The Tax Institute

Tax Update

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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
B & F Enterprises	The Full Federal Court has considered the application of section 100A of the ITAA 1936 and, in particular, when an agreement will have a tax reduction purpose for the purpose of section 100A(8) of the ITAA 1936.	Page 9
Bechtel Australia	The Federal Court has found that the otherwise deductible rule for FBT does not apply for the travel costs for FIFO workers where the FIFO workers are not rostered on from their point of origin. This case is also relevant to deductibility of travel expenses for employees.	Page 13
Diamondcreek	The Supreme Court of Victoria hands down an important decision concerning the landholder duty rules in Victoria and when an acquisition by a person in a landholder will be aggregated with acquisition made by non-associated persons. The decision has significant implications for acquisitions in managed funds that have real property in Victoria.	Page 32
Use of individual's fame by related entity	The ATO has finalised its ruling on its views that individuals are not capable of licensing their fame or image rights to a related entity.	Page 48
Taxation of crypto assets	The ATO has updated its guidance on the GST treatment of crypto assets, which includes more detail on the ATO's approach to the GST implications of transactions involving Non-Fungible Tokens (NFTs)	Page 68

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2. Cases

2.1 DiStefano – deductibility of outgoings where income activity is suspended

Facts

In August 2006, Angelo Distefano, who was experienced in investing in property purchased a rental property in Anna Bay, a suburb on the north coast of New South Wales. Angelo obtained a loan to assist with the purchase of the rental property. Angelo had trouble finding tenants for the property outside of holiday periods. The property was empty for extended periods. During these untenanted periods, the property was regularly vandalised.

A long-term tenant moved into the rental property in 2010 and moved out in 2012. In the end of lease report, the tenant indicated that there were a number of defects and issues with the rental property.

The rental property has not been rented since the tenant vacated. Angelo had decided to undertake work on the property to increase the rental income from the property but this work was delayed for various personal reasons.

In July 2012, Angelo's father suffered a stroke. Angelo visited his father every day at hospital and by December 2012, Angelo's father had moved in with him and Angelo became his primary carer.

In 2014, Angelo recommenced work on the property. He removed trees, made modifications to the garage and arranged for the property to be surveyed. In April 2015, Angelo arranged for a bushfire assessment, received quotes regarding supply of a drainage system and organised for a report regarding the environmental impact of a development to be completed.

However, further delays occurred, with the contribution to those delays including:

1. the business that Angelo worked for was experiencing a downturn which had impacted the profitability of the business;
2. Angelo's father's health was worsening;
3. Angelo began to experience depression in around 2015.

Angelo continued to pay interest on the mortgage and had not progressed in reducing the principal loan amount. Angelo has continued to pay land tax, council rates and insurances. Angelo claimed these amounts as deductible, being losses or outgoings incurred in connection with the rental property, for all years including up to and after the year ended 30 June 2017.

At some point in time, the Commissioner commenced a review of the deductions claimed by Angelo. In October 2019, Angelo advised the Commissioner that it was still his intention to work on the property with a view to bring it back onto the rental market. It appears that Angelo had indicated that he has expected to fund the building works from the sale of shares that Angelo was to receive in a company that was expected to be listed on the stock exchange. However, the listing did not occur and Angelo did not receive the income he was expecting to receive in the income years ended 30 June 2019 and 2020. Accordingly, the work did not commence as planned.

The Commissioner subsequently amended Angelo's income tax assessment for the year ended 30 June 2017 disallowing the deductions. Angelo lodged an objection, but the Commissioner disallowed the objection. Angelo then appealed the decision to the AAT.

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At the AAT the parties agreed that the case must be considered under the first limb of section 8(1) of the ITAA 1997.

At issue in the case was the application of the principles in *Fletcher v Federal Commissioner of Taxation* [1991] HCA 42 where the High Court held that 'where the costs are wholly or partly incurred in gaining or producing assessable income is a question of characterisation and the relationship between the outgoing and assessable income must be such that the outgoing must have been incidental and relevant.'

Further, in *Fletcher* the Court held that '...it is to be construed as an abstract phrase which refers not only to assessable income derived in that or in some other tax year but also to assessable income which the relevant outgoing would be expected to produce.'

Angelo argued that the rental property was originally purchased as an investment property, and that it was nothing more than a lull the property was experiencing and the lull of income-producing activity did not change the character of the assets or the character of the losses and outgoings.

Angelo also referred to Taxation Ruling TR 2004/4, which concerns deductions for interest incurred prior to the commencement of, or following the cessation of, relevant income earning activities. In this ruling the Commissioner refers to a number of cases, including the High Court case of *Steele v Deputy Commissioner of Taxation* [1999] HCA 7 which stated:

> *The interest incurred in a period prior to the derivation of relevant assessable income will be incurred in gaining or producing the assessable income in the following circumstances:*
>
> - *the interest is not incurred 'too soon', is not preliminary to the income earning activities and is not a prelude to those activities;*
> - *interest is not private or domestic;*
> - *the period of interest outgoing prior to the derivation of relevant assessable income is not so long, taking into account the kind if income earning activities involved;*
> - *the interest incurred with one end in view, the gaining or producing of assessable income;*
> - *continuing efforts are undertaking in pursuit of that end.*

The Commissioner referred to a number of cases in support of the position that outgoings has ceased to have a sufficient nexus to assessable income.

In *Bonaccordo v Commissioner of Taxation* [2009] AATA 385 the taxpayer had purchased a neighbouring property but it remained untenanted for three years as little efforts had been made to rent it out, with such efforts limited to placing a sign on the property advertising it for rent. Tamberlin J concluded that the taxpayer did not make 'sufficient efforts to indicate that the property was available to rent' stating as follows:

> *...the importance of adopting a practical commercial commonsense approach to determination of the question of whether sufficient and genuine attempts were made to rent the property so as to provide the necessary connection with the production of rental income.*

In *Re Ormiston and Federal Commissioner of Taxation* [2005] AATA 978 an inexperienced property investor acquired a property with the intention of renting it out following modest renovations. The planned renovations did not come to fruition quickly because of a lack of proper planning and problems in the taxpayer's personal life. The Tribunal accepted the holding costs were deductible in the circumstances. The Tribunal noted there was no doubt about the taxpayer's intention in acquiring the property. The ATO's representative pointed out Mr DiStefano was not an inexperienced property investor like the taxpayer in *Ormiston*, and the delay in this case was even longer than in *Ormiston* (being 5 years in *Ormiston*).

In *Temelli v Federal Commissioner of Taxation* [1997] FCA 756, the taxpayer had acquired vacant land for the purpose of building a rental property. The taxpayer failed to undertake a detailed analysis of the costs of the

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building project and did not take any steps toward bringing the development into fruition. In *Temelli*, the Court concluded that the taxpayer in that scenario did not exhibit a degree of commitment to the relevant income producing activity.

The Commissioner argued that Angelo had borrowed a large amount of money, was an experienced property investor and was assisted by relatives with relevant skills who could have progressed his plans for the property if he were seriously committed to the project notwithstanding his carer responsibilities.

Issue

Were the costs claimed by Angelo incurred in gaining or producing assessable income under section 8(1) of the ITAA 1997?

Decision

The AAT accepted that the rental property was acquired for the use of generating income for Angelo and had generated income since being acquired. Angelo had demonstrated that he was working (admittedly slowly) in renovating the rental property to be able to be liveable again and that the period between the outgoings and the prospect of deriving assessable income was not so great that the nexus between deriving income and the outgoing and losses incurred, was broken.

The AAT was satisfied that Angelo had done just enough to demonstrate that he retained his commitment to the rental property, so that the rental property would ultimately yield assessable income. Angelo made it clear that he had acquired the property for rental purposes and he had made genuine efforts to market the rental property when he had first acquired the rental property.

The AAT was not satisfied that the slow progress in attending to the defects and issues of the rental property between February 2016 and June 2017 suggested that the nexus between deriving income and the outgoings and losses incurred by Angelo was broken.

The AAT ordered the decision be set aside and that Angelo's claim for deductions in respect of interest and other outgoings relating to the rental property for the income year ended 30 June 2017 be allowed.

TIP – while the cases from which the principles in TR 2004/4 are drawn were cases concerning taxpayers in business, and not merely in receipt of passive income, the Commissioner accepts in that ruling that the principles apply equally to taxpayers not in business.

TRAP – where a property is not available for rent the vacant land measures, that affect expenditure on and from 1 July 2019, would deny a deduction for interest in the above case. The above case better demonstrates the general principle that there needs to be sufficient nexus between producing income and incurring outgoings for the outgoings to be deductible.

Citation *DiStefano v Commissioner of Taxation* [2023] AATA 1697 324 (Deputy President McCabe, Member Lee Benjamin, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1697.html

2.2 B&F Investments (BBlood) – 100A and dividend stripping

Facts

The Blood Motor Group was a car dealership run by Brian Blood and his two business partners, Sean Blood and Darron Muir.

The Brian Blood Group included Illuka Park Pty Ltd (**IP Co**), BBlood Enterprises Pty Ltd (**BBlood Enterprises**), and B&F Investments Pty Ltd.

A trust in the group, the B&F Investments Trust, owned 40% of the shares in one of the head companies of the four tax consolidated groups that comprised the Blood Motor Group. Prior to 2015, the B&F Investments Trust received significant franked dividends income over time. The B&F Investments Trust had distributed most of its income to IP Co. As a result, IP Co had retained earnings of $7,421,722.

The Illuka Park Trust (**IP Trust**) was a discretionary trust established by a deed of settlement dated 15 February 2010 (**IP Trust Deed**). B&F Investments was the trustee of the IP Trust (**IP Trustee**). Until 31 March 2014, the property of the IP Trust was limited to $10 of cash on hand. It had not previously received any income.

IP Co was a 'General Beneficiary' of the B&F Investments Trust. IP Co was owned 99% by the IP Trustee and 1% by Fiona.

Fiona and Brian were 'Primary Beneficiaries' of the IP Trust. As Primary Beneficiaries, Fiona and Brian were also 'General Beneficiaries' in addition to any corporation of which either of them was a member or director.

Brian had received and had heavily relied on the advice of Fordham Business Advisors Pty Ltd (**Fordham**) since 1999.

In the income year ended 30 June 2014, the following steps took place:

1. IP Co paid franked dividends to the IP Trust on 31 March 2014 ($121,739) and 30 April 2014 ($59,400) such that, with the income the IP Trust received from the B&F Investments Trust, the IP Trust had income of $304,377 for the year ended 30 June 2014. The IP Trust received a dividend in the amount of approximately $300,000. The IP Trust had never previously received a dividend;
2. a newly incorporated beneficiary (BBlood Enterprises) was made presently entitled to the income of the IP Trust. The income (according to the deed, being income according to ordinary concepts) distributed by the IP Trustee to BBlood Enterprises totalled $304,377. The amount remained unpaid;
3. the IP Trust Deed was varied so that the definition of income was changed from net income under section 95 of the ITAA 1936 (i.e. tax law income) to income to be determined by the trustee in accordance with ordinary concepts; and
4. on or about 25 June 2014 IP Co bought back the shares held in it by the IP Trust. Aside from $99.00, the buy-back proceeds were debited to IP Co's retained earnings account.

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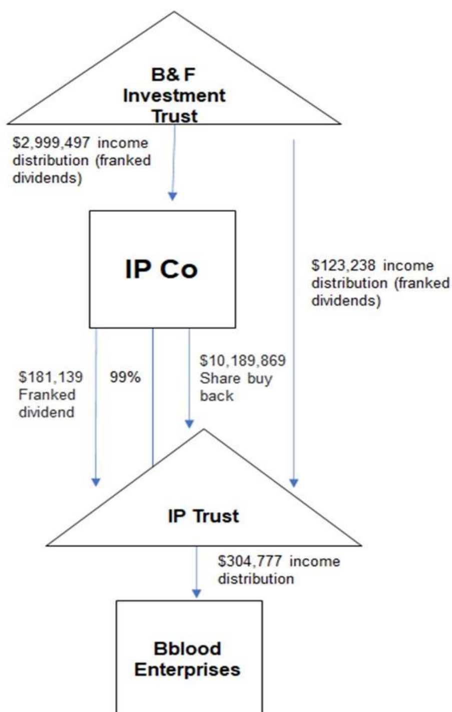
The following flow chart sets out the transactions:



The taxpayer treated the income tax implications of these steps as follows:

1. the buy-back proceeds were treated as a fully franked dividend;
2. as BBlood Enterprises was made presently entitled to the whole of the income of the IP Trust for the year, BBlood Enterprises was assessed on the IP Trust's tax law income, including the Share Buy-Back Dividend under section 97 of ITAA 1936;
3. BBlood Enterprises paid no additional tax, because the Share Buyback Dividend was fully franked and the tax payable on the Share Buy-Back Dividend was wholly offset by the franking credit;
4. the IP Trust retained the amount of the Share Buy-Back Dividend as corpus of the trust. However, it was not liable to pay tax under section 99A of the ITAA 1936 in respect of the Share Buy-Back Dividend, because it was not 'income' of the trust to which no beneficiary was presently entitled

Section 100A

The Commissioner issued an assessment to the IP Trustee dated 11 August 2020 (**IP Assessment**) on the basis that the arrangement was a 'reimbursement agreement' for the purposes of section 100A of the ITAA 1936. Accordingly, the IP Trustee was assessed on whole of the net income of the IP Trust for the year under section 99A of the ITAA 1936.

Section 100A(1) of ITAA 1936 provides:

'(1) Where:

(a) apart from this section, a beneficiary of a trust estate who is not under any legal disability is presently entitled to a share of the income of the trust estate; and

(b) the present entitlement of the beneficiary to that share or to a part of that share of the income of the trust estate (which share or part, as the case may be, is in this subsection referred to as the relevant trust income) arose out of a reimbursement agreement or arose by reason of any act, transaction or circumstance that occurred in connection with, or as a result of, a reimbursement agreement;

the beneficiary shall, for the purposes of this Act, be deemed not to be, and never to have been, presently entitled to the relevant trust income.'

Subject to certain qualifications, a reimbursement agreement is defined in section 100A(7) as follows:

> *'(7) Subject to subsection (8), a reference in this section, in relation to a beneficiary of a trust estate, to a reimbursement agreement shall be read as a reference to an agreement, whether entered into before or after the commencement of this section, that provides for the payment of money or the transfer of property to, or the provision of services or other benefits for, a person or persons other than the beneficiary or the beneficiary and another person or other persons.'*

Section 100A(8) has the effect of excluding from reimbursement agreements captured under section 100A(7) agreements that do not have a purpose of reducing or deferring the liability to tax by a relevant person.

Section 100A(13) also excludes the application of section 100A an agreement, arrangement or understanding entered into in the course of ordinary family or commercial dealing.

Where section 100A applies, the trustee is assessed on the assessable income under section 99A of the ITAA 1936 on the basis that no beneficiary is deemed to be presently entitled to the net income of the trust.

<u>Dividend Stripping</u>

The Commissioner also issued an alternative amended assessment to BBlood Enterprises dated 15 August 2019 (**BE Assessment**). The BE Assessment was issued on the basis that BBlood Enterprises was not entitled to claim a tax offset for the franking credits under section 207-150(1) of the ITAA 1997. The Commissioner contended that this was because the Deemed Share Buy-Back Dividend was made a part of a dividend stripping operation in accordance with section 207-155 of the ITAA 1997.

<u>First instance decision</u>

At first instance in the Federal Court, the primary judge held that section 100A applied, with the effect that it was deemed that no beneficiary was presently entitled to the Share Buy-Back Dividend and the IP Trustee was properly assessable on that amount.

The primary judge also considered that the arrangement was part of a dividend stripping operation in accordance with section 207-155 of the ITAA 1997.

IP Trustee appealed the decision to the Full Federal Court, contending that section 100A did not apply to the transactions.

BBlood Enterprises appealed the decision to the Full Federal Court, contending that the BE Assessment would necessarily be excessive, because, if section 100A applied, the IP Trustee would be assessed on the Share Buy-Back Dividend and BBlood Enterprises would not be liable to tax as it would not have been presently entitled to the Share Buy-Back Dividend.

Issues

1. For the purposes of subsection 100A(8) of the ITAA 1936, did the primary judge err in finding that the arrangement was entered into with a purpose of reducing or deferring income tax?
2. Did the primary judge err in concluding that the deemed dividend paid to BBlood Enterprises was made as part of a dividend stripping operation for the purposes of subsection 207-150(1) of the ITAA 1997?
3. Did the primary judge err in dismissing the application in relation to the BE Assessment?

Decision

Section 100A

The Full Federal Court gave detailed consideration to the operation of subsection 100A(8) and noted that what is to be investigated are the purposes of one or more of the parties to the reimbursement agreement. The Court held that the advisers formulating the documentation and implementing the arrangement with the knowledge and assent of the controllers of the entities who were parties to the transactions are themselves parties to the reimbursement agreement. The Court noted that the share buy-back strategy did not originate as a consequence of Brian or any of the Blood Motor Group entities seeking advice, but rather was a strategy brought to him by the advisers who were also taking the strategy to other clients. The Court held that those circumstances may give a greater emphasis to the purposes of advisers as parties to the arrangement.

The Court noted that arrangements which involve departures from historical patterns of behaviour without commercial justification, where the change in behaviour contributes to an expected outcome of reducing or deferring tax, are capable of supporting a conclusion as to the purpose of a party in entering into the arrangement.

The Court also held that it was not necessary to establish an alternative postulate of what the parties *would* have done in the absence of the arrangement. Rather, the consideration of other means that could have been used to achieve the same commercial outcome is relevant only to the extent it casts light on the purpose of a party in adopting the means in fact adopted.

The Court held that section 100A applied and dismissed the IP Trustee's appeal. As a result, IP Trustee was liable to tax on the net income of the IP Trust that was attributable to the Share Buy-Back Dividend.

Dividend stripping

As the Court held that section 100A applied, it was not necessary to determine whether the deemed dividend paid by IP Co was made as part of a 'dividend stripping operation'.

Alternative assessment

The Court noted that the assessment issued to BBlood Enterprises was necessarily an alternative assessment to that issued to IP Trustee because, if section 100A applied, BBlood Enterprises would be taken not to have been presently entitled to the deemed frankable Share Buy-Back Dividend and, therefore, BBlood Enterprises would not be liable to tax (with or without a tax offset) in respect of that Share Buy-Back Dividend.

The Court noted that it is open to the Commissioner to issue alternative assessments which are necessarily inconsistent, once the true state of facts is determined and the liability of the correct taxpayer has been established, the alternative inconsistent assessment is necessarily excessive.

The Court held that the appeal by BBlood Enterprises should be allowed as section 100A applied and two inconsistent alternative assessments ought not be affirmed as correct by order of the Court.

Citation *B&F Investments Pty Ltd as trustee for the Illuka Park Trust v Commissioner of Taxation* [2023] FCAFC 89 (Moshinsky, Colvin and Hespe JJ, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/89.html

2.3 Bechtel Australia – FBT and deductibility of FIFO expenses

Facts

Bechtel Australia Pty Ltd is a subsidiary of a group of companies, with the ultimate parent company, Bechtel Group, Inc., incorporated in the United States. Bechtel operates a contracting services business in Australia for large scale construction projects.

Bechtel was awarded an engineering, procurement and construction contract for the Liquefied Natural Gas projects on Curtis Island, near Gladstone in Central Queensland. Curtis Island is only accessible by sea or air, with a ferry service operating between Curtis Island and the mainland.

The LNG projects on Curtis Island commenced during the FBT year ended 31 March 2010.

Bechtel recruited a workforce both Australia-wide and internationally with the requisite specialist skills and experience to complete the projects. One of the terms of the governmental approval was to prohibit the relocation of employees to the immediate vicinity of the site who did not already reside there. This resulted in Bechtel engaging the additional workforce on a Fly In Fly Out (**FIFO**) basis.

The FIFO employees travelled from their respective home base airports to Gladstone in order to undertake duties at Curtis Island during their rostered period. A home base for an employee was known as a 'point of origin' and roster periods were known as 'swings'. During a swing, employees were required to live on Curtis Island in the temporary accommodation provided at or near the project site by Bechtel. At the end of a swing, the employees returned to their respective point of origin airports. Employees made their own arrangements in relation to travel between their residence and respective point of origin base airport. A typical journey for an employee to commence a rostered duty would involve a flight from the point of origin airport, or road transport, to Brisbane airport, a flight from Brisbane airport to Gladstone airport, a bus from Gladstone airport to the Gladstone ferry terminal, a ferry to the relevant Curtis Island ferry terminal, and a bus to the temporary accommodation provided by Bechtel.

Bechtel arranged and incurred expenses for travel for the FIFO employees who could not be accommodated on the mainland in or near Gladstone. These employees were typically engaged by Bechtel for duty at the site for 2 to 3 years. Bechtel incurred travel expenses for transporting these employees from their point of origin airport to Gladstone airport to undertake work during the employee's swing, and back to their point of origin airport at the conclusion of a swing. Importantly, the employees were rostered on to duty when they arrived at the project site at Curtis Island.

Travel from Curtis Island to an employee's point of origin usually commenced on the last day of a swing. Where an employee was rostered for 8-hour shift on that day, the employee worked ordinary duties at the project site on Curtis Island for the first 4 hours of the shift then returned to check out of the temporary accommodation before commencing return travel to his or her point of origin.

FIFO employees also received a project allowance which was paid in recognition of the inconvenience of having to work on Curtis Island, rather than in recognition of any travel to and from Gladstone.

Employees were required to read and sign a copy of Bechtel's code of conduct and project work rules prior to commencing their employment. The employees were required to abide by those rules whilst travelling on transport arranged by the employer. Breaches of these project work rules while travelling could, and did, result in the taking of disciplinary action, and potentially termination, by Bechtel.

The Commissioner included the travel expenses in deemed FBT assessments to Bechtel for each of the FBT years ended 31 March 2012 to 31 March 2019 (inclusive) as being the taxable value of the residual fringe benefits under the FBTAA. The total amount of fringe benefits tax in dispute was $13,014,296.

Bechtel accepted that these travel expenses were residual fringe benefits but objected to the assessments on the basis that the taxable value should be reduced to nil, because the expenses satisfied the 'otherwise deductible' test under section 52(1) of the FBTAA.

Bechtel submitted that, on the evidence, a deduction would have been allowable to employees, because the circumstances were not materially distinguishable from those of *John Holland Group Pty Ltd v Commissioner of Taxation* [2015] FCAFC 82. In *John Holland*, the travel expenses incurred by the employer for fly in fly out employees between a remote worksite and a major metropolitan airport were held to meet the 'otherwise deductible' test in circumstances where those workers commenced their rostered shift on arrival at the metropolitan airport and ceased their rostered duty on return to that same airport. The metropolitan airport was the 'point of hire' for such employees.

The Commissioner contended that the circumstances of *John Holland* were distinguishable from those of Bechtel as the travel of employees did not occur during working time for which the employees were rostered-on.

The Commissioner disallowed Bechtel's objection. Bechtel appealed to the Federal Court.

Issue

Would a deduction have been allowable to the employees in respect of travel expenses under section 8-1 of the ITAA 1997, if the employee had incurred the travel expense?

Decision

The appeal was dismissed.

The travel expenses incurred for the relevant employees were not expenditure incurred in, or in the course of, gaining or producing the employee's income. The Court distinguished *John Holland,* as none of Bechtel's employees were rostered on to duty as soon as they arrived at their point-of-origin airport. The travel between the point-of-origin airport and Curtis Island was not travel between two places of employment. As such, the expenditure on the travel was a prerequisite to the earning of the employee's income. The travel expenses did not meet the 'otherwise deductible' test in section 52 of the FBTAA.

The Court noted that if Bechtel had so chosen to change the place of the rostered start time of the employee to the point-of-origin airport, those expenses may have met the 'otherwise deductible' rule in section 52 of the FBTAA. Justice Logan noted the result seemed anomalous, however any correction in the gaps in the operation of the FBT legislation was a matter for the legislature, not the judiciary.

The Court considered that whilst Bechtel's code of conduct and project work rules extended to employees during their employer-funded travel to or from their point-of-origin airport, that the employees received a project allowance for their inconvenience of having to work on Curtis Island and that Bechtel did not require employees to complete their full rostered hours on the last day of a 'swing', none of those facts converted the relevant travel to 'travel in the course of employment'.

TRAP – there are FBT exemptions for accommodation benefits and food benefits provided to FIFO workers but these exemptions do not apply to travel benefits.

TRAP – where an FBT return is not lodged, because it is anticipated there were no fringe benefits provided, as appears to have occurred here, the time limits for amendment of assessment do not begin to run. Lodging a nil return, where it is considered that no fringe benefits have been provided, results in a deemed nil assessment that is subject to time limits for amendment, unless there is fraud or evasion present.

Citation *Bechtel Australia Pty Ltd v Commissioner of Taxation* [2023] FCA 676 (Logan J, Queensland)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/676.html

2.4 Geelong Turf Company Pty Ltd – superannuation guarantee amnesty

Facts

Geelong Turf Company Pty Ltd runs a landscaping business. Luke Belleville is the director of Geelong Turf.

On 3 October 2019, the Commissioner sent Geelong Turf a letter requesting evidence that Geelong Turf had paid the super guarantee (SG) contributions for its employees for the quarters ending 31 December 2016 to 31 March 2019. The letter was addressed to Geelong Turf 's accountant and the postal address listed with the ATO at the time.

On 26 February and 27 February 2020, an ATO officer tried to contact Luke but was unsuccessful.

On 28 February 2020, an ATO officer contacted Geelong Turf's accountant, Ms Erika Fischer at Accountable Business Solutions (ABS) and was advised that the letter dated 3 October 2019 had not been received. The letter was then sent by email the same day. No response was provided by Geelong Turf.

Geelong Turf co-operated with the Commissioner by providing information in relation to its employees and payroll in mid-August 2021, being after the SG amnesty period of 24 May 2018 to 7 September 2020 (**Amnesty Period**) had ended.

On 12 March 2020, the Commissioner commenced an audit in respect of the quarters ended 31 December 2016 to 31 December 2019. By 13 January 2021, the Commissioner notified Geelong Turf that the audit was being extended to cover the quarters ending 31 March 2020 to 30 September 2020, after the Amnesty Period.

On 3 March 2021, the Commissioner notified Geelong Turf that it would issue default SGC assessments for numerous quarters including for the quarters ending 30 September 2016, 31 December 2016, 20 March 2017, 30 June 2017, 31 December 2017 and 31 March 2018 (**Amnesty Quarters**). The Commissioner noted that Geelong Turf's income tax lodgements were up to date but Geelong Turf separately owed an amount of approximately $30,000 tax. The Commissioner also advised Geelong Turf that it was liable for Part 7 penalties under the SGAA. In relation to the Amnesty Quarters. Geelong Turf was responsible at 200% of the SGC in the amount of $60,023 but this amount was remitted to 150% of the SGC being $45,017. The Commissioner then issued notices of assessment of SGC and the Part 7 penalties.

On 14 April 2021, Luke wrote to the Commissioner 'objecting' to the superannuation charges and included an email he previously sent to the ATO. That email described the issues Luke was having with his bookkeeper Ms Kelly Howard from Accountable Business Solutions and his general issues with work.

There was extensive correspondence between Geelong Turf 's new accountant (Mr Dylan Davis from Advisory Partners) and ATO officers between 5 August 2021 and 8 September 2021 to clarify and formalise the objection lodged by Geelong Turf.

On 22 September 2021, the Commissioner made an objection decision allowing the objection, in part, for the SGC assessments and the Part 7 penalties for the Amnesty Quarters were reduced from 150% of the SGC to 100% of the SGC for each quarter totalling $29,761.

On 27 September 2021, the Commissioner issued a letter and notices of assessment of SGC for the Amnesty Quarters and the non-amnesty quarters. The Part 7 penalties for the non-amnesty quarters were reduced from 150% of the SGC to 56% of the SGC. During the AAT proceedings, the Commissioner agreed to remit the Part 7 penalties in full for the non-amnesty quarters.

On 16 November 2021, Geelong Turf applied to the AAT for a review of the objection decision on the basis that it is wrong as the Commissioner should have further remitted the Part 7 penalties for all quarters.

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Luke argued that the Part 7 penalties were excessive because they are an overreach of the Government and not justified as they are unacceptably high. He also argued that there were exceptional circumstances which prevented Geelong Turf from disclosing the information during the Amnesty Period, thus allowing further remission of the Part 7 penalties.

In the submission to the AAT, Geelong Turf filed and relied upon a number of witness statements from specialists and medical practitioners (such as a naturopath, chiropractor, GP, and a pain specialist) that attested to the poor health and chronic fatigue of Luke during the relevant period concerning the SG quarters. Notwithstanding Luke's poor health, he was still working during this time and was still lodging Geelong Turf's income tax returns.

In addition, evidence was submitted about the fact that Geelong Turf's former accountant Ms Kelly Howard had been suspended by Chartered Accountants Australia and New Zealand (CAANZ) for breach of trust on an unrelated matter. She had been charged and pleaded guilty to stealing money from a client. Luke relied on this evidence to show that Kelly did not apply the necessary attention to Geelong Turf's accounting matters.

The Commissioner submitted that the Part 7 penalties were not excessive. Geelong Turf had not discharged its burden of proof to show that exceptional circumstances continuously existed pursuant to section 62(5) of SGAA, which prevented Geelong Turf from disclosing that information for the Amnesty Quarters either during the Amnesty Period or prior to Geelong Turf being notified of the examination of Geelong Turf's SG compliance.

Issue

Did exceptional circumstances exist which prevented Geelong Turf from disclosing information relevant to the amount of its SG shortfall for each of the Amnesty Quarters either during the Amnesty Period or before Geelong Turf was notified that the Commissioner was examining or intending to examine Geelong Turf's SG compliance for any Amnesty Quarters?

Decision

The AAT confirmed that the SGAA provided a one-off amnesty period from 24 May 2018 until 7 September 2020. If an employer lodged their SG statements for historical quarters (being quarters from 1 July 1992 to 31 March 2018) within the Amnesty Period, no Part 7 penalties are imposed. After this time, in relation to the Amnesty Period, the SGAA restricts the ability of the Commissioner to remit the Part 7 penalties below 100% of the SGC liability unless there are exceptional circumstances.

The phrase 'exceptional circumstances' is not defined in the SGAA but its meaning must be construed as a matter of ordinary statutory interpretation. Relying on the dictionary and the cases such as *Mourched v Commissioner of Taxation* [2014] AATA 223 and *Etmekdjian v Commissioner of Taxation* [2020] AATA 3821, the AAT found that the phrase 'exceptional circumstances' referred to:

1. 'unusual or not typical': Macquarie Dictionary;
2. 'forming an exception or unusual instance, unusual; extraordinary': Australian Concise Oxford Dictionary;
3. '…it is more than unusual or out of the ordinary – it seems to require circumstances that rarely occur and perhaps are 'outside reasonable anticipation or expectation'': *Mourched;*
4. '…the circumstances in question must be genuinely unusual or rare so there is a good reason for treating this case differently from the other cases': *Etmekdjian*.

The AAT held that to constitute 'exceptional circumstances' there need to be *'…something especially unusual or uncommon or unprecedented that distinguishes the circumstances from ordinary or common situations…the circumstances must be so unusual or uncommon to justify different treatment from usual cases.'*

As such, the SGAA imposes a higher test for the ability to give a full or further remission to a penalty imposed in respect of the Amnesty Period.

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The AAT was not persuaded that the physical and mental health issues of Luke were unusual, uncommon or unprecedented. Even if they were, they did not prevent Geelong Turf from disclosing its SG shortfalls. This is because while Luke had these health conditions, these conditions did not afflict him in a way to stop him from working or from continuing to attend to other tax lodgements of the Company. Luke continued to lodge income tax returns and BASs throughout the relevant period.

There was also no evidence that the former accountant's conviction and suspension impacted Geelong Turf. Further, Geelong Turf continued to have a SG shortfall after the accountant's suspension up to 31 March 2019, which indicated a systemic failure by Geelong Turf.

The AAT concluded that the Part 7 penalties were not excessive because there were no exceptional circumstances which prevented Geelong Turf from disclosing its SG shortfall during the Amnesty Period.

Citation *Geelong Turf Company Pty Ltd v Commissioner of Taxation (Taxation)* [2023] AATA 1718 (Senior Member G Lazanas, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1718.html

2.5 Mylan Australia Holding – Part IVA and dominant purpose

Facts

Mylan Australian Holding Pty Ltd and its subsidiary Mylan Australia Pty Ltd are part of the Mylan Group. These two entities are the Australian subsidiaries of a larger, international group. The two entities entered into an intra-group borrowing arrangement that ultimately resulted in the acquisition of Alphapharm.

At the time of these proceedings, there are two appeals on foot against two decisions and subsequent amended assessments made by the Commissioner.

In November 2009 the Commissioner commenced a review of Mylan Australia Holding Pty Ltd which progressed to audit in August 2012. During this time the Commissioner issued 18 requests for information and over 1,500 documents were produced.

The Commissioner issued assessments on 27 April 2021 for the income tax years from 2009 until 2019, and also issued an assessment for the 2020 year on 28 February 2022. The assessments denied deductions for interest costs incurred on the intra-group borrowing arrangement between the two entities. Mylan Australia Holding Pty Ltd lodged subsequent notices of objection.

The Commissioner ultimately disallowed the objections. The Commissioner's decisions were all made on substantially the same basis, which was that the incorporation of Mylan Australia Holding Pty Ltd and Mylan Australia Pty Ltd was a part of a scheme to derive a tax benefit for the purposes of Part IVA of the ITAA 1936.

The proceedings relating to the appeal of the Commissioner's decisions commenced on 22 December 2021. The evidence produced predominantly consisted of expert evidence and documentary evidence. This included an export report prepared by Kevin Glenn (a US tax attorney), a responding report prepared by Harry Rosenbloom (also a US tax attorney) and a reply from Kevin Glenn. There were other expert reports in addition to these.

During these proceedings the Commissioner made an application to the Court for an order that Mylan Australia Holding Pty Ltd make available six categories of documents. Ultimately, the Commissioner only proceeded with this application on the basis that discovery be ordered in relation to three categories of documents. The categories pressed were as follows:

Category 3

All documents created during the Relevant Period [29 January 2007 to 31 December 2007] containing US or Australian tax modelling or analysis of US or Australian tax consequences of the Mylan Group's anticipated acquisition of the Merck Generics business, which for the avoidance of doubt includes modelling or analysis of acquisition structures or financing arrangements not adopted by the Mylan Group and modelling or analysis of the availability of foreign tax credits.

Category 4

All documents created during the Pre-Acquisition Period [29 January 2007 to 2 October 2007] recording or evidencing any consideration given by any member of the Mylan Group to the debt servicing capacity of any Australian subsidiary of the Mylan Group (including any Australian subsidiary of the Mylan Group yet to be incorporated or acquired).

Category 6

All documents created between 2 October 2007 to 8 July 2009 relating to the setting of the interest rate of PN A2.

The Commissioner considered that such documents were relevant to ascertaining whether there was a dominant purpose of obtaining a tax benefit.

The Court referred to the *Federal Court Rules 2011* (Cth) noting that discovery in tax cases is only to be given where an order is made, and that no application for discovery should be made unless it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

Mylan Australia Holding Pty Ltd contended that the categories of documents sought by the Commissioner went to the subjective aspects of the transaction and, therefore, were not relevant to whether Part IVA should be applied. This argument was based on the fact that when considering the application of Part IVA it is only the objective intention of a taxpayer entering into a scheme, as determined by the factors section out in section 177D of the ITAA ~~1936, that~~1936 that is relevant to determining whether there was an intention to derive a tax benefit.

During the course of the proceedings, the Senior Counsel for Mylan Australia Holding Pty Ltd conceded that there is 'room for argument where the line is to be drawn between subjective and objective matters in Pt IVA cases'.

Issue

Should the Court make the orders for discovery?

Decision

In relation to each category of documents, the Court ultimately found that Categories 3 and 4 were relevant for determining objective intention for the purposes of Part IVA as follows:

1. the existence and result of the modelling may go to the manner in which a scheme was entered into or carried out, as the existence and results of a model may themselves constitute objective facts; and
2. whether or not there was an analysis of servicing capacity may go to the manner in which the scheme was entered into or carried out.

The Court ordered that Mylan Australia Holding Pty Ltd make available the documents in categories 3 and 4 for the periods specified.

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The Court found that no order for discovery should be made for the category 6 documents. This was for various reasons, including that the Commissioner had previously accepted a factual point that the Commissioner sought to question, or would open to questioning, by obtaining the order for discovery on these documents.

TRAP – while the Commissioner sought discovery of documents in the proceedings, he could have obtained these documents prior to the proceedings under section 353-10 of Schedule 1 to the TAA, where little objection could be made to their relevancy unless they were being requested for an improper purpose.

Citation *Mylan Australia Holding Pty Ltd v Commissioner of Taxation* [2023] FCA 672 (Button J, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/672.html

2.6 Cavanagh – carrying on a business

Facts

Craig Cavanagh applied to the Small Business Taxation Division of the AAT for review of a decision in relation to his tax affairs.

Small business applicants in the Small Business Taxation Division of the AAT have a reduced filing fee, tailored early case assessment and alternative dispute resolution processes, a 28-day turnaround on decisions following a hearing, and (as a consequence of an administrative policy of the Commissioner) access to matching funding for legal representation if the Commissioner elects to engage external legal representation.

A taxpayer is only entitled to access the review process in the Small Business Taxation Division if they satisfy the relevant criteria. Critically, the application must be in relation to a 'small business taxation decision', which is defined in section 5 of the *Administrative Appeals Tribunal Regulations 2015* (Cth) as:

> *...a decision made:*
> *(a) under a taxation law (within the meaning of the Income Tax Assessment Act 1997); and*
> *(b) in relation to a small business entity (within the meaning of the Income Tax Assessment Act 1997).*

There is no question that the decision in this case was made under 'a taxation law'. The definition of 'small business entity' is found in s 328-110 of the ITAA 1997. Section 328-110(1) provides:

> *(1) You are a small business entity for an income year (the current year) if:*
> *(a) you* ***carry on a business in the current year****; and*
> *(b) one or both of the following applies:*
> *(i) you carried on a business in the income year (the previous year) before the current year and your aggregated turnover for the previous year was less than $10 million;*
> *(ii) your aggregated turnover for the current year is likely to be less than $10 million.*
>
> (emphasis added)

Craig is a lawyer, accountant, tax agent and businessman who claims to have been conducting a business of asset management. Craig established 3 unit trusts, including setting up a corporate trustee. Craig said that he was 'the decision-maker in relation to the unit trusts, the investment assets and the overall management strategy' and referred to engaging in research and devising an investment strategy, borrowing money, engaging service providers, and carrying out work on some of the properties that were acquired. In relation to financing, Craig said he signed purchase documentation as a director of the trustee company.

The Commissioner argued that if any asset management business was being carried on, it would be carried on by the trustee, not Craig personally.

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Issue

Was Craig carrying on a business such that he could access the Small Business Taxation Division in the AAT?

Decision

Deputy President McCabe noted that any decision on whether Craig was carrying on a business would be provisional and would be explored more fully at the final hearing. However, the AAT must have an adequate basis for forming a provisional view as to whether the taxpayer satisfies the criteria.

Deputy President McCabe found that Craig's evidence pointed to the conclusion that the business-like activities he was carrying on were in fact undertaken in his capacity as a director of the trustee company. Deputy President McCabe found that Craig was not entitled to proceed in the Small Business Taxation Division.

COMMENT – this case is the first occasion we are aware of in which there has been a contest over the entitlement of a taxpayer to access the Small Business Taxation Division.

Citation *Cavanagh and Commissioner of Taxation (Taxation)* [2023] AATA 1700 (16 June 2023) (Deputy President McCabe, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1700.html

2.7 Container Homes Designer Domain – consideration for a taxable supply

Facts

Container Homes Designer Domain Pty Ltd entered into an arrangement with King Island Links Pty Ltd to supply King Island Links with 20 customised container homes at $37,300 per unit.

Bassem Halaseh, a director of Container Homes, made enquiries with suppliers in various jurisdictions to meet the supply order and chose a supplier in India. The Indian supplier required an upfront payment for the units. Duncan Andrews, a director of King Island Links, was not prepared to make an upfront payment directly to the overseas company. Duncan agreed instead to pay the amount to Container Homes. On 7 May 2015, King Island Links paid to Container Homes an amount of $373,000, being 50% of the agreed total price for the units. Container Homes in turn paid the amounts to the supplier in India.

On the same day, documents dated 7 May 2015 comprising specifications for the container homes were signed by Duncan as director of King Island Links and emailed to Container Homes. The documents bore the logo of Container Homes but were not signed on behalf of Container Homes. The documents were unsophisticated and contained details of delivery and terms of payment. The documents referred to the initial payment as a ‘50% advance’. The documents also made references to ‘this Agreement’, the ‘Seller’ and ‘Manufacturer’ and contained two warranty clauses.

Bassam spent some months in India dealing with the supplier for the construction of the home units. Duncan also flew to India and confirmed he was satisfied with the construction of the home units. Duncan sought an initial delivery of four home units. However, before delivery occurred, King Island Links withdrew from the arrangement without taking delivery of any of the home units. King Island Links agreed Container Homes could retain the $373,000 and the four units for which delivery had been arranged. Container Homes took delivery of the four units and paid GST at Customs. Container Homes claimed the GST paid as an input tax credit.

The Commissioner assessed Container Homes for GST on the net amount of $373,000 for the March 2016 quarterly tax period, on the basis it was a forfeited deposit under Division 99 of GST Act.

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Division 99 of GST Act provides that a 'deposit held as security for the performance of an obligation' is not treated as consideration for a supply unless it is forfeited because of failure to perform the obligation or applied as part of the consideration for a supply.

Container Homes asserted it did not make a taxable supply of the container homes because it was merely acting as agent for King Island Links. Container Homes objected to the assessment, which was disallowed by the Commissioner. Container Homes sought a review in the AAT.

At the AAT hearing, Bassem gave oral evidence that he had transitioned from Centrelink support by completing a small business course but was not experienced in business. This was provided as context for Bassem's submission that the documents dated 7 May 2015 did not constitute a sale contract, and that Container Homes was acting as mere agent of King Island Links.

At issue in the hearing was also whether the payment was a genuine security deposit such that it became consideration a taxable supply only when the supply proceeded or the security deposit was forfeited, such that it was included in Container Homes' net amount in March 2016 when the amount was forfeited.

Issue

1. Was Container Homes acting as agent for King Island Links?
2. Was the payment a deposit held by Container Homes as a security for the performance of King Island Links' obligations under the arrangement?

Decision

Was Container Homes acting as agent?

Senior Member Olding rejected Bassam's assertion that the 7 May 2015 documents did not evidence a contract for the sale of the homes by Container Homes to King Island Links.

The Senior Member found that the documents at the least evidenced an offer that was accepted by Duncan signing for King Island Links and returning the documents by email to Container Homes. There was no evidence to suggest that the parties did not intend to create legal relations.

The submission by Bassem that Container Homes entered into the arrangement as agent for King Island Links was unsupported by the evidence and was at odds with the documents which contained distinctions between the Seller and Manufacturer and contained warranty provisions to be provided by the Seller. In particular, there were no documents or communication in which King Island Links or Duncan acknowledged that Container Homes had the authority to bind King Island Links or act as its agent. On balance the evidence pointed to the nature of the arrangement being that Container Homes would acquire the units and sell them to King Island Links, with title passing from Container Homes to King Island Links in accordance with the contract.

Was the payment a genuine security deposit?

On the question of the characterisation of the payment, the Senior Member found that the payment was not a deposit, such as to engage Division 99 of the GST Act.

The Senior Member considered that the amount of the payment was substantial, and a deposit of 50% of the selling price in itself would be extraordinary, although that fact alone was not sufficient to determine whether the amount paid was a deposit. However, on balance, the payment was not properly characterised as a deposit for a number of reasons. This included that the documents dated 7 May 2015 described the payment as an advance, and there was no express term treating the amount as forfeitable in full. The conclusion was also consistent with the conduct of Container Homes, which did not set aside the payment as a deposit to be retained, instead immediately transferring funds to the supplier in India. If the payment was a security deposit, it would be expected King Island Links would have required it be set aside in a trust account.

The objection was allowed in full.

TRAP – given the decision, the full amount of the consideration under the contract may have needed to be included in Container Homes' net amount in the June 2015 quarter, with Container Homes then receiving a decreasing adjustment when the contract was terminated in March 2016. This is because part-payment triggers attribution on the entire consideration receivable for the supply unless the supplier is on a cash basis. The Commissioner is now presumably now out of time to re-assess Container Homes for the June 2015 quarter.

Citation *Container Homes Designer Domain Pty Ltd and Commissioner of Taxation (Taxation)* [2023] AATA 1815 (Sydney, Senior Member R Olding)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1815.html

2.8 Chobani – Flip Strawberry Shortcake flavoured yoghurt and GST

Facts

Chobani Pty Ltd is a seller of yoghurt products. One of its product ranges is the 'flip' yoghurt, with different flavours and dry inclusions.

The 'flip' range of yoghurt products are supplied in a plastic tub with two compartments, the main compartment containing yoghurt and a smaller compartment containing dry ingredients. The dry inclusions are kept separate from the yoghurt component to prevent the yoghurt base from spoiling due to the microbial load of the dry inclusions, and to retain the texture of the dry inclusions.

The smaller compartment can be flipped into the larger compartment and is a significant element in the marketing of the 'flip' range of products, with Chobani promoting a 'crave worthy crunch' experience. In Chobani's promotional videos, a person was shown to be flipping the dry inclusions of a 'flip' product into the yoghurt compartment and proceeding to eat from the yoghurt compartment with a teaspoon. The name of the product has also been trademarked.

The Commissioner had previously treated the 'flip' products as GST-free supplies. However in 2021, the Commissioner advised Chobani that he would treat the supplies of the 'flip' products as taxable supplies from September 2021.

To test the Commissioner's view of the GST status of the 'flip' products, Chobani brought GST to account on a single supply of an eight pack of Chobani Flip Strawberry Shortcake flavoured yoghurt in its activity statement for the April 2021 tax period then objected to the deemed assessment of the net GST Amount.

The Chobani Flip Strawberry Shortcake flavoured yoghurt contained yoghurt base with strawberry fruits mixed in, and dry cookie pieces and white chocolate chips. The strawberry yoghurt blend weight made up 90% of the product, while the dry inclusions and made up 10% of the product.

The labelling includes the following words on the foil cover:

NO PRESERVATIVES, ARTIFICIAL COLOURS OR FLAVOURS

CHOBANI

GREEK YOGHURT

'flip.'

Strawberry Shortcake

Strawberry Low-Fat Yoghurt with Cookie Crumble

and white chocolate

Chobani purchased the dry inclusions as a blend from an external supplier, Scalzo Foods. Scalzo Foods in turn sourced the cookie pieces from Ellison Bakery which calls them 'Dry Sugar Graham Pieces'. Scalzo Foods sourced white chocolate chips from Fresh Food Industries Pty Ltd, which described its product as 'Real white chocolate in the form of chips'. The dry inclusions consist of 70% of cookies pieces by weight while the white chocolate chips accounted for 30% by weight.

The GST status of the supply of the Flip Strawberry Shortcake flavoured yoghurt depended on whether the supply of the product was excluded from being GST-free under the second limb of section 38-3(1)(c) of GST Act.

The second limb of section 38-3(1)(c) excludes:

food of a kind specified in the third column of the table in clause 1 of Schedule 1, or ***food that is a combination of one or more foods at least one of which is food of such a kind.***

Food specified in the third column of the table in clause 1 of Schedule relevantly include:

1. item 8 - confectionery, being *food marketed as confectionery, food marketed as ingredients for confectionery or food consisting principally of confectionery; and
2. item 32 - 'biscuit goods' being *food that is, or consists principally of, biscuits, cookies, crackers, pretzels, cones or wafers.

Chobani submitted that the Flip Strawberry Shortcake flavoured yoghurt is not a 'food that is a combination . . .' of one or more foods. Chobani contended that, in determining if a food is a combination of one or more foods, the enquiry should be what is the food, and if the food sensibly be described, as a matter of commercial, economic and practical reality, as a 'combination'.

In the case of the 'flip' product, Chobani stated that ingredients of the product were so closely linked that they should be considered a single supply of flavoured yoghurt, and it would be artificial to recognise the dry ingredients separately. Chobani also submitted that it would be difficult to eat dry ingredients separately without nimble fingers or making a mess, and the dry ingredients would be too dry to be enjoyable.

As an alternate argument, Chobani contended that the dry inclusions should be recognised as a blend, instead of the individual chocolate chips and cookie pieces. The blend, when considered as a whole, was neither biscuit goods nor confectionery.

Chobani provided the AAT with a sample of the product for examination and sampling.

The Commissioner submitted that the word 'combination' should take its ordinary meaning, and the characterisation of the product should involve a short practical assessment of appearance and physical attributes, taste, ingredients, use, marketing and packaging of the product, to identify whether the overall impression of what is supplied is a combination of foods.

Issues

1. Is the Flip Strawberry Shortcake flavoured yoghurt a 'food that is a combination...' of one or more foods?
2. Are the dry ingredients neither confectionery nor biscuit goods?

Decision

<u>Food that is a combination?</u>

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The AAT rejected Chobani's 'practically, economically and commercially distinct' construction. The AAT referred to the Full Federal Court case of *Lansell House Pty Ltd v Commissioner of Taxation* [2011] FCAFC 6 and noted the following principles when determining the characterisation a food product for GST purposes:

1. it involves fact finding and evaluative judgement;
2. it is appropriate to into account all factors of appearance, taste, ingredients, process of manufacture, marketing and packaging together;
3. this may include a Court or Tribunal relying on its own experience of how a product is used and undertaking a physical examination of the product;
4. in the end, what is involved is a matter of overall impression.

In relation to the physical appearance of the product, the AAT observed that dry ingredients were physically separated from flavoured yoghurt, and the cookie pieces and the white chocolate chips were identifiable in the blend. The AAT sampled the product the noted that it was not difficult to eat the dry ingredient alone and it also was not too dry.

The AAT noted that the dry ingredient accounted for a material proportion of the overall weight and mass, as well as the cost of the product.

The AAT also noted the significance of the dry ingredients to the marketing of the product and the consumer experience, and importantly, that Chobani described the product on its label as 'Strawberry Low-Fat Yoghurt with Cookie Crunch and White Chocolate'.

Having regard to the above, the AAT held that the overall impression that the product is a combination of strawberry-flavoured yoghurt, cookie pieces and white chocolate chips, and not a single supply of flavoured yoghurt.

<u>Confectionary or biscuit goods?</u>

The AAT considered that the dry ingredients, consisting of chocolate pieces and cookie pieces, were confectionary and biscuit goods.

The AAT noted that, while the chocolate pieces were small, they were not sold for baking purposes but were instead part of the dry ingredients sold for direct consumption. In relation to the cookie pieces, the AAT considered it to be food comprised entirely of cookie pieces, even if it is presented as a crumble. Even if the dry ingredients were to be viewed as a blend, it would fit into the definition of biscuit goods which includes food that 'consists principally of' cookies.

The AAT affirmed the Commissioner's decision that sale of the Flip Strawberry Shortcake flavoured yoghurt is a taxable supply.

Citation *Chobani Pty Ltd and Commissioner of Taxation (Taxation)* [2023] AATA 1664 (Senior Member R Olding, Brisbane) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1664.html

2.9 BSA Ltd – payroll tax relevant contract exclusions

Facts

BSA Ltd is a technical services organisation.

In the year ended 30 June 2017, BSA had contracts with Foxtel Management Pty Ltd (Foxtel) and Optus Networks Pty Ltd (Optus) to supply and install pay TV and broadband equipment and to provide service calls to Foxtel and Optus customers.

BSA Ltd also entered into subcontracts with other companies which required technicians to attend the premises of customers of pay TV and broadband providers, including Foxtel and Optus, to supply and install pay TV and broadband equipment and to provide service calls (the Subcontracts).

The Chief Commissioner determined that the subcontracts were 'relevant contracts' within section 32 of the *Payroll Tax Act 2007* (NSW). As a result, the amounts paid by BSA to its subcontractors were taken to be wages, with the consequence that they were liable to payroll tax.

The relevant sections of the Payroll Tax Act are as follows:

> *(2) However, a **relevant contract** does not include a contract of service or a contract under which a person (the **designated person**) during a financial year in the course of a business carried on by the designated person—*
>
> *(a) is supplied with services for or in relation to the performance of work that are ancillary to the supply of goods under the contract by the person by whom the services are supplied or to the use of goods which are the property of that person, or*
> *…*
> *(d) is supplied with services solely for or ancillary to the conveyance of goods by means of a vehicle provided by the person conveying them.*
>
> *(2B) Subsection (2) (a), (b), (c) or (d) does not apply to a contract under which any additional services or work (of a kind not covered by the relevant paragraph) are supplied or performed under the contract.*

The basis upon which the Chief Commissioner determined that the Subcontracts were 'relevant contracts' was that, although the exclusions to a 'relevant contract' in sections 32(2)(a) and 32(2)(d) applied on their terms, additional services were provided under the Subcontracts within section 32(2B) of the Payroll Tax Act. The effect of section 32(2B) is that the exclusions in sections 32(2)(a) and 32(2)(d) do not apply.

On 11 December 2018, the Chief Commissioner issued BSA with a notice of assessment. BSA objected to the notice of assessment, and the Chief Commissioner disallowed the objection. BSA applied to the NCAT for a review of the assessment.

Evidence was given that:

1. a Foxtel service call involved a technician being called out to attend a malfunction in a system which is already installed and that a service call may involve trouble-shooting problems with existing equipment;
2. some service calls did not involve the installation of any equipment, or they may involve installing a router which had been sent to the customer by Optus; and
3. service calls could occur years after the original installation of equipment and the technician performing a service call was not always the same technician who had installed the equipment.

The NCAT found that 'additional services' were supplied under the subcontracts, within section 32(2B) of the Payroll Tax Act, and the subcontracts were, therefore, relevant contracts. BSA appealed the decision to the Appeal Panel of NCAT.

Issues

1. Did the NCAT err in finding the fact that some service calls (those not involving supply or conveyance of goods) were performed by a subcontractor other than the subcontractor who had previously supplied or

conveyed the goods being serviced meaning that the exclusions no longer applied due to section 32(2B)?

2. Did the NCAT err in not concluding that the subcontracts under which change orders involving new goods (such as an additional outlet) being supplied or conveyed by the subcontractor who uses those goods in their installation services were within the exclusions and section 32(2B) did not apply?

Decision

Ground 1

The first ground of appeal is whether the NCAT erred in finding that services provided by a different subcontractor from the subcontractor who supplied or conveyed the goods were not services 'ancillary to the supply of goods' or services 'ancillary to the conveyance of goods'.

The Appeal Panel confirmed that the NCAT at first instance did not expressly state what meaning of 'ancillary' it had adopted. Nonetheless, the Appeal Panel stated that in circumstances where the NCAT was bound by the decisions in the *Downer* and *Smith's Snackfood* litigation, and where it cited the parties' submissions about the meaning of that term as derived from those cases, it inferred that the NCAT adopted the meaning given to the term in those cases.

The Appeal Panel also concluded that the NCAT did not expressly find that the supply of services by a second subcontractor causes the services to 'cease being' ancillary services under sections 32(2)(a) or 32(2)(d) of the Payroll Tax Act. Rather, the NCAT found, in the circumstances of this case, that services provided by a second subcontractor were not ancillary to the supply of goods by a first subcontractor.

The question of whether services are ancillary to the supply or conveyance of goods is a question of fact and degree. The Appeal Panel confirmed that it was open to the NCAT to find that services supplied at a later point in time than the supply or conveyance of goods, by a different person, were not ancillary to the supply or conveyance of goods in this context. That is, these services were reasonably regarded as not being 'supplementary or auxiliary or accessory' to the initial supply of goods.

The Appeal Panel stated that the more time which has passed since goods have been supplied, the less likely it is that the supply of services will be 'supplementary or auxiliary or accessory' to the supply of those goods. The circumstance that a service could be provided under the subcontracts years after the supply of goods, without a further supply of goods, tended to support the NCAT's conclusion that the supply of such a service was not ancillary to the supply of goods. Further, there is no indication in the case law that services ancillary to the supply or conveyance of goods would include all subsequent repair work to the goods.

The Appeal Panel dismissed the first ground of appeal.

Ground 2

The NCAT did not find that the change order involved the supply of new goods, and it was open to make this finding. The Appeal Panel stated that supplying the service of relocating goods under a contract as part of a change order, if not ancillary to the supply or conveyance of goods, would have the effect of attracting section 32(2B). Therefore, it was open for the NCAT to conclude that services were provided which were not ancillary to the supply or conveyance of goods, such that section 32(2B) applied.

The Appeal Panel dismissed the second ground of appeal.

TRAP – section 32(2B) of the Payroll Tax Act can result in a contract that contains services that would otherwise be covered by an exclusion in section 32(2) of the PTA as not being excluded if services are also provided under the contract that are not covered by the exclusion.

Citation *BSA Ltd v Chief Commissioner of State Revenue* [2023] NSWCATAP 159 (Senior Member Dr R Dubler SC and Senior Member Dr J Lucy, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAP/2023/159.html

2.10 Sexyworld – cash flow boost

Facts

Sexyworld (Aust) Pty Ltd (**Sexyworld**), Robhill Dandenong Pty Ltd (**Robhill**), Fugazzi Pty Ltd (**Fugazzi**), The Trustee for Cybersex Unit Trust (**CUT**), Club X Ballarat Pty Ltd (**Club X**) and The Trustee for The Qld Shops Trust (**QST**) operate adult stores. Each of these entities was wholly or substantially owned by Mr Kenneth Hill and Ms Margaret Hill. Mr Alexei Glavenko is the current director of each of Sexyworld, Robhill, Fugazzi and Club X. The CUT and QST are unit trusts. Alexei is the director of each trustee company.

During the COVID-19 pandemic, the federal government offered a Cash Flow Boost to support small and medium businesses who employed staff to retain those employees throughout any downturn experienced during two defined periods of the COVID-19 pandemic.

Section 5(1)(a) of the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (Cth) (**Cash Flow Boost Act**) required, among other things, that

> *(i) the entity makes a payment in the period and must withhold an amount from the payment under Subdivision 12-B, 12-C or 12-D in Schedule 1 to the Taxation Administration Act 1953 (regardless of whether the entity actually withholds the amount);*

Relevantly, under section 12-35 of Schedule 1 of the TAA provides as follows:

> *12-35 Payment to employee*
>
> *An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee* ***(whether of that or another entity).***
>
> (emphasis added)

QST paid the salary and wages to its employees through a related company (the **Payroll Entity**). That is, QST discharged its obligations to pay the remuneration payable to its employees by arranging for the Payroll Entity to pay its employees on its behalf and QST then reimbursed the Payroll Entity. Alexei was appointed as director of the Payroll Entity on 28 September 2020.

QST consistently reported wages on its BASs, paid superannuation contributions and remitted payroll tax from its bank account. While QST reported salary and wages in its income tax returns for the financial years ended 30 June 2013 to 2017, it did not report the salary and wages in its income tax returns for the financial years ended 30 June 2018 and 2019. However, as part of an undocumented and longstanding internal arrangement between the Payroll Entity and QST, the Payroll Entity paid the 'net wages' of the employees of QST – even though QST reported the wages and PAYGW tax through single touch payroll.

Sexyworld, Robhill, Fugazzi, CUT and Club X claimed to have paid their respective employees by the same method. However, it was unclear whether Sexyworld, Robhill, Fugazzi, CUT and Club X had employees, and whether they repaid the Payroll Entity for any wages that were claimed to have been paid. There was no documentation, employment contracts or payroll records and these entities had not implemented single touch payroll.

An entity that was eligible for the Cash Flow Boost would receive a minimum payment of $10,000 in the first period for which it was eligible, and could then receive further amounts, up to a maximum cap of $50,000 (First Boost). The same entity could then receive a subsequent amount in later periods (Second Boost) up to another maximum cap of $50,000.

Each of the parties claimed the Cash Flow Boost as follows:

1. $20,000 for the quarterly tax periods ending 31 March 2020, 30 June 2020 and 30 September 2020 for Sexyworld;
2. $26,674 for the quarterly tax periods ending 31 March 2020, 30 June 2020 and 30 September 2020 for Robhill;
3. $28,184 for the quarterly tax periods ending 31 March 2020, 30 June 2020 and 30 September 2020 for Fugazzi;
4. $20,000 for the quarterly tax periods ending 31 March 2020, 30 June 2020 and 30 September 2020 for CUT;
5. $10,096 for the quarterly tax periods ending 31 March 2020 and 30 June 2020 for Club X; and
6. $70,692 for the monthly periods of March 2020, April 2020, May 2020, June 2020, July 2020, August 2020 and September 2020 for QST.

The Payroll Entity had its own employees and claimed the maximum Cash Flow Boost.

On 15 September 2020, the Commissioner advised QST of a review of its eligibility for the Cash Flow Boost. QST responded to a series of information requests in relation to how the arrangement with the Payroll Entity worked.

The Commissioner determined that the entities, excluding the Payroll Entity, were not eligible for the Cash Flow Boost. Objections were lodged and disallowed.

On 8 September 2021, QST and the other entities applied for review of the Commissioner's objection decisions with the AAT.

The Commissioner contended that the parties had not made payments which were subject to a relevant withholding obligation.

The Commissioner also contended that 'integrity measures' would have applied to deny eligibility for the Cash Flow Boost on the basis that QST had amended its BASs to increase the wages reported at label W1 and PAYGW tax at label W2 in its March 2020, April 2020, May 2020 and June 2020 BASs as compared to amounts reported prior to the announcement of the Cash Flow Boost Act. At the same time, the BASs of the Payroll Entity were amended to reduce the reported wages by the same amount.

The other entities commenced reporting wages (label W1) and PAYGW (label W2) in their BASs for the first time after the announcement of the Cash Flow Boost.

The Commissioner suspected that the reductions in the Payroll Entity’s total wages and PAYGW amounts were 'distributed' to the other entities as the Payroll Entity had reached the capped amount of the Cash Flow Boost and the other entities had not made their own Cash Flow Boost claims.

QST argued that the reason for the increase in wages was because of the opening of a new store that commenced operations in February 2020, and not because of a contrived arrangement.

QST submitted that QST incurred the wages expense, and the Payroll Entity made the payments to QST’s employees as its agent, due to the convenience of using a single batch payment system set up with the parties' bank. QST argued that the Payroll Entity merely provided the mechanism through its batch payment system to distribute the monies to the employees of QST.

Issue

Were the parties eligible for the Cash Flow Boost?

Decision

The AAT was not satisfied that Sexyworld, Robhill, Fugazzi, CUT and Club X had employees, owing to the lack of documentation or other evidence. In any case, there was no reliable evidence to show that these entities had made payments to any person through the Payroll Entity. Sexyworld, Robhill, Fugazzi, CUT and Club X were found not to be eligible for the Cash Flow Boost.

QST did produce contemporaneous documentation as to the employment relationships and reported the payment of the wages, PAYGW and superannuation on its STP and BASs, as well as remitting PAYGW, superannuation and payroll tax to the relevant authorities. However, the AAT noted that the key eligibility requirement under subparagraph 5(1)(a)(i) of the Cash Flow Boost Act is that an entity makes a payment in respect of which there is a withholding obligation. The withholding obligation is imposed on the entity that makes the payment of wages to an individual as an employee (whether of that entity or another entity). As the payments to the individual were made by the Payroll Entity, the Payroll Entity is the entity with the relevant withholding obligation, regardless of whether it was acting as an agent.

As both QST and the other entities were found to be ineligible, it was not strictly necessary to consider whether the integrity measures would apply. However, the AAT found that there was no relevant 'scheme' as defined in the integrity measures in the legislation in relation to QST and that the variations were explained by the accountant.

The other entities were already found to be ineligible on the basis that they did not have employees. However, the AAT also found that their decision to commence reporting wages amounts at label W1 and PAYGW tax at label W2 on their respective BASs shortly after the CFB announcement where there was no prior history of them reporting these amounts constituted a 'scheme' to which the integrity measures would have applied.

Citation *Sexyworld (Aust) Pty Ltd and Commissioner of Taxation (Taxation)* [2023] AATA 1919 (Senior Member G Lazanas, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1919.html

2.11 Rawson – judgement obtained by fraud

Facts

Rawson Finances Pty Ltd was an Australian incorporated company incorporated in 1997.

It was a wholly owned subsidiary of Ligon 158 Pty Ltd as trustee for the Caringbah Investment Trust. Margaret Binetter and Erwin Binetter were the majority shareholders of Ligon 158. The directors of Rawson were Erwin, Margaret and their son, Andrew Binetter.

Rawson's main business was ostensibly borrowing and lending money. No net assets were recorded on the balance sheets for Rawson for the relevant years. The main liabilities recorded were loans from the Mercantile Discount Bank (**MDB**), a bank in Israel.

Between June and December 1997, three transfers amounting to $4.75 million were made from MDB to Rawson. These transfers were claimed to be the principal of a loan from MDB to Rawson. From 1998 to 2009, Rawson made a series of transfers to MDB regarding these ‘loans’.

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In addition to Ligon 158 and Rawson, the Binetter family controlled various entities including BCI, Advance, Civic and EGL.

Different members of the Binetter family were the directors of these entities. These entities, excluding Rawson, are now under external administration.

As part of Project Wickenby, the ATO commenced an audit into the affairs of Rawson and other entities in the Binetter Family Group. The Commissioner did not accept that Rawson, then a recently incorporated Australian company with no net assets and issued share capital of $2, was able to obtain a loan for $4.75 million from a reputable Israeli bank whilst providing no security and was able to seemingly default on its interest payment obligations for lengthy periods of time without any recovery steps being taken, or without any apparent response from MDB.

The Commissioner disallowed amounts which Rawson claimed were allowable deductions representing interest incurred by it on the MBC loans, and also included in Rawson's assessable income amounts received by Rawson in Australia from MDB by way of purported loans. Default assessments and penalty assessments were issued against Rawson for the financial years ending 30 June 1997 to 30 June 2008.

Rawson objected to the assessments issued by the Commissioner on the ground that the amounts received from the MDB were part of a genuine loan arrangement which was disallowed by the Commissioner on the basis that it was a sham.

Rawson commenced proceedings in the AAT on the basis that the Binetter family had a business practice of setting up special purpose vehicles to take out loans from Israeli banks in exchange for personal guarantees. Other entities in the Rawson family group, including BCI, Advance, Civic and AGL also took out significant loans on the strength of a personal guarantees, therefore the inference should be made in relation to Rawson's loans from MDB.

Rawson relied on evidence from Binetter family members familiar with the business practices of the entities within the group. In addition, Rawson provided expert evidence to establish the existence of similar loan practices and the acceptance of personal guarantees.

For instance, Rawson relied on the evidence of Baruch Etzion, an ex-banker and lawyer from Bank Hapoalim, an Israeli Bank. Baruch provided a report stating that a loan granted by the bank to BCI, a Binetter entity had similar terms to the Rawson loan, including the use of personal guarantees as security. Rawson also submitted two statutory declarations from Israel Zamir, a former manager at MDB which stated that the bank had provided three loans to Rawson. Annexed to these statutory declarations were letters from MDB which set out the loan account and interest details for each loan. The two statutory declarations were largely identical. However, that the loans were 'against sufficient securities' was omitted from the second statutory declaration.

Rawson did not provide direct evidence of any security or guarantees in respect of the loans obtained from MDB.

The AAT found in favour of Rawson and set aside the Commissioner's decision to disallow Rawson's objection.

The Commissioner appealed the decision of the AAT to set aside the objections to the Federal Court.

The Commissioner contended that the AAT had erred in reversing the onus of proof and that Rawson had not proven, on the balance of probabilities, that the assessments were excessive.

The primary judge found that there was no evidence of a loan or obligation on Rawson's part to repay the amounts received from the MDB. The primary judge characterised the amounts received by Rawson from the MDB to be transfers from Rawson's' bank accounts with MDB in Israel to its Australian bank account and that Rawson had not discharged the burden of proving that the funds were not income. Accordingly, at first instance in the Federal Court, the Commissioner's appeal was upheld.

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Rawson appealed to Full Court of the Federal Court and succeeded. The Full Court found that there was no legal error in the AAT's fact-finding process. Given evidence of MDB's status as a reputable bank and the evidence provided by Andrew, there was material from which a justifiable inference could be drawn that the funds transfers were genuine loans.

The Full Federal Court also held that the AAT had considered the totality of the evidence before it in reaching its decision. The Court also found that there was conceptual difficulty with the Commissioner's contentions challenging the inconsistency of the evidence and the weight given to the evidence in the AAT. The AAT's decision was reasonably open based on the material before it, including evidence of MDB's status as a reputable bank and the evidence provided by Andrew.

Other entities of the Binetter family, including BCI, Advance, Civic and EGL commenced proceedings under Part IVC of the *Taxation Administration Act 1953* in response to audit finding against them. During this process, new evidence came to light which established that in each case the loans to these entities were secured by linked deposit accounts.

The documents relating to the other Binetter entities, such as evidence from the liquidators and the Israeli banks, established the existence of deposit accounts securing the loans from Israeli banks to BCI, Advance, Civic and EGL. The documents show that MDB allowed the Binetters to use code names, and to sign documents using the code names, to open bank accounts and authorise transactions in relation to the entities.

In relation to the Rawson's loans with MDB, new evidence provided that:

1. Rawson's loans with MDB were secured by a secret deposit account named ‘Arthur Belan’, a code name used by Andrew to obtain the loans from the MDB, and that Rawson never defaulted on the loans. This included an internal summary report, which confirmed that the loans to Rawson were secured against the deposit account in the name of Arthur Belan and a Deed of Pledge where Andrew was a signatory;
2. MDB imposed a 0.6% margin for facilitating the back-to-back arrangement;
3. MDB was effectively indifferent as to the terms of the ‘borrowing’ on the funds. As long as the 0.6% margin was maintained, the interest rates for the loans and the deposit could be, and in fact were, dictated by Rawson, which in this instance was 8.298%; and
4. there was no need for personal guarantees, given the loan was secured by collateral.

Further, new evidence emerged to show that in 2007, Andrew had arranged for the preparation of draft correspondence to be sent by the Israeli banks on their bank letterheads, which misrepresented the so-called loan arrangements by concealing the existence of the back-to-back deposits.

In light of the new evidence, the Commissioner applied to Federal Court of Australia to set aside the Full Court decision.

The Commissioner contended that, having regard to the entirely of the new evidence, it could be established that Rawson’s ‘*business practice*’ case before the Tribunal that the loans obtained by Advance, Civic, BCI, and EGL were not secured by a cash deposit but by personal guarantees only was knowingly false.

The Commissioner argued that this evidence demonstrated that Rawson, through Andrew, failed to disclose documents and information in relation to the back-to-back arrangement. The decision in the AAT proceedings was obtained by fraud. By relying on the same facts in subsequent appeals, Rawson also acted fraudulently in the Federal Court and the Full Court.

Rawson admitted the existence of the back-to-back loans, but contended that the Commissioner could not succeed in setting aside the Full Court decision, given the new evidence confirmed that the Rawson loans were genuine and enforceable loans in respect of which interest was payable. Rawson also contended that Rawson could not act fraudulently in the Federal Court and the Full Court appeal, as those were appeals on a question of law only.

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Issues

1. Was the decision of the Full Court of the Federal Court obtained by fraud?
2. If the decision of the Full Court of the Federal Court was obtained by fraud, was this fraud material so as to warrant the decision to be set aside?

Decision

Was the decision of the Full Federal Court obtained by fraud?

Perry J held that the new evidence established that the decision of the AAT and the Full Court of the Federal Court were obtained through fraudulent means, particularly on the part of Andrew. This new evidence did not only undermine Rawson's inferential 'business practice' case, but contradicted its case in material aspects. It was shown that Andrew had knowledge to the arrangement and either failed to request documents from MDB or deliberately withheld documents from the bank, and that Andrew intentionally concealed evidence relating to the deposit account.

The Court ultimately concluded that the new evidence before it established significant and fraudulent misconduct by Rawson, through Andrew, throughout the proceedings in the AAT.

Although the fraud was perpetrated before the AAT, Perry J considered that Rawson continued its Part IVC proceedings in the Federal Court and the Court on this misleading basis, affected the issues before and the decision of the Full Court.

Was the fraud material?

As the Court determined that the decision of the Full Federal Court has been obtained by fraud, it was necessary for the Court to consider the materiality of the fraud in order to determine whether the judgment of the Full Court should be set aside.

The Court considered that the Commissioner had successfully demonstrated that the fraud committed by Rawson was significant. The new evidence undermined the primary conclusions of the AAT, particularly in accepting the evidence provided by Andrew and his assertion that he had no knowledge of the existence of any security in the loan arrangements.

The Court considered that had this new evidence been available during the AAT proceedings, it is highly likely that the decision of the AAT would have been different.

Accordingly, the Court determined that the judgement of the Full Court of the Federal Court had been obtained by fraud and that this was material.

Accordingly, it was ordered that the decision of the Full Court be set aside and that the decision of the Federal Court would stand.

Citation *Commissioner of Taxation v Rawson Finances Pty Ltd* [2023] FCA 617 (New South Wales, Perry J)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/617.html

2.12 Diamond Creek – 'Associated transaction' for landholder duty

Facts

Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd (**Diamond Creek**) is part of the Oliver Hume Property Funds Group and is also part of the wider Oliver Hume Group. The Oliver Hume Group is a property development group and the Oliver Hume Property Funds Group is the 'funds management vehicle'

which aims to generate returns for investors from the property development activities of the Oliver Hume Group.

Diamond Creek is a special purpose vehicle that was established to acquire and hold the property situated at 272 Broad Gully Road, Diamond Creek in Victoria and to issue securities to raise capital for the Diamond Creek development project.

Pursuant to the *Corporations Act 2001*, the shares in Diamond Creek could only be offered to ‘sophisticated investors’ (as that term is defined in the Corporations Act) as disclosure to investors under part 6D.2 of the Corporations Act was not being made. The Information Memorandum for the Diamond Creek development was distributed to investors which appeared on the Oliver Hume Group’s database as having made enquiries regarding, or having invested in, previous development projects. The Information Memorandum was also distributed as part of consultancy and referral agreements entered into with third parties.

The Information Memorandum stated that once the target subscription of 1,800,000 ordinary shares had been achieved, shares would be allotted.

Paragraph 5.3 of the Information Memorandum addressed the 'General Risk Factors' and noted that:

> *… the acquisition of Shares by Applicants under this Offer will not attract Victorian transfer duty, unless the landholder duty provisions apply (generally, if the shareholder, or two or more associated shareholders acquire 50% or more shares of the Company) ... It is recommended that potential investors obtain appropriate professional advice prior to any proposed acquisition of Shares.*

On 2 July 2014, Diamond Creek issued 1,800,000 shares at a price of $1 per share to 18 investors with investment parcels ranging from $50,000 (corresponding to 50,000 shares) to $200,000 (corresponding to 200,000 shares). The names of 14 of the 18 investors were sourced from the Oliver Hume Group’s database. Of the other 4 investors, 2 were referred by Mr Ian Mortley under a consultancy arrangement with Elder Heights Pty Ltd and the other 2 were neither on the database nor referred under a consultancy agreement.

No duty under the *Duties Act 2000* (Vic) was assessed or paid on the allotment of shares in Diamond Creek on 2 July 2014.

On 19 January 2017, the Victorian State Revenue Office advised Diamond Creek that it had commenced an investigation to determine whether Diamond Creek complied with the landholder provisions of the Duties Act in respect of the issue of shares in Diamond Creek in July 2014.

The landholder provisions are set out in part 2 of the Duties Act.

Section 77 of the Duties Act created a liability to pay duty when a relevant acquisition is made. The phrase 'relevant acquisition' was defined in section 78 of the Duties Act to include when a:

> *… person* ***acquires an interest in a landholder*** *… that* ***amounts to a significant interest*** *in the landholder* ***when aggregated with other interests in the landholder acquired by*** *all or any of the following -*
> *(A) the person; or*
> *(B) an associated person; or*
> *(C)* ***any other person in an associated transaction****; or*
> *...* (emphasis added).

The word 'landholder' was defined in section 71 of the Duties Act to include a private company which had land holdings in Victoria with a total unencumbered value of $1,000,000 or more.

Section 79 of the Duties Act stated that a 'significant interest' includes the entitlement of a person to 50% or more of the property of the landholder corporation upon winding up. Section 80 provided that a person can

acquire a significant interest by purchasing a share and that a person is taken to obtain a beneficial interest even where they acquire the share as trustee of a trust.

An 'associated transaction' was defined in section 3 as:

> *In relation to the acquisition of an interest in a landholder by a person, means an acquisition of an interest in the landholder by another person in circumstances in which—*
> *(a) those persons are acting in concert; or*
> *(b) the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions.*

On 28 February 2019, the Victorian State Revenue Office informed Diamond Creek that the Commissioner formed the view that a relevant acquisition for the purposes of the Duties Act had taken place when the shares in Diamond Creek were issued in July 2014. The Commissioner formed this view on the basis that the acquisitions of shares in Diamond Creek constituted an 'associated transaction' as the acquisitions together 'form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions'.

On 1 July 2020, the Commissioner issued Diamond Creek with a Notice of Assessment. The duty component of the assessment was in the amount of $151,235 and was calculated by the Commissioner on the *'Acquisition of an aggregate 99.99% interest in [Diamond Creek] on 2 July 2014'*. The Commissioner also assessed Diamond Creek for penalty tax in the amount of $7,562 and interest of $9,366. Accordingly, the total amount payable by Diamond Creek set out in the assessment was $168,163.

On 27 August 2020, by way of email, Diamond Creek gave notice of objection to the assessment.

On 11 August 2021, the Commissioner partially allowed the objection by removing the penalty tax component of the assessment, reducing the total amount payable by Diamond Creek to $160,601.

The Commissioner referred Diamond Creek's objection to VCAT in accordance with a request by Diamond Creek, pursuant to section 106 of the *Taxation Administration Act 1997* (Vic).

Diamond Creek accepted that it was a landholder. Diamond Creek submitted that the acquisitions of the shares in Diamond Creek on 2 July 2014 should not have been aggregated and did not amount to a significant interest. The arguments raised by Diamond Creek against aggregation included the following:

1. the Information Memorandum and share offer were not confined in their circulation, but were widely distributed. Further, the entitlement of acceptance of the share offer was not limited to a finite group on the Oliver Hume Group's database;
2. the investors made their decisions independently. The Information Memorandum and share offer did not require that certain parties invest in the project, nor was any application for shares conditional upon the investment by other identified parties. The only requirement was to reach the target investment;
3. there were 18 separate investors and they exhibited no 'unified feature'. There was no identifiable connection between the investors except for the fact that they each responded to the share offer;
4. it could not be said that 'in substance' any one investor had acquired 99% of the shares in Diamond Creek;
5. the Information Memorandum and share offer were 'relevantly indistinguishable' from public offers and prospectuses lodged with ASIC, which the Commissioner accepted in Revenue Ruling No. DA 057 would not be regarded as associated transactions; and
6. the legislative purpose of section 78 of the Duties Act was to ensure that acquirers did not avoid duty by 'acquisition splitting', being the acquisition of a significant interest in a landholder through several acquisitions, each of which amounts to less than a significant interest.

The arguments raised by the Commissioner in support of aggregation included the following:

1. each of the acquisitions stem from the same share offer and terms set out in the Information Memorandum;
2. as the acquisitions would only occur if the target subscription was met, each of the acquisitions was conditional on one another, and interdependent;
3. as the acquisitions were made as part of a capital raising of $1,800,000 and the setting up of a syndicated managed investment vehicle, the purpose of the acquisitions was the same;
4. the investors all applied to invest in Diamond Creek at or around the same time. Further, the applications were made under the same offer and pursuant to documents that defined the purpose of the investment;
5. the acquisitions were made on the same date, being after the target subscription was met; and
6. Diamond Creek issued shares to each of the 18 investors who applied to participate.

Issue

Were the acquisitions of the shares in Diamond Creek on 2 July 2014 an 'associated transaction' giving rise to a liability to pay landholder duty?

Decision

Macnamara J noted that, as the events took place in July 2014, the provisions of the Duties Act in effect as at that date are relevant (not the current provisions of the Duties Act).

Macnamara J found that it was necessary to have regard to the actions and motives of both the transferor and the transferee when determining whether there was 'unity of purpose' that results in there being 'substantially one arrangement'.

Macnamara J held that there was a clear unity of purpose as it related to Diamond Creek, being to raise equity to enable it to carry out a singular development project. Although the shareholders were unrelated and unknown to each other, Macnamara J also found that there was a unity of purpose between the shareholders and Diamond Creek as by applying for shares in accordance with the Information Memorandum, the shareholders joined in the objective of Diamond Creek. The acquisitions were, therefore, found to form substantially one arrangement or transaction. The Commissioner was correct to treat the acquisitions as being associated transactions for the purposes of landholder duty.

Macnamara J confirmed the Commissioner's assessment.

COMMENT – there are similar provisions in the Duties laws of other States that have the effect of aggregating the interests of unrelated acquirers in ascertaining whether a person has acquired a significant interest in a landholder. However, the provisions in some State are not exactly the same as the provisions considered here. For example, in New South Wales, the aggregation for the landholder duty provisions requires that the 'acquisitions form, evidence, give effect to or arise from what is substantially one arrangement **between the acquirers**'. Revenue NSW has long considered the words 'between the acquirers' requires the acquirers to have knowledge of the identity or purposes of the other acquirers. Accordingly, it is not clear that this approach in this case applies in all States.

Citation *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2023] VCAT 634 (Macnamara J, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2023/634.html

2.13 Appeal Update – JMC

The Commissioner has sought leave to appeal to the High Court against the decision in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 (see our June 2023 Tax Training Notes), which relates to whether a university lecturer was an employee or a contractor for superannuation guarantee purposes.

2.14 Other tax and superannuation related cases in period of 9 June 2022 – 13 July 2023

Citation	Date	Headnote	Link
Mintfield Pty Ltd v Commissioner of State Revenue [2023] VSC 317	9 June 2023	PRACTICE AND PROCEDURE — Appeal to the Trial Division of the Supreme Court of Victoria from the Victorian Civil and Administrative Tribunal — Must demonstrate a real prospect of success — Court to avoid overly pernickety examination of reasons	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/317.html
Wei v Chief Commissioner of State Revenue [2023] NSWCATAD 161	21 June 2023	TAXES AND DUTIES — surcharge land tax – liability	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/161.html
Nguyen v Commissioner of State Revenue (Review and Regulation) [2023] VCAT 694	21 June 2023	Review and Regulation List – Duties Act 2000 (Vic), ss 3 and 28A – whether a joint purchaser of three properties was a 'foreign purchaser', 'foreign natural person' – Migration Act 1958 (Cth), s 30(1) – whether joint purchaser held a permanent visa – whether the respondent's forms or processes were misleading or insufficient – complaints about conveyancer's role in transactions - concession as to remission of penalty tax and interest	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2023/694.html
Gogulan v Chief Commissioner of State Revenue [2023] NSWCATAD 162	21 June 2023	TAXES AND DUTIES – land tax – principal place of residence exemption – onus of proof	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/162.html
Hannover Life Re of Australasia Ltd v Commissioner of Taxation [2023] FCA 680	22 June 2023	TAXATION – goods and services tax – input tax credits – creditable acquisitions – creditable purpose – whether life insurer is entitled to input tax credits under the A New Tax System (Goods and Services Tax) Act 1999 (Cth) for certain acquisitions, being commissions paid to licensed distributors of life insurance policies and 'overhead' expenses – where life insurer made GST-free supplies of reinsurance – whether commissions and overheads are credible acquisitions as relating not only to input taxed supplies – fair and reasonable method of calculating extent of creditable purpose	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/680.html
Richmond and Commissioner of Taxation (Taxation) [2023] AATA 1915	27 June 2023	TAXATION – applications for review of objection decision – whether income tax assessment was excessive or otherwise incorrect – deduction claimed under s 8-1 of ITAA 1997 – alternatively deductions claimed under ss 40-80(1), 40-25, 40-730 and 40-880 of ITAA 1997 – whether applicant is entitled to deductions – whether expenditure to capital or	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1915.html

		revenue account– purchase of interest in mining tenement through farm-in agreement – depreciating asset - applicant failed to discharge onus of proof pursuant to s 14ZZK of TAA 1953 – decision affirmed	
Aston v Commissioner of Taxation (Taxation) [2023] AATA 1848	28 June 2023	TAXATION – superannuation – excess contribution tax – whether concessional contribution can be disregarded or allocated to another financial year – whether special circumstances – decision under review affirmed	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1848.html
Aston v Commissioner of Taxation (Taxation) [2023] AATA 1848	28 June 2023	TAXATION – superannuation – excess contribution tax – whether concessional contribution can be disregarded or allocated to another financial year – whether special circumstances – decision under review affirmed	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1848.html
T.D.S. Biz Pty Ltd v Commissioner of Taxation [2023] FCA 710	29 June 2023	TAXATION – appeal from a decision the Administrative Appeals Tribunal affirming a decision by the Commissioner of Taxation to disallow an objection to a notice of amended assessment by which a claim for research and development (R&D) tax offsets was not allowed – where the Tribunal also affirmed a decision by the Commissioner to disallow an objection to a notice of assessment of shortfall penalty imposing a 50% administrative penalty – whether the Tribunal erred in the construction and application of ss 355-205 and 355-210 of the Income Tax Assessment Act 1997 (Cth) – whether the Tribunal erred by denying the applicant procedural fairness and not affording the applicant a reasonable opportunity to present its case – Held: appeal dismissed with costs	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/710.html
Harbourlights - Strata Plan 32515 v Chief Commissioner of State Revenue [2023] NSWCATAD 172 (30 June 2023)	30 June 2023	TAXATION AND DUTIES — Parking Space Levy — exemption — whether parking spaces 'set aside exclusively' for exempt and non-exempt purposes —remission of interest — market rate component — premium rate component	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/172.html
Ierna Beneficiary Pty Ltd v Commissioner of Taxation [2023] FCA 725	30 June 2023	TAXATION – where Commissioner amended income tax assessments for applicants based on application of Div 7A to the extinguishment of loans payable – where Dissh Pty Ltd was further issued an amended assessment of income tax reducing the carried forward tax losses to zero, resulting in increase in taxable income and income tax payable – where applicants objected against amended assessment on operation of Div 7A – where Commissioner disallowed objection – where applicants filed notices of appeal in this Court – where, during trial, Commissioner concedes the amended assessment excessive – where the court has power to make an order under 14ZZP of the Tax Administration Act 1953 (Cth) (TAA) if satisfied the applicant has discharged the burden of proof specified under	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/725.html

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		s 14ZZO(b)(i) of TAA by proving the amended assessment is excessive – where a concession made by the Commissioner that the amended assessment is excessive the onus on applicants is discharged – where parties make joint submissions the appeal should be allowed –where the mere consent of the parties is insufficient basis to exercise power under s 14ZZP of the TAA – where consent orders must conform with legal principles Thomas Australia Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150 applied – where the Commissioner's admissions enough to satisfy evidentiary burden s 81 and s 87 Evidence Act 1995 (Cth) – objection decision set aside and remitted to Commissioner for amendment of assessment	
Hedges v Commissioner of Taxation [2023] FCAFC 105	12 July 2023	TAXATION – appeal from decision of primary judge dismissing appeal from decision of Administrative Appeals Tribunal – where taxpayer is retired partner of a law firm – whether appellant was entitled to receive capital proceeds from disposal of interest in goodwill of partnership – whether appellant made a capital gain	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/105.html?context=1;query=hedges;mask_path=

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3. Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2022 Measures No. 4) Bill 2022	23/11	30/11	1/12	21/6	23/6
Treasury Laws Amendment (2023 Measures No. 1) Bill 2023	16/02	09/03	09/03		
Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023	22/03	29/03	30/03	22/6	28/6
Treasury Laws Amendment (2023 Measures No. 2) Bill 2023	10/05	25/05	13/6	19/6	23/6

3.2 Non-arm's length expense rules for superannuation funds

The Commonwealth Government is seeking consultation on the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Non-arm's Length Expense Rules for Superannuation Funds*. The Bill proposes to enact amendments to the non-arm's length income (**NALI**) provisions in the ITAA 1997 that were announced in the 2023-24 Budget.

Consistent with the 2023-24 Budget, the Bill contains the following amendments:

1. limiting the application of the non-arm's length expense (**NALE**) rules to SMSFs and small APRA regulated funds. Large APRA regulated funds, including exempt public sector superannuation funds, will be exempt from the NALE rules;
2. for the purposes of the NALE rules, distinguishing between specific and general expenses of a fund. General expenses of a fund will be expenses that are not related to gaining or producing income from a particular asset of the fund and specific expenses of a fund will be any other expenses;
3. setting the amount of income that will be taxed as NALI from a general expense breach by an SMSF or small APRA regulated fund as twice the difference between the amount of the expense that would have been charged as an arm's length expense and the amount of the expense that was actually charged to the fund. The existing treatment for specific expenses will continue to apply;
4. limiting the non-arm's length component of a small complying superannuation fund to the fund's taxable income less assessable contributions and related deductions; and
5. exempting expenses incurred or expected to have been incurred before 1 July 2018 from the application of the NALE rules.

w https://treasury.gov.au/consultation/c2023-408585

3.3 Withholding rates from 1 July 2023

The ATO has issued Legislative Instrument 2023/19 under the TAA setting out the Taxation Administration Withholding Schedules 2023. The determination sets out the withholding schedules for working out the amounts to be withheld by an entity from a withholding payment covered by Subdivision 12-B, 12-C and 12-D in Schedule 1 to TAA commencing 1 July 2023.

The only change in rate, as compared with last year, is Schedule 8: Statement of formulas for calculating study and training support loans components. The Study and training support loans weekly, fortnightly and monthly tax tables have been updated for the 2023–24 year to take into account the annual indexing of the repayment incomes for study and training support loans.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI202319/00001

3.4 Cents per kilometre deduction rate for car expenses

The ATO has made Legislative Instrument 2023/23 under subsection 28-25(4) of ITAA 1997 determining that the rate of cents per kilometre for cars for income years commencing on or after 1 July 2023 is 85 cents per kilometre.

The rate has increased from 78 cents per kilometre which applied for the period 1 July 2022 to 30 June 2023.

The instrument will apply to the income year commencing 1 July 2023 and any subsequent income years until such time that the determination is repealed.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI202323/00001

3.5 Small Business Energy Incentive

Treasury has published exposure draft legislation to implement the small business energy incentive announced in the May 2023 Federal Budget (see our May 2023 tax training notes).

If enacted, small businesses with an aggregated turnover of less than $50 million will have access to a 20 percent bonus deduction for the cost of eligible depreciating assets and improvements to depreciating assets that support electrification or more efficient energy use, up to a maximum bonus deduction of $20,000.

Included assets

Under the draft legislation, depreciating asset will be eligible for the bonus deduction if it:

1. uses electricity and there is a new reasonably comparable asset that uses a fossil fuel available in the market;
2. uses electricity and is more energy efficient than the asset it is replacing or, if it is not a replacement, a new reasonably comparable asset available in the market; or
3. is an energy storage, demand management or efficiency-improving asset.

Improvements to existing depreciating assets may also be eligible if the improvement:

1. enables the asset to use electricity instead of fossil fuels.
2. enables the asset to be more energy efficient; or
3. facilitates energy storage, demand management or monitoring.

In order to claim the bonus deduction for an amount of expenditure, a deduction must otherwise have been available under a provision of the tax law. Generally, the cost of an asset can only be deducted to the extent that that asset is used for a taxable purpose. For example, under Division 40 of the ITAA 1997, an entity can deduct an amount equal to the decline in value of a depreciating asset and this amount must be reduced to the extent that the decline in value is attributable to the asset being used or installed ready for use, for a purpose other than a taxable purpose.

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Excluded assets

It is proposed that some types of assets and expenditure will be ineligible for the bonus deduction even where they would otherwise meet the requirements. These are:

1. assets, and expenditure on assets, that can use a fossil fuel;
2. assets which have the sole or predominant purpose of generating electricity (such as solar panels);
3. capital works;
4. motor vehicles (including hybrid and electric vehicles) and expenditure on motor vehicles;
5. assets and expenditure on an asset where expenditure on the asset is allocated to a software development pool; and
6. financing costs, including interest, payments in the nature of interest and expenses of borrowing.

Comments are invited to be submitted to Treasury on or before 18 July 2023.

w https://treasury.gov.au/consultation/c2023-402752

3.6 Single Touch Payroll reporting exemption for Withholding Payer Number holders

This instrument provides an exemption from Single Touch Payroll (**STP**) reporting to any entity that:

1. would otherwise be required to notify the Commissioner of an amount referred to in column 1 of the table in subsection 389-5(1) in Schedule 1 to the *Taxation Administration Act 1953* (Cth);
2. does not have an ABN, and
3. has been assigned a withholding payer number (**WPN**) by the ATO for the purposes of pay as you go (**PAYG**) withholding.

Holders of WPNs are persons and entities that are not entitled to an ABN.

The instrument commences from 1 July 2023. It was released in draft in March 2023.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI202322/00001

3.7 Recipient created tax invoices

Legislative Instrument LI 2023/20 is made under section 29-70(3) of the GST Act.

The Legislative Instrument consolidates the Commissioner's approach to recipient created tax invoices (**RCTIs**) by replacing 51 instruments that each separately specify recipients, requirements and circumstances for issuing RCTIs.

Under section 29-70(1) of the GST Act tax invoices are to be issued by the entity that makes a taxable supply.

Section 29-70(3) of the GST Act confers upon the Commissioner the power to specify a class of tax invoices, known as 'recipient created tax invoices' (**RCTIs**) that may be issued by the recipient of the taxable supply instead of the supplier.

The instrument allows government related entities, large business entities and business entities to issue a RCTI if certain conditions are satisfied.

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The instrument defines 'business entity' to mean an entity that carries on an enterprise and is registered for GST. A business entity can only issue an RCTI for a taxable supply if it determines the value of the taxable supply acquired from the supplier.

A 'large business entity' is a business entity that:

1. meets the large business entity turnover condition;
2. is a member of a GST group that includes a member that satisfies the large business entity turnover condition;
3. satisfies the membership requirements of a GST group where the GST group includes a member that meets the large business turnover condition;
4. would satisfy the membership requirements of a proposed GST group where the proposed GST group would include a member that meets the large business entity turnover condition; or
5. is joint venture operator of a GST joint venture that meets the large entity turnover condition.

The turnover condition is that entity's GST turnover that is at or above the tax period turnover threshold (currently $20 million).

Where a recipient satisfies the definition of more than one type of entity to which the instrument applies, they can choose which requirements they will comply with. For example, where an entity is both a large business entity and a business entity, it can choose to only comply with the requirements that apply to large business entities in order to issue a RCTI.

For all entities, the requirements that must be met to issue a RCTI are that the recipient and the supplier of the taxable supply must be registered for GST and the recipient must:

1. issue a document that complies with section 29-70 of the GST Act (tax invoices) or section 29-75 of the GST Act (adjustments notes);
2. issue the RCTI (whether as original or copy) to the supplier within 28 days from when the taxable supply is made by the supplier or the value of the taxable supply is determined by the recipient, where the recipient determines the value of the taxable supply after the supply is made;
3. retain the original RCTI or a copy of the RCTI for five years;
4. have a written agreement with the supplier that meets the requirements of the instrument or is imbedded in the RCTI and meets the requirements of the instrument; and
5. reasonably comply with its obligations under taxation laws.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI202320/00001

3.8 ATO landlord insurance and income protection insurance data matching

The ATO will acquire data from insurers in relation to income protection insurance policies for the financial year ended 30 June 2022 through to financial year ending 30 June 2026.

Collected data items will include:

1. policy owner details including names, addresses, phone numbers, dates of birth, account name, BSB, account number, etc.;
2. policy details including policy name, year, policy type, policy brand, start/end dates, premiums, payouts, etc; and
3. insured person details including names, addresses, phone numbers, dates of birth, account name, BSB, account number, etc.

w https://www.legislation.gov.au/Details/C2023G00631

3.9 ATO rental property data matching

The ATO will acquire landlord insurance data from insurers for the financial year ending 30 June 2022 through to financial year ending 30 June 2026.

Collected data items include:

1. client identification details including names, addresses, phone numbers, date of birth, etc.;
2. insurance policy details including policy numbers, policy details, insured property details, insurance premiums paid, claims information including payouts received, etc.

The data will be used to support the identification, assessment, and treatment of rental property income, expenses, and capital gains tax risks.

w https://www.legislation.gov.au/Details/C2023G00630

3.10 Reporting by electronic distribution platform operators

An instrument has been developed to ensure that the ATO can more effectively support participants in the sharing economy to pay the correct amount of tax on any income they earn. Item 15 of the table in section 396-55 in Schedule 1 to the TAA requires an operator of an electronic distribution platform (**EDP**) within the meaning of the GST Act to prepare a report about certain supplies made through that EDP to the ATO.

This instrument changes the default annual reporting period to require operators of an EDP to prepare a report every six months. The substituted reporting periods are the two six-month periods from 1 January to 30 June, and from 1 July to 31 December, in each calendar year.

EDP operators who are required to prepare a report in relation to a period must give that report to the Commissioner by the 31st day after the end of that reporting period.

The instrument does not affect any other reporting requirements that reporting entities may have under section 396-55 in Schedule 1 to the TAA.

The instrument commences on the day after it is registered on the Federal Register of Legislation. It has effect from different dates, depending on the type of transaction. It applies to transactions entered into on or after:

1. 1 July 2023, for transactions that relate to a supply of taxi travel (within the meaning of the GST Act);
2. 1 July 2023, for transactions that relate to a supply of short-term accommodation; and
3. 1 July 2024, for all other transactions to be reported under item 15 of the table in section 396-55 in Schedule 1 to the TAA.

w https://www.legislation.gov.au/Details/F2023L00850

3.11 Revenue Legislation Amendment Bill 2023 – Queensland

The Bill implements the amendments to the legislation initiated by the revenue measures announced in the 2023-2024 Queensland State budget.

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The *Land Tax Act 2010* (Qld), the *Land Tax Regulation 2021* (Qld) and the *Duties Act 2001* (Qld), will all be amended to take into consideration:

1. the 50% reduction in build to rent developments for the next 20 years,
2. the 100% reduction in the taxable value of the land for land tax foreign surcharges in build to rent developments, and
3. the 100% discount on any additional foreign acquire duty for build to rent developments.

The *Payroll Tax Act 1971* (Qld) will be amended to include:

1. the extension of 1% payroll tax rate for regional employers until 30 June 2030;
2. the extension of the 50% rebate for wages paid or payable to apprentices and trainees until 30 June 2024;
3. transition provisions in relation to a change to the payroll tax deduction phase out rate.

The changes made by the proposed Bill will apply for income years commencing on or after 1 July 2023.

w https://documents.parliament.qld.gov.au/bills/2023/3147/Revenue-Legislation-Amendment-Bill-2023-e57b.pdf

4. Rulings

4.1 Non-arm's length income (NALI) and CGT

On 30 June 2023, the ATO released draft *Taxation Determination* TD 2023/D1, which outlines the Commissioner's views as to how the non-arm's length income (**NALI**) and capital gains tax (**CGT**) provisions interact in determining the amount of statutory income that is NALI where a capital gain arises as a result of non-arm's length dealings.

Under subsection 295-550(1) of the ITAA 1997, a capital gain made by a superannuation fund that arises as a result of a scheme, the parties to which were not dealing with each other at arm's length, is NALI where one or more of the following applies:

1. the amount of the capital gain is more than the amount the superannuation fund might have been expected to derive if the parties had been acting at arm's length in relation to the scheme (paragraph 295-550(1)(a) of the ITAA 1997); and
2. in gaining or producing the capital gain, non-arm's length expenditure (**NALE**) is incurred (including nil expenditure) in respect of a CGT asset that is less than the amount of a loss, outgoing or expenditure that the superannuation fund might have been expected to incur if those parties were dealing with each other at arm's length in relation to the scheme (paragraphs 295-550(1)(b) or (c) of the ITAA 1997).

The draft Determination provides that, in determining 'the amount' of statutory income that is NALI, the amount of NALI is capped to the superannuation fund's net capital gain as calculated under subsection 102-5(1) of the ITAA 1997 for the relevant income year. This non-arm 's length capital gain is however the amount calculated without regard to the CGT discount or the small business CGT concessions (if applicable).

The draft Determination includes three examples. Example 1, which relates to NALE incurred to acquire a CGT asset at below market value, is partially reproduced below:

> *16. Anya is the trustee of the Forja Self-Managed Super Fund (SMSF) which had the following income for the 2022–23 income year:*
>
> *• $500,000 arm’s length capital gain*
>
> *• $2 million non-arm’s length capital gain as a result of a CGT event happening to a CGT asset of the Forja SMSF. The CGT asset had been acquired by the Forja SMSF in the 2020–21 income year under a scheme where the parties to the scheme had not dealt with each other at arm’s length such that paragraph 295-550(1)(b) applies. If the parties had dealt with each other at arm’s length and paid arm’s length consideration for the asset, the capital gain would have been $1.3 million.*
>
> *• other assessable income of $883,333.33 – not a capital gain.*
>
> *17. Forja SMSF had a current year capital loss of $200,000 and no previous year net capital losses. Both capital gains are discount capital gains, but the small business concessions in Subdivisions 152-C, 152-D and 152-E do not apply.*
>
> *18. The net capital gain reported was $1,533,333.34, calculated using the method statement under subsection 102-5(1) (the CGT market value substitution rule in section 112-20 that modifies the cost base was not applied by the trustee):*
>
> > *$2,500,000† − $200,000‡ − $766,666.66§ = $1,533,333.34*
> >
> > *Where:*

- *† is $500,000 + $2,000,000*
- *‡ is the capital loss*
- *§ is the 33⅓% discount percentage for SMSFs.*

19. The net capital gain that should have been reported is $1,066,666.67 (applying the relevant CGT market value substitution rule in section 112-20), calculated as follows:

$1,800,000† − $200,000‡ − $533,333.33§ = $1,066,666.67

Where:

- *† is $500,000 + $1,300,000*
- *‡ is the capital loss*
- *§ is the 33⅓% discount percentage for SMSFs.*

20. The expenditure incurred by the Forja SMSF in acquiring the asset is NALE as it is less than the expenditure the superannuation fund would have been expected to incur had it been dealing at arm's length with the entity from which it acquired the asset. There is a sufficient nexus between the expenditure incurred by the Forja SMSF in acquiring the asset and the capital gain made on the asset for paragraph 295-550(1)(b) to apply. While the non-arm's length capital gain as a result of a CGT event happening to the CGT asset was $1.3 million, the amount of NALI calculated by reference to the non-arm's length capital gain cannot exceed Forja SMSF's net capital gain for the income year, being $1,066,666.67. The amount of NALI is therefore $1,066,666.67

When TD 2023/D1 is finalised, it is proposed to apply to years of income commencing before and after its date of issue. Comments on the draft Determination, including in relation to the proposed date of effect, are due by 28 July 2023.

TIP – the NALE provisions that treat a capital gain on sale of an asset acquired for less than market value as NALI are intended to be amended so that they do not relate to acquisitions before 1 July 2018 as a result of a 2023 Budget measure and a related Treasury draft bill.

ATO reference *Draft Taxation Determination TD 2023/D1*
w https://www.ato.gov.au/law/view/document?DocID=DXT/TD2023D1/NAT/ATO/00001

4.2 Aggregated turnover and connected entities – 'control' another entity

On 28 June 2023, the Commissioner published Draft Taxation Determination TD 2023/D2 to provide guidance on the administration of the discretion in subsection 328-125(6) of the ITAA 1997 to determine that an entity does not 'control' another entity.

TD 2023/D2 provides guidance on the following specific issues relating to the concept of 'control' which the Commissioner has to consider in administering the Commissioner's discretion:

1. requests for the exercise of the Commissioner's discretion where a third entity has sole or primary responsibility for day-to-day management of the affairs of the test entity, but holds relatively insignificant or no interests in the income or capital of the test entity, or in shares carrying voting rights (if the test entity is a company); and

2. applications that control percentage interests of between 40% and 50% should be disregarded because the remaining holders of interests in the test entity will together necessarily control the entity, irrespective of their number or relationship to each other.

Subsections 328-125(2) and 328-125 (4) of the ITAA 1997 set out the primary tests of control for the purposes of section 328-125, being the calculation of a 'control percentage'. Where an entity (the first entity) holds a percentage of at least 40% of the relevant interests in another entity (the test entity), the first entity is considered to control the test entity for the purposes of section 328-125.

Where the first entity has a control percentage of at least 40% but less than 50%, subsection 328-125(6) provides the Commissioner with a discretion to determine that it does not control the test entity. To make that determination, the Commissioner must consider whether the test entity is controlled by an entity or entities that is not, or does not include, the first entity or any of its affiliates.

The language of section 328-125(6) requires the Commissioner to form a view on actual control by reference to all relevant circumstances. It is not sufficient to merely show that the first entity is not a controller.

Relevance of who has responsibility for managing the day-to-day business

The ATO considers that sole or primary responsibility for the day-to-day management of the affairs of the test entity, while not irrelevant, does not of itself constitute control for the purposes of subsection 328-125(6).

Concept of 'control'

The nature of control relevant for the Commissioner's discretion is control over those matters associated with ownership of a business entity. Namely, entitlements to income and capital of the entity, and participation in decision making on key matters affecting the entity's constitution, funding, structure and management.

Control exercised by managers with responsibility for the day-to-day conduct of the business of the entity, in the ATO view, do not of themselves constitute control of the entity. It is necessary to distinguish control of an entity from powers in respect of the conduct of an entity's business.

However, the holding of interests carrying rights to more than 50% of the income, capital and voting power in a company is consistent with control of the company for the purposes of subsection 328-125(6).

Third entity can hold less than 40% interest

The Commissioner will not accept that an entity's control percentage interest of between 40% and 50% should be disregarded on the basis that the remaining interest holders together necessarily control the test entity, irrespective of their number or relationship to each other. In order for the Commissioner to form a view that a group of third entities controls the test entity, evidence must show that the group has agreed to operate, and does operate, as a single controlling mind in respect of decision making generally of the test entity.

ATO reference *Draft Taxation Determination TD 2023/D2*
w https://www.ato.gov.au/law/view/document?DocID=DXT/TD2023D2/NAT/ATO/00001

4.3 Travel and overtime meal allowance expenses

On 28 June 2023, the Commissioner issued TD 2023/3, setting out the amounts considered to be reasonable for the substantiation exception in the *Income Tax Assessment Act* 1997 (Cth) for the 2023-24 income year. This includes overtime meal expenses, domestic travel expenses, and overseas travel expenses.

The Determination should be read together with *Taxation Ruling* TR 2004/6, which explains how these expenses can be claimed under the substantiation exception. The reasonable amounts can be claimed without

further substantiation but the amounts still need to have been incurred. If a taxpayer's affairs are reviewed by the ATO, the taxpayer must still demonstrate that they spent the money on work-related expenses, provide evidence of expenditure, show that they were not reimbursed, and correctly declared the allowance as income.

ATO reference *Draft Taxation Determination TD 2023/3*
w https://www.ato.gov.au/law/view/document?DocID=TXD/TD20233/NAT/ATO/00001

4.4 Use of an individual's fame by related entities

The ATO has released *Taxation Determination* TD 2023/4 Income Tax: use of an individual's fame by related entities. TD 2023/4 applies to arrangements where an individual with fame establishes a related entity and enters into an agreement with that entity for the use of their name, image, likeness, identity, reputation or signature (referred to as 'fame'). The related entity then enters into arrangements with third parties for the use of the individual's fame for a fee.

TD 2023/4 does not apply to income from the provision of services, such as where the individual is engaged by a related entity to provide their personal services to a third party, nor does it apply to fees earned by a related entity from exploiting copyright, trademark or registered design rights licensed to the related entity.

The ATO considers that as there is no property in 'fame', it therefore cannot be vested or transferred to another entity. Exploitation of an individual's fame can be done by way of agreement for consideration. However ,where a related entity is party to such an agreement, the ATO considers it is incapable of authorising the use of the fame to third parties as the agreement does not transfer any property to the related entity. As such the income derived under any purported sub-licensing of the fame to a third party is ordinary income of the individual.

The fact there is no proprietary right in fame can be contrasted to the recognised proprietary right in copyright, trademark and registered designs. These are acknowledged as having proprietary rights under Australian common law and legislation.

TD 2023/4 acknowledges that while there is no proprietary right in fame, an individual may be entitled to pursue a limited number of causes of action, such as the tort of 'passing off' where their fame is used in a manner which misleads the public into thinking some form of association exists between the individual and the product or services of another. The relevant property under this tort is the goodwill. Individual goodwill is incapable of being transferred independently of that individual's business.

TD 2023/4 provides the following example:

> *Example - media personality agrees with a related entity to use their fame*
>
> *12. A family trust is established by a media personality, Harry Smith. The trustee of the family trust enters into a deed with Harry which grants a right to use and exploit Harry's fame (name, likeness, image and reputation) throughout Australia.*
>
> *13. The trustee contracts with an unrelated business, Products Pty Ltd, for the use of a photo of Harry and Harry's name on the packaging of their product for a fee. Neither Harry nor the family trust has any copyright, trademark or registered design rights in the photo to be used or in Harry's name. Payment by Products Pty Ltd is made to the trustee. However, the income from this use of Harry's fame is ordinary income of Harry. This is because, while the trustee has a right to use that fame, the deed does not provide any property to the trustee which could allow a third party to use it for a fee. Therefore, Harry is required to include the fee amount paid by Products Pty Ltd to the trustee in his assessable income in the relevant income year.*

TD 2023/4 applies to income years commencing before and after its date of issue. It will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue.

ATO reference *Taxation Determination TD 2023/4*
w https://www.ato.gov.au/law/view/document?DocID=TXD/TD20234/NAT/ATO/00001

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5. Private binding rulings

5.1 Capital vs revenue property development of farmland

Facts

The taxpayer has held two parcels of land for more than 20 years. One parcel is pre-CGT land, the other was acquired post-CGT. Since acquisition, the land contained the taxpayer's main residence and farmland which has been used in the taxpayer's primary production business.

The taxpayer is in their late seventies and is looking to retire from the primary production business, which is facing regional uncertainty.

The taxpayer is a partner in a farming business partnership that is registered for GST. The taxpayer does not have a history of buying and selling property.

The land has been listed for sale through a real estate agent in the past, but no sale has occurred.

A prospective buyer approached the taxpayer proposing to purchase the land along with neighbouring properties. This contract did not proceed after the prospective buyer failed to pay the required contract deposits and comply with the terms of the contract of sale.

There were other proposals to purchase the land over the years, but no firm offers.

A farming organisation to which the taxpayer belongs identified a development opportunity for the taxpayer's land and neighbouring properties and identified a marketing agent.

The taxpayer and their neighbours attended a presentation by the marketing agent and accepted the proposal to market the landholdings for sale. Each consenting landowner entered into a separate engagement with the marketing agent on the basis that all the properties were to be marketed for a collective sale and a property advisory firm would be engaged to prepare development plans.

The marketing agent commenced preliminary work for the expression of interest process to identify buyers/investors and/or developers. A developer was identified following a tender process. The marketing agent funded the tender costs.

A large-scale development was planned, including infrastructure, public amenities and retail facilities.

Landowners were permitted to continue farming up until development activity commenced on their land. The landowners continued to own their land until the developed lots were sold to third parties.

Under the development agreement, the landowners, including the taxpayer, played a passive role with the developer paying all project costs (with the exception of the fees payable to the marketing agent) in return for the developer being entitled to receive a percentage of the post-GST proceeds from the sale of each developed lot.

Under the development agreement, participating Landowners would share in the remaining proceeds of all lots, based on the size of their landholding as a proportion of total project land. The landowners would also be paid two lump sums upon satisfaction of certain conditions relating to due diligence and project approvals.

Participating landowners' interests in the project were represented by a Landowner Representative who was the Landowners' point of contact with the developer. The taxpayer was a founding member and founding director of the Landowner Representative.

Issues

1. Will the lump sums and the landowner's share of the proceeds be assessable income to any extent under section 6-5 of the ITAA 1997, as a profit arising from carrying out a profit-making undertaking or scheme?
2. If the answer to Question 1 is 'yes', was the land ventured into or committed to the undertaking or scheme referred to in Question 1 on the Agreement Date?
3. If the answer to Question 1 is 'yes', can the 'estimated profits approach' be used to determine how much of profit is to be included in assessable income under section 6-5 of the ITAA 1997 in each income year?
4. Will there be CGT consequences when the developed land is sold to the buyer?

Decision

Question 1 – will the lump sums and share of proceeds be ordinary income?

Yes. A profit or gain may be ordinary income where it arises from activities which amount to more than the mere realisation of an asset, even where those activities do not constitute the carrying on of a business.

The ATO considered that the magnitude of the project, the complex terms of the development agreement, and the sharing of proceeds and development costs rateably between landowners was akin to a joint venture and went beyond the mere realisation of an asset. The taxpayer's readiness to involve themselves with the other landowners was also a relevant factor.

Question 2 – when was the land ventured into the profit-making scheme?

The ATO ruled that the land was ventured into or committed to the profit-making undertaking or scheme on the date the development agreement was signed, as that was the date from which the taxpayer had formally signified their intention to have the land developed and sold and the commencement of activities directed to that end.

Question 3 – can net profits be estimated?

Yes, the 'estimated net profits' approach can be used.

The taxpayer will be required to return the net profit from the project. The proceeds will include all lump sums and the landowner's share under the sharing mechanism in the development agreement. Costs will include commissions payable to the agents for selling the land and the market value of the land at the time it was ventured into the profit making undertaking (i.e. the agreement date).

As the net profit from the project will not be known in advance, the taxpayer's ordinary income would need to be returned in each income year using an estimate.

The ruling states that the Commissioner would accept any method which:

- reasonably re-estimates total proceeds on an annual basis,
- reasonably re-estimates and attributes project costs to each income year, taking into account the extent to which the taxpayer has received the proceeds that the taxpayer estimates will be received over the course of the project, and
- reasonably takes into account differences between actual and estimated proceeds, so as to ensure that the actual profit is returned as assessable income over the duration of the project.

Acceptable methods include the 'estimated profits' approach described in Taxation Ruling TR 2018/3.

Question 4 – will there be CGT implications when the land is sold?

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Yes, CGT event A1 will occur when the taxpayer sells the land. The capital proceeds will include the total sale price of the land payable under the contract of sale, less net GST. Amounts payable to other participating landowners under the landowner sharing mechanism and amounts payable as a fee to the developer will still be included as capital proceeds.

The cost base of the land will include the amounts paid by the taxpayer to acquire the land, the commission payable to the agents for selling the land, and the balance of proceeds payable to the developer, to the extent that the purpose or expected effect of that expenditure was to increase or preserve the value of the land.

Any capital gain on the pre-CGT property will be disregarded. Any capital gain on the post-CGT property will be reduced by any amount included in ordinary income in respect of that parcel of land under the anti-overlap provisions in section 118-120 of the ITAA 1997. This reduction would not include the landowner's share of amounts which are assessable because of CGT events happening to land owned by other participating landowners. The taxpayer's entitlement to receive such amounts would not depend on when or whether a CGT event happens to the taxpayer's land.

To the extent that any capital gain remains, the taxpayer should be entitled to the 50% CGT discount.

CGT event K4 (an asset becoming trading stock) does not occur when the land is ventured into the profit-making undertaking, as the taxpayer is not carrying on a business of land development and sale.

ATO reference *Private Binding Ruling Authorisation No.1052074179174*
w https://www.ato.gov.au/law/view/document?docid=EV/1052074179174

5.2 ESS and salary referable to Australian service

Facts

The taxpayer is originally from Country Z and is a citizen of both Country Z and Australia.

In XX/XX/20XX, the taxpayer commenced employment with an Australian employer.

The taxpayer was an Australian resident for tax purposes until the taxpayer permanently departed Australia on XX/XX/20XX to Country Z. The taxpayer ceased to be a tax resident of Australia at this time.

The taxpayer's last working day in Australia with the Australian employer was XX/XX/20XX.

From XX/XX/20XX to XX/XX/20XX the taxpayer had a Leave Without Pay (LWOP) arrangement with the Australian employer. Employment with the Australian employer was officially terminated on XX/XX/20XX.

A month after departing Australia, the taxpayer commenced employment with an employer in Country Z.

The Country Z employer is unrelated to the Australian employer.

Employment with the Country Z employer initially commenced as a 12 month contract but then became permanent. The taxpayer is taxed as a resident of Country Z under the domestic tax law of Country Z.

The taxpayer received salary payments from the Australian employer after becoming a foreign resident. Tax was withheld by the Australian employer for these items.

While the taxpayer was working in Australia for the Australian employer, the taxpayer participated in an ESS and was granted ESS interests in the form of Restricted Share Units (RSUs).

The ESS Vesting Report shows various ESS interests were granted each year from 20XX to 20XX.

The ESS Annual Tax Statement for the 20XX-XX income year shows Discount from deferral schemes F $XX,XXX. The statement shows RSU's fully vested in XX/XX/20XX.

The Statement of Account indicates the taxpayer disposed the ESS interests on XX/XX/20XX.

Issues

1. Are the salary payments received assessable in Australia?
2. Is the ESS discount on deferral schemes relating the ESS interests that vested assessable in Australia?

Decision

Question 1

The ATO ruled yes.

Subsection 6-5(3) of the ITAA 1997 provides that the assessable income of a foreign resident taxpayer includes ordinary income that is sourced directly or indirectly from all Australian sources during the income year. Employment income is ordinary income for the purposes of subsection 6-5(3) of the ITAA 1997.

Generally, Australian courts have held that the source of employment income is where the employee performs their duties. The case law states that it is appropriate to apportion income earned to reflect the source of income. Thus, any employment income earned while carrying out duties while physically present in Australia is sourced in Australia. Employment income earned while being carried out overseas is considered to be sourced in that overseas country.

An entity derives an amount of ordinary income as soon as it is applied or dealt with in any way on the entity's behalf or as directed by it (subsection 6-5(4) of the ITAA 1997). Taxation Ruling TR 98/1 sets out the Commissioner's view on when income is derived and explains that income can be derived either on the basis of the 'receipts' method or the 'earnings' method. Under paragraph 42 of TR 98/1, the Commissioner takes the view that salary, wages or other employment remuneration are assessable on receipt even though they relate to a past or future income period.

The Double Taxation Agreement (DTA) between Australia and Country Z Agreement provides that salaries, wages and other similar remuneration derived by a resident of Country Z in respect of an employment shall be taxable only in Country Z unless the employment is exercised in Australia. If the employment is exercised in Australia, Australia will have the right to tax the remuneration.

The taxpayer received salary payments from the Australian employer after they became a foreign resident. The employment income was derived from duties exercised for the Australian employer while the taxpayer was in Australia.

Question 2

The ATO ruled yes.

Subsection 83A-110(1) of the ITAA 1997 provides that your assessable income for the year that the deferred taxing point occurs includes the market value of the ESS interest (calculated at the deferred taxing point) reduced by the cost base of the interest.

Subsection 83A-110(2) of the ITAA 1997 prescribes that you treat an amount included in your assessable income under subsection (1) as being from a source other than an Australian source to the extent that it relates to your employment outside Australia.

In the ATO view, whether a gain is ultimately included in the taxpayer's assessable income is then determined by the core residence and source rules relating to statutory income in section 6-10 of the ITAA 1997.

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The ATO concluded that the ESS discounts arising in relation to the ESS interests granted prior to the date the taxpayer left Australia, related to the time that is attributable to their Australian employment. Therefore, they are Australian source income.

The full amount of the ESS discount will be assessable in Australia notwithstanding that the taxpayer was a foreign resident at the deferred taxing point.

COMMENT – it appears in this PBR that the taxpayer was still employed by the Australian employer, albeit on leave without pay, while not a resident of Australia, but the ATO did not attribute any portion of the ESS amount to the period while they were on leave without pay. It is not clear why the leave without pay while overseas did not make the portion of the discount referable to that period foreign sourced income.
For someone coming to Australia, if the deferred taxing point occurred while they are a resident, the ESS rules would tax all the amount of any discount in Australia, but attribute the portion referable to foreign service as being foreign sourced income, presumably to allow foreign tax credits in respect of that amount.

ATO reference *Private Binding Ruling Authorisation No.1052114000885*
w https://www.ato.gov.au/law/view/document?docid=EV/1052114000885

5.3 Partial main residence exemption and small business concessions

Facts

A business was purchased jointly with the taxpayer and their former spouse over 25 years ago.

The taxpayer and the former spouse were partners in a partnership at the time they purchased the property.

The property consisted of two levels. The ground level being the commercial premises where the business operated and the top level being the main residence of the taxpayer.

A breakdown in the marriage resulted in the taxpayer removing themselves from the business.

The taxpayer acquired the dwelling as part of the property settlement with the former spouse.

The ground level and top level had the same floor area and the net value of the business was under $X million.

The taxpayer is over 55 years old.

Questions

1. Is the taxpayer entitled to a partial main residence exemption in relation to the disposal of the property?
2. Did the taxpayer satisfy the basic conditions for small business relief upon sale of the property?

Ruling

Question 1

The ATO confirmed that the full main residence exemption could not be claimed as the taxpayer had used part of the dwelling to produce assessable income.

In order for a taxpayer to be eligible for a partial CGT exemption on a CGT event, the taxpayer must satisfy the conditions in section 118-190 of the ITTA 1997:

1. the dwelling was acquired after 20 September 1985, and was used as the taxpayers main residence;

2. the taxpayer used any part of the dwelling to produce income during all or part of the period they owned the dwelling;
3. the taxpayer would have been allowed a deduction for interest incurred in relation to money borrowed to acquire the dwelling.

The ATO was satisfied that the taxpayer satisfied the conditions in section 118-190 of the ITTA 1997.

In calculating the partial exemption available to the taxpayer, the ATO apportioned the property on the basis that the ground floor of the dwelling was used exclusively for the business and the top floor of the dwelling was used exclusively as the main residence of the taxpayer.

Question 2

Subsection 152-10(1) of the ITAA sets out the conditions where a capital gain may be reduced or disregarded:

1. a CGT event happens in relation to a CGT asset in an income year;
2. the event would have resulted in a gain;
3. at least one of the following applies:
   (a) you are a small business entity for the income year;
   (b) you satisfy the maximum net asset value test;
   (c) you are a partner in a partnership that is a small business entity for the income year and the CGT asset is an interest in an asset of the partnership;
   (d) you do not carry on a business, but your CGT asset is used in a business carried on by a small business entity that is your affiliate, or an entity connected with you;
4. the CGT asset satisfies the active asset test.

The maximum net asset value test is satisfied as the total net value of the CGT asset does not exceed $6 million.

As the taxpayer acquired half of the dwelling through a marriage breakdown, subsection 152-45(2) of the ITAA 1997 applies to the taxpayer, as if:

1. the taxpayer acquired the asset when the transferor acquired the asset;
2. the asset was an active asset of the taxpayer; and
3. the asset had not been an active asset during the times the asset was not an active asset for the transferor.

In considering whether the asset was an active asset the ATO acknowledged that the definition of active asset does not require exclusive use of the asset for business purposes. In *Rus and FCT* [2018] AATA 1854, the taxpayers purchased a 16-hectare and used a minor portion to carry on a plastering/housing construction business, however, the majority of the business activities were conducted off site. In that case, the land was not found to be an active asset.

The ATO considered that the circumstances here distinct from those in *Rus*. The property is predominantly commercial in nature with street frontage in a commercial business area. The business was also carried on exclusively from the property. Despite the use of the property as a main residence, for the purpose of the active asset test, the ATO was satisfied that property was used in the course of carrying on the business.

The taxpayer owned the dwelling for more than 15 years, and the dwelling was an active asset of the taxpayers for a total of at least 7.5 years.

The taxpayer's spouse acquired the dwelling at the same time the taxpayer acquired the dwelling and the dwelling was an active asset of the former spouse at all times the dwelling was an active asset for the taxpayer.

The active asset test is satisfied.

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The ATO confirmed that the taxpayer is entitled to a discounted capital gain using the small business 50% asset reduction and as the taxpayer is over 55 years of age, the taxpayer can disregard any remaining gain under the small business retirement exemption up to a limit of $500,000.

COMMENT – this PBR is of interest as after *Rus* it was unclear how much of a property needs to be used in a business to be an active asset. It appears here that 50% is enough.

ATO reference *Private Binding Ruling Authorisation No 1052118989563*
w https://www.ato.gov.au/law/view/document?docid=EV/1052118989563

5.4 Division 7A and family court orders

Facts

Person A (Husband) and Person B (Wife) were married, their marriage has broken down. An order made by the Family Court proposes that certain marital assets be transferred to the Wife, including:

1. units in Unit Trust A owned by the A Family Trust;
2. units in Unit Trust B owned by the B Family Trust; and
3. ordinary shares in Company A.

In the ruling, the units in Unit Trust A and Unit Trust B are collectively referred to as the units.

The group structure is as follows.

In relation to Unit Trust A:

1. the trustee of Unit Trust A is Company B;
2. x units were issued on establishment of the trust at an issue price of $X per unit;
3. Company C as trustee for the A Family Trust holds x units in Unit Trust A;
4. there have been no changes to the original unit holdings.

In relation to Unit Trust B:

1. the trustee of Unit Trust B is Company D;
2. x units were issued on establishment of the trust at an issue price of $X per unit;
3. Company C as trustee for the B Family Trust holds X units in Unit Trust C;
4. there have been no changes to the original unit holdings.

In relation to the A Family Trust:

1. the trustee of the A Family Trust is Company E;
2. the Husband and Wife are joint appointors of the A Family Trust;
3. the Wife is a beneficiary of the A Family Trust;
4. the A Family Trust owns X units in Unit Trust A;
5. the A Family Trust has pre-July 2009 unpaid present entitlements owing to Company F.

In relation to the C Family Trust:

1. the trustee of the B Family Trust is Company E;
2. the Husband and Wife are joint appointors;
3. the Wife is a beneficiary;
4. the B Family Trust owns X units in Unit Trust C;

5. the B Family Trust has pre-July 2009 UPE's owing to Company F.

In relation to Company F:

1. Company F was incorporated on XX XX XX;
2. the original ordinary shareholders were the Husband (X W class shares), Person C (X Y class shares) and Person D (X Z class shares);
3. the shares originally held by Person C passed on the death of Person C to Person E.
4. in XX year, a corporate restructure was undertaken as part of a family succession plan, and new X,Y and Z class shares were issued to Company A, Company G and Company H.
5. in the XX year, the entire retained profits of Company F were distributed in equal proportions to the holders of X, Y and Z class shares.

In relation to Company A there are a number of shareholders including the Husband and the Wife.

The Husband and Wife are both Australian resident taxpayers taxed at the highest marginal rate.

Questions

1. Will section 109XA of the ITAA 1936 apply to the Wife if under the Family Court Orders:
   (a) a proportion of the units in Unit Trust A held by the A Family Trust were transferred to the Wife in her individual capacity; and/or
   (b) a proportion of the units in Unit Trust B held by the B Family Trust were transferred to the Wife in her individual capacity?
2. If section 109XA does not have application to the proposed transfer of the Units mentioned in Question 1, does section 109T apply to treat the transfer of the units under the Family Court Orders from existing holders to the Wife as a payment?

Ruling

Question 1

The ATO ruled no. Section 109XA sets out the conditions where certain payments made by trustees are treated as deemed dividends in accordance with section 109XB. Section 109C(3) defines payment to include the transfer of property.

109XB applies if:

1. a trustee makes a payment to a shareholder or an associate of a shareholder of a private company, and
2. the payment is a discharge of, a or a reduction in, a present entitlement of a shareholder or an associate of a shareholder, that is wholly or partly attributable to an amount that is an unrealised gain; and
3. either:
   (a) the company is presently entitled to an amount from the net income of the trust estate at the time of the transaction, and the whole of that amount has not been paid to the company before the earlier of the due date for lodgement and the date of lodgement of the trustee's income tax return for the year of income of the trust in which the actual transactions takes place; or
   (b) the company is presently entitled to an amount from the net income of the trust estate at after the transaction but before the earlier of the due date for lodgement and the date of lodgement of the trustee's income tax return for the trust for the year of income of the trust in which the transaction takes place, and the whole amount has not been paid to the company before the earlier of those dates.

An unrealised gain is defined under section 109XA(7) to include any unrealised gain, whether of a capital or income nature, but does not include an unrealised gain to the extent that it has been or would be included in the assessable income of the trust for:

1. a year of income before the year in which the actual payment was made; or
2. the year of income in which the actual payment was made; or
3. the year of income following the year in which the actual payment was made.

The Explanatory Memorandum for the *Tax Laws Amendments (2004 Measures No.1) Act 2004* provided that 'unrealised gains' was intended to be applied very broadly. For the purposes of these rules, realisation is taken to have occurred when a gain converts into a recoverable debt.

The ATO noted that the transfer of the Units to the Wife would constitute a payment as defined in section 109C(3). However, the transfer of Units does not occur to discharge a present entitlement to an unrealised gain of the trust. The Units will be transferred to discharge an obligation set out by the Family Court orders. Therefore, not all conditions in section 109XB are satisfied, so it will not apply to the transfer of Units under the Family Court orders to the Wife.

Question 2

The ATO ruled no.

Section 109T(1) provides that a private company will be taken to have made a payment to the target entity where a reasonable person would conclude that the private company made the payment to the first interposed entity, solely or mainly, as part of an arrangement involving a payment through one or more interposed entities to the target entity. For the purposes of this section, it does not matter whether the interposed entity made the payment to the target entity before, after or at the same time as the private company made payment to the first interposed entity. It also does not matter whether the interposed entity paid the target entity the same amount as the private company paid the first interposed entity.

The transfer of the Units to the Wife is a payment for the purposes of section 109C(3). The Units will be transferred from two family trusts (who have always held the Units) to discharge the Family Court orders. The payment from the family trusts to the Wife are not sourced directly or indirectly from a payment or loan made by a private company. A reasonable person would determine that the Units are being transferred pursuant to the Family Court orders. Section 109T(1) will not apply to the transfer of Units to the Wife.

COMMENT – the operation of sections 109XA and 109XB can largely be ignored because of the Commissioner's views in TR 2010/3, where he considers that when Division 7A operates as between a trust and a corporate beneficiary, subdivision EA of Division 7A (where section 109XA and 109XB are located) do not apply – unless there is a pre-16 December 2009 UPE amount owing (as there was in this PBR) or there is a sub-trust arrangement in place.

ATO reference *Private Binding Ruling Authorisation No. 1052016191301*
w https://www.ato.gov.au/law/view/document?docid=EV/1052016191301

5.5 CGT – legal v beneficial ownership

Facts

The taxpayers' parents purchased a property in 19XX.

The property required major repairs and renovations. However, the parents were not able to finance the repairs and renovations.

In 20XX, the property was transferred to the taxpayers by their parents, as a gift, for the purpose of acquiring finance to renovate the dilapidated dwelling. It was also gifted to the taxpayers to ensure that upon the parents' death, the proceeds from the sale of the property would be shared in accordance with the parents' wishes.

The taxpayers resided in the property prior to the change in title.

The taxpayers took out a loan to carry out the renovations which absorbed the remaining balance of the prior loan. The renovations were 100% financed through the loan and were finished in approximately 20YY.

The parents assumed responsibility for the repayment of the new loan that was under the taxpayers' names and all other expenses related to the property.

The property has always been considered as the parents' main residence and was intended to be until their death.

Neither the taxpayers or parents have declared rental income or expenses from the property.

In 20XX, parent A passed away, and later in Month 20XX parent B passed away. Both parents did not have a Will.

The taxpayers paid the mortgage and other costs for the property after both parents passed away until the property was sold. The property was sold in Month 20YY.

The property was in the taxpayers' name when it was sold and did not form part of the parents' deceased estate.

When the property was sold, the taxpayers each received 37% of the proceeds and their children received 25% after considering costs incurred to prepare the property for sale.

Question

Will the taxpayers be required to declare CGT in relation to the sale of the property in their income tax return?

Ruling

The ATO ruled yes.

When considering the sale of property, it must be determined who had ownership of the property.

The legal owner of the property is recorded on the title deed for the property. It is possible for legal ownership of property to differ from beneficial ownership. Where beneficial ownership and legal ownership of an asset are not the same, there must be evidence that the legal owner holds the property on trust for the beneficial owner. A beneficial owner is defined as a person or entity who is beneficially entitled to the asset.

The ATO found that there was no evidence that beneficial ownership remained with the parents. This is because the title to the property was transferred into the taxpayers' names and the loan to finance the renovations was in the taxpayers' names. While the taxpayers state the parents were paying the expenses arising from the property, including all loan repayments, there was no evidence to show that they were actually paying for these expenses.

The ATO found that there was also no formal trust deed in place to alter the position that the parents held beneficial ownership in the property. In addition, the taxpayers did not provide any information to demonstrate the existence of an informal trust.

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As neither of the parents had Wills and the property was in the taxpayers' names, the property was not distributed as part of either of the parents' deceased estates. The taxpayers' distributed the proceeds from the sale to them and their children.

The ATO concluded that the taxpayers were the owners of the property and, therefore, CGT event A1 occurred when their legal ownership ended. As the property was held for more than 12 months, the CGT discount of 50% can be applied.

COMMENT – it seems unfair in this instance that there was not a trust arrangement found to be in place, as it was clearly intended that the taxpayers not benefit from the sale proceeds of the property with instead the sale proceeds being received by their children in accordance with their parents' wishes.

ATO reference *Private Binding Ruling Authorisation No. 1052115910479*
w https://www.ato.gov.au/law/view/document?docid=EV/1052115910479

5.6 Trust Resettlement – amendment to trust deed

Facts

The trustee and 3 individuals executed a trust deed establishing the Unit Trust.

The trustee sought to amend the trust deed in order to satisfy the criteria of a fixed trust under section 3A(3B) of the *Land Tax Management Act 1956* (NSW).

The terms of the Unit Trust deed allowed for the Trustee to vary, alter or add to the Trust Deed with the consent of the unit holders.

Question

Will the proposed Deed of Amendment cause any CGT to occur?

Ruling

The ATO ruled no.

The ATO noted that the proposed changes to the Trust Deed were within the powers of the Trustee and therefore, the continuity of the Unit Trust will be maintained for trust law purposes.

The ATO also noted that the execution of the proposed Deed of Amendment will not result in any change to the cost base of the units.

In coming to the determination, the ATO referred to Taxation Determination TD 2012/21 which states that a valid amendment to a trust pursuant to an existing power will not result in CGT event E1 or CGT event E2 from happening, unless:

1. the change causes the existing trust to terminate and a new trust to arise for trust law purposes; or
2. the effect of the change or court approved variation is such as to lead to a particular asset being subject to a separate charter of rights and obligations such as to give rise to the conclusion that that asset has been settled on terms of a different trust.

COMMENT – it is very unlikely that a trust deed amendment will result in a CGT event, or a 'resettlement' of a trust. The ATO guidance on this issue can be found in the TD referred to here -TD 2012/21.

ATO reference Private *Binding Ruling Authorisation No. 1052113998591*
w https://www.ato.gov.au/law/view/document?docid=EV/1052113998591

5.7 Theft and Deduction

Facts

The taxpayer carried on a business and sold the majority of its business assets.

On advice from advisors, the taxpayer's trustee deposited a sum of money from the sale of the assets onto a legitimate cryptocurrency platform. The intention was to trade daily and the income be treated on revenue account.

Shortly after the funds were deposited into the cryptocurrency platform, the advisors used the trustee's details to log onto the platform and steal the funds.

The stolen funds were not recoverable and the police have confirmed this was cybercrime.

Question

Are the stolen funds deductible under section 25-45 of the ITAA 1997?

Decision

The ATO ruled no.

The ATO noted that section 25-45 of the ITAA 1997, which provides a deduction for a loss in respect of money if the loss was caused by theft, stealing, embezzlement, larceny, defalcation or misappropriation by the taxpayer's employee or agent, must be in respect of money which has been included in the taxpayer's assessable income.

The ATO noted that the definition of an agent as set out in section 960-105 of the ITAA 1997 provides:

> *This Act applies to an entity as if the entity were an agent of another entity (the principal) if:*
> *(a) the principal is outside Australia; and*
> *(b) the entity is in Australia and, on behalf of the principal, holds money of the principal or has control, receipt or disposal of money of the principal.*

In relation to the requirement that the income included in the taxpayer's assessable income, the ATO considered the case of *EHL Burgess Pty Ltd v Federal Commissioner of Taxation* (1988) 88 ATC 5417 and noted that, if the income has been dealt with in a way where it can no longer be traced or identified, then the predecessor of section 25-45 of the ITAA 1997 could no longer apply.

The ATO also referred to the more recent case of *Lean v FCT* (2010) 75 ATR 213 which held that the application of income towards expenses or investment is sufficient to break the necessary connection between money included in the taxpayer's assessable income and a subsequent misappropriation.

In this case, as the taxpayer had transferred money to a cryptocurrency trading platform, it lost the character of 'amounts included in assessable income'. Further, where the taxpayer's advisor used it details to steal the money, it is not considered that the advisor was granted control, receipt or disposal of the taxpayer's money.

ATO reference *Private Binding Ruling Authorisation No. 1052119013740*
w https://www.ato.gov.au/law/view/document?docid=EV/1052119013740

5.8 Deductions – home to work travel expenses

Facts

A taxpayer lives in Location A.

The taxpayer accepted a fixed term full time contract of employment as a X with a company, effective DDMM20YY until DDMM20YY.

The role is located in Location B. The employer does not have an office or worksite location in Location A.

When home in Location A, the taxpayer is able to work from a dedicated home office that is used exclusively for work purposes.

The offer signed with the employer was conditional upon the taxpayer attending the workplace in Location B and commencing the performance of work in accordance with the contract of employment. However, the contract of employment states that the Employer may ask the taxpayer to travel to, and work at, different locations and to relocate to another place of work to meet business needs from time to time, without any additional payment.

The taxpayer's ordinary weekly office hours of work in Location B were set out in the contract as 8:30am to 5:00pm, Monday to Friday, which averages out to 37.5 hours over a period of up to X weeks. Under the contract of employment, the employer may direct the taxpayer, subject to consultation, to work shift work whenever it so requires. The taxpayer also agreed to work additional hours as necessary, which was considered by the employer when setting the taxpayer's annual remuneration of $X (excluding superannuation).

The taxpayer is not paid a travel allowance, nor are they reimbursed for any costs incurred for travel from Location A to Location B, or vice versa. However, the taxpayer's salary was negotiated to include travel costs throughout the year.

From MMYYYY until the end of the contract of employment in MMYYYY, the taxpayer will travel to Location B for one week at a time, and then return to Location A for one week. The taxpayer will repeat this cycle for the remainder of the calendar year.

The taxpayer and their family have not relocated to Location B and remain living in Location A.

Question

Is the taxpayer entitled to a deduction, under section 8-1 of the ITAA 1997, for travel expenses such as meals, accommodation, incidentals and flights incurred between their home in Location A and their regular workplace in Location B and vice versa?

Ruling

The ATO ruled no.

A taxpayer may claim a deduction under section 8-1 of the ITAA 1997 for all losses and outgoings to the extent to which they are incurred in gaining or producing assessable income, except where the outgoings are of a capital, private or domestic nature, or relate to earning exempt income.

The ATO noted that the deductibility of transport expenses where an employee is travelling between their home and a regular place of work is settled. The ATO referred to Taxation Ruling TR 2021/1 *Income tax: when are*

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deductions allowed for employees travel expenses? which states that transport expenses incurred for ordinary travel between home and a regular place of work are not deductible.

The ATO considered that the travel expenses are a consequence of the taxpayer choosing to live in Location A and work in Location B. While the travel expenses are a prerequisite to the taxpayer gaining or producing assessable income, the travel between the taxpayer's home and regular workplace is private in nature.

ATO reference *Private Binding Ruling Authorisation No. 1052106110372*
w https://www.ato.gov.au/law/view/document?docid=EV/1052106110372

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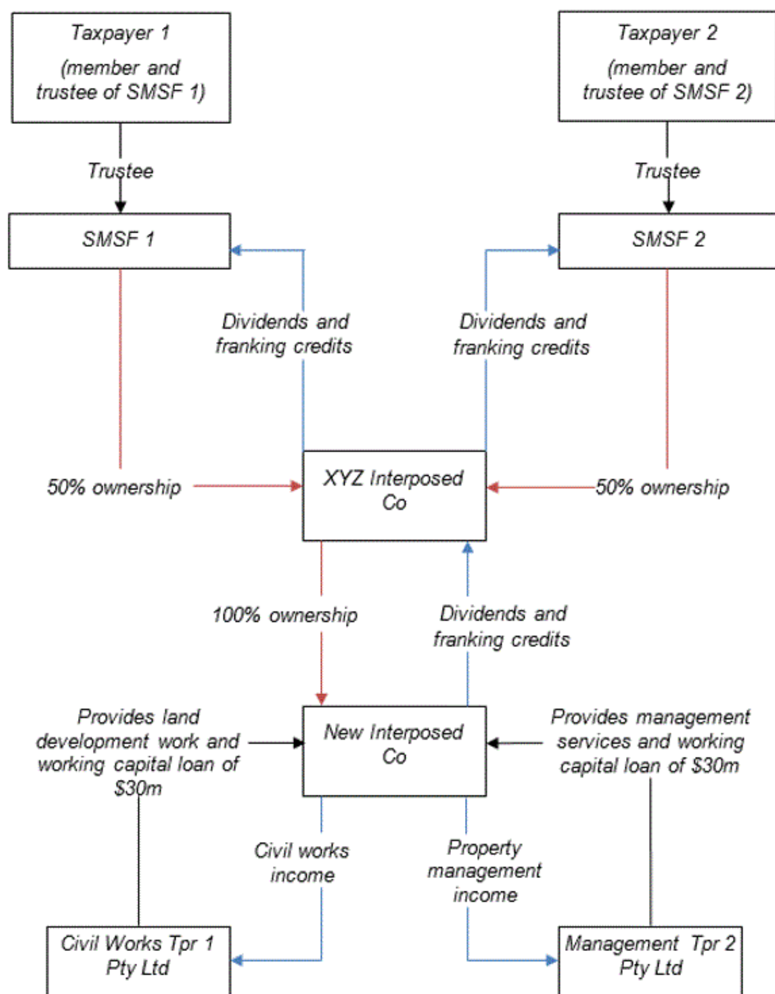
6. ATO and other materials

6.1 Property development and SMSFs

On 15 June 2023, the ATO released Taxpayer Alert TA 2023/2 concerning arrangements where profits of a property development project are diverted to one or more self-managed superannuation funds, involving non-arm's length arrangements through use of special purpose vehicles, which have the effect of shifting profits from the SPV to the SMSF, in excess of what would ordinarily be the case if the parties had dealt with each other at arm's length.

The Taxpayer Alert provides the following example of an arrangement that the Commissioner is concerned



about:

1. Taxpayer 1, an individual, is a member and trustee of SMSF 1 and also the controlling mind of Civil Works Tpr 1 Pty Ltd which is engaged in property construction;
2. Taxpayer 2, an individual, is a member and trustee of SMSF 2 and the controlling mind of Management Tpr 2 Pty Ltd which is engaged in the management of construction projects and providing finance;
3. a third-party land owner is seeking to engage a property developer to construct buildings on its land in return for a fixed portion of the sale proceeds of each developed property;
4. Taxpayer 1 and Taxpayer 2 undertake the property development project under the following structure:
   - XYZ Interposed Co is created and owned 50% each by SMSF 1 and SMSF 2.
   - New Interposed Co, a special purpose vehicle, is created and owned 100% by XYZ Interposed Co.

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- New Interposed Co contracts with the third-party land owner to undertake the property development.
- New Interposed Co subcontracts all property development functions to Civil Works Tpr 1 Pty Ltd and property development project management functions to Management Tpr 2 Pty Ltd.
- Management Tpr 2 Pty Ltd and Civil Works Tpr 1 Pty Ltd each provide a working capital loan of $30 million to New Interposed Co on non-arm's length terms, including no interest and no set repayments of principal and interest;

5. ordinary shares are issued by XYZ Interposed Co to SMSF 1 and SMSF 2 for an arm's length price;
6. ordinary shares in New Interposed Co are issued to XYZ Interposed Co at a discounted nominal price;
7. Civil Works Tpr 1 Pty Ltd charges fixed fees that are below market value;
8. Management Tpr 2 Pty Ltd charges fixed fees which are at arm's length;
9. New Interposed Co receives fees over the duration of the property development project, pays franked dividends sourced from the proceeds of these sales to XYZ Interposed Co. In turn, XYZ Interposed Co pays franked dividends to SMSF 1 and SMSF 2.

The ATO is concerned about the effect of these arrangement in diverting profits attributable to a property development project that would otherwise be taxed higher rate, to an SMSF at a concessional rate.

The ATO considers the tax consequences that may arise from the following arrangement include the dividends and franking credits received by the SMSF being NALI under section 295-550 of the ITAA 1997, capital gains and income that flows to the SMSF being NALI, and the application of Part IVA of the ITAA 1936 applying to the tax benefit arising from the arrangement.

The ATO considers from a compliance perspective, the SMSFs may be in breach of the sole purpose test, in-house asset test and borrowing provisions under the SIS Act.

ATO reference *Taxpayer Alert TA 2023/2*
w https://www.ato.gov.au/law/view/document?DocID=TPA/TA20232/NAT/ATO/00001

6.2 Central management and control test

In the 2020/21 Budget, the former government announced technical amendments to the corporate residency test. In response to that announcement, the Commissioner released *Draft Practical Compliance Guideline PCG 2018/9DC1.* That guideline is now to be updated to include a risk assessment framework to assist foreign-incorporated companies in managing their compliance risks for the central management and control test of residency and in applying the principles set out in Taxation Ruling TR 2018/5 *Income Tax: central management and control test of residency.*

The Guideline also amends the transitional period to be between and including:

1. 15 March 2017 (this is the original date); and
2. 30 June 2023 (this is the amended date).

ATO Risk Assessment Treatment

The risk assessment framework for ATO treatment of foreign-incorporated companies is made up of 3 zones:

Low

The Commissioner will not normally allocate resources to review a company's position on the central management and control test of residency if it falls within the 'low' risk zone.

Moderate

A company that falls within this risk zone is more likely to be reviewed for compliance activity. The Commissioner may conduct further analysis to understand the company's residency position and taxation outcomes.

High

A company in this risk zone will need to provide analysis for the Commissioner and the Commissioner may proceed to audit where appropriate if the position remains high risk.

Paragraph 105 of the Guideline has been amended to include the ongoing compliance approach for public groups. The term 'Public group' is defined as a group whose head entity or ultimate parent is listed on an approved stock exchange as set out in Schedule 3 to the I*ncome Tax Assessment (1997 Act) Regulations 2021.*

The Guideline also includes an appendix setting out the risk assessment framework. The appendix aims to assist companies in determining their risk zone and how the ATO will respond.

Criteria for Risk Zones

Low Zone

If the company self-assesses as a non-resident, is a resident of a foreign jurisdiction and one or more of the following apply:

1. the company ordinarily has their central management and control in the foreign jurisdiction, but has a one-off temporary change to their governance resulting in the meeting being held in Australia or directors attending meetings from Australia via audio-visual means;
2. the company is a subsidiary incorporated in the foreign jurisdiction and is subject to an Australian parent company policy, proposal or approval processes but there is evidence that directors are making high level decisions in the foreign jurisdiction;
3. the company has a wholly offshore operating business in that foreign jurisdiction, the company's tax position in Australia is substantially similar to what it would be if the company was an Australian resident but most of the central management and control is exercised through the foreign jurisdiction; or
4. the company intended to change its governance arrangement so that central management and control was outside of Australia under the transitional compliance approach.

Moderate Zone

If the company self-assesses as a non-resident, is a resident of a foreign jurisdiction and one or more of the following apply:

1. the company has a repeated or sustained lapse in directorial standards or corporate governance and it becomes uncertain as to what capacity the person in Australia is making decisions;
2. majority of the directors spend time in Australia but are stated to make all decisions in a foreign jurisdiction;
3. there are circumstances relating to the implementation of central management and control of the company that appear to lack a clear commercial basis. For example, the high-level decision making does not seem to be taking place in the foreign jurisdiction;
4. there are unusual circumstances such as the director's role or roles appearing to be undertaken by persons in Australia;
5. there appears to be a mismatch between legal form arrangements relating to residency outcomes and high-level decision making; or
6. the company's residency position related to a broader set of taxation issues.

High Zone

If the company self-assesses as a non-resident, is a resident of a foreign jurisdiction and one or more of the following apply:

1. the company does not appear to be a foreign resident;
2. the evidence suggests that central management and control is in Australia;
3. tax and profit outcomes in Australia do not appear to be proportionate with Australian operations;
4. there is an artificial arrangement affecting the location of central management and control, including previous migration of residency;
5. a tax avoidance scheme exists;
6. there are arrangements to conceal ultimate beneficial or economic ownership;
7. there are arrangement involving abuse of board processes; or
8. evidence indicates that there is no substantive high-level decision making in the foreign jurisdiction in which the company is a residence.

The Commissioner is open to receiving comments before 28 July 2023.

ATO reference *Draft Practical Compliance Guideline PCG 2018/9DC1*
w https://www.ato.gov.au/law/view/document?DocID=DPA/PCG20189DC1/NAT/ATO/00001

6.3 Lodgment obligations, due dates and deferrals

The ATO has made minor updates throughout Practice Statement Law Administration PS LA 2011/15 to include of the new method available to tax agents to make lodgment deferral requests via online services for agents (OSFA).

The ATO has also added a new section to PS LA 2011/15 under Attachments B and D on Specific Lodgment Requirements, which relates to 'Sharing economy reporting – electronic distribution platforms'.

From 1 July 2023 electronic distribution platform (**EDP**) operators must report on transactions entered into via the EDP for supplying:

1. taxi travel services including ride-sourcing; and
2. short-term accommodation.

From 1 July 2024, EDP operators must report on all other types of reportable transactions for supplies made via EDP.

ATO Reference *Practice Statement Law Administration* PS LA 2011/15
w https://www.ato.gov.au/law/view/document?docid=PSR/PS201115/NAT/ATO/00001

6.4 Objections out of time

The ATO has updated Practice Statement Law Administration PS LA 2007/3 which provides guidance to ATO officers on when to allow requests to treat out of time objections as if they were lodged within time.

The update clarifies the factors which an ATO officer should take into account, including the following additional factors added by this update:

1. the legislative purpose for having a limited objection period;

2. whether the objection and the application for an extension of time was lodged by the taxpayer as soon as circumstances permitted;
3. whether a negligent failure to follow instructions on the part of an advisor contributed to the delay;
4. whether the taxpayer was informed that they could object but did not do so;
5. the duration of the delay (a delay of several years would require better explanation than a delay of a few days);
6. whether the Commissioner's consideration of the objection is prejudiced by reason of the delay, including:
   (a) where material documents have been lost, destroyed or are no longer available;
   (b) where witnesses have disappeared or their recollections have faded; and
   (c) where avenues of useful enquiry have dried up or have become difficult to pursue;
7. whether the delay is explained, in whole or in part, by an intent to allow a period of review of the correct taxpayer and the correct tax period, as contended in the objection, to expire; and
8. any other matter that the circumstances of the case make relevant.

The update also adds to the list of reasons where an extension of time should not normally be allowed, by adding that such an extension would not normally be granted if the only explanation for delay is that the taxpayer has changed advisor.

Most importantly however, the revision deletes this sentence from the original guidance:

> *As a general rule, requests for extension of time are to be approached on the basis that extensions will be granted, unless there are exceptional circumstances.*

It is replaced with:

> *We have the discretion to treat a late objection as if it had been lodged within the required period.[1]*
>
> *This discretion is an exception to the general rule. The purpose of the discretion is to avoid injustice being caused in a particular case because of the rigid application of a time limit.*

ATO reference *Practice Statement Law Administration* PS LA 2003/7
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20037/NAT/ATO/00001&PiT=20230706000001

6.5 GST and crypto assets

On 5 July 2023, the ATO published updates to its website guidance on GST and digital currency.

GST and digital currency

According to the guidance:

> *For GST purposes, digital currency is a digital unit of value that:*
>
> - *is fully interchangeable with the same digital currency;*
> - *can be provided as payment;*
> - *is available to the public free of any substantial restrictions;*
> - *is either:*
>   - *not denominated in any country's currency; or*
>   - *denominated in a currency that is not issued by, or under the authority of, an Australian or foreign government;*
> - *does not have a value that is derived from or is dependent on anything else;*

- *does not give an entitlement to receive something else unless it is incidental to holding it or using it as payment; and*
- *if supplied, would not be an input-taxed financial supply for a reason other than being a supply of a digital currency or money.*

Examples of digital currency include Bitcoin, Ethereum and Litecoin.

The guidance confirms that the following are not digital currency:

Crypto asset	GST Treatment
Non-fungible tokens (NFTs) are not 'digital currency' because each is unique and cannot be interchanged with another NFT.	The supply of a NFT is taxable unless it is GST-free
A **stablecoin** that is pegged to the value of some other asset (such as a commodity or fiat currency) is not a digital currency.	The supply of a stablecoin is an input-taxed financial supply unless it is GST-free.
An **initial coin offering (ICO)** is not digital currency if it: 1. is a security, including a share or managed investment scheme; 2. is a derivative; or 3. gives a right or entitlement to goods and services.	If an initial coin offering is a security or derivative, your supply will be an input-taxed financial supply unless it is GST-free. If it gives a right or entitlement to goods and services, your supply of the initial coin offering will be taxable unless the entitlement is incidental or the supply is GST-free.

GST and digital currency as payment

If you make a taxable supply and you receive digital currency as payment, or if you use digital currency to make a purchase for your GST-registered enterprise and claim a GST credit, the GST amount for that payment included in your business activity statement must be in Australian dollars.

If you account for GST on a non-cash basis, the day you calculate the conversion into Australian dollars is determined by whichever happens first of either the:

1. day you receive any of the payment
2. transaction date or invoice date.

If you account for GST on a cash basis, your conversion day can be the transaction date, invoice date or the day you receive any of the payment.

GST and trading digital currency

The GST treatment of trading digital currency is different to the GST treatment when digital currency is used for payment. If you trade digital currency in exchange for money or digital currency with an Australian resident who is located in Australia, your supply will be an input-taxed financial supply. You don't need to pay GST on input taxed supplies you make.

The website guidance states that if you trade digital currency in exchange for money or digital currency with a non-resident who is not located in Australia, your supply will be GST-free.

The website guidance also states that if you trade digital currency through a digital currency exchange and you cannot identify the counterparty, you may use the location of the digital currency exchange to treat a supply as GST-free if the exchange is not located in Australia.

GST and digital currency exchanges

A digital currency exchange is an online trading platform that enables entities to trade crypto assets (other than non-fungible tokens) for fiat currency or other crypto assets.

Supplies of facilitating trades of crypto assets will be taxable if the supply is made to an Australian resident located in Australia. If the supply is made to a non-resident who is not located in Australia, the supply will be GST-free.

If a digital currency exchange operator buys and sells crypto assets directly with traders, its supply will be an input-taxed financial supply unless it is a GST-free supply.

Non-resident entities operating digital currency exchanges may be required to register for GST in Australia if they carry on an enterprise and make supplies connected with Australia that exceed the GST turnover threshold.

w https://www.ato.gov.au/Business/GST/In-detail/Your-industry/GST-and-crypto-assets/

6.6 Division 7A interest rate

The Division 7A benchmark interest rate for the income year ending 30 June 2024 is 8.27% per annum.

w https://www.ato.gov.au/rates/division-7a---benchmark-interest-rate/

6.7 Rental property data matching

The ATO notes that there is a $1.3 billion rental tax gap (being the difference between the amount of tax paid in relation to rental income and the amount of tax that should be paid in relation to rental income). Key contributors to the tax gap include incorrect reporting of rental income and expenses, including interest expenses, insurance premiums, claim payouts, repair costs and capital works deductions. In order to minimise this tax gap, the ATO will collect data for the financial year ended 30 June 2022 through to financial year ending 30 June 2026 related to landlord insurance and residential investment property loans.

w https://www.ato.gov.au/Tax-professionals/Newsroom/Income-tax/Rental-property-data-matching/

6.8 New ATO charter

On 26 June 2023, the ATO launched a refreshed ATO Charter (formerly known as the Taxpayers' Charter) following extensive community consultation and feedback.

The ATO Charter now explains:

1. what to expect when interacting with the ATO;
2. the ATO's commitments to the people;
3. what is expected by the ATO; and
4. what steps can be taken if people are not satisfied.

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The ATO Charter is intended to be easy to understand and contains links to more detailed information on specific topics and commitments.

w https://www.ato.gov.au/ATOcharter
w https://www.ato.gov.au/Media-centre/Media-releases/ATO-s-commitments-to-the-community-made-clear-in-new-look-Charter/

6.9 Queensland State Budget Summary – tax related measures

The 2023-24 Queensland Budget was handed down on 13 June 2023. Some of the key tax and small-business related measures are highlighted below.

Payroll Tax Rebate for Apprentices and Trainees

The Queensland Government is extending the 50% payroll tax rebate on the exempt wages of apprentices and trainees to 30 June 2024. The rebate is available for the financial years between 2016 and 2024.

Build to Rent Tax Concession

The Queensland Government is providing tax concessions for eligible build to rent developments that provide at least 10% of dwellings as affordable homes with discounted rents.

The tax concession will be made available for a maximum period of 20 years or until 30 June 2050, whichever occurs earlier.

The concession is to commence from 1 July 2023.

General Practitioner payroll tax amnesty

The Queensland Government is providing an amnesty for the period of 30 June 2018 to 30 June 2025, for eligible medical practitioners, who are otherwise liable to pay payroll tax on payments made to contracted general practitioners. This amnesty is to allow medical practitioners to rectify any non-compliance during the period and to ensure they comply with their payroll taxes moving forward.

To be eligible for the amnesty, the medical practitioner must lodge an expression of interest by 29 September 2023.

Regional Payroll Tax discount

The Queensland Government is extending the 1% discount on the payroll tax rate for eligible regional employers until 30 June 2023.

The current discounted payroll tax rates are as follows:

1. 3.75% for employers or group of employers who pay $6.5 million or less in Australian taxable wages; and
2. 3.95% for employers or group of employers who pay $6.5 million or more in Australian taxable wages.

w https://budget.qld.gov.au/budget-papers/#budget-paper-4

6.10 South Australian Budget

On 15 June 2023, the South Australian Government released the 2023/24 State Budget. The below sets out the tax measures implemented by the Budget.

Abolition of stamp duty for first home buyers

No stamp duty will be payable by eligible first home buyers who enter into a contract to purchase a new home or vacant land to build a new home after 15 June 2023.

No stamp duty will be payable on the purchase of an eligible new home valued up to $650,000, with relief progressively phasing out for properties valued up to $700,000.

For the purchase of vacant land on which a new home will be built, no stamp duty will be payable for vacant land valued up to $400,000 with relief phasing out for land valued up to $450,000.

To be eligible for relief, the new home must be occupied as the principal place of residence.

Build-to-rent properties

The Budget introduces a land tax reduction for eligible build-to-rent properties on land, where construction commences on or after 1 July 2023.

This will apply as a 50% reduction in the land value of relevant parcels of land, where the land is being used as an eligible build-to-rent project.

The land tax reduction will be available from the 2023-24 financial year up to, and including, the 2039-40 financial year.

Affordable community housing

The Affordable Community Housing Land Tax Exemption Pilot provides eligible property owners with ex gratia relief, equivalent to a land tax exemption for property they rent through a participating community housing provider for affordable housing purposes.

The pilot program will run for 5 years, commencing 1 March 2020 and is limited to 100 South Australian properties.

Affordable housing

Developers are able to apply for ex gratia relief where land being used to develop affordable housing has been aggregated with other land they own. The relief will be equivalent to the difference between their tax liability and the tax they would be liable for if each affordable housing parcel were taxed individually and not aggregated with their other land.

Relief will be limited to a 12-month period and will be conditional on developers entering into a Land Management Agreement or similar arrangement with the SA Housing Authority, with the developer agreeing to meet any requisite affordable housing requirements.

w https://www.treasury.sa.gov.au/__data/assets/pdf_file/0008/914669/2023-24-Budget-Measures-Statement.pdf
w https://www.revenuesa.sa.gov.au/landtax/LTExemptions/accordian-pages/tax-concessions-to-promote-new-housing-opportunities

6.11 Tasmania – Intergenerational Rural Transfer Exemption

The Tasmanian State Revenue Office has released guidance regarding the Intergenerational Rural Transfer Exemption under section 225 of the *Duties Act 2001* (TAS).

Section 225 of the Duties Act includes a family farm exemption from duty for the transfer of primary production land and associated farming equipment. This exemption applies when the land is used in the business of primary production at the time of transfer, will continue to be used for primary production after the transfer, and is classified as primary production land for land tax purposes.

The exemption also covers the transfer of shares or units in certain landholders that own farming property.

The guideline confirms that it is not imperative that the transferor and the transferees runs a primary production business, for example, the land may be leased to another person or entity that runs a primary production business.

The guidance noted that the Commissioner may request a Primary Production Land (PPL) application if the land does not have a PPL classification for land tax purposes. The exemption can apply to eligible land when multiple certificates of titles or a single title with mixed purposes are transferred among relatives.

The exemption for transfers to a trust under Section 225 of the Duties Act has specific conditions. These conditions are generally dependent on the status of the transferor and the transferee, including whether they are natural persons, trusts or companies. The guidance provides a table that sets out the conditions for receiving the exemption.

The guidance also provides that, in respect of trusts, if a beneficiary in the trust is not a relative of the transferor, the transfer will not be eligible for the exemption. The trust deed must specify all beneficiaries by name, and general groups like 'children of' or 'spouse of' will not meet the requirements. If the trust deed allows distribution to non-relatives or the removal of beneficiaries, the transfer will not qualify for the exemption.

w https://www.sro.tas.gov.au/Documents/intergenerational-rural-transfer-exemption-guideline.pdf

6.12 Fact Sheet – South Australian Return to Work Act 2014 - lump sum payments

On 15 June 2023, the ATO released guidance on lump sum payment which may be received under the *Return to Work Act 2014* (SA) where an individual has been incapacitated due to a workplace injury and are able to return to work.

The fact sheet covers the following payment types:

1. retraining allowance - a lump sum contribution by an employer towards retraining expenses;
2. section 54 redemption payments for liabilities associated with medical services - a capital payment made as a result of an agreement with the Return to Work Corporation of SA to redeem an employer's liability to compensate the individual for medical services;
3. sections 56 and 56A lump sum payments for permanent impairment (economic loss) - a lump sum payment to compensate for loss of future earning capacity; and
4. section 58 lump sum payments for permanent impairment (non-economic loss) - a lump sum payment to compensate for non-economic loss such as pain and suffering.

Where an individual received any one of these payments, the payment will be non-taxable and does not need to be shown in the individual's tax return.

w https://www.ato.gov.au/law/view/document?docid=AFS/sa-rwa-lsp/00001

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