The Tax Institute

Tax Update

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Contents

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

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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
Widdup	The Federal Court considers application of family trust distribution tax rules, including personal liability of directors of trustee, and when a trustee will have made a valid family trust election.	Page 6
JMC and EFEX Group	The employee-contractor tests are considered in two different cases before the Federal Court. These cases demonstrate the difference in outcome where a comprehensive written contract is in place.	Page 9 and 11
Matthews and Anders	The test for employment related deductions is considered in two AAT cases. The cases underscore the strict approach of the ATO to employment related deductions at audit	Page 17 and 20
Concreting and Formwork Personne	The validity of the appointment of a person as a director of a company is considered in a case concerning a director penalty notice. The Court concluded that DPN was not validly issued as the "director" was not validly appointed.	Page 27
Residency ruling	The ATO has finalised its ruling on the test for individual residency in TR 2023/1. This ruling now takes on greater importance given that it does not appear that the proposed changes to the test for individual residency will proceed.	Page 40

2. Cases

2.1 Widdup – family trust distribution tax

Facts

Julian James Widdup and Cecilia Anne Widdup are married.

Entities associated with Julian and Cecilia

Fidelity Pacific Insurance Company Limited (**Fidelity**), FPL Partnership Pty Ltd (**FPL**), Aurum Asset Management Pty Ltd (**Aurum**) and FPLJCW Investment Fund LLC (**FPLJCW**) are associated with Julian and Cecilia.

FPL and Aurum are both Australian companies, whereas Fidelity and FPLJCW are both offshore companies. Fidelity is a company incorporated in Canada which provides 'offshore financial services' out of Vanuatu. Fidelity also holds shares in FPLJCW.

Family Trust

By trust deed dated 22 August 2008, the J&C Widdup Family Trust (later the Fidelity Holdings Trust) (**Family Trust**) was established. The trustee of the Family Trust was JCW Capital Pty Limited (**JCW**) until it was deregistered on 15 May 2019. The directors of JCW were Julian and Cecilia.

On 19 October 2010, JCW lodged the tax return for the Family Trust for the financial year ended 30 June 2009 and recorded in that return that a Family Trust Election (**FTE**) had been made in the same financial year.

A 'family trust election' is an election made in accordance with section 272-80. Section 272-80(2) provides that an election 'must be in writing and in the approved form' and section 272-80(3) provides that the election must also 'specify an individual as the individual whose family group is to be taken into account in relation to the election'. In limited circumstances, an FTE may be revoked if the trustee completes and lodges an FTE revocation form with the ATO. The revocation must also be in the approved form.

The approved form in respect of an FTE is ATO form NAT2787 (Family trust election, revocation or variation form). The ATO had no record of a form NAT2787 being lodged for the Family Trust.

For each of the financial years ended 30 June 2009 to 30 June 2017, JCW recorded in the trust tax returns that an FTE had been made in the financial year ended 30 June 2009 and that it had distributed annual trust income to individual members of the Widdup family or to a family-owned company (except in 2011 when an overall loss was made). The FTE was not revoked during the period available to revoke the election, which lapsed on 30 June 2013.

In October 2017, JCW derived a capital gain of $9,740,503 when it sold shares it had earlier acquired in Palisade Investment Partners Limited.

On 22 March 2018, Julian, in his capacity as a director of JCW, wrote to the ATO stating:

> *I refer to my discussion with the ATO today whereby the ATO confirmed that my family trust, the J&C Widdup Family Trust, has never made a family trust election … the Family Trust Election Status should have been left blank in the trust's tax returns, rather than reporting 2009 as being the financial year when the trust was established. (I had thought that box had to be filled in by all family trusts). This had been a recurring error reported since 2009 and was simply repeated on subsequent trust tax returns …*

On 25 June 2018, JCW resolved to appoint Fidelity to be a member of the 'Eligible Classes' for the purposes of the Family Trust. On 29 June 2018, JCW then resolved to apply, set aside and pay all capital gains of the Family Trust to Fidelity. Both resolutions were signed by Julian and Cecilia as the directors of JCW.

On 11 February 2019, JCW lodged the tax return for the Family Trust for the financial year ended 30 June 2018 and left the fields in the tax return concerning the Family Trust's FTE status and interposed entity election status blank.

During 2018 and 2019, the funds referrable to the capital gain derived in October 2017 flowed through various bank accounts controlled by or associated with members of the Widdup family. There were also a series of complicated interactions, arrangements and transactions involving JCW, Fidelity and a partnership between FPL, FPLJCW and Aurum, which accounted for the funds differently.

On 21 June 2021, the Deputy Commissioner issued notices of amended assessment to both Julian and Cecilia for the financial year ended 30 June 2018 on the basis that the amount of $3,829,178 (being the discounted amount of the capital gain made by JCW) should have been included in their assessable income for that tax period. The Deputy Commissioner concluded that Julian and Cecilia, *'had the benefit and control of the capital gain derived by [the] Trustee by reason of an undisclosed arrangement that exists or existed under which FPLI [Fidelity Pacific] agreed to apply any trust income or capital from FHT [the Family Trust]*' for the benefit of Julian, or Cecilia, or at their direction and therefore, the proceeds formed part of their assessable income. The Deputy Commissioner also decided that Julian and Cecilia were liable to administrative penalties due to making a false or misleading statement to the Deputy Commissioner, being the statement in their tax returns for the financial year ended 30 June 2018 which did not include the net capital gain.

If a trust that has made an FTE makes a distribution or payment to a person or entity outside the relevant family group, Family Trust Distributions Tax (**FTDT**) of 47% applies (this is the 2023 rate).

The Deputy Commissioner determined that:

1. JCW had made an FTE in relation to the Family Trust;
2. Julian was the individual specified in the election. Accordingly, the family group comprised Julian, Cecilia, certain individual members of their family and certain companies, partnerships and trusts owned by Julian or members of his family;
3. the Family Trust had conferred a present entitlement to the capital gains made by the Family Trust to Fidelity; and
4. Fidelity was not a member of Julian's family group. Accordingly, the distribution to Fidelity gave rise to a family trust distribution tax liability on the part of the JCW and Julian and Cecilia as the directors of JCW.

On 21 June 2022, the Deputy Commissioner issued Julian and Cecilia with the following notices:

1. notices of liability to pay FTDT of $3,599,409, for which Julian and Cecilia were said to have been liable since 20 July 2018 (being 21 days after they had made the distribution to Fidelity per section 271-75);
2. notices of liability to a general interest charge of $1,210,9074 (accrued as at 21 June 2022) in respect of the FTDT liability;
3. notices of amended assessment to income tax under section 170(1) of the ITAA 1936 which assessed Julian and Cecilia to each be liable for income of $1,785,073.69 for the income year ended 30 June 2018; and
4. notices of assessment of shortfall interest of $249,943 in respect of the assessed income tax shortfall.

The notices stated that each of the Trustee, Julian and Cecelia were jointly and severally liable to pay the FTDT and that both Julian and Cecelia, in their capacities as directors of JCW, were also liable to pay the general interest charge amounts of FTDT that remained unpaid 60 days after the due date.

Freezing orders

The Federal Court has the power to freeze the assets of a taxpayer where:

1. the person applying for the freezing order has a good or reasonably arguable case on a prospective cause of action in the Court;
2. there is a danger that a prospective judgment in respect of that cause of action may be wholly or partly unsatisfied because, among other things, the assets of the prospective judgment debtor or another person will be removed from Australia, or disposed of, dealt with or diminished in value; and
3. the balance of convenience favours the making of the order.

On the afternoon of 21 June 2022, the Deputy Commissioner applied, ex parte, to the Federal Court for freezing orders to be made against Julian, Cecilia, Fidelity, FPL, Aurum and FPLJCW. The interlocutory application was heard by Nicholas J, the duty judge, on an urgent basis. Justice Nicholas made the freezing orders against Julian, Cecilia, Fidelity, FPL, Aurum and FPLJCW which were to have effect up to and including 29 June 2022. The general effect of the freezing orders was:

1. in relation to Julian and Cecilia, to restrain them from removing from Australia or in any way disposing of, dealing with or diminishing the value of any of their assets in Australia up to the unencumbered value of $4,810,316; and
2. in relation to Fidelity, FPL, Aurum and FPLJCW, to restrain them from dealing with certain assets in which they were said to have an interest.

On 29 June 2022, the freezing orders were, with the consent of Julian, Cecilia, Fidelity, FPL, Aurum and FPLJCW, extended until further order of the Federal Court.

The Federal Court has the discretion to lift freezing orders if the prospective judgment debtor pays an amount to the Federal Court as security for the potential judgment debt. On 1 August 2022, the freezing orders ceased to have effect as the amount of $4,810,316 was paid to the Federal Court by and on behalf of Julian, Cecilia, Fidelity, FPL, Aurum and FPLJCW.

On 29 August 2022, Julian, Cecilia, Fidelity, FPL, Aurum and FPLJCW filed an interlocutory application in which they sought, among other things, an order that the money paid into the Federal Court by Julian, Cecilia, Fidelity, FPL, Aurum and FPLJCW be repaid.

The basis of the interlocutory application was that the Deputy Commissioner did not have a good or reasonably arguable case in relation to the FTDT liability. The taxpayers contended that the Family Trust was not a 'family trust' because JCW never made an FTE in the approved form as required by section 272-80(2) of schedule 2F to the ITAA 1936). Further, Julian, Cecilia, Fidelity, FPL, Aurum and FPLJCW argued that JCW did not make an FTE which included the information required by section 272-80(3) of schedule 2F to the ITAA 1936.

In opposing the interlocutory application, the Deputy Commissioner claimed that JCW had made a FTE and that Julian was the individual specified in the election as the FTE status box had been ticked in the tax returns for the Family Trust for the 2009 to 2017 tax periods, which indicated that a FTE had been made and further, that the distributions made by the Family Trust during those tax years had all been made to members of Julian's family group. Additionally, the Deputy Commissioner noted that Julian signed the Family Trust's tax returns.

Issue

Did the Commissioner have a good or reasonably arguable case that JCW made an FTE in relation to the Family Trust?

Decision

Wigney J considered that it was open to the Deputy Commissioner to find that the Family Trust had made an FTE in accordance with section 272-80 of the ITAA 1936 as that is effectively what Julian told the Deputy Commissioner when he completed the tax returns for Family Trust for the tax years 2009 to 2017.

Wigney J further held that, even if the Deputy Commissioner was aware that Julian claimed in a call to an ATO enquiry line on 22 March 2018 that he had made a mistake when completing the tax returns and that the Family Trust had not made an FTE, the Deputy Commissioner was not obliged to accept or act on the basis of that information. Wigney J also noted that Julian's telephone calls appeared, at least at first blush, to have been contrived and calculated.

Wigney J also did not consider the fact that the ATO records did not indicate that the Family Trust had lodged an FTE in the approved form was critical, as section 271-15 of the ITAA 1936 does not require that an FTE be lodged with the ATO, it merely requires that the trustee 'make' an FTE.

Wigney J dismissed the interlocutory application by Julian and Cecilia without costs.

TRAP – it is critical that whether a family trust election has been made before determining who will benefit from the income or capital of a trust. Note that the ATO have a broad view on what constitutes a benefit for these purposes, and an interest free loan to a person or entity that is not part of the family group by a trust that has made an FTE would be subject to FTDT.

COMMENT – it is not clear whether the Commissioner was attempting to recover income tax from Julian and Cecilia as well as family trust distributions tax. The freezing orders only concerned the family trust distributions tax and the GIC on that amount. Tax law provides that once the FTDT has been paid, effectively, no other person is assessed on the amounts subject to FTDT (section 271-105 of Schedule 2F to ITAA 1936).

Citation *Deputy Commissioner of Taxation v Widdup (No 2)* [2023] FCA 377 (Wigney J, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/377.html

2.2 JMC – employee vs contractor

Facts

JMC Pty Limited (**JMC**) is a provider of higher education programmes.

JMC engaged Nicholas Harrison, a qualified sound engineer, to provide teaching services including delivering lectures and marking student exams and assignments in courses for a Bachelor of Creative Technologies.

Nicholas was engaged as a lecturer and marker through a total of 22 short term contracts between 1 April 2013 to 30 June 2016 and between 1 July 2017 and 31 March 2018. Nicholas was paid an hourly rate. The contract stated that Nicholas was required to have an ABN, but he did not in practice have an ABN at any stage.

There was no provision in the contract for sick leave, holiday pay or superannuation. The contract required Nicholas to submit invoices, time sheets and signed weekly 'lesson plans' to JMC. Through its managing academic officer, JMC was able to oversee and control when and how Nicholas provided his teaching services.

Nicholas was paid in accordance with the invoices he submitted to JMC. JMC did not make any superannuation contributions on behalf of Nicholas.

The contract contained terms stating that Nicholas agreed and acknowledged that his relationship with JMC is that of a 'contractor' and that he indemnified JMC in relation to any and all claims which may be made in respect of entitlements which would accrue to an employee.

On 25 March 2019, the Commissioner issued notices of assessment of superannuation guarantee charges totalling $17,369, including interest and administration components, in respect of the amounts paid to Nicholas by JMC.

The Commissioner submitted that Nicholas was an employee of JMC for superannuation guarantee purposes, either because he fell within the ordinary meaning of the term 'employee', or because he worked under contracts that were 'wholly or principally' for his 'labour' and therefore fell within the extended definition of employee in section 12(3) of the SGAA.

On 22 May 2019, JMC lodged an objection against the superannuation guarantee charge assessments. On 17 January 2020, the Commissioner disallowed the objection. JMC appealed to the Federal Court.

The primary judge considered the principles set out in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (**Personnel Contracting**) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; 96 ALJR 144 (**Jamsek**) and confirmed that the question of whether a person is an employee or independent contractor should be determined by a consideration of the terms of the contract and not by reference to the performance of the contract.

At first instance, Wigney J found that the terms of the contract suggested that Nicholas was an employee within the ordinary meaning, because the totality of rights and obligations were such that his work under the contracts was so subordinate to JMC's business that Nicholas could be seen as an employee of that business, rather than as a contractor conducting an independent business or enterprise.

Wigney J considered the right to delegate that Nicholas had, which would ordinarily indicate he was not an being paid for his labour, but held that JMC had extensive control over Nicholas, including through timetables which could not be varied, lesson plans which had to be presented to and approved by JMC and the fact that Nicholas was required to obtain JMC's consent before subcontracting. Wigney J held that the limited right to subcontract was not capable of outweighing all the other considerations in this case.

JMC appealed to the Full Federal Court.

Issues

1. Was Nicholas an 'employee' of JMC within the ordinary or common law meaning?
2. Was Nicholas engaged by JMC under a contract wholly or principally for his labour?

Decision

When considering whether Nicholas was an employee, the Full Federal Court examined whether Nicholas had a real contractual power to subcontract or assign the performance of the teaching services with consent.

Ordinary meaning of 'employee'

The Full Federal Court noted that a right to delegate is an important indication of an independent contractor relationship. A right to subcontract is no different and, where such a right exists in the contract, it does not matter whether there is a history of that right being exercised.

The Full Federal Court held that, although Nicholas had to get consent from JMC before subcontracting his teaching services, Nicholas was able to subcontract a significant portion of his teaching services, not just discrete tasks. The fact that Nicholas had to get consent did not negate his ability to exercise this right under the contract, and to do so on short notice as was evidenced on at least three occasions. JMC required notice before consenting to a subcontractor in order to ensure the academic suitability of the proposed subcontractors. The Full Federal Court held that there is nothing remarkable about imposing a restriction, such as requiring consent, to ensure that that the proposed subcontractor is qualified to do the work to the standard necessary to

meet regulatory requirements and protect legitimate commercial interests. Nicholas had a real and exercisable right to subcontract that was inconsistent with an employer-employee relationship.

In relation to the issue of control, the judges found that the control exercised by JMC was found to be very little beyond the provision of broad parameters regarding what should be covered and suggestions as to how the content may be delivered. The lesson plans that Nicholas was required to give to JMC before lectures were found not to be detailed or proscriptive and did not dictate how Nicholas had to convey the lesson.

Section 12(3) expanded definition of 'employee'

While Nicholas could perform the contract personally, for the reasons explained above, he had rights under the contract to subcontract or assign the rights to perform the services, with JMC's consent. Where the contract allows for such subcontracting or assignment, it cannot be a contract 'wholly or principally' for that person's labour.

The Full Federal Court held that Nicholas was not an employee of JMC, under either the ordinary meaning of the term or under the extended definition in section 12(3) of the SGAA.

COMMENT – in the previous decision in this case it appeared that the requirement on Nicholas to get JMC's consent prior to delegating was a relevant factor in determining whether the payment to him was wholly or principally for this labour, but as set out above, despite the requirement of consent he was found to have a real and exercisable right to subcontract or delegate, which per *Neale v Atlas Products* (1955) 94 CLR 419 would indicate he was not being paid for his labour.

Citation *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 (Bromwich, Thawley and Hespe JJ, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/76.html

2.3 EFEX Group v Bennett – employee vs contractor where no written agreement

Facts

EFEX Group Pty Ltd (**EFEX**) conducted a services business providing voice, data, printing management and other technology-based services. Gerrard Bennett was engaged by EFEX on 1 February 2018 as Business Development Manager of the company's South Australian operations.

Gerrard had been friends with the founder and CEO of EFEX (Nick Sheehan) and the Branch Manager of EFEX (Dean Brogan) for some years before Gerrard joined EFEX. Dean and Gerrard had been friends for over 18 years. The CEO told Dean that he was prepared to engage Gerrard on the same basis as Dean's 'contractor arrangement'. Dean said that, although he could not recall the actual words used, he did recall Gerrard telling him that he was happy to be engaged as a contractor.

There was no written employment or engagement agreement between EFEX and Gerrard. Gerrard claimed that he was instructed that EFEX would remunerate him for his work for the company at a flat rate of $120,000 per annum plus GST. The monthly payment of $10,000 was to be invoiced on the 9th or 10th of each month. Gerrard was required to obtain an Australian Business Number (ABN).

On or about 29 January 2018, Gerrard established the Bennett Enterprises Trust and obtained an ABN for the trust.

Between February 2018 and October 2019, the Bennett Enterprises Trust sent a tax invoice on or about the 13th of each month for $10,000 plus GST of $1,000 for what was stated in the invoices to be the supply of the following:

> *Gerrard Bennett — Provision of Sales Contracting Services for the month of [month] [year].*

The invoice sought direct payment to the Bennett Enterprises Trust at a nominated bank account. The bank account was in the name of Gerrard John Bennett as trustee for the Bennett Enterprises Trust.

With respect to sick leave or annual leave, Gerrard claimed that there was no fluctuation in his pay even when he was away sick or on holidays. If he was taking leave, he would inform the Chief Operating Officer and the General Manager. Gerrard said that he recalled an occasion at a lunch in Sydney when the CEO said to him 'I pay you while you are away on holidays'.

Gerrard said that, upon the commencement of his work with EFEX, he was provided with business cards, a company laptop, a company email and an EFEX polo shirt. Gerrard was not required to wear a uniform, including the polo shirt at any time as part of his role. Dean recalled that, although Gerrard was issued with an EFEX laptop, Gerrard used his personal laptop most days at the office.

The CEO said that Gerrard was expected to use his own motor vehicle and mobile telephone and that he was not reimbursed for those expenses through his monthly invoices or through the EFEX payroll system. He was not paid a motor vehicle or telephone allowance during his engagement by EFEX.

Gerrard claimed that he worked a standard business week of Monday to Friday from 8 am to 5 pm and sometimes provided services to clients on weekends. Dean did not agree with Gerrard's assertion that he worked a standard business week. Gerrard was attending university during business hours on one or more days a week and both Dean and Gerrard would go to the gym during business hours, mostly around 3-4pm. Dean said that he never told Gerrard that he had to work specific office hours and that they had flexibility as to working hours provided they were achieving the relevant sales targets. Gerrard agreed that he did not have to seek permission to attend personal appointments during business hours and that there was no requirement to be in the office.

Gerrard said that he was required to attend interstate sales conferences and compulsory training. Dean said there was a sales 'kick off' conference each year that all EFEX workers were asked to attend and a two day sales extra training conference. Dean could not recall being told that this training conference was compulsory.

According to Gerrard, on 31 October 2019 Dean told him that the payment structures would be changed from flat rate to more performance based and that someone from head office would call Gerrard. Gerrard said he did not receive a call from head office.

On 1 November 2019 Gerrard had a conversation with the General Manager of EFEX to obtain more information about the new structure which he understood was due to take effect very soon. The General Manager agreed to send Gerrard an email with the details. Gerrard said he did not receive an email.

Eventually Gerrard discovered that the new structure involved being paid half his base salary with commission in addition to the base salary. There would be no change in Gerrard's title or role.

On 1 November 2019, EFEX wrote a letter to Gerrard offering him full-time employment on these terms.

On 6 November 2019, Gerrard received a call from the CEO of EFEX to discuss the contract. The CEO said that they had previously discussed the structure. Gerrard denied that they previously discussed changing to a performance-based contract.

On 8 November 2019, Gerrard had the following text message exchange with the CEO:

[CEO]: Let me know how you're placed for a call, I need to wrap this up today. I'm good from 1:30 to 3.

[Gerrard]: I am still working through what the change in landscape means from target revenue, GP etc. I have an exam tomorrow, another next week so evening have been studying. I need a bit more time I don't want to rush a decision that for me is significant.

[CEO]: Ok I understand. I'm finishing your current contract arrangement up, effective today. If you'd like to take a sales role I'll leave that decision up to you, but until I get some clarity on which way you'd like to go, I'll take it that you no longer work here and have your email etc closed down. Please leave your notebook with Dean.

Gerrard viewed this communication as involving his dismissal.

On 10 November 2019, Gerrard met with Dean who said:

mate I think you should leave, they have had it in for you for a while, and they are going to make it hard for you to stay, and that if you do, they aren't going to let you do uni anymore, as it is affecting your work.

Gerrard said he had no other conversation about his dismissal with the CEO or Dean.

Gerrard brought a claim with the Fair Work Commission on the basis of unfair dismissal. EFEX sought to have the claim dismissed on the basis that Gerrard was not an employee and that, therefore, the Fair Work Commission had no jurisdiction to hear an unfair dismissal claim. The Fair Work Commission held that Gerrard was an employee and that the unfair dismissal proceedings could continue.

EFEX appealed the Fair Work Commission decision to the Federal Court.

On appeal, Gerrard claimed that he was an employee of EFEX for the following reasons:

1. EFEX had the right to control Gerrard's performance of his work;
2. EFEX held Gerrard out as part of the EFEX organisation;
3. Gerrard's right to obtain other employment was limited in that he had a limited ability to work for others;
4. In practical terms, Gerrard had no ability to delegate any of his work for EFEX to others;
5. Gerrard did not provide significant capital or assets towards or in relation to his work for EFEX;
6. Gerrard had no ability to generate goodwill or other saleable assets in connection with his work for EFEX; and
7. the basis upon which Gerrard was remunerated by EFEX, namely, by payment of a fixed amount each month, was strongly suggestive of an employment relationship.

EFEX contended that Gerrard was an independent contractor for the following reasons:

1. the taxation arrangements adopted by the parties suggested an independent contractor relationship;
2. the informal arrangements concerning 'leave' for Gerrard are consistent with an independent contractor relationship;
3. the parties understood that Gerrard was an independent contractor, not an employee;
4. here was no direction that Gerrard be in the office at any particular time; and
5. Gerrard had almost total freedom in how he carried out his sales activities.

Issue

Was Gerrard an employee of EFEX?

Decision

The Court was not satisfied that there was a common understanding between the parties that Gerrard was an independent contractor. Absent a clear understanding of the terms and conditions, the Court held that the

subjective understanding of the relationship by the parties has little substantive effect, rather like the label the parties might apply to their relationship,

The Court found that Gerrard was held out to represent the EFEX business based on the fact that Gerrard used EFEX sales template documents, a company email, an EFEX business card and represented himself as an EFEX representative. The Court also considered that it would be unlikely that Gerrard, an independent contractor, reported to Dean, another independent contractor.

The Court considered whether Gerrard had the ability to work for other people and concluded that the salary and tenor of discussions (such as they were) were that Gerrard's position was a full-time, or nearly full-time, position.

The Court held that there was no evidence that Gerrard either did or would have been permitted to delegate his work as Business Development Manager to a third party. The nature of the work and the circumstances in which it was to be carried out suggested that delegation was not practical or, indeed, possible.

The Court found that there was no evidence that Gerrard was developing his own goodwill through his work with EFEX. Gerrard was not at risk, in terms of his remuneration. He was paid the same amount regardless of whether he was sick or whether he outperformed his sales targets. This is consistent with an employment relationship.

While there were some matters that pointed towards an employment relationship and others that pointed towards an independent contractor relationship, the Court concluded that Gerrard was an employee of EFEX.

COMMENT – the recent High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (**Personnel Contracting**) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; 96 ALJR 144 (**Jamsek**) were of limited application in this case, as both those cases involved a comprehensive written contract. Where there is no comprehensive written contract, it is necessary to examine the practical day-to-day nature of the relationship.

Citation *EFEX Group Pty Ltd v Bennett* [2023] FCA 508 (Besanko J, South Australia)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/508.html

2.4 Integrated Trolley Management – payroll tax and employment agency provisions

Facts

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

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

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

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

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

Dennis and Steven managed the contracts with the supermarket operators. This involved conducting site visits to the shopping centres, and occasionally this resulted in site audits being undertaken. Dennis and Steven provided induction training and ongoing training to the subcontractors. ITM provided the subcontractors with a Workplace Health and Safety and Compliance Manual (**Compliance Manual**). Dennis and Steven encouraged the supermarket managers to communicate to the subcontractors through them. ITM imposed a requirement on the subcontractors to wear ITM uniforms.

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

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

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

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

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

ITM submitted that the subcontractors performing the trolley collection services were not sufficiently integrated into Woolworths' business to be seen as additional to Woolworths' workforce. ITM relied on the following factors:

1. the location of the subcontractors undertaking the trolley collection services was external to the supermarket store;
2. fulfilling the labour and equipment requirements for undertaking these tasks was left entirely to the subcontractor. That is, the subcontractor had to ensure that the trolley bays were filled to a certain percentage;
3. the subcontractors and supermarket staff were clearly separate by the fact that the subcontractors wore ITM uniforms which were distinct from the supermarket; and
4. the degree of interaction between the subcontractors and supermarket staff was minimal. It was ITM that dealt with complaints and requests from the supermarkets, supervised, and provided training to the subcontractors.

The Chief Commissioner submitted that the following factors were important for assessing whether the subcontractors were working in and for the business of the supermarket operators:

1. the collection of trolleys played an important part in the conduct of the supermarket operators business;
2. there was a continuity and regularity of the service being provided by the subcontractors;
3. there were some contractual provisions requiring ITM to comply with Woolworths' directions and policies;
4. the Compliance Manual stated: 'We are part of the total shopping experience of every customer…';
5. the subcontractors had a right to use the supermarket facilities, and even though the facilities were not used that is not the critical issue;
6. sometimes the subcontractors came into the stores to organise and pick up trolleys; and
7. the trolley collection service could have been carried out by Woolworths staff.

Issue

Did ITM procure the services of the contractors 'in and for' the conduct of the businesses of ITM's clients, being Woolworths, ALDI and IGA, such that an employment agency contract existed under section 37 of the *Payroll Tax Act 2007* (NSW)?

Decision

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

His Honour identified that the first step is to identity the employment agency contract arrangement or undertaking between the relevant parties and asking whether that contract, arrangement or undertaking is an 'employment agency contract'. That is, the contract under which the employment agent procured the services for the client. The Chief Commissioner looked at the contract between ITM and the supermarket operator to determine whether that was an employment agency contract. However, his Honour confirmed that this was not the correct approach. Rather, the correct approach is to consider whether each of the contracts with the subcontractors was an employment agency contract. This requires an assessment of each individual contract.

His Honour considered the origin of the 'in and for' test formulated by White J in UNSW Global. His Honour stated that, in formulating the 'in and for' test to the business of the client, White J was drawing a distinction between the client's business on the one hand, and a business operated by the service provider on the other. This was to ensure that independent contractors operating their own businesses who were retained by a client through an intermediary, would remain independent contractors operating their own businesses and not undertaking work 'in and for' the business of the client.

His Honour did not accept the Chief Commissioner's submission that a person engaged in the collection of trolleys on a contract basis is not a 'genuine' independent contractor. His Honour stated that the scope of section 37 of the Payroll Tax Act must depend on applying the statutory language to the particular contractual relationship in question rather than making an assumption as to what is a 'genuine' form of contracting.

Next, his Honour considered the factors identified by the parties in their submissions as to whether or not the arrangement was an employment agency contract. In respect of the arrangement with Woolworths, his Honour stated the following:

1. the fact that the trolley collection services involved activities which took place outside the Woolworths' premises was significant. The subcontractors did not require any supervision or coordination from Woolworths staff;

2. some characterisation of the nature of the client's business was required to assess whether an activity is 'in and for' that business. Therefore, his Honour characterised Woolworths' business as one of selling goods by retail using a supermarket format. While the collection of trolleys would be for the benefit of the overall business, it is no more 'in and for' the business than the delivery truck driver who delivered the goods to the store for sale;
3. the defined nature of the task done by the trolley collectors, and the associated maintenance of demarcation, were significant factors. There is also an established market of trolley collector operators and ITM is only one contractor;
4. the fact that the trolleys were owned by Woolworths and the trolley collectors were required to identify themselves as 'Woolworths trolley collectors' when dealing with the public does not inform the question of whether the trolley collectors are comparable to Woolworths employees;
5. the fact that the subcontractors were responsible for supplying and maintaining the equipment needed to collect the trolleys was an important factor which is a typical indication of an independent contractor conducting its own business;
6. ITM's subcontractors could, and in some cases did, perform work for more than one store at the same shopping centre which illustrated their independence of their businesses from Woolworths' business;
7. the trolley collectors were there to undertake a certain task as defined by the contract and were not to be asked to step outside that area. That is, they would not be asked to, for example, come into the store and work on the checkout;
8. the statement in the Compliance Manual about the trolley collectors being part of the customers' shopping experience are of minimal, if any, significance as this statement was a matter of opinion; and
9. the argument that the trolley collectors' work could have been undertaken by Woolworths employees is a submission which is available in every case.

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

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

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

Citation *Integrated Trolley Management Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 557 (Parker J, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/557.html

2.5 Mathews – deductions for work-related expenses

Facts

Douglas Mathews worked as a driller and operated his own business called 'Drilling and Watering Systems'. He held an ABN.

On 20 August 2019, Douglas entered into a contract with Hays Specialist Recruitment (Australia) Pty Ltd. Douglas's business name and ABN were not included in the contract. The contract included an 'Assignment

Letter' which set out the scope of work. This letter provided that Douglas was engaged as a drilling supervisor for Hays' client, the Water Corporation, and referred to Douglas as a '*temporary casual worker*'.

Under the contract:

1. Hays had the discretion to terminate the assignment if the Water Corporation changed the duration of the assignment;
2. Douglas was bound to act in accordance with the directions of Hays and the Water Corporation;
3. Douglas undertook to comply with the policies and procedures of the Water Corporation and complete the safety training mandated by the Water Corporation;
4. Douglas would be paid an hourly rate which would include casual loading;
5. Hays would deduct PAYG tax and pay superannuation contributions; and
6. Douglas was not required to provide his own vehicle and was not paid a motor vehicle allowance.

In April and May 2020, Douglas also worked as a supervisor for Pilbara Drilling Pty Ltd. There was no contract for this work. Douglas's business, Drilling and Watering Systems issued invoices to Pilbara Drilling for the work performed. He charged GST on his fees despite not being registered for GST.

For the year ended 30 June 2020, Douglas claimed $152,307 in tax deductions. This included a claim for $70,626 in work related car expenses (at D1) and $78,884 in other deductions (at D15). Part of the D1 – work related car expenses of $70,626 included the cost of parts required to repair Mr Mathews' car after an accident which totalled $66,600. There were no invoices for these parts, instead there was a list of dates and amounts on an invoice prepared by Douglas. The most significant D15 expense was $73,200 for mineral exploration drilling equipment which he labelled 'consumables'.

The work-related car expenses related to three vehicles used by Douglas to carry out the work for Hays and Pilbara Drilling. This included registration, fuel, engine oil, degreaser and a socket set. Despite being provided with a car by Hays he used his own vehicles for travel as he thought the vehicle provided to him unsuitable.

On 4 August 2020, the Commissioner of Taxation commenced an audit of Douglas in respect to the deductions claimed for work related car expenses and other deductions. On 17 September 2020, the Commissioner advised that these deductions were disallowed, The Commissioner subsequently issued an amended notice of assessment.

On 18 October 2020, Douglas objected to the notice of assessment. On 2 August 2021, the Commissioner allowed the objection in part by allowing deductions of $844.

Douglas sought a review of the objection decision in the AAT.

In the AAT, Douglas submitted that he had been engaged by Hays and Pilbara Drilling not as employee but as an independent contractor through his business and that the deductions claimed were expenses incurred in gaining or producing assessable income or were expenses that were necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income.

Given the urgent nature of the work for the Water Corporation and the fact that Hays would not contract with a sole trader, Douglas had entered into the Hays contract in his own name and not under his business name even though he intended to be engaged as an independent contractor.

Douglas also submitted that the income derived from the work performed for Pilbara Drilling was income produced in carrying on a business of exploration or prospecting for minerals or quarry materials. Relevantly, section 40-730 of the ITAA 1997 provides a deduction for expenditure on exploration or prospecting.

In evidence, Douglas stated the work he undertook for Pilbara Drilling consisted of mentoring and teaching.

Issues

1. Were the relevant deductions incurred in carrying on a business for the purposes of gaining or producing assessable income?
2. Were the relevant deductions incurred in the carrying on a business of exploration or prospecting for minerals, or quarry materials, obtainable by such operations?
3. Were the relevant deductions incurred in the course of gaining or producing assessable income?

Decision

The AAT first considered the nature of Douglas's engagement under the Hays contract. The Senior Member considered that doing so would be helpful in characterising amounts as capital, private or domestic in nature. In doing so, the AAT applied the case of *Construction, Forestry Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1. In particular, the AAT considered whether Hays or the Water Corporation had the right under the Hays contract to exercise control over the work that Douglas was engaged to perform and control over how the work is to be carried out.

The AAT considered that Douglas did not have control over the length and duration of his engagement under the Hays contract. Douglas was also required to comply with the directions of Hays and act in accordance with the undertakings in the Hays contract. The significant control Hays exercised over Douglas's work aligned with that of an employer. The fact that Hays deducted PAYG and made superannuation contributions on Douglas's behalf was also indicative of an employee/employer relationship.

Therefore, the AAT considered that Douglas was an employee of Hays under the Hays contract.

In respect of the arrangement between Douglas and Pilbara Drilling, the AAT considered that the work was personal services income. There was insufficient evidence that Douglas was carrying on a business, given the lack of business plan, projections or business financial records. There was also insufficient evidence that Douglas was carrying out prospecting or exploration activities. Although the purchasing of certain equipment was evidence that Douglas would conduct exploration activities in the future, Douglas had not in fact carried on exploration activities in the 2020 income year.

In respect of the work-related car expenses, the AAT considered that there was insufficient evidence to establish a nexus between the expenses and the income producing activities performed by Douglas. For instance, Douglas had failed to keep a detailed logbook in respect of the deductions claimed for fuel.

Therefore, the AAT determined that the work-related car expenses were not deductible.

In respect of the other deductions, such as the drilling equipment, the AAT considered the fact that Hays did not require Douglas to provide his own equipment was important. The AAT commented as follows:

> *These consumables did not seem to be required to produce his assessable income, but Mr Mathews made the decision to acquire them just in case something went wrong. I therefore do not think that there is a sufficient nexus between these expenses and the gaining and producing of Mr Mathews' assessable income.*

In respect to the other deductions claimed by Douglas, the AAT considered that Douglas failed to establish the link between the expenditure and the income producing activities. For instance, certain expenses such as an esky and basic clothing were all considered to be of a private nature. In respect of other expenses such as communications and IT, Douglas had failed to keep receipts and records of this expenditure.

COMMENT – it is not clear that in this case, even in if Douglas had kept a logbook for the vehicles, and had invoices for work done, that the Tribunal would have accepted that the vehicle usage had the necessary connection to the derivation of his assessable income for the expenses to be deductible.

If Douglas had been in business, then his choice to acquire items that may be needed as part of his work would be more likely deductible as being 'necessarily incurred'.

Citation *Mathews and Commissioner of Taxation (Taxation)* [2023] AATA 1329 (Senior Member Dr M Evans-Bonner, Perth)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1329.html

2.6 Anders – deduction for work-related self-education expenses

Facts

Timothy Anderson is a qualified teacher specialising in music.

Since 2015, Timothy has operated Octopus Music offering music lessons to students in Melbourne schools. In the 2021 income year, Timothy was a casual teacher at The Lakes South Morang College, teaching music to students in prep to year 9.

On 12 March 2021, Timothy commenced a Master of Public Policy and Management at the University of Melbourne.

Timothy enrolled in Political Problems & Policy and Governance subjects and sought to claim a deduction for work-related study expense totalling $14,582 in relation to the subject tuition fees.

On 7 September 2021, Timothy lodged his 2021 income year tax return.

On 7 December 2021, the Commissioner commenced an audit of Timothy's income tax return for the 2021 year.

On 13 December 2021, Timothy's tax agent provided details of Timothy's claimed deductions to the Commissioner. Relevantly, the cover letter stated:

In order to advance his prospects of promotion within the Education Department, the taxpayer undertook a Masters of Public Policy and Management.

The skillset derived from the Masters Degree will be used for his advancement to either Deputy Principal initially and the Principal with further management experience.

On 14 January 2022, the Commissioner issued an audit finalisation letter. Timothy's tax return for the 2021 year was amended to reflect that the claimed deduction was disallowed on the basis that there was no real and direct connection between the Masters Course and Timothy's work. No penalties were applied.

On 21 January 2022, Timothy objected to the audit decision. On 29 April 2022, the Commissioner disallowed Timothy's objection. On 29 April 2022, Timothy lodged an application for review in the AAT.

On 6 December 2022, prior to the hearing, Timothy provided a witness statement which outlined as follows:

1. that his motivation for studying the Masters course was to advance his career opportunities in secondary school teaching, both in terms of the breadth of subjects which he was able to teach and in terms of his promotion prospects;
2. his pathway to a leadership position had been thwarted by the lack of teaching opportunities; and
3. he aspired to 'move up the ranks' in secondary school teaching into a leadership role and ultimately to become the Principal of a secondary school.

During the hearing, Timothy provided the following evidence:

1. the work Timothy was doing was that of a primary school relief teacher, predominately as 'the music teacher who could fill in';
2. Timothy had no intention of seeking further employment in the 2020 or 2021 school years other than, that of a relief teacher as his primary focus was being a stay-at-home parent and running his instrumental music business; and
3. teaching was not Timothy's primary objective at the time of undertaking the study. That is, he intended to complete a Masters in the Arts and the subjects related to his overall goal of obtaining a leadership position.

Issue

Are the expenses incurred by Timothy in respect of the Masters course deductible in accordance with section 8-1 of the ITAA 1997?

Decision

The AAT confirmed that the test in section 8-1 of the ITAA 1997 is an objective test. That is, the reason or motive of a taxpayer incurring education expenses is not determinative of the question whether the expenses were incurred in gaining or producing income.

The AAT found that the subjects undertaken by Timothy in the 2021 year did not maintain or improve his skills or knowledge as either a music teacher or relief teacher, and they were not likely to lead to an increase in Timothy's income-earning activity as a relief teacher or as a music teacher.

The AAT concluded that Timothy undertook study in the 2021 year to capitalise on his new working arrangements which allowed him to fulfil his family commitments while providing additional time that he could devote to study.

Timothy's intention to expand his ability to teach in subjects outside of music and to gain leadership positions was not a sufficient basis for those expenses to be deductible. The AAT stated that this finding was consistent with other AAT cases. That is, expenditure incurred with the aim of securing or improving the prospects of obtaining new employment is not incurred in the course of gaining or producing income.

Therefore, the AAT was not satisfied for the purposes of section 8-1 of the ITAA 1997 that the work-related self-education expenses of $14,562 were incurred in gaining or producing Timothy's assessable income during the 2021 year. The assessments under review were affirmed.

Citation *Anders v Commissioner of Taxation* [2023] ATA 1471 (Member D Mitchell, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1471.html

2.7 Burswood Care – remission of SGC penalties

Facts

Burswood Care Pty Ltd as trustee for the Roshana Family Trust is a member of a group of entities that operate residential health care facilities in Western Australia.

In 2018, 2019 and 2021, the Commissioner conducted audits of the Roshana Family Trust's superannuation compliance with its superannuation obligations. Each audit resulted in amended assessments and penalty assessments.

Administrative penalties are imposed under part 7 of the SGAA. The Part 7 penalty is imposed automatically by the legislation and becomes an additional superannuation guarantee charge (**SGC**) in respect of that quarter. The amount of the additional SGC is equal to 200% of the SGC.

Section 62(3) of the SGAA gives the Commissioner the discretion to remit the penalties in certain circumstances.

The Commissioner exercised the discretion to remit in full the Part 7 penalties that were otherwise payable on the amended assessments raised following the 2018 and 2019 audits. The penalties remitted amounted to $5,555,180.

However, on 13 October 2021, the Commissioner decided not to exercise the discretion for the Part 7 penalties of $966,602 that were otherwise payable on the amended assessments raised following the 2021 audit.

The trustee of the Roshana Family Trust sought review of the decision not to remit the penalties in the AAT.

The ATO has published Practice Statement Law Administration, PS LA 2021/3 *Remission of additional superannuation guarantee charge*, which sets out the policy which guides ATO officers in the exercise of the discretion to remit pursuant to section 62(3). One of the steps set out in the PS LA is to consider any other mitigating facts or circumstances that warrant further remission.

The trustee contended that the penalties should be remitted in full due to the fact that:

1. during the relevant periods, the Roshana Family Trust acquired new facilities, which rapidly increased the number of employees for which the Roshana Family Trust was responsible;
2. many of the group's facilities required significant repairs and were financially unstable;
3. the aged care industry was severely impacted by COVID-19 during the relevant periods;
4. several key personnel, including accounting staff, were unable to re-enter Western Australia due to the State's border closures for much of the period;
5. COVID-19 and the constricted labour market made it difficult to recruit and retain appropriately qualified staff in the accounting and payroll departments; and
6. failure to remit the penalty would be harsh in the circumstances, given the financial position of the business.

The Commissioner argued that the power to remit was based on the level of culpability of the employer, not the relief of hardship. As such, the Commissioner contended that the decision-maker was required to have regard to the facts and circumstances which prevented the taxpayer from complying with its obligations in the first place and not the hardship that might be caused by the imposition of the penalty on the employer.

Issue

Should the Commissioner have exercised the discretion in section 62(3) of the SGAA to remit the Part 7 penalties?

Decision

The AAT considered that the remission power in section 62(3) is a narrow power that looks to the level of culpability and not the hardship that might be suffered by the employer. The AAT reasoned that the power should be interpreted narrowly the penalty regime was in place to ensure compliance with their obligations by an employer, and that if they did not comply then the hardship was instead suffered by an employee that did not have their superannuation contributions paid. This was despite case law considering other remission powers of the Commissioner being interpreted to apply narrowly only because there were broad powers to provide relief in relation to hardship elsewhere in tax law.

The AAT considered that most of the challenges that led to the non-compliance were the result of inadequate resources and shortcomings in internal processes that persisted over a relatively long period. The Roshana Family Trust was not organised to meet its obligations and prioritised expansion over obligations owed to employees.

While COVID-19 was an external factor beyond the Roshana Family Trust's control, the AAT stated that it was not clear how the pandemic restrictions seriously compromised the Roshana Family Trust's capacity to administer its superannuation obligations in any practical sense.

The AAT noted that the Commissioner had previously been lenient by remitting significant penalties in full. Having regard to all the relevant circumstances that reflect on culpability, the AAT was unable to conclude the penalty was harsh and that it ought to be further remitted. The AAT affirmed the objection decision.

COMMENT – while the Deputy President in this case considered hardship imposed on an employer to be an irrelevant factor in a decision to remit, presumably hardship imposed on an employer could lead to staff layoffs which could lead to hardship for employees. As such, you should strongly consider including the impact on the business of the imposition of penalties in any remission request.

Citation *Burswood Care Pty Ltd (ACN 154 327 545) as trustee for Roshana Family Trust and Commissioner of Taxation* [2023] AATA 1468 (Deputy President B J McCabe, Perth)
w https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/1468.html

2.8 Pappas – transfers partly in conformity with the will

Facts

Eugenia died in February 2021 and was the owner of the Weston Property which was her principal place of residence at the date of her death. The Weston Property is located in the ACT.

Eugenia had three children, Bill, Paul and Georgina who were the residuary beneficiaries of her will. The will made provision to each of the children in equal shares.

Bill is the executor of the Eugenia's estate.

As at the date of death, the Estate consisted of the following:

1. the Weston Property, valued at $1,000,000;
2. proceeds of bank accounts held with the St George Bank in the sum of $328,764; and
3. proceeds of bank accounts held with the ANZ Bank in the sum of $28,465.

The will contained an express provision that allowed the trustee to be able to appropriate any part of the real property of the estate in satisfaction of a share of any person in the estate.

Bill wished to receive his share in the estate by way of an *in specie* transfer of the Weston Property, while his siblings would receive their share of the estate in cash.

The beneficiaries agreed that Bill and his wife Helen Pappas would purchase the balance of the estate interest in the Weston Property from the estate to enable the full transfer of the Weston Property to Bill and Helen, respectively.

The deed of family arrangement comprised:

1. each party was entitled to approximately $450,000 (after expenses);
2. Bill would receive his entitlement by way of an *in specie* transfer of the Weston Property to the value of $450,000;
3. Bill would purchase an additional share in the Weston property so that he would receive a 50% interest in the Weston Property as a tenant-in-common; and
4. Helen would purchase the remaining share in the Weston Property to be a tenant-in-common with Bill.

On 28 October 2021, a title search was obtained which showed that the title of the Weston Property was held in Bill's name as executor.

On 24 November 2021, settlement occurred between the Commonwealth Bank (as the incoming mortgagee for Bill and Helen) and the Estate.

On 25 November 2021, the sum of $570,000 was banked into the trust account of the lawyers for the Estate.

On 1 December 2021 a draft distribution statement, noting that each beneficiary was entitled to a distribution from the estate in the sum of $447,570, was approved. Cash distributions of $447,570 were made to each of Paul and Georgina to reflect their one third share of the estate.

On 5 January 2022, a Duties Notice of Assessment was issued in respect of the Weston Property. The notice was for the sum of $18,597, calculated on the basis that the transfer to Bill and Helen was a transfer made partly in conformity with a trust contained in the will, and therefore, the 'dutiable value' of the Weston Property was $666,600 (being two thirds of the full dutiable value of the Weston Property, or $1,000,000 property value reduced by one-third).

On 23 February 2023, Bill objected to the assessment. Bill argued that the dutiable value of the Weston Property was $550,000. He reached this number by deducting the value of his interest under the will from the value of the property (i.e. $1,000,000 less his entitlement under the will). The Chief Commissioner disallowed the objection, and Bill made an application to the ACT Civil & Administrative Tribunal (**ACAT**) for review of the decision.

Presidential Member H Robinson considered the operation of section 232D of the Duties Act. This section establishes an exemption to the usual imposition of duty on transfer of dutiable property, where the dutiable property is transferred in conformity with, or partly in conformity with the will. Section 232D(3) provides that the following formula applies to determining the dutiable value of a transfer of dutiable property partly in conformity with the will:

> ***x – y***
> ***x*** *means, if all the dutiable property were transferred in conformity with the trust, the unencumbered value of the property*
> ***y*** *means the unencumbered value of the beneficial interest in the property transferred in conformity with the trust.*

The parties agreed that *x* was equal to $1,000,000 (based on the formal valuation of the Weston Property).

The dispute was in relation to the value of y.

In order to calculate *y,* Presidential Member H Robinson needed to decide whether *y* is equal to the value of the dutiable property transferred in conformity with the trust, or the value of the express beneficial interest in the property transferred in conformity with the trust (i.e. is *y* $333,000, being 1/3 of the value of the Weston Property, or $447,430, being 1/3 of the value of the Estate).

Issues

1. What is the value of the property transferred?
2. Whether the transfer has been made in conformity with the will?

Decision

The ACAT held that the word 'the' before the word 'property' in section 232D referred to a definite and identifiable property and that the equation is referring to the dutiable property, not all the property transferred under the will.

The ACAT confirmed that the reference to 'the property' in section 232D can only mean the dutiable property (here the Weston Property) and as such the value of *y* is $333,400 being one third of the dutiable property transferred.

The ACAT confirmed the Chief Commissioner's decision.

COMMENT – the interpretation of the duty reduction provision in NSW is the same as this ACT decision.

Citation *Pappas v Commissioner for Revenue* [2023] ACAT 24 (Presidential Member H Robinson, Australian Capital Territory)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2023/24.html

2.9 Earlmist – GST creditable acquisitions

Facts

In 1985, Westpoint commenced business in Perth (**Westpoint Group**). The Westpoint Group comprised of approximately 157 related corporate entities and trusts of which the ultimate controller was Norman Carey. The group developed residential and commercial property projects until it collapsed in 2005.

Between 1985 to 2005, the Westpoint Group completed over $900 million in projects. At its collapse, the Westpoint Group was in the process of undertaking projects worth over $2.2 billion, and it had around $200 million worth of new projects 'in the pipeline'.

By 2005, the Westpoint Group directly employed approximately 400 employees and collectively engage over 1000 contractors.

The Westpoint Group conducted business according to its 'Integrated Development Process'. Under that process, the Westpoint Group would identify a project it was considering and then established a company as a 'special purpose vehicle' to secure the relevant land through a conditional contract. The special purpose vehicle would be responsible for delivering the development.

In each case, the special purpose vehicle would act as trustee of a trust. The beneficiaries of these trusts were interests associated with Norman. The special purpose vehicle also engaged with other group companies throughout various stages of the development. Relevantly:

1. Westpoint Corporation Pty Ltd (**Westpoint Corporation**) which operated as the central treasury for the entire Westpoint Group. Westpoint Corporation would organise funding for the special purpose vehicle that was sourced from other group companies;
2. Westpoint Constructions Pty Ltd (**Westpoint Constructions**) which carried out design and construction of the project for the special purpose vehicles. Westpoint Constructions engaged employees and contractors; and
3. Westpoint Realty Pty Ltd (**Westpoint Realty**) which carried out marketing and property management activities in respect of each project.

Following the lodgement of in 2012 of BASs by the SPV Entities for the periods ending in late 2005 and early 2006, the Commissioner initiated a review. The Commissioner revised the BASs to nil on the basis that the SPV Entities were not entitled to any input tax credits and were not owed any refunds. The Commissioner issued reassessments to the SPV Entities to this effect.

The applications for review were commenced in the AAT by certain special purpose vehicle entities (**SPV Entities**). The applications were made on the basis that the SPV Entities made creditable acquisitions when they acquired taxable supplies from Westpoint Corporation, Westpoint Constructions and Westpoint Realty

(and from other entities in the Westpoint Group). The applications related to five developments undertaken by five SV entities.

The SPV Entities relied upon certain documentation in discharging their onus of proof. As the relevant events occurred nearly two decades ago the documentary evidence available and the recollection of available witnesses was degraded through this passage of time. Further, the litigation involving ASIC and external receivers, managers and liquidators after the collapse of the Westpoint Group has further degraded the available evidence.

The documentation tendered by the SPV Entities was predominantly unstamped. These documents included: agency agreements, loan agreements, sale of land agreements and design and construction contracts. Relevantly, section 27(1) of the *Stamp Act 1921* (WA) (**Stamp Act**) provides (with **emphasis**):

> *Except as otherwise provided by a stamp Act* ***no instrument chargeable with duty and executed in Western Australia****, or relating, wheresoever executed, to any property situate or deemed to be situate or to any matter or thing done or to be done in Western Australia,* ***shall****, except in criminal proceedings,* ***be pleaded or given in evidence*** *or admitted to be good, useful, or available in law or equity,* ***unless it is stamped in accordance with the law*** *in force at the time when it was first executed.*

The SPV Entities argued that pursuant to section 79 of the *Judiciary Act 1903* (Cth) the laws of evidence are not binding on the AAT, on the basis that the AAT is a part of the executive branch of government.

Issues

1. Could the SPV Entities rely on the unstamped documents during the AAT proceedings?
2. Did the Westpoint Companies make creditable acquisitions from related entities such that the Westpoint Companies were entitled to claim input tax credits on taxable supplies referred to in the disputed tax invoices?

Decision

Duty

The AAT accepted the argument by the SPV Entities that the AAT is not bound by the rules of evidence pursuant to section 79 of the Judiciary Act.

The AAT also noted the operation of section 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) which provides that the AAT *'is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate'*.

The documents that were sought to be relied on the proceedings were subsequently lodged for stamping under section 27(3) of the *Stamp Act 1921* (WA). Therefore, while the AAT reasoned that it would be appropriate to have regard to these documents, the AAT identified that the failure to stamp the documents reflected on the integrity of the record-keeping of the SPV Entities. Therefore, this would have implications on the weight given to these documents.

GST

For each SPV Entity, the AAT considered the nature of the arrangement between the SPV Entities, Westpoint Corporation, Westpoint Construction and Westpoint Realty and the invoices relied upon by the SPV Entities.

In summary, the AAT affirmed each objection decision on the basis that the SPV Entities failed to discharge their onus under section 14ZZK of the TAA. Namely, the AAT stated that the evidence relied upon by the SPV Entities shared the following characteristics:

1. all the contracts and agreements relied upon were signed by Norman as director and Graeme Rundle as secretary;
2. it was unclear who made the alleged creditable acquisitions;
3. there was no clear legal basis upon which some of the SPV Entities could charge Westpoint Realty for agency or management fees given the doubts over whether the SPV Entities were the owner or prospective owner of the land;
4. a search of the accounts of Westpoint Constructions and Westpoint Realty do not show the corresponding loan drawdowns and the amounts payable under the tax invoices provided by some of the SPV Entities;
5. there was an absence of mutual book entries for the associated entities showing the set-off;
6. the reports of affairs are inconsistent with the existence of inter-company debts;
7. the failure to contemporaneously stamp certain contracts raised concerns about their integrity;
8. there were doubts as to the validity of the appointment of certain SPV Entities as trustees of trusts within the Westpoint Group; and
9. different versions of building contracts raised doubts about which building contract was the actual building contract.

The AAT concluded that, in relation to all five developments, it was not satisfied that the SPV Entities had discharged their onus of demonstrating the assessments were excessive or otherwise incorrect and what the assessment should have been.

Citation *Earlmist Pty Ltd as the trustee for the Earlmist Unit Trust v Commissioner of Taxation (Taxation)* [2023] AATA 978 (Deputy President B J McCabe and Senior Member Dr M Evans-Bonner, Perth)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/978.html

2.10 Concreting and Formwork Personnel – appointment of officeholders

Facts

Francis Eltakchi operated formwork and concreting businesses and companies and had done so for over 30 years. His wife, Jennifer Dib, assisted him with administrative tasks for his businesses and companies, but had no authority or involvement in decisions concerning the management of those businesses and companies.

In June 2018, Francis was advised by his accountant, Sam, that in order to reduce payroll tax, Francis should set up a new company to hire employees for his business and appoint a person other than himself as the director of that company. Francis instructed Sam to appoint his wife Jennifer as the director of the new company.

A few days later, Sam emailed Francis the documents to incorporate the new company, including a consent to act as public officer, consent to act as director, and consent to act as secretary which relevantly named Jennifer as the appointee and provided for her signature.

Francis told Sam that he would not be able to provide the signed documents that day but that Sam should proceed to register the company regardless. Sam agreed to do so.

Following this, on 6 July 2018, Concreting and Formwork Personnel Pty Ltd was incorporated. On the date of incorporation, Jennifer was overseas. She had departed Australia on 1 July 2018 and returned on 19 July 2018. Jennifer was not aware at any time that she was recorded as the sole director and company secretary of the company and did not any sign documents on behalf of the company in any capacity.

In July 2019, Francis instructed Sam to remove Jennifer as the director and secretary of Concreting and Formwork Personnel and to appoint Francis in her place, so that he could open a bank account in the name of the company.

On 16 September 2019, Sam lodged a Form 484 with ASIC purporting to give notice of this change of office holders.

On 14 November 2019, the Commissioner issued a penalty notice to Jennifer in respect of PAYG withholding amounts totalling $523,351 that Concreting and Formwork Personnel had failed to pay during the time that Jennifer was, on the register maintained by ASIC, recorded as the sole director of the company.

Jennifer did not become aware of the penalty notice until around August / September 2022, because the penalty notice had been sent to an old address for the company. Upon becoming aware of the penalty notice, Jennifer was informed by Francis that she had been a director and company secretary of Concreting and Formwork Personnel for a period of time and that he had arranged for his accountant to appoint her as an officer of the company while she was overseas.

In the meantime, on 17 January 2020, the company went into liquidation under a creditors' voluntary winding up. The liquidator appointed to the company was Schon Gregory Condon.

Jennifer's solicitors corresponded with the liquidator and the accountant regarding whether there was any signed consent from Jennifer to act as director and company secretary of the company. In response to this:

1. on 16 November 2022, the liquidator sent a letter advising he had reviewed all of the company's books and records received from the accountant and had been unable to locate any consent to act as a director; and
2. on 21 November 2022, Sam sent an email which stated that his firm sent the documents for the incorporation of the company to Francis, who was 'tasked to organise the required signatures', but that 'we did not receive any such signed documents from the client'.

On 16 February 2023, Jennifer commenced proceedings in the Supreme Court of New South Wales seeking:

1. leave pursuant to section 500(2) of the *Corporations Act 2001 (Cth)* (**Act**) to commence these proceedings against Concreting and Formwork Personnel which at the time had been wound up;
2. declarations to the effect that she did not consent to act as, and was not appointed as, the company's director and company secretary on 6 July 2018 and that those purported appointments are void and of no effect.

The liquidator was a party to these proceedings and did not oppose the relief sought by Jennifer. The liquidator filed a submitting appearance.

On 28 April 2023, the Deputy Commissioner was joined as a party to the proceedings. The ATO neither consented to nor opposed the relief sought and submitted it would withdraw the penalty notice if relief was granted.

Issue

Whether, in the circumstances, it was appropriate for the Court to make the declarations to the effect that Jennifer did not consent to act as, and was not appointed as, the director and company secretary Concreting and Formwork Personnel on 6 July 2018 and that those purported appointments are void and of no effect.

Decision

William J granted the relief sought by Jennifer and made declarations that:

1. Jennifer did not consent to act as, and was not appointed as, the director or the company secretary of Concreting and Formwork Personnel on 6 July 2018;
2. Jennifer did not resign as director of the company on 20 August 2019; and
3. the purported appointment of Jennifer on 6 July 2018 as director and secretary of the company on 6 July 2018 is void and of no effect.

William J considered that the evidence given by Jennifer and Francis was consistent with documentary evidence, including the email from Sam dated 21 November 2022 and the books and records reviewed by the liquidator. It was also clear from Jennifer's unchallenged evidence about the nature of the work that she undertook in relation to the company that she did not, in fact, act as a director or secretary of the company.

Given this, William J was satisfied on the evidence that Jennifer was not validly appointed as, and did not in fact act as, director and secretary of Concreting and Formwork Personnel during the period from 6 July 2018 to 20 August 2019.

Citation *In the matter of Concreting and Formwork Personnel Pty Ltd ACN 627 355 480 (In Liquidation)* [2023] NSWSC 512 (Williams J, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/512.html

2.11 Eshchenko – relevant acquisitions for QLD landholder duty

Facts

On 29 July 1997, Maylake Pty Ltd was incorporated. At this time, George Gilltrap was Maylake's sole director and sole member, holding one redeemable preference share.

On 6 August 1997, Leonid Eshchenko became the sole director and secretary of Maylake, and was allotted one ordinary share. As the holder of all the ordinary shares on issue, Leonid held an entitlement to all distributions on the winding up of the company. It appears that George's shares at this time had been redeemed.

On 1 July 1998, Maylake allotted 2,999,999 ordinary shares to Leonid. These shares carried the same rights as the previous ordinary share issue on 6 August 1997. From that day, the share capital of Maylake comprised of 3,000,000 ordinary shares.

On 11 July 2013, Leonid as the sole shareholder entitled to vote on resolutions of Maylake, passed a resolution to insert a new Article 88 to the Constitution of Maylake, relevantly providing that:

(a) there would be two classes of shares comprising:
  (i) 3,990,000 ordinary shares; and
  (ii) 10,000 redeemable preference shares;
(b) the 3,990,000 ordinary shares rank pari passu and (subject to the rights of the holders of redeemable preference shares) carried the right to receive all dividends and all distributions upon a winding up; and
(c) the 10,000 redeemable preference shares rank pari passu and carried the right:
  (i) to receive 49% of any dividend declared by Maylake; and
  (ii) to receive 49% of any amount distributed to the members of Maylake upon a winding up.

On the same day, 10,000 redeemable preference shares in Maylake were issued to Ruslan Eshchenko, Leonid's son, providing him with the entitlement to a distribution of 49% of the property of Maylake on winding up.

On 21 June 2021, the shareholders of Maylake passed a special resolution to vary the share rights of the redeemable preference shares so that the issued 10,000 redeemable preference shares carried between them the right:

(a) to receive 100% of any dividend declared by Maylake; and
(b) to receive 100% of any amount distributed to the members of Maylake upon a winding up.

As a result of the 21 June 2021 special resolution, Ruslan acquired an additional entitlement to a distribution of 51% of the property of Maylake upon its winding up.

As at 21 June 2021, Maylake was the registered owner of the 5 properties in Queensland, with a total market value of $30,700,000.

On 23 June 2021, Leonid transferred all his 3,000,000 ordinary shares to Ruslan.

On 24 January 2022, Queensland Revenue Office (**QRO**) issued an assessment of landholder duty in the amount of $880,802 on a dutiable value of $15,657,000, being 51% of $30,700,000 that Ruslan acquired on 21 June 2021.

On 15 February 2022, Ruslan lodged an objection to the assessment.

Ruslan did not dispute that he had made a relevant acquisition in a private landholder within the meaning of section 158(1)(b) of the *Duties Act 2001* (Qld). However, he considered that the 51% interest acquired as a result of the variation of his share rights was an 'excluded interest' under section 179(6) of the Duties Act, on the basis that it was an interest held by Leonid, a related person of Ruslan, more than three years before the relevant acquisition, or at a time when the landholder did not hold land in Queensland.

Relevantly, section 179(6)(a) of the Duties Act provides:

> *(6) In this section—*
> ***excluded interest**, of a person who makes a relevant acquisition in a private landholder, is any interest constituting the relevant acquisition—*
> *(a) held by the person, or a related person of the person, on or before the day that is 3 years before the relevant acquisition, unless—*
> *(i) the interest was acquired as part of an arrangement; and*
> *(ii) the arrangement includes the interest most recently acquired as part of the relevant acquisition; or*
> *(b) acquired by the person, or a related person of the person, at a time when the landholder did not hold land in Queensland.*

On 31 March 2022, QRO disallowed Ruslan's objection. The objection was disallowed based on the following reasoning:

1. the term ‘excluded interest’ defined in section 179(6) applies only to an interest 'constituting the relevant acquisition'. This directs attention to section 158(1) and the three circumstances that will trigger a relevant acquisition;
2. the interest constituting the relevant acquisition is the aggregate of the interest acquired by Ruslan on 21 June 2021 (51%), and the existing interest held by Ruslan as at 11 July 2013 (49%), which totals 100%;
3. an interest is acquired if a person obtains an interest, or increases their interest, regardless of how this occurs;
4. the focus is on the person who has ‘acquired’ an interest in a landholder;
5. where the person acquires an interest from a related person (as in this case), it ceases to be held by the related person and therefore, it does not count towards the interests to be aggregated under section 158(1)(b);
6. interests held by related persons will only count as an interest constituting the relevant acquisition if held by the related person immediately before and after the relevant acquisition. In the present case, after the relevant acquisition there was only the interest held by Ruslan (not Leonid).

On 3 May 2022, Ruslan filed the notice of appeal in this proceeding.

Ruslan submitted that the unambiguous language of section 179(6) should be given a literal construction that excluded intragroup acquisitions. Ruslan submitted that, under the literal construction, the 51% interest Ruslan acquired by reason of the 21 June 2021 special resolution was an interest held by his father who had a 51% interest in Maylake, and therefore an excluded interest. Ruslan also submitted that nothing in the words of section 179(6) limits its operation to circumstances within section 158(1)(b) of the Duties Act.

Issue

Was the 51% interest acquired by Ruslan in Maylake an 'excluded interest' within the meaning of section 179(6) of the Duties Act?

Decision

The Supreme Court identified two matters to be considered when determining whether an interest held or acquired by a related person is to be treated as an interest of the person who makes the relevant acquisition under section 179(6) of the Duties Act. These two matters are:

1. the interest is to be an interest "constituting the relevant acquisition". This requires an examination of the circumstances in section 158 of the Duties Act which constitute an acquisition of an interest for landholder duty purposes; and
2. the time at which the interests which constitute the relevant acquisition are to be identified for the purpose of applying the definition in section 179(6) is the time of the relevant acquisition.

Based on this analysis, the Supreme Court held that the calculation of the dutiable value is a two-step process:

1. the first step is the identification of the component interests which constitute the relevant acquisition; and
2. the second step is the to identify which, if any, of the component interests are excluded from the calculation of dutiable value by the application of the definition in section 179(6). Section 179(6) makes no reference to the interest acquired by the person *at the time* the relevant acquisition is made, it only refers to interests held by the person, or a related person, *before* the relevant acquisition was made or interests acquired at a time when the landholder did not hold land in Queensland.

The Supreme Court concluded that the legislative intent was not to exclude interests Ruslan acquired from Leonid at the time of the relevant acquisition, but rather to exclude interests held by Ruslan or Leonid at the time of the relevant acquisition but acquired *before* the relevant acquisition was made.

The Supreme Court concluded that the 51% interest in Maylake which Leonid ceased to hold on 21 June 2021 was not an interest of Ruslan which constituted a relevant acquisition for the purposes of section 179(6) of the Duties Act. Therefore, it followed that the 51% interest Ruslan acquired on 21 June 2021 was not an excluded interest within the meaning of section 179(6) of the Duties Act.

Citation *Eshchenko v Commissioner of State Revenue* [2023] QSC 100 (Cooper J, Brisbane)
w https://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2023/100.html

2.12 Resilient Investment Group – priority dispute and R&D refund and true employer

Facts

Spitfire Corporation Limited (in liquidation) was the parent company of the Spitfire group which comprised 7 wholly owned subsidiaries and relevantly included Aspirio Pty Ltd (in liquidation). The Spitfire group is tax consolidated and has a tax sharing agreement effective from 1 July 2015.

The Spitfire group developed and acquired wealth management and share analysis technology platforms. As part of the business, Spitfire engaged in research and development (**R&D**) activities that qualified it to receive a tax offset from the Commissioner of Taxation at the end of each financial year.

The Spitfire group employed 42 employees at different times. Spitfire was the employer of six executives of the group, and Aspirio was the employer of all other group employees. In relation to those employees, Aspirio was the contracting entity, however there were various references to 'the Group' in the group employees' employment agreements with Aspirio, which was defined to include the Spitfire group. Aspirio paid wages, superannuation and other entitlements to employees of the Spitfire Group and reported PAYG. Aspirio was identified as the payer on payslips issued to the employees.

Aspirio did not conduct any business on its own or have any functions external to the Spitfire group, nor did it charge a management fee in connection with being the 'employer entity' of the Spitfire group. The manner in which Aspirio satisfied the obligations it had to the employees of the Spitfire group was as follows:

1. Spitfire paid money out of its own bank account to employees or their superannuation funds (with respect to wages and other entitlements), workers compensation insurers (with respect to workers compensation premiums) and the Commissioner (with respect to PAYG withholding tax); and
2. amounts paid by Spitfire were added to the loan balance owing by Aspirio to Spitfire at any given time, by way of book entry.

On 29 April 2019, Spitfire entered into a convertible note trust deed and general security deed with Resilient Investment Group Pty Ltd. Pursuant to these agreements, Spitfire borrowed $3 million from Resilient and granted Resilient a security interest over its present and after-acquired property. Resilient registered its interest on the PPSR.

On 7 August 2020, Elizabeth Barnet and Damien Hodgkinson were appointed as joint and several administrators of Spitfire and several subsidiaries, including Aspirio.

On 4 November 2020, Spitfire and some of its subsidiaries executed a deed of company arrangement. On 19 February 2021, the DOCA was terminated and those companies were placed into liquidation.

The Commonwealth Attorney-General's Department made advances to Spitfire and Aspirio, for the purposes of payment of outstanding wages, superannuation contributions and leave of absence.

During the course of the liquidation, the liquidators caused Spitfire to submit tax returns for the 2019 and 2020 income years, including a research and development tax incentive application and a claim for research and development tax offsets, and received tax offset refunds totalling some $2 million for the 2019 and 2020 income years (**R&D Refunds**).

Resilient, as the secured creditor, and the Commonwealth of Australia, as a subrogated employee creditor under section 560 of the *Corporations Act 2001* (Cth), each claimed priority to the R&D Refunds. To the extent that Spitfire was the true employer of the employees engaged by Aspirio, the Commonwealth had reserved its right to increase its claim in the winding up of Spitfire to take into account of those employees' claims.

Section 561 of the Corporation Act relevantly provided that in the winding up of a company, certain categories of debt due to employees specified in section 556, and any amount in respect of which priority is given by section 560 for advances to a company to make such payments to employees, should be preferred to the claims of a secured creditor in relation to a 'circulating security interest'.

Whether Resilient's security interest in the R&D Refunds was a 'circulating security interest' depended upon whether the R&D Refunds were a 'circulating asset' of Spitfire for the purposes of section 340 of the *Personal Property Securities Act 2009* (Cth) at the appointment date. Section 340(1) relevantly defines a 'circulating asset' as 'personal property, which includes an 'account', being a 'monetary obligation' that 'arises from' providing services 'in the ordinary course of a business providing services of that kind'.

Consistent with case law, 'monetary obligation' is 'an existing legal obligation on another party to pay an identifiable monetary sum to the company on an ascertainable date'.

If the R&D Refunds were a 'monetary obligation', then those amounts are required to be applied by the liquidators to satisfy the employee entitlements of Spitfire's employees under section 556(1) the Corporation Act in priority to Resilient's claim as secured creditor.

In around September/October 2021, the liquidators applied to the Supreme Court for directions concerning the distribution of the R&D Refunds.

On 25 March 2022 and 12 May 2022, the primary judge held that:

1. the R&D Refunds were 'circulating assets' of Spitfire at the appointment date, being personal property of Spitfire under section 340(1)(a) of the PPSA because the R&D Refunds were an 'account' withinsection340(5)(a) of the PPSA;
2. the employees in respect of whom Aspirio was the employer of record were employees of Spitfire as Aspirio had engaged those employees as an agent of Spitfire, an undisclosed principal; and
3. the Commonwealth was entitled to the R&D Refunds as the subrogated employee creditor of Spitfire under section 560 of the Corporation Act, subject to any equitable lien of the liquidators in respect of their costs, expenses and remuneration in connection with the R&D Refunds.

Resilient appealed the decision and contended that the primary judge erred in finding that:

1. the R&D Refunds were 'personal property' of Spitfire for the purpose of section 340(1) of the PPSA;
2. if the R&D Refunds were an account, whether it 'arose from' providing services pursuant to section 340(1)(a) of the PPSA;
3. Spitfire was the true employer of the 'named employees' for the purposes of Pt 5.6, Div 6 of the Corporation Act.

In relation to whether the R&D Refunds were 'personal property', Resilient's contention was that Spitfire's claim to the R&D Refunds was at most a right to require the Commissioner to perform his duties under the tax legislation, which does not create a debt or proprietary right in favour of Spitfire. Resilient submitted that the earliest point in time at which Spitfire could be said to have any 'property' arising from the right or claim to the R&D Refunds arose upon the making of an assessment by the Commissioner, which occurred after the appointment date.

The Commonwealth's argument was that Spitfire's claim to the R&D Refunds automatically arose at the conclusion of the relevant income year for 2019 and 2020, and that the statutory entitlement to receive the tax offset refunds was a chose in action.

If the R&D Refunds were a 'monetary obligation' at the appointment date, Resilient submitted the R&D Refunds did not arise from Spitfire providing services in the sense of 'in the ordinary course of a business of providing services of that kind'. That is Spitfire was a consumer of goods and services in undertaking research and development activities, not a provider of goods and services.

The Commonwealth submitted that there was a casual nexus between the money obligation and the provision of services, as the purpose of the research and development activities by Spitfire was to advance, at some point in the future, the provision of services to customers.

In relation to whether Spitfire was the true employer of 'named employees', Resilient asserted that the primary judge erred in considering the substance and totality of the relationship in determining who the employer of certain employees was. Resilience submitted that the High Court's decisions in *Personnel Contracting*, *Workpak* and *ZG Operations* meant that written agreements should be decisive of the character of the relationship.

The Commonwealth asserted that the inconsistency alleged by Resilient regarding the three High Court cases is not relevant in this case because the identity of the employer can be (and was) determined by reference to principles of agency.

Issues

1. Whether the R&D Refunds were 'personal property' of Spitfire for the purpose ofsection340(1) of the PPSA.
2. Whether the R&D Refunds were 'circulating assets' pursuant tosection340(1)(a) of the PPSA.
3. Whether Spitfire was the true employer of the Aspirio employees for the purposes of Pt 5.6, Div 6 of the Act.

Decision

As to whether the R&D Refunds were an account (i.e., 'monetary obligation')

The Court of Appeal considered that, read in context, the provisions of the tax legislation which provide for an entitlement to tax offset refunds for R&D expenditure do not impose an obligation on the Commissioner to pay a tax offset refund to the taxpayer at the end of an income year, and an R&D entity does not have a chose in action against the Commonwealth at the end of the income year for a tax offset refund.

Given this, the R&D Refunds were not an 'account' (i.e. monetary obligation) at the appointment date for the purpose of section 340(5)(a) of the PPSA.

As to whether the R&D Refunds 'arise from' providing services

Although, this question would only arise if it was held that the R&D Refunds were a 'monetary obligation at the appointment date', the Court of Appeal considered that the words 'arise from' do not require the 'account' to arise in the ordinary course of business. Instead, the 'account' must arise from the provision of services by Spitfire which must be provided in the ordinary course of a business of providing financial platform services.

The Court of Appeal stated that the Commonwealth's position ignored the significance of the definitions of core R&D activities and supporting R&D activities. It is an error to equate R&D activities in the form of experimental activities whose outcome cannot be known or determined in advance, with the provision of services in 'the ordinary course of a business of providing services of that kind'.

Given this, the Court of Appeal stated that the primary judge erred in finding that the R&D Refunds answered the description of an account that arises from the provision of services 'in the ordinary course of providing services of that kind'.

As to the true employer issue

The Court of Appeal stated that ascertaining the identity of the employer is a separate question from ascertaining the 'character' or 'characterisation' of the relationship between the putative employee and his or her putative employer. There is no inconsistency between the application of orthodox contractual principles in determining the character of the parties' relationship the subject of a written agreement and the application of the principles of agency to determine the parties to a contract.

The Court of Appeal considered the evidence of the financial arrangements between Spitfire and Aspirio and the business model adopted by the Spitfire group, including that Aspirio did not carry on any business activities; had no assets or revenue from which to pay employees if called upon to do so; there was no labour hire arrangement between Aspirio and Spitfire; all employee payments were made directly by Spitfire; and the intercompany debt between Spitfire and Aspirio for employee payments was the subject of a deed of forgiveness.

The Court of Appeal held that Aspirio was acting as the agent for an undisclosed principal, Spitfire, in entering employment contracts with employees within the Spitfire group.

Citation *Resilient Investment Group Pty Ltd v Barnet and Hodgkinson as liquidators of Spitfire Corporation Limited* (in liq) [2023] NSWCA 118 (Gleeson JA, White JA, Brereton JA, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA//2023/118.html

2.13 Appeal update – XPTC

The Federal Court has dismissed the appeal brought by the Commissioner against the decision in *XPTC and Commissioner of Taxation (Taxation)* [2022] AATA 4147 (see our February 2023 Tax Training Notes). In that case, XPTC had paid a settlement sum and legal fees in relation to alleged unauthorised transactions entered into during the course of his employment. The settlement sum and legal fees relating to the settlement were held to be deductible. XPTC's legal fees related to liquidation of XPTC's company and threatened defamation proceedings were not deductible, as they were not incurred in the course of gaining or producing XPTC's assessable income.

Citation *Commissioner of Taxation v Wood* [2023] FCA 574 (Stewart J, New South Wales)
w https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca0574

2.14 Other tax and superannuation related cases in period of 9 May 2022 – 7 June 2023

Citation	Date	Headnote	Link
Vicinity Funds RE Ltd v Commissioner of State Revenue (No 3) [2023] VSC 278	29 May 2023	TAXATION – Statutory construction – *Taxation Administration Act 1997* (Vic) – Appeals from determinations of Commissioner disallowing objections to assessments of dutiable value of land – *Duties Act 2000* (Vic)section22(3) – Nature of relevant state of satisfaction of Commissioner – Request for discovery and particulars – Refused – Whether applicants entitled to impugn state of non-satisfaction of Commissioner at earlier time of assessing liability to taxation as well as at later time of disallowing determination objections – Extent of entitlement – Power of court to order discovery and particulars – Supreme Court (Miscellaneous Civil Proceedings) Rules 2018 (Vic) r 7.06 – *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353– *Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* [1975] HCA 5; (1976) 132 CLR 535 – *Binetter v Commissioner of Taxation* [2003] FCA 687; (2003) 130 FCR 135 – *Jilani v Wilhelm* [2005] FCAFC 269; (2005) 148 FCR 255 – *WA Pines Pty Ltd v Bannerman* [1980] FCA 79; (1980) 41 FLR 175 – *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 606 – Application dismissed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/278.html
Condon v Commissioner of Taxation [2023] FCA 561	2 June 2023	TAXATION – appeals pursuant tosection14ZZ(1)(a) of the Taxation Administration Act 1953 (Cth) in respect of assessments made undersection167 of the Income Tax Assessment Act 1936 (Cth) – assessments made by the Commissioner applied 'asset betterment method' – nature of the onus of proof taxpayer is required to satisfy undersection14ZZO(b)(i) of the Taxation Administration Act 1953 (Cth) – obligation of taxpayer to show what their	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/561.html

		assessable income was in relevant year – insufficient to attempt to establish that Commissioner's asset betterment statements were in error – taxpayer unable to establish what his assessable income was in each year of income – appeals dismissed EVIDENCE – onus of proof – taxpayer's evidence neither reliable nor credible – taxpayer's affairs characterised by undocumented, cash transactions in respect of which no records were kept – absence of corroborating or supporting evidence – taxpayer unable to establish necessary facts to prove his actual assessable income on his evidence alone	
Chief Commissioner of State Revenue v Shell Energy Operations No 2 Pty Ltd [2023] NSWCA 113 (Kirk JA, Griffiths AJA and Adamson JA, Sydney)	26 May 2023	TAXES AND DUTIES — Vesting orders — Power sufficiently broad under the Electricity Generator Assets (Authorised Transactions) Act 2012 (NSW) to authorise vesting of interests owned by the Water Administration Ministerial Corporation — Purposive considerations especially significant in relation to poorly drafted instruments — Construction of practical documents meant to achieve a practical end — Achieving certainty in identification of assets for sale by privatisation — Vesting orders legally severed the interests in the items constituting the power stations TAXES AND DUTIES — Dutiable transactions — Dutiable property — Whether items constituting power stations were fixtures, innominate sui generis property or "goods" — Items in question had been goods but became part of the land when affixed — Statutes may operate by reference to general law notions — Duties Act does not alter conclusion that the items were "goods" liable to duty — Even if innominate sui generis interests would still be liable to duty TAXES AND DUTIES — Whether primary judge fell into error by considering if the leases were a "driver of value" — Finding that the bare lease agreements contributed to value did not foreclose the finding that the water agreements were fundamentally more important — Primary judge did not mistake the facts in House v The King sense	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2023/113.html

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		
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		
Treasury Laws Amendment (2023 Measures No. 2) Bill 2023	10/05	25/05			

3.2 Miscellaneous tax amendments

On 10 May 2023 the *Treasury Laws Amendment (2023 Measures No. 2) Bill 2023* was introduced into Parliament. The Bill includes a number of tax measures, many of which were budget measures.

Medicare levy and Medicare levy surcharge income thresholds

This amendment will increase:

1. the Medicare levy low-income thresholds for individuals and families (including the dependent child/student component of the family threshold) to be in line with changes in the CPI;
2. the Medicare levy low-income thresholds for eligible individuals and eligible families of the seniors and pensioners tax offset (including the dependent child/student component of the family threshold), to be in line with changes in the CPI; and
3. the Medicare levy surcharge low-income threshold to be in line with the changes of the CPI.

These amendments commence from the 2022-2023 income year.

Maintaining the Commonwealth Bank superannuation fund guarantee

This amendment confirms the guarantee that was provided by the Commonwealth Bank to the CBA Super fund members, who were members prior to the privatisation of the Commonwealth Bank that they are still not at risk of losing their superannuation following the privatisation of the Commonwealth Bank.

This will commence on the day after the Bill receives Royal Assent.

Tax accounting for primary produce registered emission units

This amendment allows eligible primary producers to treat certain carbon abatement income as primary production income for the purposes of the Farm Management Deposit Scheme. It will also allow primary producers to access income tax averaging arrangements.

This will commence on the first 1 January, 1 April. 1 July or 1 October, the Bill receives Royal Assent.

Cash flow relief for small and medium businesses

This amendment reduces the GDP adjustment factor for the 2023-2024 income year to 6 per cent.

The Commissioner relies on the GDP adjustment factor to work out the amount of PAYG and GST instalments payable by a taxpayer.

This amendment will commence from the 2023-2024 income year.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7023

3.3 NSW Duties Amendments

The *Revenue Legislation Amendment Act 2023* (NSW) commences on 1 July 2023.

The Act will amend the Duties Act 1997 (NSW) to remove the 10% concession available to public landholders regarding the amount of duty payable.

It also amends the *Land Tax Management Act 1956* (NSW) to provide for an extension of time, from 4 to 6 years, during which unoccupied land can be treated as a person's principal place of residence for land tax.

w https://legislation.nsw.gov.au/view/html/bill/1277d9ee-b64d-4913-bb68-81032aedc582

On 23 May 2023, the *First Home Buyer Legislation Amendment Bill 2023* (NSW) was introduced to Parliament and proposes to:

1. amend the *Duties Act 1997* (NSW) to:
   (a) require a person to reside in a home as the person's principal place of residence for a continuous period of at least 12 months to be eligible for a duty exemption or concession;
   (b) the revise values for property to be eligible for the purposes of the First Home Buyers Assistance Scheme. Specifically, that a property having a private dwelling built on it must have a dutiable value of less than $1,000,000, rather than $800,000 as is currently the case;
2. amend the *Property Tax (First Home Buyer Choice) Act 2022* (NSW) to prevent a person making an election to pay property tax rather than stamp duty on a transfer of land occurring on or after 1 July 2023;
3. amend the *First Home Owner Grant and Shared Equity Act 2000* (NSW) to require first home buyers to reside in the home as their principal place of residence for a continuous period of at least 12 months to be eligible for a First Home Owner Grant.

As at 1 June 2023, the Bill is awaiting assent.

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18436

3.4 AFCA and superannuation complaints

The Government is seeking consultation on the *Treasury Laws Amendment (Measures for Consultation) Bill 2023* (Cth). The Bill proposed to amend the *Corporations Act 2001* to reinstate the Australian Financial Complaints Authority (AFCA) jurisdiction to hear complaints relating to superannuation, whether or not they meet the definition of a superannuation complaint in the Corporations Act.

The intention of the Bill is to reinstate the original policy intent following the decision in *MetLife v AFCA* [2022] FCAFC 173. The MetLife decision held that AFCA did not have jurisdiction to hear complaints relating to superannuation unless the complaint was specifically listed in section 1053(1) of the Corporations Act.

Written submissions to this consultation are required to be submitted by 16 June 2023.

w https://treasury.gov.au/consultation/c2023-396390

3.5 Superannuation work test

On 10 May 2023, the Deputy Commission of Taxation made the *Taxation Administration (Remedial Power – Work Test for Personal Superannuation Contributions) Determination 2023* (Cth).

The Determination modifies subsection 290-165(1A) of the ITAA 1997 to operate as if:

1. you will also meet the requirement in paragraph 290-165(1A)(a) if you worked for gain or reward as a covered person for at least 40 hours in any period of 30 consecutive days during the income year in which the contribution was made; and
2. you will also meet the requirement in subparagraph 290-165(1A)(b)(i) if you worked for gain or reward as a covered person for at least 40 hours in any period of 30 consecutive days during the income year ending before the income year in which the contribution was made.

The modifications made pursuant to the Determination apply in relation to contributions made on or after 1 July 2022.

w https://www.legislation.gov.au/Details/F2023L00564

4. Rulings

4.1 Individual residency ruling

On 7June 2023, the ATO published *Taxation Ruling TR 2023/1* which was previously issued as draft Taxation Ruling TR 2022/D2 (see our October 2022 Notes).

The Ruling replaces IT 2650 and TR 98/17. The Ruling was prepared to update the ATO's public position to reflect recent developments in case, including the decisions in *Harding v Commissioner of Taxation* [2019] FCAFC 29, *Pike v Commissioner of Taxation* [2019] FCA 2185 and *Addy v Commissioner of Taxation* [2019] FCA 1768.

The finalised Ruling includes clarification at paragraphs [35] to [37] regarding the weight given to a person's subjective intention and objective circumstances in relation to the 'resides' test.

The finalised Ruling contains the following additional examples in response to feedback on the draft ruling.

Secondment

> *Example 2 - person in Australia for 8 months - resident*
>
> *114. Giovanna, a solicitor, comes to Australia for 8 months on a secondment to a large law firm. Giovanna is single. While in Australia, Giovanna is under the direction of, and is paid by, the Australian entity. Giovanna enters a fixed lease for 6 months with an option to extend on a month-by-month basis near her workplace and joins the local bushwalking club. During her secondment, her sister visits Australia and stays with her. Giovanna joins her sister on a short break in Australia taking paid leave from her employment.*
>
> *115. Giovanna exhibits behaviour that is consistent with residing here. She establishes a connection to Australia during her 8 months in Australia. Her accommodation, work, social and hobby arrangements demonstrates that she resides in Australia according to the ordinary concepts test.*

Some assets left in Australia

> *Example 6 - person leaving Australia - non-resident when they depart*
>
> *127. Sophie, an Australian resident for tax purposes, decides to start her own business in Singapore. Sophie has spent several years researching Singapore and has spent a number of months there over the last few years meeting with prospective clients and investors and deciding if it is the right move for her. On one of these trips she locates suitable business accommodation and takes all the necessary steps to legally commence her business in Singapore. It is Sophie's intention to live in Singapore with no set plans to return to Australia. She maintains a bank account and superannuation in Australia and sells or gifts her possessions to her adult children. One of her adult children will live in the family home rent-free. Sophie is accompanied by her spouse who runs a global consulting business from their home.*
>
> *128. They initially stay in short-term accommodation until they find a suitable long-term home. After 6 weeks, they purchase a home to live in. In the 2 years after leaving, Sophie and her spouse return to Australia only to attend the funeral of a close friend.*
>
> *129. Sophie is not a resident of Australia under the ordinary concepts test from the date of her departure. Her intention is to leave Australia indefinitely and her observable behaviours are consistent with this. Sophie's remaining connection with Australia (her superannuation and assets) are not, in Sophie's circumstances, consistent with continuing to reside in Australia.*

130. Sophie is not a resident under the domicile test because, although domiciled in Australia, she has abandoned residency in Australia and commenced living permanently overseas.

Delayed family relocation when leaving Australia

Example 10 - person out of Australia indefinitely - non-resident

141. Brian, an Australian resident, is unhappy with his current lifestyle and wants to move overseas, closer to his extended family in Vietnam. In July, he applies for and is successful in gaining a permanent full-time position in Nha Trang, Vietnam and departs Australia to take up his new position. Brian's family agrees to follow Brian to Vietnam in December when the children finish the school year, after which they will attend the international school in Nha Trang. Brian sells his car and other belongings and leaves his house for his wife and children to use until they move to Vietnam in December, after which he puts it on the market. In Vietnam, Brian rents an apartment that will accommodate his family when they move over to Vietnam. In the first 6 months away, Brian returns twice for a week at a time to visit his wife and children and help get the house ready for sale. During these visits, he resides with the family at their family home.

142. Brian is not considered to be a resident of Australia from when he departs under the ordinary concepts test as he is not residing here and intended to leave Australia indefinitely. While Brian's wife and children remain here, it is for a finite period of 6 months only and Brian's return visits are limited and specific and not consistent with ongoing residency.

143. Brian is not a resident under the domicile test because, although domiciled in Australia, he has abandoned residency in Australia and commenced living permanently in Vietnam.

144. Brian is not in Australia for 183 days so the 183-day test does not apply.

The feedback on the draft ruling also requested several examples that the ATO decided not to include when finalising the ruling. No example was included in relation to the situation of aircrew and ship crew visiting Australia in undertaking their duties, because the ATO considered it would be misleading without a consideration of the relevant double taxation agreement (DTA) which may contain specific Articles addressing employment income of ship crew.

No example was included in relation to individuals displaced by war, in COVID quarantine, receiving medical treatment or other circumstances beyond their control, on the basis that the situation is very fact dependent and a small change to the situation could have a material impact on the analysis.

ATO reference *TR 2023/1*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20231/NAT/ATO/00001

4.2 NSW Duties – transfer of farming property between family members

In May 2023, Revenue NSW published a new version (version 2) of Revenue Ruling DUT 050. The ruling provides a detailed interpretation of section 274 of the *Duties Act 1997* (NSW), following the recent amendment to that section by the *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* (NSW) (**Amending Act**), which commenced on 19 May 2022.

Section 274 of the Duties Act provides an exemption from duty for transfers of certain business property between family members. The Amending Act expanded the operation of that section by enabling primary production land to be transferred or leased to companies and trusts controlled by relevant family members, not just to those family members personally, on or after 19 May 2022, free of duty.

In order to be eligible for the exemption, the Chief Commissioner must be satisfied of the following:

1. the land that is the subject of the transfer (or agreement for sale) is 'land used for primary production'. The expression 'land used for primary production' means land that is exempt from land tax under section 10AA of the *Land Tax Management Act 1956* (NSW);
2. the transferor, or the person directing the transferor, is a member of the family of the transferee or the person directing the transferee; and
3. the business will continue to be carried on, whether alone or with others, by the transferee or the person directing the transferee.

'Person directing'

Section 274(4A) of the Duties Act defines the phrase 'person directing', as it applies in relation to both the transferor and transferee, in the following situations:

1. a deceased estate – the person directing the transferor or transferee (i.e. the executor or administrator of a deceased estate) is the deceased person him/herself. Importantly, there is no requirement for the executor or administrator to be a member of the family, nor is there a requirement for the transfer to be in accordance with the deceased person's Will;
2. a bare trust – the person directing the transferor or transferee (i.e. the trustee of a bare trust) is the beneficiary of the bare trust;
3. a self-managed superannuation fund – the person directing the transferor or transferee (i.e. the self-managed superannuation fund) is a person who is a member of the self-managed superannuation fund. Importantly, a person in recipient of death benefits or any other beneficiary of a self-managed superannuation fund that is not a member of the fund is not able to be the person directing the transferor or transferee;
4. a discretionary trust – the person directing the transferor or transferee (i.e. the trustee of a discretionary trust) is a person who is entitled (as a taker in default) to not less than a 25% interest in the capital of the discretionary trust and:
   (a) in the case of the transferor, the person must have also held this beneficial entitlement for at least 3 years before the date of the transfer or from the date of establishment of the trust (where this was less than 3 years ago); and
   (b) in the case of the transferee, the person must also hold this entitlement for at least 3 years after the date of the transfer;
5. a private unit trust scheme – the person directing the transferor or transferee (i.e. the trustee of a private unit trust scheme) is a unit holder in the unit trust scheme who holds the units beneficially and is entitled to not less than 25% of the assets of the unit trust scheme on its winding-up and:
   (a) in the case of the transferor, the person must have also held this entitlement for at least 3 years before the date of the transfer or from the date of establishment of the trust (where this was less than 3 years ago); and
   (b) in the case of the transferee, the person must also hold this entitlement for at least 3 years after the date of the transfer; and
6. a proprietary limited company – the person directing the transferor or transferee (i.e. the proprietary limited company) is a shareholder in the company who is beneficially entitled to the shares in the company, entitled to vote at meetings of the company, is entitled as a shareholder to not less than 25% of the assets of the company on winding-up and:
   (a) in the case of the transferor, the person must have also held this entitlement for at least 3 years before the date of the transfer; and
   (b) in the case of the transferee, the person must also hold this entitlement for at least 3 years after the date of the transfer.

Revenue NSW Reference *DUT 050v2*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/duties/dut-050v2?SQ_VARIATION_1138547=0

4.3 Present entitlement of trust beneficiaries

On 31 May 2023, the ATO published an addendum to *Taxation Determination* TD 2012/22, which deals with the proportion of the income of a trust estate to which a beneficiary is presently entitled.

In *Lewski v Commissioner of Taxation* [2017] FCAFC 145, the Court determined that where a distribution is contingent on an event, the distribution may be ineffective for creating a present entitlement for tax purposes. The ATO has updated TD 2012/22 by adding a paragraph on variation of income clauses as follows:

> ***Income variation resolutions***
>
> *65A. Broadly, income variation resolutions arise where, in formulating resolutions to distribute income, the trustee has made further resolutions which are intended to deal with the situation where there is a change to the income of the trust at a later time.*
>
> *65B. While trustees have sought to use these resolutions to specify which beneficiaries are presently entitled to trust income where there is an adjustment made by the Commissioner, often these resolutions are not effective in achieving what the trustees sought.*
>
> *65C. The validity and effect of these resolutions (including their effect on other income resolutions and, consequently, any outcomes under the proportionate approach) will depend on the facts and circumstances of each case - in particular, the specific terms of the trust and the wording of the resolutions. This includes:*
>
> - *how the income of the trust is defined*
> - *whether the variation of income resolution is authorised by the trust deed*
> - *whether the variation resolution could be severed if found to be invalid*
> - *the existence of default beneficiaries, and other relevant terms of the trust deed*
> - *the wording of the income variation resolution*
> - *any other resolutions made by the trustee for that income year.*
>
> *65D. For income tax purposes, the relevant question to be determined is whether the resolutions were effective in conferring present entitlement on any beneficiaries by the end of the income year.*
>
> *65E. In Lewski v Commissioner of Taxation [2017] FCAFC 145 (Lewski), the Court determined the validity and effect of variation of income resolutions. It held that the effect of the resolutions was that the distribution of income to the beneficiary was contingent on the occurrence of an event, being the Commissioner's disallowance of a deduction or inclusion of an amount in the assessable income of the trust estate. Consequently, the beneficiary was not presently entitled to any income.*
>
> *65F. However, the Commissioner considers that the existence of a variation of income resolution will not necessarily result in ineffective conferral of present entitlement on all named beneficiaries. Rather, the outcome in any case will depend on the precise terms of the trust deed and resolutions. In some cases, there will be a range of possible interpretations of the relevant trust deed and resolutions and therefore genuine doubt about where the liability to tax rests. In those circumstances, the Commissioner will consider issuing alternative assessments.*
>
> *The decision Lewski confirms that, where a trustee makes an income variation resolution, the determination of a beneficiary's share of the net income of a trust estate will depend on the facts and circumstances of the case.*

The addendum notes that the Commissioner will not devote compliance resources to identifying and examining the resolutions made before 31 May 2023 where all of the net income of the trust estate has been brought to

tax either by inclusion in the assessable income of a beneficiary or by assessment to the trustee, and there is no evidence of tax avoidance, evasion or fraud.

ATO reference *TD 2012/22A1* w https://www.ato.gov.au/law/view/document?docid=TXD/TD201222A1/NAT/ATO/00001&PiT=20230531000001

5. Private binding rulings

5.1 Repaid dividend still assessable income

Facts

Company A declared and paid a dividend to its shareholder. The shareholder included the dividend in their income tax return.

An administrator was appointed for Company A, resulting in Company A being wound up for insolvency. The liquidators claimed that Company A was insolvent before the dividend was declared.

The liquidators commenced proceedings against the shareholder to recover the dividend, on the basis that it was a 'voidable transaction' because it was a payment to defeat creditors.

The shareholder entered into a deed of settlement and paid an amount to the liquidators. The liquidators included this amount as 'voidable transaction recoveries' on their end of administration return.

Question

Is the dividend declared from Company A which their liquidators treated as a voidable transaction, assessable income to the shareholder?

Decision

The ATO ruled yes.

Section 6-10 of the ITAA 1997 provides that assessable income includes statutory income. Dividends are listed in section 10-5 of the ITAA 1997 as being statutory income. Therefore, the shareholder was required to report the dividend in their income tax return.

Section 59-30 of the ITAA 1997 operates to exclude an amount from assessable income for an income year if the amount is repaid it in a later income year and the taxpayer cannot deduct the repayment in any income year. Section 59-30 relevantly states:

> ***Amounts you must repay***
> *(1) An amount you receive is not assessable income and is not * exempt income for an income year if:*
> *(a) you must repay it; and*
> *(b) you repay it in a later income year; and*
> *(c) you cannot deduct the repayment for any income year.*
> *(2) It does not matter if:*
> *(a) you received the amount as part of a larger amount; or*
> *(b) the obligation to repay existed when you received the amount or it came into existence later.*

The ATO ruled that because the amount was paid to the liquidators as a 'settlement sum', it was considered to be a payment to settle a claim to avoid future legal action. The ATO considered that it was not a 'repayment' of the dividend within the meaning of section 59-30.

Therefore, the dividend remained fully assessable income of the shareholder.

ATO reference *Private Binding Ruling Authorisation No. 1052103867210*
w https://www.ato.gov.au/law/view/document?docid=EV/1052103867210

5.2 CGT small business concessions – rental properties

Facts

Individual A and Individual B acquired three properties as joint tenants.

The three properties are all leased as long term rentals (the **Properties**):

1. Property 1 was purchased to carry on a business by a related company. The related company leased the premises from the Individuals. The business carried on by the related company was eventually sold and the new unrelated owners of the business now lease the premises. Improvements were made to the premises and the lessee has exclusive possession of the premises;
2. Property 2 has one tenant, which has exclusive possession of the premises; and
3. Property 3 has a number of separate tenants. Each of the tenants have exclusive possession of their premises, with shared access to amenities. The Individuals purchased Property 3 with industrial buildings on a large site as a going concern and improved the property over time as it was badly run down.

All rental income is paid directly by the tenants into one bank account held by the Individuals. The Individuals do not collect the rent, instead the Individuals generate tax invoices using MYOB and emailed them to all tenants each month with a due date for payment.

The Individuals pay the liabilities for rates, water and electricity and charge them out as recoverable outgoings for the tenants based on the proportional area as per their lease.

The Individuals together spend on average of XX hours per week managing the rental properties.

Individual A carries out most of the general repairs and maintenance for all the Properties, including gardening, landscaping, repairs to buildings, driveways, and access roads. Individual A carries out inspections every 6 months, which take, on average, about an hour each. Individual A also negotiates the terms of the lease, rent and bond to be paid.

Individual B manages the administrative side, which includes invoicing the tenants for rent, calculating and reconciling outgoings, recording all income and expenses for the profit and loss and BAS using MYOB, calculating the annual rent increases as per CPI or according to the lease. Individual B also takes phone calls from tenants and finds solutions to tenant issues.

The Individuals maintain a dedicated room as their office, comprising of two desks with chairs, phone, computer, printer, filing cabinets and storage shelving fixed to one wall, for this purpose.

The Individuals do not have a formal partnership agreement.

The Individuals are considering selling a commercial property and wish to apply the small business CGT concessions, including the small business roll-over relief to the construction of a new commercial development on vacant land that is owned by the Individuals.

Questions

1. Are Individual A and Individual B an association of persons carrying on a business as partners for the purposes of section 995-1 of ITAA 1997 in relation to their co-ownership of the Properties?
2. Are the Properties 'active assets' under section 152-40 of ITAA 1997?

Ruling

<u>Question 1</u>

The ATO ruled yes.

The ATO noted that in Taxation Ruling TR 93/32 *Income tax: rental property - division of net income or loss between co-owners*, the Commissioner explains that co-ownership of rental property is a partnership for income tax purposes but is not a partnership at general law unless the ownership amounts to the carrying on of a business.

The ATO referred to paragraph 51 of Taxation Ruling TR 2003/4 which states:

> *... for a business to be carried on by owners of property, one would expect that they would be involved in providing services in addition to the process of letting property (as with a boarding house), not merely receiving payments for the tenants' occupation of the property.*

The ATO noted in the *Rental Properties 2022* guide (Rental Properties guide) published by ATO that the Commissioner explains when the owner of one or more rental properties can be said to be carrying on a business. In particular, the ATO drew attention to, Example 4, which outlines a situation in which the owners are considered to be carrying on a rental property business:

> *The D'Souza's own a number of rental properties, either as joint tenants or tenants in common. They own eight houses and three apartment blocks - each block comprising six residential units - a total of 26 properties.*
>
> *The D'Souza's actively manage all of the properties. They devote a significant amount of time - an average of 25 hours per week - to these activities. They undertake all financial planning and decision making in relation to the properties. They interview all prospective tenants and conduct all of the rent collection. They carry out regular property inspections and attend to all of the everyday maintenance and repairs themselves or organise for them to be done on their behalf...*
>
> *The D'Souza's are carrying on a rental property business. This is demonstrated by:*
> - *the significant size and scale of the rental property activities;*
> - *the number of hours the D'Souza's spend on the activities;*
> - *the D'Souza's extensive personal involvement in the activities; and*
> - *the business-like manner in which the activities are planned, organised and carried on.*

Accordingly, the ATO considered that the Individuals are partners carrying on a business of letting rental properties due to the following:

1. the significant size and scale of the rental property activities;
2. the number of hours Individual A and Individual B spend on the activities;
3. Individual A and Individual B's extensive personal involvement in the activities; and
4. the business-like manner in which the activities are planned, organised and carried on.

Question 2

The ATO ruled no.

The term 'active asset' is defined at section 152-40 of the ITAA 1997 and excludes, among other things, assets whose main use is to derive rent. Such assets are excluded even if they are used in the course of carrying on a business. If the activities carried on do not amount to the carrying on of a business, it is unnecessary to consider whether the main use of the asset is to derive rent.

The ATO noted that paragraphs 21 to 25 of TD 2006/78 explain factors which indicate that an asset is being used to derive rent. These factors include, whether the occupier of a premises has right to exclusive

possession, how much control is retained by the owners of the premises, and the extent of services provided by the owner such as room cleaning, provision of meals, supply of linen, and shared amenities.

In this case, the ATO considered that the property being sold is not an active asset of the partnership as the partnership is not actively utilising the property for any purpose other than deriving rent.

ATO reference *Private Binding Ruling Authorisation No. 1052102358494*
w https://www.ato.gov.au/law/view/document?docid=EV/1052102358494

5.3 Assessable income – TikTok live streaming

Facts

A taxpayer performs live streams on TikTok. TikTok promotes live streams as a way to earn sustainable income.

The taxpayer was required to have 1,000 followers before live streaming could commence. During the live streams the taxpayer performs various activities. The live streams do not have a particular structure, and viewers tune in from around the world.

Occasionally the taxpayer receives gifts from viewers during the live streams. The gifts are given at random, and are not guaranteed. The taxpayer does not perform specific acts for the gifts. The gifts can be exchanged for money. In order to receive gifts, the taxpayer had to change their settings on TikTok to allow for the receipt of gifts. The default setting is to have this turned off.

The gifts vary from $X - $X per night, with the average being $X per night.

The taxpayer performs live streams on TikTok for X days per week at an average of X hours per week. The live stream averages X hours.

The taxpayer views the live streaming as a hobby, and has taken no steps to form a business.

The taxpayer does not rely on the gifts. The taxpayer has a full-time job.

Question

Whether the income you received from the taxpayer's live steams on TikTok is assessable income under section 6-5 of the ITAA 1997?

Ruling

The ATO ruled yes.

The ATO noted that section 6-5 of the ITAA 1997 provides that assessable income includes income according to ordinary concepts, or in other words - ordinary income. There are three broad categories of ordinary income, being income from rendering personal services, income from property and income from carrying on a business. Other typical characteristics include receipts that are earned, expected, relied upon and have an element of regularity.

The ATO referred to the fact that TikTok advertises its live streaming as an income earning activity, that the taxpayer had to gain 1,000 followers before signing up, and that the taxpayer had to change the default setting to allow the receipt of gifts.

While the taxpayer noted in the ruling request that the live streaming is just a hobby, the ATO noted that the taxpayer's behaviour was synonymous with professional streamers in the industry. Professional streamers host

"just chatting" streams which focus on interactions with people, which also has no particular form or structure. These streams are regularly conducted throughout the week to generate income. The ATO considers that the current circumstances reflect these "just chatting" streams made by professional steamers.

The ATO also noted the "not insignificant" amount of income derived from, and amount of time spent doing, the TikTok live streaming. The ATO considered that based on the amount of income received, it would suggest it is the taxpayer's primary source of income.

The ATO referred to the case of *Hayes v FC of T* (1956) 11 ATD 68 which considered the question of whether a "gift" is assessable income in the hands of the recipient. The case confirms that it will depend on the particular objective circumstances of each case. The ATO also referred to its Taxation Ruling IT 2674 *Income tax: gifts to missionaries, ministers of religion and other church workers – are the gifts income?* This ruling provides factors that should be considered:

1. how, in what capacity, and for what reason was the gift received;
2. whether the gift is of a kind which is a common incident of the recipient's calling or occupation;
3. whether the gift is made voluntarily;
4. whether the gift is solicited;
5. if the gift can be traced to gratitude engendered by some service rendered by the recipient to the donor, whether the recipient had already been remunerated fully for that service;
6. the motive of the donor; and
7. whether the recipient relies on the gift for their regular maintenance.

If the facts demonstrate that the payment or transfer was made without legal obligation, but is related to the recipient's employment, or services rendered, or to a business carried on, and is not a mere gift but is the product of an income-earning capacity, it will be assessable income in the hands of the recipient.

The ATO noted that the gifts in the present circumstances are received as a result of services rendered in the form of entertainment through the TikTok live streams. The money the taxpayer has received will be ordinary income under section 6-5 of the ITAA 1997.

ATO reference *Private Binding Ruling Authorisation No. 1052104487216*
w https://www.ato.gov.au/law/view/document?docid=EV/1052104487216

5.4 Deduction for advertising expenses

Facts

A company operates a business.

The company intends to sponsor a motor racing team with the belief that the sponsorship will benefit the business in the form of advertising to increase sales and business development opportunities, and to promote brand visibility.

To achieve this goal, the company intends to sponsor an entity incorporated by an affiliate of the company (the **Motorsport Entity**) to undertake motorsport activities.

A director of the company is also a director and controller of the Motorsport Entity (the **Common Director**). However, the company has other directors and shareholders who will need to approve the sponsorship arrangement based on a business case and the commerciality of the arrangement.

When the Common Director is:

1. engaged in racing the Motorsport Entity's vehicles the Common Director will be paid by the Motorsport Entity as a driver at market rates; and
2. participating in promotional track days on behalf of the company the Common Director will be paid by the company for the time spent in advocating and promoting the company's business under the sponsorship agreement.

The Common Director's remuneration or trust distribution from the company is not reduced by an amount commensurate with the amount paid under the sponsorship arrangement to the Motorsport Entity.

The company's sponsorship will cover branded merchandise and vehicle signage, and partially cover some of the operating costs of the motor vehicle.

The Motorsport Entity will purchase a vehicle to be used solely as a business asset and exclusively at motorsport club and registered racing events, where the Motorsport Entity will undertake promotional activities to stimulate interest in the company's business.

Employees of the company will have an opportunity to participate in events to promote the activities of the company as a sponsor of the Motorsport Entity. The employees will not be providing services to Motorsport Entity.

The sponsorship arrangement will reflect commercial sponsorship arrangements between unrelated parties dealing on arm's length terms having regard to matters such as the driver's abilities, the standard of racing, the type of racing, crowd numbers, the standard of performance and conduct required, and the duration of such arrangements. The Motorsport Entity will also be sponsored by third party businesses on commercial terms.

Question

Is the company entitled to a deduction under section 8-1 of the ITAA 1997 for expenses incurred in sponsoring a motor racing team?

Ruling

The ATO ruled yes.

The ATO noted that under section 8-1 of the ITAA 1997, deductions are allowed for all losses or outgoings to the extent that they are incurred in gaining or producing assessable income or are necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income.

The ATO confirmed that the commercial and practical implications of the term 'necessarily incurred' imply that voluntary expenditure incurred for business needs may be deductible. The ATO referred to case law which confirmed that it is for the taxpayer who is carrying on the business to judge what outgoings are necessarily incurred in the business.

The ATO noted that the company believes that the sponsorship will benefit the business in the form of advertising and exposure to generate future income. The ATO accepted that advertising expenses are directed to enhance the income producing activities of the company's business, are not excluded on the basis of being capital or of a private or domestic nature, and therefore are deductible under section 8-1 of the ITAA 1997.

ATO reference *Private Binding Ruling Authorisation No. 1052109550358*
w https://www.ato.gov.au/law/view/document?docid=EV/1052109550358

5.5 Claiming a deduction for interest on a loan

Facts

A taxpayer acquired a loan from a bank to purchase a rental property.

The taxpayer claimed a deduction for interest on the loan against the income received from the rental property.

The taxpayer also borrowed money from their parents. Under a written loan agreement, the taxpayer was to make monthly repayments to her parents that included interest at commercial rates.

The taxpayer put this money into an offset account for the loan for the rental property.

The taxpayer commenced making repayments to their parents in accordance with the terms of the loan agreement.

Questions

1. Is the interest paid to the taxpayer's parents deductible under section 8-1 of the ITAA 1997?
2. If you use the money borrowed from your parents, to pay out the investment loan will the interest the be deductible?

Ruling

Is interest paid to the parents deducible?

The ATO ruled No.

Section 8-1 of the ITAA 1997 allows a deduction for outgoings that are incurred in gaining or producing assessable income provided that the outgoings are not of a capital, private or domestic nature or where the outgoings relate to exempt income.

The ATO considered the Commissioner's views in respect of interest expenses as set out in Taxation Ruling TR 95/25. Relevantly, the Commissioner provided that there must be a sufficient nexus between the interest expense and the activities which produce assessable income. This involves a consideration of the intention of the taxpayer when borrowing the funds and the use of the borrowed funds.

The ATO explained that there is a distinction between circumstances where a loan is used for investment purposes, where interest will be deductible, and a situation where a loan is used for private purposes, where interest will not be deductible.

In respect of a situation involving a loan account offset arrangement for the purposes reducing interest, the ATO considered Taxation Ruling 93/6. In accordance with that ruling, a taxpayer may claim a deduction for interest provided that there is no entitlement to receive interest payments or another benefit from the deposit account other than a reduction of interest on the loan account.

In these circumstances, there was an acceptable offset arrangement as the loan from the bank was used for an income producing purpose. The ATO considered that the taxpayer could claim a deduction for the interest expenses in relation to this loan provided that the property was rented out or available for rent in the relevant income year.

The ATO distinguished the loan from the taxpayer's parents from a redraw facility. The deposits into the offset account were used to reduce the interest on the loan from the bank. Any withdrawals from this account were not a form of borrowing but was a withdrawal of the taxpayer's savings.

Therefore, the loan from the taxpayer's parents was for the sole purpose of reducing the interest in respect of the loan from the bank but was not a refinance of that loan. Any interest expenses associated with the loan from the taxpayer's parents does not have the sufficient connection to gaining or producing assessable income. Such expenses had the essential character of being private in nature.

If loan from parents is used to pay out loan from bank, is the interest deductible?

The ATO ruled yes.

The ATO noted that the interest on the parent's loan would be deductible where it is used to repay the bank loan provided that the loan was used for an income producing activity.

COMMENT – this is a disappointing view from the ATO on what, in a low interest environment, had become a common practice. The ATO view appears to be borrowing from one party, albeit related party, to reduce a deductible expense, does not result in deductible interest on the borrowing. This is strange, as funds had been borrowed from that related party to pay down the loan, the interest would have been clearly deductible. This may be a situation where applying existing cases (based on specific facts) does not result in a logical or appropriate outcome.

ATO reference *Private Binding Ruling Authorisation No*: *1052103070022*
w https://www.ato.gov.au/law/view/document?docid=EV/1052103070022

6. ATO and other materials

6.1 NSW payroll tax annual reconciliations – new disclosures

The 2023 annual return for NSW payroll tax will include two new disclosure items: 'Number of Employees' and 'Ultimate Holding Companies (UHC)'. The new fields are optional for the 2023 annual return but will be mandatory for the lodgment of the 2024 annual return.

The 2023 payroll tax annual reconciliation will be available from mid-June. Lodgment and payment is due by 28 July 2023.

To complete the annual reconciliation, you will need your Client ID and Correspondence ID from the most recent correspondence received from Revenue NSW. Correspondence IDs are only valid for 16 months.

w https://engagement.customerservice.nsw.gov.au/pub/pubType/EO/pubID/zzzz64780bd80a00f852/?aid=6011210ceb088832&#6011210ceb088832

6.2 Media release – land tax management is changing

From 6 June 2023, NSW land tax 'customers' can access and manage their land tax via their MyServiceNSW account.

When a customer enters their MyServiceNSW account, they will have the option to add land tax to their services. The land tax services provided include:

1. view and manage land tax online;
2. lodge a return, request an exemption or make any changes to property details;
3. access current and past notice of assessments;
4. pay land tax and set up an extended payment plan; and
5. update notification preferences to digital.

w https://www.revenue.nsw.gov.au/news-media-releases/the-way-you-manage-land-tax-is-changing?utm_medium=oss&utm_source=tg&utm_campaign=202305_land

6.3 Tasmanian budget

The budget did not introduce any new taxes, but indicated a change to the Emergency Services Levy later in 2023, in order to fund a new fit-for-purpose integrated fire and emergency services entity.

w https://www.treasury.tas.gov.au/Documents/2023-24-Budget-Paper-No-1.pdf

6.4 Victorian budget

The Victorian government handed down its 2023-2024 Budget on 23 May 2023, and included important changes to the Victorian payroll tax, land tax and stamp duty regime.

Payroll Tax

From 1 July 2023, there will be a new payroll tax surcharge of 0.5% which will be imposed on large businesses with a national annual payroll of $10 million or over. For businesses with an annual national payroll over $100 million, a further 0.5% surcharge will be imposed.

From 1 July 2024 the payroll tax-free threshold will be increased from $700,000 to $900,000. It is proposed that the payroll tax-free threshold will be further increased to $1 million from 1 July 2025. The benefit of these thresholds is said to be phased out for larger businesses.

Land Tax

From 1 January 2024, there will be a reduction in the land tax threshold for general land tax rates from $300,000 to $50,000. This will result in more land tax being payable by landholders with relatively small land holdings.

The absentee owner surcharge will increase from 2% to 4% of the land value from 1 January 2024.

There will also be additional temporary land tax surcharges imposed from 1 January 2024. A fixed fee of $500 will apply to landholdings with a value between $50,000 and $100,000. Similarly, a fixed fee of $975 will apply to landholdings with a value above $300,000. There will also be a 0.10% increase in the land tax rate for landholdings above $300,000 (or $250,000 where the landholdings are held by a trust).

The Commissioner of State Revenue will also have a discretion to increase land tax exemption by an additional 2 years where a principal place of residence is undergoing construction or renovation and the builder has become insolvent.

Stamp Duty

From 1 July 2024, certain purchasers of commercial and industrial properties can elect to pay an annual property tax instead of stamp duty upon purchasing the property.

w https://www.budget.vic.gov.au/budget-papers#budget-overview

6.5 Small business lodgment amnesty program

As part of the 2023-2024 Budget, the Government announced a lodgment penalty amnesty program for small businesses.

The ATO has published website guidance regarding the amnesty, which states that to be eligible for the amnesty the small business must, at the time of the **original** lodgment, be an entity with an aggregated turnover of less than $10 million.

The amnesty applies to tax obligations, including income tax and business activity statements, which were originally due from 1 December 2019 and 28 February 2022.

If those returns are lodged between 1 June 2023 and 31 December 2023, any failure to lodge penalty applying to the late lodgment will be automatically remitted. No action is required to request a remission.

TRAP – the ATO website guidance includes the statement that the amnesty does not apply to privately owned groups, or individuals controlling over $5 million of net wealth. That information was not included in the budget announcement.

TIP – If the amnesty is not available to a taxpayer, it may be possible to request that the Commissioner remit the penalties. See *PS LA 2012/5 Administration of the false or misleading statement penalty - where there is a shortfall amount* for more information.

w https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Small-Business---Lodgment-Penalty-Amnesty-Program/

6.6 Decision Impact Statement – Buddhist Society

This Decision Impact Statement outlines the ATO's response to the decision in *The Buddhist Society of Western Australia Inc v Commissioner of Taxation (No 2)* [2021] FCA 1363.

The case concerned the decision by the Commissioner to revoke the endorsement of the Buddhist Society of WA as a deductible gift recipient, on the basis the Commissioner did not consider that the relevant buildings at the Dhammaloka Buddhist Centre were used as a school or college.

Central to the appeal was whether the Commissioner's decision had erred in law as to the ordinary meaning of 'school' for the purposes of table item 2.1.10 of subsection 30-25(1) of the ITAA 1997.

In the Federal Court, McKerracher J found that the Commissioner had proceeded on a misunderstanding of the law as to the 'ordinary meaning' of 'school'. His Honour made reference to the High Court case of *Cromer Golf Club Ltd v Downs* (1973) 47 ALJR 219 which applied a broad ordinary meaning of the term 'school'. His Honour stated that the factors expressed in paragraph 18 of *Taxation Ruling 2013/2 Income tax: school or college building funds* do not form part of the ordinary meaning of 'school'.

Following this decision, the Commissioner accepts that the view expressed in TR 2013/2 do not reflect the ordinary meaning of the term 'school'.

The Commissioner agrees with McKerracher J that the ordinary meaning of school does not require a course of education to be 'vocational as opposed to recreational', and the focus will be whether instructions are being given in an activity or area of knowledge.

In relation to buildings, the Commissioner will consider to the overall purpose (or purposes) for which the building was 'established and maintained' and the activities which support its purpose.

The Commissioner will review and update TR 2013/2 to relevant website guidance in light of the decision.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/WAD118of2020/00001

6.7 Surcharge purchaser duty and surcharge land tax – international tax treaties update

On 21 February 2023, Revenue NSW announced that the NSW surcharge provisions are inconsistent with a number of international tax treaties that have been entered into by the Federal Government.

The following countries have been identified by NSW Revenue as nations that have international tax treaties with the Federal Government that may affect surcharge purchaser duty and surcharge land tax liability:

1. India;
2. Japan;
3. Norway; and

4. Switzerland.

If an individual is a citizen of the following countries that will no longer be required to pay surcharge purchaser duty or surcharge land tax is they are purchasing residential-related property or land in their own capacity:

1. New Zealand;
2. Finland;
3. Germany;
4. India;
5. Japan;
6. Norway;
7. Switzerland; and
8. South Africa.

Corporations, trusts or partnerships that arises because of an entity's affiliation with these nations may also be affected by the international tax treaties.

The refund period has now been extended from 1 July 2021 to 1 January 2021.

w https://www.revenue.nsw.gov.au/news-media-releases/surcharge-purchaser-duty-and-surcharge-land-tax-international-tax-treaties-update

6.8 Covid superannuation minimum drawdown

The government temporarily reduced superannuation minimum drawdown requirements for account-based pensions and similar products by 50% for the 2020 to 2023 financial years.

This 50% reduction in the minimum pension drawdown rate will no longer apply from the 2024 financial year.

This means that on 1 July 2023 the 50% reduction will not apply to the calculated minimum annual payment on the pension balance.

w https://www.ato.gov.au/Super/SMSF-newsroom/Compliance/Changes-to-minimum-annual-payments-for-super-income-streams/

6.9 Car limit

A car limit applies to the cost of passenger vehicles (except a motorcycle or similar vehicle) designed to carry a load less than one tonne and fewer than 9 passengers. The car limit determines the maximum cost of the car for the purposes of working out depreciation deductions and the amount of input tax credits allowable on the acquisition or importation of a car. The indexed car limit for the income year ending 30 June 2024 will be $68,108.

TRAP – the car limit still applies to limit deductions, even where temporary full expensing or instant asset write-off measures would otherwise allow full write-off of the cost.

w https://www.ato.gov.au/Business/Depreciation-and-capital-expenses-and-allowances/Simpler-depreciation-for-small-business/Assets-and-exclusions/#Cars

6.10 ATO trust variation guidance

On 31 May 2023, the ATO released website guidance regarding variation of income resolutions for trusts. The guidance complements the addendum to TD 2012/22 that was published on the same day (see 4.3 of these notes).

The guidance states that where there is uncertainty as to who should be taxed on trust net income, the ATO will consider raising alternative assessments, which may include assessments to beneficiaries (including default beneficiaries) as well as an assessment to the trustee under section 99A of the ITAA 1936 on the highest amount that they could be assessed on under any of the alternative views.

The guidance also provides a detailed example showing the different possible interpretations of a variation of income resolution, as well as the tax outcomes under each interpretation.

w https://www.ato.gov.au/General/Trusts/In-detail/Trust-tax-time-toolkit/Resolutions-checklist/?anchor=Variationofincomeresolutions#Variationofincomeresolutions

6.11 QLD payroll tax and medical practices amnesty

On 3 February 2023, the Queensland Government announced that it is providing a payroll tax amnesty in relation to payments made to contracted general practitioners up until 30 June 2025. The aim of the amnesty is to incentivise and support medical practices to bring themselves forward and into compliance with their payroll tax obligations.

On 15 March 2023, the Treasurer approved *Administrative Arrangement Temporary payroll tax amnesty measure* in relation to payments made to general practitioners under the relevant contract provisions, which sets out the basis on which the payroll tax amnesty will be administered (**Administrative Arrangement**).

To support the administrative arrangement, the Commissioner of State Revenue approved Guidelines for Administration (**Guidelines**) that outline certain operational aspects of the amnesty.

Administrative Arrangement

The Administrative Arrangement confirms the eligibility requirements for the amnesty which include that a medical practice must:

1. be a designated medical practice which means an employer for payroll tax purposes that conducts a medical centre business;
2. submit an expression of interest using the online form on the relevant website by **29 September 2023**;
3. make a voluntary disclosure and, if not already registered for payroll tax, register for payroll tax in Queensland by 30 June 2025; and
4. comply with its ongoing payroll tax obligations after making the voluntary disclosure, this includes from 1 July 2025.

The amnesty period means up until 3 June 2025 and the earlier of 1 July 2018 or, if a medical centre is subject to an audit, the earliest financial year that the audit activity relates to.

If a medical centre satisfies the eligibility criteria, the Commissioner will administer the Payroll Tax Act on the following basis:

1. payments to contracted GPs will not be included in assessing the medical practice's payroll tax liability during the amnesty period; and

2. if the medical practice has already paid payroll tax in relation to payments to contracted GPs during the amnesty period as a result of audit activity, a reassessment of payroll tax will be made to exclude those payments. A refund may be made in accordance with the Taxation Administration Act.

Guidelines

The Guidelines confirm that each medical practice in a payroll tax group will need to submit an expression of interest by 29 September 2023.

After an EOI is submitted, designated medical practices will have until 30 June 2025 to review their arrangements and make voluntary disclosures to Queensland Revenue Office. To constitute a voluntary disclosure, the information provided by a designated medical practice needs to contain sufficient information for the Commissioner to assess the practice's eligibility for the amnesty and determine its payroll tax obligations. This information is listed in the Guidelines.

Once a medical practice makes a voluntary disclosure, all relevant payroll tax obligations (e.g., lodging payroll tax returns) will apply. Medical practices that are required to register for payroll tax as part of the amnesty need to lodge payroll tax returns once registered, even if they are not required to pay payroll tax during the amnesty period once payments to contracted GPs have been excluded.

From 1 July 2025, medical practices that did not participate in the amnesty may be subject to compliance activity.

w https://s3.treasury.qld.gov.au/files/Administrative-arrangement-payroll-tax-amnesty-for-medical-practices.pdf
https://s3.treasury.qld.gov.au/files/Commissioners-guidelines-payroll-tax-amnesty-for-medical-practices.pdf

6.12 Intangible assets – updated compliance approach

In response to feedback received on the first draft of their PCG 2021/D4 (see our June 2021 Tax Training Notes), the ATO has updated its draft Practical Compliance Guideline regarding the transfer pricing implications of Intangible Arrangements. 'Intangible Arrangements' refers to cross-border arrangements relating to the development, enhancement, maintenance, protection and exploitation (**DEMPE**) of intangible assets.

The updated PCG 2023/D2 provides additional examples for applying the risk assessment framework to Intangible Arrangements and introduces a points-based approach.

The updated PCG 2023/D2 also focuses on tax issues relating to any restructure or change associated with the intangible assets that allows another entity to access, hold, use, transfer or benefit from the intangible assets (referred to as 'migration'), as well as potential mischaracterisation of Australian activities connected with the DEMPE of intangible assets.

ATO Compliance Approach

The ATO will consider Law Administration Practice Statements PS LA 2005/24 *Application of General Anti-Avoidance Rules* and PS LA 2017/2 *Diverted profits tax assessments*, and Practical Compliance Guideline PCG 2018/5 *Diverted profits tax* when determining the risk rating of Intangible Arrangements.

If Intangible Arrangements are rated low risk or medium risk and self-assessment has been verified, the ATO is unlikely to spend resources to audit the arrangement.

If Intangible Arrangements are rated high risk, the ATO will likely engage with you to assess the compliance framework and may escalate to a review or audit.

Risk Assessment Framework

The ATO has provided a diagram to assist in determining whether Risk Assessment Framework 1 (used for compliance risks in relation to Migration of intangible assets) or Risk Assessment Framework 2 (used for risks associated with Australian DEMPE activities) will apply.

The self-assessment of compliance risk involves the application of the risk assessment framework to each Intangible Arrangement in each income year:

1. for existing arrangements, before tax returns for the relevant income year are lodged; or
2. where a new arrangement is entered into during an income year, at the time it is entered into.

Evidence Expectations

In the event that Intangible Arrangements have been restructured, the ATO will require information to:

1. verify the market value of any intangibles acquired or sold;
2. evidence any other considerations connected with entering into the restructure or arrangement, including whether other or alternative arrangements were considered and the reasons why any alternative arrangements were not pursued; and
3. evidence and verify any tax and non-tax or commercial objectives achieved under the arrangement.

When assessing the legal form and substance of Intangible Arrangements, the ATO requires documents that evidence the detailed legal form of Intangible Arrangements including (but not limited to) legal agreements, details of ownership of intangible assets, guidelines, manuals and policies.

In order to identify and evidence the intangible assets and connected DEMPE activities, the ATO may require a broad range of evidence ranging from contemporaneous documentation including relevant reports, internal or external database extracts and correspondence of people identified as being involved in DEMPE activities. Some issues may require discussions or interviews of relevant personnel or the review of specific documentation.

Eligible taxpayers may apply for the simplified transfer pricing record-keeping options under Practical Compliance Guideline PCG 2017/2 *Simplified transfer pricing record-keeping options*.

Once finalised, PCG 2023/D2 is intended to apply before and after its date of issue.

The last day for comments on draft PCG 2023/D2 is 16 June 2023.

COMMENT – the draft PCG does not include references to the anti-avoidance measure announced in the 2022-2023 October Federal Budget regarding denying deductions for prevent significant global entities (entities with annual global income of $1 billion or more) from claiming tax deductions for payments made directly or indirectly to related parties in relation to intangibles held in low- or no-tax jurisdictions. Exposure draft legislation for this measure was released on 31 March 2023, but it has not yet been introduced to Parliament.

ATO reference *PCG 2023/D2*
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2023D2/NAT/ATO/00001