The Tax Institute

Tax Update

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Our tax training notes are prepared by Marianne Dakhoul, Jane Harris, Matthew McKee, Gillian Tam, Hayden Rudd, Aritree Barua and Amy Burriss.

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The Tax Update Pitstop provides a quick reference to the top 5 tax matters from the month as determined by our experts.

Tax Update Matter	Impact Summary	Further Detail
Item 2.1 SFQV	The Administrative Revie Tribunal has affirmed a decision of the ATO concerning the appropriate attribution of a supply of development services as part of an arrangement where the developer was granted a Crown lease in the ACT. The decision also considered the application fo the excess GST rules and whether ATO should refund the GST.	Page 7
Item 2.3 Cheung	The Administrative Review Tribunal has held that a payment made from a Hong Kong company after cessation of the company's business but prior to any winding up was a dividend and not a return of capital.	Page 13
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2. Cases

2.1 SFQV – GST payable on supply of property development services

Facts

On 1 October 2014, SFQV entered into a contract to acquire land from the ACT Land Development Agency for $5.4 million and development services as non-monetary consideration. On the same day, the parties executed a Project Delivery Agreement, requiring SFQV to design and construct residential units on the land.

Between 24 March 2015 and 28 May 2021, SFQV entered into contracts of sale for the units. All contracts provided the parties agreed for the margin scheme to be applied. Settlements occurred between 15 September 2017 and 30 June 2021. During this period, SFQV adopted a pricing strategy to maximise revenue, adjusting prices based on market conditions.

On 3 July 2015, SFQV was granted a 99-year Crown Lease over the land by the ACT Planning and Land Authority, which contained obligations for SFQV to complete the development within 48 months.

On 16 October 2015 SFQV lodged its BAS for the September 2015 tax period but did not report any sales. It reported a net amount of $247 credit. That is, SFQV did not report the taxable supply of the development services to the ACT Land Development Agency.

On 22 June 2016, SFQV met with PwC to discuss the GST implications of the project. Following the meeting, PwC was engaged to provide GST advice and to prepare a request for a private ruling. At this time, the director of SFQV understood that there were strong grounds for SFQV being able to include the non-monetary consideration in its acquisition price for GST but decided to take a conservative approach when lodging SFQV's activity statements until a ruling was obtain from the ATO.

On 13 December 2017, the ATO issued a private ruling to SFQV, confirming that the development services constituted non-monetary consideration for acquiring the land, which could be used in GST margin scheme calculations. The ATO also ruled that the development services were a supply by SFQV to the ACT Land Development Agency.

On 21 December 2017, SFQV issued an invoice to the ACT Suburban Land Agency (being the successor agency of the ACT Land Development Agency) for the development services, totalling $113,460,254 (including GST of $10,314,569). The ACT Suburban Land Agency paid the GST component only, in accordance with a gross up clause in the Project Delivery Agreement.

On 8 September 2017, the ACT Registrar General registered the units plan for the development. This marked the completion of the Crown Lease, converting it into leasehold interests in the individual units.

For each of the September 2017, December 2017 and March 2018 quarterly tax periods, in preparing its BASs SFQV did not include the value of the non-monetary consideration for its acquisition of the land in calculating its margin under the margin scheme. The explanation for the September 2017 tax period was that, as the ATO had not yet issued its private ruling, SFQV wished to take a conservative position. No explanation appears to have been provided as to why SFQV did not include the value of the non-monetary consideration in calculating the margin for the December 2017 and March 2018 tax periods despite having received a positive private ruling by the time it lodged its BAS for those periods saying it could.

From June 2018, SFQV did include the non-monetary consideration for its acquisition of the land in calculating the margin in lodging its quarterly business activity statements. However, SFQV did not initially include the supply of the development services to the ACT Land Development Agency in any tax period. SFQV used the GST inclusive value of $113,460,254 of the development services to calculate its margin.

From October 2018, the Commissioner began reviewing SFQV's GST affairs. The review evolved into an audit in August 2019, focusing on whether SFQV:

1. had correctly calculated its GST liability;
2. passed on excess GST for the September 2017, December 2017 and March 2018 quarterly tax periods and, if so, whether the Commissioner should exercise the discretion under section 142-15 of the GST Act to allow a refund of the GST on the basis that SFQV had not made a windfall gain.

On 20 February 2020 SFQV requested that the Commissioner amend its assessments for various tax periods, including the September 2017 tax period. In respect of that period, SFQV reported the supply of the development services to the ACT Land Development Agency in its sales.

On 16 October 2020 the Commissioner issued amended assessments to SFQV on the basis that it should have reported its taxable supply of the development services in the September 2015 tax period as this is when SFQV first received consideration for the supply, being the grant of the Crown Lease. The Commissioner also notified SFQV that the discretion under section 142-15 of the GST Act would not be exercised and that, accordingly, the excess GST for the September 2017, December 2017 and March 2018 quarterly tax periods would not be refunded to SFQV.

On 14 December 2020 and 18 March 2022, SFQV lodged objections to the various assessments and the refusal by the Commissioner to exercise the discretion under section 142-15 of the GST.

On 23 March 2023, the Commissioner disallowed SFQV's objections. SFQV applied to the ART for a review of the objection decisions.

Section 142-10 of the GST Act provides, in effect, that a taxpayer is not entitled to a refund of "excess GST" where the GST has been passed on to another entity, unless the passed-on GST is reimbursed to that other entity. Section 142-15 of the GST Act gives the Commissioner the discretion to refund "excess GST" paid by a taxpayer where the Commissioner is satisfied that providing a refund would not give rise to a windfall gain for the taxpayer.

<u>SFQV's contentions</u>

In relation to the period to which the supply of the development services should be attributed, SFQV made the following arguments:

1. that the GST payable on its development services was attributable to the September 2017 tax period, as the consideration for the supply was only received upon the registration of the units plan, which created saleable individual units. The grant of the Crown Lease was not consideration as it could be terminated if certain covenants were not met; and
2. alternatively, the total consideration was not known in September 2015, and the GST should be attributed to the period when it became certain in September 2017 in accordance with *A New Tax System (Goods and Services Tax) (Particular Attribution Rules Where Total Consideration Not Known) Determination (No 1) 2000* (Cth).

In relation to the issue of whether it was entitled to a refund of the excess GST, SFQV made the following arguments:

1. there was no "excess GST" within the meaning Division 142 because the over-reported GST on residential unit sales offset the under-reported GST on development services and Division 42 required there to be an excess net amount reported in a BAS;

2. it did not pass on the excess GST to purchasers, as its pricing was market-driven and independent of GST considerations, and purchasers would have paid the same prices regardless of GST treatment; and
3. that refunding the excess GST would not result in a windfall gain, as it had consistently acted on the belief that it was entitled to include the development services in its GST calculations.

SFQV also maintained that the GST liability on the development services should be included in the value of the non-monetary consideration for its acquisition of the land, claiming the full $113,460,254 (including GST) represented the proper calculation under the GST margin scheme.

<u>Commissioner's contentions</u>

The Commissioner contended that SFQV's taxable supply of development services was attributable to the September 2015 tax period as the grant of the Crown Lease on 3 July 2015 was consideration for the development services. It was not appropriate to use the attribution rules for when consideration is unknown as, in this case, the consideration not unknown. It was always possible to ascertain the value the consideration through a professional valuer valuing the Crown Lease.

In relation to the refund of excess GST issue, the Commissioner made the following arguments:

1. excess GST must be determined on a per-supply basis and cannot be offset against under-reported amounts on other supplies. As such, there were excess GST amounts for the September 2017, December 2017, and March 2018 tax periods;
2. SFQV had passed on the excess GST to the purchasers of the residential units because its pricing strategy ensured it recovered its costs, including GST. The Commissioner emphasised that Division 142 of the GST Act applies when the economic burden of excess GST is transferred to the purchasers, regardless of whether SFQV explicitly accounted for GST in its pricing; and
3. refunding the excess GST to SFQV would result in a windfall gain, as SFQV had passed on the GST to purchasers and not reimbursed them. The discretion under section 142-15 of the GST Act is reserved for exceptional cases where denying a refund would lead to unintended consequences, which was not applicable in this case.

Issues

1. Was the GST payable on SFQV's taxable supply of development services was attributable to the September 2015 or September 2017 tax period?
2. Should the "excess GST" be refunded to SFQV?
3. Was the GST liability on SFQV's development services included in the value of the non-monetary consideration for the purpose of determining its acquisition costs under the margin scheme?

Decision

<u>Attribution of the supply of the development services</u>

The ART determined that the GST payable on SFQV's taxable supply of development services was attributable to the September 2015 tax period. It concluded that the grant of the Crown Lease on 3 July 2015 constituted the consideration for the development services provided by SFQV to the ACT Land Development Agency. The grant of the lease had significant economic value and a direct connection to the supply of development services, satisfying the definition of consideration under the GST Act. The presence of conditions attached to the lease, such as the obligation to complete the development, did not change the fact that consideration was received when the lease was granted.

The ART also rejected SFQV's argument that the "total" consideration was not known until the registration of the units plan in September 2017. The ART noted that, the fact that the lease may be terminated, did not mean that the total consideration was unknown but, instead, if would simply mean that an adjustment event under section 19-10 of the GST Act would occur as the consideration had changed.

Accordingly, the ART upheld the Commissioner's position that the GST liability was properly attributable to the September 2015 tax period.

Refund of the "excess GST"?

As the supply of the development services was attributable to the September 2015, this meant SFQV's argument about there being no excess GST fell away.

In any event, the ART found that there would still have been an amount of excess GST under Division 142 of the GST Act for the September 2017, December 2017 and March 2018 tax periods. The ART noted that section 142-5 of the GST Act states as follows:

> *(1) This Subdivision applies if, after disregarding any amounts covered by subsection (2), your assessed net amount for a tax period takes into account an amount of GST exceeding that which is payable.*

The ART considered that the underlined words made it clear that Division 142 required an assessment of excess GST on a per-supply basis and not simply whether taxpayer had an excess net amount for the period. The excess GST reported on the sales of the units constituted "excess GST" for the purpose of Division 142.

The ART found that SFQV had passed on the excess GST to the purchasers of the residential units. The ART considered that SFQV set its unit prices based on what the market would bear, with no evidence that it absorbed the economic burden of the excess GST itself.

Although SFQV argued that its pricing practices did not explicitly account for GST and were driven by market conditions, the ART concluded that these practices did not demonstrate that the excess GST had not been passed on. The ART noted that SFQV's pricing ensured that it recovered its costs, including GST and there was no evidence that any units were sold at a loss or below cost. The ART emphasised that passing on is determined by whether the economic burden of the excess GST was transferred to purchasers, which SFQV failed to disprove.

The ART determined that refunding the excess GST to SFQV would result in a windfall gain.

The ART rejected SFQV's argument that a refund would not result in a windfall gain because it had anticipated recovering the correct GST amount under the margin scheme. It concluded that SFQV could not reasonably have expected a refund in circumstances where it had over-reported GST and passed on the excess amount to purchasers. The ART also emphasised that section 142-15 of the GST Act is intended for exceptional cases where denying a refund might lead to unintended consequences, which did not apply in this case.

The ART affirmed the Commissioner's decision to deny the refund.

Value of non-monetary consideration

The ART determined that the GST liability on SFQV's development services should not be included in the value of the non-monetary consideration for its acquisition of the land under the GST margin scheme. It concluded that the value of the non-monetary consideration was $103,145,685, which excluded the GST amount of $10,314,569 that SFQV recovered from the ACT Suburban Land Agency.

The ART reasoned that the GST component of the development services had been recovered by SFQV was not included in the value of the non-monetary consideration for the acquisition of the land but was, instead, simply an amount that SFQV was entitled to recover under its GST gross up clause under the Project Delivery Agreement. The ART also noted that this was consistent with the broad terms of the ruling that SFQV had obtained from the Commissioner.

COMMENT – this is a further case where a taxpayer has not been able to satisfy its onus that it did not pass on GST where it mistakenly over-reported its GST. These cases have largely relied upon a decision of the High Court in *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29, which considered the passing on provisions in the former sales tax provisions. In that case, the High Court observed that it was in the nature of sales tax for its economic burden to be passed on rather than borne by the entity liable to remit the tax and, as such, proof to the contrary will be rare, and that the question of passing on 'is not to be answered merely by pointing to price as the sole indicator of passing on'. There is a question of whether the approach adopted in a sales tax context, where generally the wholesaler had greater control over pricing (albeit, subject to market dynamics) and did not usually negotiate on price with the retailer, should be applied in the context of the sale of land, where the price is ordinarily set through negotiations between the vendor and purchaser or through a public auction. At first instance in the *Avon Products* litigation, Hill J (in *Avon Products Pty Ltd v Federal Commissioner of Taxation* (2004) 55 ATR 520) set out the following principles:

> *'(1) The question whether overpaid tax has been passed on will raise the question whether it is the taxpayer or the purchaser from the taxpayer which bears the incidence of the sales tax.*
>
> *(2) Where the sales tax is separately identified in the price it will be the purchaser from the taxpayer who will bear the incidence of the sales tax.*
>
> *(3) Where the sales tax is not separately identified in the price it will be necessary for a taxpayer seeking to prove that the tax has not been passed on to show that the price charged is calculated without regard to the sales tax and that the proper conclusion is that it is the taxpayer who is bearing the sales tax. As the onus of proof lies on the taxpayer it will normally be difficult (although not impossible) for the taxpayer to satisfy the onus of showing that the taxpayer bore the incidence of the sales tax where the taxpayer sells at a price above cost plus sales tax.*
>
> *(4) Where the price charged is calculated so as to exceed the cost (including sales tax) by a profit margin, it will be the customer who bears the incidence of the sales tax and not the vendor of the goods.*
>
> *(5) Where sales tax increases but prices remain the same there may be a prima facie case that the vendor bears the increased sales tax. However the vendor will still need to show that other factors such as decrease in costs, including exchange variations as in Amway, do not affect the conclusion.*
>
> *(6) Where there is a change in sales tax rate but prices remain the same it will generally be necessary to know who bore the sales tax before the sales tax change to determine who bears the sales tax thereafter.'*

There is much to be said for the principles-based approach adopted by Hill J.

COMMENT – a, perhaps, puzzling aspect of the operation of Division 142 of the GST Act is that it does not operate merely because excess GST has been calculated into the price for a supply. Instead, it only operates where a taxpayer has overreported the GST i.e. they are still operating under the mistake that caused the excess GST to be included in the price at the time the BAS for the period is lodged. If the taxpayer identifies the mistake before a BAS is lodged, they are entitled to retain the GST subject to their contractual arrangements with the recipient. This seems to create an incentive to not lodge on a GST return on a conservative basis, although the taxpayer will then bear the risk that penalties will be imposed if the net amount is understated.

COMMENT – as a matter of statutory construction, it is unclear why the windfall gain principle should be limited to exceptional circumstances or unintended consequences. Notably, there was no windfall gains tax exception under the sales tax regime, which likely reflects the practical differences between the operation of GST and sales tax. The approach taken by the ATO and the ART in this case arguably conflates the concepts of passing on and windfall gains. If a taxpayer can show that, had they correctly ascertained their GST, the price would have been the same, why is that not sufficient to show there was not a windfall gain? Respectfully, the reasoning that the windfall gain exception will only be applied in exceptional circumstances or where are unintended consequences, fails to consider the question asked by the statutory provision, which is simply whether the supplier made a windfall gain from the excess GST.

TRAP – the GST treatment of the development services fee in this case (that the fee was included in the acquisition cost for the margin scheme and is consideration for a supply of development services to the ACT government agency) no longer represents the view of the Commissioner in relation to such arrangements. In 2021, the Commissioner issued *Goods and Services Tax Determination* GSTD 2021/1, which states that where the benefit of any building works is retained by the developer, it will not be consideration for the acquisition of the land and will not a supply to the government agency. There may be associated development works for the benefit of the government agency, such as the building of public infrastructure, that are treated as non-monetary consideration for the acquisition and a supply to the government agency. In this case, the Commissioner was bound by the private ruling that had been given to SFQV. It is not clear from the decision if and why the private ruling would bind SFQV in relation to the development services being a supply to the ACT Suburban Land Agency or why it was not treated as being a supply consistent with the approach of the Commissioner in GSTD 2021/1. It may be that this would have meant that SFQV had stopped relying on the ruling within the meaning of section 357-65 of Schedule 1 of the TAA and, as a result, the Commissioner would no longer be bound on the acquisition point.

Citation *SFQV and Commissioner of Taxation (Taxation)* [2024] ARTA 9 (Deputy President G Lazanas, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2024/9.html

2.2 Fisher – review of decision to cancel ABN

Facts

On 23 February 2023, Brian Fisher's Australian Business Number (**ABN**) was cancelled. On 4 April 2023, he reactivated his ABN and sought to backdate its effect to 4 April 2020. On 2 January 2024, the Deputy Commissioner of Taxation confirmed Brian's GST registration and backdated it to 4 April 2020.

During the period between 1 April 2020 and 31 March 2024 Brian claimed GST on input tax credits totalling $54,567, while GST on taxable supplies totalled $662.

On 26 March 2024, the ATO commenced an audit of Brian’s activity statements. Subsequently, on 16 July 2024, the Deputy Commissioner of the Australian Business Register cancelled Brian’s ABN registration, effective from 4 April 2020, citing the absence of an active business. The following day, 17 July 2024, the Deputy Commissioner of Taxation issued amended GST assessments for the period between 1 April 2020 and 31 March 2024. These assessments concluded that Brian was not entitled to input tax credits claimed during this period, as he was deemed not to be carrying on an enterprise.

On 22 July 2024, Brian filed a judicial review application challenging several decisions, including the ABN and GST cancellations and the backdated amendments. This was supported by a wide-ranging affidavit outlining various activities he claimed constituted a business, such as property renovations, restoring vehicles, and speculative technology investments. On 26 July 2024, Brian’s GST registration was officially cancelled, effective from 30 June 2024.

On 2 August 2024, Brian lodged formal taxation objections under Part IVC of the TAA, contesting the ABN cancellation, GST registration cancellation and amended assessments. These objections mirrored the arguments presented in his court application.

Brian argued that his enterprise encompassed a broad range of activities, such as renovating his own house to “flip” it, allegedly "flipping" motor vehicles, and running for political office. The activities also reportedly included plans to build a motel at Cowra Airport using shipping containers and investing in gene technology aimed at bringing people back to life.

Issue

Should the Court grant declaratory and injunctive relief to set aside these decisions?

Decision

The Federal Court dismissed Brian's application for judicial review. The Court held that it was not appropriate to grant the relief Brian sought because he already had access to an established process to challenge these decisions under tax law.

The Court highlighted that judicial review is typically not available when there is a more suitable process to address the same issues. Since Brian's objections were still under consideration, the Court saw no reason to intervene.

COMMENT – judicial review is limited to assessing whether the decision-making process was lawful, not whether the decision was correct on its merits. The Court has discretion to grant judicial review, but it will typically decline to do so when a more appropriate and efficient statutory review process, such as the tax objection framework under Part IVC, is available.

TIP – anecdotally, the ATO is taking a more proactive approach to determining whether an entity is entitled to an ABN at the time registering for an ABN. This may slow down the process for obtaining an ABN and the ATO may require evidence to be shown of the enterprise to be carried on at the time of registration.

Citation *Fisher v Deputy Commissioner of Taxation* [2024] FCA 1364 (Jackman J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/1364.html

2.3 Cheung – return of capital or final dividend

Facts

From 1 November 2006 Dr Allen Sing Kai Cheung had held a minority shareholding in Wu Tung Steel Fabrics Co Ltd, a Hong Kong-based company founded by his late grandfather. Though never involved in its operations, he regularly received dividends from the company, declaring them as income in Australia.

In early 2020, his grandfather's declining health prompted the company's directors to sell its primary asset, a factory premises which has been acquired on 11 October 1982, for HKD $188 million. The sale resulted in a significant capital gain, which was recorded as profit in the company's financial statements. Following the sale, the directors resolved to distribute a portion of these proceeds to shareholders.

On 12 October 2020, Cheung was notified of a dividend payment of HKD $24.75 million, which he received two days later. However, his shares remained intact, and the company was not formally wound up.

When lodging his 2021 Australian tax return, Cheung declared the distribution as foreign-sourced income but argued it should be treated as a return of capital, subject to CGT rather than ordinary income tax. Seeking certainty, he applied for a private ruling from the ATO, which determined that the payment was an assessable dividend under section 44 of the ITAA 1936. Cheung objected to the decision, but the ATO upheld its position.

Cheung applied to the Administrative Review Tribunal, arguing that the distribution was capital in nature and should be assessed under CGT provisions and not as a dividend.

Issue

Was the distribution taxable under the CGT provisions and not as a dividend?

Decision

The ART ruled in favour of the ATO, confirming that the payment was a dividend derived from company profits and assessable as ordinary income.

The ART noted that, as the company had not been placed into liquidation, the provision that was applied to determine the character of the payment was section 44 of the ITAA 1936 and not section 47 of the ITAA 1936. The ART noted that section 47 of the ITAA 1936 does operate, in relation to a liquidator's distribution, to treat certain amounts as not being a dividend. However, section 47 could not apply here as the distribution was not made by a liquidator, unless section 47(2A) applied. The ART held that section 47(2A) of the ITAA 1936, which applies to treat distributions to shareholders made as part of a discontinuance of a company other than though a formal winding up as it the amount had paid by a liquidator, as that section still requires the distribution to be made by someone other than the company. In this case, the company made the distribution.

TIP – under section 47, the portion of a liquidator's distribution that represents a capital gain made by the company that was not included in a net capital gain of the company is not a dividend for the shareholder. This is particularly relevant for pre-CGT capital gains and other tax preferred capital gains (such as exempt or disregarded amounts under the small business CGT concessions) made by companies. Distributions of such amounts by a liquidator may result in a far better tax outcome for the shareholders than if the company paid them out as dividends prior to winding up.

Citation *Cheung and Commissioner of Taxation (Taxation and business)* [2024] ARTA 152 (General Member R Smith, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2024/152.html

2.4 Dinheiro – transfer not in conformity with agreement

Facts

On 2 August 2017, Craig and Susan Doyle entered into a contract to purchase an off-the-plan townhouse in Maryville, New South Wales for $875,000. They paid a 5% deposit, and the contract was stamped with full ad valorem duty. However, at settlement on 23 October 2019, the property was transferred to Dinheiro Pty Ltd

At all relevant times, Craig was the sole director and shareholder of Dinheiro. Dinheiro also acted as the trustee of a unit trust, the Craig Doyle Fixed Trust. Craig was the sole unitholder of the trust after it was converted from a discretionary trust in 2013 by a deed of variation.

Craig was listed as the sole holder of all 100 issued units of the Craig Doyle Fixed Trust under the deed of variation. No register of unitholders was maintained for the Trust, and the accountants had continued to treat the Craig Doyle Fixed Trust as a discretionary trust despite the deed of variation. Payments were made to Susan by the Craig Doyle Fixed Trust in the years after the deed of variation, but there were no written records indicating that any units were ever issued to Susan.

Under the *Duties Act 1997* (NSW), both the agreement for sale and the property transfer are dutiable transactions. However, section 18 of the Duties Act provides relief from double duty in certain circumstances. Dinheiro self-assessed and paid nominal duty of $10 on the transfer, believing it met the conditions of section 18(3) of the Duties Act for relief.

Following an investigation, the Chief Commissioner reassessed Dinheiro, determining that section 18(3) did not apply and issued an assessment for transfer duty, interest and penalties amounting to $56,861. Namely, section 18(3)(d) of the Duties Act requires that at the time the agreement was entered into (the Contract Date), **and** at the completion or settlement of the agreement (the Settlement Date):

1. the purchaser under the agreement (other than a purchaser who purchased as a trustee) and the transferee under the transfer were related persons; or
2. if the purchaser purchased as a trustee (other than as a trustee of a self-managed superannuation fund)—the transferee and the beneficiary were related persons.

The Chief Commissioner contended that Dinheiro and Craig and Susan were not related persons.

Dinheiro objected to the reassessment, but the objection was disallowed. As a result, Dinheiro applied to the NCAT for a review of the assessment, challenging the Chief Commissioner's decision on the applicability of section 18(3) of the Duties Act.

In the proceedings, several issues were identified with the Trust's accounts and income tax returns. For instance, the 2021 income tax return incorrectly listed the Trust as the "Craig Doyle Family Trust," a discretionary trust, and recorded distributions to Susan that should not have occurred under the terms of the Trust, as amended in 2013 These errors were reflected in the Trust's accounts.

There were also inconsistencies regarding Susan's interest in the property (1% vs. 50%), confusion about the existence of a "Craig Doyle Legal Trust," and references to a non-existent asset, "Equity in Doyle Legal Trust." Important records, such as trustee minutes on distributions to Susan and related transactions, were either lost, not produced, or unprepared. The Trust also failed to maintain a unit register. These issues were considered in the findings of fact for the case.

Issues

1. Was the Property acquired by the Dinheiro as transferee in its capacity as trustee of the Trust?
2. Were each of Craig and Susan "related persons" as at the Contract Date and the Settlement Date, having regard to the capacity in which the property was acquired by Dinheiro?
3. Would ad valorem duty be payable on half the value of the property or on the full value of the property if only one of Craig and Susan satisfied the "related persons" requirement?

Decision

<u>Beneficial ownership of property</u>

Susan was not a 'related person' of Dinheiro within the meaning of that term in the Duties Act as this required that she be a director or a shareholder of the company, which she was not. Accordingly, for section 18(3) to apply at all, it was necessary that Dinheiro acquired the property as trustee of the Craig Doyle Fixed Trust and not in its own capacity.

The NCAT identified significant gaps in the documentary evidence, including missing or incomplete records, such as the settlement statement, and inconsistent references to the Trust's name and financing arrangements. Despite these deficiencies, it was argued that the property transfer to the Dinheiro occurred as a trustee under the Trust, as reflected in the 2020 financial statements and 2021 tax return, which showed an increase in liabilities and assets related to the property.

The NCAT concluded that, despite the lack of comprehensive documentation, it was "more likely than not" that the acquisition by Dinheiro was made in its capacity as trustee.

Related persons test

The NCAT considered whether Susan met the 'related persons' test under section 18(3)(d)(i) of the Duties Act, which requires individuals to be beneficiaries of the trust. While Craig, as the sole unitholder of the Craig Doyle Fixed Trust, was a beneficiary at both the Contract Date and Settlement Date, the Tribunal found that Susan did not satisfy the related person test. Susan was never a unitholder in the Trust, as there was no evidence supporting that she held units or that any units were ever transferred to her. Additionally, no unit register or documentation was provided to verify such a transfer.

Furthermore, the NCAT concluded that Susan was not a beneficiary of the Trust. The common law meaning of "beneficiary" requires an individual to have an equitable interest in the trust, but as Susan was not a unitholder, she had no such interest. Although there were references to "distributions" made to her, these were considered invalid because they were made in breach of the Trust's terms. The NCAT also noted that the accounts recorded a "beneficiary account" for her, and that the Trust and Susan lodged tax returns on the basis that she received distributions, but this did not equate to her being a beneficiary under the Trust's amended terms.

Based on these findings, the NCAT determined that Susan was not a related person of the Trust, and as a result, the requirements of section 18(3)(d) of the Duties Act were not met. Therefore, the exemption from double duty under section 18(3) of the Duties Act did not apply.

Dutiable value

The NCAT found that the Chief Commissioner was not estopped from issuing the full duty assessment. Referencing precedents, the NCAT clarified that the doctrine of estoppel does not prevent the Chief Commissioner from assessing duty in accordance with the Duties Act, even if Dinheiro had relied on advice it received. It reaffirmed that no conduct by the Chief Commissioner could override the statutory duty to assess the correct amount of duty.

Ultimately, the NCAT ruled that fairness and moral considerations could not displace the legal requirements under the Duties Act, and the Chief Commissioner was bound to apply the statutory framework. Dinheiro, like all taxpayers, was required to comply with the relevant provisions, and section 18(3) provided no discretion to reduce the duty assessed. Therefore, the additional duty was correctly imposed, as the statutory obligations took priority over Dinheiro's claims of unfairness.

The NCAT concluded that the requirements of section 18(3) of the Duties Act were not satisfied and affirmed the duty assessment. In respect of penalty tax, despite the NCAT finding that no reasonable care was taken, penalty tax was remitted to 15%. The NCAT recognised the broad and unfettered character of the discretion to remit penalty tax under section 33 of the TAA, and an absence of reasonable care for the purpose of s 27(3)(a) of the TAA did not preclude an exercise of discretion to fully or partly remit penalty tax under section 33 of the TAA. The premium component of interest was remitted in full.

TRAP – section 18(3)(d) of the Duties Act requires that the relevant connecting conditions between the purchaser under the agreement and transferee be met **both** at the time of the agreement and at the time of the transfer. This can be problematic. For example, if the transferee did not exist at the time of the agreement, because it was incorporated after the contract was exchanged, the transfer will not be entitled to concessional duty under section 18(3): see *Perizon Nominees Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWCATAD 84.

COMMENT – where a company is acting as a trustee, there is authority that it will not be sufficient to establish that the other person meets the related person test in respect of the company. Rather, it is necessary to show the related person test is met in the company's capacity as trustee: see *Chrissie Group Pty Ltd atf All Angels Family Trust v Chief Commissioner of State Revenue* [2018] NSWCATAD 77.

Citation *Dinheiro Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWCATAD 347 (Senior Member J Sullivan, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/347.html

2.5 Wylarah Pastoral Co – land tax

Facts

In May 2022, Wylarah Pastoral purchased a 9.3-hectare property in Medway, NSW, zoned as 'RU2 Rural Landscape'. The company claimed the land was used for maintaining cattle and should qualify for a land tax exemption under primary production provisions.

Throughout 2022 and 2023, various preparatory works were undertaken on the land for cattle maintenance, but no income was generated from cattle sales. Instead, a residence on the land was rented for $650 per week, and rental income was the only revenue derived from the property during the disputed land tax years. The expenses incurred on the competing uses was $11,581.77 for the house and $8,388.60 for the balance of the land.

Two National Vendor Declaration (Cattle) and Waybills dated 10 November 2022 and 3 February 2023 appeared to describe the moving of 25 Angus heifers onto and off the land, although there were some discrepancies with the Property Identification Code used in the declarations.

Aerial imaging obtained by the Chief Commissioner at various times during from August 2022 to May 2024 indicated that there were no cattle on the land. It was not disputed that there were no cattle on the land in the 2024 land tax year.

On 24 September 2024, five cows and six calves were stocked on the land, with expectations of future income from cattle sales. However, at the time of the land tax assessments, the only proven income source was residential rent.

On 30 January 2024, the Chief Commissioner of State Revenue issued a land tax assessment for the 2023 and 2024 land tax years. The assessment denied the primary production exemption for the Medway property.

On 18 March 2024, Wylarah Pastoral lodged an objection to the assessment, which was disallowed by the Chief Commissioner.

On 5 August 2024, Wylarah Pastoral applied to the NCAT for an administrative review of the decision, arguing that the land's primary use in the relevant years was for the maintenance of cattle for sale

Issue

Was the dominant use of Wylarah Pastoral's land the maintenance of cattle for sale?

Decision

The NCAT upheld the Chief Commissioner's land tax assessment, ruling that Wylarah Pastoral's land was not exempt from tax because its dominant use was residential rental, not cattle maintenance. Although preparatory works for cattle grazing had been undertaken in 2022 and 2023, no income was generated from livestock, and the only revenue during the disputed tax years came from renting the residence for $650 per week.

Wylarah Pastoral presented evidence, including National Vendor Declarations and Waybills, but inconsistencies in property identification codes and aerial images showing no cattle on the land undermined its claim. The NCAT acknowledged that preparatory work could constitute land use but found that it was not substantial enough to outweigh the rental use.

Key factors in the decision included the financial returns, land use intensity and expenditure breakdown, all of which indicated that residential rental was the primary function of the land.

Senior Member MacIntyre stated that, even if 25 Angus heifers had been present on the land at certain times during the relevant land tax years, their presence alone would not be sufficient to change the conclusion that the dominant use of the land was residential rent rather than cattle maintenance.

As a result, the NCAT confirmed the land tax assessment, rejecting Wylarah Pastoral's exemption claim.

COMMENT – The comments of Senior Member MacIntyre suggest that the fact the primary production activities on land in the relevant years were largely only preparatory, was main factor in his decision. Instead, it appears that as long as the residence continued to be used for rent, he would have concluded that the dominant use was not primary production. There may be a different outcome if the income and expenses from the primary production exceeded the income and expenses from the rental activities.

Citation *Wylarah Pastoral Co Pty Ltd ATF Tallong Family Trust v Chief Commissioner of State Revenue* [2024] NSWCATAD 366 (Senior Member EA MacIntyre)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/366.html

3. Cases in brief

3.1 Karagounis – time limit to claim input tax credits

Rebecca Karagounis registered for GST on 1 July 2010 and operated a cleaning business, accounting for GST on a cash basis. Between 1 October 2015 and 31 March 2017, she failed to file Business Activity Statements for six reporting periods due to issues with her former tax agent and health problems. These statements, due between 28 February 2016 and 28 April 2017, were eventually submitted on 10 July 2021, making them four to five years late. Following this, on 6 August 2021 the Commissioner issued Notices of Assessment. Rebecca objected on 16 October 2021, claiming entitlement to $10,680 in input tax credits under section 93-10 of the GST Act. However, the Commissioner disallowed her objection on 23 November 2021, stating that section 93-5 of the GST Act barred claims made beyond four years of their due dates, with no overriding provisions in the TAA.

On 13 July 2023, Rebecca took her case to the ART, arguing that the Commissioner's decision was incorrect. She cited section 93-10, which allows exceptions under specific circumstances, but neither applied to her case. She also raised claims of maladministration and procedural unfairness. The ART ruled that section 93-5 explicitly prevented her from claiming input tax credits due to the late lodgement of her statements. It found no basis for applying section 93-10 and confirmed that it lacked the discretion to override clear legislative provisions. The ART also dismissed Rebecca's additional claims, as they fell outside its jurisdiction.

TRAP - the four-year time limit in section 93-5 of the GST Act strictly applies to a taxpayer's ability to claim input tax credits, but it does not limit the Commissioner's power to recover unpaid GST. While taxpayers may lose their entitlement to credits after four years, the Commissioner can still pursue outstanding GST liabilities from earlier periods if they were not properly declared, subject to the limitation on the Commissioner's limitation to amend an assessment after 4 years. This is relevant to late lodgment of BASs, as the late lodgment may result in input tax credits being unavailable for a period but will not prevent Commissioner from issuing an assessment for the sales made for that period.

Citation *Karagounis and Commissioner of Taxation (Taxation and business)* [2024] ARTA 80 (General Member J Dunne, Melbourne)
w http://classic.austlii.edu.au/au/cases/cth/ARTA/2024/80.html

3.2 Aviation v Lao – joint and several liability for landholder duty

Aviation 3030 Pty Ltd was found to be jointly and severally liable for land tax under section 85(2) of the *Duties Act 2000* (Vic) following the acquisition of shares by Lao Holdings Pty Ltd. Lao Holdings had acquired a significant interest in Aviation 3030 as part of an associated transaction, which triggered a landholder duty liability. The Commissioner of State Revenue issued an assessment for unpaid duty, which Aviation 3030 ultimately paid. Aviation 3030 then sought to recover a portion of this amount as a debt from Lao Holdings, arguing that, as the acquirer of the shares, Lao Holdings should bear the economic burden of the duty. When Lao Holdings refused to pay, Aviation 3030 commenced proceedings in the Supreme Court of Victoria to enforce recovery.

The Supreme Court of Victoria ruled that Aviation 3030 was entitled to recover part of the landholder duty liability from Lao Holdings Pty Ltd under section 85(2) of the *Duties Act 2000* (Vic). The Court held that Lao

Holdings, as the acquirer in an associated transaction, was jointly and severally liable for the duty. Since Aviation 3030 had paid the amount to the Commissioner of State Revenue, it had a statutory right to seek recovery.

COMMENT – under the landholder duty and trust acquisition or surrender regimes in the various States and Territories, liability can be imposed in ways in unexpected ways. For example, in Queensland (which contains a trust acquisition and surrender duty regime), where a person is surrendering an interest in a trust that has dutiable property, it is liable for the duty (jointly with the trustee) on the trust surrender. Similarly, the various landholder duty regimes will usually impose joint and several liability on the acquirer, the trustee itself and potentially entities who have had their acquisitions aggregated with another entity under the aggregation rules: see, for example, section 89 of the *Duties Act 1999* (ACT) and section 154 of the *Duties Act 1997* (NSW). In some jurisdictions, the entities that are jointly and severally liable may have a statutory right of recovery of the amount paid against one of more of the other parties: see, for example, section 154(2) of the *Duties Act 1997* (NSW).

TIP – this potential for joint and several liability should be considered as part of any transaction that results in an acquisition in landholder or that is a trust acquisition or surrender. Even where there is a statutory right of recovery, consideration should be given as to how that right would be enforced.

Citation *Aviation 3030 Pty Ltd (in liq) v Lao Holdings Pty Ltd* [2024] VSC 800 (Croft J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2024/800.html

3.3 Roofing Services Queensland – payroll tax and relevant contracts

Roofing Services Queensland Pty Ltd, established in 2013, provided roofing services across Queensland and New South Wales. The company engaged contractors whom the Commissioner of State Revenue initially classified as independent businesses rather than employees. However, in January 2022, the Commissioner issued reassessment notices, determining that payments to certain contractors were taxable wages under the *Payroll Tax Act 1971* (Qld), resulting in a tax liability of $53,763 for the financial years 2018 to 2021. Roofing Services objected, claiming that the payments qualified for exemptions under section 13B(2)(b)(iii) and section 13B(2)(c)(iii) of the Payroll Tax Act, but the Commissioner rejected these claims.

In August 2022, Roofing Services sought to introduce new evidence, including statutory declarations, to demonstrate that certain contractors engaged additional workers. In July 2023, the company was granted permission to argue that some contractors worked fewer than 90 days per financial year, making them eligible for exemption.

The QCAT upheld the Commissioner's decision for most contractors. The QCAT found insufficient evidence proving that these contractors engaged multiple workers or met the 90-day exemption. However, the reassessment for one of the contractors was set aside, as credible evidence showed it regularly employed multiple workers and provided services for fewer than 90 days annually. The QCAT directed the Commissioner to reconsider the objection regarding that contractor.

COMMENT – this case demonstrates the difficulty in proving that exclusion applies for the relevant contract provisions. The need to collect evidence is something that should be considered as part of the contractor on-boarding experience and annual contract management for a contractor.

Citation *Roofing Services Queensland Pty Ltd ATF Roofing Services Qld Trust v The Commissioner of State Revenue t/as Office of State Revenue* [2025] QCAT 604 (Member King-Scott, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2025/604.html

3.4 Blockchain Tech – Bitcoin as property

On 3 December 2017, Blockchain Tech Pty Ltd was incorporated with Jin Chen as its sole director. The company was established to develop software for cryptocurrency and blockchain technology. Jin held 70% of the shares, with the remaining 30% owned by Livia Holdings Pty Ltd, a company associated with Wei Zhao.

On 24 October 2017, Galaxy Crowdfunding Pty Ltd was incorporated as a joint venture between Jin and Wei. Both were appointed directors and shareholders, each holding 50% of the shares. The company aimed to secure an Australian Financial Services Licence (AFSL) and operate a crowdfunding business.

After this time, a dispute arose between Jin and Wei over various Form 484s lodged by Wei in the companies to transfer shares owned by Jin, to remove him as a director and to appoint Biyang Hu as a director of Galaxy Crowdfunding without Jin's consent. Jin made various allegations against Wei including that Wei misappropriated cryptocurrency assets held by Blockchain Tech.

The Court held that Wei had failed to properly manage and account for cryptocurrency assets held by Blockchain Tech and, in doing so, made the following findings:

1. having regard to previous case law outside of Australia, including *AA v Persons Unknown [2019] EWHC 3556 (Comm)* and *Ruscoe v Cryptopia Ltd (in liq) [2020]* 2 NZLR 809, Bitcoin is property as it meets the 4 legal characteristics of property as follows:
   (a) it has an identifiable subject matter;
   (b) it is identifiable by third parties;
   (c) it is capable of assumption by third parties;
   (d) there is some degree of permanence or stability;
2. while Bitcoin is property, it is intangible and is not held in possession and, as such, is not capable of being subject to bailment;
3. Bitcoin is not "transferred" but, instead, each time a Bitcoin transaction occurs, the property of the "transferor" ceases to exist and a new item of property is created for the recipient; and
4. as Bitcoin is property, it can be held on trust.

COMMENT – the Court's comments that a Bitcoin trade is not a 'transfer' but, instead, results in the seller's property ceasing to exist and the purchaser acquiring a new piece of property potentially has important tax implications for two reasons:

1. it suggests that the relevant CGT event for a Bitcoin trade may be CGT event C2 (a CGT asset coming to an end), instead, of CGT event A1 (a disposal of a CGT asset). Different rules apply for CGT event C2 as compared with CGT event A1. Importantly, there is automatic market value substitution for CGT event C2, with some exceptions; and
2. it suggests that when Bitcoin is lent or 'staked', a CGT event may happen at that time, even if there is some expectation that an equivalent Bitcoin will be returned.

Citation *Re Blockchain Tech Pty Ltd* [2024] VSC 690 (Attiwill J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2024/690.html

3.5 Cheung – unexplained deposits

Mr Lin Jum Cheung, also known as Rene Ah Pow, is an 80-year-old man. Rene was born in Vanuatu but retired to Australia in 2000. Rene's older sister, Graziella, owned a supermarket chain in Vanuatu, which Rene had previously worked in as a general manager until 2000.

Throughout the 2005 to 2015 income years, 99 deposits from bank accounts in Vanuatu, associated with Graziella's business, were paid into Rene’s, or his and his wife’s, Australian bank account. The deposits totalled $32,799,582, which the Commissioner assessed as income according to ordinary concepts.

Key evidence was presented to prove that these deposits were not income. Central to the case was the testimony of Graziella, which the court found to be honest and reliable. She confirmed that the funds transferred to Rene were gifts made out of familial love and trust, intended for family investment in Australia, and not payment for services or business income. The Court accepted that Graziella was the sole owner of the supermarket business during the relevant period, and that Rene held no ownership interest or formal employment in the business after retiring in 2000 due to health reasons.

The funds were managed by Rene for family investments, including properties in New South Wales and Queensland, but he received no financial benefit beyond modest living expenses. The Court also considered the long-standing family tradition of supporting relatives financially and noted that the payments lacked the characteristics of income, such as periodicity or compensation for services.

The Court held the deposits were gifts of capital voluntarily made by a loving sister to a loved brother. The deposits should not have been assessable to Rene as he did not have an ownership interest in that business, the payments were not a reward for services rendered, nor were they an ex gratia payment to a former employee or in the nature of a pension. The Court accepted that the funds were merely transferred from a sister to a brother who was trusted to invest them wisely for the wider family.

Justice Logan ruled that the Commissioner of Taxation had incorrectly characterised the funds as income, emphasising that they were capital gifts. Consequently, the objection decision was set aside, and Rene’s taxable income was limited to declared interest income of $1,953,631 during the relevant period.

Citation *Cheung v Commissioner of Taxation* [2024] FCA 1370 (Logan J, Queensland)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/1370.html

3.6 Bakarich – tax exploitation scheme

In March 2014, The Dream Consortium Pty Ltd (**TDC**) was incorporated with Julian Bakarich as its sole director, secretary, and shareholder. In December 2014, Bakarich invited Thi Cam Tu Nguyen to collaborate in starting an accounting business, The Dream Accountants (**TDA**), which was incorporated in July 2015.

Between 2016 and 2019, both Julian and Thi were involved in providing R&D services to clients, including the preparation and submission of R&D tax incentive claims. This process included client referrals, information collection, R&D registration applications, and invoicing for services provided by TDC and TDA.

In 2016, the ATO began investigating Julian, leading to separate proceedings against Julian, TDC, and TDA in the Federal Court between February and May 2020. The investigation focused on tax exploitation schemes related to R&D claims under Division 355 of the ITAA 1997, where it was found that the claims were not legally arguable. Under Section 290-65(1) of the TAA, these schemes were considered tax exploitation schemes, as they involved claims made with the purpose of obtaining an illegitimate tax benefit.

On 16 June 2022, Nguyen admitted to three contraventions of section 290-50(1) of the TAA, resulting in a penalty of $100,000. Later, in September 2024, an in-principle agreement was reached between Thi and Julian and the Commissioner to impose a penalty of $4,500,000 for promoting 12 tax exploitation schemes. Both Julian and Thi admitted to promoting these schemes, with Julian additionally involved in tax evasion. TDC and TDA, although not directly part of the proceedings, were also found to have promoted the same schemes, violating section 290-50(1) of the TAA based on Julian's actions.

Citation *Commissioner of Taxation v Bakarich (No 2)* [2024] FCA 1448 (Kennett J, New South Wales) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/1448.html

3.7 Naaman – trustee indemnity

The High Court considered whether a new trustee must protect a former trustee's right to recover trust expenses. Anthony Naaman, a creditor of the former trustee (JPG), claimed the successor trustee (Jaken) wrongly transferred trust assets, leaving nothing for JPG's reimbursement.

The key issue was whether the former trustee's right of indemnity created a fiduciary duty for the new trustee. The Court clarified that a former trustee holds a **beneficial interest** in trust assets for reimbursement, but this is distinct from a **beneficiary's** interest. The High Court ruled that a former trustee's right of indemnity gives them a beneficial interest in trust assets, but this does not mean they can retain those assets. Instead, the former trustee only has a right to apply to a court to enforce their entitlement, such as by seeking a sale of assets or payment from trust funds. The new trustee must prioritise beneficiaries but does not owe a duty to protect the former trustee's claim.

The High Court upheld the NSW Court of Appeal's ruling that Jaken had no fiduciary obligation.

COMMENT – this case raises concerns for parties when dealing with trustees and the ability to enforce obligations out of the assets of the trust in the event that the contracting trustee ceases to be the trustee of the trust. While contractual protections could be put in place, such as providing that a change of trustee without consent is an event of default under the contract, there are only limited ways that the counter-party to a contract would know if there has been a change of trustee.

Citation *Naaman v Jaken Properties Australia Pty Limited* [2025] HCA 1 (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2025/1.html

3.8 Gainer – lost trust deed

The Werner Thelen Family Trust was created in April 1982, with Gainer Associates Pty Ltd acting as trustee. Werner and Gail Thelen, as sole directors and shareholders of Gainer. Gainer executed a charge in favour of a Bank in 2001 expressed to be given by Gainer "in its own capacity and as trustee of the Werner Thelen Family Trust" and included these particulars:

> *"Date of deed creating trust (including variations): 1 April 1982*

Parties to deed creating trust: Gainer Pty Ltd and Narelle Margaret Mayes."

Narelle Mayes as Werner's secretary in the late in the late 1970s and early 1980s at American Express and Visa and gave evidence she had no recollection of being the settlor of the trust or of the trust at all.

Gainer, as trustee, purchased a service station, which was the Trust's main asset. Financial records confirmed that from 2008 to 2021, the Trust was a discretionary trust distributing exclusively to Werner and Gail. Following their deaths in 2014 and 2021, respectively, the NSW Trustee and Guardian appointed liquidator Timothy Heesh to manage Gainer, but no trust deed could be found. By June 2024, the Trust's net value was $2.8 million.

Gainer sought judicial advice regarding the Trust's assets. The Supreme Court of New South Wales ruled that the Trust had failed due to uncertainty, as the absence of the trust deed meant the full class of beneficiaries could not be determined. Under trust law, when a trust fails, its assets revert to the settlor via a resulting trust. The Court found that Werner was the settlor, meaning the assets passed to his estate and subsequently to Gail's estate as she was his sole beneficiary. The Court also confirmed that Gainer was entitled to recover its expenses and legal costs from the Trust's assets before distribution.

In terms of the finding that Werner was the settlor and Narelle, the Court commented as follows:

> *The Court finds, based on Ms Mayes' evidence about the work she did for Werner, that insofar as she may have contributed property to the Trust, it would have been provided by Werner and that he (and she) would not have intended Ms Mayes to have had any beneficial interest in the Trust's assets. Without any criticism of Ms Mayes, the Court prefers the evidence in the charge over Ms Mayes' recollection of many years before, and finds that Ms Mayes was the settlor identified in the trust deed. However, the Court also finds that she was the settlor in name only, with any initial settled property provided to her by Werner (for example, the generally nominal amount paid to the trustee as the initial corpus of the trust). This finding is based on the Court's experience with family trust deeds and common knowledge to the effect that it is not unusual for the named settlor to be someone such as the family solicitor or accountant, or a secretary or clerk in the employ of such a person. Whatever their position, there could be no doubt that they were never intended to have any beneficial interest in the relevant trust.*

Citation *Application by Gainer Associates Pty Ltd* [2024] NSWSC 1437 (Kunc J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1437.html

3.9 Appeals update – Grant and Collie

The Full Federal Court has allowed the taxpayers' appeals to the decisions in *Grant and Commissioner of Taxation (Taxation)* [2024] AATA 427 and *Collie v Commissioner of Taxation* [2024] AATA 440 (see our April 2024 Tax Training Notes). Both decisions concerned Part IVA assessments issued by the ATO in relation to an alleged scheme to shelter profits from an law firm business from tax. In *Grant*, the Full Federal Court stated that "*… there was a wholesale failure of the Tribunal to have regard to material evidence, to weigh in the balance competing submissions, and to provide adequate reasons for any of its conclusions*". The cases have been remitted to the ART for re-decision.

Citation *Grant v Commissioner of Taxation* [2024] FCAFC 173 (O'Callaghan, McEvoy and Needham JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/173.html
Citation *Collie v Commissioner of Taxation* [2024] FCAFC 172 (O'Callaghan, McEvoy and Needham JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/172.html

3.10 Other tax and superannuation related cases in period of 8 November to 10 February 2025

Citation	Date	Headnote	Link
Xin v Chief Commissioner of State Revenue [2024] NSWCATAD 333	8 November 2024	TAXES AND DUTIES – Surcharge purchaser duty – Principal place of residence exemption not available – Interest – Penalty tax	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/333.html
Sutton v Chief Commissioner of State Revenue [2024] NSWCATAD 338	12 November 2024	TAXES AND DUTIES – Land tax – Applicant fails to notify Respondent of errors in assessment – Errors ultimately corrected and revised assessment made – Interest imposed – Whether there are grounds for remission	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/338.html
Commissioner of Taxation v Patrix Prestige Pty Ltd [2024] FCAFC 148	14 November 2024	TAXATION – whether respondent was entitled to claim decreasing luxury car tax (LCT) adjustments pursuant to Division 15 of the A New Tax System (Luxury Car Tax) Act 1999 (Cth) (LCT Act) – where Tribunal found, following a concession from the applicant, that the respondent was entitled to decreasing LCT adjustments in respect of 13 "new" luxury cars, but not in respect of 4 "used" cars – whether Tribunal incorrectly construed ss 9-5 and 15-30 of the LCT Act – the Tribunal misconstrued ss 9-5 and 15-30 – the Tribunal's construction infected the entirety of its reasons – appeal allowed – matter remitted to the Tribunal to be reheard according to law	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/148.html
RRS Holdings Aust Pty Ltd ATF RRS Holdings Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 352	25 November 2024	TAXES AND DUTIES – Surcharge land tax – Applicant holds land on trust – discretionary trust –amendment to trust deed – interpretation of deed – whether the "no amendment requirement" in s5D(3)(b) of the Land Tax Act 1956 (NSW) was satisfied	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/352.html
Commissioner of State Revenue v Van Dairy (Hong Kong) Group Ltd, Van Dairy (Hong Kong) Group Ltd v Commissioner of State Revenue and Ningbo Kaixin Investment Co Ltd v Commissioner of State Revenue [2024] TASSC 70	27 November 2024	Administrative law – Administrative tribunals – Statutory appeals from administrative authorities to courts – Magistrate correctly held that Sale and Purchase Agreement was legally binding agreement for sale of land – That corporation was a land-rich corporation – Evidence beyond doubt that valid transfer of shares occurred – Magistrate entitled to not remit interest in full - Ningbo not exempt from paying duty under the legislation. Administrative law – Administrative tribunals – Statutory appeals from	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASSC/2024/70.html

Citation	Date	Headnote	Link
		administrative authorities to courts – Appeal from commissioner of state revenue – Legislation does not require existence of exceptional circumstances for interest on duty payable to be remitted. Taxes and duties – Stamp duties – Assessment and amount payable including fines – Other cases – Tasmania – Whether Ningbo could have acquired land from Mr Lu in manner that involved no change in beneficial ownership of land – Acquisition of land by company makes company owner of land and not the shareholders – Ningbo not exempt from paying duty under the legislation.	
Sandhu v Commissioner of State Revenue [2024] QCAT 511	28 November 2024	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – review of decision to refuse payment of First Home Owner Grant and for the repayment of the Regional Home Building Boost Grant – decision made on the basis that the house had been occupied by Airbnb guests or on other short-term tenancies for about two years before the purchase – how the expression 'has not been previously occupied or sold as a place of residence' should be construed – whether occupation must be as a place of residence – whether residence requires some long term commitment by the occupier – whether the house was a 'new home' when purchased	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2024/511.html
Lifestyle Homes (ACT) Pty Ltd v Deputy Commissioner of Taxation [2024] FCA 1376	29 November 2024	CORPORATIONS – statutory demand – application to set aside under s 459G of the Corporations Act 2001 (Cth) ('the Act') – where issuing party used outdated version of prescribed form – where updated form added two words – whether omission of those words from outdated form causative of substantial injustice – where receiving party claimed to suffer confusion – where issuing party subject to model litigant obligations CORPORATIONS – statutory demand – variation to amount of demand under s 459H(4) of the Act – where variation not opposed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/1376.html
Pugliese v Commissioner of State Revenue (Review and Regulation) [2024] VCAT	29 November 2024	Review and Regulation List – Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 71 – Review of rejection of	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/V

Citation	Date	Headnote	Link
1136		application lodged by beneficiary of trust for review of decision of Commissioner of State Revenue refusing to refund land tax to trustee – Whether applicant entitled to make application – Proceedings regarding refusal of refund to be brought in Supreme Court of Victoria – Tribunal lacks jurisdiction to consider application – Rejection of application confirmed.	CAT/2024/1136.html
Commissioner of State Revenue v Lewis [2024] QCATA 126	2 December 2024	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – Review of administrative decision – HomeBuilder Grant – where owners entered into contract with unlicensed building company to build house – whether eligible transaction for the purposes of the Administrative Direction – grant not payable – appeal allowed First Home Owner and Other Home Owner Grants Act 2000 (Qld) s 25Q(3)	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCATA/2024/126.html
Fava v Chief Commissioner of State Revenue [2024] NSWCATAD 363	3 December 2024	REVENUE LAW – Dutiable transaction - First Home Buyers' Assistance Scheme - whether applicant met the "residential requirement in s76(1) of the Duties Act 1997 (NSW) – occupied – principal place of residence – interest – penalty tax.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/363.html
Commissioner of Taxation v Bakarich (No 2) [2024] FCA 1448	16 December 2024	TAXATION – where first and fourth respondents admit contraventions of s 290-50(1) of Sch 1 of the Taxation Administration Act 1953 (Cth) – whether agreed civil penalties for first and fourth respondents appropriate having regard to all relevant matters pursuant to s 290-50(5) – where second and third respondents are defunct corporate entities that have not taken an active role in the proceeding – whether second and third respondents contravened s 290-50(1) – whether proposed penalty for second and third respondents appropriate – whether declarations of contraventions should be made in respect of each respondent	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/1448.html
Islam and Australian Securities & Investments Commission (Taxation and business) [2024] ARTA 88	18 December 2024	SUPERANNUATION – Self Managed Superannuation Fund (SMSF) – where applicant was disqualified from being an approved SMSF auditor – whether applicant a fit and proper person – whether applicant failed to carry out or perform adequately and properly the duties of an approved SMSF auditor –	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/ARTA/2024/88.html

Citation	Date	Headnote	Link
		whether breach of auditing standards – whether disqualification order appropriate - specific and general deterrence – protection of public – integrity of superannuation system - decision under review affirmed	
Smith and Commissioner of Taxation (Taxation and business) [2024] ARTA 49	19 December 2024	TAXATION – income tax – ordinary income - taxpayer burden of proof - deposits of proceeds from cattle sales and other deposits into joint personal bank account controlled by taxpayer and his wife – intermingling of business with personal monies – whether the taxpayer's raised issues outside the grounds of objection – evasion – administrative penalties – statutory interest charge – late request for adjournment – objectives of the *Administrative Review Act 2024* (Cth).	http://classic.austlii.edu.au/au/cases/cth/ARTA/2024/49.html
6 DOUBLEBAR PTY LTD ACN 627 973 246 AS TRUSTEE FOR THE 6 DOUBLEBAR TRUST ABN 27 264 911 230 [2024] ACAT 94; 4 BLOODFINCH PTY LTD ACN 627 969 813 AS TRUSTEE FOR THE 4 BLOODFINCH TRUST ABN 46 501 073 014 v COMMISSIONER FOR ACT REVENUE (Administrative Review) [2024] ACAT 9	20 December 2024	ADMINISTRATIVE REVIEW – stamp duty payable by two purchasers on two transactions for the purchases of two allegedly undervalued properties – sections 20 and 24 of the Duties Act 1999 – whether the transactions should be aggregated – transactions should not be aggregated – consideration of the preferred dutiable values of the properties – consideration of whether there is a tax default and any penalty – interest payable is not within tribunal's jurisdiction	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2024/94.html
Jemag Pty Ltd ATF The Nawar Family Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 392	23 December 2024	TAXES AND DUTIES – Surcharge land tax – discretionary trust – whether foreign persons were excluded as a beneficiary under the terms of the trust deed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/392.html
Siltech PMR Pty Limited and Commissioner of Taxation (Taxation and business) [2025] ARTA 26	7 January 2025	TAXATION – GOODS AND SERVICES TAX – whether silver bangles/bracelets, electrical nodes and silver foil are 'precious metals' under s 195 of the A New Tax System (Goods and Services Tax) Act 1999 – whether 'in an investment form' – decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/26.html
Wang v Chief Commissioner of State Revenue [2025] NSWCATAD 17	7 January 2025	TAXES AND DUTIES — Land tax — Liability — concession for unoccupied land intended to be the principal place of residence TAXES AND DUTIES — Administration — Interest — no remission	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/17.html
Benson Healthcare Enterprises Pty Ltd and	15 January 2025	PRACTICE AND PROCEDURE – Extension of time to lodge application for	https://www.austlii.edu.au/cgi-

Citation	Date	Headnote	Link
Commissioner of Taxation (Practice and Procedure) [2025] ARTA 19		review of objection decision – factors to be taken into account – explanation for delay – whether arguable case – procedural fairness and public interest - Cash Flow Boost – Scheme - Tax agent dispute with Tax Practitioners Board – Administrative Review Appeals Act 2024 (Cth), s 19	bin/viewdoc/au/cases/cth/ARTA/2025/19.html
T & A Skills Care Service Pty Ltd v Chief Commissioner of State Revenue [2025] NSWCATAD 18	15 January 2025	TAX AND REVENUE – land tax – primary production exemption – onus of proof not satisfied	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/18.html
Value Marketing QLD Pty Ltd v Commissioner of State Revenue (Review and Regulation) [2025] VCAT 34	15 January 2025	Review and Regulation List – Payroll Tax Act 2007 (Vic), ss 32(2)(b)(iii), 32(2)(d)(iii) and 79 – Exceptions to contractor provisions for door-to-door sales of goods and services provided for 90 days or less during a financial year – Scope of door-to-door sales exception – Evidentiary burden on taxpayer – Whether discretion should be exercised to de-group applicant and commonly controlled company (since deregistered) – Payroll tax assessments confirmed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2025/34.html
Roofing Services Queensland Pty Ltd ATF Roofing Services Qld Trust v The Commissioner of State Revenue t/as Office of State Revenue [2025] QCAT 604	17 January 2025	TAXES AND DUTIES – PAYROLL TAX – LIABILITY TO TAXATION – GROUPING OF EMPLOYERS – Where Commissioner assessed payments to various sub-contractors as taxable wages – conceded that the contractors were independent contractors and not employees – exemptions under s 13B(2)(b)(iii) and s 13B(2)(c)(iii) of the Payroll Tax Act 1971 (Qld) disallowed – Where respondent sought review of Commissioner's decision to disallow objection against assessment	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2025/604.html
XL Retail Services Pty Ltd v Chief Commissioner of State Revenue [2025] NSWCATAD 22	17 January 2025	REVENUE LAW - State taxes - payroll tax -employment agency contract - services "for the client" - "in and for" the conduct of client's business - cleaning services - trolley collection services REVENUE LAW - assessment - reassessment - payroll tax return - chain of "on-hire" - reliance on legal interpretations and assessment practices – ruling PTA 027 REVENUE LAW - penalties - reasonable care - interest - market rate – remission ADMINISTRATIVE LAW - reviewable decision - correct and preferable decision - Civil and Administrative Tribunal	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/22.html

Citation	**Date**	**Headnote**	**Link**
XGDM and Commissioner of Taxation (Taxation and business) [2025] ARTA 57	24 January 2025	TAXATION – application for review of an objection decision – Commonwealth Superannuation Scheme – excess non-concessional contributions tax – general transfer balance cap – calculation of total superannuation balance – Lump Sum method – Transfer Value method	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/57.html
Body by Michael Pty Ltd and Industry Innovation and Science Australia (Taxation and business) [2025] ARTA 44	30 January 2025	*TAXATION – Research and development tax offset – registration of activities relating to development of an integrated 'six pillars' program and an associated app – Whether any activities were "core R&D activities" or "supporting R&D activities" – Meaning of "outcome cannot be known or determined in advance" – Meaning of "based on principles of established science" – Whether there is a necessity for documentary evidence – Whether there is a necessity for contemporaneous evidence – Whether Applicant's activities excluded as "research in social sciences, arts or humanities" – Meaning of "social sciences" – Analysis of expert evidence – GENERAL – use of artificial intelligence at the Tribunal*	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/ARTA/2025/44.html
Commissioner of Taxation v Liang [2025] FCAFC 4	31 January 2025	TAXATION – appeal from single judge decision quashing decision of the Administrative Appeals Tribunal to affirm objection decision made by Commissioner – where amount of unexplained deposits received by a trust assessed as ordinary income – where taxpayers' evidence that the deposits were loans or equity contributions from taxpayers' parents was rejected by the Tribunal – whether taxpayers discharged their onus of proof under s 14ZZK of the Taxation Administration Act 1953 (Cth)	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/4.html
Kheireddine v Chief Commissioner of State Revenue [2025] NSWCATAD 31	31 January 2025	REVENUE LAW – Dutiable transaction - First Home Buyers' Assistance Scheme - whether applicant met the residential requirement in s76(1) of the Duties Act 1997 (NSW) – occupied – principal place of residence – interest – penalty tax.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/31.html
YZDZ and Commissioner of Taxation (Taxation) [2025] ARTA 73	31 January 2025	TAXATION – CASH FLOW BOOST – eligibility for cash flow boost – pay as you go withholding (PAYGW) – corporate entity supporting medical specialist – whether applicant and or associates or agents entered into or carried out a scheme or part of a scheme for the sole or dominant purpose of increasing its	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/73.html

Citation	Date	Headnote	Link
		entitlement to cash flow boost – decision affirmed	
Nishaharan v Chief Commissioner of State Revenue [2025] NSWCATAD 35	5 February 2025	TAXES AND DUTIES – Land tax – Exemption – Unoccupied land intended to be the owners' principal place of residence – Whether the owners are entitled to have their actual use and occupation of other land taken into account for the purposes of the principal place of residence exemption	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/35.html

4. Federal Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Superannuation (Objective) Bill 2023	16/11	19/3	20/3	28/11	10/12
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11	9/10	10/10		
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11	9/10	10/10		
Taxation (Multinational—Global and Domestic Minimum Tax) 2024	4/7	22/8	22/8	26/11	10/12
Taxation (Multinational—Global and Domestic Minimum Tax) Imposition 2024	4/7	22/8	22/8	26/11	10/12
Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) 2024	4/7	22/8	22/8	26/11	10/12
Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024	12/9	10/10	18/11	28/11	10/12
Treasury Laws Amendment (Tax Incentives and Integrity) 2024	28/11				

4.2 Rules on operative aspects of global minimum tax

A legislative instrument has been introduced to implement the domestic framework for a multinational top-up tax, aligning with Pillar Two of the OECD/G20's Two Pillar Solution. Under the OECD Global Anti-Base Erosion (GloBE) Rules, multinational enterprises (**MNE**s) are required to meet a global minimum tax rate of 15%. This is achieved by identifying low-taxed income within an MNE group, allowing parent or other jurisdictions to claim taxing rights over that income. Australia also imposes a domestic top-up tax on entities with an effective tax rate below the 15% global minimum.

In December 2024, three Bills were enacted to implement the global and domestic minimum tax rules in Australia. The Taxation (Multinational—Global and Domestic Minimum Tax) Rules 2024 outlines how to compute and allocate GloBE Income or Loss, Adjusted Covered Taxes, and applies to investment and tax-transparent entities. It also includes safe harbour provisions and transitional measures for MNE Groups that are newly subject to the *Taxation (Multinational—Global and Domestic Minimum Tax) Act 2024*. The instrument ensures that future OECD guidance can be incorporated effectively.

The new tax rules are applied retroactively from 1 January 2024, in line with the start date set by the OECD's Two Pillar Solution.

w https://www.legislation.gov.au/F2024L01740/asmade/text

4.3 ATO rental bond data matching

The ATO will acquire rental bond data from state and territory rental bond regulators bi-annually for the 2023–24 financial year through to the 2025–26 financial year. The data collected under the program, which includes individual client details, managing agent identification details, and rental bond transaction details, will assist the ATO in identifying taxpayers who fail to meet their reporting and lodgment obligations.

w https://www.legislation.gov.au/C2025G00006/latest/text

4.4 Build-to-rent legislative instrument

On 18 December 2024, the Treasurer made the *Income Tax Assessment (Build to Rent Developments) Determination 2024*. The instrument sets out the requirements for a dwelling to be considered an 'affordable dwelling' for the Build to Rent (**BTR**) development tax concessions.

To be an 'affordable dwelling':

1. the rent payable must be no more than 74.9% of the market value of the right to occupy the dwelling; and
2. the dwelling must be tenanted, or available to be tenanted, to one or more of the following:
   (a) a single adult tenant, with a taxable income less than 120% of average annual earnings;
   (b) 2 or more adults with no dependent children, with a combined taxable income less than 130% of average annual earnings, or
   (c) one or more adults and one or more dependent children, with a combined taxable income less than 140% of the average annual earnings.

'Average annual earnings' means the amount of the full-time adult average weekly ordinary time earnings, for the most recent period for which an amount has been published by the Australian Statistician, multiplied by 52.

Eligibility for the concessions is assessed when various events occur, including a lease being entered into, a lease being renewed, or changes in household composition after the lease has been entered into or renewed.

The concessions for eligible dwellings include:

1. an accelerated deduction of 4% for capital works relating to BTR developments; and
2. a concessional final withholding tax rate of 15% on eligible fund payments (amounts referrable to rental income and capital gains from the BTR development).

The instrument takes effect on 1 January 2025.

w https://www.legislation.gov.au/F2024L01729/asmade/text

4.5 Announced changes to philanthropic giving

On 5 December 2024, The Hon Dr Andrew Leigh MP, Assistant Minister for Competition, Charities and Treasury, Assistant Minister for Employment, announced reforms to tax deductibility rules for donations. The $2 minimum threshold will be removed to encourage small contributions, including rounding up purchases at checkout.

Ancillary funds will be renamed ‘giving funds’. These funds are designed to facilitate charitable giving by holding and investing donations before distributing them to eligible charities.

Currently, private ancillary funds must distribute at least 5% of their net assets annually, while public ancillary funds must distribute at least 4%, but proposed reforms may increase these rates and allow distributions to be spread over three years for greater flexibility in funding larger projects.

w https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/supporting-philanthropic-giving

4.6 New AML/CTF due diligence and reporting obligations

The *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* received Royal Assent on 10 December 2024 and introduces significant changes for accountants and tax professionals. From 31 March 2026, AML/CTF obligations will apply to professional service providers, including accountants and trust and company service providers. Key new compliance obligations for from 31 March 2026 include:

1. Customer due diligence (CDD) – Accountants must verify client identities, assess risks, and conduct ongoing monitoring for suspicious activity.
2. Reporting obligations – Accountants must report suspicious matters, large cash transactions, and international fund transfers to AUSTRAC.
3. AML/CTF programs – Firms must implement risk-based AML/CTF policies, including staff training and independent reviews.
4. Record-keeping – Transaction records and CDD documentation must be retained for at least seven years.
5. Tipping off restrictions – It will be an offence to inform clients about AML/CTF investigations.

The Act also updates the definition of 'qualified accountant' to include members of the Institute of Public Accountants.

Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7243

5. State legislation

5.1 Amendments to various NSW revenue legislation

On 2 December 2024, the *Revenue, Fines and other Legislation Amendment Act 2024* (NSW), which amended various State revenue legislation, received assent.

The amendments to the *Duties Act 1997* (NSW) introduced several key changes. One provides an exemption from duty for a declaration of a bare trust if the transfer of dutiable property to the trust is exempt under section 274. It also extends the duty exemption in cases of a relationship breakdown to include a person's legal representative after death.

The *Land Tax Management Act 1956* (NSW) amendment clarifies that the reduction in land value for flats on mixed-use land does not apply if the land is owned by a person acting as trustee of a special trust.

The *Payroll Tax Act 2007* (NSW) amendments include a change to the anti-phoenixing provisions by extending the definition of "former entity" to corporations involved in deeds of company arrangements. It also expands the rebate for general practitioner services covered by the Department of Veterans' Affairs, aligning them with bulk-billing thresholds.

w https://legislation.nsw.gov.au/view/pdf/bill/aac3b3d4-38cd-4243-9d42-48ff7d182405?utm_medium=oss&utm_source=psc&utm_campaign=202412_rlfaa

5.2 QLD election commitments bill

The *Revenue Legislation Amendment Bill 2024* (Qld) has been introduced which proposes several key changes. These changes include:

1. Transfer Duty First Home New Home Relief: Full transfer duty relief for eligible first home buyers purchasing new homes or vacant land (to build a home) will be available starting 1 May 2025. This applies to the extent that the property is used as their home;
2. Transfer Duty Home Concessions – Partial Rent of Property: The Bill amends the Duties Act to allow recipients of home concessions (home, first home, and first home vacant land) to lease part of their property during the one-year occupation period without losing the full benefit of the concessions. This change applies to leases starting 6 December 2024; and
3. Payroll Tax Exemption for General Practitioners: The Bill amends the *Payroll Tax Act 1971* (Qld) to exempt certain wages paid by medical practices to general practitioners from payroll tax and the mental health levy. This exemption applies to relevant wages paid from 1 December 2024 and will be retrospective. The terms "medical practice" and "general practitioner" are defined within the amendments.

w https://www.legislation.qld.gov.au/view/whole/html/bill.first/bill-2024-053

6. Rulings

6.1 Division 7A and loan guarantees

On 11 December 2024, the ATO published *Draft Taxation Determination* TD 2024/D3 regarding the application of section 109U of the ITAA 1936 under Division 7A. TD2024/D3 addresses whether section 109U applies exclusively to arrangements where a private company guarantees a loan to another private company.

Explanation of the requirements in section 109U

Section 109U addresses situations where a private company guarantees a loan made by another entity to a third party (target entity). This prevents tax avoidance through arrangements where payments or loans are channelled via entities with insufficient distributable surpluses.

Guaranteeing a loan

The first requirement, under paragraph 109U(1)(a), is that a private company must provide a guarantee for a loan made by another entity, known as the "first interposed entity." This guarantee can include providing security for the loan. The law does not limit the type of entity receiving the guarantee, which could be a related or unrelated private company, a public company, or a bank.

Clear purpose of the arrangement

Paragraph 109U(1)(b) involves what is called the "reasonable person test." When looking at all the circumstances, it must be clear that the main reason for the private company providing the guarantee was to create an arrangement where money or benefits flow to the target entity. This is intended to ensure that the law applies only to schemes designed to pass private company funds to shareholders or their associates.

Payment or loan to the target entity by a private company

Paragraph 109U(1)(c) requires that the money or loan ultimately reach the target entity from a private company. This can happen in two ways:

- in straightforward arrangements (subparagraph 109U(1)(c)(i)), the entity receiving the guarantee must itself be a private company that directly pays or loans money to the target entity; or
- in more complex arrangements with multiple entities involved (subparagraph 109U(1)(c)(ii)), the final entity providing the payment or loan must be a private company. However, the entity receiving the original guarantee can be any kind of entity, such as a bank or public company.

Exceeding distributable surplus

For section 109U to apply, paragraph 109U(1)(d) requires that the payment or loan to the target entity is greater than the private company's distributable surplus. This condition makes sure that any deemed dividend reflects the private company's actual ability to distribute profits.

How the deemed dividend is calculated

If all the above conditions are met, section 109U treats such arrangements as if the private company directly paid or loaned the money to the target entity. The Commissioner will determine the amount of the deemed payment under section 109V. This amount depends on the structure of the arrangement and how much distributable surplus the private company has.

Determination

The determination differentiates between direct and multi-entity arrangements under section 109U:

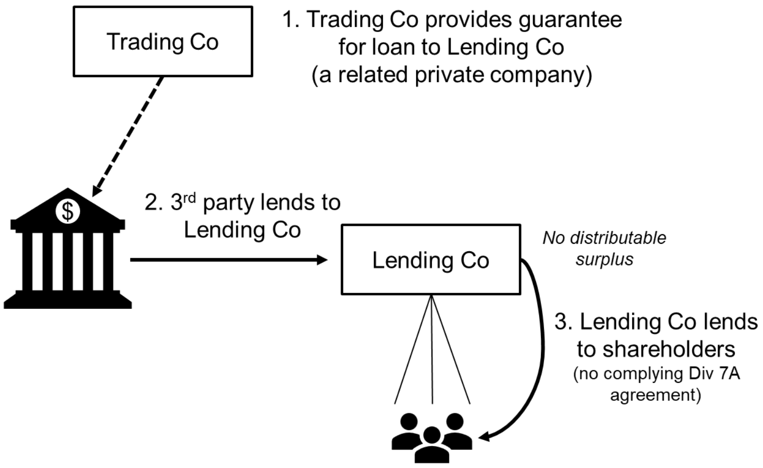
1. **direct arrangements (subparagraph 109U(1)(c)(i)):** The first interposed entity must be a private company making a loan directly to the target entity; and
2. **multi-entity arrangements (subparagraph 109U(1)(c)(ii)):** The first interposed entity can be any entity, but the entity ultimately paying or lending to the target entity must be a private company.

TD2024/D3 confirms that section 109U does not require the first interposed entity receiving the guarantee to being a private company. It can be any entity, including public entities such as banks. However, the provision requires that the entity ultimately making the payment or loan to the "target entity" must be a private company. Section 109U applies only if all other requirements, including the "reasonable person test" and the insufficient distributable surplus condition, are met.

The ATO will focus its compliance efforts on high-risk arrangements that demonstrate artificial or contrived elements, particularly those attempting to circumvent Division 7A. This includes cases involving private companies with no distributable surplus engaging in questionable transactions.

Example and Diagram

TD2024/D3 includes an example where a private company guarantees a loan from a public company (bank) to another private company, which then transfers funds to a shareholder for personal use.



The example demonstrates how section 109U deems the guarantor (Trading Co) to have made a payment to the shareholder, resulting in a deemed dividend for the shareholder.

TD2024/D3 was open for comment until 31 January 2025. When finalised, it is proposed that it will apply to years of income commencing both before and after its date of issue.

TIP – the ATO has also published a Taxpayer Alert 2024/2 regarding such arrangements (see item 7.1 of these Tax Training Notes).

ATO reference *TD 2024/D3* w https://www.ato.gov.au/law/view/document?docid=DXT/TD2024D3/NAT/ATO/00001

6.2 Thin capitalisation – third party debt test

On 4 December 2024, the ATO published Draft Taxation Ruling TR 2024/D3, providing detailed guidance on the third party debt test (**TPDT**) under Subdivision 820-EAB of the ITAA 1997. The TPDT was introduced as part of the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Act 2024* (Cth). This test replaces the arm's length debt test for general class investors and financial entities, streamlining the framework for determining deductible debt. Designed to ensure integrity in financing arrangements, the TPDT focuses on genuine Australian business activities, particularly for industries like property and infrastructure.

Purpose and scope

The TPDT limits an entity's debt deductions to those attributable to debt interests issued to unrelated parties and used exclusively for Australian operations. It seeks to prevent multinationals from exploiting debt deductions through complex arrangements involving foreign entities or assets. Notably, the TPDT was designed with asset-heavy industries in mind, recognising their unique financing needs due to long investment horizons and depreciation cycles.

Key conditions of the TPDT

To comply with the TPDT, debt interests must meet the following conditions:

1. Unrelated parties: Debt must be issued to entities that are not associate entities of the issuer, and the debt interest must not be held by associate entities during the income year.
2. Recourse limited to Australian assets: The holder of the debt must only have recourse to Australian assets or membership interests in Australian entities, with certain exclusions such as credit support rights.
3. Use of proceeds: The proceeds of the debt issuance must be used substantially for commercial activities in connection with Australia. Activities excluded include overseas operations, investments in foreign-controlled entities, and distributions to investors.
4. Australian entity status: The issuer of the debt must be an Australian entity throughout the relevant income year.

Recourse and credit support rights

A critical feature of the TPDT is the restriction on recourse to assets. Debt holders can only claim against Australian assets, defined as resources substantially connected to Australia, such as real property, machinery, or cash used in Australian operations. Rights under guarantees, securities, or credit support are generally prohibited unless they relate to specific Australian CGT assets, including land, moveable property, or renewable energy infrastructure. Even in these cases, exceptions do not apply if the rights allow recourse against foreign associate entities.

Practical applications

The ruling provides examples to illustrate compliance and non-compliance scenarios. For instance, debt backed by Australian real property typically meets the TPDT requirements, while debt used to fund indirect acquisitions of foreign subsidiaries or trust distributions to offshore investors does not. The ruling also explains how minor or insignificant assets, such as shares with nominal value, are disregarded when determining compliance.

Compliance requirements

Entities must keep detailed records to demonstrate that proceeds are used in line with the TPDT conditions. If an asset funded by debt proceeds is sold, the entity must reassess the usage of the remaining proceeds to ensure continued compliance.

When finalised, TR 2024/D3 will apply retrospectively and prospectively.

TIP – the ATO has also published draft Practical Compliance Guideline PCG 2023/D3 regarding the restructures and the thin capitalisation and debt deduction creation rules.

ATO reference *TR 2024/D3*
w https://www.ato.gov.au/law/view/document?docid=DTR/TR2024D3/NAT/ATO/00001

6.3 Superannuation guarantee – extended meaning of employee

On 11 December 2024, the ATO has updated *Taxation Ruling* TR 2023/4, which concerns when an individual is an 'employee' of an entity for the purposes of PAYG withholding and superannuation guarantee, as a result of comments received on the ruling. The updates includes a compendium of responses to comments received.

The classification of a worker as an employee for the purposes of SGAA is not solely dependent upon the existence of a common law employment relationship.

Subsections 12(2) to 12(10) of the SGAA list further persons who are also treated as employees. These subsections deem persons who fall within them to be employees for the purposes of the SGAA, even if they are not common law employees. The deemed employees for superannuation purposes include:

1. a person who is entitled to payment for the performance of duties as a member of an executive body of a body corporate (subsection 12(2));
2. a person who works under a contract that is wholly or principally for the labour of the person (subsection 12(3));
3. a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills (paragraph 12(8)(a));
4. a person who is paid to provide services ***in connection with*** any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills (subsection 12(8)(b)); and
5. a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast (subsection 12(8)(c)).

Under subsection 12(3), a person who works under a contract that is wholly or principally for their labour, will be an employee of the other party to the contract.

As expressed by the Full Federal Court in *Moffet*, for subsection 12(3) to apply, 3 elements must be satisfied:

1. firstly, there must be a contract
2. secondly, the contract must be wholly or principally 'for' the labour of a person, and
3. thirdly, the person must 'work' under that contract.99

Is there a contract?

This first element of subsection 12(3) (that is, that there is a contract), requires there be a bilateral exchange of promises of labour and payment between two sides of the contract.

A contract can be bilateral even though there are more than 2 parties to the contract. The superannuation regime cannot be circumvented by the simple device of forming a contract which names more than 2 parties.

Does the person work under the contract?

The concept of 'works under a contract' is one of personal exertion and personal effort.

Subsection 12(3) only applies where the party providing the labour (that is, the worker) is a natural person who was a party to the contract in his or her individual capacity and not in any other capacity such as a trustee of a personal services trust or a partner in a partnership. Subsection 72(1) does not operate to deem a partnership or other entity to be a natural person for the purposes of being treated as an employee under subsection 12(3).106

Is the contract wholly or principally 'for' the labour of the person?

Whether the contract is wholly of principally 'for' the labour of a person, is to be assessed from the perspective of the engaging entity and is to be determined by reference to the terms of the contract.

The word 'principally' assumes its commonly understood meaning, that is, 'chiefly' or 'mainly', and 'labour' includes mental and artistic effort as well as physical toil.

A contract will not be wholly or principally for the labour of a person where:

1. the contract leaves the worker free to do the work themselves or to employ another person to carry it out (that is, the contract contains a right to delegate, subcontract or assign the work); or
2. the contract is for the provision or production of a result and the worker is paid for that result (that is, results contracts); or
3. the contract is principally for a benefit other than the labour of the worker (for example, the contract is principally for the provision of equipment).

Changes to ruling

The word "employer" has been changed to "engaging entity" to reflect that superannuation guarantee may be payable under the extended definition of "employee", even where the worker is not a common law employee. Further clarification has been provided in paragraph [88] of TR 2023/4 as to when an independent contractor at common law may be a deemed an employee under section 12 of the *Superannuation Guarantee (Administration) Act 1992* (**SGAA**).

The updated ruling includes a new paragraph 129 in relation to the extended definition of employee for superannuation guarantee purposes, which states:

> *Payments for services provided in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast – paragraph 12(8)(c)*
>
> *129. A person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment under paragraph 12(8)(c). The terms of paragraph 12(8)(c) do not require the person to perform in such a broadcast using their physical or personal skills.*

One of the comments in the compendium requested that the ruling should clarify the application of superannuation guarantee to directors (for example, non-executive directors on the board of a corporate entity who contract with a company for director's services via an interposed company or family trust. The ATO responded to this comment in the compendium. The ATO clarified that TR 2023/4 does not directly address situations involving personal service entities (PSEs). In cases where a company engages a PSE to provide a director's services, the company is obligated to pay the PSE, not the individual director. Therefore, the director is not entitled to superannuation guarantee contributions from the company, as the individual is not considered an employee under superannuation guarantee laws in such circumstances.

COMMENT – this ATO comments concerning directors contracting through an entity relies on the decision of the Full Court in *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48, which relates to section 12(3) of the SGAA.

ATO reference *TR 2023/4A1* – Addendum
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20234A1/NAT/ATO/00001
ATO reference *TR 2023/4EC2*
w https://www.ato.gov.au/law/view/document?docid=CTR/TR2023EC4-2/NAT/ATO/00001

6.4 Superannuation and non-arm's length income (NALI)

On 27 November 2024, the ATO updated *Law Companion Ruling* LCR 2021/2 and *Taxation Ruling* TR 2010/1. The draft updates to the rulings reflect the amendments made to the NALI rules in section 295-550 of ITAA 1997 by Schedule 7 to the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024* (Cth) (**2024 amendments**).

LCR 2021/2

This draft Ruling clarifies how the 2024 amendments operate in a scheme where the parties do not deal with each other at arm's length and the trustee of a small complying superannuation fund, with no more than 6 members including a SMSF, incurs non-arm's length expenditure, or where expenditure is not incurred, in gaining or producing ordinary or statutory income.

The 2024 amendments apply to income derived and a loss, outgoing or expenditure that is incurred, or not incurred but might have expected to be incurred, in the 2018–19 income year and later income years, superseding amendments made in 2019.

The 2024 amendments modified the calculation of the non-arm's length component for an income year for small complying superannuation funds. Now, the non-arm's length component for an income year is the lesser of:

1. the sum of each amount of NALI, other than NALI as a result of a general expense that is a non-arm's length expense less deductions attributable to that NALI, and each amount of NALI as a result of a general expense that is a non-arm's length expense; and
2. the fund's taxable income for the year less assessable contributions plus any deductions to the extent they are attributable to those contributions.

TR 2010/1

In this draft Ruling, the Commissioner removed the compliance approach that was proposed in TR 2010/1DC for the 2018–19 and later income to determine whether a contribution has been made, where the NALI rules apply. The Commissioner considers that no advantage should be obtained through non-arm's length dealings that have the effect of circumventing the operation of the contribution cap provisions, and, as such, from the date of this draft Ruling, no compliance approach will apply. For arrangements that occurred between 28 July 2021 and the date of this draft Ruling, application of the draft compliance approach will be considered by the Commissioner on a case-by-case basis on application by a trustee of a fund.

ATO reference *Law Companion Ruling* LCR 2021/2
w https://www.ato.gov.au/law/view/document?DocID=DCC/LCR20212DC1/NAT/ATO/00001
ATO reference *Taxation Ruling* TR 2010/1
w https://www.ato.gov.au/law/view/document?docid=DTC/TR20101DC2/NAT/ATO/00001

6.5 99B trust income and 'resident taxpayer' tests

On 27 November 2024, the ATO finalised Taxation Determination TD 2024/9. This determination was previously issued as *Draft Taxation Determination* TD 2024/D2 (see our July 2024 Tax Training Notes).

The ATO has also published a compendium showing some of the feedback received from public consultation and the ATO responses. Some of the key changes are outlined below.

Application to resident trusts

The finalised ruling introduces a new example (Example 7) to clarify how section 99B of the ITAA 1936 applies when a non-resident trust becomes an Australian-resident trust. While the broader application of section 99B to Australian-resident trusts is outside the scope of this determination, this example aims to provide practical guidance in such situations.

The new Example 7 is as follows:

> ***Example 7 – Change in residence of trust not relevant***
> *47. A non-resident trust is established in 1999. The settled property comprises shares in a Canadian company. The beneficiaries of the trust include the trustee's child who is an Australian resident.*
>
> *48. On 28 June 2019, the trustee resigns and appoints an Australian resident trustee. As the trust became an Australian resident, section 855-50 of the ITAA 1997 operates to give the Canadian shares a cost base equivalent to the market value on the date of change in residency. In 2020, the trustee sells the shares and distributes all proceeds to the Australian beneficiary.*
>
> *49. The distribution represents, and is attributable to, the proceeds of sale of the shares. For the purposes of the hypothetical resident taxpayer tests, the acquisition and disposal of the shares is relevant and the cost base of the shares at the time they were acquired is a relevant tax attribute. The change in residence of the trust is not relevant.*

Definition and clarification of corpus

A significant update addresses the definition of 'corpus'. The ruling clarifies that corpus refers to trust capital, which is represented by the trust's assets, excluding income that has been accumulated. This was an important point of clarification, as previous language caused some confusion. The updated paragraphs 19 and 20 clearly indicate that, when relying on the corpus exception in section 99B(2), the amount assessed under section 99B(1) will not be reduced by any amounts attributable to accumulated income.

Evidencing corpus and accounting treatment

The ruling reinforces that while trust accounts and distribution statements can help demonstrate that a distribution represents corpus, they are not conclusive evidence. Example 4 highlights that simply debiting an asset revaluation account is insufficient to establish a distribution as corpus. Moreover, the updated guidance emphasises that taxpayers must establish that the distributed amount is not attributable to accumulated income or other assessable amounts by using a comprehensive tracing method.

Hypothetical resident taxpayer tests

The hypothetical resident taxpayer tests received multiple clarifications. Paragraph 32 explains that the CGT discount is irrelevant in this context because it is not available to all resident taxpayers. Concessions granted to executors under section 118-195 of the ITAA 1997 cannot be taken into account. Example 1 was refined to make it clear that no part of the proceeds from the sale of a pre-CGT asset is included in the assessable income of a hypothetical resident taxpayer.

Treatment of capital asset acquisitions and tracing requirements

The ruling places significant emphasis on tracing the source of trust distributions to determine if an amount represents assessable income. Example 8 was expanded to illustrate this tracing process, with particular focus on identifying the ultimate source of an amount. The finalised language clarifies that tracing requires examining not just the most recent transaction but looking at the full history of how the property became a trust asset.

New examples and expanded guidance

Several new examples were added to address common scenarios. Example 2 now provides more detailed guidance on distributions from non-resident deceased estates, including how the cost base is determined depending on the deceased's residency status. Example 7 focuses on the initial cost base setting for a non-resident trust that becomes a resident trust, while Example 6 clarifies how proceeds from the sale of a gifted residential property are treated.

Clarification on CGT provisions

The final ruling reiterates that when applying hypothetical resident taxpayer tests, the character of an amount, such as whether it is a capital gain, affects its treatment. New explanations were added to ensure taxpayers understand that capital gains derived from trust property do not automatically fall under the corpus exception unless supported by sufficient evidence.

TIP – this PCG should be read in conjunction with PCG 2024/3.

ATO reference *TD 2024/9*
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20249/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=CTD/TD2024EC9/NAT/ATO/00001

6.6 CGT event K6

On 11 December 2024, the ATO issued a draft update to *Taxation Ruling* TR 2004/18.

This taxation ruling clarifies the application of CGT event K6 under section 104-230 of the ITAA 1997. CGT event K6 is designed to address capital gains arising from the disposal of pre-CGT shares or trust interests when the underlying property includes significant post-CGT property. CGT event K6 can result in a capital gain (but not a capital loss) if certain CGT events happen to pre-CGT shares in a 'private' company or pre-CGT interests in a 'private' trust where the market value of the entity's post-CGT property is at least 75% of its net value (**75% test**).

Attribution in multi-tier structures

Paragraphs 35 to 35B clarify how capital proceeds should be attributed in multi-tier structures. The ruling highlights that it is generally reasonable to attribute the capital proceeds to the underlying property rather than to the interests held in lower-tier entities. This approach ensures that the pre- and post-CGT status of the underlying property is properly reflected in the capital gain calculation. However, in limited situations, such as when the lower tier company's shares have no value despite the underlying post-CGT property increasing in value, it may not be reasonable to use this approach, as other factors may prevent that increase in value of underlying property in the lower tier company from affecting the capital proceeds received in relation to the higher tier entity. This is further explained at new paragraphs 103A to 130D.

Paragraphs 146 to 149D provide examples illustrating a different calculation method being used to reflect the complexity of multi-tiered ownership structures while ensuring a reasonable outcome.

The draft is open for public comment until 14 February 2025.

The changes will take effect once the addendum is finalised. For periods before 11 December 2024, entities can choose to rely on either the original wording of the ruling or the revised wording introduced by the addendum.

ATO reference *TR 2004/18*
w https://www.ato.gov.au/law/view/document?docid=DTC/TR200418DC1/NAT/ATO/00001

6.7 QLD duty – transfer duty home concessions

The Queensland Revenue Office has issued Public Ruling DA000.20.2 *Concessions for homes—disposal and partial renting on or after 6 December 2024*. This public ruling outlines an administrative arrangement that allows recipients of home, first home, or vacant land concessions under the *Duties Act 2001* (QLD) to retain their concession benefits, even if they do not meet the usual requirements.

Under the Duties Act, one of the key requirements for retaining these concessions is that the recipient cannot lease or grant exclusive possession of the property within one year after moving in. Failure to meet this requirement typically leads to reassessment and a reduction or loss of the concession. However, the administrative arrangement now stipulates that the Commissioner will not reassess the concession if the recipient leases or grants exclusive possession of part of the property within the one-year period, provided the disposal occurs on or after 6 December 2024.

The home concessions under the Duties Act provide relief from transfer duty for the transfer of a home, first home, or vacant land where a first home will be constructed. To qualify for the full benefit, the recipient must occupy the residence within a year of the transfer date and not have held any other residential land or vacant land previously. If a person does not meet the occupancy requirement, the Duties Act allows for reassessment and potential disallowance of the concessions. The new administrative arrangement provides relief from reassessment for disposals that occur within the one-year period, but only for leases or exclusive possession granted to another person.

This change does not affect any other requirements for the home concessions under the Duties Act. The arrangement is retroactive to apply to disposals on or after 6 December 2024, meaning that even if the transfer duty liability for the transaction arose before this date, the administrative arrangement may still apply. It simplifies the process for recipients who may need to lease or grant possession within the one-year period, ensuring they can retain the home concessions without facing reassessment by the Commissioner.

Queensland Revenue Office reference *DA000.20.2*
w https://qro.qld.gov.au/resource/da000-20/

6.8 QLD payroll tax – exemptions for medical practitioners

The Queensland Revenue Office has issued Public Ruling PTAQ014.1.1 *Payroll tax exemption for wages paid to general practitioners* which outlines an administrative arrangement under the *Payroll Tax Act 1971* (Qld) that exempts wages paid or payable by a medical practice to a general practitioner from payroll tax and the mental health levy, effective from 1 December 2024.

The Ruling specifies that wages paid by a medical practice to a general practitioner, as defined under the *Health Practitioner Regulation National Law* (Queensland) and the *Health Insurance (General Medical Services Table) Regulations 2021* (Cth), are exempt from payroll tax and the mental health levy.

The term "medical practice" is defined as a business, other than a hospital, where services typically provided by a general practitioner are offered, either in-person or remotely, such as via telephone. This exemption applies to medical practitioners registered in general practice or those who predominantly provide such services.

The arrangement clarifies that all other provisions of the *Payroll Tax Act 1971* (Qld) and the *Taxation Administration Act 2001* (Qld) remain applicable unless specifically altered by the ruling.

Queensland Revenue Office reference *PTAQ014.1.1*
w https://qro.qld.gov.au/resource/ptaq014-1/

6.9 NSW duty – Revenue NSW contracts for sale of land and transfers guide

Revenue NSW has issued a Contract for Sale of Land Guide offering detailed information on assessing transfer duty for contracts and transfers and providing a checklist to ensure all important factors are considered when making a duties assessment.

The Guide addresses the following:

1. off the plan agreements;
2. contract arrangements involving put and call options;
3. aggregation of dutiable transactions;
4. transfers in conformity/not conformity;
5. variation of contract;
6. novation, nomination and assignment;
7. declaration of trust in a contract for sale;
8. determining the dutiable value;
9. premium property duty;
10. duty exemptions and concessions;
11. surcharge purchaser duty;
12. supporting evidence and audit requirements;
13. lodgement and processing requirements; and
14. cancelled contracts, agreements and transfers.

w https://www.revenue.nsw.gov.au/property-professionals-resource-centre/duties-guides/contracts-for-sale-of-land-and-transfers?result_396764_result_page=1

6.10 NSW duty – grant of options to purchase land and change of beneficial ownership

Revenue NSW has released *Commissioner's Practice Note* CPN 037, detailing the circumstances under which the Chief Commissioner will consider certain common transactions involving the grant of an option to purchase land in New South Wales as subject to duty. It should be read alongside CPN 025: *Change in Beneficial Ownership*.

The grant of an option to purchase land in NSW results in a change in beneficial ownership of dutiable property under section 8(1)(b)(ix) of the Duties Act and is therefore liable to duty.

Under section 8(3) of the Duties Act, a 'change in beneficial ownership' encompasses both the creation of dutiable property and a shift in equitable interest in dutiable property. When an option to purchase land is granted, it results in the creation of dutiable property (the option itself) and grants the option holder an equitable interest in the land.

The legal substance of a transaction or arrangement, rather than its form, is the key factor in determining whether duty applies under the change in beneficial ownership provisions. Not all options automatically create an interest in the underlying property. For example, the grant of a 'put' option alone does not typically incur duty.

CPN 037 states that ,in many cases, an arrangement concerning real property referred to as an 'option' will typically fall into one of the following categories:

1. a put option;
2. a true call option; and
3. a conditional contract to transfer.

Put Option

A simple put option is an arrangement that grants a person who owns (or will own) a property the right to require another party to purchase that property under specified terms. These terms typically include factors such as timing, price, and other conditions. Unlike a call option, a put option provides the right to sell rather than to purchase.

In most cases, the grant of a put option does not result in a change in beneficial ownership of the property, as the option holder and the property owner are the same entity. However, more complex put option structures, such as tripartite arrangements where a third party is given the right to direct the sale of an asset to another party, may involve changes in beneficial ownership. Such cases will be assessed individually based on their specific circumstances.

Call Options and Conditional Contracts

Most agreements referred to as options typically fall into one of two categories: a conditional contract to purchase or transfer dutiable property, or an irrevocable offer to sell for the duration of the option.

A 'true' call option is defined as “an offer, together with a contract that the offer will not be revoked during the time, if any, specified in the option” (*Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127 at [132]).

An option over land in New South Wales that takes the form of an irrevocable offer constitutes dutiable property under section 11(1)(k) of the Duties Act. Entering into such an option arrangement is subject to duty, as it results in a change in beneficial ownership under section 8(1)(b)(ix) of the Duties Act.

In contrast, a conditional contract is an agreement to sell property contingent upon the fulfillment of specified conditions. A conditional contract for the sale of land in New South Wales is liable for duty under section 8(1)(b)(i) as "an agreement for the sale or transfer of dutiable property." However, it is not subject to duty under the change in beneficial ownership provisions of section 8(1)(b)(ix) of the Duties Act.

Dutiable value

Under Section 21 of the Duties Act, the dutiable value of property in a dutiable transaction is the greater of the consideration or the unencumbered value of the property. In the case of granting a call option, the dutiable value will be the greater of the option consideration (which includes fees, payments, legal fees, non-refundable deposits, break fees, and the value of in-kind works) and the unencumbered value of the option. The consideration for granting an option is typically outlined in the option agreement but can also include related documents or arrangements.

If the parties are acting at arm's length, the dutiable value is generally equal to the consideration for the option grant. If not, a valuation may be required.

Revenue NSW reference *CPN 037* w https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/cpn-037-options-to-purchase-land-change-in-ownership

7. Private rulings

Taxpayers cannot rely on private rulings obtained by other taxpayers. Private rulings are not binding on the Commissioner in relation to taxpayers other than the rulee(s) and provide no protection (including from any underpaid tax, penalty, or interest). Additionally, private rulings are not an authority for the purposes of establishing a reasonably arguable position for taxpayers to apply to their own circumstances. For more information on the status of edited versions of private advice and the reasons the ATO publishes them, refer to PS LA 2008/4.

7.1 Passing on GST

Facts

The taxpayer operates a chai tea business in Australia and is registered for GST. The business sells chai tea and associated products, with its chai blends classified as GST-free under Schedule 2, Item 5 of the GST Act. These products consist of raw tea, spices, and other ingredients, rather than processed or powdered chai. Accordingly, GST was not factored into pricing decisions.

For business and wholesale (B2B) sales, the taxpayer has consistently excluded GST, issuing tax invoices without a GST component. These sales were conducted separately from their Shopify website. However, the taxpayer launched an online store using Shopify and mistakenly charged GST on chai tea sales to individual customers, believing these sales were taxable.

After engaging a new tax agent to prepare their income tax return, the taxpayer discovered the error and promptly updated the website to remove GST from individual sales. Tax invoices ceased including GST from that point onward. Despite this correction, GST had been incorrectly charged on certain individual sales between one period, while during other periods, sales were correctly treated as GST-free.

The taxpayer attributes the error to Shopify's complex tax settings, particularly when updating product images and prices, which did not prompt a review of tax coding. The tax agent primarily relied on Xero for BAS preparation and did not regularly check Shopify settings. Although multiple users had access to Shopify, there is no audit log identifying who altered the tax treatment. The taxpayer believes the error was inadvertent.

Supporting documents provided include tax invoices for both individual and B2B sales, evidencing different GST treatments over time, as well as GST reports detailing the inclusion or exclusion of GST. The taxpayer has calculated the GST remitted on individual sales and seeks confirmation that excess GST was not passed on to customers. They also request confirmation of their entitlement to a refund by amending their BAS for the relevant periods.

Question

Is the taxpayer entitled to a refund for excess GST under section 142-10 of the GST Act on the basis that it did not pass on excess GST incorrectly paid?

Ruling

Under Division 142 of the GST Act, a refund of excess GST is generally not allowed if the tax has been passed on to customers. The ATO relied on *GSTR 2015/1*, which states that GST included on a tax invoice is strong evidence that it was passed on. The taxpayer mistakenly classified some chai tea sales as taxable due to a Shopify coding error, leading to GST-inclusive pricing, tax invoices, and BAS reporting.

Although the taxpayer argued that GST was not a pricing factor, the ATO found that prices for B2B and individual customers differed and that GST was included in online sales pricing until the error was corrected. Without clear evidence to the contrary, the ATO concluded that the excess GST was passed on.

ATO reference *Edited Private Advice Authorisation No. 1052317264810* w https://www.ato.gov.au/law/view/document?docid=EV/1052317264810

7.2 GST and subdivision

Facts

The taxpayer and their spouse sought to purchase residential land near the spouse's new employment location to build a home. They initially considered acquiring a smaller parcel but ultimately purchased a larger block in a low-density residential zone. The land was held as tenants in common, with ownership structured through a family trust.

The land included an old house, which the taxpayer and their spouse occupied. To better suit their needs, they decided to subdivide the property into three lots: one retaining the existing house, another designated for a new home, and a third for potential sale. Plans for building a new house were initially drawn up but later abandoned, leading to the sale of the additional lots.

Over time, the taxpayer determined that maintaining the larger property was beyond their physical and financial capacity. Consequently, they opted for a five-lot subdivision, securing council approvals and engaging engineers for the necessary work. Subdivision activities included sewer system design, driveway improvements, and utility connections. Although profit was a factor, the primary motivation was to downsize the property.

By 2022, most construction was completed, and the lots were listed for sale, though not all were sold immediately. The taxpayer managed the sales personally and engaged contractors for various improvements, such as fencing and landscaping. However, they were not registered for GST, nor did they conduct the activities in a manner consistent with a business or enterprise.

The ATO's ruling examined whether the sale proceeds were assessable as statutory income or merely a capital gains realisation and whether GST applied to the lot sales.

Questions

1. Are the proceeds from the sale of the subdivided lots assessable as statutory income, on capital account, or as a mere realisation of a capital asset under the ITAA 1997?
2. Will GST apply to the sale of the subdivided lots under the GST Act?

Ruling

<u>Income tax treatment of sale proceeds</u>

The ATO ruled that the proceeds from the sale of the subdivided lots constitute a mere realisation of a capital asset and are not assessable as statutory income. The taxpayer originally acquired the land for residential purposes, and while a subdivision was later undertaken, this was primarily motivated by a desire to downsize rather than to conduct a profit-making venture. The ATO determined that the taxpayer was not engaged in a business of property development, nor was the subdivision carried out in a commercial or business-like manner. The activities undertaken, such as securing council approvals, engaging engineers, and improving infrastructure, were considered necessary to facilitate the subdivision but did not indicate a business operation. As a result, the proceeds were treated as capital gains.

GST applicability

The ATO ruled that the sale of the subdivided lots was not a taxable supply under the GST Act, meaning no GST was payable. For GST to apply, the taxpayer would need to be carrying on an enterprise, which was not the case here. The subdivision and sale were deemed an isolated transaction rather than part of a broader business activity. The taxpayer was not registered for GST, nor were they required to be, as their activities did not meet the thresholds for conducting an enterprise. Furthermore, the land was originally acquired for private purposes, and the scale of the subdivision was not sufficient to suggest a commercial venture. Consequently, the sale of the lots was not subject to GST.

ATO reference *Edited Private Advice Authorisation No. 1052317264810*
w https://www.ato.gov.au/law/view/document?docid=EV/1052317264810

7.3 Entitlement to apply margin scheme

Facts

The taxpayer is an Australian statutory corporation and a government agency established under specific legislation. It is registered for GST and has a statutory mandate to oversee the development of a designated precinct, within which it owns land intended for future residential development.

The land in question is currently subject to a commercial lease generating income, and the taxpayer is engaged in an enterprise of leasing commercial property. The taxpayer was registered as the proprietor of each lot through a formal transfer process, executed under legislation that allows land acquisition agreements between government agencies.

The previous owner of the lots was another statutory body, also registered for GST. The transfer of land between the two entities was documented in a Deed of Transfer, which specified that no consideration was payable. The transfer was also recorded as the supply of a GST-free going concern, with a nominal $1.00 listed for administrative purposes to meet registry requirements.

Historically, the lots were previously owned by the Crown and another statutory entity before being vested in the prior owner through a vesting order. No consideration was payable by the prior owner to the original owners when acquiring the lots. Following legislative changes, the name of the registered proprietor was updated to the prior owner, before ultimately transferring to the taxpayer.

Questions

1. Is the taxpayer entitled to apply the margin scheme in calculating the amount of GST on any taxable supply of the lots under section 75-5 of the GST Act?
2. Is the taxpayer entitled to calculate the margin on any taxable supply of the lots under subsection 75-11(6) of the GST Act?

Ruling

The ATO determined that the taxpayer is entitled to apply the margin scheme in calculating the amount of GST on the taxable supply of the lots under section 75-5 of the GST Act. The taxpayer is entitled to calculate the margin on any taxable supply of the lots under subsection 75-11(6) of the GST Act.

Under section 9-5 of the GST Act, a taxable supply must be made for consideration, in the course of an enterprise, within the indirect tax zone, and by a registered entity. The ATO found that the taxpayer's proposed sale of the lots satisfied these criteria, as the sale would involve consideration, be connected to the taxpayer's enterprise, take place in Australia, and be made by a GST-registered entity. Since no other provision of the GST Act rendered the supply GST-free or input-taxed, the sale was considered a taxable supply.

The margin scheme under Division 75 of the GST Act allows taxable supplies of freehold interests in land to be subject to GST on the margin rather than the full sale price. However, subsection 75-5(2) excludes its application if the interest was acquired through an ineligible supply. The ATO examined whether the taxpayer acquired the land through an ineligible supply, considering whether the transfer from the previous owner was a taxable supply under section 9-10. As the transfer was executed through a Deed of Transfer under an agreement between government agencies, rather than a compulsory acquisition or vesting order, it was considered a supply under section 9-10.

Further analysis under subsection 75-5(3) confirmed that none of the exclusions applied, as the transfer was not for consideration, was not an inheritance, did not occur within a GST group, did not involve a joint venture, and was not a GST-free going concern under section 38-325. Consequently, the ATO determined that the taxpayer was eligible to use the margin scheme for the sale of the lots.

Regarding subsection 75-11(6), which governs the margin calculation, the ATO assessed whether the taxpayer’s acquisition met the criteria outlined in paragraphs (a) to (e) of that section. The taxpayer and the previous owner were statutory bodies and thus considered 'associates' under subsection 75-11(8). Since the previous owner was GST-registered at the time of transfer, the supply was not a taxable supply under section 9-5 due to the absence of consideration. The previous owner’s supply was made in the course of an enterprise, satisfying paragraph 75-11(6)(d). As none of the exclusions under subsections 75-11(1) to (5) applied, the taxpayer was required to calculate the margin on any taxable supply of the lots under subsection 75-11(6)(iii), which means using the GST market value of the land at the time that the previous owner acquired the land.

ATO reference *Edited Private Advice Authorisation No. 1052336787365*
w https://www.ato.gov.au/law/view/document?docid=EV/1052336787365

7.4 Non-commercial losses

Facts

The taxpayer was a sole trader and former owner of a short-term accommodation rental business. In November of an unspecified year, the taxpayer and their spouse purchased the business as a going concern, which included land, buildings, and goodwill. The purchase was funded by a bank loan that required the taxpayer to be a joint owner, although their participation in the business was minimal. Instead, all profits were allocated to the spouse, who managed daily operations while the taxpayer maintained full-time employment.

The business faced significant challenges due to COVID-19 lockdowns and restrictions, which resulted in booking cancellations and financial losses. Just before the end of the pandemic, the taxpayer’s spouse was diagnosed with an illness and subsequently passed away. This event left the taxpayer as the sole owner of the business.

Following their spouse’s death, the taxpayer decided to sell the business but continued its operations in the interim with assistance from their adult child. They later sold the business for an amount that covered the value of the property and chattels, including goodwill.

The taxpayer provided financial statements showing a loss for the relevant financial year. However, they did not meet the income requirement under subsection 35-10(2E) of the ITAA 1997, which is necessary to deduct losses from non-commercial business activities.

Questions

Will the Commissioner exercise the discretion in paragraph 35-55(1)(a) of the ITAA 1997 to allow the taxpayer to include to deduct the losses from their cabin rental facility?

Ruling

The ATO determined that the Commissioner would exercise discretion under paragraph 35-55(1)(a) of the ITAA 1997 to allow the taxpayer to deduct the losses from their cabin rental facility.

This decision was based on the taxpayer's unique circumstances, including the impact of COVID-19 restrictions and the resulting financial losses. The Commissioner also recognised that special circumstances beyond the taxpayer's control, such as the illness and passing of their spouse, prevented them from making a tax profit. Consequently, the taxpayer was permitted to offset the business losses against their taxable income for the specified financial year.

ATO reference *Edited Private Advice Authorisation No. 1052327839183*
w https://www.ato.gov.au/law/view/document?docid=EV/1052327839183

7.5 OTE and additional duties of part time workers

Facts

The taxpayer operates a school catering to students with intellectual disabilities. Among its staff are teachers and student support officers (SSOs), who assist with classroom duties and other tasks. The school also provides transport services, collecting students from their homes and returning them at the end of the school day. Each trip includes a "bus assistant" to supervise students.

SSOs are employed under an Enterprise Agreement, which governs pay and conditions for teachers and non-teaching staff. Their primary role is in the classroom, but some also perform additional duties related to student transport, referred to as "bus work." This work is remunerated separately at a casual rate.

Teachers and SSOs may also take on extra hours beyond their contracted agreements, either through ad hoc arrangements or separate contracts. The taxpayer sought clarification on whether these additional hours, including "bus work," constituted ordinary time earnings (OTE) for superannuation purposes under the *Superannuation Guarantee (Administration) Act 1992* (SGAA).

Questions

1. Is the "bus work" performed by part-time SSOs considered OTE within the meaning of the SGAA?
2. Are extra hours worked by part-time SSOs, beyond their contracted hours, considered OTE within the meaning of the SGAA?
3. Are extra hours worked by part-time teachers, beyond their contracted hours, considered OTE within the meaning of the SGAA?

Ruling

The ATO ruled that "bus work" performed by part-time SSOs does not constitute OTE under the SGAA. Similarly, additional hours worked by part-time SSOs beyond their contracted hours were not considered OTE. However, for part-time teachers, extra hours worked beyond their contracted hours do form part of OTE.

The ATO determined that "bus work" was an additional duty separate from classroom responsibilities, paid at a casual rate, and therefore not OTE. Similarly, extra hours worked by part-time SSOs were treated as distinct from ordinary hours due to their ad hoc or separate contractual nature, meaning they did not attract superannuation contributions.

However, extra hours worked by part-time teachers were included in OTE because they formed an extension of their regular work pattern rather than a separate duty. Since these hours were not classified or remunerated differently, they were considered part of ordinary earnings for superannuation purposes.

The ATO relied on *Superannuation Guarantee Ruling SGR 2009/2* for guidance on interpreting OTE and referred to *Quest Personnel Temping Pty Ltd v Commissioner of Taxation* (2005) 144 FCR 402. This case clarified that prescribing a minimum or maximum number of hours does not necessarily define ordinary time, supporting the distinction between regular work patterns (which form OTE) and separately contracted or ad hoc hours (which do not).

ATO reference *Edited Private Advice Authorisation No. 1052293788466*
w https://www.ato.gov.au/law/view/document?docid=EV/1052293788466

7.6 Deductibility of retention bonuses

Facts

HeadCo is an Australian incorporated company. HeadCo acquired all shares in Company A under a Share Sale Agreement, forming a tax-consolidated group with Company A and its subsidiaries. The group is engaged in the sale and distribution of products within Australia and globally.

The bonus plan was introduced to provide additional rewards to employees, above their base salary, as an incentive for exceeding company targets. The bonus payments were contingent upon a 'change of control' event, defined as a transaction resulting in a third party acquiring more than 50% of HeadCo's issued securities. The payments were calculated based on the purchase price of the company, with variations depending on investment multiples and adjustments outlined in offer letters to participants.

Employees were required to remain employed at the time of the change of control to qualify for the payments. The funds for these payments were sourced from the cash holdings of Company C, a member of the tax-consolidated group, without reliance on loans.

Questions

1. Will the bonus payments made under the Deferred Bonus Plan be deductible under section 8-1 of the ITAA 1997?
2. If the bonus payments are not deductible under section 8-1 of the ITAA 1997, will they be deductible under section 40-880 of the ITAA 1997?

Ruling

The ATO determined that the bonus payments made under the Deferred Bonus Plan were not deductible under section 8-1 of the ITAA 1997. The payments were not considered an outgoing incurred in gaining or producing assessable income, nor were they necessarily incurred in carrying on a business for that purpose. Instead, the ATO viewed the payments as being linked to the change of control of HeadCo, which was a capital transaction. The ATO did not view the payments as relating to the ordinary revenue-generating activities of the business. Given their connection to the sale of shares and the long-term returns for shareholders, the payments were characterised as capital in nature and, therefore, not deductible under section 8-1.

However, the ATO ruled that the bonus payments were deductible under section 40-880 of the ITAA 1997. This section allows deductions for certain capital expenditure over five income years, provided the expenditure is incurred in relation to a business that is carried on for a taxable purpose. The ATO found that the payments satisfied these requirements, as they were related to the company's business activities and met the criteria for capital expenditure eligible for amortisation over time.

ATO reference *Edited Private Advice Authorisation No. 1052302976514*
w https://www.ato.gov.au/law/view/document?docid=EV/1052302976514

7.7 Cryptocurrency – liquid staking

Facts

The taxpayer is an investor in cryptocurrency and holds X tokens on the X blockchain. They have engaged in liquid staking activities involving X tokens and their associated liquid staking tokens across multiple platforms. Most transactions were not linked to Decentralised Finance (DeFi) protocols. The taxpayer utilises tax software to record their liquid staking transactions and has provided web addresses explaining how the X tokens and liquid staking tokens function.

The liquid staking platforms outline that when X tokens are staked, a new token (the LST) is issued based on the platform's ratio of staked tokens. The taxpayer retains control over the LST, which fluctuates in value according to the staking returns. The LST can be traded on both centralised and decentralised platforms and can be exchanged directly for X tokens. When the LST is traded, any accumulated staking rewards are also transferred. The taxpayer's staked X tokens are placed into a pool managed by the platform.

Question

Does the activity of liquid staking X tokens trigger a CGT event under section 104-5 of the ITAA 1997?

Ruling

The ATO determined that the taxpayer's activity of liquid staking X tokens triggers CGT event A1 under section 104-5 of the ITAA 1997.

The ATO concluded that a CGT event occurs because liquid staking results in a change in the taxpayer's ownership rights over the X tokens. Under section 108-5 of the ITAA 1997, a CGT asset includes any form of property or an interest in property, as well as legal or equitable rights that are not property. The ATO relied on Taxation Determination TD 2014/26, which states that Bitcoin, and by extension other cryptocurrencies, constitute CGT assets.

When the taxpayer participates in liquid staking, their X tokens are sent to a smart contract or staking pool, and in exchange, they receive an LST. The ATO determined that this transaction involves a disposal of the X tokens because the LST represents a separate asset with distinct characteristics. The LST is a fungible asset that can be traded, used in DeFi protocols, or transferred while continuing to earn staking rewards. The ATO further noted that, upon redemption of the LST, the taxpayer does not necessarily regain the original X tokens but rather an equivalent quantity from the liquidity pool.

The ruling also considered the *Ainsworth test* (as referenced in TD 2014/26), which requires a property right to be sufficiently definable, identifiable, and stable. Since the LST has different characteristics from the original X token, the ATO concluded that the two are separate CGT assets. Therefore, when the taxpayer stakes X tokens and receives LSTs, they are effectively disposing of one asset and acquiring another, triggering a CGT event.

ATO reference *Edited Private Advice Authorisation No. 1052344537848*
w https://www.ato.gov.au/law/view/document?docid=EV/1052344537848

7.8 Cryptocurrency – burn staking

Facts

The taxpayer invested and staked A tokens in the 'A' project, which operates as a set of smart contracts on the Ethereum blockchain. The project is designed to replicate a time deposit, with A tokens being ERC-20 tokens.

When the taxpayer staked their A tokens, these tokens were sent to a burn address and permanently removed from circulation. In exchange, the taxpayer received B-Shares, which represent a claim on the staked assets. The burn address is not controlled by any entity, and the tokens sent there are irretrievable. The number of B-Shares received depended on factors such as the price of B-Shares in 'A' terms, the duration of the stake, and the amount of A tokens staked.

The taxpayer agreed to lock up their A tokens for a set period without being rewarded for validating transactions. B-Shares are not tokenised, transferable, or tradeable and remain locked in the stake until the relevant smart contract functions are triggered.

Upon completion of the stake, the taxpayer was minted new A tokens equivalent to the amount originally committed, plus additional A tokens proportional to the number of B-Shares held, referred to as payouts. The payouts were determined by the number of B-Shares held, the length of the stake, and penalties incurred if the stake was not ended within a specified period.

To end a stake, the taxpayer could either use the End Stake (ES) function, which calculates payouts and mints new A tokens, or the Good Accounting function, which allows the stake to mature without incurring penalties but does not mint new A tokens immediately. The ES function could be used later to finalise the stake and receive new A tokens.

Questions

1. Does a capital gains tax (CGT) event occur when the taxpayer sends A tokens to the smart contract to enter into the stake?
2. Is the first element of the cost base of the new A tokens received at the end of the staking the market value of the property given to acquire them, worked out as at the time of acquisition?
3. Are the additional amounts of A tokens received at the end of the stake assessable as ordinary income under section 6-5 of the ITAA 1997?

Ruling

<u>CGT event C2 and disposal of A tokens</u>

The ATO determined that CGT event C2 occurs when the taxpayer sends A tokens to the smart contract to enter the stake. Under section 104-25 of the ITAA 1997, a CGT event C2 happens when ownership of an intangible CGT asset ends through redemption, cancellation, or abandonment. Since the A tokens are sent to a burn address and permanently removed from circulation, they are considered abandoned, surrendered, or forfeited, thereby triggering CGT event C2.

The capital proceeds for this CGT event are the market value of the A tokens at the time they were sent to the burn address.

<u>Cost base of new A tokens</u>

The ATO ruled that the cost base of the new A tokens is equal to the market value of the original A tokens the taxpayer gave up. Under section 110-25(2)(b) of the ITAA 1997, the first element of the cost base of a CGT asset includes the market value of any property given to acquire it. Since the taxpayer's entitlement to the new

A tokens is contingent on the ending of the original stake, the acquisition cost of the new A tokens is determined based on the market value of the A tokens at the time they were sent to the burn address.

Tax treatment of additional A tokens

The ATO concluded that the additional A tokens received at the end of the stake are not assessable as ordinary income under section 6-5 of the ITAA 1997. The A tokens received do not represent income from services, as the taxpayer was not engaged in transaction validation. Additionally, the receipt of new A tokens does not constitute income from property, as the original A tokens were permanently removed from circulation.

The ruling noted that the staking arrangement differs significantly from traditional staking mechanisms that validate transactions. The additional A tokens received were not derived from an isolated transaction or business activity. Given these factors, the ATO determined that the additional A tokens do not exhibit the characteristics of ordinary income and are therefore not assessable under section 6-5 of the ITAA 1997.

ATO reference *Edited Private Advice Authorisation No. 1052312263742*
w https://www.ato.gov.au/law/view/document?docid=EV/1052312263742

7.9 Cryptocurrency – legal v beneficial ownership

Facts

The taxpayer purchased cryptocurrency assets on behalf of a friend due to security concerns and their experience in trading such assets. The taxpayer was not acting as a financial adviser, and the transaction was undertaken as a favour. The friend transferred funds from their personal bank account to the taxpayer's bank account, after which the taxpayer used these funds to purchase cryptocurrency and transferred the assets to their personal wallet.

The taxpayer had no financial stake in the purchase or sale of the cryptocurrency assets. Subsequently, the friend requested that the taxpayer sell the assets and transfer the holdings to them. The final sale of the assets was completed on a specified date, and the proceeds were received and deposited into the taxpayer's bank account. The taxpayer then transferred the funds to the friend on multiple occasions.

Question

Will CGT event A1 occur on the disposal of the cryptocurrency asset under section 104-5 of the ITAA 1997?

Ruling

The ATO determined that CGT event A1 occurred upon the disposal of the cryptocurrency asset.

The ruling was based on the conclusion that the taxpayer held both the legal and equitable interest in the cryptocurrency assets at the time of disposal. While the taxpayer acted on behalf of their friend, they retained control over the private key, which allowed them to manage the assets independently. All risks associated with the transactions were borne by the taxpayer, and the proceeds of the disposal were initially credited to their personal bank account.

Under section 104-10 of the ITAA 1997, CGT event A1 occurs when ownership of a CGT asset is transferred. Since the taxpayer exercised control over the assets, including deciding when to dispose of them, they were considered the legal and beneficial owner for tax purposes. Consequently, the capital gain or loss on disposal was attributed to the taxpayer, making them liable for CGT on any gain realised.

ATO reference *Edited Private Advice Authorisation No. 1052319758011*
w https://www.ato.gov.au/law/view/document?docid=EV/1052319758011

7.10 Deduction for rental expenses

Facts

The taxpayer purchased a property with the intention of renting it to tenants. However, the property had caveats on the title, one of which was lodged by a government body due to issues related to the property.

Prior to purchasing the property at auction, the taxpayer enquired whether it had been used for any nefarious purposes. The real estate agent denied any wrongdoing. However, on the day tenants were due to move in, a nearby resident informed the taxpayer that illegal activities had taken place on the premises. As a result, the taxpayer decided not to rent out the property.

Further investigations confirmed that illegal activities had indeed occurred, leading the taxpayer to commission forensic testing, which revealed unacceptable traces of chemicals on the premises. During this period, the property remained vacant as the taxpayer could not ensure the health and safety of potential tenants.

The taxpayer engaged a solicitor and barrister with the intention of pursuing legal action against the agent and vendors for misrepresentation, incurring legal expenses in the process. A plumber was hired to assess the extent of damage caused to the plumbing, as contamination materials had been disposed of through the stormwater and sewerage system.

The property was a four-level terrace, and the taxpayer provided a partially furnished dwelling, including a washing machine and refrigerator for tenants. A three-wheeled stair trolley was purchased to assist in transporting these items to the third floor. The taxpayer also incurred costs for transporting the refrigerator from the place of purchase, as well as rental and petrol expenses. The trolley remained on the ground floor of the property to assist tenants with moving large items and preventing property damage.

Up until a specified date, the taxpayer incurred various expenses related to the property, including loan interest, title insurance, water rates, reimbursement of prepaid rates, landlord insurance, gardening expenses, and key cutting. A fence privacy decoration was also purchased.

Questions

1. Can the taxpayer claim deductions for expenses incurred for loan interest, title insurance, water rates, prepaid rates for land, gardening expenses, landlord insurance, key cutting, and car rental/petrol in relation to the property under section 8-1 of the ITAA 1997?
2. Can the taxpayer claim deductions for expenses incurred for contamination testing by a plumber and related expenses as environmental protection activities under subsection 40-755(1) of the ITAA 1997?
3. Can the taxpayer claim deductions for legal expenses incurred in relation to investigating legal action against the agent and vendors of the property under section 8-1 of the ITAA 1997?
4. Can the taxpayer claim depreciation deductions for the trolley purchased for use at the property under section 40-25 of the ITAA 1997?
5. Can the taxpayer claim a capital works deduction for the fence privacy decoration purchased for the property under Division 43 of the ITAA 1997?

Ruling

Deductibility of rental expenses

Under section 8-1 of the ITAA 1997, deductions are allowed for expenses incurred in gaining or producing assessable income unless they are of a capital, private, or domestic nature. Expenditures related to holding a rental property, such as council rates, water rates, and land tax, are typically deductible. Loan interest on a property intended to be rented can also be deducted if it accrues in a year when the property is rented or genuinely available for rent.

Since the taxpayer purchased the property with the intention of renting it out and incurred expenses such as loan interest, title insurance, water rates, prepaid land rates, gardening expenses, landlord insurance, key cutting, and car rental/petrol, these expenses were deemed deductible under section 8-1 of the ITAA 1997.

Deductibility of contamination testing expenses

Subsection 40-755(1) of the ITAA 1997 allows deductions for expenses related to environmental protection activities, which include measures undertaken to prevent, fight, or remedy pollution associated with an earning activity. Since the taxpayer incurred costs for contamination testing due to the previous illegal use of the property, these expenses were considered environmental protection activities and were deductible under subsection 40-755(1).

Deductibility of legal expenses

Legal expenses are deductible if they are incurred as a consequence of the taxpayer's income-earning activities, provided they are not of a capital, private, or domestic nature. Citing *Herald & Weekly Times Ltd v Federal Commissioner of Taxation* (1932) 48 CLR 113 and *Putin v Federal Commissioner of Taxation* (1991) 21 ATR 1245, the ATO determined that legal expenses related to misrepresentation by the vendor directly correlated with the taxpayer's ability to generate rental income. Accordingly, these expenses were deductible under section 8-1 of the ITAA 1997.

Depreciation of the trolley

Section 40-25 of the ITAA 1997 allows deductions for the decline in value of depreciating assets held for income-producing purposes. As the taxpayer purchased the trolley for use at the property and retained it there, it was considered a depreciating asset. Consequently, the taxpayer was entitled to claim depreciation deductions for the trolley under section 40-25.

Capital works deduction for the fence privacy decoration

Division 43 of the ITAA 1997 provides deductions for capital works, including structural improvements such as fences and alterations. The ATO determined that the fence privacy decoration was a structural improvement rather than a plant item. As a result, it was classified as a capital expense, and the taxpayer was entitled to claim a capital works deduction over time.

ATO reference *Edited Private Advice Authorisation No. 1052315350762*
w https://www.ato.gov.au/law/view/document?docid=EV/1052315350762

8. ATO and other materials

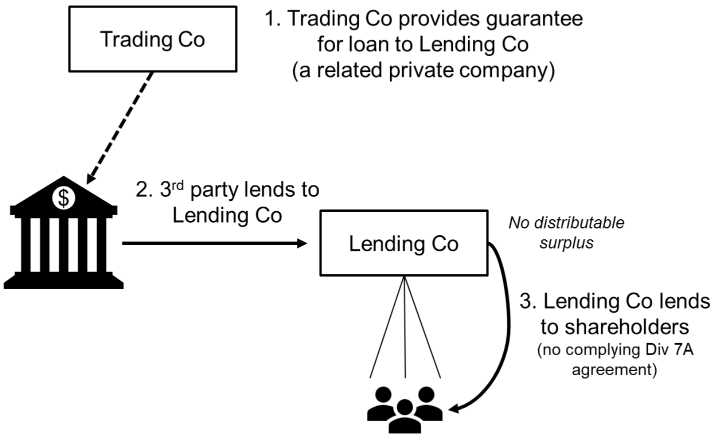
8.1 Taxpayer alert for Division 7A avoidance

On 12 December 2024, the ATO published Taxpayer Alert 2024/2 regarding arrangements to circumvent Division 7A of the ITAA 1936 through the guaranteeing by private companies of third-party loans.

Division 7A aims to prevent private companies from providing tax-free distributions to shareholders or their associates by treating certain payments or loans as unfranked dividends. The ATO is currently investigating these arrangements and warns taxpayers and advisers to exercise caution.

Overview of arrangements

The arrangements under scrutiny involve a private company (Trading Co) guaranteeing a loan provided by a third-party financier (e.g., a bank) to a related private company (Lending Co), which has minimal or no distributable surplus. Lending Co then on-lends or transfers part or all of these funds to Trading Co's shareholders or their associates without adhering to Division 7A requirements, such as compliant loan agreements under section 109N.



By structuring the transactions in this manner, taxpayers attempt to avoid a deemed dividend that would typically arise if Trading Co. directly lent or paid the amounts to its shareholders. The ATO views such arrangements as contrived steps designed to circumvent Division 7A.

ATO concerns

The ATO considers that such arrangements may involve misinterpretation of section 109U, which applies when a private company guarantees a loan leading to payments or loans to its shareholders or their associates. Section 109U does not require the third-party lender (e.g. a bank) to also be a private company, contrary to some taxpayers' understanding.

Where section 109U applies, Division 7A may deem the guaranteeing company (Trading Co) to have provided unfranked dividends to shareholders receiving benefits via the related entity (Lending Co).

If Division 7A does not otherwise operate to cause a deemed dividend, the Commissioner may apply Part IVA to cancel tax benefits arising from such arrangements.

The ATO notes that it will ordinarily only have cause to apply compliance resources to consider the application of section 109U to arrangements involving a series of steps that, when viewed objectively, are intended to circumvent the operation of Division 7A. The Taxpayer Alert refers to Appendix 2 of *Draft Taxation Determination* TD 2024/D3.

Potential outcomes

Where these arrangements are identified, the ATO may impose penalties and consider other compliance measures. Severe penalties under Division 290 of the *Taxation Administration Act 1953* could apply to promoters, with potential referrals to the Tax Practitioners Board for breaches under the *Tax Agent Services Act 2009*.

ATO recommendations

Taxpayers and advisers involved in these arrangements are encouraged to:

1. seek independent advice or request a private ruling;
2. disclose their participation voluntarily to reduce potential penalties; and
3. avoid entering into such arrangements and ensure compliance with Division 7A requirements.

For further information or to report such arrangements, the ATO provides contact details for inquiries and anonymous tip-offs.

ATO reference *TA 2024/2*
w https://www.ato.gov.au/law/view/document?DocID=TPA/TA20242/NAT/ATO/00001&PiT=99991231235958

8.2 Taxpayer alert for tax avoidance through ESIC offset

On 10 December 2024 the ATO issued Taxpayer Alert TA 2024/1 concerning circular finance arrangements taking advantage of the offset for early-stage innovation concession companies.

The ATO is currently reviewing arrangements where individuals claim the early stage investor tax offset on shares acquired through tailored financing schemes. The ATO considers that these arrangements appear to be designed to artificially meet the conditions for the tax offset while minimising or eliminating the individual's investment risk, with the entities promoting these schemes sharing in the tax offset.

The common features include:

1. individuals being offered financing to fund share subscriptions in start-up companies presented as qualifying ESIC;
2. the financing arrangement typically requires only a nominal deposit, with the full subscription amount placed back on deposit with the financier;
3. the company has limited access to these funds for its business activities;
4. the individual claims the tax offset and uses the refund to repay part of the finance, with the remaining loan repaid from funds returned by the company through selective share buy-backs;
5. the individual retains a residual shareholding for which they paid no effective consideration.

The ATO is concerned these arrangements may be marketed as legitimate tax planning strategies but do not comply with the law. The ESIC offset is likely to be denied because the company may not meet ESIC criteria. Any claimed interest deductions on the financing are unlikely to be allowed, and the general anti-avoidance provisions (Part IVA) may apply, cancelling the offset and deduction. Capital gains tax exemptions on the disposal of shares will also not be available.

ATO reference *TA 2024/1*
w https://www.ato.gov.au/law/view/document?DocID=tpa/ta20241/nat/ato/00001

8.3 99B compliance approach guidance finalised

On 27 November 2024, the ATO finalised PCG 2024/3. This guideline was previously published as PCG 2024/D1 (see our July 2024 Tax Training Notes). The ATO has also published a compendium showing some of the feedback received from public consultation and the ATO responses.

Some of the key changes are outlined below.

New and updated examples

Several new examples have been added, and existing ones refined to clarify specific scenarios. Example 3 clarifies that the recipient, Jack, is a resident beneficiary of a non-resident trust. Example 7 now includes a scenario involving a change in the residency of the beneficiary in the same income year. Example 21 specifies that the repayment requirements for loans on commercial terms align with Division 7A standards for interest rate and loan terms.

Evidentiary requirements

The guideline expands on the core documentation required to substantiate claims under subsection 99B(2), including trust deeds, trustee minutes, financial statements, and bank records. Examples 11 and 12 illustrate scenarios where insufficient records result in the full amount being included in the beneficiary's assessable income.

Compliance approach for low-risk arrangements

The compliance approach applies to two common low-risk scenarios. For distributions from non-resident deceased estates, the arrangement is considered low risk if the distribution is made within 24 months of the deceased's date of death and the total value does not exceed A$2 million. For provision of trust property on commercial terms, a safe harbour option is available for monetary loans, with interest rates and loan terms matching those prescribed under Division 7A.

Clarification of scope

The final guideline clarifies that the compliance approach does not apply to testamentary trusts. It also states that arrangements with contrived elements or those designed to fall within the compliance approach will not qualify for the safe harbour.

Other refinements

Additional updates include expanded guidance on tracing requirements for foreign trusts and the removal of references to specific countries from Examples 14, 16, and 18. Footnotes now reference section 102AAM of the ITAA 1936, indicating the potential for additional tax liabilities under that provision.

TIP – this PCG should be read in conjunction with TD 2024/9.

ATO reference *PCG 2024/3*
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20243/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20243EC/NAT/ATO/00001

8.4 ATO website guidance on 99B

On 17 December 2024, the ATO published an update on its website about the tax implications of receiving payments or assets from foreign trusts for Australian residents. The update focuses on the application of section 99B of ITAA 1936, which applies when foreign trust property is paid to or applied for the benefit of an Australian resident. Trust assets can include cash, land, shares, and other assets.

The update clarifies that the value of these payments must generally be included in the recipient's assessable income in the financial year they are received. It also lists scenarios where section 99B may apply, such as loans made directly or indirectly by the trustee, amounts paid on behalf of a beneficiary, or distributions in the form of trust assets like shares. Payments or benefits from a foreign trust that was previously a resident trust may also fall under section 99B.

The ATO website outlines situations where the taxable amount may be reduced. For instance, certain payments or benefits that have already been assessed as income, represent a return of capital, or are not otherwise taxable can be excluded from the assessable amount. The ATO may request documentation to verify claims for reductions.

For those receiving money or other assets from a foreign trust, the ATO recommends confirming whether the recipient is a beneficiary of the trust, understanding how the trust obtained the money or property, and determining the nature of the payment, for example, whether it is a gift, service payment, or distribution.

The update also reminds taxpayers that section 99B may trigger additional tax obligations and encourages them to consult further documentation and seek professional advice if needed. Data reported through AUSTRAC (Australian Transaction Reports and Analysis Centre) is also used by the ATO to monitor payments and assets received from overseas, ensuring compliance.

w https://www.ato.gov.au/businesses-and-organisations/trusts/in-detail/distributions/receiving-payments-or-assets-from-foreign-trusts

8.5 Suspected fraud involving unconnected third parties

On 12 December 2024, the ATO issued Practice Statement Law Administration PS LA 2024/1, which outlines the policy for managing cases of suspected fraud involving unconnected third parties. It focuses on fraud where an external entity, unrelated to the taxpayer, acts without authority and the taxpayer has not contributed to, enabled, or benefited from the fraudulent conduct.

The policy highlights key indicators of such fraud, including unauthorised access to personal details, changes to financial account details, or misdirected refunds. Notably, cases where the taxpayer contributes (e.g., providing myGov login credentials) or involves connected entities (such as authorised representatives) are excluded from this Statement.

Steps for managing suspected fraud

The ATO prescribes a structured five-step process for ATO officers to follow:

1. identify circumstances of fraud, gather facts to determine potential fraud indicators;
2. implement additional account safeguards such as updated contacts, restricted access, or account suppressions;
3. report all suspected fraud for investigation and recovery processes by the Fraud and Criminal Behaviours (FCB) division;
4. FCB or Frontline Operations document findings of whether fraud exists based on case evidence; and
5. if fraud is confirmed, corrective measures, such as cancelling or amending lodgements, are applied.

Corrective actions

For tax returns, the ATO can cancel lodgements if no assessment has been issued or amend assessments if already served. Similarly, fraudulent business activity statements (BAS) can be cancelled unless a deemed assessment exists. Refund recovery efforts may include electronic fund recalls, applying fraud credits, or raising liabilities against the third-party recipient.

A fraud credit offsets any taxpayer liability where fraud is confirmed, and funds were misdirected without taxpayer involvement. If recovery is uncertain, the ATO may temporarily account for the overpayment until the responsible party is identified.

TIP - Where fraud is confirmed, the ATO may apply a fraud credit to correct the taxpayer's account. However, until fraud is established, the taxpayer remains liable for any overpayment. Advisers need to manage client expectations, particularly around liability resolution timelines and the burden of proof required to secure fraud credits.

ATO reference *PS LA 2024/1*
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20241/NAT/ATO/00001

8.6 Updated compliance approach to thin capitalisation

On 4 December 2024, the ATO updated Draft Practical Compliance Guideline PCG 2024/D3 to include schedules 3 and 4, which outline its compliance approach for restructures in response to the new thin capitalisation rules. The draft PCG was originally published in November (see our November 2024 Tax Training Notes).

Thin capitalisation changes

The previous thin capitalisation rules have been replaced with three tests for general class investors:

1. Fixed ratio test: Limits net debt deductions to 30% of the entity's tax EBITDA.
2. Group ratio test: Allows higher deductions based on the worldwide group's financial position.
3. Third-party debt test: Caps gross debt deductions to amounts tied directly to external financing under stringent conditions.

Schedule 3 of PCG 2024/D3 outlines the ATO's compliance approach for the Third Party Debt Test. It provides targeted guidance to taxpayers restructuring debt arrangements to meet the Third Party Debt Test requirements, focusing on removing recourse to foreign assets, ensuring minor or insignificant assets are not included in debt tests, and aligning intercompany loan terms with external financing. Low-risk examples include eliminating foreign asset recourse and aligning interest rates without markups.

The general requirements to qualify for targeted compliance under Schedule 3 are as follows:

Restructure for compliance purposes: The restructure must be undertaken straightforwardly to meet Third Party Debt Test conditions, without contrivance or artificiality, and must be on arm's-length terms.

1. **No application of Part IVA (anti-avoidance provisions):** The restructure must not attract Part IVA of the ITAA 1936, which targets tax avoidance schemes.
2. **Original arrangement compliance:** The original debt arrangement must comply with all other third-party debt conditions before and after the restructure, except for the specific condition being addressed.
3. **Consistent financial arrangement purpose:** The purpose of the financial arrangement must remain the same, with no significant changes to the terms, including quantum, rate, or duration.
4. **Time-limited application:** These compliance approaches apply to restructures undertaken between 22 June 2023 and the end of the first income year after the guideline is finalised. For conduit financing cases, the compliance approach may extend to income years ending on or before 1 January 2027.

Schedule 4 focuses on the ATO's risk assessment for restructures in response to thin capitalisation changes. Low-risk restructures include consolidating groups to reduce disallowed debt deductions. High-risk restructures involve artificial arrangements, such as introducing excessive debt or manipulating interest rates, to maximise debt deduction capacity without genuine commercial purpose.

TIP – this guidance should be read in conjunction with Taxation Ruling TR 2024/D3 (see item 5.1 of these notes).

ATO reference *PCG 2024/D3*
w https://www.ato.gov.au/law/view/document?DocID=DPC/PCG2024D3/NAT/ATO/00001

8.7 MYEFO 2024–25

On 18 December 2024, the Treasurer released the 2024–25 Mid-Year Economic and Fiscal Outlook (MYEFO). Several key measures relating to tax and superannuation were as follows:

1. ***Modernising tax administration systems:*** From 1 July 2026, a new system will include the pre-filling of trust income for beneficiaries, mirroring existing processes for salaries, wages, and bank interest. Trustees will be required to report beneficiaries' Tax File Numbers (TFNs) in tax returns, starting from the first quarter after the relevant legislation receives Royal Assent.
2. ***R&D offset gambling and tobacco exclusion:*** Changes have been announced for the Research and Development (R&D) Tax Incentive, aimed at excluding activities related to gambling and tobacco. Once enacted, these changes will take effect for income years starting on or after 1 July 2025.
3. ***Changes to philanthropic giving:*** these changes have been discussed above in these Notes.
4. ***Strengthening the tax penalty regime:*** From 1 July 2026, tax scheme penalties will apply to taxpayers in loss positions, and penalties will be introduced for large taxpayers who mischaracterise or undervalue payments to avoid withholding tax obligations. Furthermore, the Shortfall Interest Charge will be extended to cover overclaimed refundable offsets, acting as a deterrent against incorrect claims.
5. ***Shadow economy compliance program:*** The government has also allocated additional funding for the ATO under the Shadow Economy Compliance Program. Running from 1 January 2025 to 30 June 2028, this initiative will target high-risk behaviours, such as under-reporting taxable income, illicit tobacco trade, and unregistered businesses.

w https://budget.gov.au/content/myefo/index.htm

8.8 ATO case studies on Commercial Deals Engagement

On 6 January 2024, the ATO published resources on its website in relation to its Commercial Deals engagement service. The webpage includes four case studies of transactions addressed through the Commercial Deals engagement service. There are also several short videos between 30 seconds and 2 minutes in length:

1. engage early with the ATO;
2. how to navigate a commercial deals engagement;
3. increased certainty prior to lodgment;
4. tax assistance in real time; and
5. advice and assurance options for early engagement.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-you-should-know/the-right-services/commercial-deals/commercial-deals-service-resources

8.9 Proposals for beneficial ownership reforms for unlisted companies

The Commonwealth Government has released proposals to improve information on the beneficial ownership of unlisted companies. The proposals include the establishment of a new regulatory regime, which will include:

1. a requirement for:
   (a) unlisted companies to collect, verify and record information about their beneficial owners; and
   (b) beneficial owners to self-identify to unlisted companies; and
2. appropriate ASIC powers to enforce the new obligations.

During the first stage of the new regime, access to information will be limited to journalists, academics, entities with Anti-money Laundering and Counter-terrorism Financing reporting requirements, and specified regulators and law enforcement agencies.

w https://treasury.gov.au/publication/p2024-604994

8.10 Updates to PSLAs

On 5 December 2024, the ATO published the following updated practice statements:

1. *PS LA 2011/11* on refunds of certain pay as you go withholding amounts. This statement was updated to clarify the situation for foreign-resident capital gains withholding by providing examples; and
2. *PS LA 2011/22* on the Commissioner's discretion to retain a refund. This statement was updated to include new content for retaining refunds for outstanding Single Touch Payroll obligations, as enacted in the *Budget Savings (Omnibus) Act 2016*.

On 5 December 2024, the ATO withdrew *PS LA 2012/6* on the exercise of the Commissioner's discretion to retain a refund as its content is covered by PS LA 2011/11.

w https://www.ato.gov.au/law/view/document?DocID=PSR/PS201111/NAT/ATO/00001&PiT=99991231235958
w https://www.ato.gov.au/law/view/document?DocID=PSR/PS201122/NAT/ATO/00001&PiT=99991231235958
w https://www.ato.gov.au/law/view/document?DocID=PSR/PS20126/NAT/ATO/00001&PiT=99991231235958

8.11 Enforcement measures used for debt collection

On 30 January 2025, the ATO updated Practice Statement LA 2011/1 – *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts*.

The updates reflect changes that have been made to the law introduced by the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020*.

The updated Practice Statement reflects the Commissioner's expanded authority to estimate unpaid GST liabilities, including wine equalisation tax and luxury car tax, and issue director penalty notices for these liabilities. It also clarifies the ATO's stance on applications by taxpayers seeking to set aside judgments for unpaid tax liabilities. Generally, the ATO will not agree to set aside a judgment unless the debt, along with interest and costs, has been fully paid, and the taxpayer submits a proper affidavit outlining the facts. The update also notes that tax fraud or crime cases may be referred to the Commonwealth Director of Public Prosecutions.

The policy revision also includes changes to when the ATO will not typically withdraw a garnishee notice, now extending to cases where a tax debtor appoints a small business restructuring (SBR) practitioner. Under the Director Penalty Notice rules, director penalties can be remitted or defended when an SBR practitioner is appointed, depending on the nature of the debt. Furthermore, small business entities can now apply to the Administrative Review Tribunal to seek an order staying or otherwise modifying the implementation of a reviewable objection decision, including blocking garnishee notices issued by the ATO.

w https://www.ato.gov.au/law/view/document?DocID=PSR/PS201118/NAT/ATO/00001&PiT=99991231235958

8.12 ATO guidance on inbound related party funding for private groups

On 15 January 2025, the ATO published new guidance for private groups that receive funding from an overseas related party or associate for property and construction. The guidance covers:

1. demonstrating the commerciality of funding arrangements and ensuring they are at arm's length;
2. observations made by the ATO of conventional funding practices in the property and construction industry;
3. the ATO's concerns and factors that attract the ATO's attention. These factors include insufficient equity (capital) or excessive debt, subordinated or unsecured loans with excessive interest rates, loans with excessive durations, and deferral or avoidance of interest withholding tax;
4. examples of different funding arrangements and behaviours, and their level of tax risk; and
5. compliance obligations, including record-keeping when receiving funding.

The ATO also provides compliance tips, such as:

1. explaining the funding options available and justifications for the choice;
2. keeping evidence that the arrangement is commercial and at arm's length, such as project details, loan documentation, transfer pricing analysis and workpapers;
3. lodging the International Dealings Schedule and accurately disclosing the arrangement;
4. understanding and complying with interest withholding tax obligations, including timely remittance and proper reporting; and
5. reviewing and monitoring related party funding arrangements to ensure ongoing compliance.

This guidance should be read with Practical Compliance Guideline *PCG 2017/4 ATO* on cross-border related party financing.

The ATO has also released a statement regarding the basics about inbound related party financing for privately owned and wealthy groups in property and construction.

The ATO is concerned that businesses are claiming excessive debt deductions and shifting profits overseas. They are doing that by setting unrealistic interest charges for funding received from overseas related entities.

The ATO expects entities or individuals to explain their funding arrangements to explain the funding arrangement maintain evidence to support the ongoing commerciality and arm's length nature of the arrangement and understand and comply with tax obligations.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/guidance-on-inbound-related-party-funding-for-private-groups
w https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/private-wealth-

international-program/related-party-financing-risk/inbound-related-party-financing-for-private-groups-in-property-and-construction/what-you-need-to-know-about-financing

8.13 Automotive Invest – Decision Impact Statement

On 11 December 2024 the ATO issued a Decision Impact Statement (**DIS**) on the decision of the High Court in *Automotive Invest Pty Limited v Commissioner of Taxation* [2024] HCA 36. In this case, the taxpayer was successful in establishing that it acquired luxury cars and used them for a "quotable purpose" under the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) (**LCT Act**) despite the cars were displayed in a car museum as the objective purpose of the displaying of the cars was to market them for sale to potential customers

The DIS contains the ATO's views on the implications of the decision.

The ATO's position is that when an entity quotes for luxury car tax (LCT) purposes, the supplier or Australian Border Force must determine if the quote is effective. An effective quote means no LCT is payable. However, if there are reasonable grounds to believe the entity is not entitled to quote under section 9-5 of the LCT Act, the quote will be ineffective. This determination relies on the entity's subjective purpose at the time of acquisition, rather than an objective one. The assessment is based on available information at the time of quoting, not on later evidence of actual use.

For Division 15 change of use adjustments, the taxpayer's subjective purpose is also central to determining whether a car is held for a 'quotable purpose.' When the taxpayer is not an individual, the subjective purpose can include the intentions of directors, officers, and employees. Evidence such as business plans, financial documents, and actual use of the car may help assess whether the taxpayer's stated purpose aligns with the facts.

A car ceases to be held solely for a quotable purpose if it is used for any additional or alternative purpose.

For GST input tax credit purposes under section 69-10, the taxpayer's intention at the time of acquisition is critical to determine if input tax credits are limited.

The ATO notes that the subjective purpose test in section 9-5(1) of the LCT Act is specific to the statutory context of the LCT provisions. Not all provisions that refer to 'purpose' adopt a subjective test. For example, anti-avoidance rules in section 177D of the ITAA 1936 and Division 165 of the GST Act are based on objective criteria.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/s170-2023/00001

8.14 FRCGW changes

Effective from 1 January 2025, the foreign resident CGT withholding rate will increase from 12.5% to 15%, and the $750,000 property value threshold will be removed. This means the withholding rules will now apply to all property sales, regardless of the property's value.

Requirements for Australian residents

Australian resident property sellers must obtain a clearance certificate from the ATO to avoid the 15% withholding. This certificate must be provided to the purchaser before or at settlement. If a clearance certificate is not obtained, 15% of the sale price will be withheld by the purchaser and paid directly to the ATO. Clearance certificates are valid for 12 months, and the ATO advises sellers to apply early, as processing times can vary. While most certificates are issued within a few days, some can take up to 28 days to process.

Advice for vendors and tax professionals

The ATO encourages all vendors and tax professionals to familiarise themselves with the updated rules to ensure compliance. For foreign resident vendors, there may be options to vary the withholding rate in certain situations. Vendors are reminded that if an amount is withheld from the sale, they can claim a refund when they lodge their next income tax return.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/withholding-changes-when-buying-and-selling-property

8.15 Foreign residents disposing of Australian real property

On 23 December 2024, the ATO published an update on its website about foreign residents disposing of taxable Australian property. The update focuses on the ATO's attention to compliance with CGT obligations by foreign residents.

The following activities by foreign residents attract the ATO's attention:

holding significant direct or indirect interests in taxable Australian property (TAP), such as shares in mining companies and interests in commercial properties;

5. disposing of taxable Australian real property (TARP) or indirect interests without meeting CGT obligations.
6. characterising or valuing assets to come within the CGT exclusion;
7. entering into a series of transactions, such as "staggered sell-down" arrangements, to attempt to qualify for CGT exclusion;
8. lodging returns that do not comply with the new associate inclusive test for determining total participation interests;
9. failing the principal asset test by misallocating significant market value to non-TARP assets; and
10. being unlikely to have sufficient funds or assets in Australia to meet tax obligations related to a TARP disposal.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-attracts-our-attention/international-transactions/foreign-residents-disposing-of-taxable-australian-property

8.16 Busting NFP myths

On 4 February 2025, the ATO published an update on its website about common misconceptions regarding not-for-profit (NFP) organisations and their tax reporting obligations. The update aimed to clarify key points about income tax exemptions for NFPs and the annual NFP self-review return, which is due in March. It emphasised that not all NFPs are income tax exempt and outlined the criteria they must meet to qualify for this exemption. The update also debunked myths around lodging the NFP self-review return, explaining the process and who is authorised to lodge on behalf of NFPs.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/busting-nfp-myths

8.17 ATO private wealth international program

On 10 December 2024, the ATO published information about its Private Wealth International Program. Under the program, the ATO engage with privately owned and wealthy groups that have international operations and dealings. The program provides a combination of approaches to help these groups understand and comply with their tax obligations, including education campaigns, developing public advice and guidance, carrying out early engagement activities and targeted risk campaigns, risk-based reviews, and audits.

The program focuses on the following key international tax risks:

1. related party financing risks, such as loans between related parties;
2. intangibles migration, being arrangements connected with the development, enhancement, maintenance, protection, and exploitation of intangible assets;
3. controlled foreign companies;
4. non-resident withholding tax;
5. tax residency (both individual and corporate); and
6. related party service arrangements.

w https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/private-wealth-international-program

8.18 New international tax measures affecting private groups

On 23 December 2024, the ATO published information about the new measures in international tax that may affect privately owned and wealthy groups. These measures include new thin capitalisation rules, global and domestic minimum tax, and strengthening the foreign resident CGT regime.

New thin capitalisation rules

Under the new rules, applying to income years starting on or after 1 July 2023, 'general class investors' will be subject to one of 3 new tests, being the fixed ratio test, group ratio test and the third-party debt test.

The arm's length debt test has been removed for all taxpayers, and the previous transfer pricing limitation in section 815-140 of the ITAA 1997 has also been removed.

The new thin capitalisation rules are supported by the debt deduction creation rules, which deny debt deductions arising from relevant related party loans to fund asset acquisitions, or prescribed payments such as distributions and returns of capital. These rules, applying to income years starting on or after 1 July 2024, reduce the ability for multinational businesses and private groups, with at least $2 million in debt deductions on an associate inclusive basis, to create debt through internal transactions.

Global and domestic minimum tax

The Government announced, as part of the 2023–24 Budget, that it will implement key aspects of Pillar Two of the OECD/G20 Two-Pillar Solution, which involves the introduction of legislation to include:

1. a 15% global minimum tax for multinational enterprise groups (MNE groups) with the Income Inclusion Rule applying to fiscal years starting on or after 1 January 2024 and Undertaxed Profits Rule applying to fiscal years starting on or after 1 January 2025; and
2. a 15% domestic minimum tax for MNE groups applying to fiscal years starting on or after 1 January 2024.

Strengthening the foreign resident capital gains tax regime

The Government announced, as part of the Budget 2024–25, its intention to amend the non-resident CGT provisions in Division 855 of the ITAA 1997. The changes will apply to CGT events starting on or after 1 July 2025, and will:

1. clarify and broaden the types of assets for which foreign residents are subject to CGT;
2. amend the point-in-time principal asset test to a 365-day testing period; and
3. require foreign residents disposing of shares and other membership interests exceeding $20 million in value to notify the ATO, prior to the transaction being executed.

w https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/private-wealth-international-program/new-international-tax-measures-affecting-private-groups

8.19 Non-resident withholding tax

On 10 December 2024, the ATO published information about the issues it has observed with respect to non-resident withholding tax in privately owned and wealthy groups. These issues include:

1. failure to lodge a PAYG withholding from interest, dividend and royalty payments paid to non-residents;
2. withholding tax not being withheld or paid, or an incorrect amount being withheld or paid;
3. incorrectly claiming deductions for interest or royalty payments to an offshore entity, withholding tax exemption, or tax treaty relief
4. inappropriate reliance on the exemption in section 128F or section 128FA of the ITAA 1936 to avoid liability to interest withholding tax;
5. uncommercial arrangements where entities claim income tax deductions on an accruals basis but withholding tax is not paid when deductions are claimed; and
6. using artificial structuring to obtain a reduced withholding tax rate under a double-tax agreement.

w https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/private-wealth-international-program/non-resident-withholding-tax

8.20 ATO related party service arrangements

The ATO has released a reminder of what to consider if you have a related party service arrangement.

The ATO is concerned about the mischaracterisation of cross border service arrangements where the legal structure does not align with the economic reality of the situation.

For instance, this can occur when:

1. Australian individuals perform activities for an overseas related entity that could be viewed as central management and control (CMAC) or key value-adding functions, but these activities are incorrectly categorised as routine or low-value services. This mischaracterisation could create corporate residency risks or lead to transfer pricing advantages, especially when control is concentrated in a founder, director, or a small group of people in a privately held business; and
2. service fees are paid to an overseas related entity, but the benefit received by the Australian entity is questionable or, in some cases, the service was never actually provided. This could result in a transfer pricing advantage, particularly if the overseas service provider has no employees and all work is either done by Australian staff or outsourced to third-party providers under Australian direction.

w https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/private-wealth-international-program/related-party-service-arrangements

8.21 ATO private wealth priorities for 2025

The ATO Deputy Commissioner (Private Wealth – Client Experience), Lousie Clarke, has shared her priorities for 2025.

Deputy Commissioner Clarke stated that one of the main challenges in 2025 will be reducing the outstanding debt, especially within the smaller privately owned and wealthy groups (POWG) market. This issue, which was a priority in 2024, will continue to be a focus for the ATO. The ATO aims to encourage timely lodgments and ensure debts are paid.

There is an ageing demographic among the controlling individuals in the POWG market, especially in the Top 500 and Next 5,000 groups. This has led to increased succession planning, business sales, and generational wealth transfer, resulting in more private ruling requests. Deputy Commissioner Clarke stated that the ATO's challenge is to provide support to ensure these groups have certainty on the tax implications of such activities.

Succession planning, including addressing risks related to Division 7A loans, trust restructuring, and late lodgements, will remain a key focus in 2025. The ATO aims to increase awareness of family trust distributions tax (FTDT) to ensure compliance.

Reflecting on 2024, Deputy Commissioner Clarke emphasised the importance of education campaigns, particularly around Division 7A and complex tax provisions, to improve taxpayer understanding and compliance. The ATO will continue to refine its communication channels and invest in staff training to prepare for emerging trends and maintain a fair tax system.

Deputy Commissioner Clarke also discussed efforts to enhance client engagement by refining the Top 500 program and introducing measures to support justified trust. The ATO is considering tailored approaches for varying group sizes and wealth levels, especially for groups with net wealth between $5 million and $10 million. Another ongoing review will assess whether the three-year monitoring period for tax assurance remains appropriate.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/spotlight-on-deputy-commissioner-louise-clarke

8.22 ATO focus areas for small business

On 28 November 2024, the ATO published its focus areas for small businesses. These include:

1. using business money and assets for personal use or benefit;
2. deductions, particularly non-commercial business losses, and concessions, namely the small business CGT concessions; and
3. operating outside of the system, such as not declaring all income and over-claiming expenses.

Behaviours that attract the attention of the ATO include small businesses deliberately not reporting or registering correctly, not lodging and paying in full and on time, not knowing tax and super obligations, paying in cash and not declaring income, and having poor record keeping and/or cash flow management.

Small businesses that deliberately avoid the ATO, or their obligations, can expect the ATO to take firm action such as commencing reviews or audits, applying penalties and interest on any unpaid tax, commencing debt collection activities, applying administrative penalties, or, in more serious cases, seeking the application of civil or criminal sanctions.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/our-focus-areas-for-small-business

8.23 ATO Top 500 and Next 5000 findings report

On 4 December 2024, the ATO published the latest findings for the Top 500 tax performance program and Next 5,000 program.

For the Top 500 tax performance program, in the 2023–2024 financial year:

1. $1.646 billion in income tax paid by Top 500 entities was 'tax assured' i.e. the ATO has a high level of confidence the transactions and arrangements to which this amount relates have been correctly reported;
2. income tax liabilities of $552.5 million were raised, $41.3 million of which was from voluntary disclosures. Many of the tax liabilities arose from basic errors, and from groups with little or no documented tax governance; and
3. maintaining adequate records to substantiate positions taken, and transparency in dealings with the ATO, helped to resolve compliance matters quickly.

In relation to the Next 5,000 program:

1. the ATO reviewed around 8,850 transactions, activities and events, which was achieved by finalising around 1,404 streamlined assurance reviews;
2. over 320 streamlined assurance reviews and 55 comprehensive risk reviews were completed during the 2024 financial year;
3. private groups correctly reported amounts relating to significant activities, events and transactions totalling over $36 billion;
4. common tax issues observed by the ATO included:
   (a) errors in reporting matters; and
   (b) inadequate governance and record-keeping, especially in areas such as intra-group transactions, trust distributions, and the sale of significant assets;
5. while many groups reported GST correctly, some groups lack a basic understanding of GST, how GST applies to related party transactions and correct reporting. The ATO observed significant late lodgment in relation to BAS; and
6. increasingly, the ATO has seen:
   (a) transactions between SMSFs and related parties giving rise to non-arm's length income; and
   (b) group restructures and transfers of assets between group members that have not appeared to relate to succession planning.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/findings-report-top-500-tax-performance-program-june-2024
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/findings-from-the-next-5000-tax-performance-program

8.24 New incentives for BTR

The following new tax incentives are available for eligible build to rent (**BTR**) developments:

1. <u>Faster Depreciation</u>: the capital works tax deduction rate increases from 2.5% to 4%, shortening the depreciation period for construction costs from 40 years to 25 years; and

2. Lower Withholding Tax: the withholding tax rate for eligible fund payments from managed investment trusts decreases from 30% to 15% for income generated by eligible BTR developments.

To be eligible for the incentives, a BTR owner must notify the ATO of their choice to access the incentives. The owner must meet eligibility criteria over a 15-year compliance period. If any of the eligibility criteria are not met in the 15-year period after making the choice, a new misuse tax may apply.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/new-incentives-for-build-to-rent-developments

8.25 Personal financial advice fees paid from super funds

On 15 January 2025, the ATO released draft *Practical Compliance Guideline* PCG 2025/D1 for consultation. The draft Guideline outlines:

1. Part 1: the methodology a trustee of a superannuation fund, other than a SMSF, can use to determine the extent to which payments of financial advice fees satisfy paragraph (d) of table item 5 of subsection 295-490(1) of ITAA 1997, which requires that the amount is not incurred in relation to producing the fund's exempt income or non-assessable non-exempt income; and
2. Part 2: the ATO's compliance approach in relation to a fund's PAYG withholding obligations for financial advice fees paid in the income years prior to 1 July 2019.

The methodology in Part 1 of the Guideline does not apply to SMSFs due to their limited number of members. SMSF trustees must assess each piece of personal advice to determine if the associated financial advice fee is deductible.

All superannuation funds, including SMSFs, can rely on Part 2 of the Guideline regarding the ATO's compliance approach to PAYG withholding obligations for income years before 2019–20.

When the draft Guideline is finalised, Part 1 is proposed to apply for the 2019–2020 income year and later income years, and Part 2 is proposed to apply for the 2018–2019 income year and earlier income years.

Comments on the draft Guideline are due by 14 February 2025.

ATO reference *PCG 2025/D1*
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2025D1/NAT/ATO/00001

9. Tax Professionals

9.1 TPB guidance on 8 new code items

On 23 December 2024, the TPB finalised its guidance on how the 8 new Code items, contained in the Tax Agent Services (Code of Professional Conduct) Determination 2024, apply. These obligations came into effect for larger tax practitioner firms, with more than 100 employees from 1 January 2025. Firms with 100 or fewer employees must comply from 1 July 2025 onwards.

The TPB developed these guidance materials following stakeholder consultation, including roundtable discussions and written submissions. In addition to formal guidance, the TPB is supporting practitioners through webinars and practical case studies available on its website.

w https://www.tpb.gov.au/tpb-guidance-support-tax-practitioners

9.2 Finalised TPB information sheet – Ethical standards

The TPB finalised its information sheet TPB(I) 44/2024 regarding the obligations under section 10 of the Tax Agent Services (Code of Professional Conduct) Determination 2024. The finalised information sheet refines the draft TPB(I) D56/2024 (see our November 2024 Tax Training Notes) by incorporating feedback from the consultation process.

Section 10 obliges tax practitioners to uphold and promote the Code and refrain from conduct that may discredit the tax profession or tax system. It requires collaboration among practitioners to maintain public trust. Practitioners must also ensure that employees, contractors, and other assistants meet these obligations.

New paragraphs 24 and 25 were inserted as follows:

> *24. A registered tax practitioner providing considered feedback or submissions, which may include criticism on the content of public consultation documents or proposed government policies, that is done professionally will not be considered conduct that breaches paragraph 10(b) of the Determination. A key design approach for Government and regulatory agencies when developing laws and policies is to seek input from key stakeholders. Consultation allows for a range of views to be expressed and allows practical insights to be shared, which will help shape and improve legislative and regulatory outcomes.*
>
> *25. Any registered tax practitioner that chooses to exercise their legal rights, such as lodging an objection to a decision of the Commissioner of Taxation or appealing a decision of the Commissioner of Taxation or TPB to the Administrative Review Tribunal, also will not be in breach of section 10 of the Determination.*

w https://www.tpb.gov.au/tpbi-442024-upholding-and-promoting-ethical-standards-tax-profession

9.3 Finalised TPB information sheet – False and misleading statements

On 23 December 2024, the TPB finalised its information sheet TPB(I) 45/2024 regarding false or misleading statements. This finalised TPB(I) D57/2024 (see our November 2024 Tax Training Notes). The changes primarily involved clarifications, rewording, and structural adjustments, with no substantive alterations to obligations.

The information sheet is intended to guide registered tax agents and BAS agents on their obligations under section 15 of the Tax Agent Services (Code of Professional Conduct) Determination 2024. This sheet outlines the duties to prevent, correct, and report false or misleading statements made to government agencies, including the TPB and the Australian Taxation Office (ATO). The Code contains 17 items regulating conduct, with section 15 detailing specific obligations to address material misstatements.

w https://www.tpb.gov.au/tpbi-452024-false-or-misleading-statements

9.4 Finalised TPB information sheet – Conflicts

On 23 December 2024, the TPB finalised its information sheet TPB(I) 46/2024, regarding managing conflicts of interest and maintaining confidentiality in dealings with government. This finalised TPB(I) D58/2024 (see our November 2024 Tax Training Notes) includes several key updates, which are outlined below.

Meaning of 'material'

The TASA and Tax Agent Services Regulations 2022 do not provide any guidance on when a conflict of interest will be ‘material’. The finalised information statement says that the term 'material' takes its ordinary meaning, which the TPB interprets as being "of substantial import or consequence".

Identifying conflicts that must be reported

The TPB notes at paragraph 38 that if a registered tax practitioner, after taking reasonable steps to identify and document any material conflict of interest related to an activity for a government agency, discovers material conflicts involving other related third parties, these must also be disclosed to the agency to comply with section 20(b) of the Determination.

New paragraphs have been inserted at 45 to 47 to clarify that if a registered tax practitioner assesses a conflict of interest as not material and decides not to disclose it to a government agency, they should document their decision in case they need to explain it later. If the TPB later finds the conflict should have been disclosed, it will take a balanced approach, considering the practitioner’s rationale. If the explanation is satisfactory, the TPB’s response will likely be educative rather than punitive, with sanctions unlikely unless the circumstances warrant them.

Information covered

Paragraph 66 clarifies that the obligation to maintain confidentiality and not disclose or misuse information applies to information received by a tax practitioner directly from the Australian government agency or indirectly through others working with the agency on the practitioner’s behalf. Paragraph 73 further clarifies that the obligation does not apply to generic, non-taxpayer-specific information provided by the ATO to the tax practitioner community, as this information is general in nature.

Further disclosure of information was authorised by Australian government agency but further on-disclosure by third parties was not authorised

New paragraphs 99 to 101 state that when an Australian government agency authorises the disclosure of confidential information to third parties, any further on-disclosure by those third parties must also be authorised by the agency. If a registered tax practitioner is unaware of the unauthorised on-disclosure and the initial disclosure was authorised, it is unlikely they will breach section 25 of the Determination. However, the practitioner may need to report the on-disclosure if the third parties are registered tax practitioners. The TPB may take regulatory action against the third parties or the firm involved in such cases.

New case study

A new case study (Case Study 9) has been inserted, illustrating that no breach of subsection 25(1) of the Determination occurred when confidential information from a draft ATO Class Ruling was shared appropriately with a client's Board and CEO but not further disclosed.

w https://www.tpb.gov.au/tpbi-462024-managing-conflicts-interest-when-undertaking-activities-government-and-maintaining-confidentiality-dealings-government

9.5 Finalised TPB information sheet – Client records

On 23 December 2024, the TPB finalised its information sheet TPB(I) 47/2024, regarding the obligation to keep proper client records of tax agent services provided. This finalised TPB(I) D59/2024 draft (see our November 2024 Tax Training Notes) and included a few minor updates.

A new paragraph 51 was inserted as follows:

> *It is also noted that the Accounting Professional and Ethical Standards Board (APESB) has released APES 220 Taxation Services (APES 220) and APES 320 Quality Management for Firms that provide Non-Assurance Services (APES 320), which apply to members of relevant professional bodies that have adopted it. While not binding on all registered tax practitioners, these standards provide useful guidance on what steps a registered tax practitioner can take to ensure they have adequate arrangements in place for record keeping in relation to activities that are undertaken in their capacity as a registered tax practitioner. APES 220 notes, among other things, that a member is required to prepare working papers that appropriately document the work performed, while APES 320 outlines the requirements for engagement documentation.*
>
> (footnotes omitted)

Paragraph 23 was updated to clarify some of the kinds of records required to be kept, including:

records that reference or describe information exchanged with the client, including advice received from the client; and

11. records of steps taken to ascertain the client's state of affairs relevant to the tax agent services being provided including, for example, records of source documents sighted or reviewed.

w https://www.tpb.gov.au/tpbi-472024-obligation-keep-proper-client-records-tax-agent-services-provided

9.6 Finalised TPB information sheet – Supervision, competency and quality control

On 23 December 2024, the TPB finalised its information sheet TPB(I) 47/2024, regarding the obligations for Supervision, competency and quality management under the *Tax Agent Services Act 2009*. This finalised TPB(I) D60/2024 (see our November 2024 Tax Training Notes).

An example of circumstances where a tax agent holding multiple supervisory roles would fail to meet the required standard has been deleted. Paragraph 73 has been updated to state:

> *Adequate training may consist of both formal and 'on-the-job' training. The adequacy and appropriateness of the training will depend on the skills and knowledge of the unregistered individual, and the relevance of the training to the services they perform on the tax practitioner's behalf.*

Relevance of APES 320

A new paragraph 78 has been inserted to note that the obligations in section 40 of the Determination have been informed by standards issued by the Accounting Professional and Ethical Standards Board (APESB), speficically APES 320 Quality Management for Firms that provide Non-Assurance Services (APES 320). The TPB notes that registered tax practitioners may also be able to seek guidance from their professional association in relation to the requirements of APES 320.

Example of expected internal controls for SME and sole practitioners

A new paragraph 81 has been inserted as follows:

> *For example, the types of internal controls an SME with staff may be required to document, maintain and enforce include:*
>
> - *a written policy on the professional standards that staff are required to adhere to in providing tax agent services*
> - *use of letters of engagement to set out the terms of engagement with a client,[60] including processes for managing complaints and conflicts*
> - *a process for verifying the identity of a client and conducting proof of identity checks[61]*
> - *maintaining physical controls over filing cabinets and storage of physical documents*
> - *policies and processes for recruitment, education and training of both registered and unregistered staff*
> - *policies and processes for the appropriate engagement of external consultants and contractors in the provision of tax agent services*
> - *maintaining a dedicated register of actual or perceived conflicts of interest, to be checked prior to engaging or re-engaging a client*
> - *quality assurance processes and systems to maintain supervision and review the accuracy of tax agent services being provided to clients*
> - *regular periodic reviews of whether the firm's quality management system remains effective and up to date*
> - *regularly updating software to manage cybersecurity risks and ensure information remains confidential.*

The TPB notes that a sole practitioner without staff is still required to document, maintain and enforce internal controls, but these can be scaled to fit their circumstances. While controls for staff recruitment or reporting are not needed, sole practitioners should plan for compliance with the TASA if they become incapacitated and cannot provide services.

w https://www.tpb.gov.au/tpbi-482024-supervision-competency-and-quality-management-under-tax-agent-services-act-2009

9.7 Finalised TPB information sheet – Keeping clients informed

On 23 December 2024, the TPB finalised its information sheet TPB(I) 49/2024, regarding keeping clients informed. This finalised TPB(I) D61/2024 (see our November 2024 Tax Training Notes) includes some minor updates following a consultation period that closed on 21 November 2024.

Obligations of individual tax agents working for tax agent entity

Paragraph 13 was updated to clarify that when a partnership or company registered tax practitioner (the entity) provides tax agent services, the obligation under section 45 of the Determination applies to the entity, not the individual registered tax practitioners who meet the 'sufficient number' requirement. Individual practitioners are only personally responsible for complying with section 45 if they provide tax agent services in their personal capacity, separate from the services they perform on behalf of the entity.

New paragraphs 14 and 15 were inserted to state that while the entity is not required under section 45 of the Determination to inform clients about individuals providing services on its behalf, the entity must still comply with its broader obligations under the TASA, including ensuring appropriate supervision and quality management of tax practitioners. Individual registered tax practitioners who must make disclosures under section 45 in their personal capacity should also disclose relevant matters about any associated company or partnership involved in providing tax agent services.

Disclosure obligations and the 5-year look back period

Registered tax practitioners have an obligation to inform clients about certain significant events that could affect their decision to engage or continue using their services. This includes events such as a suspension of registration, a serious conviction, or being penalised for promoting tax exploitation schemes. Practitioners must disclose these events if they occurred within the past five years. Paragraph 33 was updated to clarify that the 5-year look back period does not apply to events which occurred before 1 July 2022.

'Prominent, clear and unambiguous'

Registered tax practitioners must give, in writing, to all their current and prospective clients, the information set out in subsection 45(1) of the Determination in a prominent, clear, and unambiguous way. Paragraph 44 has been updated to state:

> *While the phrase 'prominent, clear and unambiguous way' is not defined in the TASA, it is generally taken to mean that information is explained in simple, plain English which allows clients to make informed decisions as to whether to engage (or continue to engage) a registered tax practitioner to provide them with a tax agent service.*

The draft information statement indicated that the TPB would consider this requirement to be met if the registered tax practitioner:

publishes the information on a publicly accessible website that the registered tax practitioner uses to promote the tax agent services they offer;

12. includes the information in letters of engagement or re-engagement (as the case requires), given to each of their clients; and
13. provides their clients, upon engagement or re-engagement (as the case requires), with a copy of the TPB's factsheet on general information for clients.

The finalised information sheet clarifies that this is not the only way in which a registered tax practitioner can satisfy subsection 45(2) of the Determination. For example, where a registered tax practitioner does not have a publicly accessible website to promote tax agent services, the registered tax practitioner may satisfy the requirements of subsection 45(2) by simply including the information in engagement or re-engagement letters and providing the TPB factsheet. The link to the factsheet is included below.

w https://www.tpb.gov.au/tpbi-492024-keeping-your-clients-informed
w https://www.tpb.gov.au/sites/default/files/2024-12/Factsheet_Information%20for%20clients.pdf

9.8 ATO approach to TPB changes

The ATO is developing guidance materials and digital solutions to help tax practitioners comply with the new TPB Code changes. It is currently identifying an existing secure digital channel for notifying false or misleading statements and will provide further details on notification requirements in 2025.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/tpb-code-of-professional-conduct-changes

9.9 Reminder to include client bank account details on lodgments

The ATO published a reminder on its website emphasising the importance of including clients' current bank account details on every lodgement to ensure refunds are issued electronically. Electronic payments are faster and more secure than cheques. If bank details are missing, refunds and future payments will default to cheques, as the details are removed from the client's tax account.

Cheques may also be issued if there is a problem with the bank account provided or for non-income tax payments, such as superannuation, where the ATO does not have correct details.

Agents can use Online services for agents to view, add, update, or delete client bank account details. Ensuring bank details are included and accurate in all lodgements helps streamline payment processing and avoid delays caused by issuing cheques.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/include-your-clients-bank-account-details-on-every-lodgment