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| Tax UpdateNovember 2023BWS_logo_PMS654_RGBWritten by:**Brown Wright Stein Lawyers**Level 6, 179 Elizabeth StreetSydney NSW 2000P 02 9394 1010 |
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Contents

[1. Tax Update Pitstop 5](#_Toc150851071)

[2. Cases 6](#_Toc150851072)

[2.1 Bowerman – profit-making intention and main residence 6](#_Toc150851073)

[2.2 Quirky Mama – meaning of 'incurred' 9](#_Toc150851074)

[2.3 Bampton – land tax principal place of residence 13](#_Toc150851075)

[2.4 Home789 Resources Pty Ltd – payroll tax grouping 16](#_Toc150851076)

[2.5 Holm – out of time objections 20](#_Toc150851077)

[2.6 Vanderstock v Victoria – electric vehicle road user charge invalid 21](#_Toc150851078)

[2.7 Baullo – transfer of property from discretionary trust to its beneficiaries 22](#_Toc150851079)

[2.8 Hall v CAP Security Services – DPNs and insolvency 25](#_Toc150851080)

[2.9 Appeals update 27](#_Toc150851081)

[2.10 Other tax and superannuation related cases for 9 October 2023 to 8 November 2023 28](#_Toc150851082)

[3. Legislation 30](#_Toc150851083)

[3.1 Progress of legislation 30](#_Toc150851084)

[3.2 Alternative records for fringe benefits 30](#_Toc150851085)

[3.3 Notice of a visa data-matching program 30](#_Toc150851086)

[4. Rulings 32](#_Toc150851087)

[4.1 GST on combination foods 32](#_Toc150851088)

[4.2 Composite items – identifying the relevant depreciating asset for capital allowances 33](#_Toc150851089)

[4.3 Victorian duties – meaning of land development 34](#_Toc150851090)

[4.4 Acquisition of economic entitlements in relation to land (service fees) 34](#_Toc150851091)

[5. Private binding rulings 36](#_Toc150851092)

[5.1 Rental income - legal vs beneficial ownership 36](#_Toc150851093)

[5.2 Offset accounts and interest deductibility 36](#_Toc150851094)

[5.3 Rent charged to family members 37](#_Toc150851095)

[5.4 Short term accommodation and active asset test 38](#_Toc150851096)

[5.5 Short term accommodation and active asset test 41](#_Toc150851097)

[5.6 Return of capital and section 45B 42](#_Toc150851098)

[5.7 Entitlement to a tax deduction as a result of a fraud 45](#_Toc150851099)

[5.8 ESS deferred taxing point 48](#_Toc150851100)

[5.9 CGT – trading stock and small business concession 50](#_Toc150851101)

[5.10 GST registration and crypto asset trading 53](#_Toc150851102)

[5.11 Non-commercial loss rules and $250,000 income test 55](#_Toc150851103)

[6. ATO and other materials 57](#_Toc150851104)

[6.1 ATO Report – Next 5000 Program Findings 57](#_Toc150851105)

[6.2 Downsizer Contributions guidance note 59](#_Toc150851106)

[6.3 International businesses – get your GST right from the start 60](#_Toc150851107)

[6.4 Commissioner's remedial power not applied – business 60](#_Toc150851108)

[6.5 Losses in crypto investments 61](#_Toc150851109)

[6.6 New requirement to publish R&D expenditure information 62](#_Toc150851110)

[6.7 Clarifying R&D program integrity rules 62](#_Toc150851111)

[6.8 Superannuation fund mergers and defined benefit income streams 63](#_Toc150851112)

[6.9 Prohibited SMSF loans 63](#_Toc150851113)

[6.10 IGTO Report: Commissioner’s General Powers of Administration 63](#_Toc150851114)

[6.11 ACNC 2022–23 annual report released 64](#_Toc150851115)

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# 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.

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| **Tax Update Matter** | **Impact Summary**  | **Further Detail** |
| Bowerman | The AAT has held that a taxpayer held their main residence on revenue account and, therefore, was entitled to deduct the loss they made on the disposal of the property. | Page 6 |
| Vanderstock | The High Court had held that the Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic) was invalid due to the operation of section 90 of the Constitution, which prohibits the States from imposing an excise. The High Court decision expands upon the meaning of excise for the purpose of section 90 of the Constitution. The decision is expected to have implications for a range of state taxes.  | Page 21 |
| Baullo | The Victorian Civil and Administrative Tribunal has held that the duties concession in Victoria for transferring property toa beneficiary is not available where, as part of the transfer, the beneficiary forgives a debt owed by the trust. | Page 22 |
| Hall v CAP Security Services | A former director of a company has successfully caused a company to be wound up within the 21 days required to comply with a Directors' Penalty Notice (DPN), by applying to the Court as a creditor of the company after paying $5,000 to the ATO in relation to the DPN.  | Page 25 |
| ATO Next 5000 Program | The ATO has published a report on the Next 5000 Program, including the common areas it has identified as being of concern for groups in the Next 5,000 Program. | Page 57 |

# Cases

## Bowerman – profit-making intention and main residence

Facts

Jenifer Bowerman is an 86 year old self-funded retiree.

Since the 1960s, Jenifer and her husband had invested in property, deriving rental income and capital gains from the long-term holding of properties. Until recently, Jenifer had never made a loss on a property sale.

In or about 2002, Jenifer and her husband adopted a retirement investment strategy to focus on generating income returns from ASX listed shares and managed fund investments rather than seeking long term capital growth, although they still continued to own property investments.

From 1972 until 2018, Jenifer lived in the family home on the waterfront in Caringbah South, New South Wales. The family home was inconvenient, as there was a steep decline of 78 steps from the public road to the house, which was built on pylons over the water. An inclinator had been installed in around 1990 after Jenifer had knee replacement surgery.

On 23 July 2015, a few weeks after her husband passed away, Jenifer executed and exchanged an off-the-plan contract to purchase a residential unit for $1,505,000 at Woolooware Bay in New South Wales (the **Foreshore Boulevard Unit**). At the time of executing the contract for the purchase of the Foreshore Boulevard Unit, Jenifer expected she would ultimately live in that apartment as her home and the completion of its purchase was to be funded from the sale of the existing family home.

On 22 December 2016, Jenifer received notice that the construction of the Foreshore Boulevard Unit was delayed, and the sunset date for the off-the-plan contract would be extended by 12 months to 30 June 2020.

In November 2017, a real estate agent advised Jenifer that she should be able to sell the family home for more than $2 million.

On 28 November 2017, Jenifer executed a contract, as purchaser, to buy another off-the-plan unit in the same development as the Foreshore Boulevard Unit at Woolooware Bay (**Dune Walk Unit**) for $1,200,000. The Dune Walk Unit was closer to completion than the Foreshore Boulevard Unit.

The family home was listed for sale on 21 December 2017 and on 8 February 2018 Jenifer exchanged a contract to sell the family home for $2,230,000. The settlement date was set to roughly coincide with the revised expected completion date for the Dune Walk Unit purchase.

On 7 May 2018 settlement on the purchase of the Dune Walk Unit occurred and Jenifer moved in one week later. Jenifer lived in the Dune Walk Unit from 14 May 2018 for about 26 months until early July 2020.

In around April 2020, Jenifer's real estate agent listed the Dune Walk Unit for sale. Unfortunately, this timing coincided with the first COVID-19 lockdown restrictions and it was difficult to sell the property due to difficulty holding open home showings and a decreased demand and related price drop in the Sydney property market.

On 20 April 2020, Jenifer exchanged a contract to sell the Dune Walk Unit for $1,015,000. Jenifer felt compelled to sell the unit as she needed the funds to settle her purchase of the Foreshore Boulevard Unit.

On 9 July 2020, settlement occurred on the sale of the Dune Walk Unit.

On 14 July 2020, settlement occurred on the purchase of the Foreshore Boulevard Unit. Jenifer moved into the Foreshore Boulevard Unit and continues to live there.

On 18 September 2020, Jenifer lodged her income tax return for the year ended 30 June 2020 and received a notice of assessment. Her tax return included interest income, dividends and rental income from properties.

On 28 September 2021, Jenifer objected to the assessment and claimed that she had an allowable deduction under section 8-1 of the ITAA 1997 for the loss of approximately $265,935 on the sale of the Dune Walk Unit.

On 15 March 2022, the Commissioner disallowed the objection in full.

The Commissioner considered that the sale of the Dune Walk Unit was a mere realisation of a capital asset and that the loss was capital in nature. In addition, the Commissioner considered that under section 118-100 of the ITAA 1997, Jenifer must ignore any capital gain or capital loss she made from a capital gains tax event that happens to a dwelling that is her main residence and, therefore, Jenifer was also not entitled to carry forward the loss from the sale of the Dune Walk Unit under the capital gains tax provisions.

On 1 May 2022, Jenifer sought review of the objection decision in the AAT.

Jenifer contended that her intention at the time of acquiring the Dune Walk Unit was to make a profit on its sale within two to three years. In her evidence, Jenifer said:

*Although I did intend to reside at Dune Walk when the apartment became available to me, my decision to acquire Dune Walk was not motivated by being able to reside in the apartment during my period of ownership. If I did not believe I would be able to make a profit on the acquisition and sale of Dune Walk, I would never have proceeded with the acquisition in the first place.*

Jenifer also contended that the loss on the disposal of Dune Walk Unit was incurred for income tax purposes upon the contracts for sale being exchanged on 20 April 2020, not when settlement occurred on 9 July 2020 so that the loss was available in the year ended 30 June 2020.

The Commissioner denied that the loss was incurred 'in gaining or producing assessable income' as required by section 8-1(1)(a) of the ITAA 1997. Relying on the decision in *Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18 (**Myer Emporium**), the Commissioner argued that there was insufficient objective evidence to show that Jenifer purchased the Dune Walk Unit with the exclusive purpose of selling it for a profit as part of a business operation or commercial transaction. In support, the Commissioner made the following contentions:

1. that a business person would not ordinarily be expected to acquire a property which so precisely matches their own personal living needs and that the purchase of the Dune Walk Unit was a means to an end for Jenifer to leave the family home;
2. that a business person would not contribute to the wear and tear of the property by personally living in it for 26 months; and
3. that a business person would not put themselves in the position of being unable to await more favourable offers due to being forced to sell to fund the purchase of the Foreshore Boulevard main residence.

The Commissioner also argued that, in any case, Jenifer was not entitled to a deduction under section 8-1(2)(b) of the ITAA 1997 as the fact that she lived in the Dune Walk Unit for the entire period of her ownership meant that the loss was private or domestic in nature.

In relation to timing, Jenifer submitted that she had incurred the loss in the income year ended 30 June 2020. That was the income year in which the contract for the sale of the Dune Walk Unit was executed. The sale proceeds of $1,015,000 and related disposal costs were known and/or capable of determination at that time and this enabled the deductible loss of $265,936 on the sale of the Dune Walk Unit to be calculated.

Jenifer referred to Taxation Ruling TR 97/7 (**TR 97/7**) concerning the meaning of ‘incurred’. Paragraph [9] of TR 97/7 states:

*9. In these circumstances, subject to the propositions outlined above,* ***a taxpayer who uses a cash receipts based accounting system need not necessarily have******paid or borne a loss or outgoing in order for that loss or outgoing to have been ‘incurred’ for the purposes of section 8-1.***

(emphasis added)

Jenifer submitted that, consistent with section 357-60 of Schedule 1 to the *Taxation Administration Act 1953* (Cth), the Commissioner was bound by TR 97/7.

The Commissioner relied on the decision of the Federal Court in *Sole Luna Pty Ltd (as trustee for the PA Wade No 2 Settlement Trust) v Commissioner of Taxation* [2019] FCA 1195 and contended that to be deductible, the loss must be a realised loss which has been definitively encountered, run into or fallen upon by the taxpayer. If there had been a gain on the sale of the Dune Walk Unit, and had that gain not been a capital gain but rather realised on revenue account, the Commissioner submitted that there would be no doubt that the gain, calculated as the balance of proceeds over cost, would have been derived at the time of settlement on 9 July 2020.

Issues

1. Was the loss on the sale of the Dune Walk Unit incurred in gaining or producing her assessable income?
2. Was the loss unable to be deducted because it was private or domestic nature?
3. When was the loss 'incurred'?

Decision

Revenue loss?

Senior Member Lazanas considered the decision in *Myer Emporium* as standing for the proposition that a profit from an isolated transaction involving the sale of property will form part of a taxpayer’s assessable income when two limbs are satisfied:

1. where the taxpayer acquired the property for the purpose of profit-making; and
2. where the acquisition and sale of the property took place in the context of a business operation or commercial transaction.

In relation to the first limb, Senior Member Lazanas found that the objective evidence pointed to Jenifer having the requisite profit-making intention at the time that she purchased the Dune Walk Unit and her intention to live in it was a subsidiary purpose. Senior Member Lazanas placed weight on the fact that Jenifer intended to sell the Dune Walk Unit for a profit, not hold it for long-term investment, as evidenced by the fact that Jenifer knew at the time of purchase that she needed to sell the Dune Walk Unit to have the funds to settle on the purchase of the Foreshore Boulevard Unit, which she had contracted to purchase before buying the Dune Walk Unit. Senior Member Lazanas also found that it is not necessary that the profit-making intention be the sole or dominant purpose of entering into the transaction, and that it is sufficient if just one of the purposes included a profit-making intention.

In relation to the second limb, Senior Member Lazanas found that there is no requirement for there to be ancillary or recurrent activities in order for a transaction to be considered a business operation or commercial transaction. The transaction only has to be the sort of thing a business person or person in trade does. Senior Member Lazanas considered this to be a low threshold to meet, and that Jenifer's opportunistic purchase of the Dune Walk Unit to make a short-term profit gave a flavour of commercial or business dealing.

Senior Member Lazanas found that Jenifer purchased the Dune Walk Unit with the intention of making a profit on sale, and that the loss was incurred in gaining or producing assessable income within the meaning of section 8-1(1)(a) of the ITAA 1997.

Not private or domestic

Senior Member Lazanas found that the fact that the Dune Walk Unit was Jenifer's residence did not automatically make the loss of a private or domestic nature. Senior Member Lazanas referred to the decision in *John v Commissioner of Taxation* [1989] HCA 5, in which it was held that where stock acquired for the purpose of sale was sold as intended, the loss or outgoing could not be private in nature.

Timing

Senior Member Lazanas considered the wording in paragraph [9] of TR 97/7 and concluded that it was unclear what the paragraph meant. However, Senior Member Lazanas stated that it was not appropriate to undertake detailed statutory interpretation in relation to a public ruling, which is necessarily broad in application. Senior Member Lazanas found that Jenifer was entitled to rely on TR 97/7 and that, therefore, Jenifer ‘incurred’ the loss on the entering into the contract for the sale of the Dune Walk Unit in the income year ended 30 June 2020.

**COMMENT** **–** Senior Member Lazanas noted that, absent the reliance on TR 97/7, she would have found that the loss was not incurred until settlement took place (i.e. in the income year ended 30 June 2021). That is, it was the effect of TR 97/7 being binding on the Commissioner that resulted in the loss having been incurred on exchange.

**COMMENT** **–** the approach that Senior Member Lazanas took to the “commercial transaction” issue can be contrasted with the Commissioner’s view of that test following the decision in *Greig v Commissioner of Taxation* [2020] FCAFC 25. Following that decision, the Commissioner issued a Decision Impact Statement in which the Commissioner considered the decision in *Greig* was not inconsistent with the existing advice and guidance in Taxation Rulings TR 92/3 and TR 92/4 and, accordingly, *Greig* was not seen as a decision that would change the Commissioner’s approach to revenue versus capital issues. It is clear that Senior Member Lazanas considered that the commercial transaction test involves a low threshold following *Greig*.

Citation *Bowerman and Commissioner of Taxation (Taxation)* [2023] AATA 3547 (Senior Member G Lazanas, Sydney)

w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3547.html>

## Quirky Mama – meaning of 'incurred'

**Facts**

Quirky Mama Productions Pty Ltd was incorporated in 2018 for the purpose of producing the feature film titled ‘Occupation: Rainfall’. Carly Sparke and Carmel Imrie, Carly's mother, were directors of Quirky Mama.

Luke Sparke, Carly's husband, was the director and writer of ‘Occupation: Rainfall’. Carly and Carmel were producers of the film.

On 2 March 2018, Quirky Mama entered into a director and writer agreement with Luke, which set out the terms of his engagement as director and writer for the consideration of $825,000. The $825,000 payment was structured as follows:

* $100,000 being director fees to be paid in weekly instalments during production;
* $425,000 being writer fees to be paid in weekly instalments during production; and
* $330,000 that was ‘*to be reinvested and guaranteed to be paid back to the Producer [ie, Quirky Mama] out of the QAPE on receipt from the ATO in a priority position. If not enough excess in rebate the Director shall be paid out of any other sales from any and all platforms until paid in full.’*

QAPE was a reference to qualifying Australian production expenditure. Production expenditure is defined in section 376-125(1) of the ITAA 1997:

*(1) A company's production expenditure on a film is expenditure that the company incurs to the extent to which it:*

*(a) is incurred in, or in relation to, the making of the film; or*

*(b) is reasonably attributable to:*

*(i) the use of equipment or other facilities for; or*

*(ii) activities undertaken in;*

*the making of the film.*

To be qualifying Australian production expenditure the general test requires that it be production expenditure on the film to the extent to which it is incurred for, or is reasonably attributable to: (a) goods and services provided in Australia; or (b) the use of land located in Australia; or (c) the use of goods that are located in Australia at the time they are used in the \* making of the film (section 376-145).

On 5 March 2018, Quirky Mama entered into producer agreements with Carly and Carmel. The producer agreements provided each of Carly and Carmel to be paid a total of $350,000 for their work as producers. The $350,000 payment was structured as follows:

* $100,000 to be paid in weekly instalments during development, pre-production and block one shoot;
* $30,000 to be paid in weekly instalments during the block two shoot; and
* $220,000 that was “*to be reinvested and guaranteed to be paid back to the Producer out of the QAPE on receipt from ATO in a priority position. If not enough excess in rebate the Producer shall be paid out of any other sales from any and all platforms until paid in full*.”

In March 2018, Quirky Mama applied for a ‘producer tax offset’ certificate under Division 376 of the ITAA 1997.

Producer offset regime

Section 376-55 of the ITAA provides that a film production company is entitled to a producer offset for an income year in respect of a film if:

*(a) the film was completed in the income year; and*

*(b) the film authority has issued a certificate to the company under section 376‑65 (certificate for the producer offset) for the film; and*

*(c) the company claims the offset in its \*income tax return for the income year; and*

*(d) the company:*

*(i) is an Australian resident; or*

*(ii) is a foreign resident but does have a permanent establishment in Australia and does have an ABN;*

*when the company lodges the income tax return and when the tax offset is due to be credited to the company.*

Section 376-60(a) of the ITAA 1997 provides that the amount of the producer offset is 40% if the film is '*a feature film that was produced for commercial exhibition to the public in cinemas...*'.

The producer tax offset regime is administered by Screen Australia. Section 376-75(1) of the ITAA 1997 instructs Screen Australia to '*determine in writing the total of the company's QAPE on the film for the purposes of the producer offset'* when the production company applies for a certificate under section 376-65.

In its 2018 application, Quirky Mama estimated the QAPE would be $11,839,720 and the total film expenditure would be $12,156,720. Screen Australia issued a provisional certificate on that basis on 3 May 2018.

However, the film cost much more to produce than was anticipated. In May 2018, the producers came to rely much more heavily on editing and visual effects (**VFX**) to complete the film. Quirky Mama also became embroiled in an industrial dispute with members of the crew and their union over wages. This had caused the production to come an extended halt.

It was then agreed that Alex Becconsall would take on the VFX work for the film. He was working on the film as an executive assistant at that time, but he did not have experience in the VFX department. Alex set up a new company, Green Smoke Pty Ltd.

On 17 April 2019, Green Smoke entered into a post-production services agreement (**PPSA**) with Quirky Mama to do the VFX work. The exact VFX requirements (and fee structure) were to be determined once the scope of work became clear.

Clause 8.1 of the PPSA required Quirky Mama to pay Green Smoke 'in accordance with the Fees set out in the Schedule 2 in the manner and at the times provide for in this agreement'. However, Schedule 2, which was supposed to specify the ‘services, deliverables and fees’, was left blank.

The anticipated scope of the work changed substantially after the agreement was signed. Once part of the shooting was complete at the end of 2019, Alex developed a clearer idea of the VFX requirements and revised the cost estimate to around $10 million.

On 13 January 2020, Quirky Mama and Green Smoke entered into a ‘payment agreement’ in the form of a counter-signed letter, which provided as follows:

*In reference to your original Agreement made April 2019 between Quirky Mama Production [sic] Pty Ltd and Green Smoke Digital Pty Ltd, it is understood and further agreed that now shooting has wrapped for Occupation;Rainfall that there will be in the vicinity of 1400-1500 whole VFX shots and total individual shot bids listed. The final costs for all work are in the $15m+ range minimum.*

*Both parties therefore agree that when it comes time for the final audit for the tax rebate (QAPE) submission, Green Smoke Digital will provide an official reinvestment for all costs accrued to date, and take first position over any rebates, sales and subsequent monies made by the production until the debt is repaid.*

On 6 August 2020, the producer agreements with Carly and Carmel were amended to set out the terms on which the balance of the producer fee in the amount of $220,000 would be ‘reinvested’. The agreements set out that each of Carly and Carmel would issue a tax invoice to Quirky Mama for their producer fees under the March 2018 agreement, forgo the payment of the invoice and receive payment of a profit share pursuant to the agreement.

The August 2020 amendment had the effect that Carly and Carmel would only be entitled to be paid the $220,000 if there were sufficient funds available in the form of QAPE and sales, and in default, any net profits.

The agreement with Luke was also amended in August 2020, with the effect that Luke would forgo payment of the fees owed to him under the earlier agreement and reinvest that amount in the film to be recouped following completion of the film.

The final certificate issued by Screen Australia

By the end of October 2020, Green Smoke claimed to have performed VFX work on the film to the value of $20,234,388 (exclusive of GST). Of that amount, $15,238,729 was attributed to subcontractors.

A further application for the producer offset certificate was lodged on 25 March 2021 which claimed QAPE of more than $30 million. Screen Australia took the view that Quirky Mama only incurred QAPE on the production in the amount of $10,127,187, on the basis that a large portion of the expenditure was not incurred. Screen Australia decided to issue a final certificate consistent with the QAPE amount of $10,127,187 on 1 October 2021 pursuant to section 376-75(1) of the ITAA 1997.

Quirky Mama appeal against Screen Australia's decision.

Quirky Mama contended that an item of expenditure might be incurred even though payment has not yet been made.

Screen Australia contended the some of the expenditure was not incurred as it was subject to contingencies, and agreements between Quirky Mama and each of Luke, Carly, Carmel and Green Smoke were specifically excluded under items 6 and 7 of section 375-135 of the ITAA 1997.

Section 376-135 of the ITAA 1997 excludes some expenditures from being treated as production expenditure. In particular, item 6 refers to deferments (being 'amounts that are payable only out of the receipts, earnings or profits from the film') and item 7 deals with profit participation (being 'amounts that :(a) depend on the receipts, earnings or profits from the film; or (b) are otherwise dependent on the commercial performance of the film').

**Issue**

Were the producer fees, the writer/director fees and the post-production expenditure by Green Smoke incurred within the meaning of the term in section 376-125(1) of the ITAA 1997?

**Decision**

Producer Agreements

The AAT found that the obligation to pay the $220,000 amount under each of the producer agreements with Carly and Carmel was never expected to crystallise before the production was complete and the film was released. While Carly and Carmel were required under the amended agreements to render invoices so those amounts could be recorded as producer fees and ‘reinvested’, those terms did not transform a pending liability under the agreements into a presently existing liability to pay. The later agreements were intended to further defer the contingent obligation to pay the lump sum fees.

In addition, Carly and Carmel were only entitled to be paid the $220,000 ‘reinvested’ out of QAPE and sales, and then and out of any net profits, provided the funds available from those sources were sufficient to meet the obligation. The outcome of the application for QAPE and the potential commercial success of the film was uncertain. Therefore, the AAT found that the amount would not be incurred until the condition precedent was satisfied.

The AAT found that the August 2020 agreements made it clear that the producer fee was ultimately paid out of QAPE and sales, or if necessary out of net profit, and fit squarely within items 6 and 7 in section 376-135. Therefore, the amounts cannot be regarded as production expenditure even if they had been 'incurred'.

Writer/director agreement

The payment terms of the writer/producer agreement with Luke were set out similarly to the terms in the producer agreements with Carly and Carmel. The reinvestment amount was only payable to Luke out of QAPE and sales i.e. out of net profits. Therefore, the AAT was not satisfied that the expenditure was incurred, and in any event, the expenditure was excluded under section 376-135 items 6 and 7.

The arrangement with Green Smoke

The AAT observed that the PPSA and subsequent amendments made it clear that payment of the fees would be deferred until the film was complete and used the word ‘reinvestment’ similarly to the agreements between Quirky Mama and Luke, Carly and Carmel.

The AAT held that, not only did the payment clause indicate the source of any payment (i.e. from QAPE rebates, Sales or other net profits), but the effect it was also that the fee was only payable if Quirky Mama received such amounts.

Accordingly, the AAT was satisfied that the expenditure was not incurred because the payment was subject to a contingency, and in any event, the expenditure would not be regarded as production expenditure because it was excluded pursuant to items 6 and 7 in section 376-135.

Ultimately, the AAT was only satisfied that the following amounts were incurred and formed part of QAPE:

* $260,000 in producers’ fees paid to Carly and Carmel;
* $100,000 in director’s fees that were paid to Luke; and
* $254,168 paid to Green Smoke as the production proceeded.

The AAT varied the decision of Screen Australia accordingly.

Citation *Quirky Mama Productions Pty Ltd (Subject to Deed of Company Arrangement) and Screen Australia (Taxation)* [2023] AATA 3089(Deputy President B J McCabe, Sydney)

w <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3089.html>

## Bampton – land tax principal place of residence

**Facts**

Michael Bampton and Karen Bampton purchased a semi-detached house at Bondi as tenants in common in February 1994. Michael was a former Henry David York and Gadens partner.

In February 1999, Karen purchased the semi-detached house next door. Michael and Karen intended to modify the original property and the second property to form one residence.

On 25 May 2001, Michael and Karen lodged a development application to Council for certain building works to be undertaken in respect of the original property. Development consent was granted on 20 July 2001 and a construction certificate to undertake the works was issued on 22 April 2002.

On 29 November 2005, an officer of the Council inspected the properties and noted that the existing common wall between the two semi-detached dwellings had been demolished and the brickwork at the ‘rear proportion’ was being constructed.

On 13 December 2005, Council issued a show cause notice to Michael and Karen in respect of building works undertaken without approval.

On 20 December 2005, an application to Modify Development Consent was lodged by Michael and Karen seeking approval for the works which had been undertaken without consent. The modification was approved on 8 February 2006.

On 17 February 2006 a certificate of construction compliance was issued in respect of the modifications to the Properties.

Land tax notices of assessment were issued for each of the 2000 to 2008 land tax years assessing:

1. nil land tax in respect of the first property on the basis that it was exempt under the principal place of residence exemption; and
2. land tax in respect of the second property.

In 2001, 2005 and 2007, an accountant on behalf of Michael queried the land tax assessments in respect of the second property with the Chief Commissioner.

On 27 March 2009, an objection was lodged by Karen to the land tax assessments in respect of the first property for each of the 2000 to 2008 land tax years.

By letter dated 1 July 2009, the Chief Commissioner wrote to Karen advising that the objection had not been lodged within time and was, therefore, invalid. The Chief Commissioner also advised that:

1. in order for the principal place of residence exemption to extend to a parcel of land which is comprised of two lots, the Chief Commissioner must be satisfied that the lots are undivided not only by physical separation but also by use, occupation and title; and
2. as the first property was owned by both Michal and Karen, but the second property owned solely by Karen, there was no unity of title between the properties.

Between 2010 and 2021, land tax assessments were issued to Michael and Karen consistent with the 2000 to 2008 assessments.

On 4 March 2021, Karen lodged an objection to the land tax assessments in respect of the second property for the 2003 to 2021 land tax years.

On 8 November 2021, the Chief Commissioner issued re-assessments for the 2017 to 2021 land tax years exempting the properties from land tax as Michael and Karen’s principal place of residence. The cover email under which the re-assessments were sent noted that the Chief Commissioner now accepted that Michael was a beneficial owner of the second property, such that there was unity of title between the two properties i.e. both Michael and Karen were owners of both properties.

On 26 May 2022, Michael and Karen lodged an objection against the decision not to re-assess the years prior to 2017.

On 4 October 2022, the Chief Commissioner accepted the objection to the assessments in respect of the 2009 to 2016 land tax years out of time. The Chief Commissioner did not accept the objections to the assessments for the 2000 to 2008 land tax years on the basis that an objection had already been made for those years and was upheld.

On 5 October 2022, the Chief Commissioner issued re-assessments for the 2009 to 2016 land tax years on the basis that the second property was exempt from land tax as Michael and Karen’s principal place of residence.

Michael and Karen then lodged an application for review with NCAT seeking an order pursuant to section 41 of the *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**) or section 99(1) of the *Taxation Administration Act 1996* (NSW) (TAA) extending the time for bringing their application for review of the objection decisions for the 2000 to 2008 land tax years.

Section 99 of the TAA provides:

*An application for review following a determination by the Chief Commissioner of an objection must be made not later than 60 days after the date of issue of the notice of the Chief Commissioner’s determination of the objection. The court or tribunal to which the application is to be made may allow a person to apply for a review after that 60-day period.*

Section 41 of the CAT Act relevantly provides:

*(1) The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.*

*(2) Such an application may be made even though the relevant period of time has expired.*

Michael and Karen submitted that they were not made aware by the Chief Commissioner in the letter dated 1 July 2009 of their right to seek a review of the assessments in NCAT. Michael and Karen also submitted that because the Chief Commissioner had dealt with objections to other tax years out of time, there could be no prejudice in allowing this application to be made out of time.

The Chief Commissioner submitted that that if an order was made extending the time for the filing of the application for review, he would be prejudiced because:

1. aerial photos of the properties for the period prior to 2009 could not be obtained as they are no longer available;
2. witness statements from neighbours could not be obtained to test the evidence in respect of the timing of construction works and the extent of the construction works as a number of the neighbouring properties have been sold and due to the passage of time;
3. the Chief Commissioner could not test Michael and Karen's evidence in respect of the properties and subsequent renovations in the absence of objective documentation in relation to those matters.

**Issues**

1. Should the NCAT exercise the discretion under section 41 of the CAT Act or section 99(1) of the TAA extending the time to bring the application for review?
2. Was the second property exempt from land tax as it formed a parcel of land with the original property which was used together by Karen and Michael as their principal place of residence?

Decision

The NCAT ordered that:

1. the application for an order extending time for the filing of the application for review in respect of the 2000 to 2006 land tax assessments for the second property be dismissed;
2. the application for review in respect of the 2000 to 2006 land tax assessments for the second property be dismissed;
3. under section 41 of the CAT Act, the period of time for filing an application for review for the second property for the 2007 and 2008 land tax years is extended to 4 April 2023;
4. the land tax assessments for the second property for the 2007 and 2008 land tax years are revoked and remitted to the Chief Commissioner for reassessment on the basis that the second property is exempt as Michael and Karen’s principal place of residence.

In coming to its decision, NCAT considered:

1. as a solicitor of 36 years, despite having no knowledge of land tax legislation, Michael would have been able to easily seek advice (within his own firm). Michael and Karen’s ignorance of their rights was not a satisfactory explanation for the delay;
2. there was no causal link between the communications that Michael and Karen had with the Chief Commissioner prior to 2022 and the delay in commencing proceedings;
3. while Michael attempted to discuss the matter with the Chief Commissioner following correspondence on 4 October 2022, Michael’s attempts accounted for only three weeks of the thirteen year delay, that is for the period between 4 October 2022 and 24 October 2022;
4. the Chief Commissioner would suffer significant prejudice in being unable to rigorously test Karen and Michael's evidence as to precisely what construction works were undertaken and when in the absence of witnesses who may have been able to have been called and such documents as may have been available;
5. evidence demonstrates that the construction works in respect of the properties were completed in 2006. On that basis, the properties were, by that time physically undivided and being used and occupied by the Bampton family as one physical residence so that the principal place of residence exemption would apply for the 2007 and 2008 land tax years; and
6. the properties were likely not capable of 'seamless occupation and use' or used and occupied as a 'single residence' for the 2000 to 2006 land tax years.

Citation *Bampton v Chief Commissioner of State Revenue* [2023] NSWCATAD 267 (Senior Member S Dunn, Sydney)

w [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/267.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/267.html?context=1;query=%22taxation%22;mask_path=au/cases)

## Home789 Resources Pty Ltd – payroll tax grouping

**Facts**

Walton Chu was a licensed real estate agent and was the sole director and sole shareholder of Home789 Resources Pty Ltd. Home789 Resources carried on a real estate agency business. Home789 Resources employed 10-15 employees. All employees reported to Walton.

Generally, Home789 Resources would act as agent for vendors, and occasionally purchasers, in respect of property sales. This involved listing and marketing properties, conducting property inspections and coordinating property settlements.

The Chief Commissioner grouped Home789 Resources with 6 other entities which operated businesses in the real estate industry under section 72(2) and section 74(1) of the *Payroll Tax Act 2007* (NSW). These entities were as follows:

1. Great Fortune Investments Pty Limited;
2. Bright Australia Pty Limited;
3. SWASW Wealth as trustee for the CJ Family Trust;
4. Australian Sunshine Marketing Pty Ltd;
5. UFN Resources Pty Limited; and
6. UFN A Epping Pty Limited as trustee for the UFN A Epping Unit Trust.

Relevantly, the ownership and control of each of these entities was as follows:

1. Walton was the sole director and sole shareholder of Great Fortune Investments Pty Limited;
2. Walton was the sole director and sole shareholder of Bright Australia Pty Limited at least in the periods 1 February 2012 to 16 July 2013, and 9 November 2014 to 21 December 2016;
3. Walton owned more than 50% of the issued share capital of UFN A Epping Pty Limited and had a beneficial interest in more than 50% of the units in the EFN A Epping Unit Trust;
4. Walton, Walton's wife, Whitney Jiang, and their children were discretionary beneficiaries of the CJ Family Trust;
5. SWASW Wealth as trustee for the CJ Family Trust was the sole shareholder of UFN Resources Pty Limited; and
6. SWASW Wealth as trustee for the CJ Family Trust held 99% of the shares in Australian Sunshine Marketing Pty Ltd.

Great Fortune Investments carried on a business that provided property management services to owners who leased out their property. It was common for purchasers who purchased a property from Home789 Resources as an investment property to engage Great Fortune Investments as the property manager for the property. Accordingly, the majority of the clients of Great Fortune Investments were referred by Home789 Resources.

SWASW Wealth as trustee for the CJ Family Trust held the intellectual property for the 'Home789' brand.

Australian Sunshine Marketing often traded as 'Home789'. This company carried on a real estate business of forming relationships with certain property developers and acting as the exclusive selling agent for those developers. However, Australian Sunshine Marketing did not itself provide marketing or sales activities for the property developers. Australian Sunshine Marketing would enter into a Conjunction Agreement with licenced real estate agents who would provide these services to the property developers. Under the Conjunction Agreement, commission from the sale of a property would be split between Australian Sunshine Marketing and the licenced real estate agent.

It was common for Australian Sunshine Marketing to engage Home789 Resources as the listing agent for properties developed by the property developers.

On 29 December 2013 Australian Sunshine Marketing and Home789 Resources entered into a Service Agreement to govern this relationship. Approximately 90% of the properties of which Australian Sunshine Marketing had been appointed as the exclusive listing agent were sold through the services provided by Home789 Resources.

UFN Resources operated a business that provided administration and book-keeping services for foreign investors. These investors invested in property develop projects throughout Sydney. UFN Resources provided these services to Australian Sunshine Marketing.

Home789 Resources, Great Fortune Investments and Australian Sunshine Marketing all leased adjacent commercial suites. These businesses also shared the reception area and common areas in this premises. The businesses had the same receptionist and phone number.

On 15 March 2019, the Chief Commissioner raised assessments of payroll tax for the period of 1 July 2012 to 31 January 2019 on the basis that these entities were grouped. The Chief Commissioner also imposed penalty tax at 25% and interest on the assessments.

The entities in the payroll tax group had previously applied to the Chief Commissioner to be excluded from the payroll tax group. This application was also denied by the Chief Commissioner.

On review at the NCAT, the Chief Commissioner contented that the businesses operated by the group members were sufficiently connected to warrant being grouped for payroll tax purposes. The Chief Commissioner largely relied on the following grounds:

1. Walton could control and influence the operation of each of the businesses in the payroll tax group;
2. the natures of the businesses were similar as each business operated within the real estate industry;
3. all businesses operated from the same commercial premises and shared the same common spaces, reception, receptionist and telephone number;
4. most of the businesses were ultimately marketed through the Home789 brand;
5. the interconnectedness between the businesses was such that the group members could be taken to have carried on a single business;
6. there was financial interdependency between the members of the group; and
7. there were common sales staff between the business.

The entities in the group argued that each of the entities carried on distinct and independent businesses. Any connection between the parties was not material and did not affect the operation of the businesses carried on by the entities in the group. In particular, the group members made the following assertions:

1. Walton did not have significant control and influence over all of the businesses in the group as Whitney controlled and managed Australian Sunshine Marketing and Hui Fang Cao, Whitney's mother, controlled and managed UFN Resources. Walton was also not involved in the day-today operation of these entities;
2. the fact that the businesses operated in the real estate industry and had dealing with each other was not a sufficient basis to group the entities as there was no interdependence between the businesses;
3. the group entities rented the shared premises at market rates and the fact that the entities leased adjacent suites was a matter of convenience and did not evidence a significant connection between the businesses;
4. the businesses were not marketed together under the Home789 brand;
5. the entities operated distinct businesses with distinct operations which were managed by different people;
6. the entities were not financially dependent on each other; and
7. there were no shared sales staff between the entities but some staff had ceased employment with one group entity and commenced employment with another group entity at a later date.

The Chief Commissioner also contended that various commission payments to 31 persons and entities who were licensed real estate agents were taxable wages under section 34 of the Payroll Tax Act. These persons and entities held ABNs and were registered for GST.

Home789 Resources (and other entities) claimed that these persons or companies were carrying on their own real estate businesses in their own right. The commission payments were made in accordance with the Conjunction Agreements and, therefore, the commission payments did not constitute taxable wage.

In respect of the taxable wage issue, Home789 Resources made the following arguments:

1. the Conjunction Agreements did not set out that one party was required to work for the other. The only obligation created under the agreements was for the agent to act for a particular vendor;
2. the commission payments were not consideration for services provided by the recipients of the payments;
3. the commission represents the agent's commission from the sale of the property for the activities undertaken for the vendor in the transaction;
4. the relationship cannot be characterised as one of principal and independent contractor or one of employee and employer.

For these reasons, Home789 Resources contended that the commission payments could not be characterised as taxable wages.

The Chief Commissioner contended that Home789 Resources failed to establish that the characterisation of the commission payments as taxable wages was incorrect. In particular, the Chief Commissioner argued that Home789 Resources did not product sufficient evidence to demonstrate, on the balance of probabilities, that the payments should not be classified as taxable wages.

The Chief Commissioner characterised the payments made to the relevant persons and entities by Home789 Resources and associated entities into 4 categories as follows:

1. existing employees (Category 1);
2. deemed employees (Category 2);
3. payment under relevant contracts (Category 3); and
4. re-directed payments, being payments re-directed to an entity associated with an individual who was an employee of Home789 Resources and associated entities (Category 4).

**Issues**

1. Should the entities or a combination of entities be excluded from the payroll tax group?
2. Should payments made to certain persons or entities be treated as taxable wages?

**Decision**

Should the entities or a combination of entities be excluded from the payroll tax group?

The NCAT considered the recent case of *Chief Commissioner of State Revenue v Elanor Operations Pty Ltd* [2022] NSWCA 222 and considered that the fact that there is a common director across a number of entities is not, alone, sufficient grounds to group the entities for payroll tax purposes. This is merely one factor to consider when determining whether the businesses in the group are in fact separate parts of an associated enterprise operated for the same persons. This case demonstrated that it is necessary to consider the ultimate control and beneficial ownership of each member of the group.

The NCAT considered that the group members failed to provide sufficient evidence to establish that the entities should not be remained grouped. In particular, the NCAT put emphasis on the fact that Walton failed to provide direct evidence given his proximity to each of the businesses in the group. The NCAT also took into account the fact that Whitney and Hui also failed to give evidence.

The NCAT considered that in practice Walton had significant control, and exercised that control, over each member of the payroll tax group. The NCAT considered the fact that Walton was not involved in the daily operations of most of the businesses was not sufficient to demonstrate that Walton did not have control and exercise control over each business. It was sufficient that Walton had the ability to influence the strategic and financial decisions in each business.

The NCAT also considered the fact that all businesses operated from the same premises, had shared common spaces, reception area, a receptionist and the same telephone number to be factors that indicated that the nature of the businesses were connected.

On the evidence provided by both parties, it was also determined that the businesses in fact marketed themselves as a 'one-stop-shop' through the Home789 brand.

The NCAT did note that the fact that all of the businesses in the group operated in the real estate industry alone was insufficient ground for the businesses to be grouped.

Ultimately, the NCAT concluded that the nature of the connections between the group were such that the connections were not infrequent or random and the connections went to the nature and operation of each of the businesses. It was determined that there was sufficient commercial integration between the businesses of the group.

The NCAT upheld the decisions of the Chief Commissioner to group the entities and to refuse the application for exclusion.

Should payments made to certain persons or entities be treated as taxable wages?

In most cases, the NCAT considered that many of the individuals and entities to whom payments were made did not provide or provided insufficient evidence to demonstrate that the Chief Commissioner's classification of the payments was incorrect and that the payments were not taxable wages. In respect of other payments, the NCAT considered that the payees did not meet the exemption criteria.

The NCAT considered that three of the commission payments to individuals were genuinely a commission for services that these individuals provided to the public and not for Home789 Resources or an associated entity.

Accordingly, with the exclusion of these three payments, the NCAT determined that the Chief Commissioner's assessments should be upheld.

**COMMENT –** exclusion from a group under section 79 of the Payroll Tax Act 2007 (NSW), and the equivalents in other jurisdictions, cannot be self-assessed. Instead, an application needs to be made to the Chief Commissioner for an exclusion order. The prospects of obtaining an exclusion order have increased since the decision of the NSW Court of Appeal in *Chief Commissioner of State Revenue v Elanor Operations Pty Ltd* [2022] NSWCA 222.

Citation *Home789 Resources Pty Ltd & others v Chief Commissioner of State Revenue* [2023] NSWCATAD 263 (Senior Member J S Currie, New South Wales)

w [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/263.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/263.html?context=1;query=%22taxation%22;mask_path=au/cases)

## Holm – out of time objections

Facts

On 20 October 2022, Kenneth Holm wrote to the Commissioner requesting to have his taxable income decreased by $2.00 for each of the years from 30 June 1999 to 30 June 2021. Kenneth sought to claim deductions on the basis that he acquired his first mobile phone in January 1999 and estimated that each financial year he sent 20 work-related text messages from his work phone, leading to a deduction of $2.00 in each year.

The Commissioner refused the request to amend the tax returns for the years ended 30 June 1999 to 30 June 2019 on the basis that Kenneth the period of review to amend the tax returns had expired, being 2 years since the date of the notices of assessment for each year.

Kenneth then lodged an objection to the Commissioner's decision in relation to the years ended 30 June 1999 to 30 June 2019 and requested that the objection be treated as being within time.

The Commissioner disallowed the objection and determined not to treat the objection as being made within time.

On 3 May 2023, Kenneth made an application to the AAT for a review of the Commissioner's decision to not treat the objection as being made within time.

Section 14ZW(1)(aa) of the *Taxation Administration Act 1952* (Cth) provides that the time limit to lodge an objection is within two or four years after the notices of assessment were given depending upon what time limit applies to the amendment of the relevant assessment. Section 14ZW(2) of the TAA provides that, if the time limit has passed, a person may still lodge the objection and request that it be treated as being made within the time limit. Such a request must state fully and in detail the circumstances concerning and the reasons for the person's failure to lodge within the required period.

Section 14ZX(1) of the TAA requires that, after considering an application for an extension of time, the Commissioner must decide whether to agree to it or refuse it. Where the Commissioner refuses a request, the person may apply to the AAT for review of the decision.

At the hearing, Kenneth acknowledged that the delay in lodging the objections was significant, however that there were important reasons for the delay. Kenneth informed the AAT that he was unaware of the potential to claim a deduction for work-related text messages until he attended a social occasion in July 2022 at which time he was informed by an acquaintance.

Kenneth contended that he had no obligation to seek professional help, which was agreed by the Commissioner, however the Commissioner noted that this simply puts a greater burden on Kenneth to accurately attend to his taxation affairs. The Commissioner submitted that ignorance of the law does not justify exercise of the discretion to grant an extension, nor is it a significant unusual circumstance, to the contrary, it is a common circumstance.

Issue

Should the Commissioner grant Kenneth an extension of time to lodge out of time objections?

Decision

The AAT considered whether there was merit to Kenneth's objections and whether allowing the objections to be treated as within time would cause any prejudice to the Commissioner. The AAT emphasised the fact that Kenneth did not have evidence to substantiate his claims over the years from 30 June 1999 to 30 June 2019.

The AAT noted that in considering whether any prejudice or unfairness arises in relation to granting or not granting an extension of time request, the general position is that once a decision is made and a review period expired, beyond that period there is an expectation that the matter is finalised. The AAT also noted that the prejudice caused to Kenneth was limited to $21.00.

The AAT noted that the lack of substantiation meant that Kenneth had little prospect of succeeding with his objections. The AAT considered that there was a lack of prejudice caused to either party – however this does not weigh in favour of granting an extension of time.

On these grounds, the AAT confirmed the decision of the Commissioner to not grant an extension of time to Kenneth to lodge the objections.

Citation *Holm and Commissioner of Taxation (Taxation)* [2023] AATA 3545(Member D Mitchell, Brisbane)

w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3545.html>

## Vanderstock v Victoria – electric vehicle road user charge invalid

Facts

On 1 June 2021 the *Zero and Low Emission Vehicle Distance-based Charge Act 2021*(Vic) (the **ZLEV Charge Act**) received Royal Assent.

Section 7(1) of the ZLEV Charge Act imposed a charge for the use of a Zero and Low Emission Vehicle (ZLEV) on specified roads.

Section 90 of the Constitution provides that that the Commonwealth has the exclusive power to impose duties of custom and excise and that the States and Territories of Australia are not permitted to impose duties of custom and excise. At issue was whether the charge imposed by the ZLEV Charge Act was a duty of excise, being a tax on goods. While it is clear that a tax on the sale or distribution of goods is a duty of excise, in *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, the majority had concluded that a tax on the consumption of goods did not qualify as a duty of excise.

On 6 September 2022, Christopher Vanderstock and Kathleen Davies, who are owners of ZLEVs, challenged the validity of section 7(1) of the ZLEV Charge Act in the High Court.

The Commonwealth Attorney General intervened in the proceedings to support Christopher and Kathleen's claim.

The Attorneys-General of South Australia, Western Australia, Queensland, New South Wales, Tasmania, the Northern Territory, and the Australian Capital Territory intervened in the proceedings in support of the State of Victoria’s position.

Issue

Is section 7(1) of the ZLEV Charge Act invalid on the basis that it imposes a duty of excise within the meaning of section 90 of the Constitution?

Decision

The High Court reconsidered its earlier decision in the *Dickenson's Arcade* case.

The majority of the High Court decided to overturn the decision in *Dickenson's Arcade*, and clarified that an excise, as defined in section 90, refers to a tax on goods within a country's borders.

The majority of the High Court rejected the characterisation of the ZLEV charge as being a tax on the activity of driving a ZLEV on a specified road, because 'specified road' was broadly defined as including anywhere in Australia where members of the public have right of way.

The majority of the High Court held that whether a tax can be considered a tax on goods depends on two key factors:

1. the tax must have a strong connection to the production, manufacturing, sale, distribution, or consumption of goods; and
2. the tax should have an impact on goods, either as items produced or manufactured, or as products of commerce.

The ZLEV charge was held to be a tax on goods because it is closely related to the usage of ZLEVs, and it affects the demand for ZLEVs in the market.

The ZLEV charge was, therefore, held to be a duty of excise. As Victoria is not permitted to impose duties of excise under section 90 of the Constitution, section 7(1) of the ZLEV Charge Act was held to be invalid.

**COMMENT** –the decision in *Vanderstock* is likely to have an effect on taxes in other states, including the invalidation of electric vehicle charges imposed by those states. The minority judgments *Vanderstock* suggested that there may also be implications to other state taxes, such as stamp duty on transfer of goods with land or businesses, certain vehicle duties or registration charges, waste disposal levies, gaming machine levies and 'point of consumption' betting taxes.

Citation *Vanderstock v Victoria* [2023] HCA 30 (Kiefel CJ; Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ)

w <https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/30.html>

## Baullo – transfer of property from discretionary trust to its beneficiaries

**Facts**

Tony Baullo is the father of Jordan Sebastian Baullo.

On 2 December 2017, Tony and Jordan were the successful bidders at the auction for a property in Pascoe Vale South, Victoria. The purchase price of the property was $905,000.

Tony is a builder with property development experience.

Tony and Jordan intended to develop two units on the property. Tony paid the deposit in the amount of $90,000 and was reimbursed by Jordan for his half share.

The contract for the sale and purchase of the property allowed for the purchaser to nominate a different party to take the transfer of the property. On the advice of his accountant, Tony decided that the property should be held in a discretionary trust.

In February 2018, Tony and Jordan established J.T. Family Trust, with JT Development Nominees Pty Ltd as JT Development Nominees Pty Ltd. Tony and Jordan are beneficiaries of the J.T. Family Trust and directors and shareholders of JT Development Nominees Pty Ltd .

On 21 March 2018, the JT Development Nominees Pty Ltd was registered as the sole proprietor of the property.

The J.T. Family Trust did not have a bank account or other funds. Accordingly, the purchase of the property was funded as follows:

1. stamp duty in the amount of $49,370 and other incidental costs were paid by Tony and Jordan;
2. a mortgage over the property was taken out with the National Australia Bank, in the amount of $825,869; and
3. the amount of $156,846, including the deposit, was 'contributed' by Tony and Jordan on the understanding that they would be 'reimbursed' when the developed lots were sold.

Neither Tony nor Jordan had any expertise in finance and accounting and, as such, left it to their accountant to reflect the acquisition of the property in the financial statements of the J.T. Family Trust. As at 30 June 2018, the accounts of the J.T. Family Trust noted that JT Development Nominees Pty Ltd:

1. owned freehold land and buildings with a value of $959,620, being the sum of the purchase price, stamp duty and the incidental costs paid by Tony and Jordan;
2. owed the NAB an amount of $825,869; and
3. owed an amount of $156,846 by way of ‘Beneficiary Loans’.

At some point in June 2018, Jordan proposed to his partner.

Jordan wanted to own and occupy one of the units to be developed on the property as his main residence and informed Tony of his intent. Tony advised Jordan that the property could no longer be held within the J.T. Family Trust if Jordan wanted to access the CGT main residence exemption. After speaking to an officer at the Victorian State Revenue Office, Tony decided to transfer the property to himself and Jordan, on the understanding that this would not be subject to duty.

Section 36A(1) of the *Duties Act 2000* (Vic) provides that *'[n]o duty is chargeable ... in respect of a transfer of dutiable property that is subject to a discretionary trust ... to a beneficiary of the trust'*, which is subject to certain pre-conditions, notably section 36A(1)(e) of the Duties Act which states that the Commissioner must be *'… satisfied that the transfer is not part of a sale or other arrangement under which there exists any consideration for the transfer*'.

There is an exception in section 36C of the Duties Act, which provides that a transfer is not to be treated as part of a sale or arrangement only because a beneficiary *'gives a mortgage to secure the same or a greater amount as that outstanding under a mortgage to which the property was subject immediately before the time of the transfer'*.

On 28 March 2019, a transfer of land was signed by JT Development Nominees Pty Ltd (as the transferor) and Tony and Jordan (as the transferees). The consideration section of the transfer was left blank at the time the transfer was signed, but at some point before registration, the words ‘Entitlement in equity’ were added.

In May 2019 Tony and Jordan’s lawyer, in correspondence with the SRO stated that, in relation to the Beneficiary Loans ‘as the land is being transferred to the beneficiaries the loans will be forgiven and not repaid’.

At 30 June 2019 the financial statements of the JT Family Trust were prepared to show it had cash on hand of $1 and no liabilities.

In late October 2019, the transfer was completed. The delay in registering the transfer was due in part to the need to arrange a new loan to pay out the NAB.

On 14 April 2020, JT Development Nominees Pty Ltd was deregistered.

By 28 September 2021, Tony and Jordan had subdivided and partitioned the property so that Jordan became the registered proprietor of the lot on which his home was located and Tony acquired the other lot.

The Commissioner made an assessment which imposed duty of $46,070 on the transfer of the Property from JT Development Nominees Pty Ltd to Tony and Jordan.

Tony and Jordan sought review of the assessment in the VCAT.

Tony and Jordan challenged the assessment, arguing that transfer is exempt from duty under section 36A of the Duties Act on the basis that the property was transferred to them as beneficiaries of the J.T. Family Trust. Tony and Jordan also argued that:

1. they did not make any loans to JT Development Nominees Pty Ltd or the J.T. Family Trust. In advancing this argument, Tony and Jordan pointed to the fact that the deposit was paid by them at a time when the J.T. Family Trust did not exist;
2. paying stamp duty and other amounts from personal accounts, is common practice in conveyancing. and the amounts were 'contributions', not loans. The recognition of the amounts in the Trust’s financial statements as ‘beneficiary loans’ was erroneous; and
3. they did not forgive any loans which may be found to exist.

The Commissioner argued that the assessment should be confirmed as:

1. based on advice sought by Tony, he and Jordan chose to have the property purchased by JT Development Nominees Pty Ltd;
2. Tony and Jordan chose to treat the amounts they had paid in respect of the property as advances by way of one or more loan. The accountant should be accepted as being the agent for Tony and Jordan, Tony made reference to there being ‘beneficiary loans’ in correspondence he had sent to the State Revenue Office and Jordan's affidavit referenced an expected ‘reimbursement’ of the funds that had been contributed by him and Tony; and
3. following the transfer of the property, the beneficiary loans were reduced to nil, indicating that they had been forgiven.

The Commissioner drew attention to an email Tony sent to the State Revenue Office wherein he stated that *'as the land is being transferred to the beneficiaries the loans will be forgiven and not repaid'*. Further, Jordan's affidavit stated that, following the transfer of the property, he and Tony *'considered that there was no longer any monies owed to us by the [Trust]'*.

**Issue**

Was the transfer of the property to Tony and Jordan part of a sale or other arrangement under which there existed consideration for the transfer?

**Decision**

Senior Member Tang held that the extinguishment of the loans of $156,846 was part of the consideration that moved the transfer of the property to Tony and Jordan.

Senior Member Tang held that the preconditions for the exemption in section 36A of the Duties Act were not satisfied.

The assessment was confirmed.

Citation *Baullo v Commissioner of State Revenue (Review and Regulation)* [2023] VCAT 1164 (Senior Member

R. Tang AM, Melbourne)

w <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2023/1164.html>

## Hall v CAP Security Services – DPNs and insolvency

**Facts**

On 5 January 2004, Tallicat Pty Ltd was established with Dale William Hall as its sole director, secretary and member. Since its establishment, Tallicat has acted as the trustee of the Hall Family Trust.

On 8 January 2004, Dale was appointed as director and secretary of CAP Security Services Pty Ltd. CAP Security carried on the business of providing security service personnel, in the nature of door attendants and front door security, to a number of licensed venues across Queensland.

From around 3 December 2018 until the occurrence of the events detailed below, Tallicat, acting in its capacity as trustee of the Hall Family Trust, was the sole shareholder of CAP Security, holding 20 ordinary shares.

Sale of shares held by Tallicat in CAP Security

On or around 9 September 2021, Tallicat entered into a written agreement, described as a 'Business Sale Agreement', for the sale of 70% of its shares in CAP Security to Trojan Consultant Services Pty Ltd. At the time the agreement was signed, Peter Sleiman was the sole director of Trojan.

The agreement provided for completion to occur on 30 September 2021, and on completion, Dale was to resign as the director and secretary of CAP Security.

On or about 21 September 2021, Dale signed an ASIC Form 370 (Notification by officeholder of resignation or retirement) and tendered his resignation as director and secretary, effective on the completion date of 30 September 2021. However, completion did not occur in the manner contemplated by the agreement. A dispute arose between Tallicat and Trojan which was resolved at a mediation, after which Tallicat and Trojan entered into a 'Deed of Settlement and Release' dated 26 May 2022. At the time the deed was signed, Dale's resignation had not been effected, nor had the transfer of shares been registered.

On 16 June 2022, Dale’s resignation as a director was registered. It is notable that, despite the delay in registering the resignation, Dale had not participated in the management of CAP Security since around 30 September 2021 and had been excluded from the business premises.

Trojan was never registered as a shareholder of CAP Security. Instead, 70% of the shares came to be held by Suria Global (L) Australia Pty Ltd of which Peter has, at all relevant times, been the sole director, secretary and shareholder.

Director Penalty Notice (**DPN**)

On 8 August 2023, the Deputy Commissioner of Taxation issued Dale with a DPN, which was not received by him until 18 August 2023 as it was sent to his former residential address. The DPN identified that, for the period from 1 July 2021 to 30 September 2021, CAP Security had unpaid GST liabilities in the amount of $208,574. The DPN made Dale personally liable to pay the amount of $208,574.

A director has 21 days, from the date the Commissioner left or posted the DPN, to cause any one of the following four events set out in section 269-15 of Schedule 1 to the TAA to take place, in which case the penalty will be remitted:

*(a) the company complies with its obligation; or*

*(b) an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Act 2001; or*

*(ba) a small business restructuring practitioner for the company is appointed under section 453B of that Act; or*

*(c) the* ***company begins to be wound up*** *(within the meaning of that Act).* [Emphasis added].

Accordingly, Dale had 21 days from 8 August 2023 (being 29 August 2023) to take any of the steps listed above.

Upon receiving the DPN, Dale promptly sought legal advice and, on 23 August 2023, personally made a payment to the ATO in the amount of $5,000 in respect of the DPN. Crucially, this provided Dale with standing to make an application for winding up CAP Security as, pursuant to section 269-45(2) of Schedule 1 to the TAA, he was now entitled to be indemnified by CAP Security and thereby became a creditor.

Application to wind up CAP Security

Dale brought an application, the subject of this case, on an urgent basis seeking to have CAP Security wound up, arguing:

1. firstly, pursuant to section 459A of the Corporation Act, CAP Security should be wound up in insolvency; and
2. secondly, pursuant to section 461(1)(k) of the Corporations Act, CAP Security should be wound up on just and equitable grounds.

In cases where a person applying for a company to be wound up does not rely upon the failure of a company to comply with a statutory demand, or any other presumption of insolvency in section 459C of the Corporations Act, the Court must be satisfied that the company is insolvent. Whether a company is insolvent is a question of fact that is usually answered by considering the company’s financial position taken as a whole. Although, evidence of insolvency may be established by a company failing to pay an undisputed and genuine debt.

Dale produced a profit and loss statement and a balance sheet for CAP Security for the financial year ending on 30 June 2021, as well as the company's balance sheet as at 30 September 2021. The profit and loss statement for the financial year ending on 30 June 2021 showed CAP Security had made a net profit of slightly over $2 million, which was only due to it receiving over $3.8 million in JobKeeper subsidies. A substantial change in circumstances was shown in the balance sheet as at 30 September 2021, as CAP Security's earnings were negative $206,545 over the first three months of the financial year. Net assets had also decreased by approximately $600,000, leaving a deficiency of current assets over current liabilities of approximately $124,000. Importantly, the balance sheet also noted the GST liability to the Commissioner of $208,574. Dale also supplied evidence that CAP Security had not paid its rent for June and July 2023, that the landlord alleged it was in breach of its lease, and that it had abandoned its premises.

At the last-minute, before the first hearing of the matter on 25 August 2023, CAP Security produced an amended BAS for the period from July 2021 to September 2021, which reported total sales of nil and nil GST owed to the ATO. However, CAP Security was not able to provide evidence explaining the amended BAS.

**Issue**

Should CAP Security be wound up in insolvency pursuant to section 459A of the Corporation Act?

**Decision**

Derrington J considered the last-minute production of the amended BAS was concerning and suspected that it had been submitted by CAP Security to make Dale desist with the present application. Derrington J found that, at most, the amended BAS could indicate CAP Security was in error as to the quantum of its liability to the Commissioner. However, given the GST liability to the Commissioner was evidenced in CAP Security’s own balance sheets, it was safe to proceed on the basis that there is no genuine dispute about CAP Security’s indebtedness to the Commissioner.

The failure of CAP Security to meet its taxation liabilities over an extended period of time was considered by Derrington J as a significant indication of its insolvency. The fact that CAP Security had also not paid the landlord the money it owed, or provided a reason as why it had not paid the landlord, further supported a conclusion of insolvency. In *Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd* (1991) 29 FCR 564 (*Ataxtin*), Heerey J observed:

*... With no further evidence, the natural inference to be drawn is that the company did not pay the amount admittedly due because it was unable to do so. The conclusion will ordinarily follow that the company is unable to pay its debts …*

In following *Ataxtin,* Derrington J drew a 'natural inference' from the absence of CAP Security's response to the evidence of its indebtedness that the company is unable pay its debts.

Derrington J held that there are sufficient grounds for CAP Security Services to be wound up in insolvency pursuant to section 459A of the Corporations Act.

Citation *Hall v CAP Security Services Pty Ltd, In the matter of CAP Security Services Pty Ltd* [2023] FCA 1237 (Derrington J, Queensland)

w <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1237.html>

## Appeals update

**Bendel**

The Commissioner has appealed against the AAT decision in *Bendel and Commissioner of Taxation (Taxation)* [2023] AATA 3074 (see our October 2023 Tax Training Notes).

**MJH Trading Trust**

The Commissioner has appealed the decision in *MJH Trading Trust v Commissioner of Taxation* [2023] AATA 3005 (see our October 2023 Tax Training Notes) to the Federal Court.

## Other tax and superannuation related cases for 9 October 2023 to 8 November 2023

| **Citation** | **Date** | **Headnote** | **Link** |
| --- | --- | --- | --- |
| *Aymsheen Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 1237 | 5 October 2023 | CIVIL PROCEDURE — separate determination of questions — where appropriate — constitutional validity of imposition of payroll tax | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/1237.html |
| *Sage v Commissioner of Taxation* [2023] FCA 1247 | 19 October 2023 | TAXATION - application for judicial review of Administrative Appeals Tribunal's decision to refuse to require production of documents from Commissioner of Taxation - where applicant alleges Tribunal held erroneous view of the law relevant to its powers - where documents include external legal advice provided to Commissioner - consideration of modification of s 37 Administrative Appeals Tribunal Act 1975 (Cth) by s 14ZZF Tax Administration Act 1953 (Cth) - consideration of relevance test in s 37(2) of AAT Act - consideration of availability of review under Administrative Decisions (Judicial Review) Act 1977 (Cth) - held Tribunal had not misunderstood its powers - appeal dismissed | <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1247.html> |
| *York v Chief Commissioner of State Revenue* [2023] NSWCATAD 270 | 19 October 2023 | TAXES AND DUTIES – Land tax – Liability – Exemptions – Principal place of residence – Adjoining lots – Whether access is readily available between the lots in accordance with legislative requirements – Whether the site of a single residence – Whether a residence without an Occupancy Certificate is capable of being used for separate occupation | <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/270.html> |
| *McPartland v Commissioner of Taxation* [2023] FCA 1260 | 20 October 2023 | TAXATION – appeal from decision of Administrative Appeals Tribunal on a question of law – Tribunal upholding an Objection Decision in relation to default assessments made under s 167 of the Income Tax Assessment Act 1936 (Cth) – Tribunal misunderstanding and failing to resolve two issues raised by the taxpayers – failures amounting to errors of law – taxpayers having onus to show that the assessments were excessive and what the assessed amounts ought to have been – material before the Tribunal material incapable of discharging the taxpayers’ onus – no utility in remittal to the Tribunal – appeal dismissed | <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1260.html> |
| *Watertite Investments Pty Ltd ATF Isgrove Trust v Chief Commissioner of State Revenue* [2023] NSWCATAD 274 | 24 October 2023 | TAXES AND DUTIES -Land tax – Surcharge land tax – Applicant holds land on trust – discretionary trust – whether, during the relevant land tax years, foreign persons were excluded as a beneficiary under the terms of the trust deed | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/274.html |
| *D'couto and Tax Practitioners Board* [2023] AATA 3485 | 26 October 2023 | TAX AGENTS – breach of TASA Code of Professional conduct – tax agent registration termination – decision to prevent reapplying for tax agent registration for three years – whether the applicant acted honestly and with integrity – whether the applicant complied with taxation laws – whether the applicant provided tax agent services competently – whether the applicant is a fit and proper person – reviewable decision affirmed | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3485.html |
| *QQRK and Commissioner of Taxation (Taxation)* [2023] AATA 3493 | 27 October 2023 | Section 14ZZK(b) of the Taxation Administration Act 1953 – Onus – substantiation – gambling – betting – winnings – losses – record-keeping – assessment of evidence – substantive liability – administrative penalty – intentional disregard – recklessness – Austrac | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3493.html |
| *Jassar & Manesh Pty Ltd as trustee for the Jassar Manesh Consultants Unit Trust and Commissioner of Taxation (Taxation)* [2023] AATA 3499 | 30 October 2023 | TAXATION – CORONAVIRUS ECONOMIC RESPONSE PACKAGE – JOBKEEPER – discretion to determine that an entity is not liable to repay an overpaid amount – considerations relevant to exercise of discretion – determination not made | https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3499.html |
| *Jassar & Manesh Pty Ltd as trustee for the Jassar & Manesh Unit Trust and Commissioner of Taxation (Taxation) [2023*] AATA 3502 | 30 October 2023 | TAXATION – CORONAVIRUS ECONOMIC RESPONSE PACKAGE – JOBKEEPER – discretion to determine that an entity is not liable to repay an overpaid amount – considerations relevant to exercise of discretion – determination not made | https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3502.html |
| *Savitri v Chief Commissioner of State Revenue* [2023] NSWCATAD 286 | 31 October 2023 | TAXES AND DUTIES — Dutiable transactions — Dutiable property — Cancelled agreementsTAXES AND DUTIES — Administration — Assessment — ReassessmentTAXES AND DUTIES — Administration — Refunds | https://www.caselaw.nsw.gov.au/decision/18b829d200b73d1bf7b13706 |

# Legislation

## Progress of legislation

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Title** | **Introduced House** | **Passed House** | **Introduced Senate** | **Passed Senate** | **Assented** |
| Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 | 16/02 | 09/03 | 09/03 |  |  |
| Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023 | 22/06 | 09/08 | 09/08 |  |  |
| Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023 | 13/09 |  |  |  |  |

## Alternative records for fringe benefits

On 12 October 2023, the ATO published five draft Legislative Instruments concerning alternative record keeping for fringe benefits in relation to temporary accommodation, living away from home allowances, FIFO workers and the private use of motor vehicles. These are part of a series of similar instruments issued to simplify record keeping requirements.

The draft Legislative Instruments are made under section 123AA of the *Fringe Benefits Tax Assessment Act 1986*, which allows the Commissioner to make a determination that specifies 'adequate alternative records' or documents to be kept and retained by a specified class of persons for a specified year of tax.

The draft determinations are open for consultation until 9 November 2023.

ATO references LI 2023/D18 and LI 2023/D19

w <https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D18/00001>

w <https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D19/00001>

w <https://www.ato.gov.au/law/view/view.htm?docid=%22OPS%2FLI2023D20%2F00001%22>

w <https://www.ato.gov.au/law/view/view.htm?docid=%22OPS%2FLI2023D21%2F00001%22>

w <https://www.ato.gov.au/law/view/view.htm?docid=%22OPS%2FLI2023D22%2F00001%22>

## Notice of a visa data-matching program

The Commissioner has published a notice in the Federal Register of Legislation gazette on 13 October 2023, providing notice that the ATO will acquire visa data from the Department of Home Affairs for the 2024 to 2026 income years.

The data will include identification details such as address and contact history for visa applicants and sponsors, address and contact history for migration agents, active visas, visa grant status by point in time, international travel movements undertaken by visa holders (arrivals and departures), sponsor details (457 visa) and visa subclass name.

Some of the objectives of the program are to help ensure that individuals and businesses are fulfilling their tax and super reporting obligations and to promote voluntary compliance by communicating how the ATO use external data.

Further details of the program are available at [www.ato.gov.au/dmprotocols](http://www.ato.gov.au/dmprotocols)

w<https://www.legislation.gov.au/Details/C2023G01133>

# Rulings

## GST on combination foods

On 11 October 2023, the ATO issued a draft determination to provide guidance on when, under section 38-3(1)(c) of the GST Act, a supply is a supply of food that is a combination of one or more foods (combination food), where at least one of which is taxable food.

GSTD 2023/D1 follows the decision in *Chobani*, where the AAT considered whether Chobani Flip Strawberry Shortcake flavoured yoghurt was a combination food. The product comprised flavoured yoghurt in a plastic tub compartment with dry inclusions (cookie pieces and chocolate chips) in a smaller compartment. In that case, the AAT accepted that a classification of a food product involves questions of fact and degree, objectively taking all factors into account. The AAT held that the cookie pieces and chocolate chips were not insignificant, remained readily identifiable and were not subsumed into a separate product, therefore the yoghurt, cookie pieces and chocolate chips were a combination food under section 38-3(1)(c) and the supply of the product was a taxable supply.

In GSTD 2023/D1, the Commissioner set out its view in relation to the meaning of combination food in s 38-3(1)(c):

1. combination food comprises separately identifiable foods, at least one of which is a taxable food;
2. a food is separately identifiable when it can be individually perceived by ordinary visual inspection;
3. the word 'combination' takes its ordinary meaning to mean 'product or outcome of joining 2 or more things together in some way';
4. whether separately identifiable foods are sufficiently joined together so that they form a combination food is a matter of overall impression, having regard to factors including physical appearance and packaging, labelling, marketing, product design, manner of sale and consumer experience;
5. two or more foods that are separately identifiable and sufficiently joined will not be a combination food if the taxable food is so integrated into the overall product, or is so insignificant within that product, that it has no effect on the essential character of that product; and
6. whether food is a combination food must be evaluated at the point of supply.

The Commissioner has also set out the following 3 principles when determining whether there is a supply of a combination food:

1. Principle 1 – there must be at least one separately identifiable taxable food;
2. Principle 2 – the separately identifiable taxable food must be sufficiently joined together with the overall product; and
3. Principle 3 – the separately identifiable taxable food must not be so integrated into the overall product, or be so insignificant within that product, that it has no effect on the essential character of that product.

The draft Determination sets out examples of when food products are combination foods.

The draft Determination is open for comments until 10 November 2023.

ATO reference *GSTD 2023/D1*

w <https://www.ato.gov.au/law/view/document?docid=DGD/GSTD2023D1/NAT/ATO/00001>

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

From 4 October 2023, *Taxation Ruling* TR 2017/D1 has been replaced by draft *Taxation Ruling* TR 2023/D2which deals with depreciation on composite items.

Division 40 of the ITAA 1997 provides for deductions for the decline in value of depreciating assets. Where an asset consists of a number of components, it is necessary to determine whether that larger asset is itself a depreciating asset, or whether one or more of its components are separate depreciating assets. Identifying the relevant depreciating asset is important for working out its effective life and therefore the rate at which deductions can be claimed. A depreciating asset that is the composite item as a whole may have an effective life that is different to the effective life of any individual component or components.

The draft ruling provides guidance on the classification and treatment of composite items, modifications to depreciating assets, jointly-held tangible assets, and intangible depreciating assets for tax purposes. The ruling emphasises that the determination of whether a composite item is a single depreciating asset or multiple depreciating assets depends on the specific facts and functions of the components, and no one principle is determinative. It provides guidance on how to identify separate depreciating assets within a composite item, particularly in the context of their functionality, physical integration, and commercial value.

Paragraph [10] of the draft ruling states that the main principles that are taken into account in determining whether a composite item is a single depreciating asset, or more than one depreciating asset, are:

1. the depreciating asset will ordinarily be an item that performs a **separate identifiable function**, having regard to the purpose it serves in its business context;
2. an item may be identified as having a discrete function, and therefore as a depreciating asset, **without** necessarily **being self-contained** or used on a **stand-alone basis**;
3. the greater the degree of **physical or functional integration** of an item with other component parts, the more likely the depreciating asset will be the composite item;
4. when the **effect of attaching** an item to another item (which itself has its own independent function) varies the function or operational performance of that other item, the attachment is more likely to be a separate depreciating asset;
5. when various components are purchased (whether via one or multiple transactions) to **function** together **as a system** and are necessarily connected in their operation, the depreciating asset is usually the system (the composite item).

The draft ruling also addresses the treatment of modifications to existing depreciating assets, noting that substantial alterations or additions can be treated as separate depreciating assets, while restorations and minor alterations that do not change the asset's overall function are not considered separate assets. Additionally, the draft ruling clarifies that different considerations may apply when determining a 'facility' for withholding tax purposes and a 'composite item' for depreciation purposes.

In the case of jointly-held tangible assets, the draft ruling explains how to calculate deductions based on an entity's share of the decline in value.

The draft ruling also provides guidance on intangible depreciating assets, specifying that the only intangible assets that are capable of being 'depreciating assets' are those intangible assets that are specifically listed in subsection 40-30(2) that are not trading stock.

The draft ruling provides 14 examples to illustrate the principles.

Comments on the draft ruling were due to the ATO by 3 November 2023.

ATO reference *Taxation Ruling* TR 2023/D2

w <https://www.ato.gov.au/law/view/document?docid=DTR/TR2023D2/NAT/ATO/00001>

## Victorian duties – meaning of land development

The State Revenue Office of Victoria has published a revenue ruling on the meaning of Land Development. The meaning of the term is relevant to foreign purchaser additional duty and to the operation of the sub-sale provisions. As explained by the ruling:

*… land development that occurs between the contract date and the nomination date will attract duty liabilities under the Sub-sale provisions. However, if land development occurred after the nomination date, an exemption from duty is available under the Sub-sale provisions. Where land development occurs before the contract date, it does not trigger the operation of the Sub-sale provisions. Therefore, it is possible for land development to occur without triggering additional duty consequences if it occurs before the contract date or after the nomination date.*

Land development, as defined under section 3(1) of the *Duties Act 2000* (Vic), includes the following activities:

1. preparing a plan of subdivision or taking steps to register a plan under the Subdivision Act 1988 (Limb (a));
2. applying for or obtaining a permit under the Planning and Environment Act 1987 regarding land use or development (Limb (b));
3. requesting a planning authority to prepare an amendment to a planning scheme that would affect the land (Limb (c));
4. applying for or obtaining a permit or approval under the Building Act 1993 concerning the land (Limb (d));
5. undertaking actions on the land that would require a permit or approval under the Building Act 1993 (Limb (e)); and
6. any activity that enhances the value of the land through development or change (Limb (f)).

The term 'land development' refers to the process of altering the state or use of the land. It is not necessary to demonstrate an increase in value for land development to occur. When determining if an activity constitutes land development, factors considered include the circumstances, tangible actions, and overall consequences.

Activities undertaken by parties directly or indirectly involved in the contract or nomination are taken into account, including those by related parties, agents, associates, or tenants acting with knowledge or consent. Activities not falling under Limbs (a) to (e) can still be considered land development under Limb (f) if they enhance the land's value. The ruling sets out further detail on the various limbs.

SRO reference *Revenue Ruling DA-064v2*

w <https://www.sro.vic.gov.au/legislation/meaning-land-development>

## Acquisition of economic entitlements in relation to land (service fees)

The State Revenue Office of Victoria has published two draft revenue rulings in relation to when economic entitlement provisions will apply to service fees.

Section 32XC of the *Duties Act 2000* (Vic) establishes the criteria for when a person acquires an economic entitlement. This occurs if, after 19 June 2019, an arrangement involving relevant land with an unencumbered value of more than $1 million grants the person (directly or indirectly) the right to:

1. participate in the income, rents or profits derived from the land;
2. participate in the capital growth of the land;
3. participate in the proceeds of sale of the land;
4. receive any amount determined by reference to any of the above matters; or
5. acquire any entitlement described above.

When a person obtains an economic entitlement, they are considered to have acquired beneficial ownership of the land. The percentage of beneficial ownership is determined under section 32XE of the Duties Act. In certain circumstances, the assumption is that the person has acquired 100% beneficial ownership, unless the Commissioner decides otherwise. This 100% ownership assumption is particularly relevant when the arrangement involves other entitlements or payments to associated persons, as defined in section 3(1) of the Duties Act.

Draft revenue ruling DA-065:

1. clarifies the application of the economic entitlement provisions to service fees;
2. sets out when the economic entitlement provisions can apply to a resident in a retirement village; and
3. deals with acquisitions of shares in companies and units in unit trust schemes that may be outside the scope of the landholder provisions in the Duties Act.

Draft revenue ruling DA-065 does not deal with any other arrangement or the acquisition of an economic entitlement in relation to a private landholder under section 81 of the Duties Act.

In considering whether a service fee determined by reference to one or more economic benefits of land amounts to an economic entitlement, the Commissioner will have regard to the following factors:

1. the nature and scale of the arrangement as a whole, including the rights, obligations, risk allocation, and responsibilities of the parties to the arrangement. The assumption by a service provider of economic risks associated with the ownership and/or development of land generally indicates that this type of service fee will amount to an economic entitlement;
2. the nature and magnitude of the service fee, including whether the percentage used to calculate the fee is at market rates and the structure of the fee is similar to standard fees chargeable by a comparable service provider for the identified services. The larger the percentage of an economic benefit of land used to calculate the service fee, the more indicative the service fee will amount to an economic entitlement; and
3. the nature of the service provider, including whether the service provider ordinarily provides the identified services to third-party recipients within the course of its business.

Draft revenue ruling DA-066 provides guidance on how to determine the percentage of beneficial ownership of land taken to have been acquired under an economic entitlement, including circumstances where the Commissioner considers it appropriate to exercise the discretion under section 32XE(3) of the Duties Act to determine a percentage less than 100%.

SRO Victoria reference *Draft Revenue Ruling* DA 065

w <https://www.sro.vic.gov.au/land-transfer-duty-acquisition-economic-entitlements-relation-land-service-fees>

SRO Victoria reference *Draft Revenue Ruling* DA 066

w <https://www.sro.vic.gov.au/land-transfer-duty-calculation-economic-entitlements>

# Private binding rulings

## Rental income - legal vs beneficial ownership

**Facts**

A property was purchased on XXXX and has been leased as an investment property.

The legal title holders of the property are Person A, Person B and their child Person C as joint tenants.

Person A and Person B wanted to assist Person C in purchasing a property and used their investment property as collateral to obtain finance to purchase the property.

Although Person A and Person B are both co-borrowers on the loan, they have not contributed towards the purchase price of the property or provided financial assistance on the mortgage payments.

There is no written agreement between the parties regarding how the property was to be treated.

Person A and Person B have:

1. not incurred any expenses related to the property's ownership;
2. not received the rental income from the property;
3. not declared any rental income or expenses from the property in their tax returns;
4. never lived or stored their possessions or assets at the property.

**Question**

Can Person A and Person B disregard the rental income or losses from the property?

**Ruling**

The ATO ruled yes.

Although Person A and Person B are the legal owners of the property, the ATO ruled that Person A and Person B did not have any beneficial ownership in the property.

The ATO noted that *Taxation Ruling* TR 93/32 provides guidance on the issues involved when the equitable interest does not follow the legal title.

**COMMENT** **–** the ruling referred to states: ‘We consider that there are extremely limited circumstances where the legal and equitable interests are not the same and that there is sufficient evidence to establish that the equitable interest is different from the legal title. We will assume where taxpayers are related, e.g., husband and wife, that the equitable right is exactly the same as the legal title.’

ATO reference *Private Binding Ruling Authorisation No. 1052167367264*
w <https://www.ato.gov.au/law/view/document?docid=EV/1052167367264>

## Offset accounts and interest deductibility

Facts

The taxpayer and the taxpayer's spouse have an investment property.

The loan on the investment property is interest only.

The loan has an offset account which covers 100% of the loan.

In the relevant financial year, there were no interest charges claimed against the property.

The taxpayer expects to withdraw funds from the offset account to purchase a main residence, which will trigger the resumption of interest charges on the investment property loan.

At all times, the investment property loan amount will remain unchanged as the loan does not have a redraw facility, and no principal has been paid off to date.

**Question**

Is the taxpayer entitled to a deduction for the interest on the investment property loan when the taxpayer withdraws funds from the offset account to purchase a main residence?

**Ruling**

Yes.

The ATO ruled that the taxpayer is able to claim a deduction for the interest on the investment loan under section 8-1 of the ITAA 1997, as the nature of the original borrowing has not changed from that of an investment loan.

**COMMENT** **–** included in our June 2023 training notes was an example of an arrangement where a person borrowed from family at interest to put money into an offset account to reduce the deductible interest on the loan from a financial institution. The ATO ruled that the interest paid to the family was not deductible.

ATO reference *Private Binding Ruling Authorisation No. 1052166807536*

w <https://www.ato.gov.au/law/view/document?docid=EV/1052166807536>

## Rent charged to family members

Facts

A taxpayer and their spouse purchased a unit a couple of years ago.

The taxpayer and their spouse have a child, has a disability and receives a pension.

The taxpayer and their spouse purchased the unit for their child to live in, to assist their child in living independently.

The taxpayer and their spouse charge their child weekly rent. The rent covers the cost of holding the unit and maintenance. The taxpayer has received a land tax exemption.

The intention of the taxpayer and their spouse was not to make money out of having the unit but to assist their child with supporting their disability.

Question

Is the weekly income the taxpayer receives from their child for renting their unit assessable income?

Ruling

The Commissioner ruled no, the money the taxpayer and their spouse receive from their child as rent for their unit is not assessable income.

The arrangement the taxpayer has with their child is a family arrangement, not a commercial arrangement.

The taxpayer does not need to declare these amounts in their tax return, and they are not able to claim any deductions in relation to the unit they rent to their child.

ATO reference *Private Binding Ruling* *Authorisation Number: 1052167050593*

w <https://www.ato.gov.au/law/view/document?docid=EV/1052167050593>

## Short term accommodation and active asset test

Facts

The taxpayers were partners in a partnership that owned a property. The property was offered to the public as short stay accommodation through booking sites and a letting agent.

The property consists of three separate units of accommodation, each comprising one entire floor. Each unit is a separately available and accessible unit of accommodation. Two of the units had three bedrooms and a bathroom and the third unit had a single bedroom and a bathroom. All three units are on one title.

Guests generally stay for one week, and do not enter into rental or lease agreements.

The relevant terms and conditions of the stay are:

1. that a valid and fully paid booking grants a limited license to occupy the property as short term holiday accommodation during the agreed booking term for the guests specified in the booking;
2. that the agreement does not constitute a residential tenancy;
3. during the stay, staff or tradespeople may enter the property to carry out an inspection or to complete repairs and maintenance;
4. guests are provided with bed linen, towels, cutlery, crockery, furniture and appliances;
5. units are cleaned at the conclusion of a stay;
6. access to Wi-Fi and internet is provided;
7. transfers to from the airport can be arranged;
8. small quantities of dishwashing liquid, laundry detergent and soap are provided at commencement of stay;
9. provision of a car to select guests.

The taxpayers took a hands-on role in managing the property. One of the taxpayers attended the property in his role as manager of the property to oversee and undertake maintenance of the property.

The taxpayers undertook many tasks in managing the property, including:

1. purchase of linen, towels, cutlery, crockery, furniture and appliances;
2. stocktake of all of the above items;
3. replacement of items as required;
4. cleaning of units for guests, if paid cleaners were unavailable;
5. supervising cleaners;
6. management and performance of various the maintenance projects in relation to the Property
7. management of the letting agent;
8. managing the payment of bookings;
9. managing payment of cleaners;
10. paying insurance and making claims, where relevant; and
11. management of the Partnership bank account.

The partnership generated substantial income from the provision of accommodation and also incurred outgoings, producing profits on a regular basis. The taxpayers sold the property in March 20XX.

Question

Was the property used in providing short-term accommodation an active asset of the Taxpayers for the purposes of the small business CGT concessions?

Ruling

The ATO ruled yes, the property was an active asset.

The ATO noted that a CGT asset is an active asset at a time, if at that time the taxpayer owns the asset (whether the asset is tangible or intangible) and it is used, or held ready for use in the course of carrying on a business that is carried on by:

1. the taxpayer, or
2. affiliates of the taxpayer; or
3. another entity that is connected with the taxpayer.

However, section 152-40(4)(e) provides that a tangible CGT asset will not be an active asset where the asset's main use is to derive interest, an annuity or rent, royalties or foreign exchange gains, unless its main use for deriving rent was only temporary.

Carrying on a business

The ATO noted that whether an asset is used or is held ready for use in carrying on a business is a question of fact.

Section 995-1 defines 'business' as 'including any profession, trade, employment, vocation or calling, but not occupation as an employee'.

*Taxation Ruling* TR 97/11 provides the Commissioner's view of the factors used to determine if a taxpayer is carrying on a business for tax purposes. Its principles are not restricted to questions of whether a primary production business is being carried on.

In the Commissioner's view, the factors that are considered important in determining the question of business activity as outlined in paragraph [13] of TR 97/11 are as follows:

1. whether the activity has a significant commercial purpose or character;
2. whether the taxpayer has more than just an intention to engage in business;
3. whether the taxpayer has a purpose of profit, as well as a prospect of profit, from the activity;
4. whether there is regularity and repetition of the activity;
5. whether the activity is of the same kind and carried on in a similar manner to that of ordinary trade in that line of business;
6. whether the activity is planned, organised and carried on in a businesslike manner such that it is described as making a profit;
7. the size, scale and permanency of the activity; and
8. whether the activity is better described as a hobby, a form of recreation or sporting activity.

Paragraph [16] of TR 97/11 states the indicators must be considered in combination and as a whole and whether a business is being carried on depends on the 'large or general impression gained' from looking at all the indicators, and whether these factors provide the operations with a 'commercial flavour'. However, the weighting to be given to each indicator may vary from case to case.

The ruling also made reference to TR 2003/4, which is about boat hire arrangements. TR 2003/4 indicates that a person who simply owns one or more investment properties is usually regarded as an investor who is not carrying on a rental property business. There needs to be something special about the activity to constitute a business being carried on. This will generally relate to the provision of additional services to the client in a manner that enhances the gross return above investment levels.

The ATO made the following observations regarding the taxpayer:

1. the scale of the activities is small - the number of units available for accommodation of the guests is at most three, which have a total of seven bedrooms;
2. the units were offered fully furnished with linen, towels, cutlery, Wi-Fi and internet, and a small quantity of consumables provided at the commencement of the guest's stay. Guests were provided with additional towels and linens upon request, and travel to and from the airport was arranged at the request of guests;
3. the relationship between the taxpayers and the guests was not that of landlord and tenant, as the terms and conditions under which the guests stayed in the units provided them with a licence to occupy the unit during their stay (generally of one week or less); and
4. the manager of the property attended the property, and was involved in the management of cleaners, acquiring replacement linens, and was actively involved in the management and maintenance of the property.

The ATO ruled that while the scale of the operations was small, given the services provided and the involvement of the taxpayer in the management and maintenance of the property, the partnership is carrying on a business of providing short-term accommodation.

Main use to derive rent?

The ATO then considered whether the exclusion in section 152-40(4)(e) for an asset the main use of which is to derive rent.

Whether an asset's main use is to derive rent will depend on the particular circumstances of each case. The term 'rent' has been described as follows:

1. the amount payable by a tenant to a landlord for the use of a leased premises;
2. a tenant's periodical payment to an owner or landlord for the use of land or premises; and
3. recompense paid by the tenant to the landlord for the exclusive possession of corporeal hereditaments...The modern conception of rent is a payment which a tenant is bound by contract to make to his landlord for the use of the property let.

The ATO distinguished rent payable under a lease from a fee paid under a licence to occupy (as set out in TD 2006/78). The ATO noted that relevant factor to consider in making this assessment are whether the occupier has an exclusive right to possession, the degree of control retained by the owner and the extent of any services provide by the owner (room cleaning, supply of linen, shares amenities, provision of meals etc.).

The ATO determined that in this case the guests are not entering into a lease agreement that provides exclusive possession, but a licence to occupy the unit during their stay. Therefore, the payment made by the guests is not considered the payment of rent for leasing the unit – it is a payment to occupy the unit and for the other services provided. The ATO ruled that the exclusion in paragraph 152-40(4)(e) does not apply.

ATO reference *Private Binding Ruling Authorisation No. 1052161692517*

w <https://www.ato.gov.au/law/view/document?docid=EV/1052161692517#_ftn1>

## Short term accommodation and active asset test

**Facts**

A taxpayer purchased property for long term rental purposes.

When the economy took a downturn, taxpayer removed the property from the long-term rental market and commenced using the property to provide short-term accommodation. The purpose of commencing this activity was to increase income and cover the cost of mortgage payments and other expenses in retirement, with the potential to grow the activity into a profitable short-term accommodation provider business.

The property was advised through Airbnb and Bookings.com for a minimum of 3 nights with no maximum length of stay.

The taxpayer furnished the property and provided internet access, bedding and amenities such as tea, coffee, milk and sugar and snacks.

The taxpayer undertook the following task in relation to the property:

1. cleaning and maintaining between changeover of guests;
2. restocking supplies and preparing for new guests;
3. shopping for supplies;
4. washing/laundering;
5. guest relations and communications;
6. bookkeeping;
7. strategic planning; and
8. travel.

The taxpayer's hour spent on these activities varied depending on the occupancy levels and the number of changeover of guests.

The taxpayer has a dedicated bank account, accounting software and a business plan in relation to the short-term rental business.

**Questions**

1. Was the taxpayer carrying on a business of providing short term accommodation at the property?
2. Was the taxpayer entitled to claim deductions under section 8-1 of the ITAA 1997 for travel in relation to the property?
3. Was the taxpayer entitled to claim the cost of depreciating assets acquired for the property under the temporary full expensing provisions in Subdivision 40-BB of the *Income Tax (Transitional Provisions) Act 1997*?

**Ruling**

Question 1

The Commissioner again turned to *Taxation Ruling* TR 97/11 for guidance as to the indicators of whether or not a person is carrying on a business.

The Commissioner considered the following indicators in the context of the short-term accommodation activity:

* the activity lacked commercial purpose and was small in comparison with others in the business of providing short term accommodation;
* the intention of the taxpayer to investigate the feasibility of increasing his/her portfolio of properties suggested that the activity is preparatory or preliminary to the carrying on a business;
* the taxpayer did not show any evidence that he/she consulted experts or received advice on the profitability of the activity;
* the activities were considered more akin to those where it was found that the taxpayers were not carrying on a business, particularly due to the small size and scale of the activity, limited repetition and regularity and the lack of additional services provided;
* the repetition and regularity of the activity was low because the activity involved only one single occupancy property; and
* the size and scale of the activity was small because the activity involved only one single occupancy property.

On balance, the Commissioner did not consider the taxpayer to be carrying on a business of providing short term accommodation. While there was some repetition and regularity to the activity, it lacked a significant commercial character and was not of a size or scale necessary to be characterised as carrying on a business of providing short term accommodation.

Question 2

As the taxpayer was not carrying on a business of providing short term accommodation, or an excluded entity, the taxpayer could not claim deductions for any travel expenses incurred in relation to the property.

Question 3

As the taxpayer was not carrying on a business of providing short term accommodation, the taxpayer was not eligible to apply the temporary full expensing rules to his/her depreciating assets.

ATO reference *Private Binding Ruling Authorisation No. 1052140890611*

w <https://www.ato.gov.au/law/view/document?docid=EV/1052140890611>

## Return of capital and section 45B

Facts

Entity A is the provisional group head of a multiple entry consolidated (MEC) group that consists of a number of subsidiaries.

Entity A's sole shareholder is Entity B, a foreign resident company.

Entity B's cost base of the shares in Entity A is more than the amount of the proposed capital return.

Entity B does not have any capital losses.

Prior to a particular income year, Entity A provided an amount of capital via a subscription for shares to Entity C (Capital Injection), which is a subsidiary member of the MEC group, to enable Entity C to meet certain regulatory requirements. Entity C invested the Capital Injection in a term deposit.

Entity A sourced the funds to provide the Capital Injection from Entity B, via a subscription for shares in Entity A.

The regulatory requirements subsequently changed, and Entity C determined that it had excess capital.

Accordingly, Entity C returned the excess capital to Entity A by way of a return of share capital. Entity A did not credit this amount to its share capital account.

Entity C funded the capital return to Entity A via excess operating cash. At all times during the relevant period from the initial Capital Injection to the time of return of capital to Entity A, Entity C's cash and cash equivalents balance did not fall below the capital return amount.

As a result of receiving the return of capital from Entity C, Entity A is now seeking to return this capital to its sole shareholder, Entity B. The proposed capital return will be debited against Entity A's share capital account.

The share capital account of Entity A is not a tainted share capital account under Division 197 of the ITAA 1997.

Entity A does not have a pattern of distribution of dividends to its shareholder.

Entity A has sufficient franking account balance to pay fully franked dividends to an amount exceeding the proposed capital return.

While the MEC group had retained profits, Entity A's stand-alone financial accounts show accumulated losses, prior to the proposed capital return.

The proposed capital return does not involve the provision (and later disposal) of ownership interests or an increase in the value of ownership interests (and later disposal of those interests).

The proposed capital return does not coincide with any disposal of assets or changes in the structure to the MEC group.

Questions

1. Will any part of the proposed capital return be treated as a dividend within the meaning of subsection 6(1) of the ITAA 1936?
2. Will the Commissioner seek to make a determination under section 45B of the ITAA 1936 that section 45C of the ITAA 1936 applies to deem any part of the proposed capital return to be a dividend paid out of profits?

Ruling

Will the proposed capital return be treated as a dividend?

The ATO ruled no.

A dividend is defined under section 6(1) which states that 'dividend' includes any distribution made by a company to any of its shareholders. Paragraph (d) of that definition excludes a distribution if the amount of the distribution is debited against an amount standing to the credit of the company's share capital account.

Subsection 975-300(3) of the ITAA 1997 provides that if a company's share capital account is 'tainted' (as defined in Division 197 of the ITAA 1997), that account is taken not to be a share capital account for certain purposes of the income tax legislation (including the definition of 'dividend').

The proposed capital return will be debited against the untainted share capital account of Entity A, hence it will satisfy the exclusion in paragraph (d) of subsection 6(1).

However, subsection 6(4) states that paragraph (d) of the definition of dividend in subsection 6(1) does not apply, if under an arrangement:

1. a person pays or credits any money or gives property to the company and the company credits its share capital account with the amount of the money or the value of the property; and
2. the company pays or credits any money, or distributes property to another person, and debits its share capital account with the amount of the money or the value of the property so paid, credited or distributed.

When Entity C returned excess capital to Entity A by way of a return of share capital, this amount was not credited to Entity A's share capital account. Therefore, subsection 6(4) will not apply to prevent the operation of the exclusion in paragraph 6(1)(d).

The ATO ruled that the proposed capital return will not be a 'dividend' within the meaning of subsection 6(1).

Will the Commissioner make a determination under section 45B?

The ATO ruled no.

Section 45B applies where:

1. there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company; and
2. under the scheme, a taxpayer (the relevant taxpayer), who may or may not be the person provided with the demerger benefit or the capital benefit, obtains a tax benefit; and
3. having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling a taxpayer (the relevant taxpayer) to obtain a tax benefit.

The Commissioner may make a determination in writing that section 45C applies to all or part of the capital benefit where the requirements are met. The effect of a determination made under section 45C is that part or all of the capital benefit will be an unfranked dividend paid to the relevant taxpayer out of profits.

The key issues here were whether there was a tax benefit and whether the scheme was entered into for a more than incidental purpose of obtaining a tax benefit.

Tax benefit?

Under section 45B(9), the relevant taxpayer obtains a tax benefit from a return of share capital if the amount of tax payable, or any other amount payable under ITAA 1936, by the relevant taxpayer would, apart from section 45B, be less than the amount that would have been payable, or would be payable at a later time than it would have been payable, if the capital benefit had been an assessable dividend.

In this case, the relevant taxpayer is also the person provided with a capital benefit, being Entity B.

Ordinarily, a return of capital would give rise to CGT event G1. However, unless the amount of the capital distribution per share exceeds the cost base of the share, there will only be a cost base reduction. Furthermore, for a foreign resident shareholder, Division 855 of the ITAA 1997 will operate to disregard any capital gain from CGT event G1 provided that the CGT asset is not 'taxable Australian property'.

As Entity B's cost base of the Shares is more than the amount of the proposed capital return, it is expected that Entity B will merely reduce its cost base by the amount of the proposed capital return and there will be no immediate CGT tax consequences. As such, the proposed capital return will not be immediately assessable as income for Entity B.

If the capital benefit had been an unfranked dividend, Entity B as a foreign resident would be subject to dividend withholding tax under section 128B. The liability to withholding tax on an unfranked dividend compared with the delay or reduction of tax payable on a return of capital means that the amount of tax payable by Entity B on the capital benefit would, apart from section 45B, be less than the amount that would have been payable if the capital benefit had been an assessable dividend. Accordingly, the requirements of 'tax benefit' as defined under subsection 45B(9) of the ITAA 1997 will be satisfied.

If Entity A uses its available franking credits to fully frank the cash distribution so that it is a fully franked dividend, the dividend would not be subject to dividend withholding tax. However, those franking credits would no longer be available for use in future income years as they would have been if a capital benefit had been paid instead of a dividend. In the ATO view the preservation of franking credits for the use at a future time would still constitute a tax benefit within the meaning of subsection 45B(9).

The ATO confirmed that Entity B obtains a tax benefit under the scheme and section 45B(2)(b) is satisfied.

More than incidental purpose?

For the purposes of paragraph 45B(2)(c), the Commissioner is required to consider the 'relevant circumstances' of the scheme set out under subsection 45B(8) to determine whether any part of the scheme was entered into for a purpose, other than an incidental purpose, of enabling a relevant taxpayer to obtain a tax benefit.

The test of purpose is an objective one. The question is whether, objectively, it would be concluded that a person who entered into or carried out the scheme did so for the purpose of obtaining a tax benefit for the relevant taxpayer in respect of the capital benefit. The purpose does not have to be the most influential or prevailing purpose, but it must be more than an incidental purpose.

The ATO determined that it cannot be objectively concluded that a person entered into or carried out any part of the scheme for a more than incidental purpose of enabling a taxpayer to obtain a tax benefit. The arrangement is carried out for genuine commercial reasons, being to return part of the capital that is no longer required due to a change in regulatory requirements.

The ATO ruled that a determination would not be made under section 45B in relation to the proposed capital return.

ATO reference *Private Binding Ruling Authorisation No. 1052159834230*

w <https://www.ato.gov.au/law/view/document?docid=EV/1052159834230>

## Entitlement to a tax deduction as a result of a fraud

The Company is a small business entity with an aggregated turnover of less than $2 million.

The directors and shareholders of the Company are husband (Director A) and wife (Director B). Both directors manage the daily operations of the business and are employees of the Company.

The Company maintains its own business bank accounts in which business income is deposited. Both directors have access to the bank accounts.

Director B went on maternity leave and Director A became solely responsible for managing the business operations, including approval of all payments.

At this time, Director A misappropriated the business funds to support his gambling habit. Funds in the business bank account were transferred by Director A to his personal account and recorded as business expenses.

Director A also used the personal funds invested in term deposits by him and Director B to fund his gambling activity.

Director A continued to misappropriate the Company funds undetected for many years until the Company’s tax advisor contacted Director B regarding the Company's tax related debts. Director B then found out about Director A's misappropriation of funds.

Once exposed for the fraud, Director A sought guidance and help to address the issues.

Director A was requested to pay back the debt, but due to his gambling addiction this was not possible. The personal savings of the family were reduced to nil as a result of Director A's gambling activity.

The funds lost due to the fraud committed by Director A cannot be recovered under the Company's insurance policies. A third party and family members provided temporary funding to maintain cashflow in the business and to meet all employee and tax commitments.

Director A is still currently connected with the operations and management of the business, however, his access and permissions were reduced to two signatories after the gambling issues were identified.

Director B has full control of company records and bank accounts, with Director A having limited to nil access. Any functions performed by Director A are heavily scrutinised by Director B, and appropriate internal controls have been established.

**Question**

Is the Company entitled to a deduction as a result of fraud under section 25-45 of the ITAA 1997?

Ruling

Yes, the outgoing is deductible under section 25-45 of the ITAA 1997 as the loss was caused by an employee who misappropriated the funds which were included in the Company's assessable income for his own use.

To be able to claim a deduction under section 25-45 of the ITAA 1997, the following requirements need to be satisfied:

1. the taxpayer must incur a loss;
2. the loss must be in respect of money;
3. the loss must be discovered in the income year in which the deduction is claimed;
4. the loss must be caused by theft, stealing, embezzlement, larceny, defalcation, or misappropriation
5. the theft, stealing, embezzlement, larceny, defalcation, or misappropriation must be by an employee or agent of the taxpayer; and
6. the money must have been included in the taxpayer's assessable income for the income year in which the loss is discovered or an earlier year.

Loss incurred

In this case, the Company incurred a loss as Director A, who is also an employee, misappropriated funds from the business bank accounts. In addition, the Company could not recover any amount from the director, as it had been lost through gambling.

Loss in respect of money

Director A was responsible for managing the business operations and had access to the Company's bank accounts. Director A transferred money from the Company's business account to his personal bank account to fund his gambling habit.

Loss discovered in year of income

The loss was ascertained in the relevant income year after the tax agent advised Director B of the Company's debts, which led to Director B learning about the misappropriation of Company funds by Director A.

Cause of loss

Theft, stealing, embezzlement, larceny, defalcation, or misappropriation are technical terms which cover a range of common law and statutory offences in each State and Territory. The ATO was satisfied that the cause of the loss was misappropriation of funds carried out by Director A for almost four income years.

Caused by employee or agent

Section 25-45 of the ITAA 1997 does not require that an employee or agent of the taxpayer be convicted of an offence (of theft, stealing, embezzlement, larceny, defalcation, or misappropriation) before the taxpayer can claim a deduction for the particular loss. However, such a conviction will effectively substantiate the deduction to be allowed. In this case, Director A, who was also an employee of the Company misappropriated the Company business funds by transferring them to his own personal bank account.

Loss of money that has been included in assessable income

In this case, income from the business activities was deposited in the Company's bank accounts. The income received by the Company created cash availability from which the misappropriated funds were taken.

Accordingly, the money was included in the Company's assessable income for the previous income years.

Assessable Recoupment

Where a deduction has been allowed or is allowable under section 25-45 of the ITAA 1997 in respect of a loss, any amount received as recoupment of the loss, whether by way of insurance, indemnity, recovery or otherwise, is assessable under section 20-20 of the ITAA 1997. The assessable recoupment is included in the assessable income of the Company in the year of receipts to the extent it does not exceed the loss or outgoing under section 20-35 of the ITAA 1997. Where recoupment is received before the income year of a deduction, the assessable recoupment is treated as having been received in the deduction year under subsection 25-35(3) of the ITAA 1997.

ATO reference *Private Binding Ruling Authorisation No.* *1052160316718*

w <https://www.ato.gov.au/law/view/document?docid=EV/1052160316718>

## ESS deferred taxing point

**Facts**

The taxpayer commenced employment with Company A (the Employer) in 20xx.

As part of the taxpayer's remuneration package, the Employer granted the taxpayer options (rights) to purchase shares of Common Stock of the Company.

During the 2021 income year, xx,xxx of the taxpayer's options vested.

The Employer did not report to the ATO any income arising for the taxpayer from ESS during that income year.

The taxpayer asked the Employer why the Employer did not report any income from the ESS during that income year. The Employer explained that, following the ATO regulations, the deferred taxing point for a right is the earliest of several times. For a right, the first possible deferred taxing point will occur at the earliest time when:

1. the right has not been exercised; and
2. there is no real risk of forfeiting the right; and
3. the scheme no longer genuinely restricts disposal of the right.

If it has not already been triggered based on the criteria above, the deferred taxing point will occur at the earliest time when:

1. the right has been exercised; and
2. there is no real risk that, under the conditions of the scheme, after exercising the right, the taxpayer will forfeit or lose the beneficial interest in the share (other than by disposing of it); and
3. the scheme no longer genuinely restricts disposal of the resulting share.

The taxpayer was advised that the shares could not be sold during a "Lock-Up Period" because they were subject to a real risk of forfeiture until this Lock-Up Period was lifted.

The Option Agreement outlined the rules for the Lock-Up Period. Clause 7 stated:

*7. Lock-Up Agreement. If so requested by the Company or the underwriters in connection with the initial public offering of the Company's securities registered under the Securities Act of 1933, as amended, the Optionee shall not sell, make any short sale of, loan, grant any option for the purchase of, or otherwise dispose of any securities of the Company however or whenever acquired (except for those being registered) without the prior written consent of the Company or such underwriters, as the case may be, for 180 days from the effective date of the registration statement, plus such additional period, to the extent required by FINRA rules, up to a maximum of 216 days from the effective date of the registration statement, and the Optionee shall execute an agreement reflecting the foregoing as may be requested by the underwriters at the time of such offering.*

The Option Agreement includes a section about the tax implications of the Options in Australia which states:

*Australia Statement under Section 83A-105 of the Income Tax Assessment Act 1997 (Cth) Subdivision 83A-C of the Income Tax Assessment Act 1997 (Cth) (the "Act") applies to the Plan and this Option, subject to the requirements of the Act. Accordingly, it is intended for income tax in relation to the Option to be deferred until exercise, unless the Optionee's employment is terminated for any reason prior to exercise. However, the Company is not providing tax advice, and the Optionee should consult their personal advisor for the precise tax treatment of the option."*

The taxpayer has since received additional Option Agreements which have identical wording.

The Employer has noted that once the Initial Public Offering (IPO) of the Company occurred in the following income year and the Lock-Up Period lifted, the shares could then be sold because the Lock-Up Period had ceased.

The Employer has reported income from Discount from Deferral Schemes (label 12F) in the 2022 income year on the basis that the date of IPO would be the taxing point. This figure included discounts from options which vested (and some were also exercised by the taxpayer) during that income year and the earlier income year.

The Company's Board approved sales for other employees/shareholders that received grants under the same plan before the IPO was completed.

**Question**

Were the shares acquired by exercising the options during the 2021 income year subject to genuine selling restrictions at the exercise date?

**Ruling**

The ATO ruled no.

*Taxation Determination* TD 2022/4 provides guidance on what constitutes genuine selling restrictions. Paragraph 13 of the determination states:

*A broad discretion conferred on a company board will often allow unfettered lifting of restrictions based on a variety of subjective considerations. Where a board routinely approves requests to trade, this discretionary power is not a genuine disposal restriction. On the other hand, if there are clear, fixed and objectively measured criteria to be applied by the board the restriction may be a genuine disposal restriction.*

The ATO considered this case to be similar to example one in the TD where board approval was not enough to constitution a genuine restriction on disposing of the shares.

**COMMENT** **–** presumably this PBR was requested because the employer initially indicated the taxing point would be when the Lock-Up period was lifted, but then reported to the ATO that the taxing point was at the time of the IPO. It is not uncommon for shares to decline from their IPO price, leading to someone who is taxed at the point of IPO potentially paying tax on value they no longer can access. Tax legislation does not provide any relief in these circumstances.

ATO reference *Private Binding Ruling Authorisation No. 1052166107866*
w <https://www.ato.gov.au/law/view/document?docid=EV/1052166107866>

## CGT – trading stock and small business concession

**Facts**

The Taxpayer is an Australian resident individual who is over 55 years of age.

The Taxpayer is the sole owner of a piece of rural land, which is currently held on capital account for income tax purposes (the **Land**).

The Taxpayer also acquired an adjacent parcel of land (**Adjacent Land**) in XXXX by way of a cash outlay of $X. The purpose of acquiring the Adjacent Land was to improve the lot yield, layout / aesthetic and drainage aspects of the Land (being that subject to the X lot subdivision).

The Taxpayer had previously undertaken a subdivision of a separate piece of land in XXXX into X lots and he was responsible for undertaking all aspects of that development process.

The Land

The Land consists of several lots that are adjacent to each other. The Land is subject to the precinct structure plan, which is a state government planning tool to guide the development of an area over time.

The business

The Taxpayer has operated a business on the Land as a sole trader. The turnover of the business for the relevant income years is under $2 million.

Future plans for the Taxpayer

The Taxpayer continues to conduct the business and will do so into the XXXX income year. However, he intends to retire from the business in the next 12-24 months, being the estimated time for the development works to begin.

As part of his retirement plans, the Taxpayer wishes to realise the Land but does not want to be personally involved in the practical development activities given his desire to retire and scale back on activities.

Development discussions

In XXXX, the Taxpayer was approached by a land development company (**Developer**) to discuss working collaboratively to develop the Land. Whilst the Taxpayer has been approached by different developers in the past, he has never approached any developers himself.

In XXXX, the Taxpayer decided to engage the Developer to provide a sequence of various services specifically in relation to the development of the Land.

On XXXX, the Taxpayer and the Developer entered into a Land Development Agreement (**LDA**).

LDA

The Land is subject to the precinct structure plan, which is required to be approved before any development activities can be undertaken. The LDA and the LDA variation both contain conditions precedent that require that the precinct structure plan be approved and gazetted before the development activities can commence.

The LDA grants broad rights to the Developer to develop the Land and implement the Project generally.

Payment under the LDA

The Taxpayer will receive a Landowner Payment under the LDA which is equal to:

*$X + (1X% x Gross sale proceeds).*

The *1X% x Gross sale proceeds* is referred to as the Landowner Percentage Payment.

Gross Sale Proceeds are broadly the total proceeds (inclusive of GST) from any sale of the Land or part of the Land. Also included are any amounts of compensation received if any part of the Land is compulsorily acquired and/or any consideration from third parties or insurance proceeds in respect of the Land.

The Landowner Payment is to ensure that the Taxpayer is properly and fully compensated for the value of the Land.

The Developer is entitled to a Development Fee for services provided. The Development Fee is an amount equal to:

*Gross sale proceeds - Landowner Payment - GST payable on gross sale proceeds.*

Under the LDA, the Developer must advance payments of various amounts:

*$X on the execution of the LDA;*

*$X on the date of gazettal of the precinct structure plan: and*

*$X on the date that is 12 months from the date of gazettal of the precinct structure plan.*

These advance amounts will reduce the Landowner Payment.

LDA Deed of Variation

On XXXX, the Taxpayer and the Developer entered into a Deed of Variation of the LDA (LDA Variation).

The LDA Variation included the following clauses:

1. extension of the definition of Land to include the Adjacent Land.
2. insertion of a clause which provides the advance payment due upon the gazettal of the precinct structure plan (being part of the Landowner Payment) is to be advanced on XXXX or earlier as the parties may agree, and the parties are deemed to have waived their rights to terminate the LDA and the LDA immediately becomes unconditional.
3. the Landowner Percentage Payment is deleted and replaced with X% with respect to the first X residential lots created by the Project and X% thereafter.

The LDA remained otherwise unchanged.

Trading stock election

On XXXX, the Planning Minister approved the planning scheme amendment incorporating the precinct structure plan. The precinct structure plan was gazetted in September 2022.

The Taxpayer intends to elect to value the Land at market value and will do this by the time of lodging his income tax return in the relevant income year (i.e., the income year in which the Land becomes trading stock) pursuant to subsection 70-30(2) of the ITAA 1997.

**Questions**

1. Does the Land become trading stock of the Taxpayer for the purposes of Division 70 of the ITAA 1997 when the precinct structure plan is gazetted?
2. Where the Taxpayer chooses the market value method, is the Taxpayer treated as having sold the Land at market value upon the gazettal of the precinct structure plan for the purposes of CGT event K4?
3. Does the Taxpayer satisfy the requirements to apply the 15-year exemption in relation to the disposal of the Land (excluding the Adjacent Land) for the purposes of CGT event K4?
4. Do the advance payments relate to creating a contractual right or other legal or equitable right in another entity (promises given) for the purposes of CGT event CGT event D1?

**Ruling**

Question 1 – When did the land become trading stock?

The ATO ruled yes, the land became trading stock on the date the precinct structure plan was gazetted.

The definite and continuous cycle of operations designed to lead to the sale of the land commenced upon the gazettal of the precinct structure plan.

Question 2 – CGT event K4

Where the Taxpayer chooses the market value method, the Taxpayer is treated as having sold the land at market value and the sale is subject to CGT event K4, with any capital gain or loss being brought to account unless the land is a pre-CGT asset. The ATO considered that CGT event K4 happened upon gazettal of the precinct structure plan in September 2022.

Question 3 – 15 year exemption

The ATO ruled yes, the taxpayer satisfied the requirements for the 15 year exemption. The ATO was satisfied that the Taxpayer will be reducing their activities/involvement in the farming business due to the development of the Land under the Project, and the CGT event is in connection with the Taxpayer's retirement.

Question 4

The ATO ruled no, CGT event D1 does not happen.

The advance payments related to promises to facilitate the sale of the lots under the agreement. With the signing of the LDA, the Taxpayer made a promise to make the Land available to the developer for development or, if the Taxpayer chose, to sell the land to the developer in stages.

With the signing of the Variation The Taxpayer chose to enter into the LDA with the Developer and by doing so effectively gave an undertaking that should a precinct structure plan be granted, he would undertake the development with the Developer according to the terms of the LDA they had executed. The LDA and its constituent terms wholly represented the undertaking that he would not withdraw from the agreement once the precinct structure plan was approved.

CGT event D1 happened when the promise was given, and each promise had value, as an amount was specifically attributed to it in the contract. In these circumstances, a capital gain would apply to the creation of rights under CGT event D1 as a separate specified amount was allocated for the creation of those rights in the relevant contract.

The lots that were trading stock remained CGT assets for the purposes of section 108-5 of the ITAA 1997. CGT event A1 happened upon the disposal of blocks of land created under the property development.

Section 102-25(1) of the ITAA 1997 provides that if more than one CGT event can happen, the one you use is the one that is the most specific to your situation.

The promises were given in relation to the disposal of the blocks and were required to enable the Taxpayer to complete the sale of the blocks. CGT event A1 applied in preference to CGT event D1, and consequently, CGT event D1 did not happen in relation to the giving of the promises in these circumstances.

ATO reference *Private Binding Ruling Authorisation No. 1052173744799*
w <https://www.ato.gov.au/law/view/document?docid=EV/1052173744799>

## GST registration and crypto asset trading

**Facts**

A taxpayer, not registered for GST, began trading in cryptocurrency in 20XX overseas and continued to conduct this activity when they migrated to Australia.

The taxpayer's main source of income is solely from cryptocurrency short trading. The trading activities are funded through personal cash outlay and borrowings from lending platforms.

The taxpayer's investment strategy focuses on short-term techniques, including swing trading, to optimise returns and mitigate risks.

The taxpayer facilitates the use of stop-loss orders. These orders are designed to limit the losses by automatically selling part of the holdings when it reaches a predetermined price level, thereby ensuring that any downside is kept within the taxpayer's risk tolerance.

The taxpayer trades in a variety of crypto assets, traded on a digital currency exchange.

The taxpayer cannot determine the location, residency or legal identity of the counterparty to their trades.

The taxpayer spends on average eight hours a day, seven days a week conducting research and trading, of which three hours per day is for conducting trades and five hours is for research.

The taxpayer utilises YouTube videos as a source of immediate updates and insights into the rapidly changing world of cryptocurrencies. The taxpayer also uses online platforms like TradingView for technical analysis.

The taxpayer holds crypto currencies for, on average, 14 hours before disposing of them.

The taxpayer engaged in crypto trading activity with the main intention of making a profit, not for long-term stability. The turnover of the taxpayer's cryptocurrency activities was in excess of $XX million.

During the 20XX-XX financial year, the taxpayer made a significant number of buy and sell orders. The taxpayer's trading activities involved more than XX different digital currencies.

Questions

1. Is the taxpayer carrying on a cryptocurrency trading business in the financial year ended 30 June 20XX?
2. Is the taxpayer required to register for GST?

Ruling

Is the taxpayer carrying on a cryptocurrency trading business?

The ATO ruled yes. The taxpayer had a purpose of profit as well as a prospect of profit, the activity had regularity and repetition, it was of the same kind and was carried on in a business-like manner of similar activities, and its size and scale were sufficient that it would not be considered a hobby or form of recreation.

The ATO noted that there are two possible scenarios in which gains and losses from cryptocurrency trading activities can be treated for income tax purposes.

One scenario is where the cryptocurrency activities constitute the carrying on of a business. The taxpayer's cryptocurrency would be regarded as trading stock and any gains or losses would be included in the taxpayer's assessable income.

Another scenario is where the cryptocurrency activities are regarded as investing. The taxpayer's cryptocurrency assets are considered CGT assets. Any gains resulting from the disposal of cryptocurrency would be income as a capital gain. Any losses sustained on the disposal of cryptocurrency would be a capital loss.

In order to determine which of these scenarios applies to the taxpayer, it is necessary to make a determination of whether the cryptocurrency activities amount to the carrying on of a business. The ATO considered the factors in TR 97/11 sets out the Commissioner's views as to whether a taxpayer is carrying on a business.

The ATO made the following comments in relation to the indicators:

1. the activity of buying and selling cryptocurrency is a commercial activity, particularly where cryptocurrency is held in the short term for resale at a profit. In the taxpayer's case, cryptocurrency was acquired with the intention of making a profit. The turnover of transactions involved is more than $100 million;
2. the taxpayer acquired and disposed of cryptocurrency with the intention of engaging in business rather than it being a hobby. Whilst the taxpayer was not employed full time in a paid role, the taxpayer spent over 40 hours a week conducting trades and research;
3. the taxpayer had an intention of a profit-making exercise as well as a prospect of profit;
4. cryptocurrency was held on average a total of 14 hours and the taxpayer conducted a significant number of transactions in a period of 6 months. There is a high degree of repetition and regularity that would indicate that a business activity is being carried on;
5. the taxpayer had an investment strategy with a focus on short-term techniques to optimise returns and mitigate risks. The frequency, the size and scale of the taxpayer's cryptocurrency acquisitions and disposals exhibits the size and scale that would be expected of a business of trading;
6. the time spent carrying out the cryptocurrency trading is equivalent to full-time employment. The size and scale of the transactions suggest the activities do not have the nature of a hobby or recreational pursuit.

Is the taxpayer required to be registered for GST?

No. The taxpayer is not required to be registered for GST as the taxpayer is making input taxed financial supplies.

The ATO noted that you are required to be registered for GST if you are carrying on an enterprise and your GST turnover meets the registration turnover threshold.

"Enterprise" is defined under paragraph 9-20(1)(a) of the GST Act to include, among other things, an activity, or a series of activities, done in the form of a business.

The ATO considered that the taxpayer was carrying on an enterprise. The response to question 1 set out the reasons for why the ATO considered the taxpayer was carrying on a business. This reasoning similarly applies to the finding that the taxpayer is carrying on an enterprise.

The ATO noted that the GST turnover threshold is $75,000. In order to determine GST turnover, it is necessary to consider if the supply of crypto assets would be an input taxed financial supply.

Sections 40-5(1) and (2) of the GST Act provide that a financial supply is input taxed. The ATO noted that the taxpayer would make input taxed financial supplies in relation to digital currency and derivatives. On the basis that these supplies are not included in the GST turnover, the GST turnover is less than $75,000 so the taxpayer is not required to be registered.

**TRAP** **–** while usually the supply of digital currency will be an input taxed supply it is not clear that the supply of ‘stable coins’ that have their value derived from a fiat currency, are digital currency. This would mean that their supply would count as a taxable supply when determining GST turnover.

ATO reference *Private Binding Ruling Authorisation Number: 1052162005098*w <https://www.ato.gov.au/law/view/document?docid=EV/1052162005098>

## Non-commercial loss rules and $250,000 income test

**Facts**

The taxpayers are in a partnership that is conducting a primary production business.

The partnership entered into a contract for the sale of a property including the livestock and the plant and equipment. The property was sold as part of the business plan of the primary production business.

The partnership operated a farming enterprise on the remaining land owned by the partners, which remained viable and profitable.

The partnership made a loss in a financial year.

The partnership passes the assessable income test, the profits test, the real property test and the other assets test.

The partners would have income under $250,000 if not for the capital gain for the sale of the property.

**Question**

Is the capital gain on the sale of the farmland assessable business income, when being sold in the course of carrying on a business and, therefore, not included in the assessable income for the income test in subsection 35-10(2E) of the ITAA 1997 for non-commercial loss purposes?

**Rulings**

Under Division 35 of the ITAA 1997, a non-commercial loss from a business activity is deferred unless the taxpayer satisfies the income requirement and passes one of four other tests.

The taxpayer will satisfy the income requirement under subsection 35-10(2E) of the ITAA 1997 if the sum of the following is less than $250,000:

1. the taxpayer's taxable income for that year, disregarding any assessable First home super saver released amount for that year;
2. the taxpayer's fringe benefits total for that year;
3. the taxpayer's reportable superannuation contributions for that year; and
4. the taxpayer's total net investment losses for that year.

The ATO noted that, when working the taxpayer's taxable income, any excess amounts that are attributable to the business activity for that year that the taxpayer could otherwise deduct under the ITAA 1997 for that year are disregarded.

The ATO accepted that purchasing the land was a direct consequence of carrying on the farming business, and ruled that any capital gain made on the disposal of the land is also a direct consequence of carrying on the farming business.

The ATO ruled that the capital gain made on the disposal of the property in the relevant income year is attributed to the farming enterprise which incurred a loss for that income year, the capital gain is disregarded, and the partners' adjusted taxable income under subsection 35-10(2E) of the ITAA 1997 is less than $250,000.

ATO reference *Private Binding Ruling Authorisation Number: 1052167967415*

w <https://www.ato.gov.au/law/view/document?docid=EV/1052167967415>

# ATO and other materials

## ATO Report – Next 5000 Program Findings

The ATO has released its report summarising its findings from the Next 5000 review programme as at 31 August 2023.

The Next 5000 review programme began on 1 July 2019 and covers about 7,899 private groups in Australia that have net wealth of over $50 million.

Next 5000 reviews may be either:

1. **streamlined assurance reviews**, which are generally limited to reviewing the tax returns lodged for the last 2 years and reviewing the entities in the group with significant activities, events and transactions – these have a focus on tax governance; or
2. **risk based reviews**, which are focused on specific risks identified by the ATO.

The priority areas for the programme are private groups that are dealing with:

1. experiencing rapid growth;
2. cross-border transactions;
3. domestic wealth transfer – this heading includes:
	1. mismatches between income and expenses between related parties;
	2. lack of independent valuations for transactions between related parties;
	3. omission of related party income, e.g. rent;
	4. issues with family trust elections;
	5. Division 7A compliance;
4. wealth extraction by use of private equity funds; and
5. succession planning.

**Common tax return issues**

The ATO notes the following common tax return errors uncovered by Next 5000 reviews:

1. ***Correct reporting*** – correlation between lack of documented tax governance processes, disclosure errors, late lodgment and failure to lodge supporting schedules to the income tax return;
2. ***Unsubstantiated deductions*** – especially in relation to related party transactions where the reported income derived by the related party was less than the deductions claimed by the other related party;
3. ***Division 7A*** – poor record keeping, lack of documented governance processes and procedures and not taking enough steps to satisfy Division 7A;
4. ***Sale of significant assets*** – incorrect calculation or reporting of capital proceeds and cost base, incorrect timing of capital gain, mischaracterisations of the sale of property as revenue or capital, general lack of supporting records;
5. ***Trust distributions*** – omission of income by beneficiaries, distributions to people who are not beneficiaries, distributions outside family group of family trust election test individual, application of section 100A;
6. ***Related party transactions***– lack of formal documentation, lack of valuations.

**Governance**

The ATO set out that their most common recommendations provided to taxpayers concerning governance include:

* implementing an annual engagement letter or annual scope of work with advisors to ensure that the roles and responsibilities are clear and any out-of-scope items that are still required to be reported on the income tax return are not missed;
* where the engagement letter articulates the out-of-scope items, we expect that the Next 5,000 groups to have appropriate processes and procedures for those issues. This is because it will ensure that the accountabilities in relation to those items are clear and reduce the risk of these items being incorrectly reported or omitted.
* implementing processes and procedures to ensure complete and accurate documentation, information or data is provided to tax agents where they are engaged to prepare the income tax return and accompanying schedules;
* implementing or updating existing data entry manuals and income tax return processes and procedures to ensure they include the reporting of related party transactions; and
* improving record keeping processes and procedures particularly in relation to loans between related parties and expenditure in relation to private use assets.

**What to do for your clients**

Based on the findings of the report, you can take the following steps to put your clients in the best possible position:

1. ensure your client has documented tax related procedures and lodgment deadlines;
2. create a Division 7A annual end of year checklist to ensure accurate and consistent reporting;
3. consider records and legal documentation required for related party transactions;
4. take care with trust distributions;
5. perform reconciliations between BASs and income tax returns;
6. seek advice or private binding rulings where necessary;
7. obtain supporting documentation to substantiate claims;
8. do your own pre-review review where mistakes are uncovered, consider making a voluntary disclosure to the ATO.

**What happens after the initial engagement?**

The ATO reported that 18% of cases were escalated to CRR, and 8% were taken to audit.

The main audit issues were set out as including:

* incorrect characterisation of the sale of property as capital in nature;
* failure to substantiate expenses for trading stock, interest and expenses relating to personal use assets;
* sale of property to related parties for less than market value;
* capital gains being reported that are less than they should be;
* incorrect deductions claimed relating to bad debts;
* trust distributions made without supporting trustee resolutions and that do not comply with the relevant trust deed;
* arrangements that attempt to reduce or avoid tax and that section 100A may apply;
* tax losses deducted in the current year that exceed the previous years carried forward tax losses and cannot be reconciled with relevant labels on the tax return; and
* transactions between SMSF and related parties giving rise to reporting of non-arm's length income (NALI).

## Downsizer Contributions guidance note

In the 2017-2018 Federal Budget, the Government amended the eligibility age of when people can make a downsizer contribution. That Budget lowered the eligibility age from 65 years to 60 years from 1 July 2022.

The Government made additional changes that were effective from 1 January 2023 which further reduced the eligibility age to 55 years.

The Guidance Note GN 2018/2 has been updated to reflect legislative amendments since its publication which include the reduced eligibility age of 55 years, updates to language (such as changing references from 'home' to 'dwelling') and including a new example for someone of 56 years of age applying the downsizer contribution exemption.

The downsizer contribution allows people who may had otherwise been prevented from making additional contributions to superannuation due to their respective age, employment, or contribution cap restrictions, to sell their dwelling and make a contribution to their superannuation fund.

Downsizer contributions are excluded from the definition of a non-concessional contribution. A deduction cannot be claimed for a downsizer contribution.

A downsizer contribution is not counted towards either the concessional or non-concessional caps.

To be eligible for a downsizer contribution the individual must satisfy all of the following elements:

1. the individual or their spouse must have disposed of an 'ownership interest' in a qualifying dwelling in Australia;
2. contracts for the sale of the dwelling must have been exchanged on or after 1 July 2018;
3. for contributions made before 1 July 2022, the individual must be aged 65 years or older at the time the contribution is made
4. for contributions made from 1 July 2022 to 31 December 2022, the individual must be aged 60 years or older at the time the contribution is made;
5. for contributions made on or after 1 January 2023, the individual must be aged 55 years or older at the time the contribution is made;
6. the contribution is equal to all or part of the total capital proceeds from the disposal (but not exceeding the downsizer contribution limit);
7. the contribution must be made within 90 days of disposing of the ownership interest or such longer time as allowed by the ATO;
8. the individual or their spouse, or former spouse, must have owned the dwelling, or the land on which the dwelling was situated, for 10 years prior to disposal;
9. the individual meets or notionally meets the main residence capital gains tax exemption requirement;
10. the individual makes a choice to treat the contribution as a downsizer contribution and notify the complying superannuation plan provider in the approved form, at or before the time the contribution is made.

Dwelling is defined to mean a residential building, and does not include a caravan, houseboat, or other mobile home.

Ownership interest is defined to include owning it in part as a joint tenant or tenant in common. This means an individual can still be eligible to make a downsizer contribution if they sell a part-ownership in a dwelling, even if other part-owners do not make a downsizer contribution.

If the individual is not on the title to the dwelling but their spouse is, they can still make a downsizer contribution provided they personally meet the other requirements. This can also extend to a situation where the deceased estate of a spouse disposes of the ownership interest.

Downsizer contributions are limited to the lesser of $300,000 or the total capital proceeds made from the sale of the dwelling (the gross capital proceeds of the sale of the dwelling).

If a couple is selling their dwelling under a single contract and are both eligible to make the downsizer contribution, the couple is free to choose how to apportion the total capital proceeds between them, provided that, neither of them makes a contribution greater than $300,000.

For the downsizer contribution to be made the dwelling must have been the individual's main residence at some point during the ownership period.

The dwelling must have been held by the individual or their spouse for a period of 10 years prior to the disposal.

The ATO does not require the individual to hold the interest for the entire 10-year period personally, but the ownership interest must have been held by a combination of the individual and their spouse or their former spouse. This allows for changes in ownership between spouses to account for circumstances such as the death of a spouse and relationship breakdown.

The 10-year ownership test can still be met if the dwelling disposed of is a substitute for a previous dwelling, provided the individual has owned one or the other across the entire 10-year period.

If the ATO decides that the individual is not eligible for the downsizer contribution due to failing to meet all of the eligibility criteria, they will notify the individual and seek further information. They will subsequently notify the superfund to re-categorise the contribution if required.

The guidance note provides various examples of when the downsizer contribution will apply.

An addendum has also been released to amend the Law Companion RulingLCR 2018/9 on downsizer contributions.

**TIP** **–** in addition to downsizer contributions not counting towards the concessional or non-concessional contribution caps, contributions made under the small business CGT cap do not count towards the concessional or non-concessional contribution caps.

w <https://www.ato.gov.au/law/view/document?docid=GDN/GDN20182/NAT/ATO/00001>
w <https://www.ato.gov.au/law/view/document?docid=COG/LCR20189A1/NAT/ATO/00001&PiT=20231025000001>

## International businesses – get your GST right from the start

The ATO released information on its website for international businesses who may be new to the Australian GST system. In particular, the ATO website sets out how to register, charge, report or pay for GST. Any international business whose GST turnover from sales connected with Australia is A$75,000 or more in a 12-month period should consider visiting the ATO website for information on their GST obligations.

w <https://www.ato.gov.au/Business/Business-bulletins-newsroom/General/International-businesses---get-your-GST-right-from-the-start/>

## Commissioner's remedial power not applied – business

The ATO has published a document on their website that sets out circumstances when the Commissioner's remedial power was considered but not applied to modify the operation of tax law that affects business.

The Commissioner's remedial power is a limited power that allows the Commissioner to modify the operation of tax law in circumstances where entities will benefit or not be disadvantaged by the exercise of the power.

Some of the circumstances for the application of the remedial that have been considered by the Commissioner are summarised below.

**Base Rate Entity Passive Income and Dividends**

The Commissioner's Remedial Power was considered in respect of the requirements for corporate tax entities to qualify for the lower corporate tax rate of 27.5%, specifically concerning base rate entity passive income (BREPI) and dividends. A taxpayer questioned whether non-portfolio dividends could flow through a trust and not be considered BREPI, proposing to modify the tracing rule accordingly.

However, this modification was considered unsuitable for the Commissioner's remedial power because it contradicted the policy intent. The law, as it stands, already excludes non-portfolio dividends from being classified as BREPI, and the modification would be inconsistent with this intent.

**Loss Carry Back Tax Offset**

The issue involved the temporary loss carry back tax offset, which allowed corporate tax entities to carry back losses to previous years for a refundable tax offset to address the economic impacts of COVID-19. The last time that the loss carry back can be claimed, in respect of losses for the 2020 – 2023 income years, in respect of tax paid in the 2019 – 2022 income years, is in the 2023 income tax return. The question arose about whether a loss carry back choice could be changed in certain situations.

The use of the Commissioner's remedial power was proposed but was considered unsuitable as it would require new machinery provisions that would broaden the policy intent of the original law. The issue was eventually resolved through legislative amendment in the *Treasury Laws Amendment (2021 Measures No. 5) Act 2021*.

w <https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/Commissioner-s-remedial-power-not-applied---business/>

## Losses in crypto investments

The ATO is informing trustees of self-managed superannuation funds that they should be aware of ways that crypto asset investments can be lost and how trustees can avoid them.

The ATO highlights that in the past few financial years it has seen instances of SMSF trustees losing their crypto asset investments by fake crypto exchanges, theft of crypto accounts, collapsed crypto trading platforms, and lost passwords which result in the SMSF trustee being unable to access their account.

Generally, the platforms where crypto is bought and sold are not regulated by ASIC. Therefore, SMSF trustees are not protected if a platform fails or is hacked which will most likely result in the loss of all of the crypto assets.

The ATO recommends SMSF trustees seek advice before investing in crypto and read the information available on the ACCCs Smartwatch website, the MoneySmart section on ASIC's website, and the ATO's page on SMSF investing in crypto assets.

w <https://www.ato.gov.au/Super/SMSF-newsroom/General/Losses-in-crypto-investments/>

## New requirement to publish R&D expenditure information

As part of the changes made to research and development incentive from 1 July 2021, the ATO is now required to publish information each year about R&D entities and the R&D expenditure they have claimed.

The first publication is for R&D entities that lodged a 2022 company tax return with an R&D tax offset and whose income began on or after 1 July 2021. The ATO expect to publish this information in September 2024.

The information that will be published will be based on the information included in tax returns (or amended returns) lodged with the ATO. The information to be published will be:

1. the name of the entity claiming the R&D tax incentive;
2. the ABN or ACN;
3. the entity's total expenditure on R&D (known as notional deductions claimed – label Z in Part A of the R&D tax incentive schedule) less any feedstock adjustments label B in Part B of the R&D tax incentive schedule).

The ATO will soon be emailing tax agents who represent clients whose information will be published in 2023 to let them know about the new requirement and encourage them to review R&D labels that will be published and lodge an amendment to correct any information.

w <https://www.ato.gov.au/Tax-professionals/Newsroom/Your-practice/Our-new-requirement-to-publish-RD-expenditure-information/>

## Clarifying R&D program integrity rules

The ATO is looking to ensure integrity within R&D Tax Incentive.

R&D expenditure to associates can only be claimed in the year they are paid unless the R&D entity makes an irrevocable election. The ATO will regard the following arrangements as not resulting in expenditure being paid to the associate:

1. the amount owed to the associate is converted to a loan;
2. the R&D entity and associate enter into a licencing agreement where the licence fee payment by the associate is offset against the amount the R&D entity owes the associate for R&D services;
3. 'round robin' type transactions that are artificial in nature and contrived to receive a taxation benefit.

To claim R&D notional deductions, the R&D activity must also be conducted for the R&D entity that has registered for the R&D activities. To determine if the ‘conducted for’ rule is satisfied, the ATO will make 'on balance' assessment of which entity:

1. benefits from the R&D activities and requires consideration of who bears the financial risk;
2. has effective ownership of the results of the R&D activities;
3. has control over the conduct of the R&D activities.

To be entitled to the refundable R&D tax offset, the R&D entity’s aggregated turnover must be less than $20 million. If $20 million or more, the R&D entity is entitled to the non-refundable R&D tax offset.

Overseas expenditure can only be claimed for activities conducted overseas where the entity has an ‘overseas finding’ from the Department Industry, Science and Resources.

An entity cannot notionally deduct expenditure under the R&D tax incentive if the expenditure is not at risk. Expenditure is not at risk to the extent that when it’s incurred, the R&D entity could reasonably be expected to receive an amount of consideration:

1. as a direct or indirect result of the expenditure being incurred (the nexus to expenditure test);
2. regardless of the results of the activities on which you incur the expenditure (results test).

The expenditure is not at risk if the R&D entity has a grant or contract to undertake the activities.

w <https://www.ato.gov.au/Tax-professionals/Newsroom/Your-practice/Clarifying-R-D-program-integrity-rules/>

## Superannuation fund mergers and defined benefit income streams

The Commonwealth Government has announced its intention to amend the transfer balance cap for individuals with a capped defined benefit income stream so that they are not adversely impacted in the event of a merger or successor fund transfer between superannuation funds.

The legislative amendments are intended to apply with retrospective effect from 1 July 2017.

w <https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/superannuation-fund-mergers-and-defined-benefit-income>

## Prohibited SMSF loans

The ATO released a statement on 26 October 2023 reporting that 16% of breaches were loans to members between the years of 2019 and 2022.

SMSF trustees cannot loan money or provide financial assistance in any form to a member or a relative of a member. If the trustee provides financial assistance, they could incur a penalty up to $18,780 and risk being disqualified as a trustee.

SMSF trustees cannot loan money to a related party such as a business where the value of the loan, taken together with other in-house assets, exceeds 5% of the total value of the fund.

If the SMSF's in-house assets exceed 5% of the total value of its assets at the end of the financial year, the trustee must prepare a plan to reduce their in-house assets to less than 5%, as failure to do so will result in a contravention. The ATO note that if a SMSF has made a prohibited loan from an SMSF it must be rectified as soon as possible by ensuring the loan is repaid.

w <https://www.ato.gov.au/Super/SMSF-newsroom/Compliance/Prohibited-SMSF-loans/>

## IGTO Report: Commissioner’s General Powers of Administration

The Inspector-General of Taxation Ombudsman (**IGTO**) commenced a review of the Commissioner's process of general administration in late 2021. The draft report was delivered for consideration and comment by the public in February 2022.

Various Australian taxation legislation includes a provision that states that the Commissioner shall have the general administration (**GPA**) of the Act.

The report found that regardless of the broad application and regular use of the GPA, the legislation does not define or describe the purpose, nature and scope of the GPA. The report examined a broad range of materials in order to obtain an understanding of GPA. The report contains five detailed case studies and examines in each instance how the GPA is applied by the Commissioner.

The case studies highlighted the following conceptual and practical challenges with the GPA:

1. the Commissioner's exercise of the GPA is generally not able to be challenged in the AAT or the Federal Court of Australia, leaving taxpayers with little recourse where the GPA has adversely impacted them;
2. there is no statutory framework to guide the exercise of the GPA;
3. it is difficult to delineate which aspects of the ATO's actions or decisions are made under the GPA or made pursuant to statutory provisions and discretions;
4. the exercise of the GPA may include the introduction of thresholds as part of decision making which necessarily exclude those that do not fall within the threshold;
5. the exercise of GPA may result in taxpayers with similar circumstances being treated differently or inconsistently.

The IGTO concluded that it is not clear whether the GPA was a duty or whether it was a power held by the Commissioner.

The IGTO made the following recommendations:

1. the ATO establish an advisory or oversight panel to assist and guide broad reaching exercises of the commissioners GPA;
2. the ATO considers ways in which it could raise awareness and understanding of the recommend that the ATO improves administratively by enhancing education and awareness of the GPA;
3. the ATO considers ways in which it could enhance accountability and transparency for broad reaching exercises of the Commissioner's GPA and to enable taxpayers to more easily identify and track exercises of GPA that may affect them;
4. the Government consider enacting a framework of guiding principles for the exercise of the Commissioner's GPA;
5. the Government consider improving tax administration by providing the Commissioner with an express administrative discretion, unless expressly excluded by Parliament;
6. the Government consider improving tax administration by legislating a requirement for the Commissioner to annually publish and table a record of the exercises of the GPA where it affects a broad class or broad range of taxpayers.

w <https://www.igt.gov.au/investigation-reports/the-exercise-of-the-commissioners-general-powers-of-administration/>

## ACNC 2022–23 annual report released

The Australian Charities and Not-for-profits Commission 2022-23 annual report has been tabled in Parliament.

Key achievements for the 2023 income year included:

* launch of the free Governing Charities online learning program
* significant consultation and publication of the revised Commissioner Interpretation Statement on Health Promotion Charities
* significant consultation and engagement on related party transaction reporting and DGR reviews
* red tape reduction for charities in Queensland
* working with state and territory governments to agree on reforms to charitable fundraising laws that provide a nationally consistent approach
* making 20 submissions, including to the Productivity Commission Inquiry into Philanthropy

The ACNC received 2,106 concerns about charities in 2022-2023. Almost one third were concerns that charity money had been used for personal gain. One quarter related to mismanagement of charity funds.

The ACNC revoked 7 registrations as part of the outcome of ACNC investigations, 23 registrations were revoked as a result of the review of DGR-endorsed entities, and 708 registrations were revoked for double-defaulting on lodgements of Annual Information Statements. As a result of completed investigations, 46 matters were referred to other government agencies.

The ACNC received over 5,500 registration applications, with 2,652 charities becoming registered.

w<https://www.acnc.gov.au/tools/reports/acnc-annual-report-2022-23>