  o Intellectual property:
    ▪ Patent $1.5 million
    ▪ trade mark $0.5 million
    ▪ secret processes $0.5 million $2.5 million
  o Plant & equipment $0.5 million.

Neither the taxpayer (trust) nor any connected entities have any substantial assets that would preclude the taxpayer meeting the maximum net asset value test for the purposes of Division 152.

In prior years all of the trust income has been equally distributed to Mr & Mrs Smith and it is intended to retain this distribution practice in the year of sale.

There have been no prior use made of Division 152.
BUSINESS STRUCTURE:

Discretionary Trust

Hold Co Pty Ltd

IP Hold Pty Ltd

Manufacturing Pty Ltd

TAXATION SCENARIO

i. Sell the assets

The taxation implications would be:

<table>
<thead>
<tr>
<th>Asset</th>
<th>Taxing Provision</th>
<th>Assessable Amount</th>
<th>CGT concession</th>
<th>Net assessable amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goodwill</td>
<td>CGT</td>
<td>$2 m</td>
<td>Subdiv. 152-C</td>
<td>nil</td>
</tr>
<tr>
<td>Patent</td>
<td>Div. 40</td>
<td>$1.5 m</td>
<td>nil</td>
<td>$1.5 m</td>
</tr>
<tr>
<td>Trade mark</td>
<td>CGT</td>
<td>$0.5 m</td>
<td>Subdiv. 152-C</td>
<td>$0.250 m</td>
</tr>
<tr>
<td>Secret Processes</td>
<td>CGT</td>
<td>$0.5 m</td>
<td>Subdiv. 152-C</td>
<td>$0.250 m</td>
</tr>
<tr>
<td>Plant &amp; equipment</td>
<td>Div. 40</td>
<td>$0.2 m</td>
<td>nil</td>
<td>$0.2 m</td>
</tr>
<tr>
<td><strong>Total Assessable Amount</strong></td>
<td></td>
<td></td>
<td></td>
<td><strong>$2.2 m</strong></td>
</tr>
</tbody>
</table>

Assuming the requisite amount is paid for or on behalf of the CGT concession stakeholders – Mr & Mrs Smith to their life time limit of $500,000 each.

ii. Sell the shares in Hold Company for gross asset value $5 million

To take an extreme position assume the shares in Hold Company have only nominal cost base such that all of the capital proceeds represent the capital gain.

The shares will be active assets (section 152-40(3)) for the purposes of subdivision 152-A

The additional conditions in section 152-10(2) are complied with by ensuring that the trust distributes the requisite amount of any income and/or capital gains to Mr & Mrs Smith to satisfy the 90% test.
The taxation implications for the trust would be as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital gain</td>
<td>$ 5 m</td>
</tr>
<tr>
<td>Less Division 115 discount (50%)</td>
<td>$ 2.5 m</td>
</tr>
<tr>
<td>Sub-total</td>
<td>$ 2.5 m</td>
</tr>
<tr>
<td>Less subdivision 152-C</td>
<td>$ 1.25 m</td>
</tr>
<tr>
<td>Less subdivision 152-D*</td>
<td>$ 1.0 m</td>
</tr>
<tr>
<td><strong>Net assessable gain</strong></td>
<td><strong>$ 0.25 m</strong></td>
</tr>
</tbody>
</table>

As will be noted from this simple exercise, the taxation implications of the alternative sale options are extreme for taxpayers who are entitled to attract the Division small business CGT concessions.

The attraction for the purchaser of the shares is that (putting aside the usual risk issues inherited by the purchaser), if the purchaser of the shares is a company that can form or add to their existing consolidated group the shares in Holdco and allocate the $ 5 million purchase price over all of the assets of the Holdco group entities. One consequence of this will be that the ACA will be allocated against the patent and the depreciating assets thereby creating a future Division 40 deduction.

Intellectual property has the mix of revenue and capital characteristics which ultimately has significant taxation implications in the dealing with the creation, application and disposal of intellectual property assets. Great care needs to be exercised to ensure the economic advantages of intellectual property are not reduced because of unwanted taxation consequences.

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**About the author:**
Brian Richards FCPA is the principal consultant of Richards Advisory, which is a specialist small business tax advisory consultancy. Brian has been providing taxation advice for some 40 years with a focus on the establishment, transactional and exit strategies for small to medium enterprises. Intellectual property is the “asset” of the new economy and Brian has some 20 years experience in advising start up entities and SMEs on how to deal with the structuring of IP, the taxation issues when introducing new “partners” and the disposal of intellectual property rights.

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