The Tax Institute

Tax Update

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Written by:
Brown Wright Stein Lawyers
Level 6, 179 Elizabeth Street
Sydney NSW 2000
P 02 9394 1010

Brown Wright Stein tax partners:

Amanda Comelli	E: akc@bwslawyers.com.au	P: 02 9394 1044
Andrew Noolan	E: ajn@bwslawyers.com.au	P: 02 9394 1087
Geoff Stein	E: gds@bwslawyers.com.au	P: 02 9394 1021
Matthew McKee	E: mpm@bwslawyers.com.au	P: 02 9394 1032
Michael Malanos	E: mlm@bwslawyers.com.au	P: 02 9394 1024
Rachel Vijayaraj	E: rlv@bwslawyers.com.au	P: 02 9394 1049
Suzie Boulous	E: sjm@bwslawyers.com.au	P: 02 9394 1083

www.bwslawyers.com.au

About Brown Wright Stein

Brown Wright Stein is a medium-sized commercial law firm based in Sydney. We provide legal advice in the following areas:

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At Brown Wright Stein, we believe in excellence in everything we do for our clients. It's this commitment that enables us to develop creative, innovative solutions that lead to positive outcomes.

Contents

Our tax training notes are edited by Marianne Dakhoul, Jane Harris, Rose McEvoy and Gillian Tam and prepared by members of our team:

Eleanor Arthurson	Phoebe Mayson	Hayden Rudd
Aritree Barua	Rayaan Mubayyid	
Indeya Canvin	Anna Ritchie	

1. Tax Update Pitstop

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
CVMW	The Administrative Appeals Tribunal has found in favour of the ATO in relation to payments received by a taxpayer that taxpayer contended were loans. The AAT did not accept that the accounting records of the taxpayer was sufficient evidence that the payments were loans.	Page 13
Haidi Holdings and Diamond Family Trust	A liquidator and bankruptcy trustee have, in unrelated matters, successfully sued trustees of trusts in relation to unpaid present entitlements of the insolvency company and bankrupt individual.	Page 23 and Page 26
Integrated Trolley Management	The New South Wales Court of Appeal has handed down a significant decision clarifying the operation of the employment agency contract provisions in the payroll tax laws.	Page 27
TASA Code Changes	The Tax Practitioners Board has published materials concerning the recent changes to the *Tax Agents Services Act 2009* (Cth) concerning the use of 'disqualified entities'	Page 43
Mid-Year Economic and Fiscal Outlook 2023-2	The Federal Government has proposed a number of miscellaneous tax measures, including the non-deductibility of GIC and SIC from 1 July 2025	Page 58

2. Cases

2.1 Meakins – deductibility of holding expenses

Facts

Intaglio Pty Ltd is the sole trustee of the Adrienne Meakins Family Trust (**Trust**). Adrienne Meakins is the sole director and shareholder of Intaglio Pty Ltd and the specified beneficiary of the Trust.

Adrienne's husband, Murray Pollock, is a co-founder, director and shareholder of DDH1 Drilling Pty Ltd.

On or about 2 July 2006, Intaglio Pty Ltd as trustee for the Trust purchased vacant land at North Fremantle. The purchase price of the property was $1,300,500, which was funded by an interest-only business loan by the ANZ Bank in the amount of $1,340,000 for a term of 15 years.

The vendor of the North Fremantle property had plans drawn up prior to the sale for the construction of a single residential dwelling on the property. These plans were given to Intaglio Pty Ltd at the time of the purchase.

It was intended at the time of purchase of the property that, once the commercial property was built, DDH1 Drilling Pty Ltd would occupy the property. Subsequently, DDH 1 Drilling became successful, and the property ceased to be suitable for the purposes of its business.

During the income years ended 30 June 2007 to 30 June 2017, the North Fremantle property was not rented and no rental income was received. During the income year ended 30 June 2018, the Trust received $7,000 in rental income from Mosman Bay Construction Pty Ltd. The property was used for the storage of building materials.

The Trust claimed a total of $1,083,841 of deductions for holding costs for the North Fremantle property over the income years when the property was not rented out. The Commissioner wrote to the trustee asking for an explanation as to the purpose of the acquisition of the vacant land and the basis on which the holding costs were incurred in gaining or producing the assessable income.

The tax agent for the Trust advised the Commissioner that:

1. the property was purchased with the intention of building a rental property to derive assessable income;
2. since purchasing the property, ongoing uncertainties with respect to local land use planning, local building restrictions and state land resumptions had caused the Intaglio Pty Ltd to defer undertaking the capital works which it had always intended to undertake on the property in order to generate income;
3. no building had been constructed on the property and the trustee had not, and was still not, considering commencing building on the site; and
4. the intention with respect to the property was always a commercial one, for the purpose of gaining or producing assessable income.

On 9 September 2020, the Commissioner issued a position paper stating that the holding costs incurred by the Trust in relation to the property were not deductible under section 8-1 of the ITAA 1997 for the 2007 to 2017 income years, as they were not incurred in gaining or producing assessable income. The holding costs for the 2018 income year were deductible in part, as Mosman Bay Construction Pty Ltd leased the property from 1 December 2017 for $1,000 per month. A legal representative for Adrienne and the Trust provided a response to the position paper, but the Commissioner advised that the position was unchanged.

On 2 December 2020, the Commissioner issued amended assessments for Adrienne and the Trust (noting Adrienne was the sole beneficiary entitled to the income of the Trust each year).

On 2 February 2021, Adrienne and the Trust lodged objections to the amended assessments. On 23 July 2021 and 1 November 2021, the Commissioner disallowed the objections in full.

Adrienne sought review of the decision in the AAT.

Both the Commissioner and Adrienne referred extensively to the decision in *Steele v Deputy Commissioner of Taxation* [1999] HCA 7 (***Steele***), in which the taxpayer was able to claim deductions for holding costs relating to land, despite the plans for income production from that land not coming to fruition.

Adrienne argued that the facts in this case are sufficiently similar to *Steele* and that the holding expenses should be deductible.

The Commissioner argued that, applying the principles in *Steele*, there must be objective evidence of commitment or continuing efforts towards gaining or producing of the intended assessable income. The Commissioner submitted that such commitment was not demonstrated in this case.

Issue

Were the holding expenses for the property deductible under section 8-1 of the ITAA 1997?

Decision

The AAT found a number of key differences between *Steele* and the present case, including that:

1. in *Steele*, within six months of settlement of the purchase of the property, the taxpayer had retained architects to prepare schematic design for a specific commercial development. Four months after retaining the architects, the taxpayer lodged an application for development approval for a specific development. The timeline of the present case extended 17 years without even getting to a stage of architectural drawings being produced, let alone approval being granted or even an application for development approval being lodged; and
2. in *Steele* the taxpayer had a definite, identifiable plan for the development of the property which, in a relatively short timeframe, was refined and developed to the point of architectural plans and consultants' reports sufficient to obtain local government development approval. However, in the present case Adrienne did not advance her 'intention' in relation to the development to anywhere near that level.

The AAT found that the lack of any substantial action towards developing an income producing asset is inconsistent with an ongoing intention to develop the property to generate assessable income.

The AAT found that there was a lack of any temporal relationship between the payments for which deductions are claimed and the actual or projected receipt of income. The intended income from development of the property had never been generated. The payments for which deductions were claimed were not connected to income production from the property. The costs claimed were, at best, 'entirely preliminary' to generating assessable income. The AAT found that the costs were incurred 'too soon before the commencement of the business or income-producing activity'.

Further, a primary commercial factor underpinning the purchase of the property was the construction of offices and storage for DDH1 Drilling Pty Ltd. This ceased to be a factor by late 2007 when DDH1 Drilling Pty Ltd moved into another commercial property. There has been no effort to secure another tenant.

Therefore, the holding costs incurred by the Intaglio as trustee of the Trust in relation to the North Fremantle property were not deductible under section 8-1 of the ITAA 1997 for the 2007 to 2017 income years.

TIP – this case pre-dates the introduction of section 26-102 of the ITAA 1997, which denies a deduction for losses or outgoings relating to holding land on which there is no substantial and permanent structure in use or

available for use. For more information about the denial of deductions in relation to holding vacant land, see Taxation Ruling TR 2023/3 (see our October 2023 Tax Update).

Citation *Meakins and Commissioner of Taxation (Taxation)* [2023] AATA 3852 (Boyle DP, Perth)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3852.html

2.2 Mitri – characterising gains on sale of real property

Facts

Souhail Mondous (known as Sam) is a land developer. His daughter, Natalie Mondous, is the sole director and shareholder of a company called Frontlink Pty Ltd, which owned 15 properties. Sam was heavily involved in most aspects of Frontlink's affairs and executed key documents on behalf of Frontlink.

In the income years ended 30 June 2007 to 30 June 2015, Frontlink realised the following gains on the sale of properties:

1. in the 2009 income year, $5 million in gains from the sale of a property in Beveridge;
2. in the 2011 and 2013 income years, $42 million in gains from the sale of subdivided lots of a property located in Cranbourne. The property was a acquired a result of an option agreement entered into by Sam for him or his nominee to acquire the land. In the option agreement there was a clause that said that the option was conditional on the grantee obtaining re-zoning for residential purposes, although such re-zoning was not obtained by the time the option was exercised;
3. in the 2014 and 2015 income years, $13 million in gains from the sale of subdivided lots in properties in Clyde North; and
4. in the 2014 income year, $230,000 in gains from the sale of a property in Yarra Glen.

Frontlink lodged its returns on the basis that the transactions were on capital account and it was entitled to disregard half of the gains on the Cranbourne property by using the 50% active asset reduction under the small business CGT concessions, and to defer the remaining 50% of gains on the Cranbourne property by using the small business replacement asset roll-over.

However, the Commissioner issued assessments that treated the above transactions as being on revenue account.

On 8 December 2017 Frontlink lodged an objection against the assessments. On 27 May 2021 the Commissioner disallowed the objections.

Frontlink sought review of the objection decisions in the AAT.

Natalie did not give evidence in the AAT. Sam gave evidence stating that he did not make decisions for Frontlink, but provided advice in the style of a mentor to Natalie, who made up her own mind.

Frontlink contended that the intended use of the properties was farming and that they were not acquired in the course of a business of buying land for sale or in a commercial transaction for a purpose of resale at a profit. Frontlink also contended that the properties other than the Cranbourne property were held on trust for the Natalie Mondous Family Trust (**NMFT**) and should not have been counted when assessing whether Frontlink was eligible to apply the small business CGT concessions. Accounts were not prepared for the NMFT until 2013. Before that, all the properties were included in the accounts of Frontlink.

Sam gave evidence that:

1. the properties were acquired only for farming and generated 'good income';

2. he knew nothing of proposed re-zoning which ultimately led, along with the subdivision it permitted, to the substantial gains upon sale of the subdivided lots;
3. he was not interested in the re-zoning;
4. Frontlink would not have purchased the property if he had known of the potential re-zoning; and
5. it was the rezoning, resulting in higher holding costs, that forced Frontlink to sell the property.

In unrelated proceedings in the Supreme Court of Victoria, Sam gave evidence that contradicted his statements before the AAT. Sam claimed that the earlier evidence was incorrect because he was saying what his lawyers told him to say on that occasion, and because it was the first time he had given evidence in the Supreme Court.

In response to these points, the Commissioner noted that:

1. the properties never generated a profit in any of the years for which financial information was provided and an external consultant engaged by the vendors of the Cranbourne property advised planning authorities that it was not a viable farm and any grazing was primarily for weed control;
2. the option to purchase the Cranbourne property that was executed by Sam, which preceded the contract of sale, was conditional upon rezoning occurring;
3. the Casey City Council had embarked upon an extensive consultation program about zoning of the land;
4. after settlement, Sam attended meetings with the Council about representations being made for the lands to be rezoned; and
5. Frontlink voluntarily paid over $100,000 to the Council in connection with the proposed rezoning.

The Commissioner contended that the profits or gains on the Cranbourne property and the Beveridge property were revenue in nature and, further, that, Frontlink did not meet the conditions for the CGT small business concessions.

The Commissioner accepted that the Clyde Road and Yarra Glen properties were held by Frontlink as trustee for the NMFT from October 2013, and issued alternative assessments to the beneficiaries of the NFMT accordingly.

Issue

Were the gains on sale of the Cranbourne and Beveridge properties on revenue account or capital account?

Decision

The AAT considered the principle from *Federal Commissioner of Taxation v The Myer Emporium Ltd* [1987] HCA 18, that ‘a gain on sale of property not acquired as part of a business may nevertheless be income if the property was acquired in a commercial operation for the purpose of profit-making by the means giving rise to the profit.’ On the basis of the *Myer* principle, Frontlink was required to prove that the properties were not acquired in a commercial transaction for the purpose of resale at a profit.

Based on the circumstances of the matter, and the objective evidence regarding a lack of farming income, the AAT was not persuaded that the main purpose of acquisition of any of the properties was for Frontlink to carry out a farming business.

The AAT found that the properties were acquired for the purpose of resale at a profit, having regard to:

1. the terms of the option agreement requiring rezoning;
2. the substantial activity at the Council and Victorian Government level related to zoning including extensive consultation;
3. Sam’s long background in land development;
4. Sam's statements in other proceedings in the Supreme Court regarding the modus operandi of acquiring properties and seeking favourable rezoning; and

5. the question mark over his commitment to providing accurate testimony under oath.

Entry into the sophisticated option agreement subject to the obtaining of rezoning approval was the type of thing a businessperson would do, marking it out as a commercial transaction. Therefore, the AAT found that the profits were on the revenue account.

The AAT found that there was insufficient evidence to support the contention that the Cranbourne and Beveridge properties were held by Frontlink in its capacity as trustee of the NMFT.

Citation *Mitri and Commissioner of Taxation (Taxation)* [2023] AATA 3762 (Olding SM, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3762.html

2.3 SQYY – undeclared salary and personal services income

Facts

SQYY is an individual. On 31 July 2014, SQYY was appointed as the Executive Chairman, CEO and a director of GY, an Australian Public Company listed on the Australian Stock Exchange.

On 3 March 2016, SQYY ceased being CEO of GY. Despite being the CEO of GY in the income years ended 30 June 2015 and 30 June 2016, SQYY's income tax returns for those years showed that he was not paid any salary or other income by GY.

According to GY's 2015 annual report, SQYY was paid:

1. from 1 July 2014 to 31 December 2014, the amount of $154,704 as 'cash salary and fees'; and
2. for the 2015 calendar year, the amounts of $414,300 and $36,000 as 'fees and non-monetary benefits' (total amount being $450,300).

According to GY's 2016 annual report, SQYY was paid the amounts of $403,089 as 'fees/remuneration', $36,000 as 'non-monetary benefits' and $40,000 as 'equity based payments for shares' (total amount being $479,089).

The 2015 and 2016 annual reports recorded that SQYY's services to GY were provided 'pursuant to a Contract with a Service Company'.

The 'Service Company' is CL, a company registered in Hong Kong and indirectly controlled by SQYY. CL is the trustee of SQYY's family trust.

The 'Contract', under to which SQYY's services to GY were provided, was titled 'contract for the provision of services'. The Contract was dated 28 April 2014 and commenced on the same date. The Contract also provided the following:

1. GY 'engages [CL] and [CL] accepts the engagement to provide the Services on the terms and conditions set out in the Contract';
2. 'Services' meant 'the chief executive services to be provided by the Contractor and to be performed by the Key Person … and includes the provision to GY of all Contract Material';
3. SQYY was the 'Key Person';
4. 'Contract Material' was the documents and things brought into existence for the purpose of providing the Services;
5. with the agreement of the board of GY, the Services could be provided by employees or subcontractors of CL, other than SQYY, and the contract could be sub-contracted;

6. GY was to pay CL a minimum amount of US$300,000 per annum ‘plus annual increments exclusive of costs and allowances’, as well as allowance for ‘out of pocket expenses’ for an amount of AUD$3,000 per month. The minimum payment of US$300,000 was expressed as compensation for the provision of the services of the ‘Key Person’, being SQYY.

CL issued 27 invoices to GY over the period from 30 September 2014 to 25 March 2016. In the income year ended 30 June 2015, the invoices totalled US$451,768 of which US$275,000 appears to have been the total of the monthly payments of US$25,000 under the Contract in respect of SQYY. In the income year ended 30 June 2016, the invoices totalled US$724,332 of which $225,000 appears to have been from monthly payments of US$25,000 under the Contract in respect of SQYY.

CL engaged several other individuals under contracts of employment over the relevant tax years who also undertook work for GY. CL did not have a written contract of employment for SQYY.

SQYY's income tax returns for the income years ended 30 June 2015 and 30 June 2016 noted that his taxable income was $355 and $111,725 respectively. His tax return did not show any income from GY or CL. SQYY later conceded that the tax returns were not correct.

Due to the discrepancy between GY's annual report and SQYY's income tax return, the Commissioner conducted an audit of SQYY’s tax affairs. Following the audit, on 17 July 2019 the Commissioner issued default assessments to SQYY for the income years ended 30 June 2015 and 30 June 2016.

In making the default assessments, the Commissioner relied on the amounts detailed in GY's annual reports plus the income that had already been declared by SQYY for each of the years. The Commissioner arrived at an assessment of $380,189 for the income year ended 30 June 2015 and $576,073 for the income year ended 30 June 2016. The Commissioner also issued assessment of shortfall penalties for both years for making a false or misleading statement for each year.

On 30 July 2020, SQYY objected to the default assessments.

SQYY argued that his assessable income was confined to his 'personal services income'. Section 87-15 of the ITAA 1997 provides that a taxpayer's assessable income includes an amount of ordinary income or statutory income of a personal services entity that is the taxpayer's personal services income which can be reduced by ‘certain deductions to which the personal services entity is entitled’. SQYY submitted that:

1. his taxable income for the income year ended 30 June 2015 was $233,696, calculated as $394,383 on account of CL’s receipts from GY, less $160,687 on account of CL's payments to its contractors and employees; and
2. his taxable income for the income year ended 30 June 2016 was $101,054, calculated as $770,836 on account of CL’s receipts from GY, less $669,782 on account of CL expenses. SQYY later submitted that his taxable income for the 2016 year was $386,092, calculated as $929,714 of income less $543,622 of CL's expenses.

SQYY did not identify any basis for why the amounts he claimed were his personal services income, and why the other amounts were not part of his personal services income. He also received other unexplained payments which had the potential to be considered income. Additionally, SQYY failed to reveal what payments made by GY should be deducted from his personal services income.

On 18 August 2021 the objection was disallowed by the Commissioner.

SQYY sought review of the objection decision in the AAT.

Issue

Were the default assessments excessive or otherwise incorrect?

Decision

The Member concluded that SQYY failed to prove that the default assessments were excessive or otherwise incorrect and also failed to prove what the actual assessments should have been. The Member found SQYY's evidence unpersuasive as SQYY conceded on many occasions that either did not know things or would need to refer questions to others, such as his accountant. The Member also observed that SQYY appeared to be answering questions 'with an eye focused upon what the implication of his answer might be for his case'.

The Commissioner's decision to disallow the objection was affirmed.

COMMENT – the ATO investigation in this case was commenced based on the ATO picking up information out of annual reports published by an ASX listed company.

Citation *SQYY and Commissioner of Taxation (Taxation)* [2023] AATA 4070 (Mr Rob Reitano, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/4070.html

2.4 CVMW – 'loans' from parents treated as income

Facts

Mr Chen and Ms Li (pseudonyms) are married. Through two discretionary trusts (Trading Trust 1, and Trading Trust 2) they operate hospitality businesses throughout regional Victoria.

Mr Chen and Ms Li also conduct property investment activities through a third discretionary trust (the Property Trust). In both the 2017 and 2018 income years, the Property Trust distributed income to both Mr Chen and Ms Li as to 50% each.

In the 2017 and 2018 years of income, the Property Trust received into its bank account seven deposits of cash or bank cheques which totalled an amount of $735,825.

The general ledgers of the Property Trust for the 2017 and 2018 income years described the deposits either as 'Beneficiary contribution' Mr Chen's father and mother or 'Loan from related party' Ms Li's mother.

Mr Chen and Ms Li stated that their parents loaned or provided equity to the Property Trust to help with the acquisition of the several properties.

On 31 October 2019, the ATO wrote to Mr Chen and Ms Li advising them that the ATO was auditing the Trading Trusts and the Property Trust in respect of the 2017 and 2018 income years.

On 4 December 2019, a meeting was held between Mr Chen, Ms Li, their tax agents and ATO officers. A file note from an ATO officer made the following noted:

> *Ms Li's mother would travel with cash from Hong Kong and give this to Ms Li…. Ms Li said she would take a few days before depositing the funds into her bank account... During the 2015 year, Ms Li said there was one trip where her mother gave her $50,000 cash on one day and a few days later would give her $50,000 cash (total $100,000 cash). Cash was ultimately deposited into the Property Trust account when required for the purchase of investment properties...*

Mr Chen said he received $660,000 in cash as an inheritance from his parents. This is recorded in the Property Trust as a beneficiary contribution from Mr Chen's mother and father.

The Commissioner asked for information from the Department of Home Affairs in relation to the travel movements for Ms Li's mother and Mr Chen's parents between the 2014 to 2018 income years. The incoming

passenger cards of Ms Li's mother and Mr Chen's parents did not declare any cross-border movement of cash when they arrived in Australia.

On 18 February 2020, the ATO:

1. issued position papers to Mr Chen and Ms Li;
2. issued a beneficiary adjustment to Mr Chen and Ms Li.

On 5 March 2020, Mr Chen and Ms Li accepted the ATO's position papers in relation to the two trading trusts and the ATO finalised the audit of those trusts.

On 25 March 2020, Mr Chen and Ms Li sought independent review of the audit position. The independent review was finalised on 16 December 2020 and confirmed the ATO's audit position.

On 13 January 2021, the ATO finished the audit of the Property Trust and issued a revised audit finalisation letter, and notices of amended assessments of income tax issued pursuant to section 166 of the ITAA 1936 (in relation to the deposits only) to Mr Chen and Ms Li for the years ended 30 June 2017 and 30 June 2018.

On 1 February 2021, the ATO issued notices of assessment of administrative penalties to Mr Chen and Ms Li for the years ended 30 June 2017 and 30 June 2018.

Mr Chen and Ms Li objected to the assessments and the penalties. The objection was disallowed.

Mr Chen and Ms Li sought review of the objection decision in the AAT and requested a private hearing. Their names and the names of the trusts were anonymised in the decision, but Mr Chen and Ms Li argued that the name of their tax agent should also be anonymised in the published reasons because it was necessary to protect their identity in accordance with their entitlement for a private hearing.

Issues

1. Did Mr Chen and Ms Li discharge their onus of proving the amended income tax assessments for the years ended 30 June 2017 and 30 June 2018 are excessive or otherwise incorrect and what the assessments should have been?
2. Should administrative penalties be imposed on Mr Chen and Ms Li under Division 284 of Schedule 1 to the TAA for making false or misleading statements?

Decision

The AAT held that there were several shortcomings in the evidence of both Ms Li and Mr Chen, including:

1. there was very little evidence regarding the circumstances in which the cash was given to them;
2. there were no written loan agreements, no repayments of principal or interest and the tax agent did not make any enquiries of the purported lenders;
3. the evidence provided by the tax agent contradicted the evidence of Ms Li and Mr Chen;
4. there was too much confusion regarding the source of the cash for the 1 May 2017 deposit;
5. Ms Li's oral and written evidence was contradictory; and
6. Ms Li was not a reliable witness.

Due to the inability to obtain clarity and certainty regarding the nature of the seven deposits, the AAT concluded that Mr Chen and Ms Li did not discharge their onus of proof in proving that the assessments were excessive. The AAT confirmed the Commissioner's decision to issue the amended assessments in respect of the deposits.

Based on the evidence provided by both Mr Chen and Ms Li, the AAT was not satisfied that the burden of proof proving that they, and their tax agent acted with reasonable care was discharged.

Accordingly, the AAT affirmed the decisions of the Commissioner to issue the penalty assessments.

COMMENT – the AAT noted that there is no issue with taxpayers engaging in cash transactions (cash is legal tender), but absent any independent corroboration of the alleged sources of the cash, the reliability of the evidence of the taxpayers becomes critical. In this case, the records in the financial statements were not sufficient to establish that the funds had been loaned.

Citation *CVMW and Commissioner of Taxation (Taxation)* [2023] AATA 4039 (Lazanas SM, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/4039.html

2.5 Lance – sale of property was in the course or furtherance of an enterprise

Facts

Paul Lance is a businessperson.

With his wife, Paul owns his family home and the following properties:

1. a camping ground near Mandurah, Western Australia (**Holiday Park**). The Holiday Park was purchased in or around 2002. The Holiday Park was managed by Paul and his wife, and was their primary source of income; and
2. a property containing two sheds in Pinjarra. Paul and his wife lease the sheds and generate a small amount of rental income, on which GST is paid.

Paul has also held the following property interests:

1. several blocks of land in Boddington, Western Australia. The blocks were acquired on 17 August 2010 and were sold at a later point for a loss; and
2. a property located at 5 Apollo Place, Halls Head (**5 Apollo Place**). 5 Apollo Place was acquired in early 2013 and is located immediately adjacent to Sutton Farm, the subject of the proceedings.

Purchase of Sutton Farm

Sutton Farm comprised of a single parcel of land of approximately 1.47 hectares with a homestead, a large barn and a single men's quarters.

Paul had admired Sutton Farm for years. After seeing Sutton Farm advertised for sale in the local newspaper in around April 2013, Paul decided to put in an aspirational offer without any expectations that his offer would be successful. On 13 June 2013, Paul exchanged contracts for the purchase of Sutton Farm for $1,600,000, which settled on 15 December 2013.

Development of Sutton Farm

Paul decided to sell 5 Apollo Place so that he could afford Sutton Farm. To assist with the purchase and subsequent development works, Paul took out a loan for approximately $1 million from a bank. Paul also borrowed around $1.5 million from his brother-in-law, which he did not consider to be a commercial arrangement.

Articles appeared in the local newspapers in 2014, 2015, 2016 and 2017 regarding the future use of the farm, with most stating Paul's intention was to lease out or develop Sutton Farm as a restaurant, wine bar or coffee house.

At the time of purchase, Sutton Farm was zoned 'Tourist'. Paul engaged an expert consultant to assist with rezoning the farm, preparing documents and plans for submission to council, meeting with council as well as

dealing with the Department of Heritage and the Western Australian Planning Commission. Paul claimed he wanted to rezone the farm so that he could renovate and live in the main homestead. Paul also claimed that he wanted to subdivide the property so that his daughter and son could live on the site, not for commercial purposes.

Paul experienced numerous hurdles with the rezoning in which he required the consultant's expertise and a significant amount time and money.

In or about early 2016, Paul lodged a Proposed Local Structure Plan for Sutton Farm with council. Relevantly, the plan noted, among other things, that the existing heritage site would be *'retained for tourism/entertainment functions, such as a restaurant/café, small bar, wine house and short stay accommodation'*.

Sutton Farm was rezoned 'Special Use' in or about March 2016.

In early 2017, the Local Development Plan (**LDP**) was prepared by the council, in consultation with Mr Lance and his advisers. The LDP contemplated that the farm would be subdivided, developed and then sold off as strata lots, though Paul claimed it was not his intention to do so. The LDP was approved by council in September 2017, allowing for the creation of a single residential lot in the centre of Sutton Farm.

In October 2017, Paul lodged the subdivision application for Sutton Farm with council.

In around June 2018, the subdivision of Sutton Farm was approved, subject to conditions.

Paul never made a development application to renovate the homestead while the subdivision works were proceeding. It was not necessary for the farm to be rezoned from 'Tourist' to 'Special Use' in order to renovate and occupy the homestead as a residence.

Sale of Sutton Farm

In 2017, Paul attempted to sell Sutton Farm. Paul said that his decision to sell was due to the delays, setbacks, and constant discussions with the council and government departments. The sale agent advertised that Sutton Farm could be used for a variety of different purposes, including bed and breakfast accommodation, a wine bar, a microbrewery, or an art gallery/café. As there was not much interest in the purchase of the farm, Paul decided to continue with the farm.

In or about 2019, Paul decided to try and sell Sutton Farm again, despite the subdivision and development not being completed. Paul instructed different sale agents, who advertised in their material 'the current owner has spent considerable time, energy and funds into this site and has subdivision approval for the property to be subdivided into 4 x development blocks'. Paul sought to distance himself from the advertisement on the basis that the subdivision had not been approved.

On 24 November 2020, Paul exchanged contracts for the sale of Sutton Farm for $4,250,000, which settled on 3 February 2021. The box adjacent to the statement 'GST is NOT applicable to this Contract' had been ticked in the contract and the sale was also not reported in Paul's Business Activity Statement for the month of February 2021.

Audit and assessment

Following an audit, the Commissioner issued Paul with a notice of assessment of a net amount of GST in respect of the February 2021 monthly tax period on the basis that the sale of Sutton Farm was a taxable supply.

On or about 22 February 2022, Paul objected to the assessment arguing that:

1. the sale was not made by him in the course or furtherance of an enterprise carried on by him for the purposes of section 9-5(b) of the GST Act; and
2. Sutton Farm was his residential premises and was, therefore, an input taxed supply under section 40-65(1) of the GST Act.

Paul later conceded that Sutton Farm did not meet the definition of a 'residential premises', as set out in section 195-1 of the GST Act, as the buildings were uninhabitable. As such, the sale of Sutton Farm was not an input taxed.

Paul argued that the supply of Sutton Farm was not made in the course or furtherance of an enterprise. In support of his argument, Paul claimed, among other things, that he:

1. always intended to subdivide Sutton Farm into four lots;
2. intended to live in the heritage farmhouse with his wife; and
3. pursued the subdivision of the farm for himself and not to increase the value of the land. Paul claimed that is if intention was to make profit, he would have subdivided the land into further lots and sold those lots.

The term 'enterprise', in the GST Act, is substantially broader than '*carrying on a business*' for income tax purposes. Relevantly, section 9-20(1)(a) provides that an enterprise is an activity, or series of activities, done in the form of a business. The words '*in the form of*' have the effect, as interpreted by the Courts, of extending the meaning beyond the carrying on of a business to include activities that have the appearance or characteristics of business activities. The phrase '*carrying on an enterprise*' is also broadly defined, in section 195-1 of the GST Act to include doing anything in the course of the termination of the enterprise.

Paul claimed input tax credits in respect of purchases regarding the development works at Sutton Farm. In order to claim input tax credits, taxpayers must make creditable acquisitions. Section 11-5 of the GST Act sets out the elements of a 'credible acquisition', which includes a requirement that acquisitions are made solely or partly for a 'creditable purpose'. Relevantly, section 11-15(1) of the GST Act states that an acquisition is for a creditable purpose '*to the extent that you acquire it in carrying on your enterprise*'. Paul subsequently claimed that he incorrectly claimed input tax credits as he had misunderstood the GST system.

On 10 August 2022, the Commissioner disallowed Paul's objection and Paul sought review of the objection decision in the AAT.

Issue

Was the sale of Sutton Farm made in the course or furtherance of an enterprise carried on by Paul?

Decision

Senior Member Lazanas did not accept Paul's evidence regarding his plans for Sutton Farm as he did not consider Paul to be a reliable witness. Senior Member Lazanas considered that even accepting Paul intended to live in the heritage homestead, he also intended to subdivide Sutton Farm and sell off the subdivided lots so that he could refurbish the homestead and repay his loans.

Senior Member Lazanas concluded that the series of activities that Paul undertook constituted an 'enterprise', being 'in the form of a business' under section 9-20(1)(a) of the GST Act. This was clear due to the scale of the operations in which Paul was involved, which included rezoning and subdividing the farm, as well as the amount of capital invested by him in the purchase of the property and development works. Regardless of whether Paul was in the business of being a property developer, he undertook activities such as subdividing the farm into four lots with plans for further subdivision, and completing sewerage, water and electrical works, which enhanced the value of Sutton Farm.

Senior Member Lazanas found that sale of Sutton Farm was in the course of Paul terminating the enterprise, which under the definition, constitutes part of carrying on of an enterprise.

The Commissioner's decision to disallow the objection was affirmed.

COMMENT – where a taxpayer disposes of land, the GST issue will not usually be determined by whether the taxpayer is carrying on an enterprise, as the threshold for carrying on an enterprise is low, but, instead, will depend upon whether the taxpayer is registered or required to be registered for GST. This issue was not considered in this case, but given the reasons of the AAT, it likely would have found that Paul held the land on revenue account such that the proceeds of the sale needed to be included in Paul's 'projected GST turnover' and, as a result, that Paul was required to registered for GST.

COMMENT – a question often arises in relation to when executors or administrators of deceased estates are required to register for GST. The case of *Nerang Subdivision Pty Ltd & Ors v Hutson & Anor [2023] QSC 268* (details in the table at item 2.14 of these notes) explores the relevant considerations in that context.

Citation *Lance and Commissioner of Taxation (Taxation)* [2024] AATA 11 (Lazanas SM, Perth)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/11.html

2.6 Came – foreign superannuation fund and applicable fund earnings

On 7 July 2004 James Came immigrated from South Africa to Australia and became an Australian resident for taxation purposes.

At the time, James held vested benefits in five South African pension and retirement annuity funds. Each of the funds qualified as a 'foreign superannuation fund' for the purposes of the ITAA 1997.

During the 2020 income year, James withdrew his full entitlements from the foreign superannuation funds as lump sums.

The superannuation lump sums were paid from the foreign superannuation funds into an Emigrant Capital Account in South Africa, as required by the provisions of South African *Currency Exchanges Act 1933* (Act No 9 of 1933) and related exchange regulations which prohibited the funds being transferred out of South Africa by any other means. The Emigrant Capital Account was held by James in his personal capacity, and the funds in the Emigrant Capital Account were, subject to the relevant restrictions under South African law, free for him to use.

James transferred the amounts received from the foreign superannuation funds out of the Emigrant Capital Account and into the Strayan Superannuation Fund, an Australian complying superannuation fund.

James attempted to transfer the superannuation lump sums from the foreign superannuation funds to the Straya Superannuation Fund as directly as he could, by funding the Emigrant Capital Account to deal with any known costs to keep the lump sum intact and whole, making an interim use of the funds and transferring the entirety of the lump sums promptly once he was permitted to do so.

Under section 305-70 of the ITAA 1997, where superannuation lump sums are received more than 6 months after a taxpayer commenced Australian residency, the amount of the lump sum received by the taxpayer that is the taxpayer's "applicable fund earnings" is to be included in the taxpayer's assessable income.

If a choice has been made under section 350-80 of the ITAA 1997, the taxpayer's applicable fund earnings will be reduced by the amount covered by that choice.

Section 350-80 relevantly provides that:

305-80 Lump sums paid into complying superannuation plans—choice

(1) This section applies if:

(a) section 305-70 applies to a superannuation lump sum that is paid from a foreign superannuation fund; and

(b) you are taken to receive the lump sum under section 307-15; and

(c) all of the lump sum is paid into a complying superannuation fund; and

(d) immediately after the lump sum is paid into the complying superannuation fund, you no longer have a superannuation interest in the foreign superannuation fund.

(2) You may choose for all or part of your applicable fund earnings worked out under section 305-75 (but not exceeding the amount of the lump sum) to be included in the assessable income of the complying superannuation plan.

Section 307-15 in turn provides that:

307-15 Payments for your benefit or at your direction or request

(1) This section applies for the purposes of:

(a) determining whether a payment is a superannuation benefit; and

(b) determining whether a superannuation benefit is made to you, or received by you.

(2) A payment is treated as being made to you, or received by you, if it is made:

(a) for your benefit; or

(b) to another person or to an entity at your direction or request.

Note: Paragraph (b) would cover, for example, a direction by you that a payment be rolled over from your original superannuation fund into another superannuation fund.

In his Australian income tax return for the 2020 income year, James purported to make the election under section 305-80(2) of the ITAA 1997 to include all of his applicable fund earnings from the foreign superannuation funds in the assessable income of the Strayan Superannuation Fund, being the Australian complying superannuation fund into which the superannuation lump sums were paid.

Following an audit, the Commissioner issued a notice of amended assessment treating the applicable fund earnings as assessable income of James personally. James objected to the amended assessment and the objection was disallowed.

James sought review of the objection decision in the AAT.

The Commissioner contended that, section 305-80, when read with section 307-15, James was unable to make the choice as the superannuation lump sums from the foreign superannuation funds were not transferred directly to the Strayan Superannuation Fund.

The Commissioner submitted that:

1. the words ‘taken to receive’ in section 305-80(1)(b), operating with the words ‘treated as being’ in s 307-15(2), mean that the receipt must be a ‘deemed receipt’; and
2. ‘the direction or request’ under section 307-15(2)(b), resulting in the ‘deemed’ receipt, must be a direction or request to make the payment to a complying superannuation fund.

James contended that section 305-80(2) of the ITAA 1997, on its true construction, the choice he made was available to him.

James submitted that section 305-80 contrasts with the former section 27CAA of the ITAA 1936, which had the effect that a 'payment' must be made directly from the foreign superannuation fund to a complying superannuation fund.

James submitted that the change of terminology, from 'payment' in the section former 27CAA to a 'lump sum' in section 305-80, was a substantive change to take into account that that there may be separate payments from the foreign superannuation fund into a complying superannuation fund.

Issue

Was James entitled to make a choice in relation to the superannuation lump sums transferred to the Strayan Superannuation Fund?

Decision

Deputy President Molloy agreed with James' construction that section 305-80 of the ITAA 1997 allows an election to be made where there is a receipt from the foreign superannuation fund, even if the payment is not made directly from the foreign superannuation fund to the Australian complying superannuation fund, provided that 'the lump sum' remained unchanged.

The Deputy President found that James was able elect for all his applicable fund earnings to be treated as assessable income of the Strayan Superannuation Fund and not of him personally.

Citation *Came and Commissioner of Taxation (Taxation)* [2023] AATA 3951 (Molloy DP, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3951.html

2.7 Re Rentis Pty Ltd – validity of binding death benefit nomination made by an attorney

Facts

Robert Stannett and his wife Valerie were members of the Robert Stannett Superannuation Fund. Valerie had children from a previous marriage, Sharyn and Ross. Robert and Valerie also had their own children, Kylie and Blair.

Robert had granted an enduring power of attorney in favour of his wife Valerie, and his brother Peter. The enduring power of attorney authorised the attorney '*to renew any binding death benefit nomination made by me for any superannuation benefits or entitlement*.'

Robert also made the following binding death benefit nominations:

1. the first nomination dated 13 June 2019 allocated 100% of his death benefits to Valerie, and if she did not survive Robert, allocated $200,000 to each of Kylie and Blair, and the remainder to Robert's estate;
2. the second nomination dated 23 October 2020 allocated 50% of the death benefits to Valerie and 50% to Kylie and Blair, in equal shares (i.e. 25% each);

In December 2020, Robert fell from a ladder and suffered a brain injury and as a result lost capacity to make financial and personal decisions.

On 26 February 2021, Valerie died, leaving Robert as the sole member of the Fund, and Peter as the sole attorney for Robert. Peter also assumed the rule as sole director of the trustee of the Fund.

In his role as attorney and following the death of Valerie, Peter executed two further binding death benefit nominations on behalf of Robert:

1. the third nomination dated 9 May 2022 allocated 40% to each of Kylie and Blair, and 10% to each of Sharyn and Ross (Robert's stepchildren);
2. the fourth nomination dated 17 May 2022 allocated 25% to each of Kylie and Blair and the remaining to Robert's estate.

The trustee of the Robert Stannett Superannuation Fund applied to the Supreme Court of Queensland to obtain a declaration as to the validity of the binding death benefit nominations.

Issue

1. Did Peter, in his role as attorney, have the right to renew Robert's binding death benefit nomination?
2. Was the binding death benefit made by Peter on 17 May valid?

Decision

The question for the Court was whether Peter had the authority as attorney to make the nominations on behalf of Robert. This turned on the meaning of the word 'renew', and whether in this case it should be construed with a narrow interpretation, being that the attorney simply had the power to make new or simply repeat the terms of the previous binding death benefit nomination, or whether it should be construed as adopting a broader meaning.

The Court noted that, if Peter had the power under the enduring power of attorney to make a binding declaration, then the nomination made on 17 May 2022 would be valid, and would replace the nomination made on 9 May 2022, which would in turn have replaced the nomination on 23 October 2020.

His Honour did not favour the narrow interpretation. His Honour stated that 'it would be an unappealing construction of an enduring power of attorney that was intended to empower an attorney (here, Peter) to address changed circumstances that Robert would have addressed if he had the capacity to do so'. Instead, His Honour relied on the ordinary meaning of 'renew' which in the dictionary is described as 'to restore to freshness'.

The Court found that Peter did have the authority under the enduring power of attorney to make the binding death benefit nominations. Therefore, the Court concluded that the binding death benefit nomination executed on behalf of Robert on 17 May 2022 was a valid binding nomination.

The Court ordered that the Trustee's costs and the costs of Kylie Stannett be paid out of the superannuation fund on an indemnity basis.

Citation *Re Rentis Pty Ltd* [2023] QSC 252 (Applegarth J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2023/252.html

2.8 van Camp – capacity to make a BDBN

Facts

From about 2013, Dr Harry Nespolon was in a de facto relationship with Lindy van Camp. Harry and Lindy had two children.

Harry was the sole member of the Nespolon Superannuation Fund (the **Fund**). Harry was also the sole director and secretary of the Fund's trustee, Bellahealth Pty Ltd (**Bellahealth**).

In October 2019, Harry was diagnosed with inoperable pancreatic cancer. After his diagnosis, Harry engaged Donna Benge of Piper Alderman to prepare a will and to provide estate planning advice.

On 4 November 2019, Harry instructed Donna that he intended for his member benefits in the Fund be paid to his estate to enable his executors to discharge any debts or loans of his estate. On 9 November 2019, Donna sent Harry estate planning documentation, including a letter of advice, a draft will, a draft enduring power of attorney and a draft appointment of enduring guardian. On 15 November 2019, following certain amendments requested by Harry, an execution copy of the will was sent to Harry.

On 4 December 2019, Harry advised Donna that he had executed his will. However, he did not provide Donna with an executed copy. There is no other record of a will being signed by Harry on this date.

On 23 July 2020, Harry executed his last will and testament (the **Will**). The execution was witnessed by two solicitors from Piper Alderman.

On the same date, Harry advised Lindy that he needed to get his superannuation affairs in order. On numerous occasions on 23 and 24 July 2020, Lindy spoke with Harry's accountants regarding the Fund and the preparation of a Binding Death Benefit Notice (**BDBN**).

On 24 July 2020, Donna attended Harry in hospital and he instructed her to prepare a BDBN. Harry's instructions to Donna were that, on advice of his accountant, and for tax purposes, his member benefits in the Fund must be paid to Lindy.

Donna advised Harry that his instructions contradicted his previous intention for his member benefits be used to pay down any debt. Donna noted in a file note that she was '*concerned re capacity --> sounded drugged up*'.

At 12.04pm on 26 July 2020, Lindy sent an email to Donna using Harry's email address stating that the BDBN was urgently required. At 12:30pm, Donna sent the BDBN to Harry's email address.

Between 12.50pm and 1:40pm on 26 July 2020, Harry was admitted to the intensive care unit. Around 1:00pm, Harry executed the BDBN in the presence of two doctors. In the event of his death, the BDBN directed Bellahealth to pay Harry's member benefit to Lindy.

Harry died at 8.50pm on 26 July 2020.

Bellahealth subsequently refused to pay Harry's member benefit to Lindy on the basis that the BDBN was invalid as it had not been executed in accordance with the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth). Bellahealth also raised concerns regarding Harry's capacity.

As at his date of death, Harry's member balance was worth approximately $4.72 million (the **Benefit**).

Lindy sought a declaration from the Supreme Court of New South Wales that the BDBN was valid and an order that the Benefit was to be paid to her.

Issues

1. Did Harry lack capacity to make the BDBN when he signed it on 26 July 2020?
2. Is the BDBN to be set aside by reason of unconscionable conduct on the part of Lindy?

Decision

Capacity

The Supreme Court was required to determine, on the evidence, whether Harry lacked the mental capacity to make the BDBN on 26 July 2020. The Supreme Court considered the following facts:

1. unlike the Will, the BDBN was not complex and straightforward in its terms;
2. prior to 26 July 2020 Harry had received advice about the nature and effect of making a BDBN and the Will from Donna, at which time Harry informed Donna that he had been researching BDBNs and understood what they meant;
3. Harry also received advice from his accountant about a BDBN and the tax benefits of making payments to a dependant;
4. ICU nursing admission progress notes record that Harry was 'drowsy' but they also describe him as 'orientated', indicating that Harry was aware and able to focus;
5. while Harry's cognitive functioning when he signed the BDBN may have been adversely impacted from the combination of medication administered to him on 26 July 2020, this evidence was not persuasive on the issue of mental capacity; and
6. while Donna was a solicitor with experience in estate planning and presumably had dealt with clients where capacity issues had been raised, her observations were based on a very short phone call with Harry, rather than an in-person meeting where she could properly observe and test the issues with him.

The Supreme Court found that Harry was capable of understanding the nature of the act of making the BDBN and the effect it would have.

On this basis, the Supreme Court held that the BDBN dated 26 July 2020 and executed by Harry was valid and binding.

Unconscionable Conduct

The Supreme Court considered the principles of unconscionability. Bellahealth was required to establish that:

1. Harry was at a special disadvantage compared to Lindy in the sense that the disadvantage adversely affected his ability to make a judgment about the BDBN;
2. Lindy had actual or constructive knowledge of the existence and effect of Harry's special disadvantage; and
3. Lindy unconscionably took advantage of Dr Harry's special disadvantage, with the BDBN being the product of the unconscionable conduct.

The Supreme Court accepted the argument by Lindy that Harry had the benefit of legal and accounting advice about the making of a BDBN. While Harry suffered a special disadvantage by reason of his ill health, the Supreme Court did not consider that Lindy actually knew or ought to have known of the existence of that special disadvantage. Based on the evidence provided, the Supreme Court was not satisfied that Lindy knew or suspected that Harry was confused, could not recall things or was in a very vulnerable state in relation to decision making concerning his financial affairs.

The Supreme Court concluded that Bellahealth failed to establish that the BDBN should be set aside or is void and unenforceable on the grounds of lack of capacity and unconscionable conduct. The Supreme Court ordered Bellahealth pay Lindy the Benefit within 21 days.

Citation *van Camp v Bellahealth Pty Ltd* [2024] NSWSC 7 (Henry J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/7.html

2.9 Haidi Holdings – UPEs and statutory demands

Facts

Giovanni Tesoriero was a common director and shareholder of two trustee companies, Haidi Holdings Pty Ltd as trustee of the John Tesoriero Family Trust, and Tesoriero Investment Group Pty Ltd (in liquidation) as trustee of the Tesoriero Investment Trust.

On 2 November 2022, Tesoriero Investment Group Pty Ltd was placed into liquidation following orders of the Federal Court and liquidators were appointed.

Tesoriero Investment Group issued a statutory demand dated 18 August 2023 on Haidi in the amount of $244,250 in relation to two unpaid present entitlements (**UPEs**) of Tesoriero Investment Group Pty Ltd in the John Tesoriero Family Trust for the financial years ended 30 June 2018 and 30 June 2019. Those UPEs were recorded in the financial statements of both the John Tesoriero Family Trust and the Tesoriero Investment Trust. Tesoriero Investment Group Pty Ltd also recognised the trust distribution income to which the UPEs related in its tax returns for the financial year ended 30 June 2018 and 2019.

On 6 September 2023, Haidi filed an application to the Victorian Supreme Court to set the statutory demand aside on a number of different bases, including that there was a genuine dispute whether the alleged debt was 'due and payable', there were two genuine offsetting claims, and there was 'some other reason' why the statutory demand should be set aside under section 459J(1)(b) of the *Corporations Act 2001* (Cth).

In supporting its application, Haidi contended that:

1. the debt was disputed because the book entries recording the UPEs were incomplete as at 2020 and inconclusive;
2. further transactions had occurred resulting in Tesoriero Investment Group Pty Ltd being indebted to Haidi, giving rise to a genuine offsetting claim; and
3. the liquidator did not have personal knowledge relating to the UPEs and the financial transactions between the parties.

Haidi also generally asserted that the debt the subject of the statutory demand was not genuine because Tesoriero Investment Group Pty Ltd had not issued proceedings and obtained a judgment to 'prove' the debt.

In relation to the offsetting claims, Haidi argued that the debt was offset by two 'payments' or 'investments' made by Haidi on behalf of Tesoriero Investment Group Pty Ltd into two related trusts, the 286 Carlisle Street Trust and the 23 Margaret Street Trust.

In relation to the payment to the 286 Carlisle Street Trust, the bank statement for that trust showed a payment of $100,000 had been received from Giovanni with the descriptor 'Giovanni Tesoriero Loan'. The Report on Company Activities and Property completed by the director of the trustee for the 286 Carlisle Street Trust only disclosed the Commonwealth Bank as a creditor.

In relation to the transaction in respect of the 23 Margaret Street Trust, the accountant for Haidi gave evidence that Giovanni had pledged personal assets and obtained a loan from La Trobe Financial on behalf of TIG. However, documentation showed that Giovanni procured the loan for another entity. Separately, the 23 Margaret Street Trust had been utilising the La Trobe Financial loan to refinance an existing debt and the trustee had been servicing the La Trobe Financial loan. There are no records showing that Tesoriero Investment Group Pty Ltd had any obligation to Giovanni or Haidi in respect of this transaction.

Haidi contended that the 'other reason' that the statutory demand should be set aside is because, amongst other things, the statutory demand had been issued based on unreliable financial information, the amount claimed was overstated, and that it was an 'abuse of process' that Tesoriero Investment Group Pty Ltd issued a statutory demand as a debt collection tool.

Issues

1. Was there a 'genuine dispute' under section 459H(1)(a) of the Corporations Act?
2. Were there offsetting claims under section 459H(1)(b) of the Corporations Act?
3. Was there 'some other reason' that the statutory demand should be set aside under section 459J(1)(b) of the Corporations Act?

Decision

Genuine dispute?

The Court was not satisfied with Haidi's assertion that the financial documents supporting the debt are 'unreliable' because Haidi did not set out precisely what underlying financial records were unreliable, how they were unreliable and how that unreliability impacts on the calculation of the UPE.

The Court also considered that the debt was contemporaneously recorded in various books and records of John Tesoriero Family Trust and the Tesoriero Investment Trust and the amount in those financial records corresponded with the amount claimed in the statutory demand.

As to the assertion that the liquidator of Tesoriero Investment Group Pty Ltd had no 'personal knowledge' of the UPE, the Court stated that the liquidator had verified the debt claimed in the demand and identified the source of his knowledge about the debt to be books and records of Haidi which he had inspected.

In relation to the complaint that Tesoriero Investment Group Pty Ltd had not 'proven' the debt, the Court stated that there is no principle contained within the Corporations Act that only judgment debts may be claimed in a statutory demand. The Court noted that, whether a resolution by a trustee to distribute trust income to a beneficiary constitutes a debt which may support a statutory demand, is not free from doubt. However, there are cases where the Court has held that, as trust distributions were recorded in the books of the company, the trustee was taken to have admitted the existence of the debt on account of the distributed amounts in question and become a debtor in respect of those amounts.

Offsetting claims?

In order to offset a debt, there must be some evidence confirming what the claim is and the amount (although not necessarily to the last dollar and cent). There also must be mutuality in the identity or capacity of the creditor who served the demand and the person who has the offsetting claim.

The Court stated there was no evidence showing any payment by Haidi to, or investment in, the 286 Carlisle Street Trust or the 23 Margaret Street Trust *on behalf of* Tesoriero Investment Group Pty Ltd. It did not accept the assertion that incorrect financial information had been relied on when preparing the Report on Company Activities and Property for the 286 Carlisle Street Trust (which did not include Haidi as a creditor). The Court also found the accountant's statement that Giovanni procured the La Trobe Financial loan on behalf of Tesoriero Investment Group Pty Ltd as vague and lacking in precision.

The Court determined that these payments were not offsetting claims.

Some other reason

The Court determined there was no other reason to set aside the statutory demand. The Court noted that despite generally asserting that the financial documents were not complete or accurate, Haidi did not actually challenge the specific financial documents relied on by Tesoriero Investment Group Pty Ltd. The Court found that the debt was not overstated, given it had rejected the purported offsetting claims, and Haidi had not put forward any other reason as to why the debt was overstated. The Court also held that there was no evidence of abuse of process by the liquidators of Tesoriero Investment Group Pty Ltd and that a person is not required to obtain a judgment debt before issuing a statutory demand.

Citation *Re Haidi Holdings Pty Ltd* [2023] VSC 739 (Hetyey AsJ, Victoria)
w https://austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/739.html

2.10 Diamond Family Trust – UPEs and bankruptcy

Facts

Diamond Family Investments Pty Ltd was the trustee of the Diamond Family Investment Trust. Denise Diamond was the sole director of the trustee company until June 15, 2018, when her son, Jy Diamond, was appointed as a director.

The Diamond Family Trust is a discretionary trust that was established by a deed of settlement in February 2013. Denise and her husband were the joint appointers and primary beneficiaries of the Diamond Family Trust.

In August 2013, the Diamond Family Trust acquired a property at 31 Heritage Drive, Mount Nathan in Queensland for $913,000.

On 15 August 2018, Denise became bankrupt. Denise was discharged from bankruptcy on 9 August 2022.

The trustee in bankruptcy argued that Denise had contributed $301,562 towards the purchase of the Mount Nathan Property. Accordingly, the trustee in bankruptcy contended that the trustee of the Diamond Family Trust held a share of the property upon resulting trust for the benefit of Denise. Accordingly, the trustee in bankruptcy sought a declaration of the Court recognising Denise's interest in the property.

In the alternative, the trustee in bankruptcy claimed that there was an unpaid trust distribution of $301,562 from the Diamond Family Trust owing to Denise in accordance with the terms of the trust deed. The trustee contended that there was no unpaid trust distribution from the Diamond Family Trust to Denise.

The Trustee in bankruptcy made an interlocutory application for a summary judgment that sought the following orders:

1. a declaration from the Court that the trustee in bankruptcy has an equitable interest in the Mount Nathan Property; and
2. an order for the Diamond Family Trust to pay the trustee in bankruptcy $301,562.01 as a debt.

In determining this application, the Court was required to consider whether:

1. the trustee in bankruptcy can establish a prima facie case; and
2. Diamond Family Trust has reasonable prospects of success in defending that case.

Section 31A of the *Federal Court Act 1976* (Cth) empowers the Court to give summary judgment in a proceeding if one party has no reasonable prospect of successfully prosecuting or defending it. An application is likely to succeed if the applicant can demonstrate that the respondent's prospects of success rely on a fanciful, trifling, implausible, or contradictory question of fact.

The trustee in bankruptcy submitted evidence, including financial statements for the Diamond Family Trust for the 2014, 2015, 2016 and 2017 financial years which had been signed by the trustee. These financial statements indicated there was either an unpaid trust distribution of $301,562 or a liability of $301,562 owing to Denise from the Diamond Family Trust.

The Diamond Family Trust submitted evidence that included an affidavit sworn by Denise that contended that the accountant for the Diamond Family Trust prepared the financial statements autonomously and without her instructions. Denise contended that she had never instructed the accountants that the Diamond Family Trust was to declare a distribution to her in the relevant financial years.

In her affidavit, Denise also deposed that the financial statements were sent to her for signature as the sole director of the trustee electronically and she would sign the statements without reviewing them.

Diamond Family Trust also submitted an affidavit sworn by Jy. In his affidavit, Jy deposed that the recording of the liability $301,562 in the financial statements was an error. Jy argued that the accountants had recorded this amount as a liability of the trustee owing to Denise as a primary beneficiary as a means to balance the accounts of the trust. Rather, the amount of $301,562 represented trading loses that the Diamond Family Trust had incurred.

Issue

Was there an unpaid trust distribution of $301,562.01 owing from the Diamond Family Trust to Denise?

Decision

The Court considered that the financial statements lodged on behalf of Diamond Family Trust and Denise were inconsistent with the trustee's argument that there was no unpaid trust distribution owing to Denise. The affidavits of Denise and Jy were inconsistent with the financial statements prepared on behalf of the Diamond Family Trust. Furthermore, there was insufficient evidence to establish that the information included in the financial statements was erroneous.

Accordingly, the Court considered that the financial statements for the Diamond Family Trust indicated that there was an unpaid distribution to Denise. The Court found that the argument that the liability in favour of Denise was a recording error was contrived, implausible and improbable. The Court also rejected Denise's claim that she was unaware of this liability, on the basis that she was the sole director of the trustee company and had to discharge her duties as a director of that company.

For these reasons, the Court concluded that there was a strong prima facie case that the Diamond Family Trust owed Denise an amount of $301,562. Accordingly, the Court granted the application for summary judgment and the Court ordered, among other things, the trustee for the Diamond Family Trust to pay the trustee in bankruptcy an amount of $301,562 and that the trustee in bankruptcy had an equitable interest in the Queensland Property.

Citation *Trustee of the property of Diamond v Diamond Family Investments Pty Ltd, in the matter of Diamond (Bankrupt)* [2024] FCA 18
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/18.html

2.11 Integrated Trolley Management – employment agency provisions

Facts

Since 2005, Integrated Trolley Management (**ITM**) has been operating a trolley collection contracting business to supermarket operators, Woolworths, ALDI and IGA. It was founded, and continues to be managed, by two business partners, Dennis Roy Vickery and Steven Hills.

Under the contracts with the supermarket operators, ITM collects and returns trolleys taken by customers to the store bays to keep those bays replenished at all times. Trolleys are generally collected from where they have been left within the shopping centre or the car park. From time to time, searches may be made of the neighbouring area to collect trolleys which may have been left there (these searches are referred to as 'street runs').

ITM engaged subcontractors to perform these services. ITM's subcontractors are a mixture of sole traders, partnerships, and small proprietary companies.

Equipment, such as a tractor or trailer, was used by the trolley collectors to perform the trolley collection services. The equipment was not owned by the supermarket operators, but either owned by the trolley collector or ITM who leased the equipment to the trolley collector.

The trolley collector's obligation was to ensure that the store's trolley bays were filled to a certain percentage level, and otherwise to retrieve trolleys belonging to the store within the shopping centre (or, in the case of street runs, within a defined geographical area).

Dennis and Steven managed the contracts with the supermarket operators. This involved conducting site visits to the shopping centres, and occasionally this resulted in site audits being undertaken. Dennis and Steven provided induction training and ongoing training to the trolley collectors. ITM provided the trolley collectors with a Workplace Health and Safety and Compliance Manual. Woolworths also mandated that each trolley collector was given the Woolworths' Safety, Health and Environment Trolley Contractors Handbook and comply with its requirements.

The trolley collectors had limited engagement with the supermarket staff. They did not attend supermarket staff meetings, and the supermarket staff rarely ventured into the carpark or other areas where the trolley collectors would work. If a trolley collector was required to collect trolleys left at the back of a store, they would wear a sticker displaying the word 'visitor'. While the trolley collectors were permitted to use the lunchrooms and restrooms used by the supermarket staff, Dennis gave evidence that this was rarely done as the trolley collectors tended to use the public restrooms in the shopping centres.

The contracts between the supermarkets and ITM gave the supermarkets extensive abilities to give directions to the trolley collectors, although Dennis and Steven encouraged supermarket store managers to communicate with trolley collectors through them. In particular, any requests by store managers for a particular service would typically be directed to Dennis or Steven and would be relayed by them to the relevant subcontractor. If any request was outside the scope of the contract, it would be declined.

Dennis gave evidence that ITM never sought to stop trolley collectors from providing trolley collection services directly to other stores or as subcontractors of other businesses.

In respect of ALDI, ITM supplied cleaning services to ALDI's two stores for a limited period. The cleaning services were supplied pursuant to informal arrangements constituted by exchange of emails. Generally, the cleaners attended the store twice per week with a total of 6 hours per week.

Section 39 of the *Payroll Tax Act 2007* (NSW) provides that:

> *For the purposes of this Act, the person who performs work for or in relation to which services are supplied to the client under an employment agency contract is taken to be an employee of the employment agent.*

Section 40 imposes payroll tax on amounts paid to or in relation to a service provider in respect of the provision of services in connection with an employment agency contract.

In May 2021, following an audit, the Chief Commissioner of State Revenue for New South Wales assessed ITM on the basis that the payments made to its subcontractors under its the contracts with Woolworths, ALDI and IGA were deemed by to be taxable wages paid by ITM under an employment agency arrangement where ITM was the 'employment agent' and Woolworths, ALDI and IGA were the relevant 'clients'. The assessments were issued for the financial years ended 30 June 2016, 2017, 2018 and 2019, and the primary tax liability was about $2.87 million with penalty tax and interest amounting to approximately $360,000 and $400,000, respectively.

ITM applied for a review of the assessments in the Supreme Court of New South Wales.

Parker J referred to recent cases which considered the employment agency provisions in the Payroll Tax Act, including, *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* (2016) 104 ATR 577 and *Chief Commissioner of State Revenue v E Group Security Pty Ltd* (2022) 109 NSWLR 123. His Honour concluded

that the Woolworths trolley collectors did not satisfy the 'in and for' test under section 37 of the Payroll Tax Act. Therefore, there was no employment agency contract. His Honour reached the same conclusion for the contracts between the trolley collectors and ALDI and IGA.

In respect of the cleaning services provided by the subcontractors to ALDI, his Honour relied on the decision of Kunc J in *JP Property Services Pty Limited v Chief Commissioner of State Revenue* [2017] NSWSC 1391. *JP Property Services* concerned the provision of cleaning services for a supermarket and concluded that these contracts were not employment agency contracts. His Honour applied the decision in *JP Property Services*, which resulted in the assessments being rejected in respect of the provision of ALDI cleaning services.

His Honour revoked all the assessments issued by the Chief Commissioner for the financial years ended 30 June 2016, 2017, 2018 and 2019.

The Chief Commissioner appealed the decision to the New South Wales Court of Appeal.

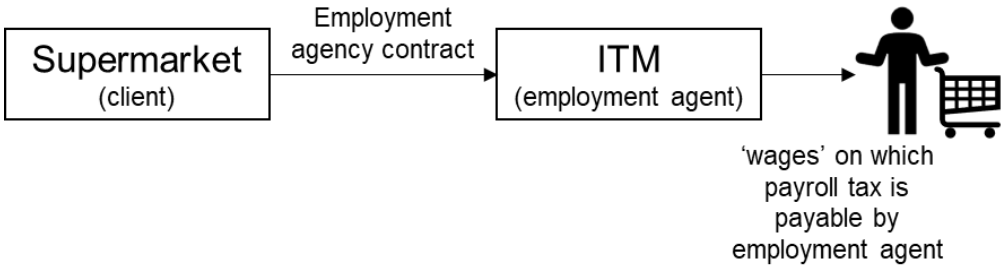
Issues

1. Were the employment agency contracts the contracts between ITM and the supermarkets or between ITM and the service providers?
2. Is an employment agency contract to be identified solely by its terms, or also by how it operated?
3. Were the services provided by ITM 'in and for the conduct of the business' of the supermarkets such that an employment agency contract existed under section 37 of the Payroll Tax Act?

Decision

Relevant employment agency contract

The Court held that the relevant employment agency contract under section 39 of the Payroll Tax Act was the contract between ITM and each of the respective supermarket operators. The Court noted that the legislative intent is to apply payroll tax in situations where the entity that could have engaged employees to do the work (and thereby been responsible for paying payroll tax on those employee wages) assumes the role of the client. This ensures that the liability is not eliminated by the involvement of an employment agent but is shifted to the employment agent. The employment agent is then responsible for paying payroll tax on payments to the



persons performing the work.

How is an employment agency contract identified?

The Court held that the employment agency contract should be assessed on its terms and that generally, the actual operation of the agreement, including arrangements between the employment agent and the persons performing the work, will not form a necessary part of the analysis and will provide little guidance as to the characterisation of the employment agency contract.

Were the services provided by ITM 'in and for the conduct of the business' of the supermarkets?

The Court cautioned against identifying the test under section 37(1) of the Payroll Tax Act as the 'in and for test'. The Court noted that the language used by White J in *UNSW Global* was 'a contract under which a person

procures the services of another person in and for the conduct of the business of the employment agent's client'. The Court held that it may be relevant to consider whether the client (the supermarket) might have conducted its business by employing workers directly to carry out the trolley collection services obtained through the agency agreement.

The Court rejected the approach taken in earlier decisions that considered whether a worker was 'integrated into' the client's workforce by looking at indicia such as whether the workers wore distinctive uniforms, signing visitor books and use of staff facilities.

The Court held that section 37(1) of the Payroll Tax Act required that individuals who worked for the client (the supermarket) should do so in much the same way as would an employee of the client. That meant that the business would involve work having a degree of regularity and continuity, and where the nature of the work was to a significant degree under the control and direction of the client. The Court found that this was satisfied when the analysis was applied to the terms of the contract between ITM and each of the respective supermarkets, as ITM was required to provide a continuous supply of trolleys during trading hours and ITM was liable for compliance by service providers with requirements under the contract and directions given by Woolworths' representatives.

The Court set aside the earlier decision and upheld the payroll tax assessments issued by the Chief Commissioner for the financial years ended 30 June 2016, 2017, 2018 and 2019.

Citation *Chief Commissioner of State Revenue v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302 (Ward P, Payne JA and Basten AJA)
w https://www.caselaw.nsw.gov.au/decision/18c5b83d35d51f3ba0c38ddb

2.12 Cisera – variation of trusts

Facts

On 23 August 1974, Clelia Cisera established the Cisera Trust with Barp Nominees Pty Limited as the trustee. The trust holds a property on Castlereagh Street in the Sydney CBD, which as at 2023 was valued at $1.7 million, and a half share in another property on Elizabeth Street in Surry Hills**,** which as at 2023 was valued at $5.1 million.

The trust deed of the Cisera Trust provided that the trust fund was to be held until the 'Terminal Date', being the first to occur of:

1. the 20th anniversary of the date of death of the last survivor of all the lineal descendants of King George V living on 23 Augst 1974; or
2. 1 January 2024; or
3. an earlier date determined by the Trustee in writing

Given the length of the royal lives period, the Terminal Date was certain to be the fixed date of 1 January 2024, a period of 49 years and 3.5 months after the trust was established, unless an earlier date was determined by the trustee.

The 'Beneficial Class' consisted of Clelia and John (Clelia's son) and any spouse of either of them. If John died before the Terminal Date, any children of his would become members of the Beneficial Class in his place.

Clelia died in December 2002. John has two children together, Ryan and Ruby (Clelia's grandchildren).

Following a conversation in 2012 between John, his father Mario, an accountant and solicitor, John was made aware that the Terminal Date of the Cisera Trust would be 1 January 2024. Mario informed John that there would be 'big problems' regarding the prospective liability for CGT on the properties held on behalf of the Trust.

In 2014 John and Mario began to address the 'issues' by first establishing Cisera Holdings Pty Limited. Cisera Holdings Pty Limited was controlled by John and Mario and in May 2015 it replaced Barp Nominees Pty Limited as trustee of the Cisera Trust. John primarily controlled the administration of the Cisera Trust, as Mario, while still alive, had poor health.

In 2016 an application was made to the Supreme Court to extend the vesting date, pursuant to section 81 of the *Trustee Act 1925* (NSW) but the application was dismissed as it was held that section 81 did not authorise the Court to extend the vesting date for a trust.

In September 2020, new legislation came into effect in New South Wales in relation to the power of the Court to vary trusts. Sections 86A, 86B and 86C in Division 3A of the Trustee Act broadly provide the Court with a power to vary or revoke an existing trust or enlarge the powers of the trustees for the purposes of administering any of the property subject to a trust.

In August 2023, an application was made to the Supreme Court to exercise its powers under the new provisions of the Trustee Act.

On 14 November 2023, a Deed of Arrangement was entered into setting out the terms which the Court was being asked to approve. The Deed was signed by all parties over the age of 18, however given Ryan and Ruby who were also parties to the deed were minors under the age of 18, would not come into effect unless approved by the Court on behalf of Ryan and Ruby.

The Deed of Arrangement provided for the variation of the trust deed for the Cisera Trust, relevantly, these amendments were to:

1. change the Terminal Date from 1 January 2024 to 23 August 2054 (being 80 years from the date of the Trust Deed); and
2. to expand the Beneficial Class to give John's children, grandchildren and remoter issue immediate membership (rather than only including John's children as at John's death).

Issue

Should the Court exercise its power under Division 3A of the Trustee Act to amend the Cisera Trust to extend the Terminal Date and extend the Beneficial Class?

Decision

Parker J noted that as a general rule, the variation of trusts legislation is recognised as remedial legislation which should not be given an unduly narrow construction. However, based on UK legislation (being the predecessor of the Australian legislation), one limitation was the ability to 'resettle' a trust. The power only extends to varying an existing trust.

Parker J held that, if the amendment being considered amounts to more than a variation, the Court does not have the power to approve the arrangement. The question to consider is whether the changes are so substantial that the trust in its amended form no longer reflects a varied version of the existing trust. The legislation refers to 'variation' and by implication, this suggests the power does not go as far as to resettle the trust.

His Honour noted that there were two particularly important factors in this case. Firstly, the application is being made when the trust is at the end of its 50 year life, the trust property is about to vest as an absolute interest

and the proposal involves a re-dedication of the trust property for the next 30 years. His Honour considered that it seems that it is only the hope to avoid adverse tax implications that this application has been made.

His Honour determined not to exercise the power to amend the trust in accordance with the deed of arrangement on the basis that the changes did not amount to a 'variation' but rather went beyond that point. His Honour specifically made reference to the fact that the design of the trust was for the income to benefit the first generation (Clelia) and the second generation (John), and only pass to the third generation upon John's death. It was not intended for it to straddle three generations. His Honour noted that, even if the Terminal Date was extended, John would not be able to distribute income to Ryan and Ruby (once they are 18) while he was still alive. However, the proposed changes resulted in Ryan and Ruby benefitting alongside John and Crystal.

His Honour was of the view that the amendments were only proposed to try to prevent the tax consequences that would arise upon vesting. His Honour further noted that, where there are taxation implications involved, further comprehensive and considered materials need to be submitted, including that contradictor needed to be appointed if the proceedings were to continue, to ensure that all tax implications were properly considered. His Honour was not convinced on the evidence presented that the changes to the Cisera Trust would result in any net tax benefit for Ryan and Ruby.

On these grounds, his Honour did not exercise the power to make the proposed amendments.

COMMENT – the comments of Parker J in this case in relation to whether the proposed changes amount to a variation or re-settlement of the trust are concerning and, potentially, inconsistent with the decision of the Full Court of the Federal Court in *Commissioner of Taxation v Clark* [2011] FCAFC 5, where the Court held that a variation to a trust will not be a resettlement if there is continuity in the essential features (the terms, property and membership) of the trust. It may be that the distinction is that in *Clark* the amendments were made pursuant to provisions in the trust deed and not as a result of a statutory power.

Citation *Cisera v Cisera* [2023] NSWSC 1507 (Parker J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/1507.html

2.13 Appeal updates

Automotive Invest

The High Court has granted leave for the operator of the Gosford Classic Car Museum to appeal the decision in *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* [2023] FCAFC 129 (See our September 2023 Tax Update). The case concerned luxury car tax and whether cars displayed in a museum were trading stock.

Edge Developments

The High Court has refused to grant leave for the taxpayer to appeal the decision in *Edge Developments Pty Ltd & Ors v Commissioner of State Taxation (SA)* [2023] SASCA 88 (see our July 2022 Tax Update for the earlier decision). The case concerned duty on the redemption of units.

Shell Energy Operations

The High Court has refused to grant leave for the New South Wales Chief Commissioner of State Revenue to appeal the decision in *Chief Commissioner of State Revenue (NSW) v Shell Energy Operations No 2 Pty Ltd* [2023] NSWCA 113.

HMNF

The Commissioner has appealed to the Federal Court against the decision in *HNMF and Commissioner of Taxation (Taxation*) [2023] AATA 4067, in which the AAT found that the GST anti-avoidance provisions were not enlivened in relation to the claim of input tax credits by a refiner of precious metal, where the entities supplying the metals to the refiner fraudulently failed to remit GST.

2.14 Other tax and superannuation related cases in period of 9 November 2023 to 8 February 2024

Citation	Date	Headnote	Link
Anderson and Australian Securities and Investments Commission [2023] AATA 3771	17 November 2023	TAXATION AND COMMERCIAL – Australian Securities and Investments Commission – financial services provider – banning order under s 920A of the Corporations Act 2001 (Cth) – whether power to impose a banning order enlivened – whether banning order should be imposed in the applicant's case – whether other sanction is more appropriate – period of banning order – decision under review affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3771.html
Song v Chief Commissioner of State Revenue [2023] NSWCATAD 301	17 November 2023	TAXES AND DUTIES – land tax – principal place of residence exemption – onus of proof - surcharge land tax – whether Applicant a foreign person – whether Applicant ordinarily resident – Applicant not in Australia during 200 or more days – reasons for absence – no discretion – presence in Australia subject to a limitation as to time imposed by law -remission of interest	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/301.html
Winter and Commissioner of Taxation (Taxation) [2023] AATA 3857	21 November 2023	PRACTICE AND PROCEDURE – Administrative Appeals Tribunal Act 1975 – whether Tribunal has power to extend time for the making of an application which was previously dismissed under s 42A(5) – consideration of estoppel – consideration of reinstatement pursuant to s 29(7) – restriction on the power to reinstate is necessary to deliver harmonious goals – s 42(10) – Tribunal does not have power to extend time – application dismissed TAXATION –Taxation Administrative Act 1953 – pt IVC – s 14ZZC – objection to amended assessment – objection to administrative penalty – application for an extension of time to make an application to the Tribunal for review of objection decision – application dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3857.html
Yarahmadi and Commissioner of Taxation (Taxation) [2023] AATA 3811	22 November 2023	SUPERANNUATION – release of superannuation on compassionate grounds – whether Reg 6.19A of the Superannuation Industry (Supervision) Regulations 1994 (Cth) is reviewable by the Tribunal – application dismissed pursuant to s42A(4) of the Administrative Appeals Tribunal Act (Cth)	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3811.html

Citation	Date	Headnote	Link
Banktech Group Pty Ltd and Commissioner of Taxation (Taxation) [2023] AATA 3850	23 November 2023	TAXATION – GOODS AND SERVICES TAX – financial supplies – whether supply is an ATM service being a withdrawal from account – whether automatic teller machine service takes trade meaning or ordinary meaning – held ordinary meaning applies – supplies are not ATM supplies – decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3850.html
Townshend and Australian Securities and Investments Commission [2023] AATA 3810	23 November 2023	SUPERANNUATION – self-managed superannuation funds – approved SMSF auditor – Commissioner of Taxation referral to regulator – disqualification order issued by ASIC – failure to comply with auditor independence requirements – auditing of funds of immediate family and close family members – whether discretion should be exercised to disqualify applicant from being an approved SMSF or whether another decision should be made – decision affirmed	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3810.html
HNMF and Commissioner of Taxation (Taxation) [2023] AATA 4067	30 November 2023	TAXATION – GST – general anti-avoidance provision – gold industry – whether it would be concluded an entity entered into scheme for sole or dominant purpose of obtaining a GST benefit – whether obtaining a GST benefit the principal effect of scheme – decision set aside	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/4067.html
PepsiCo, Inc v Commissioner of Taxation [2023] FCA 1490	30 November 2023	TAXATION – royalty withholding tax – where the taxpayers were United States companies – where the taxpayers entered into exclusive bottling agreements (EBAs) with an Australian company under which the Australian company would manufacture, bottle, sell and distribute finished beverages in Australia in the taxpayers' branded packaging – where the EBAs contained a licence of the taxpayers' trademarks and other intellectual property to the Australian company – where the EBAs provided for the sale of concentrate by the taxpayers or a nominated seller to the Australian company – where the EBAs provided for the Australian company to pay for the concentrate but did not expressly provide for a royalty to be paid for the licence of the intellectual property – whether the taxpayers were liable to pay royalty withholding tax on a portion of the payments made by the Australian company under the EBAs – held: a portion of the payments was subject to royalty withholding tax	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1490.html
Wang v Chief Commissioner of State Revenue [2023] NSWCATAD	30 November 2023	TAXES AND DUTIES — surcharge land tax – liability	https://www.caselaw.nsw.gov.au/decision/18c1878a384aec6b67294a74

Citation	Date	Headnote	Link
Nerang Subdivision Pty Ltd & Ors v Hutson & Anor [2023] QSC 268	1 December 2023	TAXES AND DUTIES – GOODS AND SERVICES TAX – REGISTRATION – BASIC RULES – where over 300 hectares of land forms part of an estate administered by the first respondent – where the first respondent and first and second applicants entered a development deed for a master planned community on the land – where the development involves subdivision of the land and sale of thousands of lots – where the third applicant was appointed under the deed as project manager – where the first respondent and third applicant are parties to four leases provided for by the deed over different parts of the land – where the deed and leases provide for the distribution of the proceeds of sale of the lots including an owner's return and developer's return – whether the first respondent is "carrying on an enterprise" – whether the sale of lots in the development would amount to a supply by way of a transfer of a capital asset owned by the first respondent – whether the first respondent is, or will be, required to be registered for GST pursuant to s 23-5 of the A New Tax System (Goods and Services Tax) Act 1999 (Cth)	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2023/268.html
Gupta v Chief Commissioner of State Revenue [2023] NSWCATAD 303	1 December 2023	TAXES AND DUTIES — Dutiable transactions — Exemptions – First Home Buyer Assistance Scheme TAXES AND DUTIES – Property tax – Eligibility	https://www.caselaw.nsw.gov.au/decision/18c1d4042bc1b6de81120f4b
Hilton International Australia Pty Ltd v Commissioner of Taxation [2023] FCA 1504	1 December 2023	PRACTICE AND PROCEDURE – Rule 23.01 of the Federal Court Rules 2011 (Cth) – application for Court-appointed expert – where Commissioner has been unable to secure a suitable expert primarily due to potential experts indicating that they are commercially conflicted	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1504.html
Active Sports Management Pty Ltd and Industry Innovation and Science Australia [2023] AATA 4078	6 December 2023	TAXATION – Research and development - R&D Tax Incentive – Whether activities undertaken by the Applicant are eligible research and development activities under the Industry Research and Development Act 1986 (Cth) and Income Tax Assessment Act 1997 (Cth) – Decision under review affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/4078.html
In the matter of Northern Minerals Limited [2023] NSWSC 1568	11 December 2023	CORPORATIONS — Meeting of members — Request for meeting by shareholder — Where the Commonwealth of Australia has prohibited that shareholder from acquiring further interests in the company — Where the Foreign Investment Review Board is investigating further acquisitions of shares in the company — Whether the Court should make an order extending the period by which the company must call the requested meeting while that investigation is pending.	https://www.caselaw.nsw.gov.au/decision/18c618afee2dc4a295d43376

Citation	Date	Headnote	Link
Zgrivets v Chief Commissioner of State Revenue [2023] NSWCATAD 314	12 December 2023	TAXES AND DUTIES – Dutiable transfers – Exemptions – First Home Buyers Assistance Scheme – Principal place of residence – Occupation as a principal place of residence for a continuous period of at least 6 months	https://www.caselaw.nsw.gov.au/decision/18c55d2af9dbe3236dd38256
Australian Investment & Development Pty Ltd v Commissioner of State Revenue [2023] VSC 741	13 December 2023	TAXATION — Land Tax — Appeal against assessment by the Commissioner of State Revenue — Primary production exemption — Land Tax Act 2005, ss 67, 68 — Whether the land was used primarily for the business of primary production — Whether the Appellant's principal business was primary production of the type carried on on the land — Whether the Appellant's sole shareholder and director normally engaged in a substantially full time capacity in the business of primary production of the type carried on on the land — CDPV Pty Ltd v Commissioner of State Revenue [2016] VSC 322 — Abbott v Commissioner of Land Tax [1985] VicRp 15; [1985] VR 164 — Annat Pty Ltd v Commissioner of State Revenue [2020] VSC 108 — Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298 — Appellant's business of cultivation of cassinia not the primary business and not the primary production of the type carried on on the land — Appeal refused.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/741.html
Australian Investment & Development Pty Ltd v Commissioner of State Revenue [2023] VSC 741	13 December 2023	TAXATION — Land Tax — Appeal against assessment by the Commissioner of State Revenue — Primary production exemption — Land Tax Act 2005, ss 67, 68 — Whether the land was used primarily for the business of primary production — Whether the Appellant's principal business was primary production of the type carried on the land — Whether the Appellant's sole shareholder and director normally engaged in a substantially full time capacity in the business of primary production of the type carried on the land — CDPV Pty Ltd v Commissioner of State Revenue [2016] VSC 322 — Abbott v Commissioner of Land Tax [1985] VicRp 15; [1985] VR 164 — Annat Pty Ltd v Commissioner of State Revenue [2020] VSC 108 — Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298 — Appellant's business of cultivation of cassinia not the primary business and not the primary production of the type carried on on the land — Appeal refused.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/741.html
Commissioner For Act Revenue v Leemhuis Investments Mitchell Pty Ltd (Appeal) [2023] ACAT 83	14 December 2023	APPEAL – liability for duty under the Duties Act 1999 – where the assets of a commercial partnership included a beneficial interest in land in the ACT purchased for investment – where the manager of the partnership held legal title to the land – where the land was developed and subdivided into four units in the course of the business and investment activity of the partnership – where the partners agreed to sell two units and dissolve the partnership with one partner taking the cash proceeds of sale of the two units and the other partner retaining the other two units – where upon	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2023/83.html

Citation	Date	Headnote	Link
		dissolution of the partnership the manager held the remaining units on a bare trust for one of the partners absolutely – whether that result was obtained by a 'declaration of trust' within the meaning of the Act – whether a series of transactions giving effect to the agreement to dissolve the partnership and distribute the partnership property was a 'declaration of trust' within the meaning of the Act – Commissioner's decision to disallow the taxpayer's objection to the assessment of duty and penalty tax set aside and substituted by a decision to allow the objection	
Palmer v No Respondent [2023] VSCA 322	15 December 2023	TAXATION – Income tax – Judgment against applicant for in excess of $2m for unpaid income tax – Attempt by applicant to file judicial review proceeding – Proposed judicial review proceeding constituting an abuse of process – Application for leave to appeal from primary judge's refusal to direct Prothonotary to accept and seal proposed originating motion – Application for leave to appeal having no prospects of success – Pseudo-legal gibberish – Mumbo jumbo – Application for leave to appeal totally without merit – Application for leave to appeal refused.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2023/322.html
Wang v Chief Commissioner of State Revenue [2023] NSWCATAP 331	15 December 2023	ADMINISTRATIVE LAW – internal appeal – application for an extension of time to lodge the appeal – whether the appeal lacks merit TAXES AND DUTIES – Land tax – Surcharge land tax – principal place of residence exemption	https://www.caselaw.nsw.gov.au/decision/18c6640bd6281a3048cfad43
Stark v Commissioner of Taxation [2023] FCA 1523	19 December 2023	TAXATION – income tax – employment termination payment – payment received by taxpayer in settlement of claims for breach of employment agreement and misleading or deceptive conduct – whether payment was exempt capital gain under s 118-37(1)(a)(i) of the Income Tax Assessment Act 1997 (Cth) (ITAA97) – whether payment was an employment termination payment under s 82-130 of the ITAA97 – appeal dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1523.html
Li v Chief Commissioner of State Revenue [2023] NSWCATAD 330	20 December 2023	ADMINISTRATIVE LAW — Civil and Administrative Tribunal (NSW) — application made out of time — land tax — application for extension of time — exercise of discretion TAXES AND DUTIES — land tax — owner of land — equitable owner — constructive trust or resulting trust — principal place of residence exemption — use and occupation	https://www.caselaw.nsw.gov.au/decision/18c7f47891ca43d5ba1cfcf9
Bagnall v Chief Commissioner of State Revenue [2023] NSWCATAD 341	22 December 2023	TAXES AND DUTIES- land tax- interest- remission. Chief Commissioner's decision not to remit either market rate component or premium component - default not outside	https://www.caselaw.nsw.gov.au/decision/18c8ea5ff4fb43953a740292

Citation	Date	Headnote	Link
		taxpayer's control- No Revenue NSW fault- reasonable care not taken by taxpayer. TAXES AND DUTIES- land tax- liability- assertions of unfairness, unreasonableness. EVIDENCE- documentary evidence- administrator's obligation to produce documents: Administrative Decisions Review Act 1997, section 58- relevance of any document a matter for the administrator.	
Fidge and Commissioner of Taxation (Taxation) [2023] AATA 4245	22 December 2023	TAXATION – INCOME TAX – where full-time Regular Army officer involuntarily transferred to Army Reserves – whether the officer was dismissed because his position was genuinely redundant – whether taxpayer entitled to protection of public ruling - decision set aside	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/4245.html
Copley v Commissioner of Taxation (Taxation) [2024] AATA 8	8 January 2024	TAXATION – income taxation – Applicant claimed deductions for work related car expenses and other work related expenses – financial years ending 30 June 2018, 30 June 2019 and 30 June 2020 – whether expenses incurred in gaining or producing the Applicant's assessable income – whether substantiation requirements satisfied – Applicant primarily relied upon bank statements as evidence of expenses – a lack of receipts or tax invoices to substantiate expenses – lack of specificity in vehicle logbook – whether deductions allowable under s 8-1 of the Income Tax Assessment Act 1997 (Cth) – Applicant unable to meet burden in s 14ZZK of the Taxation Administration Act 1953 (Cth) – Reviewable Decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/8.html
Gazal v Deputy Commissioner of Taxation (Taxation) [2024] AATA 8	8 January 2024	TAXES AND DUTIES – review – whether departure prohibition order made under Taxation Administration Act 1953 (Cth), s 14S should be set aside pursuant to Taxation Administration Act 1953 (Cth), s 14V – whether the Deputy Commissioner of Taxation had a bona fide belief and reasonable grounds to believe it was desirable to prohibit the plaintiff from departing Australia to travel to Slovenia for urgent medical treatment – where plaintiff is subject to a tax liability of $18 million under a Deed of Settlement executed by the plaintiff and the Commissioner – where plaintiff has arguably contravened freezing orders of this Court not to diminish the value of assets subject to tax recovery proceedings – where plaintiff has previously been imprisoned for financial crimes – where plaintiff frequently travels overseas and has previously transferred funds overseas.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1.html
*Nhem v Chief Commissioner of State Revenue [*2024] NSWCATAD 9	12 January 2024	TAXES AND DUTIES- Surcharge purchaser duty- Chief Commissioner's decision not further to remit or reduce penalty tax and not to remit interest which comprised market rate and premium components -no exceptional	https://www.caselaw.nsw.gov.au/decision/18ce6a862e0e12620f1d2f80

Citation	Date	Headnote	Link
		circumstances out of the control of taxpayer- reasonable care not taken by representative of taxpayer.	
Hatziantoniou v Chief Commissioner of State Revenue [2024] NSWCATAD 17	15 January 2024	MERITS REVIEW – NSW State taxes - revenue law – surcharge land tax – exemptions - onus – lack of objective evidence - credibility of the applicant as his sole witness – no reasons given for not calling other witness.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/17.html
Imbree v Chief Commissioner of State Revenue [2024] NSWCATAD 22	24 January 2024	TAXES AND DUTIES — stamp duty concession — whether s 55 applies — statutory construction —whether an agreement to transfer dutiable property is a transfer of dutiable property — whether s 55 applies only to resulting trusts —whether beneficiary of self managed superannuation fund is the real purchaser and the superannuation fund is the apparent purchaser — stamp duty exemption — whether s 65(10) applies	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/22.htm
Khalil & Associates Pty Ltd ATF The George Khalil Family Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 23	24 January 2024	TAXES AND DUTIES- taxation administration - reassessment of tax liability of taxpayer - s 5D of the Land Tax Act 1956 (NSW) – reassessment made on a reconsideration of the terms of an amending deed to the trust.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/23.html
Lei v Chief Commissioner of State Revenue [2024] NSWCATAD 28	31 January 2024	TAXES AND DUTIES – Surcharge purchaser duty – Liability – Foreign persons TAXES AND DUTIES – Surcharge purchaser duty – Exemptions – Exempt permanent residents TAXES AND DUTIES – Administration – Interest TAXES AND DUTIES – Administration – Penalty tax	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/28.html

3. Federal Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2024 Measures No. 1) Bill 2024	16/02	09/03	09/03	16/11	27/11
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2024	22/06	09/08	09/08		
Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2024	13/09	27/11	27/11		
Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023	16/11				
Superannuation (Objective) Bill 2023	16/11				
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11				
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11				
Administrative Review Tribunal Bill 2023	07/12				
Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023	07/12				
Treasury Laws Amendment (Foreign Investment) Bill 2024	07/02				

3.2 Better Targeted Superannuation Concessions

On 30 November 2023, the *Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023* was introduced to the parliament.

Schedules 1 and 3 to the Bill reduce the tax concessions available to individuals with 'Total Superannuation Balances' (**TSBs**) exceeding $3 million from 2025-26 income year onwards, by introducing a Division 296 tax which imposes a tax at a rate of 15 per cent on a percentage of superannuation earnings equal to the percentage of superannuation balances that exceed $3 million for an income year.

Division 296 Tax

An individual will have a 'taxable superannuation earnings' for Division 296 purposes if their TSB is greater than the 'large superannuation balance threshold' (currently at $3 million) and the amount of their superannuation earnings for the year is greater than nil.

Child recipients, individuals with structure settlement contributions and individuals who have died before the last day of the income year will be exempt for Division 296 tax.

The TSB for an individual will be determined at the end of an income and is determined with reference to the total superannuation balance value of each of their superannuation interest. The TSB Value is broadly the 'withdrawal benefit' of a superannuation interest, or another method or value prescribed in the regulations. Modifications are made for structured settlement contributions, family law splits and limited resource borrowing arrangements.

The total amount of 'taxable superannuation earnings' for Division 296 purposes is worked out by two formulas.

First, by calculating the percentage of the TSB at the end of the year that is above the large superannuation balance threshold according to the following formula:

$$\frac{\text{Your *total superannuation balance at the end of the year} - \text{The *large superannuation balance threshold}}{\text{Your *total superannuation balance at the end of the year}} \times 100$$

Secondly, the percentage provided by the above formula is then multiplied by the amount of 'superannuation earnings' for the year to provide the amount of taxable superannuation earnings, using the following formula:

$$\text{The percentage worked out under subsections (2) and (3)} \times \text{The amount of your *superannuation earnings for the year}$$

An individual's 'superannuation earnings' for an income year will be the current total superannuation balance, adjusted for withdrawals and contributions made for the year, minus the previous total superannuation balance. Where the previous TSB is less than the 'large superannuation balance threshold' of $3 million, then $3 million is used in the formula instead of the previous TSB.

Negative superannuation earnings in prior years can be carried forward to reduce earnings for later years.

Payment of a Division 296 tax is generally due 84 days after the Commissioner of Taxation gives the individual a notice of assessment for the tax.

Where all of part of the Division 296 tax is not paid within 84 days, the Commissioner of Taxation may issue a release authority to one or more superannuation providers that holds a superannuation interest for the individual.

Other amendments proposed under the bill include:

1. amendments to the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) to ensure the provisions operate as intended and that input tax credits can be attributable to appropriate tax periods;
2. amendments to the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) to provide two new exceptions for the public disclosure of protected ACNC information about new and ongoing investigations; and
3. amendments to the *Financial Regulator Assessment Authority Act 2021* (Cth) on review frequencies to lessen the regulatory burden on ASIC and APRA.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7133

3.3 Bill to exclude FIRB fees and state taxes from DTA non-discrimination articles

On 7 February 2024, the *Treasury Laws Amendment (Foreign Investment) Bill 2024* was introduced into the Parliament.

The Bill seeks to amend the *International Tax Agreements Act 1953* to ensure that foreign investment fees and state and territory property taxes prevail over double tax agreements between Australia and other countries.

Background

On 3 November 2021, the High Court handed down its decision in *Addy v Commissioner of Taxation* [2021] HCA 34 (**Addy**). In *Addy*, the Court concluded that Australia's 'backpacker tax' was inconsistent with Australia's obligations under Article 25(1) of the Australia-UK double tax treaty.

Article 25(1) is a non-discrimination article which similarly appears in double tax agreements between Australia and each of New Zealand, Finland, Germany, South Africa, Japan, India, Switzerland, and Norway.

Following *Addy*, various taxes have been scrutinised including the fees imposed by FIRB and the NSW foreign person land tax and duty surcharges.

On 21 February 2023, Revenue NSW issued a statement that the NSW foreign duty and land tax surcharge provisions were inconsistent with the double tax treaties between Australia and each of New Zealand, Finland, Germany, and South Africa. Revenue NSW later expanded this list of countries to include Japan, India, Switzerland, and Norway, as all of these double tax treaties contain similar non-discrimination articles. Refunds were offered to taxpayers of those nationalities who had been subjected to surcharge land tax or surcharge purchaser duty.

Amendments Proposed

The Bill seeks to amend the Agreements Act to confirm that the operation of the double tax treaties will not apply where they are inconsistent with 'a tax other than an Australian tax'.

An 'Australian tax' means income tax, FBT and the Medicare Levy. Therefore, other than income tax, FBT and the Medicare Levy, the domestic taxation laws will continue to apply. The double tax agreements will not apply to prevent foreign person and absentee person surcharges imposed by the States and Territories.

Significantly, these amendments are proposed to apply retrospectively from 1 January 2018 in respect of taxes payable on or after 1 January 2018, and taxes payable in relation to tax periods that end on or after 1 January 2018.

COMMENT – it is unclear what this will mean, if the Bill is passed, for those taxpayers from New Zealand, Finland, Germany, South Africa, Japan, India, Switzerland, and Norway who received refunds, given that this law is intended to apply retrospectively from 1 January 2018.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7142

3.4 Replacement of Administrative Appeals Tribunal

On 7 December 2023, the Administrative Review Tribunal Bill 2023 (Cth) was introduced into parliament. The bill proposes to establish an Administrative Review Tribunal to replace the current Administrative Appeals Tribunal. The Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 was introduced at the same time.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7117
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7127

3.5 Changes to TPB registrations and TASA

In 2019, the Government announced an independent review into the effectiveness of the Tax Practitioners Board (**TPB**) and the *Tax Agent Services Act 2009* (Cth) (**TASA**), to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards.

On 27 November 2020, the Government released the final report of the TPB Review and its response to it. The Government's response forms part of the Government's wider commitment to improve the effectiveness of the TPB, who are responsible for the registration and regulation of tax practitioners.

The Government supports 20 of the TPB Review's 28 recommendations in full, in part or in-principle and seeks to achieve three key objectives:

1. to increase the independence and effectiveness of the TPB;
2. ensure high standards in the tax profession; and
3. streamline the regulation of tax practitioners.

Schedule 3 of the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* implements the recommendations through legislative changes. The changes include:

1. requiring tax practitioners to not employ or use a disqualified entity without TPB approval, or enter in arrangement with a disqualified entity without TPB approval;
2. the approval process that tax practitioners will need to follow to obtain such approval;
3. convert to an annual registration period (instead of at least every three years);
4. enable the Minister to supplement the existing Code of Professional Conduct for registered tax practitioners.

The amendments take effect at various times from 1 January 2024 until 1 July 2024.

w
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6979_ems_de7e0691-4f30-451f-b207-95aba989fd22%22

3.6 TASA Code changes

In December 2023, Treasury released exposure draft *Tax Agent Services (Code of Professional Conduct) Determination 2023* for consultation.

The draft intends to strengthen the regulatory framework in the context of recent public scrutiny of misconduct in the tax practitioner profession. It is part of the third stage in the government's response to the PWC inquest. The purpose is to provide the Tax Practitioner's Board with broader and stronger powers in relation to misconduct of tax professionals.

Treasury also released a consultation paper which sets out the objectives of the draft legislation. The paper contains the following proposals in relation to the sanctions which would be available to the TPB:

1. criminal penalties for practitioners that operate without a registration with the TPB;
2. broader and increased civil penalties in the *Tax Agent Services Act 2009 (Cth)*;
3. an infringement notice scheme attached to the civil penalty regime;

4. a new TPB power to allow it to enter enforceable voluntary undertakings with tax practitioners;
5. a new TPB power to impose interim and contingent suspensions.

This draft is to commence on the day after registration or immediately after commencement of Part 1 of Schedule 3 to the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* (Cth), whichever occurs later.

w https://treasury.gov.au/sites/default/files/2023-12/c2023-469627-ex-d.pdf
https://treasury.gov.au/sites/default/files/2023-12/c2023-471426-consult-paper.pdf

3.7 Tax accountability and fairness measures

The Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 introduces a number of reforms to the TASA, the TAA 1953 and the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) (**PRRTA Act**). These are broadly:

1. amendments to the TAA 1953 with respect to the promoter penalty provisions to increase the time the ATO has to bring an application for civil penalty proceedings to the Federal Court of Australia, increase the maximum penalty applicable, and expand the application of the promoter penalty laws.
2. amendments to the TAA 1953 to extend whistleblower protections to eligible whistleblowers who make disclosures to the Tax Practitioner's Board (**TPB**), as well as disclosures to certain other entities who may support or assist the whistleblower. It also reverses the burden of proof for certain claims of protection under Part IVD of the TAA 1953.
3. amendments arising from the TPB Review to improve the Register and boost the TPB's investigation powers by increasing the information published on the Register, removing the 12-month time limit for certain information to remain on the register, extending the timeframe that the TPB has to conduct an investigation, and better target the TPB's delegation powers.
4. amendments to the TAA 1953 and the TAS Act to allow taxation officers and TPB officials to share protected information with Treasury about misconduct arising out of breaches or suspected breaches of confidence by intermediaries engaging with the Commonwealth. The amendments also allow taxation officers and TPB officials to share protected information with prescribed professional disciplinary bodies to enable them to perform their disciplinary functions.
5. amendments to the PRRTA Act to effectively cap the availability of deductible expenditure incurred by a person in relation to a petroleum project for a year of tax.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7107

4. State Legislation

4.1 NSW Land Tax thresholds 2024

The land tax threshold for the 2024 land tax year is $1,075,000 (increased from $969,000 in the 2023 land tax year).

The premium rate threshold for the 2024 land tax year is $6,571,000 (increased from $5,925,000 in the 2023 land tax year).

w https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-556.pdf

4.2 Changes to NSW duties

Revenue NSW has published materials on its website concerning the duties changes that arose from the New South Wales Budget on 19 September 2023 (see our October 2023 Tax Update).

The changes key changes are as follows.

1. from 1 February 2024, the exemption from duty for eligible corporate reconstruction transactions and corporate consolidation transactions will be replaced with a concession of 10% of the duty that would have otherwise been payable. There are transitional arrangements that apply for arrangements that commenced prior to 19 September 2023. Revenue NSW has noted that evidentiary requirements for the transitional arrangements are currently being reviewed and the guide will be updated in due course;
2. from 1 February 2024 the threshold for landholder duty to apply to an acquisition in a unit trust that is a landholder (where the unit trust that directly or indirectly holds NSW land with an unencumbered value of $2 million or more) has been reduced from 50% to 20%. The threshold for tracing of property through linked entities of a landholder has also been reduced from 50% to 20%;
3. from 1 February 2024 there are changes to the fixed or nominal duty is currently charged in respect of various transactions throughout the Duties Act as follows
   (a) $10 is increased to $20;
   (b) $50 is increased to $100 (except where relating to Managed Investment Schemes, which is increased to $500); and
   (c) $500 is increased to $750;
4. from 1 February 2024, interest (including the premium component) may only be remitted in accordance with guidelines made by the Chief Commissioner of State Revenue. The interest rate that is applied to tax defaults is the sum of two amounts – a market rate component (the bank accepted bill rate) and a premium component (set at 8%).

w https://www.revenue.nsw.gov.au/property-professionals-resource-centre/duties-guides/treasury-and-revenue-legislation-amendment-act-2023

4.3 Changes to Victorian land tax, duties and windfall gains tax

On 12 December 2023, the *State Taxation Acts and Other Acts Amendment Act 2023* (Vic) (the **Act**) received Royal Asset by the Victorian Government. The Act introduces changes to vacant residential land tax, and prohibitions on land tax and windfall gains tax apportionment as part of contracts and agreements.

Vacant residential land tax (VRLT)

From 1 January 2025, VRLT will apply to residential land across Victoria if the land is vacant for more than 6 months in the preceding calendar year.

A progressive rate of VRLT will apply to non-exempt vacant residential land across all of Victoria based on the number of consecutive tax years the land has been liable for VRLT:

1. 1% of the capital improved value of the land for the first year the land is liable for VRLT where the land was not liable for VRLT in the preceding tax year;
2. 2% of the capital improved value of the land where the land is liable for VRLT for a second consecutive year;
3. 3% of the capital improved value of the land where the land is liable for VRLT for a third consecutive year.

From 1 January 2026, VRLT will apply to all unimproved residential land in metropolitan Melbourne that has remained undeveloped for at least 5 years and is capable of residential development. VRLT exemptions will be introduced for unimproved residential land that is contiguous to a principal place of residence and unimproved land incapable of being used or developed for residential purposes.

In addition, from 1 January 2025:

1. the VRLT holiday home exemption will be amended to enable the usage and occupancy requirement to be satisfied by a relative of the owner or vested beneficiary;
2. the VRLT exemption for new residential premises will be extended to allow a maximum exemption period of 3 years, provided genuine and reasonable efforts have been made to sell the land.

Land tax and windfall gains tax apportionment

From 1 January 2024, the *Sale of Land Act 1962* (VIC) and *Property Law Act 1958* (VIC) was amended to prohibit land tax apportionment between a vendor and purchaser under a contract of sale of land, except for high-value property transactions ($10 million or greater) and prohibit windfall gains tax from being passed on to a purchaser under a contract or option agreement entered into after the windfall gains tax liability has been assessed.

These amendments do not impact contracts of sale of land entered into before 1 January 2024 (or, for windfall gains tax, options to enter into a contract of sale of land granted before 1 January 2024).

Corporate reconstruction and consolidation concessions

The *Duties Act 2000* (Vic) has been amended to:

1. enable the corporate reconstruction concession to apply to sub-sale arrangements where property is being transferred between members of the same corporate group;
2. prevent the public landholder duty concession from applying in conjunction with certain other concessions to reduce the concessional duty chargeable below 10% of the full duty;
3. clarify the timing of the 30-day period in which multiple eligible transactions may occur to be part of the same arrangement for the purposes of the corporate reconstruction concession.

Valuations of land – capital improved value

The definition of capital improved value in the *Valuation of Land Act 1960* (VIC) has been amended to ensure that all items affixed to land are included in the assessment of capital improved value, regardless of who owns the items and whether they are considered fixtures at law.

w https://www.legislation.vic.gov.au/bills/state-taxation-acts-and-other-acts-amendment-bill-2023
w https://www.sro.vic.gov.au/publications/changes-state-taxes-december-2023

4.4 Western Australia off-the-plan duty concession and foreign persons duty exemptions

The Western Australian parliament has passed the *Duties Amendment (Off-the-Plan Concession and Foreign Persons Exemptions) Act 2023* (WA), which amends the *Duties Act 2008* (WA) to implement the off-the-plan duty concession announced in the 2023-24 State Budget and to expand the circumstances in which a refund of foreign buyers' duty is available for residential developments.

w
https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_46706.pdf/$FILE/Duties%20Amendment%20(Off-the-Plan%20Concession%20and%20Foreign%20Persons%20Exemptions)%20Act%202023%20-%20%5B00-00-00%5D.pdf?OpenElement

4.5 Western Australia Land Tax Residential Construction Exemptions

On 30 November 2023, a bill was introduced in Western Australia to temporarily extend the land tax residential construction exemptions for owners who commenced construction between 1 July 2020 and 30 June 2023 by providing:

1. a three-year exemption for newly constructed or refurbished homes, which can be extended to four years in exceptional circumstances (such as delays caused by a builder going into liquidation); and
2. a two-year exemption for a new home that is being built or refurbished while the owner lives in their existing home, which can be extended to three years in exceptional circumstances (such as delays caused by building material or labour shortages).

w
https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=FE2E8603DC49364148258A75000A1AE1

5. Rulings

5.1 PAYG withholding - who is an employee?

On 6 December 2023, the ATO has released *TR 2023/4 Income Tax: pay as you go withholding – who is an employee?*. The ruling finalises TR 2022/D3.

This ruling offers guidance on determining an individual's classification as an ‘employee’ under section 12-35 of Schedule 1 of the *Taxation Administration Act 1953* (Cth). That section requires paying entities to withhold a designated amount from the payment of salaries, wages, commission, bonuses, or allowances paid to an employee, regardless of whether the paying entity is the actual employer.

The ruling is intended to assist with the dual meaning of ‘employee’ and ‘employer’ in the *Superannuation Guarantee (Administration) Act 1992*, but is not binding on the Commissioner in that respect.

The determination of whether a worker qualifies as an employee of an entity (referred to as the 'engaging entity') for TAA purposes involves an objective assessment of the overall relationship between the parties, comprising legal rights and obligations constituting that relationship.

The process includes:

1. identifying the contract, which may be wholly written, wholly oral, or a combination of both;
2. determining the terms of the contract as at the time of its formation, including written, oral, or implied terms; and
3. determining the comprehensiveness of written contracts and whether it comprehensively captures all agreed terms, or if there are additional oral or implied terms.

Where there is a comprehensive written contract that is not a sham, the contract will constitute the relevant legal basis for determining the worker's status. Day to day work practices and practical implementation of the contract are not considered.

However, in cases where the contract is not entirely in writing, an examination of how the contract was performed, including conduct and work practices, is necessary to identify agreed terms.

Once the terms of the contract are established, they alone are relevant in determining the nature of the relationship, irrespective of the form the contract takes. The previous multifactorial test remains useful only in the context of ascertaining the legal rights and obligations between the parties according to the written contract.

Evidence related to contract formation or performance may be considered, following general contract law principles, to identify the contract's purpose, establish subsequent agreements, reveal sham contracts, or provide evidence for estoppel, rectification, or other legal remedies.

In that regard, conduct inconsistent with contract terms may suggest that the contract has been varied. Where all parties lack the intention to create the purported legal relationship, the contract may a sham. Conduct of the parties may also be used as evidence relevant to rectification, estoppel, or other legal, equitable, or statutory remedies.

Test for employment relationship

The Commissioner considers the fundamental distinction between an employee and an independent contractor lies in their relationship with the engaging entity, and a focusing question would always be to ask whether the worker is working in the business or enterprise of the engaging entity.

For that reason, characterising the engaging entity's business is crucial in this assessment as set out in the case of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1. The right to control the provision of labour was deemed essential, reflecting the subservient and dependent nature of the work.

Examining whether the worker conducts their own business is not solely determinative, as workers may have their own business and still perform work in an engaging entity's business. The 'own business/employer's business dichotomy' can help focus attention on aspects that indicate whether the work is subordinate to the employer's business.

The requirement for a worker to present as part of the engaging entity's business is also a key consideration. Contractual obligations, such as wearing uniforms or displaying logos, may influence the determination, but voluntary actions may not have the same impact.

The right to control is a crucial factor to consider, with an employer generally having the right to control how, where, and when an employee performs work. The existence of a right of control serves to highlight the subservient nature of the work, aiding in distinguishing between a contract of service and a contract for services.

Where the main business activity involves the supply of labour or services, retaining control over labour is indicative of an employment relationship. In *Personnel Contracting*, the High Court emphasised that control was a core part of a labour hire agency's business.

The right to terminate a worker's contract or a requirement for indemnification may confer a capacity to control. These aspects, along with other factors, contribute to the overall determination of an employment relationship.

Other Indicia

The ruling also sets out other indicia affecting the determination of an employment relationship, including:

1. the ability to delegate, subcontract or assign work;
2. whether the substance of the contract is to achieve a specified result;
3. provision of tools and equipment;
4. allocation of risk; and
5. generation of goodwill.

ATO reference *Taxation Ruling* TR 2023/4
w https://www.ato.gov.au/law/view/document?DocID=TXR/TR20234/NAT/ATO/00001

5.2 Composite items – identifying the relevant depreciating asset for capital allowances

Taxation Ruling TR 2024/1 sets out the Commissioner's views on the depreciation of composite items. This ruling finalises the draft *Taxation Ruling* TR 2023/D2 (please see our November 2023 Tax Update) and replaces *Taxation Ruling* TR 2017/D1. TR 2024/1 is generally consistent with TR 2023/D2.

ATO reference *Taxation Ruling* TR 2024/1
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20241/NAT/ATO/00001

5.3 Deductions for financial advice fees paid by individuals

The ATO has published a draft determination to explain when an individual may be entitled to a deduction under sections 8-1 or 25-5 of the ITAA 1997 for fees paid for financial advice when the individual is not carrying on a business.

An individual may be entitled to a deduction for fees paid to a financial adviser if they satisfy the requirements in sections 8-1 (general deductions) or 25-5 (tax-related expenses). It may be necessary to apportion the deduction because the full amount of the fees paid may not be deductible.

Incurred in producing assessable income

For an expense to be incurred 'in the course of' gaining or producing assessable income, it is sufficient and necessary that the occasion of the expense is found in whatever is productive of assessable income.

The ATO provides an example: fees for financial advice on a proposed investment prior to acquisition of the asset will not be deductible under section 8-1 as it is an expense that is associated with putting the income-earning investment in place. If the expenditure was not incurred, then the taxpayer would not be in a position to earn income and does not have a sufficient connection with earning income from the investment.

Capital or of a capital nature

The ATO explains that expense items that are not recurrent but, rather, are one-off expenditures that can be expected to have an enduring or lasting benefit are considered 'capital or of a capital nature'.

Fees for financial advice on a proposed investment are also not deductible under section 8-1 because the amount is considered to be capital or of a capital nature.

Private or domestic nature

The terms 'private' and 'domestic' are not defined in the ITAA 1997 but have the ordinary meanings of 'personal' and 'relating to the home, household or household affairs' respectively.

The ATO provides that fees for advice incurred in relation to an individual's household budgeting are considered to be private or domestic expenditure and will not be deductible under section 8-1.

Tax related expenses

Fees incurred by an individual for financial advice may be deductible under section 25-5 to the extent that the advice relates to managing their tax affairs. The ATO takes the view that 'tax (financial) advice' as defined in section 90-15 of the *Tax Agent Services Act 2009* (Cth) would be included within the meaning of 'tax affairs'.

No double deduction

If financial advice fees are deductible under both sections 8-1 and 25-5, the fees can only be deducted once under the most appropriate provision. The ATO provides that usually, the most appropriate provision will be section 25-5.

Apportionment

If the financial advice received relates to managing your tax affairs and to non-tax matters, then a deduction for the full amount of the fees under section 25-5 will not be available.

The individual must provide evidence of a fair and reasonable method of apportionment. If sufficient evidence is not available, no deduction will be allowable.

Evidentiary requirements

The taxpayer is required to have sufficient evidence of the expenditure in order to claim the expense as a deduction. An itemised invoice from a financial adviser will be sufficient written evidence to be entitled to claim a deduction if it includes the following information:

1. the name of the financial adviser;
2. the amount of the expense;
3. an explanation of the advice provided;
4. the date that the expense was incurred; and
5. the date that the invoice was produced.

Examples

The ATO provides four examples that consider the general deduction test under section 8-1 and the tax related expenses test under section 25-5. One of the examples is as follows:

Example 1 – initial advice arrangement

Claudio is a financial adviser and a recognised tax adviser for the purposes of section 25-5.

Min-Ji is seeking financial advice from Claudio to enable her to increase her regular income by generating higher investment returns.

Claudio assesses Min-Ji's financial situation by considering her assets and liabilities, income, risk profile and tax profile. Claudio makes a recommendation that Min-Ji invest her savings in a managed investment scheme which provides a periodic return. In providing this advice, Claudio interprets and applies the tax laws to Min-Ji's circumstances and provides advice about liabilities, obligations and entitlements when acquiring, holding and disposing of the investment.

To the extent that Claudio charges Min-Ji for his work in recommending the investment and acquiring the units in the fund on her behalf, this is not deductible under section 8-1 because it is a fee incurred as part of putting the income-earning investment in place.

Min-Ji will be able to claim a deduction under section 25-5 in relation to the tax (financial) advice provided by Claudio. This is because the advice was provided by a recognised tax adviser and was in relation to managing Min-Ji's tax affairs.

As the advice was provided for multiple purposes, Min-Ji needs to apportion the total amount of the fee between the different components of the advice on a fair and reasonable basis.

ATO reference *Taxation Determination* TD 2023/D4
w https://www.ato.gov.au/law/view/document?docid=DXT/TD2023D4/NAT/ATO/00001

5.4 Deductibility of payments made by a superannuation fund to its trustee

The ATO has published a draft tax determination concerning the Commissioner's views on the deductibility for a superannuation fund, under section 8-1 of the ITAA 1997 of payments that are made by the trustee of the fund (in its capacity as trustee) to the trustee in its own capacity.

From 1 January 2022, the SIS Act was amended to deem any provision in the governing rules of a superannuation fund that is intended to exempt or indemnify a trustee from certain penalties to be void.

Impacted superannuation funds and their trustees have taken differing approaches to address the risk of exposure to penalties arising from the amendments, including the superannuation funds making payments to establish or build a trustee risk reserve for this purpose.

The Commissioner is of the view that payments to establish or build such a risk reserve will not be deductible where it is objectively determined on the facts that:

1. the trustee is charging the fund the amount for the purpose of building or maintaining a reserve to address the trustee's risk because of the changes to the SIS Act; and
2. the amount is charged by the trustee as a lump sum or a number of lump sum instalments or an ongoing amount that is separate and distinct from its existing ongoing and recurrent charges for trustee services.

Payments that meet these criteria will be considered to be capital in nature and are excluded from being deductible under section 8-1(2)(a) of the ITAA 1997.

However, a deduction will continue to be allowed for trustee fees where a trustee has merely increased its existing ongoing and recurrent charges for its trustee services (in accordance with its powers and terms of its engagement) to reflect the increased cost of providing those services.

ATO reference *Taxation Determination* TD 2023/D3
w https://www.ato.gov.au/law/view/document?docid=DXT/TD2023D3/NAT/ATO/00001

5.5 Character of software and intellectual property rights payments

The ATO has released a new draft *Taxation Ruling* TR 2024/D1 to replace draft *Taxation Ruling* TR 2021/D4. TR 2024/D1 considers when an amount paid under a software arrangement is subject to royalty withholding tax.

The Ruling notes that where a tax treaty applies, the 'royalty' definition in that tax treaty prevails over the domestic tax law definition of royalty. The domestic tax law definition of royalties is much broader than the standard tax treaty definition. Therefore, it follows that where an amount is a 'royalty' under a standard tax treaty definition, it will also be a 'royalty' under domestic law. However, while an amount may qualify as a 'royalty' under domestic law, it may not be a 'royalty' under a tax treaty.

The Ruling lists the following payments as royalties:

1. the grant of a right to use IP, regardless of whether that right is exercised (paragraph (a) of the standard tax treaty definition) – for example, the grant of the right to reproduce a computer program, regardless of whether or not that right is exercised;
2. the use of an IP right (paragraph (a) of the standard tax treaty definition) –for example, the use of a copyright right consists of doing an act in respect of a copyright work that is the exclusive right of the copyright holder, such as authorising the communication of a computer program;
3. the supply of know-how in relation to an IP right referred to in subparagraphs 14(a) and (b) of this Ruling (paragraph (b) of the standard tax treaty definition);
4. the supply of assistance furnished as a means of enabling the application or enjoyment of the supply (paragraph (c) of the standard tax treaty definition);
5. the sale by a distributor of hardware with embedded software, where the distributor is granted or uses rights in the IP of the software.

The Ruling also provides a list of payments that are not royalties.

In addition to this, TR 2024/D1 addresses:

1. how the ATO position distinguishes from the position contained in the OECD Commentary to the OECD Model Convention on Income and on Capital 2017;
2. the elements of the royalty definition under the standard treaty definition;
3. interpretation and application of the Copyright Act 1968 (Cth) for the purpose of determining what constitutes payment for the use of copyright (and therefore be a royalty);
4. rights other than copyright that may fall within the royalty definition, such as:
   (a) other IP rights granted (for example, trademarks, patents or confidential information);
   (b) know-how, technical or commercial information supplied to the distributor; and
5. services ancillary to the use and enjoyment of any such rights or property supplied;
6. characterisation of payments with respect to distribution of software embedded in tangible goods; and
7. when apportionment may be required to ascertain the extent to which any payment is a royalty.

The ATO has invited comments in relation to this draft ruling by 1 March 2024.

ATO reference *Taxation Ruling TR 2024/D1* w https://www.ato.gov.au/law/view/document?docid=DTR/TR2024D1/NAT/ATO/00001

5.6 Tax incentives for early stage investors – ‘expense’ that is ‘incurred’

The ATO has published *Taxation Determination* TD 2023/6. TD 2023/6 was previously released as Draft Taxation Determination TD 2019/D5.

The Determination clarifies the expenses taken into account in determining whether a company meets the requirements of an early stage innovation company (**ESIC**), so its investors can access certain tax incentives. This includes clarification in relation to the ATO view of what ‘expenses’ and ‘incurred’ mean as well as the ATO compliance approach.

To be entitled to a tax offset, the investor must be issued with shares in a company that satisfies the tests in section 36-40(1) of the ITAA 1997 immediately after the shares are issued (i.e. ‘the test time’). The tests in section 36-40(1) of the ITAA 1997 consist of an early-stage test and an innovation test. The early-stage test includes a requirement that the company issuing the shares, and any of its 100% subsidiaries, incurred total expenses of $1 million or less in the income year preceding the issue of the shares.

Under the expense tests in subparagraph 360-40(1)(a)(ii) and paragraph 360-40(1)(b) of the ITAA 1997, the ESIC (in which the inventor is investing) must only take into account ‘expenses’ which have been ‘incurred’ as at the test time.

Relevantly, the determination provides that:

1. ‘expenses’ are amounts recognised as expenses under general accounting concepts and must be incurred. Expenses ordinarily refers to a 'cost or charge…a cause of occasion of spending'. Spending conveys the notion of using up or consuming resources. In a business or commercial context, expense would not ordinarily be used to describe the purchase price of a capital asset. An implication of this interpretation is that an outgoing that has been properly capitalised, and results in the recognition of an asset under general accounting concepts is not an expense for the ESIC expense tests;
2. ‘incurred’ has the same meaning as for the purposes of the general deduction provisions under section 8-1 of the ITAA 1997. This means that the early-stage test would not include certain provisions and reserves that may be recognised as expenses for accounting but which are not incurred, for example, provision for doubtful debts or depreciation expenses consistent with Division 360 of the ITAA 1997.

The Commissioner considers there is low compliance risk in a company and its investors relying on the amount reported as 'total expenses' in the company tax return, without separately identifying whether those expenses have been 'incurred' in the tax sense. Accordingly, the Commissioner would not devote compliance resources

to query or adjust the company's incurred total expenses that use the reported amount of total expenses in the company's tax return. However, compliance action may be taken to verify that the amount of total expenses reported in the tax return is correct.

ATO reference *Taxation Determination* TD 2023/6
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20236/NAT/ATO/00001

5.7 Value of goods taken from stock for private use for 2023–24

On 2022 November 2023, the ATO published the annual determination of amounts that the Commissioner will accept as estimates of the value of goods taken from trading stock for private use by taxpayers in named industries. This determination applies to the 2023-24 income year.

ATO reference *Taxation Determination* TD 2023/7
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20237/NAT/ATO/00001

5.8 Victoria – draft rulings on interest and penalty tax, and notification default

The Victorian State Revenue Office issued two draft rulings, being TAA-007v5 to clarify the circumstances under which penalty tax and interest can be remitted and TAA-008 to explain the circumstances amounting to a notification default as defined in section 3(1) of the TAA.

Penalty Tax

The base rate penalty tax imposed is 25%. The Commissioner may remit, increase or reduce the penalty tax from 25% depending on the circumstances of the case, including where the taxpayer took reasonable care to comply with the taxation law, the taxpayer's intentional disregard of the law, the taxpayer concealed or hindered information from the Commissioner, or the taxpayer made a voluntary disclosure. The draft ruling includes table which sets out the penalty rates for each circumstance.

Interest

The Commissioner will remit the market rate of interest if there are exceptional circumstances, for example, if the State Revenue Office contributed to the tax default.

Remission of the premium rate of interest may occur in circumstances where:

1. the market rate component of interest is partially or fully remitted; or
2. penalty tax has been imposed for a tax default and there is no need for an additional penalty in the form of premium interest.

Notification Default

A notification default only arises in relation to land tax, vacant residential land tax and windfall gains tax. When a notification default occurs, penalty tax is imposed on the additional land tax, vacant residential land tax, or windfall gains tax that would have been assessed had the notification default not occurred. If no additional tax is assessed, no penalty tax will be imposed.

Notification default is defined in section 3(1) of the TAA to mean:

1. a failure to lodge a notice under section 34G of the LTA;

2. a failure to lodge a notice under section 46K of the LTA;
3. a failure to give notice to the Commissioner of State Revenue in accordance with section 61B, 61C, 61D, 61E or 61F of the LTA;
4. a failure to notify the Commissioner of a change in circumstances in accordance with section 70N of the LTA;
5. a failure to notify the Commissioner of an error or omission in accordance with section 104A of the LTA;
6. a failure to give a notice to the Commissioner in accordance with section 104B of the LTA; or
7. a failure to notify the Commissioner of an error or omission in accordance with section 26 of the *Windfall Gains Tax Act 2021*.

w https://www.sro.vic.gov.au/interest-and-penalty-tax
w https://www.sro.vic.gov.au/notification-default?utm_source=State+Revenue+Office+Victoria+List

5.9 Victoria – landholder duty ruling

State Revenue Victoria has issued Ruling DA-047v4 to clarify the circumstances in which the concessional rate of duty under Division 1B of the *Duties Act 2000* (Vic) will apply to relevant acquisitions arising on the reorganisation of listed stapled entities in accordance with Subdivision 124Q of the ITAA 1997.

Section 124-1045 of the ITAA 1997 sets out the requirements for an exchange of stapled securities to be treated as a roll-over for the purposes of Subdivision 124-Q.

There are two ways in which an exchange of securities can occur:

1. the new trust case – a new trust is interposed between the security holders of the stapled entities (that is, the exchanging members) and the stapled entities. In the new trust case, the exchanging members acquire ownership interests in the new interposed trust and cease to own their ownership interests in the stapled entities. The new trust will acquire all the exchanging members' ownership interests in the stapled entities; or
2. the existing trust case – one of the trusts comprising the stapled entities is interposed between the exchanging members and the other stapled entities. In the existing trust case, the exchanging members retain their ownership interests in the interposed trust but cease to own their ownership interests in the remaining stapled entities. The interposed trust acquires all of the ownership interests in the remaining stapled entities from the exchanging members.

Under section 250DI of the Duties Act, the concession will apply if the relevant acquisition is made in the course of, or as a result of a roll-over and the requirement in paragraph (1) or (2) above have been met. Although subdivision 124-Q of the ITAA 1997 provides roll-over relief for both listed and unlisted entities, the effect of these paragraphs is that the concession provided by Division 1B is available only for the reorganisation of listed stapled entities.

w https://www.sro.vic.gov.au/legislation/landholder-duty-duty-concession-interposition-unit-trust-between-stapled-security-0

6. ATO and other materials

6.1 Classifying workers as employees or independent contractors

The ATO has released Practical Compliance Guideline PCG 2023/2. The PCG sets out the Commissioner's compliance strategy to determine the classification of workers as employees or independent contractors. It also provides insight into how the ATO will allocate resources based on the risks associated with this classification.

This guidance applies when a business (engaging entity) engages a worker, detailing how compliance resources are allocated to investigate worker classification. The guidance summarises tax, superannuation, and reporting consequences for the engaging entity and the worker based on classification.

Consequences of a worker's classification as an employee

The engaging entity will have the following obligations where a worker is an employee:

1. reporting obligations via Single Touch Payroll;
2. withholding obligations in respect of PAYG;
3. superannuation contribution requirements;
4. fringe benefits tax obligations; and
5. no entitlement to GST credits for wages paid.

For the worker, classification as an employee will have the following consequences:

1. no entitlement to an ABN;
2. not entitled to register for GST and no GST reporting obligations.

Consequences of a worker's classification as an independent contractor

The engaging entity will have the following obligations where the worker is an independent contractor:

1. reporting obligations via Taxable Payments Annual Reporting;
2. superannuation contribution obligations where the worker satisfies the extended definition of employee;
3. if the engaging entity and worker are both registered for GST, the entity can claim GST credits; and
4. PAYG withholding obligations where the worker does not quote an ABN.

For the worker, classification as an independent contractor will have the following consequences:

1. payment of PAYG instalments;
2. entitlement to apply for an ABN;
3. potential requirement to register for GST; and
4. possible personal services income implications.

Parties in clear employment or independent contracting arrangements may choose to self-assess without relying on the PCG.

The PCG excludes the income tax affairs of a worker, personal services income rules, and non-tax, non-superannuation matters such as *Fair Work Act 2009* (Cth), state revenue issues, Comcare, and contract/award-related obligations.

Compliance Approach

The PCG outlines a risk framework for worker classification arrangements based on actions taken by parties during the arrangement. There are four risk zones determining compliance resource allocation: Very Low, Low, Medium, and High. The allocation depends on whether an unpaid superannuation query or proactive case selection triggers a review.

Very low and low-risk arrangements face minimal scrutiny, while medium and high-risk arrangements undergo detailed assessments, with high-risk arrangements receiving the highest priority.

If circumstances change, parties must reassess their risk rating. As relationships evolve over time, significant deviations in the operation of an arrangement could lead to variations in contractual rights and obligations, potentially influencing the worker's classification.

If a party self-assessed into a risk category set out in the guideline at the beginning of the arrangement, and there has been a significant deviation, the party must reassess to ensure that their risk rating has not increased.

Criteria for each risk zone

The PCG sets out the criteria for each risk category to assist engaging entities and workers in determining the risk zone of their arrangement. The criteria are:

1. mutual intent to classify the worker in the same way;
2. whether there is a comprehensive written agreement;
3. whether both parties understood the tax and superannuation consequences of that classification;
4. no significant deviation from the terms of the written agreement;
5. parties meeting the tax and superannuation obligations based on their intended classification;
6. reliance on specific advice from a qualified professional, such as in-house counsel, a solicitor, tax professional, administrative body, or client-specific advice from the ATO; and
7. whether the engaging business obtained specific advice confirming the application of the extended meaning of employee under the *Superannuation Guarantee (Administration) Act 1992* (Cth), and communicated this outcome to the worker.

The PCG provides a table at paragraph 25 setting out these criteria and low, medium and high risk examples. The PCG also provides six examples covering scenarios that are very low risk, low risk, medium risk and high risk.

ATO reference *Practical Compliance Guideline* PCG 2023/2
w https://www.ato.gov.au/law/view/document?DocID=COG/PCG20232/NAT/ATO/00001

6.2 Division 7A and UPEs – Update on Bendel

On 15 November 2023, the Commissioner of Taxation issued an interim decision impact statement in relation to the case of *Bendel and Commissioner of Taxation* [2023] AATA 3074.

The case concerned whether a private company's failure to call for payment of entitlements to income of an associated trust was the provision of 'financial accommodation' and, therefore, a loan for the purposes of section 109D of the ITAA 1936.

The AAT member held that the company's UPE to trust income did not represent a loan to the trust within the meaning of section 109D(3) of ITAA 1936, as section 109D(3) did not reach so far to capture the rights in equity created when entitlements to trust income were created but not satisfied and remained unpaid.

Where a UPE would be a loan within the meaning of section 109D(3) of ITAA 1936, the AAT member observed the deemed dividend would not be the same amount as the amount previously included in the assessable income of the company in respect of the UPE for the purposes of section 6-25 of the ITAA 1997.

The Commissioner confirmed that it has appealed the AAT's decision.

Pending the outcome of the appeal process, the Commissioner does not propose to finalise objection decisions where the decision turns on whether or not a UPE was a loan for the purposes of section 109D(3).

However, if a decision is required to be made, the Commissioner will continue to administer the law in accordance with the current view in Taxation Determination TD 2022/11 *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?.*

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/20231/3330-3331and2021/3324-3327/00001

6.3 Mid-Year Economic and Fiscal Outlook 2023-24

On 13 December 2023, the Treasurer released the Mid-Year Economic and Fiscal Outlook (MYEFO) for 2023-24, which contains a number of measures that were not previously announced.

GIC and SIC no longer deductible

General interest charge (**GIC**) and shortfall interest charge (**SIC**) incurred in income years starting on or after 1 July 2025 will no longer be tax deductible.

GIC and SIC are incurred where tax debts have not been paid on time, or a tax liability has been incorrectly self-assessed and resulted in a shortfall of tax paid, respectively. Both GIC and SIC are currently tax-deductible for all entities.

Narrower definition of fuel-efficient vehicles for Luxury Car Tax

Cars with a Luxury Car Tax (LCT) value over the relevant threshold attract the LCT at a rate of 33%. The threshold is higher for fuel-efficient vehicles.

The definition of a fuel-efficient vehicle for LCT purposes will be narrowed by reducing the maximum fuel consumption from 7 litres per 100km to 3.5 litres per 100 km. The indexation rate will also be updated.

Foreign investors

Increased CGT withholding

The foreign resident capital gains withholding tax rate will increase from 12.5% to 15%. The withholding threshold of $750,000 will be abolished, so that all disposals by foreign resident vendors are subject to capital gains withholding tax. The changes will apply to real property disposals with contracts entered into from 1 January 2025

Lower fees for Build to Rent projects

A lower commercial foreign investment application fee will apply to foreign investments in Build to Rent projects where investors are proposing to acquire residential land or agricultural land.

Higher fees for established dwellings

Higher foreign investment fees will apply for established dwellings, with the following changes:

1. foreign investment fees will be tripled for foreign investors who apply to purchase established dwellings from the day after the date of Royal Assent of the enabling legislation;
2. vacancy fees for foreign investors who have purchased residential dwellings (new and established) since 9 May 2017 will be doubled. This will result in a six-fold increase for vacancy fees for established dwellings affected by the tripling of foreign investment fees, and a doubling for other vacancy fees. This will commence from the day after the date of Royal Assent of the enabling legislation; and
3. the ATO will receive $3.5 million in funding for a compliance regime.

6.4 Commonwealth penalty unit increase

Penalty units are used calculate fines under Commonwealth laws, by multiplying the value of one penalty unit by the number of penalty units prescribed by the offence. The Commonwealth penalty unit will be increased by 5.4% from $313 to $330, commencing four weeks after passage of legislation. The increase will apply to offences committed after the relevant legislative amendment comes into force. The amount will continue to be indexed every three years in line with the CPI as per the pre-existing schedule.

w https://budget.gov.au/content/myefo/download/myefo2023%E2%80%9324.pdf

6.5 TPB website guidance regarding TPB changes

The Tax Practitioners Board (TPB) issued online guidance on changes made to the *Tax Agent Services Act 2009* by the *Treasury Laws Amendment (2023 Measures No 1) Bill 2023 (Act No 101 of 2023)*. Some of the changes are listed below.

Change	**Commencement Date**	**Explanation**
Expanding the Code of Professional Conduct (Code) to prevent the engagement of disqualified entities	1 January 2024	The new Code items 15 and 16 prevent tax practitioners from employing or using a disqualified entity without TPB approval or entering into certain arrangements with a disqualified entity.
Giving the Minister the ability to expand the Code	1 January 2024	The Minister will have the ability to expand the Code to include additional obligations that tax practitioners must comply with, to address emerging or existing behaviours and practices
Move to annual registration period	1 July 2024	The registration period for tax practitioners will change from at least every 3 years to at least every year.
Breach reporting – self reporting	1 July 2024	A tax practitioner must notify the TPB in writing if the tax practitioner has reasonable grounds to believe that they have breached the Code and that the breach is a significant breach.
Breach reporting – another tax practitioner	1 July 2024	A tax practitioner must notify the TPB and TPB recognised professional association in writing if the tax practitioner has reasonable grounds to believe that another tax practitioner has breached the Code and that the breach is a significant breach.

Updating of the objects clause in the legislation	1 January 2024	The objects clause in the TASA has been updated to modernise the object of the TASA to recognise its role in supporting public trust and confidence in the integrity of the tax profession and the tax system.
Enhance the TPB's financial independence	1 July 2024	The TPB's financial independence from the Australian Taxation Office will be enhanced by establishing a special account for the TPB, allowing separate funding for the TPB for specified purposes.
Board member appointments	1 October 2024	Ensure that individuals appointed to the TPB as Board members meet the definition of community representatives.

On 18 December 2023, The TPB also issued two draft guidance documents for feedback, D51/2023 and D52/2023.

D51/2023

D51/2023 relates to employing or using a disqualified entity in the provision of tax agent services without approval from the TPB.

Code 15 states: As a registered tax practitioner, you must not employ, or use the services of, an entity to provide tax agent services on your behalf if:

1. you know, or ought reasonably to know, that the entity is a disqualified entity; and
2. the Tax Practitioners Board has not given you approval to employ, or use the services of, the 'disqualified entity' to provide tax agent services on your behalf.

The guidance sets out what constitutes employing or using the services of an entity and the meaning of a 'disqualified entity'. Specifically, the guidance provides a table of the 'events' that will cause an entity to be a disqualified entity, such as having been convicted of a serious taxation offence. The guidance also discusses the threshold for 'know or ought reasonably to know' in the context of registered tax practitioners taking reasonable steps and making reasonable enquiries to determine if an entity is a disqualified entity.

The guidance also has a table on 'how to comply with Code 15'.

D52/2023

D52/2023 relates to the prohibition on providing tax agent services in connection with an arrangement with a disqualified entity.

Code 16 states: that a registered tax practitioner must not provide tax agent services in connection with an arrangement with an entity that the tax practitioner knows, or ought reasonably to know, is a disqualified entity.

The guidance sets out what constitutes an 'arrangement' under Code 16, and when is a tax agent service provided 'in connection with' an arrangement. Similarly to D51/2023, D52/2023 also sets out a table for how to comply with Code 16.

Both D51/2023 and D52/2023 are open for comment until 16 February 2024.

w https://www.tpb.gov.au/important-changes-tax-agent-services-legislation
https://www.tpb.gov.au/tpbi-d522023-code-professional-conduct-prohibition-providing-tax-agent-services-connection-arrangement-disqualified-entity
https://www.tpb.gov.au/tpbi-d512023-code-professional-conduct-employing-or-using-disqualified-entity-provision-tax-agent-services-without-approval
https://www.tpb.gov.au/draft-guidance-new-code-items-issued-seeking-feedback

6.6 Calculation of electric vehicle charging costs

The ATO has published *Practical Compliance Guideline* PCG 2024/2 regarding the calculation of electricity costs when charging a vehicle at an employee's or individual's home.

The PCG is available to certain employers and individuals who need to calculate the electricity cost of charging a vehicle for FBT or income tax purposes. Taxpayers may choose to use the methodology in the guideline or may use the 'actual cost' method instead.

The PCG provides a shortcut methodology for calculating electric vehicle home charging costs, being the prescribed EV home charging rate multiplied by the number of kilometres travelled by the vehicle in the period. For the income year commencing on or after 1 April 2022, the rate is 4.2 cents per kilometre.

The PCG only applies to 'zero emissions vehicles'. Where the electric vehicle is a plug-in hybrid vehicle which has an internal combustion engine, the methodology in the PCG will not apply as the shortcut method applies the home charging rate to all kilometres driven in the FBT or income tax year.

6.7 Employers who can rely on the guideline

Employers can rely on the guideline to calculate electricity costs of charging an electric vehicle at the employee's home if they:

1. provide the electric vehicle to an employee or associate for private use resulting in the provision of a car fringe benefit, residual fringe benefit or pay for expenses associated with the car resulting in a car expense payment benefit;
2. provide the electric vehicle to an employee or associate who charges the electric vehicle using electricity at a residential premises, where the electricity cost directly attributable to charging the electric vehicle cannot be practically segregated from the cost of running other electrical appliances in the home; and
3. are required to calculate the taxable value for one or more of the following as part of the employer's FBT obligations:
   (a) car fringe benefit;
   (b) residual fringe benefit;
   (c) car expense payment benefit - where the electricity charging cost incurred by the employee is reimbursed by the employer;
   (d) the grossed-up taxable value for reporting of the reportable fringe benefit amount (RFBA) for your employee - which continues to be reportable, even if the car benefit arising from the provision of the electric vehicle is exempt.

Individuals who can rely on the guideline

An individual can rely on the guideline to calculate electricity costs of charging an electric vehicle at their home if they:

1. use a zero emissions electric vehicle in gaining or producing assessable income;
2. incur electricity expenses when charging the electric vehicle at home; and
3. have kept the relevant records for the income year.

Home charging percentage

Where a zero emissions vehicle has the functionality to accurately report the percentage of a vehicle's total charge based on the type of charging location, electric vehicle charging costs can include both home charging and commercial charging station costs. This is because the home charging percentage can be accurately determined. The total number of relevant kilometres used to calculate home charging costs must be adjusted by applying the home charging percentage to arrive at the relevant kilometres.

If electric vehicle charging costs are incurred at a commercial charging station and the home charging percentage cannot be accurately determined, the taxpayer can choose either to:

1. use the EV home charging rate, but only if the commercial charging station cost is disregarded; or
2. use the commercial charging station cost, but only if the EV home charging methodology set out in the PCG 2024/2 Guideline is not applied.

Further, all necessary records such as receipts must be kept to substantiate the claim.

Record keeping

If a taxpayer wishes to rely on the EV home charging rate to calculate their electricity charging expenses, they will need to keep a record of the distance travelled by the car (odometer records) in either the applicable FBT year to 31 March or the income year to 30 June.

If an employer chooses to apply the PCG and the EV home charging rate for FBT purposes, a valid logbook must be maintained if the operating cost method is used.

If an individual chooses to apply the PCG and the EV home charging rate for income tax purposes, to satisfy the record-keeping requirements they must have:

1. a valid logbook to use the logbook method of calculating work-related car expenses. For other vehicles, it is recommended a logbook is maintained to demonstrate work-related use of the vehicle; and
2. one electricity bill for their residential premises in the applicable income year to show they have incurred electricity costs.

For FBT purposes, the guideline applies from 1 April 2022 when calculating the taxable value of benefits.

For income tax purposes, the guideline will apply from 1 July 2022, when calculating the relevant car or motor vehicle expenses.

There is a transitional approach to record keeping for the 2023 fringe benefits tax year and 2023 income year. If odometer records have not been maintained as at 1 April or 1 July 2022, or as at 1 April or 1 July 2023, a reasonable estimate may be used based on service records, logbooks or other available information.

ATO reference *Practical Compliance Guideline* PCG 2024/2
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20242/NAT/ATO/00001

6.8 Changes in reporting requirements for not-for-profits

Not-for-profit self-assessing entities with an active ABN must lodge a NFP self-review return from the 2024 income year onward to access income tax exemption.

The NFP self-review return for the 2024 income year may be lodged anytime between 1 July and 31 October 2024. It can be submitted online through Online services for business, or a registered tax agent using Online services for agents if authorised to lodge on the entity's behalf.

The ATO has updated its website to provide guidance for not-for-profits to prepare for the new annual reporting requirement. Not-for-profit entities should:

1. check the organisation's contact details are up to date, including ABN registration details;
2. review the organisation's main purpose and its governing documents;
3. set up a myGovID;
4. link myGovID to the NFP's ABN in Relationship Authorisation Manager (RAM) in order to access Online services for business.

A government entity, a charity registered with the Australian Charities and Not-for-profits Commission or a taxable not-for-profit entity are not required to lodge an NFP self-review return.

Not-for-profit self-assessing entities which fail to comply may become ineligible for an income tax exemption and penalties may apply.

w https://www.ato.gov.au/newsrooms/not-for-profit-newsroom/changes-in-reporting-requirements-for-not-for-profits

6.9 Taxpayer alert for tax exempt entities receiving franked distributions

On 8 December 2023, the ATO issued *Taxpayer Alert* TA 2023/3.

The alert advises that the ATO is currently reviewing arrangements involving franked distributions in the form of property other than money (i.e. in specie distributions) that are made to tax exempt entities, including registered charities, deductible gift recipients, scientific institutions, and public educational institutions.

Under these arrangements:

1. an in specie franked distribution is made (or flows indirectly) to an income tax exempt entity; and
2. there are restrictions on the ordinary incidents of ownership of the distributed property that:
   (a) are imposed as part of the terms and conditions for the making of the franked distribution; and
   (b) prevent the income tax exempt entity from receiving immediate custody and control of that property.

An entity that receives a franked distribution in the form of property other than money will not be eligible for a refund of franking credits where the terms and conditions on which the franked distribution is made are such that the entity 'does not receive immediate custody and control of the property' (subparagraph 207-122(b)(i) of the ITAA 1997).

The ATO takes the position that section 207-122(b)(i) of the ITAA 1997 requires the recipient entity to receive, from the moment of distribution, control of the distributed property to the same extent as an absolute owner. The ATO views being an absolute owner as having 'unrestricted authority over the ownership of that property'.

The ATO is concerned that income tax exempt entities may be entering arrangements without being aware that restrictions under these arrangements make them ineligible for a refund of the franking credits attached to the franked distribution.

The alert includes non-exhaustive examples of the arrangements the ATO considers will make an exempt entity ineligible for a refund of the franking credits attached to a franked distribution.

The ATO will be monitoring applications for franking credit refunds by exempt entities where the claim is in respect of an in specie franked distribution. The ATO is also looking to identify an appropriate case to test its views on the application of section 207-122(b)(i) of the ITAA 1997.

Exempt entities that have entered, or are contemplating entering, into arrangements of this type are encouraged to contact the ATO, seek a private ruling, seek independent legal advice, and/or make a voluntary disclosure to reduce penalties that may apply.

ATO reference *Taxpayer Alert TA 2023/3*
w https://www.ato.gov.au/law/view/document?DocID=TPA/TA20233/NAT/ATO/00001

6.10 Updated PCG on buy-back and redemption of certain hybrid securities

The ATO has updated PCG 2021/1 in relation to the application of market value substitution rules for determining capital proceeds when there is a buy-back or redemption of hybrid securities. The PCG sets out methodologies for determining market value for investors holding their securities on capital account.

The PCG applies to 'hybrid securities', which are instruments that exhibit features of both debt and equity. Hybrid securities are common in the banking and finance industry and include preference shares and capital notes. The conditions of hybrid securities typically allow the issuer to 'repay' investors at a specific future time if certain conditions are met, although repayment is not mandatory. If the issuer chooses not to repay investors at that designated time, the hybrid securities will commonly convert into ordinary shares at a predetermined point or persist until another relevant date, providing the option to repay or convert.

The PCG has been updated to clarify that the calculation of modified volume weighted average price (VWAP) should be done with regard to the ASX Listing Rules 19.12 definition of VWAP. The PCG sets out the steps for applying the modified VWAP at paragraph 45. Step 4 has been updated to clarify that when determining the 'clean price' of the security for each of the five days before the announcement of the buy-back or redemption, the amount of accrued interest to be subtracted should include the value of the expected franking credits (that is, the grossed-up interest and franking credits amount).

ATO reference *Practical Compliance Guideline* PCG 2021/1
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20211/NAT/ATO/00001

6.11 Super funds and investment platforms not eligible for RITCs on adviser fees

On 13 December 2023, the ATO published guidance on its legal database regarding the eligibility of superannuation funds and investor-directed portfolio services investment platforms to claim reduced input tax credits on adviser fees.

The guidance states that the Commissioner is of the view that superannuation funds and investor-directed portfolio services are not eligible to claim reduced input tax credits (RITCs) in respect of adviser services fees, as they are not the recipient of a supply for which the fees are consideration. The guidance states that this view is consistent with the Commissioner's existing guidance in *Goods and Services Tax Ruling GSTR* 2006/9 *Goods and services tax: supplies, including in relation to tripartite agreements.*

TIP – this information is contained in a document called 'Guidance' which can be found in the ATO legal database under 'Other ATO Documents > Goods and services tax > Other documents'. It is not a ruling or

administratively binding advice. It is not an interpretative decision, practical compliance guideline or law administration practice statement. For more information about the level of protection offered by different types of ATO guidance see https://www.ato.gov.au/about-ato/ato-advice-and-guidance/how-our-advice-and-guidance-protects-you.

w https://www.ato.gov.au/law/view/document?docid=SGM/IDPS-adviser-fees

6.12 Claiming deductions for expenses on holiday homes

On 23 November 2023, the ATO updated its newsroom content in relation to holiday homes.

The ATO reiterates that taxpayers can only claim deductions for expenses on holiday homes to the extent their expenses are incurred for the purpose of gaining or producing rental income.

Deductions on holiday homes should be reduced if:

1. the holiday home is used or reserved by the taxpayer during peak periods when it could reasonably be expected that the property would be rented out; and
2. the taxpayer places unreasonable conditions that restrict the likelihood of their property being rented.

The webpage includes guidance around key questions advisers can ask taxpayer clients to assist with determining whether the deductions claimed by the client are valid deductions and if they need to be reduced.

w https://www.ato.gov.au/newsrooms/tax-professionals-newsroom/do-your-clients-have-a-holiday-home

6.13 R&D activities delivered by associated entities

The ATO is reviewing claims made by research and development (R&D) entities for a tax offset under the R&D tax incentive (R&DTI) for expenditure incurred under an agreement with an associate of the R&D entity (**Service Provider**) who itself conducts the R&D activities.

The ATO is concerned with arrangements that:

1. incorrectly purport the R&D entity as having incurred or paid (or both) the relevant expenditure under an agreement with the Service Provider; or
2. have the effect of obtaining for the R&D entity a tax offset for expenditure on R&D activities purportedly conducted for the R&D entity's own benefit but are instead in substance being conducted for (or to a significant extent, for) the Service Provider.

The Service Provider will usually be an entity that has historically conducted the group's trading and research activities, however, is not itself an entity that would be entitled to claim an offset were it to conduct the activities for its own benefit, or if entitled, only entitled to a lesser benefit under the R&DTI.

The ATO states that it is concerned with arrangements that are commonly structured as follows:

1. the Service Provider or its controllers cause the incorporation of a special purpose company or repurpose an existing non-trading company within the controlled group to be the controlled group's R&D entity;
2. the service provider as contractor, conducts R&D activities under a service agreement with the R&D entity as principal itself funds the R&D activities being conducted, before purportedly invoicing the R&D entity a service fee or recharge amount for having conducted the activities in substance and effect:
   (a) controls the strategic decisions regarding the R&D activities;

(b) has primary rights to commercially exploit for the purposes of its own trading business any developed intellectual property (IP), know-how or other results (including data) from the R&D activities having been conducted (the Developed IP).

3. the R&D entity:
   (a) conducts limited or no other activity other than the R&D-specific arrangements under the service agreement entered into with the Service Provider;
   (b) purports to satisfy its service payment obligations to the Service Provider by a loan or other financing facility between the R&D entity and the Service Provider, or by set-off against a new licence agreement for exploitation of the Developed IP or service agreements between the R&D entity and the Service Provider;
   (c) has few employees with the technical capability;
   (d) has few sufficiently liquid assets of value capable of being provided as security;
4. in substance and effect, the refundable tax offset is the R&D entity's only receipt and the only amount used to service the R&D entity's payment obligations to the Service Provider;
5. agreements between the R&D entity and the Service Provider are inconsistent with the actual commercial substance of the agreement between the entities.

Taxpayers and advisers who enter into these types of arrangements will be subject to increased scrutiny. Further guidance will be published in due course.

Penalties may apply to participants in, and promoters of, this type of arrangement, which includes penalties for promoters under Division 290 of Schedule 1 to the TAA. Registered tax agents involved in the promotion of this type of arrangement may also be referred to the Tax Practitioners Board.

ATO reference *Taxpayer Alert TA 2023/4*
w https://www.ato.gov.au/law/view/document?docid=TPA/TA20234/NAT/ATO/00001

6.14 R&D activities conducted overseas for foreign related entities

The ATO has released a *Taxpayer Alert* TA 2023/5 which announces that the ATO is currently reviewing arrangements where Australian-resident R&D entities claim a tax offset under the R&D tax incentive rules for expenditure incurred on R&D activities conducted overseas.

The ATO is particularly looking at instances where an R&D entity has purported that the R&D activities were conducted for the R&D entity's own benefit, but those activities were instead being conducted for a foreign entity that is 'connected with' or is an 'affiliate' of the R&D entity (a foreign related entity).

The ATO has described 'arrangements of concern' as those where the R&D activities are for the benefit of the related foreign entity and may display some or all the following features:

1. the agreements between the foreign related entity and the R&D entity:
   (a) are established by and under the instruction of the foreign related entity and its controllers directly or indirectly result in the foreign related entity ultimately acquiring ownership rights in the developed intellectual property;
   (b) for the period of the R&D entity's ownership of the developed IP;
      (i) impose restrictions on some or all of the R&D entity's right to exploit, right to alienate and right to itself manage the developed IP; or
      (ii) grant to the foreign related entity primary rights to exploit and itself manage the developed IP; or
   (c) may have a legal form that is inconsistent with the actual commercial substance of the arrangement between the entities.
2. the foreign related entity:

(a) owns the pre-existing IP which is licensed to the R&D entity to undertake the R&D;
(b) in substance and effect:
    (i) assumes the financial risk in relation to any funds committed to the R&D entity for the purposes of financing the R&D activities;
    (ii) sets the conditions for initial and subsequent funding of the R&D;
    (iii) assumes the operational risk for the conducting of the R&D activities;
    (iv) controls the strategic decisions regarding the R&D activities, including the instructions given to any contracted CRO as to the way the R&D activities are to be conducted; or
(c) may itself be contracted by the R&D entity to conduct some (or all) of the R&D activities.

3. the R&D entity:
    (a) may not have a physical presence in Australia;
    (b) may have one or more foreign-resident directors that are consistent with that of (or are appointed by) the foreign related entity;
    (c) has an Australian-based resident director that acts in accordance with the directions and wishes of the foreign related entity or its controllers;
    (d) has few (if any) employees with the technical capability to design, conduct or supervise any R&D activities being conducted;
    (e) in the absence of either original and future committed funding from the foreign related entity or refundable tax offset under the R&DTI, lacks the economic capacity to either conduct the R&D activities or commercially exploit the developed IP; or
    (f) may have been incorporated shortly before the end of the relevant income year in which the R&DTI is first claimed.

The ATO has announced in TA 2023/5 that it is developing further website guidance on specific technical matters in this alert, which will be published in due course.

ATO reference *Taxpayer Alert* TA 2023/5
w https://www.ato.gov.au/law/view/document?docid=TPA/TA20235/NAT/ATO/00001

6.15 ATO practice on collection and recovery of disputed debts

On 9 November 2023, the ATO made significant updates to *Practice Statement Law Administration* PS LA 2011/4 concerning collection and recovery of disputed tax debts. Generally, a tax debt remains payable even where there is a dispute and the ATO is legally entitled to commence recovery action. However, PS LA 2011/4 sets out the ATO approach to debt recovery during ongoing disputes.

The statement has been updated throughout to clarify that as general principle that the Commissioner will generally not seek to recover a debt when there is a dispute, save in exceptional cases where there is a significant risk to revenue (generally in high-risk cases). Specific examples of higher-risk scenarios are set out at paragraph 16 and include situations where:

1. there are links to organised crime, phoenixing or other fraudulent activity;
2. there is a serious concern about the dissipation of assets or the ability to pay in the event that the taxpayer is unsuccessful in the dispute; or
3. the taxpayer's objection is frivolous or without merit and the dispute is being used to inappropriately delay or frustrate the recovery of tax.

Paragraphs 14 and 15 set out the factors that the ATO will take into account when assessing the risk that the case poses to revenue.

50/50 Arrangements

Paragraphs 22 to 41 include more detailed guidance around 50/50 arrangements. A new example has been added at paragraph 34 that illustrates the considerations for the ATO when entering into a 50/50 arrangement. Paragraph 14 indicates that the ATO considers payment of 50% of the debt to be an indication of good faith.

A new directive has been introduced at paragraph 35 that where the disputed equal to or greater than $50 million, before proceeding with a 50/50 arrangement the responsible tax officer must first obtain formal approval from both an Assistant Commissioner from Client Engagement Group and an Assistant Commissioner from Lodge and Pay.

AAT powers

Paragraphs 62 to 64 discuss the application of new AAT orders in relation to staying debt recovery for certain small business taxation assessment decisions.

TIP – it is important to engage with the ATO proactively to negotiate appropriate payment arrangements even if a debt is in dispute.

ATO reference *Practice Statement Law Administration* PS LA 2011/4
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20114/NAT/ATO/00001&PiT=20231109000001

6.16 ATO pauses debt awareness campaign after feedback

The ATO has paused its debt awareness campaign under which it was sending letters to taxpayers reminding them of existing debts with the ATO, where collection had been put on hold.

Following community feedback, the campaign has been paused and the ATO will review its overall approach to debts on hold. Tax debts on hold are debts that the ATO is not taking active steps to recover. When a tax debt is put on hold, a taxpayer is informed in writing that while the ATO will not currently pursue the debt, the debt remains payable.

w https://www.ato.gov.au/media-centre/ato-pauses-debt-awareness-campaign

6.17 ATO launches free online learning support for small businesses

The ATO has launched a new online learning platform providing free courses to help small businesses master their tax and super obligations.

There are more than 20 short courses and a calendar of key lodgment due dates to assist small business owners. The website also includes tips for where the ATO regularly sees errors are made by small businesses.

A link to the new platform, which is now live, can be found here - https://smallbusiness.taxsuperandyou.gov.au/ .

w https://www.ato.gov.au/media-centre/ato-launches-free-online-learning-support-for-small-businesses

6.18 Australia to implement the OECD's Crypto-Asset Reporting Framework

Australia will join with 47 other jurisdictions to implement the OECD's Crypto-Asset Reporting Framework. This framework is the new international standard developed by the OECD on automatic exchange of information between tax authorities in relation to transactions in crypto assets.

w https://treasury.gov.au/media-release/collective-engagement-implement-crypto-asset-reporting-framework

6.19 Queensland doubles First Home Owner Grant

The Queensland government has announced that it will double the First Home Owner Grant, taking the total to $30,000 for eligible first home purchases with effect for transactions entered into on or after 20 November 2023.

w https://statements.qld.gov.au/statements/99186

6.20 NSW promoter penalty reminder

Revenue NSW recommends that advisors familiarise themselves with the promoter penalty provisions and to exercise caution when advising clients on actions related to potential tax avoidance schemes. Penalties can be imposed of up to $1,109,900 for individuals, and $5,549,500 for corporate entities for contraventions of the promoter penalty provisions.

In particular, Revenue NSW concerned about potential tax avoidance schemes following the recent High Court decision in *Vanderstock v Victoria* [2023] HCA 30, which concerned the constitutional validity of Victoria's electric vehicle charge. Revenue NSW is assessing these arrangements under the promoter penalty provisions of the *Taxation Administration Act 1996* (NSW).

COMMENT – no details have been provided by Revenue NSW about the types of schemes allegedly being 'promoted'.

w https://www.revenue.nsw.gov.au/news-media-releases/promoter-penalty

6.21 Intangibles migration arrangements

On 17 January 2024 the ATO released *Practical Compliance Guideline* PCG 2024/1. On 18 January 2024, the PCG was updated.

The PCG explains when the ATO is likely to apply resources to consider the application of the general anti-avoidance rules (GAARs) or the transfer pricing rules to cross-border related party Intangibles Migration Arrangements. The focus is on structuring issues and tax risks associated with the migration of intangible assets and mischaracterisation and non-recognition of Australian activities connected with intangible assets.

The PCG can be used to help taxpayers understand:

1. the kinds of compliance risks that may be presented by Intangibles Migration Arrangements, enabling taxpayers to make informed decisions about the likelihood that they will be subject to compliance action;

2. the features of Intangibles Migration Arrangements that the ATO considers present greater compliance risk; and
3. the evidence the ATO is likely to ask taxpayers to produce in relation to Intangibles Migration Arrangements, including the intensity of engagement taxpayers can expect based on the compliance risks associated with Intangibles Migration Arrangements.

The ATO's engagement is broadly based on a 'traffic light approach' whereby, if an arrangement is in the green zone, it is considered low risk. Blue zone arrangements are lower to medium risk. Amber arrangements are medium risk. Red arrangements are higher risk. White zone arrangements do not require further assessments. The higher the risk rating, the more likely it is that the AOT will seek evidence beyond the taxpayer's risk assessment as part of any review.

Taxpayers may be required to report their risk rating (in line with the above) for each Intangibles Migration Arrangement or on another basis – for example in line with certain disclosure requirements. Taxpayers should use this PCG when undertaking the self-assessment risk rating. The PCG provides further details regarding each level of risk, and evidence that taxpayers would be expected to provide.

ATO reference *Practical Compliance Guideline* PCG 2024/1
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20241/NAT/ATO/00001&PiT=20240118000001

6.22 Victorian Commercial and Industrial Property Tax

The Victorian Government is progressively abolishing stamp duty on commercial and industrial property and replacing with an annual based tax – as announced in the 2023-2024 Victoria State Budget.

The new tax system will apply to commercial and industrial property transactions with both a contract and settlement date on or after 1 July 2024.

The Victorian Government has released an information sheet which provides detail on the final design features of the Commercial and Industrial Property Tax Reform, including information on a government facilitated transition loan. The Commercial and Industrial Property Tax will be set at a flat one per cent of the property's unimproved land value.

The changes will not apply to commercial or industrial property purchased before 1 July 2024, or properties primarily used for residential, primary production, community services, sport or heritage and cultural purposes (as coded by the Valuer General).

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https://www.dtf.vic.gov.au/sites/default/files/document/Commercial%20and%20Industrial%20Property%20Tax%20Reform%20%E2%80%93%20Information%20Sheet.pdf