The Tax Institute

Tax Update

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

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1. Tax Update Pitstop

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

Tax Update Matter	Impact Summary	Further Detail
Section 100A	The Full Court of the Federal Court of Australia has handed down its decision in *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3. The case involved a consideration of section 100A and Part IVA of the ITAA 1936. The decision is important as it provides further views on the application of section 100A (reimbursement agreements) and Part IVA to income distributions from trusts Importantly, in relation to section 100A the Full Court held that, for there to be a reimbursement agreement, the beneficiary presently entitled to the income must be a party to the agreement at or before the time that they become presently entitled. The ATO has also finalised its guidance on the application of section 100A of the ITAA 1936. The ATO's finalised guidance has not substantially changed from the draft guidance issued in February 2022, although additional examples have been provided of green zone and red zone arrangements.	Pages 6, 58 and 57
E Group Security – employment agents	The Court of Appeal of the Supreme Court of New South Wales found that arrangement where a group labour entity procured workers for other group entities is an employment agency arrangement for the purpose of the Payroll Tax Act 1997 (NSW). All States and Territories (other than Western Australia) have employment agency provisions in their payroll tax laws. This decision gives rise to the potential for payroll tax to be imposed, where it otherwise would not be, when a specific group entity is used to engage contractors to provide services to other group entities.	Page 17
Medical practices and payroll tax	QLD Revenue has issued a ruling concerning the application of payroll tax to medical practice arrangements. The Ruling indicates that the view of QLD Revenue, unless a specific exclusion applies, the relevant contract provisions will apply to arrangements between medical practices and practitioners.	Page 54
NSW duties changes for change in beneficial ownership and acknowledgment of trust	Revenue NSW has issued guidance on the application of the amendments made to the *Duties Act 1997* (NSW) with effect from 19 May 2022 to introduce two new dutiable transactions change in beneficial ownership and trust acknowledgment.	Pages 52, 62 and 63

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	The guidance from Revenue NSW indicates that the amendments made significant changes to the duties net in New South Wales in relation to transactions involving real property.	
Employee v contractor	The ATO has released guidance on its view of the employee v contractor test following the High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contacting Pty Ltd* [2022] HCA 1 and ZG Operations & Anor v Jamsek & Ors [2022] HCA 2 The ATO's guidance includes a compliance guidance and risk framework for worker classification containing four risk zones. If an arrangement is considered to fall in the "very low" risk zone, the ATO states that no further compliance resources will be applied.	Pages 50 and 60

2. Cases

2.1 Guardian – section 100A and Part IVA

Facts

The Australian Investment Trust (**AIT**) is a discretionary trust established on 25 June 1998. Mr Alexander Springer was the initial trustee for the AIT, and was also the Principal. Among the powers of the Principal was the power to add new beneficiaries to the trust. On 14 November 1999, Alexander resigned as trustee and Guardian AIT Pty Ltd (**Guardian**) was appointed as trustee. Alexander was the initial director of Guardian, and was the sole shareholder at all relevant times.

Alexander was involved in various business ventures and had several entities that carried out these enterprises. The shares in these entities were owned either by Guardian as trustee for the AIT, or by Alexander personally. These entities were referred to as the 'Springer Group'. In around 2007, Alexander decided that he wanted to wind up the various business, and commence a transition to retirement. As part of his retirement plan, in late 2007 Alexander moved to Vanuatu. Alexander was a tax resident of Vanuatu from the year ended 30 June 2008 onwards. Shortly after moving to Vanuatu, Alexander resigned as a director of all relevant entities within the Springer Group and appointed his son Eric as director. Alexander effectively maintained control of the Springer Group, despite no longer being the director.

From 2010 until 2014, most entities within the Springer Group were wound down and de-registered. As such, by 2012 the winding down and deregistration of the Springer Group entities was well underway. The result of this was that the AIT was effectively a passive investor.

While acting as director, Eric relied on the advice of his father's trusted business advisor, Daniel Shafferman. Eric would also act in accordance with advice received from Pitcher Partners, after consulting with his father. In late 2012, Eric moved to the USA, and so Daniel was appointed as a second director of the entities within the Springer Group. Eric signed the trust distribution for the AIT in 2012, however from the year ended 30 June 2013 onwards, Daniel would be the relevant director to sign documents.

Alexander had engaged the services of Nigel Fischer of Pitcher Partners in around 2012. Alexander would usually act on the advice provided by Pitcher Partners, however there were occasions where he would decide on a course of action opposite to the advice provided. As a general rule, Alexander's strategy for managing cash flow amongst the Springer Group entities was reactive, in that he would cause funds to be directed towards entities as the need arose. Pitcher Partners did not provide advice in relation to cash flow management or planning. Pitcher Partners would provide tax advice after carrying out an annual review at the end of the financial year.

On 27 June 2012, Alexander caused a new company to be incorporated of his own accord, AIT Corporate Services Pty Ltd (**AITCS**). The AIT held all shares on issue. Eric was the initial director, and Daniel was appointed as a co-director in late 2012. In June 2012, Alexander as Principal of the AIT caused AITCS to be added to the class of general beneficiaries of the AIT, in accordance with the trust deed. The decision to incorporate a new company and add it as a beneficiary to the AIT stemmed from advice received from Pitcher Partners. It was suggested to have a new clean skin company as a beneficiary of the AIT, now that the other corporate entities were being wound up.

Prior to the year ended 30 June 2012, the AIT would distribute its annual net income to entities within the Springer Group according to their cash flow needs. Alexander otherwise never planned future distributions. Consistent with this, there were never forward budgets or forecasts prepared for the entities within the Springer Group. Special purpose trust accounts for the AIT for the years ended 30 June 2010 and 30 June 2011 demonstrated that there was no particular pattern to the distributions.

On 29 June 2012 Alexander received an email from Pitcher Partners which enclosed a draft proposed trustee resolution for the distribution of the AIT's income for the year. Eric, as sole director at the time, signed the trust resolution. The draft resolution determined to distribute 100% of franked dividend income to Alexander, 100% of interest income to Alexander, $45,000 of the balance of the income to be distributed to Richard (Alexander's other son) and the balance to be distributed to AITCS. The financial statements for the year ended 30 June 2012 showed that Alexander received a distribution of $8,254,222 and had a UPE owing to him of $10,548,815.

Pitcher Partners provided Alexander with advice regarding the possible Division 7A issues caused by the UPE owing to the AITCS. The advice suggested either physically paying the amount of the UPE to AITCS, or putting the UPE on a Division 7A complying loan agreement (referred to as a '7 year investment agreement'). Pitcher Partners explained that, if the cash was to be paid to AITCS, it could not then be transferred back to the AIT (as this would create a Division 7A problem). Pitcher Partners clearly emphasised that the cash needed to be physically paid to a bank account in the name of AITCS. At this time, Alexander noted in an email to Pitcher Partners that he was not comfortable transferring such a substantial amount of money to an account he had no control over. On 26 March 2013, Pitcher Partners sent an email to Alexander as follows:

> *A strategy that will work is as follows:*
>
> 1. *Pay income tax of [AITCS] by AIT (by 30 April 2013 – as scheduled)*
> 2. *On 1 May 2013, pay a fully franked dividend from [AITCS] to AIT (as AIT is 100% shareholder) for the amount of retained earnings in the company i.e. $1,848,145, which will also extinguish the unpaid present entitlement to the company.*
> 3. *At 30 June 2013, AIT distributes 100% of its fully franked dividend to [Mr Springer] (given you are a non-resident for Australian tax purposes, this is a final tax)*
> 4. *Therefore, no cash transfers are required, the above all occurs via book entry.*
>
> *So all that you need to do is to pay the tax, and we will take care of the rest.*

On 11 April 2013, Pitcher Partners sent an unsigned 10 year investment agreement to Alex as an additional strategy, as a 'safety net'. This was signed by Daniel as director of Guardian.

As such, the following steps occurred:

1. on 28 June 2012 the AIT appointed income of $2,640,209 (not representing franked dividends) to AITCS. This amount was not paid to AITCS, giving rise to a UPE;
2. on 17 April 2013 AITCS drew on its UPE owing by the AIT to pay its tax liability;
3. on 1 May 2013 AITCS declared a fully franked dividend of $1,848,145 to the AIT, which was equal to the remaining UPE; and
4. on 23 June 2013, the AIT appointed the net income for the year ended 30 June 2013 that was attributable to franked dividends to Alexander. This included the fully franked dividend declared by AITCS on 1 May 2013.

The financial statements for the AIT for the year ended 30 June 2013 showed a UPE owing to Alexander of $12,546,677.

The following steps occurred in relation to the year ended 30 June 2013:

1. on 23 June 2013 the AIT appointed income of $2,646,163 (not in the form of franked dividends) to AITCS. This amount was not paid to AITCS, giving rise to a UPE;
2. on 14 February 2014 AITCS drew on its UPE owing by the AIT to pay its tax liability;
3. on 27 February 2014 AITCS declared a fully franked dividend to the AIT (which was equal to the remaining UPE); and
4. on 23 June 2014, the AIT appointed the net income for the year ended 30 June 2014 which was attributable to franked dividends to Alex. This included the fully franked dividend declared by AITCS on 27 February 2014.

Alexander's status as a non-resident meant that he was not liable to tax on the trust distributions which were attributable to fully franked dividends derived by the AIT.

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After reviewing the affairs of the AIT, the Commissioner ultimately issued assessments under section 99A of the ITAA 1936 to Guardian as trustee for the AIT, on amounts that AITCS had been made presently entitled to, on the basis that 100A applied to each of the 2012, 2013 and 2014 income years. Penalty assessments were also issued to Guardian by the Commissioner.

The Commissioner also issued alternative assessments under Part IVA of the ITAA 1936 to Alexander on the basis of a 'Primary Scheme' and alternative narrower schemes which focused on each individual income year.

Primary judgment in relation to section 100A

Guardian applied to the Federal Court to have the Commissioner's decision set aside.

In the primary judgment, the Commissioner contended that Guardian and Alexander reached an agreement or understanding on or before 27 June 2012, that in the 2012 income year and future income years:

1. AITCS would be incorporated for the purposes of being made presently entitled to the income of the AIT;
2. Guardian as trustee for the AIT would benefit from the amount to which AITCS was made presently entitled; and
3. ultimately, Alexander would benefit from the income to which AITCS was made presently entitled.

This was referred to by the Commissioner as the **2012 Understanding**. The Commissioner contended that this was a reimbursement agreement for the purposes of section 100A.

The Commissioner's alternative argument was that on or before 23 June 2013, Guardian and Alexander reached an agreement that for the 2013 income year and future years:

1. Guardian as trustee for the AIT would benefit from the amount to which AITCS would be made presently entitled; and
2. ultimately, Alexander would benefit from the income to which AITCS was made presently entitled.

This was referred to by the Commissioner as the **2013 Understanding**. Similarly, the Commissioner purported that this was the reimbursement agreement for the purposes of section 100A.

The primary judge, Logan J, ultimately determined that 100A had no application in either the 2012 year or the 2013 year.

This turned on a close consideration of section 100A. In particular, the primary judge identified 3 issues:

1. whether there was a reimbursement agreement, as defined in section 100A(13)?
2. if yes, then did the present entitlement of AITCS in a given income year arise from that agreement?
3. if yes, was there a tax avoidance purpose for the present entitlement?

Importantly, Logan J emphasised that it is necessary that there is a relevant connection between the 'reimbursement agreement' and the present entitlement, and that the reimbursement agreement in question must precede the present entitlement of the beneficiaries.

Ultimately, Logan J determined that there was insufficient evidence to determine that there was in fact a reimbursement agreement. Specifically, his Honour noted that at the time that AITCS was made presently entitled to income from the AIT, there was no evidence to suggest that there was a plan to declare a future dividend from AITCS back to the AIT. His Honour further noted that the arrangement referred to as the 2012 Understanding was an ordinary or commercial family dealing, in line with Alexander's plans to retire and wind up the various operating entities.

Logan J also noted that it was necessary to formulate a hypothesis as to what tax would have been payable, had the relevant agreement not been entered into. In these circumstances, Logan J determined that it was most likely based on the facts provided, that AITCS would have received and retained the UPE, or it would have invested that amount with AIT on a Division 7A compliant loan agreement. Neither of these

counterfactuals entailed a tax consequence for Alex. This again undermined the Commissioner's argument that there was a reimbursement agreement with a tax avoidance purpose.

Similarly, for the 2013 year, Logan J determined that section 100A had no application on the basis that there was no evidence of an agreement prior to, or at the time of, the appointment of the income for the 2013 year, for the AITCS to declare a future dividend.

Primary judgment in relation to Part IVA

The main issue considered by Logan J was whether Alexander had obtained a tax benefit in connection with the scheme identified by the Commissioner. His Honour noted that Alexander had the onus of proving that he did not obtain a tax benefit in connection with the scheme, and subsequently concluded that Alexander was successful in discharging that onus. The Commissioner had submitted that Alexander obtained a tax benefit, as instead of the AIT distributing income to him (and him paying tax on that amount), it was distributed to AITCS which paid tax at the corporate tax rate. However, Logan J dismissed this argument, on the basis that this would never have happened, noting that "*No competent adviser would have recommended such a course"* and that Alexander did not need the money.

Logan J went on to stipulate that, even if there was a tax benefit, a consideration of the eight factors found in section 177D would show that there was a distinct absence of a dominant purpose to obtain a tax benefit.

Logan J held that Part IVA did not apply in the circumstances.

Appeal in relation to section 100A

The Commissioner appealed the primary judge's decision in part to the Full Court of the Federal Court. The Commissioner accepted Logan J's decision that section 100A did not apply in respect of the year ended 30 June 2012, or in respect of the year ended 30 June 2014.

The Commissioner's position on appeal was that there was an agreement on or before 23 June 2013, between Guardian as trustee of the AIT and Alexander, that AITCS would be made presently entitled to the income for the year ended 30 June 2013, and Alexander would ultimately benefit from this amount. The Commissioner contended that whether this arrangement existed relied upon the understanding that existed amongst the representatives of Pitcher Partners. The Commissioner argued that there was an understanding that a dividend would be paid by AITCS amongst the advisers of Pitcher Partners, and that understanding could be imputed to Alex because of his practice of following the advice provided by Pitcher Partners.

The Commissioner also contended that Logan J had erred in considering correspondence sent by Pitcher Partners to Alexander. A letter was sent on 15 January 2014 by Pitcher Partners to Alexander. Logan J had determined that this letter set out the 'options' for Alexander to consider in terms of clearing the UPE owing for the 2013 income year. The Commissioner said that this letter was actually a summary, consistent with previous practice, which then noted that a dividend would be paid.

Appeal in relation to Part IVA

The Commissioner appealed the primary judge's decision in relation to a narrower 2012 scheme and the related 2013 scheme. The 2012 scheme was identified as:

1. the incorporation of AITCS and the determination of Alexander to add AITCS as a member of the class of beneficiaries of the AIT;
2. the appointment of income of the AIT for the 2012 year to AITCS;
3. the declaration and payment by the AITCS of a fully franked dividend on 1 May 2013 to the AIT (reducing the UPE to nil); and
4. the appointment of franked income of the AIT for the year ended 30 June 2013 to Alexander.

The 2013 scheme was identified as:

1. the appointment of unfranked income of the AIT for the 2013 year to AITCS;
2. the drawing down by AITCS of part of that entitlement to discharge its income tax for the year ended 30 June 2013;
3. the declaration and payment by the AITCS of a fully franked dividend on 27 February 2014 to the AIT (reducing the UPE to nil); and
4. the appointment of franked income of the AIT for the year ended 30 June 2014 to Alexander.

Decision

In relation to section 100A

The Court accepted the Commissioner's submission regarding the correspondence of 15 January 2014, namely that in light of the advice provided the prior year, this letter should be understood to be a recommendation, rather than presenting alternative options. However, the Court noted that in order for section 100A to be satisfied, there must be an agreement prior to AITCS being made presently entitled, and on the basis of Hill J's comments in *East Finchley v Commissioner of Taxation* [1989] FCA 720, where an agreement involves the payment from the beneficiary to the trustee, that beneficiary must be a party to the agreement.

The Court considered the Commissioner's argument regarding attributing a taxpayer's advisor's purpose to the taxpayer. While noting that this can be the case in the context of Part IVA, their Honours noted that the scope of section 100A is narrower, again emphasising that there must be an agreement that involves the presently entitled beneficiary.

Ultimately the Court found that, while it could be said that the payment of a dividend by AITCS to the AIT as at 23 June 2013 was not 'wholly conjectural', there was no agreement as at 23 June 2013 which involved the payment of a dividend from AITCS back to AIT, and therefore, there was no 'reimbursement agreement' for the purposes of section 100A.

The Court confirmed the decision of the primary judge that section 100A did not apply to the 2013 income year.

In relation to Part IVA

The Court considered the meaning of scheme as defined in section 177A, noting that it encompasses not only a series of steps which together constitute a scheme, but it can also be the taking of one step only. The Court referred to and agreed with Dowsett J in *Federal Commissioner of Taxation v Star City Pty Ltd* [2009] FCAFC 19, distinguishing a 'scheme' from an 'agreement' as referred to in section 100A(10). This is on the basis that the conduct which gives rise to a scheme under Part IVA may be unilateral (or multilateral), as opposed to an agreement under section 100A which requires an agreement between all relevant parties.

On this basis, the Court held that the 2012 scheme and the 2013 schemes were each a 'scheme' for the purposes of Part IVA.

Having identified the relevant schemes, the Court then considered whether Alexander obtained a tax benefit as a result of entering into the schemes. This required a comparison between the relevant scheme and the alternative postulate set out by the Commissioner.

The Court noted that the Commissioner's alternative postulate relied on the assumption that had the schemes not been entered into, Alexander would have been made presently entitled to the income of the AIT for the years ended 30 June 2012 and 30 June 2013. Their honours rejected the finding of the primary judge that the AITCS would have received its full payment of its present entitlement and retained it, on the basis that it was contrary to the concerns expressed by Alexander about leaving large amounts of cash in a bank account he did not control. Their honours also rejected the finding of the primary judge that the AITCS would have invested the amount back with the AIT under a complying loan agreement on several grounds, being that the loan agreement referred to was noted to be a 'safety net'. It was only to operate to the extent that the UPE was considered to be a loan. Secondly, this resulted in a different commercial outcome, that the asset (being the investment in AIT) would be owned by AITCS, whereas under the scheme, the final result is that Alexander

directly owned the asset. Thirdly, Alexander demonstrated no desire for AITCS to enter into an investment agreement with AIT by instead determining to pay a dividend and clear the UPE.

The Court then considered whether the dominant purpose of entering into the scheme was to obtain a tax benefit. Their Honours referred to *Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34 noting that 'dominant' in the context of Part IVA means 'the ruling, prevailing or most influential purpose'. This requires consideration of the eight factors in section 177D.

The Court considered each of the eight factors as follows.

Manner in which the scheme was entered into

The Court noted that 'manner' refers to the way in which the scheme was established or carried out. In relation to the 2012 scheme, it was noted that there was no evidence to suggest that at the time the AITCS was made presently entitled to the income of the AIT, it would pay a fully franked dividend back to the AIT. It was only at a later time when Pitcher Partners expressed their concern regarding the UPE that it was decided by Alexander to pay a dividend to clear out the UPE. As such, it could not be said that the 2012 scheme was entered into in a manner that had an objective intention of obtaining tax benefit.

However, it was held that the manner in which the 2013 scheme was entered into and carried out did support a conclusion that Alexander, AIT or AITCS entered into the scheme for the dominant purpose of enabling Alexander to obtain a tax benefit in the year ended 30 June 2013.

Form and substance

Their Honours noted that this factor required a consideration as to whether the scheme involved any sham or contrivance in its form or substance that demonstrated an objective intention that the dominant purpose for entering into the scheme was to obtain a tax benefit.

Their Honours held that incorporating AITCS and adding it as a beneficiary of the AIT was not a sham nor was it contrived.

However, making AITCS presently entitled to the net income of the AIT, but having Alexander retain the direct ownership and control of the value of that present entitlement, lead to the conclusion that the substance of the scheme was for the dominant purpose of Alexander obtaining a tax benefit.

The time at which the scheme was entered into and the length of period during which the scheme was carried out

The Court held that this was a neutral factor, on the basis that the timing of the dividend was related to the Division 7A issue. Namely, that to avoid a Division 7A issue, the dividend had to be paid to clear out the UPE owing to AITCS, prior to the lodgment day for AITCS.

The result in relation to the operation of ITAA 1936 and ITAA 1997 that would be achieved by the scheme, but for Part IVA

Similarly, the Court held that this factor, of itself, was a neutral factor.

Change in financial position of the taxpayer that has resulted from the scheme

The Court held that there was an improvement in Alexander's financial situation, as he received a fully franked dividend (and had no tax to pay) as opposed to the alternative which was to receive an unfranked distribution from the AIT. It was held that this factor suggested that the scheme was entered into for the dominant purpose of obtaining a tax benefit.

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Change in the financial position of a connected person

The Court held that the AITCS did not accumulate wealth as initially intended. AITCS was merely used for Alexander to obtain a tax benefit, as AITCS would pay tax at the corporate rate and it would ultimately flow through to Alexander. This factor suggested that the schemes were entered into for the dominant purpose of obtaining a tax benefit.

Any other consequences of the scheme for Alexander or any other person

This factor was considered to be of no weight.

Nature of any connection between the relevant taxpayer and any connected person

The Court held that the present entitlement of AITCS in the year ended 30 June 2013 was explicable by the tax benefit it conferred on Alexander, enabling him to obtain the benefit of that income in a way which limited the tax payable. This pointed towards the conclusion that the scheme was entered into for the dominant purpose of obtaining a tax benefit.

Having accepted that the 2012 scheme and the 2013 scheme both satisfied the definition of 'scheme', their Honours found that Alexander failed to discharge the onus that he had not obtained a tax benefit by entering into the schemes. Their Honours noted that for Alexander to discharge his onus, it was insufficient for him to show that the Commissioner's counterfactual scenario was not reasonable. Alexander had to satisfy the Court of what might reasonably be expected to have occurred, absent the scheme. He failed to do this.

Ultimately the Court held that the 2012 scheme was a result of an "evolving set of circumstances". It was held that the 2012 scheme was not entered into for the dominant purpose of obtaining a tax benefit.

However, the form of the 2013 scheme was "the implementation of a strategy that had been developed with the evolution and implementation of the 2012 scheme". The Court held that the 2013 scheme was entered into for the dominant purpose of obtaining a tax benefit. On this basis, their Honours determined that Part IVA should apply to include an amount in Alexander's assessable income for the year ended 30 June 2013. As AITCS had included that same amount in its assessable income for the same year, the Court directed the Commissioner to make adjustments pursuant to section 177F(3) of the ITAA 1997.

COMMENT – there are important differences between the application of section 100A and Part IVA, including that section 100A is a self-assessing provision where Part IVA is not and that the Commissioner has unlimited period for review under section 100A but only has a four year of review under Part IVA, unless an opinion is formed that there has been fraud or evasion.

Citation *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 (Perry, Derrington and Hespe JJ, Queensland)
w https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2023/2023fcafc0003

2.2 MLC Investments Limited – benefits to trustees

Facts

MLC Investments Limited (**MLC**) is a responsible entity of 19 registered managed investment schemes and is the trustee of 18 unregistered management investment schemes.

MLC wanted to retire as the responsible entity of the registered schemes and as the trustee of the unregistered schemes in favour of Channel Investment Management Limited **(CIML)**. MLC received advice from JANA Investment Advisors Pty Ltd (**JANA**) to proceed with this course of action. JANA acts as the investment adviser for each of the schemes.

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MLC considered its retirement as responsible entity and as trustee was in the best interests of the scheme members because CIML could offer the scheme members more flexibility in their investment options and improved technology which assisted with the faster implementation of scheme member instructions.

In order to implement the change from MLC to CIML, it was expected that MLC would incur expenses and disbursements in the vicinity of $500,000 to $600,000 (**Implementation Expenses**). MLC was entitled to be indemnified from the scheme property for the Implementation Expenses. However, in order to remove the burden of the scheme members paying for the Implementation Expenses, it was proposed that JANA reimburse MLC for the Implementation Expenses. Further, CIML would provide certain 'indemnities' to MLC for the proposal (**Indemnities**). The Indemnities would be included in a proposed 'Implementation Deed' and 'Deed of Retirement and Appointment' to be entered into by MLC, CIML and JANA. The Indemnities would be limited in scope to 'claims' not already covered by the right of indemnity granted to MLC from the scheme assets.

Prior to the implementation of the proposal, MLC considered the application of s 249E of the *Crimes Act 1900* (NSW) to the proposal and apprehended that this provision may prevent MLC from proceeding with the course of action. Relevantly, clause 249E of the Crimes Act provides:

> *(2) Any person who offers or gives a benefit to a person entrusted with property, and any person entrusted with property who receives or solicits a benefit for anyone, without the consent—*
>
> *(a) of each person beneficially entitled to the property, or*
>
> *(b) of the Supreme Court,*
>
> *as an inducement or reward for the appointment of any person to be a person entrusted with the property, are each liable to imprisonment for 7 years.*

MLC proposed that a resolution be passed by members of the registered schemes to make CIML the new responsible entity, and that a unanimous unitholder consent be given by the unitholders in each of the unregistered schemes to make CIML the new trustee. However, it became clear that it may not be possible to obtain the consent of all members.

The concern was that section 249E may apply because JANA and CIML were offering to give the benefit of the Implementation Expenses and the Indemnities to MLC, and MLC was proposing to receive, if not solicit, those benefits.

MLC applied to the Supreme Court of New South Wales for consent under section 249E and also sought a declaration that the Indemnities did not constitute an 'inducement or reward' for the purpose of section 249E.

Issues

1. Is a 'corrupt' intention necessary for section 249E of the *Crimes Act* to apply to the course of action proposed by MLC?
2. Should consent be provided by the court to the implementation of the proposal by MLC?

Decision

<u>'Corrupt Intention'</u>

The Court held that section 249E of the Crimes Act was not a 'strict liability' offence whereby an act without intention attracts liability under the provision. In other words, an element of 'mens rea' or intention is presumed to apply to a statutory offence unless the language of the provision expressly or by implication excludes it.

Section 249E of the Crimes Act is directed at circumstances where, as in this case, the parties have specific intent to offer, give, receive or solicit a benefit as an inducement or reward for the appointment of the person to be entrusted with property.

The Court held that there are two possibilities for 'mens rea' or intention under section 249E. That is:

1. a specific intent to offer, give, receive or solicit a benefit without consent as an inducement or reward for the appointment of any person to be a person entrusted with property; or
2. a specific intent to offer, give, receive or solicit a benefit without consent as an inducement or reward for the appointment of any person to be a person entrusted with property, where that purpose is dishonest or corrupt in some way.

The Court held that there is no question of MLC having any corrupt purpose. As such, if the mental element of the provision is the second possibility, the section of the legislation is not engaged, and the Court is not required to provide consent to the proposal put forward by MLC. However, if it is the first possibility, where having a 'corrupt' purpose is not an element of the offence, then section 249E is broad enough to capture payments or benefits without any suggestion of corruption or dishonesty.

The Court held that section 249E does not require a corrupt intent as an element of the offence. This is supported by the fact that other provisions in the Crimes Act (for example, s 249B "corrupt commissions or rewards") specifically references 'corruption' as an element of the offence.

Further, as the provision contemplates consent by those beneficially entitled to the relevant property or the court to the prescribed conduct, it was hard to see how any consent could be given if the intention included corruption or dishonesty.

Consent

The Court consented to the proposal made by MLC on the basis that:

1. MLC's financial position after the change of trustee/responsible entity would remain neutral;
2. the proposal was in the best interest of the scheme members because the Implementation Costs would be borne by JANA and not the members (through the scheme assets).

In relation to the Indemnities, the Court did not accept MLC's submission that they should not be seen as an inducement or reward. However, because the Indemnities do not go beyond those to which MLC would normally be entitled, and because the wider transaction would be in the best interest of the scheme members, the granting of the Indemnities was held not to be an inducement for MLC to act otherwise in the best interests of the scheme members.

Citation *Application of MLC Investments Limited (ACN 002 641 661)* [2022] NSWSC 1541 (Stevenson J, New South Wales) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/1541.html

2.3 Infinity Security Group – employment agents

Facts

Infinity Security Group Pty Ltd carried on a private security contracting business. Infinity contracted with licensed venues, such as pubs and clubs and commercial businesses such as brothels (**Customers**), to provide them with security guards. Infinity also supplied guards to other security companies. The security guards provided by Infinity were a combination of Infinity employees and additional individuals sourced by Infinity from unrelated security companies (**Subcontractors**).

Infinity managed the rostering of all the guards it engaged, both employee and Subcontractors. Rosters were completed weekly and there was no guarantee as to which guard would work at which Customer.

All guards reported to Infinity's supervisors or managers and did not report to the Customer's management. Guards were trained that, if a Customer representative made a request to a guard, the Customer representative should be referred to make the request to the Infinity supervisor. If a guard was running late, was ill or needed

to leave early, the guard would communicate with their Infinity supervisor who would then liaise with the Customer and find a replacement guard.

Infinity provided on-site training to each guard relating to how intoxicated patrons attending the venue might typically be or what are the venue's busiest times, where entry/exit points are, and where the guard should be situated.

Infinity provided uniforms to all of its guards which included a black shirt with the company logo on the pocket and 'SECURITY' across the back of the shirt. The guards never wore any Customer logos or banding.

The guards used the public facilities at the client venues and either brought food or ate off site during a break. The guards did not have keys to the staff rooms or any non-public areas accessible to the Customer's staff and management.

Infinity provided radios and earpieces. These were often stored at Customer venues for the guards to access. Where required, Infinity provided metal detectors for screening bags.

Some Customers provided ID scanners that were used by Infinity's guards.

As legally required, Infinity maintained an incident register at each Customer site. Infinity provided training to the guards in writing incident reports and the guards were the only individuals permitted to write in the incident register. On occasion, a guard would show the Infinity register to a Customer staff member to ensure the Customer staff member did not miss anything when completing the incident register maintained by the Customer. If a Customer maintained CCTV, the guards did not have access to the footage.

The guards regularly interacted with the Customer's patrons in the course of performing their duties. This included assessing risks, controlling entry, checking identification and placing entry stamps on patrons' hand or wrists, and escorting patrons outside.

Guards would regularly answer questions asked by patrons, such as the location of the bathroom, the venue's closing time, whether the venue is full, or whether there is a cover charge. Infinity submitted answering such questions was a matter of common courtesy and not part of their duties as a security guard.

Due to the nature of the services, the guards were likely to be the first person a Customer's patron interacted with and the last person a Customer's patron interacted with during a visit to the Customer's venue.

Guards would collect glassware that was outside the perimeter of the venue or that had been broken to prevent those items being used as weapons.

In one case, a guard would occasionally assist venue staff with tasks such as stacking chairs. This was not part of their duties as a security guard.

Payroll tax is imposed on an employer in respect of all taxable wages. Section 40 of the *Payroll Tax Act 2007* (NSW) (**PTA**) provides that amounts paid or payable under an employment agency contract are taken to be wages for payroll tax purposes.

Section 37 of the PTA relevantly provides:

> *(1) For the purposes of this Act, an employment agency contract is a contract, whether formal or informal and whether express or implied, under which a person (an employment agent) procures the services of another person (a service provider) for a client of the employment agent.*
> *…*
> *(3) In this section—*
> *contract includes agreement, arrangement and undertaking.*

The Chief Commissioner assessed Infinity to payroll tax for the financial years ended 30 June 2016 to 2019 on the basis that the arrangements between Infinity, its Customers, and its Subcontractors were employment agency contracts under section 37 of the PTA.

The Chief Commissioner determined that payments by Infinity to its Subcontractors were deemed wages under section 40 of the PTA. In addition to the primary tax, the Chief Commissioner imposed interest at the market rate of interest on the unpaid tax and imposed 12.5% penalty tax.

Infinity objected to the payroll tax assessment. On 23 April 2021, the Chief Commissioner disallowed the objection.

Infinity sought review of the decision to disallow the objection in the NCAT.

Both parties referred to the interpretation of section 37 of the PTA that was set out by White J in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 at paragraph [62]. In that case, it was held that section 37 should be read as meaning 'a contract under which a person procures the services of another person ***in and for the conduct of the business of the employment agent's client***' (emphasis added). This test considers whether the employment agent added individuals who would comprise or would be added to the workforce of the Customer or who would work in the same way as an employee of the Customer.

The Chief Commissioner submitted that, among other things, the guards worked in and for the Customer's business because of the following 'over-arching principles':

1. it was part of the Customer's business to provide a safe environment by having security guards present;
2. Infinity's guards were constantly monitoring or interacting with the Customer's patrons; and
3. Infinity's guards were generally the first and last person a patron interacted with when visiting the venue.

Infinity contended that the submission that the provision of security services are integral or provided for the necessary conduct of the Customer's business has been rejected by the Courts including in *JP Property Services Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWSC 1391 (**J P Property Services**) and by Ward CJ in *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 (**E Group Security**).

Infinity referred to the various facts that showed separation of the guards from the Customer's workforce, including:

1. training was provided by Infinity, not the Customer;
2. keeping an incident register and radios at Customer premises does not demonstrate integration into the business;
3. while services were regularly provided, and in some cases particular guards stayed for a week or a few months, there was no guarantee of any continual assignment of guards;
4. Customer staff did not direct the guards or give instructions on security issues;
5. interactions with patrons are part of the guard's role in providing security services and are readily distinguishable as security, not services provided by Customer staff;
6. both Infinity and Customers are legally required to keep incident registers, but a staff member checking the information to be included in their register does not constitute a sharing of security functions. Similarly, Customer staff collect glassware for cleaning purposes, while guards may collect it to remove a potential weapon for security purposes;
7. guards wear uniforms which differentiate them from the Customer's workforce; and
8. the guards use publicly available facilities and do not use areas available to the Customer's staff.

Issues

Did Infinity procure the services of security guards 'in and for the business of' its Customers?

Decision

Pub and club Customers

The NCAT referred to the decision of Kunc J in *J P Property Services* at paragraph 72, which asks whether the individual's services are 'provided to help the client conduct its business in the same way, or much the same way, as it would through an employee'.

The NCAT did not accept that the Chief Commissioner's 'over-arching principles' demonstrated the guards worked in and for the Customers' businesses.

Senior Member Dunn concluded that, while they were performing necessary and, in some cases integral functions for the Customers, the guards were not integrated into the Customers' businesses nor effectively added to their workforce. Among other things, this conclusion was based on the following factors:

1. the storage of radios and equipment at the Customer's venue was not of particular significance;
2. while Infinity would try to provide guards to the same venue as they had worked previously for continuity, there was no guarantee this would occur;
3. polite response to patrons' queries was necessary for the guards to provide their security services and had a security rationale;
4. uniforms clearly identified Infinity staff as security, whether or not the Infinity logo was visible;
5. interactions between guards and Customer staff were limited and generally those necessary for guards to perform security duties;
6. Customers did not have control over guards in the performance of their security duties and guards had limited access to Customer staff facilities;
7. while there was some overlap between the guards' security functions and the Customer staff's non-security functions (such as the collection of glasses, and the use of ID scanners), generally guards carried out the security duties they were trained to do and the venue staff did not; and
8. while it was part of the Customers' businesses to provide a safe environment, it does not follow that the Customers were in the business of providing security services.

It was held that the guards were not providing services 'in and for' the conduct of the pub and club Customers' businesses and the arrangements between Infinity and these Customers were not employment agency contracts within the meaning of section 37 of the PTA.

Other Customers

No evidence was provided or submissions made as to the services provided to Infinity's commercial business Customers, such as brothels. The NCAT found that Infinity had not proved that those arrangements were not employment agency contracts or that the assessment were incorrect. Infinity did not make submissions as to interest or penalty tax.

Therefore, the assessment, interest and penalty tax were upheld, to the extent that they relate to the payments to guards provided to commercial business Customers.

Citation *Infinity Security Group Pty Ltd v Chief Commissioner of State Revenue* [2022] NSWCATAD 28 (S Dunn, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/28.html

2.4 E Group Security – employment agents

Facts

From 1 July 2015 to 30 June 2018, E Group Security Pty Ltd provided security services to its customers who were primarily hotels, clubs, commercial offices, hospitals and schools (**Customers**). The security guards who

provided the services to the Customers were sourced by E Group Security from unrelated security companies (**Subcontractors**).

The Subcontractors were paid by three related companies of E Group Security: E Group Protective Services Pty Ltd, Vital Hospitality Group Pty Ltd and E Group Events Australia Pty Ltd (**Related Entities**).

The Chief Commissioner assessed E Group Security to payroll tax for the financial years ended 30 June 2016 to 2018 on the basis that the arrangements between E Group Security and its Customers were employment agency contracts.

E Group Security sought a review of the assessments in the Supreme Court of New South Wales. At first instance, the proceedings were heard by Ward CJ in Eq. The principal issues Ward CJ was required to determine was whether the arrangements between E Group Security and its Customers or, alternatively, the arrangements between E Group Security and its Related Entities are employment agency contracts.

Ward CJ decided in favour of E Group Security finding that the arrangements by which E Group Security provided security guard services to its Customers did not constitute employment agency contracts as the security guards were not working 'in and for' in an employee-like manner in the businesses of the Customers. The Chief Commissioner appealed Ward J's decision in respect of this issue and the appeal was dismissed by the Court of Appeal in an earlier decision. This decision had the effect of making E Group Security not an employment agent, but did not determine whether the Related Entities were employment agents.

In respect of whether the Related Entities 'procured' the services of the security guards for E Group Security, Ward CJ was not persuaded that there was an agreement between E Group Security and its Related Entities to procure the workers. Ward J concluded that the Group Payroll Agreements were a contract or agreement for the Related Entities to perform a payroll function only and the security guards (though paid via the Related Entities) were procured by E Group Security. The Chief Commissioner appealed this aspect of her honour's decision in the present case. This would have the effect of the Related Entities being employment agents.

Issue

Were the payments made by the Related Entities to the Subcontractors made in respect of the provision of services in connection with an employment agency contract under which the Related Entities procured the services of the security guards for E Group Security?

Decision

The question the Court of Appeal was required to consider was whether the payments made to the Subcontractors were made under a contract which the Related Entities (as employment agent) procured the services of the Subcontractors (service providers) for E Group Security (client). Therefore, the focus of the enquiry is on the arrangements between the Related Entities and the Subcontractors.

During the proceedings, evidence was relied on by the Chief Commissioner to demonstrate the character of the arrangements between the Related Entities and Subcontractors. The Court of Appeal referred to the following evidence in reaching its decision:

1. the Subcontractor invoices and statements were issued by the Subcontractors to the Related Entities (not E Group Security) and contained declarations by the Subcontractors that they contracted with the relevant Related Entity. The Court of Appeal found that these documents provided substantial evidence that the Subcontractors contracted with the Related Entities;
2. a Group Organisation Chart stated that E Group Security manages the cash flow of the group, issues all client invoices, holds all client contracts, and employs no staff or contractors. The Chart also said that E Group Protective Services 'employs and pays all security guards and contractors';
3. each Related Entity held a master licence, which it needed only if it was engaging in security work and employing security guards;
4. the financial statements and income tax returns of the Related Entities and E Group Security showed the Related Entities receiving income and paying wages and subcontractor fees in their own right and

incurring taxation liabilities. These documents were not consistent with the Related Entities acting as a mere agent for payment (i.e., payroll tax function) on behalf of E Group Security;

5. invoices were rendered by the Related Entities to E Group Security for 'labour hire services'. The Court of Appeal found that this 'powerfully shows that the Related Entities were being paid to procure service providers for E Group Security';
6. invoices rendered by E Group Security to its Customers contained a statement that the subject security services were supplied by one of the Related Entities, and provided details of that Related Entity's master licence;
7. the minutes of the Related Entities and E Group Security refer to the 'payroll tax function' of the Related Entities but also refer to the Related Entities 'administering' all staff, contractors and any other expenses for E Group Security; and
8. in affidavits filed by E Group Security at first instance, the employees deposed that they were engaged by the Related Entities. While an affidavit had been filed by E Group Security's principal, Mr Chamoun, the Court of Appeal found that these were his subjective views and were often inconsistent with the documentary evidence.

Accordingly, based on the documentary evidence, the Court of Appeal concluded that the Related Entities contracted with the Subcontractors and procured the services of security guards for their client, E Group Security. Therefore, the payments made by the Related Entities to the Subcontractors were made in connection with an employment agency contract, and E Group Security (under the grouping provisions) was liable to pay payroll tax on these payments.

The Court of Appeal refused to allow the remission of interest on the payroll tax assessments.

COMMENT – a common structure is to engage labour (employees and contractors) in an entity (the labour entity) other than the trading company and then have the labour entity supply the labour to the trading company. This decision shows that this could result in payroll tax on any payments made by the labour entity to the contractors, even if those contractors would fall within the exclusions for the relevant contract provisions, as there are no exclusions that apply for the employment agency provisions.

E Group Security Pty Ltd has applied to the High Court for special leave to appeal the decision of the NSW Court of Appeal.

Citation *Chief Commissioner of State Revenue v E Group Security Pty Ltd (No 2)* [2022] NSWCA 259 (Brereton JA, Simpson AJA and Griffiths AJA, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2022/259.html

2.5 Landcom – margin scheme

Facts

Landcom is a State-owned corporation. Landcom is registered for GST and is a 'State' for the purposes of the GST Act.

Landcom was the registered proprietor of a freehold interest in a number of lots of land which it intended to sell. Each lot was described in a separate Certificate of Title. The various lots were grouped together for the purposes of preparing two contracts of sale. Relevantly, one of the contracts, Contract B2, grouped four lots together (**Lots**). The Lots were promoted as a single piece of land as part of the same transaction, on the basis that a single buyer would purchase all of the Lots.

By a put and call option agreement dated 5 November 2015, Landcom granted an option to the purchaser, and the purchaser granted Landcom an option to require the purchaser to purchase the Lots on the terms of Contract B2. Clause 36.3 of the contract of sale provided that the parties agreed that the 'margin scheme' would be applied to work out the GST payable on any taxable supply of property under the contract.

On 26 November 2020, Landcom applied to the Commissioner for a private binding ruling. Landcom requested the Commissioner rule on whether, for the purposes of applying item 4 in the table in section 75-10(3) of the GST Act, the sale of the freehold interests in the Lots would be a single supply (**Question 3**) and whether the sale of the freehold interest in each of the Lots would each be a single supply (**Question 4**). The Commissioner answered 'Yes' to Question 3 and 'No' to Question 4. The effect of item 4 in the table is that where the supplier is a State, the land has been owned since before 1 July 2000 and there were no improvements on the land as at 1 July 2000 or at the time of the taxable supply, the margin is the difference between the sale price and the market value on the date on which the supply occurs, i.e. the margin is nil. If there are improvements on the land at the time of the supply, the value is determined as if the improvements were not there.

Landcom objected to the Commissioner’s private ruling. The objection was disallowed. Landcom appealed that objection decision to the Federal Court.

At first instance, the Federal Court set aside the Commissioner’s objection decision on the basis that the sale of the four freehold interests each constituted a separate supply for the purposes of applying item 4 of the table in section 75-10(3) of the GST Act.

Relevantly, the primary judge reasoned as follows:

1. the starting point for the application of Division 75 is whether there has been a ‘taxable supply’ by ‘selling a freehold interest in land’;
2. section 75-5(1)(a) applies where there has been a supply by selling a particular freehold interest in land, and the supplier and recipient have agreed that the margin scheme is to apply. Where that has occurred, the margin is calculated by reference to the particular freehold interest sold;
3. the reference to ‘the interest’ in section 75-10(3) is a reference to the particular freehold interest referred to in section 75-5(1)(a). The margin scheme is to be applied to each freehold interest because there has been a supply of each freehold interest by selling each freehold interest. The GST Act contemplates that a single supply might be made up of several supplies attracting different GST treatment.

The Commissioner appealed to the Full Federal Court on the following grounds:

1. the primary judge erred in concluding that Division 75 of the GST Act applies separately to each individual freehold interest and that it is not necessary to consider whether the sale of multiple freehold interests constitutes a single supply or four separate supplies;
2. the primary judge ought to have concluded that the sale of the four freehold interests should be characterised as a single supply and item 4 of the table in section 75-10(3) be applied to that single supply.

The Commissioner’s contention ultimately depends upon whether the reference to ‘a freehold interest’ in section 75-10 of the GST Act encompasses the plural as well as the singular.

If the sale was a single supply, any improvements as at 1 July 2000 on any one of the Lots would result in the non-application of item 4 of the table in section 75-10(3) and GST being payable on the entire increase in value of the freehold interest in all Lots, since 1 July 2000 (under the margin scheme rules that apply to all taxpayers).

Issue

In calculating the margin for the purposes of the margin scheme provided for in Division 75 of the GST Act, did the sale of the four freehold interests in the Land constitute a single supply or multiple supplies?

Decision

The Full Federal Court stated that the construction contended by the Commissioner was inconsistent with the structure of the GST Act and statutory language.

The Full Federal Court relied on the following to reach its conclusion:

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1. characterising a supply as a single supply or multiple supplies under section 9-5 does not determine the calculation of the amount of GST payable. The amount of GST payable is to be calculated by applying the terms of Subdivision 9-C or, if the supply is a taxable supply of real property, the terms of the special rules in Division 75;
2. pursuant to Subdivision 9-C, where a supply is a supply of several matters having different characters for GST purposes, GST is to be calculated having regard to the character of the different parts of the supply;
3. in providing for the valuation of an actual supply that is 'partly a taxable supply' and 'partly a supply that is GST-free', section 9-80 recognises that a single supply may be comprised of components that are classified differently for GST purposes (see *Federal Commissioner of Taxation v Luxottica Retail Australia Pty Ltd* [2011] FCAFC 20);
4. section 75-5(1) applies to work out the amount of GST on 'a taxable supply of real property', that is, where the taxable supply takes the form of a sale of a freehold interest in land;
5. the terms of section 75-10 direct attention to the individual freehold interest. The interest is a reference to the different forms of real property, being the intangible legal interest specified (*Sterling Guardian Pty Ltd v Commissioner of Taxation* [2006] FCAFC 12);
6. where there is a supply of more than one interest, section 75-10, by its terms, applies to each interest. This interpretation is consistent with other provisions in Division 75;
7. having regard to the structure and language of Division 75 and the language of section 75-10, the singular reference to 'interest' in section 75-10 does not include a reference to the plural. The Ful Court also stated that this interpretation gives a harmonious operation to the GST Act.

Accordingly, the Full Federal Court agreed with the primary judge and confirmed that the primary judge's interpretation avoids uncertainty and gives effect to the statutory language of the GST Act.

The Full Federal Court dismissed the Commissioner's appeal.

Citation *Commissioner of Taxation v Landcom* [2022] FCAFC 204 (Wigney, Moshinsky and Hespe JJ, Victoria) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2022/204.html

2.6 Del Castillo – residential property not an active asset

Facts

In 2003, Ms Jovita Del Castillo purchased a block of vacant land in Lawnton, Queensland. Jovita constructed four residential dwellings on the property. By February 2007, Jovita rented three of the dwellings to tenants and in April 2007 she moved into the fourth dwelling.

In July 2009, Jovita retired from her full-time occupation and decided to devote herself to managing the rental properties. The rent from the three dwellings was Jovita's principal source of income and, with the exception of the 2007 year, her activities were profitable every year until the property was sold in September 2017.

In her statement to the AAT, Jovita explained what she did to develop the property and the research she conducted into the rental market. Jovita also described the steps she took in marketing, leasing, and managing the rental properties. Jovita kept records of rent that she received and expenditure that she incurred. Jovita did not retain an agent to act on her behalf, instead she worked 15 – 20 hours per week on-site overseeing all the work connected with the rental properties.

In the financial year ended 30 June 2018, Jovita made a capital gain on the sale of a rental property. Jovita included the amount of the gain in her tax return, but objected to the assessment claiming she was entitled to apply the small business CGT concessions under Division 152 of ITAA 1997.

The Commissioner denied Jovita's objection on the basis that Jovita did not satisfy all the requirements of Division 152 of ITAA 1997. In particular, the Commissioner argued that:

1. Jovita was not carrying on a business in the relevant year of income; and
2. the property sold by Jovita was not an ‘active asset’.

The ITAA 1997 does not define what it means to 'carry on a business'. Instead, the concept has been the subject of judicial consideration. Paragraph [59] of the High Court decision of *Spriggs v Commissioner of Taxation; Riddell v Commissioner of Taxation* [2009] HCA 22 relevantly provides as follows:

> *The existence of a business is a matter of fact and degree. It will depend on a number of indicia, which must be considered in combination and as a whole. No one factor is necessarily determinative. Relevant factors include, but are not limited to, the existence of a profit-making purpose, the scale of activities, the commercial character of the transactions, and whether the activities are systematic and organised, often described as whether the activities are carried out in a business-like manner.*

The Commissioner conceded that the evidence provided by Jovita included at least some indicia of carrying on a business. The Commissioner argued that Jovita would be unable to succeed irrespective of a finding by the AAT that Jovita was carrying on a business, due to the requirement for the property to be an active asset.

The 'active asset test' is set out in section 152-35 of the ITAA 1997, but the expression 'active asset' is defined in section 152-40 of the ITAA 1997. Sub-section 152-40(4) of ITAA 1997 lists several different CGT assets that cannot qualify as active assets. Relevantly, paragraph (e) of sub-section 152-40(4) of the ITAA97 states:

> *an asset whose main use by you is to derive interest, an annuity, **rent**, royalties or foreign exchange gains unless:*
> *(i) the asset is an intangible asset and has been substantially developed, altered or improved by you so that its market value has been substantially enhanced; or*
> *(ii) its main use for deriving rent was only temporary.* [Emphasis Added].

Section 152-40(4) of the ITAA 1997 also includes the following example:

> *A company uses a house purely as an investment property and rents it out. The house is not an active asset because the company not using the house in the course of carrying on a business. If, on the other hand, the company ran the house as a guest house the house would be an active asset because the company would be using it to carry on a business and not to derive rent.*

The Commissioner argued that Jovita's main use of the property was to derive rent and that the property could not be an active asset.

Jovita attempted to distinguish her use of the property from the exceptions referred to in section 152-40(4) of the ITAA 1997 on the basis that the assets in the sub-section were used to derive passive income, whereas her use of the property was not passive because she actively managed the dwellings as part of her residential property leasing business. Jovita argued that the 'beneficial purpose' of the small business concessions meant that the reference to using a property to derive rent in sub-section 152-40(4) of the ITAA 1997 should be read as only referring to rent derived from a passive investment in property, as opposed to rental income derived from assets that are more actively managed.

Issues

1. Did the land satisfy the active asset test?
2. Was Jovita carrying on a business in the relevant year of income?

Decision

<u>Active asset test</u>

Deputy President McCabe disagreed with Jovita, holding that there is no basis to conclude that parliament intended the words *"main use...to derive... rent"* in paragraph (e) of sub-section 152-40(4) of the ITAA 1997 to mean anything other than a reference to real estate assets that are used to derive payments under a lease. Deputy President McCabe reasoned that such a description clearly captures what Jovita was doing,

irrespective of whether it is part of a small business or not. Accordingly, Jovita did not satisfy the active asset test.

Carrying on a business

As Deputy President McCabe concluded that Jovita's property was unable to satisfy the active asset test and she was therefore unable to access the small businesses CGT concessions, he did not consider whether she was carrying on a business.

Citation *Del Castillo and Commissioner of Taxation (Taxation)* [2022] AATA 4233 (Deputy President McCabe, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/4233.html

2.7 Dals Property Trust – GST and the sale of residential property

Facts

Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust (**DPT**) was a property developer that constructed a block of seven residential apartments. Although it was intended that all of the units in the development would be sold upon completion of the construction, Unit 1 and Unit 3 were rented for a period of approximately 5 years before the units were sold.

Units 1 and 3 were issued certificates of occupancy on 28 October 2011.

Unit 1 was leased to a tenant for a continuous period from 24 February 2012 to 23 July 2016. From 1 August 2016 to 5 September 2016, DPT advertised Unit 1 for lease. From 15 October 2016, Unit 1 was advertised for sale. A contract for sale of Unit 1 was entered into on 17 November 2016. The purchaser was granted a licence to occupy Unit 1 from 1 December 2016 until settlement occurred on 28 February 2017. It appears that Unit 3 was rented continuously for 5 years prior to its sale.

The terms of the contract for sale for Unit 1 and Unit 3 were almost identical. The contracts provided that GST was to be paid by the Vendor and calculated under the margin scheme. DPT subsequently paid the GST on the sales of both units.

In March 2017, DPT reported GST of $96,927 in respect of the sale of Unit 1 in its BAS. DPT reported a GST amount of $69,582 for the sale of Unit 3 in its BAS for June 2017.

DPT considered that it had made an error in paying GST on both sales as these sales were input taxed. DPT sought a refund for the GST amounts believed to be overpaid. On 12 October 2021 DPT lodged an objection against assessments of the net GST amount on this basis.

The Commissioner disallowed the objection. DPT sought review of the decision to disallow the objection in the AAT.

Generally, a sale of 'new residential premises' by a developer is a taxable supply and is subject to GST under section 75-5 of the GST Act.

However, under section 40-75(2)(a) of the GST Act, residential premises are not 'new residential premises':

> *if, for the period of at least 5 years since… the premises first became residential premises…. the premises have only been used for making supplies that are *input taxed supplies because of paragraph 40-35(1)(a).*

Relevantly, for a supply to be input taxed because of paragraph 40-35(1)(a) it must be a supply of residential premises by way of lease, hire or licence (rental supply).

The Commissioner submitted that the sale of Unit 1 is not input taxed, because the fact that Unit 1 was advertised for sale meant that it was not used 'only' for making input taxed supplies during the five-year period. Further, the Commissioner submitted that the DPT had not proved that Unit 1 was marketed for lease after 5 September 2016 or that it remained available for lease after it was put on the market for sale until the sale contract was signed. The Commissioner contended that GST should, therefore, apply to the sale of Unit 1 as a supply of new residential premises.

DPT submitted that a supply of real property by way of sale occurs upon completion of the contract of sale and that marketing in the lead up to the sale does not constitute a separate 'use' of the property.

The Commissioner submitted that in any case, section 142-10 of the GST Act applies to deny a refund of the excess GST to DPT because the GST was passed on to the purchaser.

DPT denied that excess GST was passed on in respect of either Unit 1 or Unit 3.

Issues

1. Was the sale of Unit 1 an input taxed supply?
2. Was any overpaid amount passed on to the purchaser?

Decision

Was the property being used for sale while being marketed?

The AAT found that 'use' took its ordinary meaning and that it would include the application of the property by a developer, through active marketing, as premises for sale in the course of the developer's enterprise.

The AAT considered the construction of section 40-75(2) and section 40-35(1)(a) of the GST Act and found that the five-year period had to be a continuous period, due to the reference to ***'the*** period of at least 5 years…' (emphasis added).

Unit 1 was not leased or advertised to be leased for a continuous period of five years since the certificate of occupancy was issued in October 2011. This was because the marketing of Unit 1 for sale was using the premises for a supply that was by way of sale and not continuously a rental supply.

The AAT concluded that Unit 1 was not an input taxed supply and GST was payable on the supply of Unit 1 as 'new residential premises'.

Was a refund denied on the basis that the GST was passed on to the purchaser?

As the AAT concluded that GST applied to the sale of Unit 1, the issue of whether GST was passed on to the purchaser is only relevant to the sale of Unit 3.

In the contracts for sale for Unit 1 and Unit 3, DPT, being the vendor, agreed to bear the cost of GST calculated pursuant to the margin scheme. However, the AAT observed that while the parties may have turned their minds to the treatment of GST, it could not be determined from the contract whether this was out of an abundance of caution, in error, or in anticipation of GST being payable.

The AAT considered the judgment of the High Court in *Avon Products Pty Ltd v Commissioner of Taxation* (2006) 230 CLR 356 in respect of the 'passing on' provisions in the former sales tax legislation. In that decision, the High Court held that, where the facts disclose that the taxpayer has set prices at a level to ensure they exceed cost, it will be difficult for the taxpayer to prove that it has borne the burden itself.

Although there were no tax invoices for either sale, Unit 1 and Unit 3 were sold at arm's length and at a price that was significantly more than the costs incurred by DPT to construct the units. The AAT considered that any overpayment of the GST was recovered in the purchase price of the units. The fact that the contract required

DPT to meet any GST payable without adjustment to the price, did not mean the DPT necessarily bore the economic burden of the excess GST.

The AAT affirmed the decision of the Commissioner to disallow the objection. The sale of Unit 1 was not an input taxed supply. In any event, DPT had 'passed on' the overpaid amounts to the purchaser as Unit 1 and Unit 3 were sold at a price that exceeded the costs of the units.

Citation *Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and Commissioner of Taxation* [2022] AATA 4436 (SM Olding, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/4436.html

2.8 Eskander – apparent purchaser

Facts

Dr Hanaa Eskander is the sole director and shareholder of North Richmond Family Practice Pty Ltd, which is a service company for a medical practice.

On 1 June 2014 Hanaa and North Richmond Family Practice Pty Ltd entered into a written loan facility agreement that complied with the requirements of Division 7A. The written loan agreement referred to future loans being made but did not refer to a particular loan.

On 21 February 2017, Dr Hanaa Eskander's son, Shady Eskander, agreed to purchase land at Quakers Hill.

The deposit was paid by a cheque in the name of the North Richmond Family Practice Pty Ltd. This was the service company for Hanaa's medical practice.

The remaining funds were transferred from a second account in the name of North Richmond Family Practice Pty Ltd to an account controlled by Shady. The purchase was settled on 18 May 2017.

On 19 July 2021 Shady transferred the Quakers Hill property to his mother, Hanaa for no consideration.

Hanaa declared that Shady had not contributed to the purchase of the property and that he was never to take a beneficial interest in the property. Shady also declared that he was holding the property on trust for Hanaa and was to transfer title upon her request.

On that basis, Hanaa's solicitor wrote to the Commissioner seeking confirmation that the transfer would be liable for concessional duty under section 55(1)(b) of the Duties Act.

On 22 July 2021, the Commissioner issued a letter denying Hanaa the benefit of that concession.

Hanaa objected to the decision, but her objection was disallowed on 21 April 2022.

Hanaa commenced proceedings in the NCAT for review of the Commissioner's decision.

Issue

Is Hanaa entitled to concessional duty of $50 under section 55(1)(b) of the Duties Act?

Decision

In determining whether Hanaa is entitled to concessional duty, the AAT referred to the two components of section 55(1)(b), as follows:

1. whether all of the purchase monies were or can be deemed to have been provided by Hanaa;

2. whether the property was vested in Shady as apparent purchaser upon trust for Hanaa as the real purchaser.

For Hanaa to be entitled to the duty concession both issues had to be satisfied.

The NCAT noted that section 55 of the Duties Act contemplated that, if any part of the purchase money plus related expenses was not provided by the real purchaser but rather from any other source, then the concessional duty of $50 would not be available. Here, there were two sources of payment of the total purchase, namely two accounts held in the name of the company, North Richmond Family Practice Pty Ltd. The NCAT considered that Hanna did not discharge her onus of establishing that the amounts paid by North Richmond Family Practice Pty Ltd were loan covered by the Division 7A loan agreement.

Accordingly, the NCAT confirmed that Hanaa did not satisfy the requirement to have paid the whole purchase for the property.

The NCAT concluded that the real purchaser was not Hanaa and, accordingly, it did not need to consider whether the property was vested in Shady as apparent purchaser upon trust for Hanaa as real purchaser. However, for completeness, the NCAT confirmed that the property was vested in Shady as apparent purchaser upon trust for Hanaa. The conduct and intention of the parties was that Shady did not take beneficial title to the property upon exchange or settlement and a resulting trust arose.

Despite the AAT's conclusion that Shady was holding the property on trust for Hanaa, the case failed as Hanna did not provide the whole of the purchase monies for the property and so the conditions were for the concession were not satisfied. The NCAT upheld the Commissioner's decision that Hanaa was not entitled to the concessional duty of $50.

Citation *Eskander v Chief Commissioner of State Revenue* [2022] NSWCATAD 379 (Senior Member J S Currie, New South Wales)
w https://www.caselaw.nsw.gov.au/decision/184c16e50f9b9c0d39b13709

2.9 Hedges – disposal of goodwill and offset

Facts

Brent Hedges retired from practising as a partner of the Curwoods Lawyers partnership at the end of 2008.

On 30 September 2008, Brent and the ongoing partners executed a Retirement Deed. The Retirement Deed provided that Brent's retirement would take effect on 31 December 2008. Clause 3.7 of the Retirement Deed provided that all moneys payable to the retiring partner were to be calculated in accordance with clauses 25 and 26 of the Partnership Deed dated 25 September 2006.

Under clause 25 of the partnership deed, on retirement, Brent became entitled to receive a number of payments, including the payment of $182,629 for his proportionate share of goodwill. Specifically, in relation to goodwill, clause 25 provided:

> *25. Upon the retirement of a Partner under clauses 22, 23, or 24 hereof, or otherwise however arising, or, upon the death of a Partner, he, or his legal personal representative, shall be paid:*
>
> *…*
>
> *25.4 his proportionate part calculated in accordance with the Partnership Interests for the goodwill of the Partnership…*

Clause 26 of the Partnership Deed provides:

SET-OFF

Upon the retirement … of any partner, any moneys owing by such Partner as at retirement…shall be determined and shall be offset against any amount found owing to the Outgoing Partner as at the date of retirement …

Under clause 26 of the Partnership Deed, the Partnership was entitled to be paid, by way of set-off, any amounts that Brent owed to it. Brent was required to repay the partnership the amount of $197,126, representing the amount of shortfall in his capital account.

The Partnership Deed provided for payments to be made in periodic instalments. The payment of instalments was varied in the retirement deed so that Brent's net entitlement on retirement was paid in instalments over the 2009, 2010 and 2011 tax years.

On 10 September 2014, the Commissioner issued default assessments to Brent for the 2009, 2010 and 2011 years of income.

The 2009 assessment included a discount capital gain from the disposal of the goodwill in the Partnership's business in the amount of $91,314. The Commissioner worked out the total capital proceeds in the 2009 income year as being the amount of $182,629 from the disposal of goodwill.

Brent objected to his income assessment for the 2009 tax year. The Commissioner disallowed the objection.

Brent's ground of objection was that the 2009 assessment was excessive as the capital gain included in the assessable income overstated the capital proceeds from the disposal of goodwill.

Brent submitted that the capital proceeds were the net amount he was entitled to receive, worked out as the amount attributable to the goodwill under clause 25 of the Partnership Deed, less the amount offset by the repayment of Brent's capital account in the partnership under clause 26 of the Partnership Deed.

It was not disputed between the parties that Brent's disposal of his interest in the partnership gave rise to a CGT liability in the 2009 tax year. It was also agreed that the relevant CGT event occurred on about 30 September 2008 when Brent executed the Retirement Deed, rather than the later date on which Brent's retirement took effect.

The AAT affirmed the objection decision of the Commissioner on the basis that the entitlement to the payment for the disposal of goodwill crystallised under clause 25 of the Partnership Deed before offsetting from that amount any amounts due from Brett in accordance with the set-off mechanism in clause 26 of the Partnership Deed.

Brent appealed from the decision of the AAT. The Federal Court appeal was confined to a question of law.

Brent submitted that a proper construction of clause 3.7 of the partnership deed was that the retiring partner would only be entitled to be paid an amount which crystalised after taking into account the calculations in both clause 25 and clause 26. Clause 3.7 of the partnership deed provided that '*all moneys payable to the Retiring Partner in relation to the Partnership shall be calculated in accordance with clause 25 and 26 of the Deed*'. Brent submitted that the AAT erred in taking a serial approach to the calculation at clause 25 and clause 26.

Issue

What was the amount of the capital proceeds which Brent was entitled to receive for the purpose of section 166-20 of the ITAA 1997?

Decision

On a proper construction, the Court considered clause 25 of the partnership deed plainly provided that, upon retirement occurring, the retiring partner shall be paid the amounts specified in clauses 25.1 to clause 25.4.

Clause 26 provides a set-off mechanism which was a convenient method for the partnership to recover amounts owed by the retiring partner.

Clause 3.7 of the partnership deed did not separately create a right to any payments, but set out the net position payable to the retiring partner. That clause directed the calculation back to clause 25, which was the source of the entitlement to the payment of goodwill, and to clause 26 being the mechanism by which the net payment would be calculated.

Upon retirement, Brent was entitled to receive the goodwill payment within the meaning of section 116-20(1)(a) of ITAA 1997 (dealing with capital proceeds). The capital proceeds of the CGT event were not reduced by reason of the offset. The effect of section 103-10 of the ITAA 1997 (dealing with constructive receipts) was that Brent was deemed to receive the payment for his disposal of goodwill at the time it was applied for his benefit in reducing his debt in respect of the capital account he owed to the partnership.

Citation *Hedges v FC of T* [2022] FCA 1389 (Cheeseman J, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/1389.html

2.10 Kafes – land tax assessment

Facts

Nicolaos Kafes had an ownership interest in seven properties located in New South Wales, including properties located at:

1. 241 Kingsgrove Road, Kingsgrove (**Property 241**);
2. 410 Kingsgrove Road, Kingsgrove (**Property 410**); and
3. 412 Kingsgrove Road, Kingsgrove (**Property 412**).

Nicolaos was a registered proprietor of Property 241 in partnership with three of his family members. Nicolaos had a 33% interest in the partnership.

Section 9 of the *Land Tax Management Act 1956* (NSW) (**LTMA**) provides that:

> *Land tax is payable by the owner of land on the taxable value of all the land owned by that owner which is not exempt from taxation under this Act.*

If the taxable value of an owner's land is less than the tax threshold, the applicable land tax rate is 0% according to section 3AL(2)(a) of the *Land Tax Act 1956* (NSW).

Section 9(4) of the LTMA provides that the land value of land, in relation to a land tax year, is the value entered in the Register of Land Values kept under section 14CC of the *Valuation of Land Act 1916* as the land value of the land as at 1 July in the previous year.

Section 10(1) of the LTMA provides an exemption from land tax for land that is the principal place of residence of the owner.

Property 410 and Property 412 were included on a single certificate of title. However, Property 410 and Property 412 were recorded separately on the Register of Land Values with the reference 'PT 1/78915'. 'PT' is a commonly used abbreviation in New South Wales land law for the word 'part'.

For the 2017, 2018 and 2019 land tax years, the Chief Commissioner issued a land tax notice of assessment for which included all of the properties except Property 241 and treated Property 410 as being exempt as Nicolaos's principal place of residence.

On 7 February 2020, the Chief Commissioner issued a land tax notice of assessment for the 2020 land tax year that was largely consistent with the prior year assessments, but which treated both Property 410 and Property 412 as being exempt as Nicolaos's principal place of residence.

On 26 April 2021, the Chief Commissioner sent a letter to Nicolaos indicating an investigation into Nicolaos's land tax affairs and requesting that Nicolaos complete a questionnaire. Nicolaos responded to the questionnaire and claimed the principal place of residence exemption in respect of Property 410.

On 19 May 2021, the Chief Commissioner issued amended assessments for the 2017 to 2020 land tax years which included Property 241 and, in the case of the 2020 land tax year, included Property 412 which was originally treated as being exempt as Nicolaos's principal place of residence for that year.

The Chief Commissioner also issued an assessment for the 2021 land tax year which assessed Nicolaos on all of the properties, except Property 410, which was treated as being exempt as Nicolaos's principal place of residence.

Nicolaos objected to these assessments. On 1 November 2021 the Chief Commissioner disallowed the objections.

On 21 January 2021 Nicolaos sought review of the decision to disallow the objection in the NCAT.

Nicolaos submitted that:

1. the value of his interest in Property 241 was below the land tax threshold and that it should not be included when calculating his land tax liability;
2. since Property 410 and Property 412 are included on the same title, they should both be exempt under the principal place of residence exemption; and
3. it is unfair that he is subjected to constant confusion in relation to Property 241 and unjust that he is constantly paying land tax.

Issues

1. Was Nicolaos' interest in Property 241 below the land tax threshold, such that it should be excluded from land tax assessment?
2. Were both Property 410 and Property 412 exempt from land tax as Nicolaos' principal place of residence?
3. Should Nicolaos be afforded relief on the basis that it was unfair for the Chief Commissioner to issue numerous inconsistent notices of assessment?

Decision

Value of Property 241 is below the threshold

Land tax is calculated based on the aggregated value of all land owned by a landowner. To have the rate of 0% applied to Nicolaos' land tax assessment, it would be necessary that the total aggregated value of all landholdings owned by Nicolaos to be below the land tax threshold.

Therefore, the value of Property 241 is included in Nicolaos' assessment for land tax.

Does the exemption apply to both Property 410 and Property 412?

For the purposes of land tax, land is assessed according to the 'parcels' of land as they are registered on the Register of Land Values. This may be different from what is recorded on a certificate of title.

Property 410 was a distinct 'parcel' of land from Property 412 and, therefore, the two properties should be assessed differently for the purposes of land tax. As a landowner can only claim the principal place of residence exemption for one parcel, only Property 410 could exempt as Nicolaos' principal place of residence.

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<u>Should Nicolaos be granted relief for unfairness?</u>

The NCAT determined that Nicolaos was unable to receive any relief because of any unfairness considered to be caused by the Chief Commissioner issuing a series of amended notices of assessment.

The NCAT confirmed that the Chief Commissioner was entitled to issue amended assessments. The Chief Commissioner was also bound to act in accordance with the LTMA when calculating the land tax liability of a landowner and could not exercise his discretion in such matters. Furthermore, whether there was any unfairness caused by the different assessments did not affect the validity of the final assessment as it was correctly calculated in accordance with the LTMA.

Comment – the decision on Property 410 and Property 412 is likely correct but leads to some unusual outcomes under the principal place of residence exemption. It has been the practice of Revenue NSW to accept that the principal place of residence exemption can extend across two separate legal lots of land where the conditions in cl. 13 of Sch 1A of the LTMA are satisfied, notwithstanding that the two legal lots may not be characterised as a single parcel by the Valuer-General. This means it is likely important that, in such circumstances, landowners ensure the two lots are treated as a single parcel by the Valuer-General.

Citation *Kafes v Chief Commissioner of State Revenue* [2022] NSWCATAD 385 (Senior Member AR Boxall)
w https://www.caselaw.nsw.gov.au/decision/184c5f31078db382398e5ea0

2.11 XPTC – general deductions

Facts

XPTC was a director and shareholder of CFIPL (the **Company**). XPTC's wife was also a director and shareholder of the Company.

The Company was in the business of providing consultancy services, including financial asset broking services. XPTC was employed to provide consultancy services on behalf of the Company.

From 2 February 1998 to 28 October 2011, the Company provided consultancy services to two companies, APL and RL, under a series of consultancy agreements. From 2 June 2005, the consultancy agreements were only with APL.

On 28 October 2010, the Company and APL entered into a consultancy agreement (the **Agreement**). The negotiations which preceded the Agreement included a suggestion that XPTC be 'converted to a common law employee'. However, APL was not prepared to engage XPTC on this basis.

The Agreement contained a term for the provision of consultancy services by the Company to APL as an independent contractor. The Agreement provided that the consultancy services provided by the Company were to be provided through XPTC as an employee and representative of the Company. That is, XPTC's services were secured through the Company.

XPTC was paid a monthly fee of $12,500 and participated in an incentive scheme where he received ordinary and preference shares in APL's holding company, HLPL. XPTC's title was 'Senior Business Development Executive'. XPTC was represented to customers as an APL employee, attended work at APL's business place, reported to APL managers, was required to abide by APL policies and procedures and used an APL email address.

The Company was obliged under the Agreement to accept all liability for XPTC's acts and omissions and was responsible for all employment related obligations to XPTC. Under the Agreement, the Company and XPTC indemnified APL against all loss arising from XPTC's acts and omissions relating to the services provided.

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In 2011, XPTC was approached to work for a company, HP. XPTC told APL that he wanted to end his relationship with APL through the Company.

On 26 October 2011, XPTC, the Company, APL and HLPL entered into a separation deed which terminated the Agreement with effect from 28 October 2011 (**Separation Deed**).

The Separation Deed obliged:

1. APL to pay to the Company all money outstanding under the Agreement and for HLPL to enter into a buy back agreement with the Company and XPTC;
2. XPTC to buy back all of the ordinary shares and preference shares that the Company held in HLPL for $136,433.

After the Separation Deed was entered, a dispute occurred over claimed breaches of the Agreement which culminated in the commencement of litigation by APL. APL claimed that XPTC and the Company had done things in about 2006 or 2007 that were in breach of the Agreement, a breach of fiduciary obligations and a breach of the *Consumer and Competition Act 2010* (Cth).

In December 2011, after XPTC had commenced employment with HP he was told by a senior at HP that someone from APL said that XPTC '*was being investigated for fraudulent activity in the discharge of [his] services at APL*' which involved an accusation of a '*wilful act of fraud and larceny*'. This senior person at HP told XPTC that, if the allegations were true, HP 'would have to let [XPTC] go'.

XPTC did not at that time commence proceedings involving the potential defamation but threatened to do so in a letter. Threats were made by APL to XPTC that APL would '*spend as much as it takes to destroy you and your family*'. Threats were also made by APL against XPTC's career.

As the Agreement was terminated, the Company ceased trading and it did not have any resources to defend the litigation. XPTC would have to pay the costs of legal fees personally.

On 10 July 2012, APL and HLPL commenced proceedings in the Federal Court of Australia against XPTC and the Company seeking damages of approximately $2.4 million plus interest and legal costs in respect of negotiations undertaken by XPTC under the Agreement. It was alleged that XPTC entered into unauthorised transactions.

XPTC brought a cross claim whereby XPTC sought performance of the share buyback by HLPL, payment of some debts owed to the Company, and claimed that the relationship between XPTC and APL was that of employer and employee. XPTC was said to be owed accrued annual and long service leave which accrued from February 1998 to October 2011 of approximately $400,000.

On 26 April 2013, a liquidator was appointed to the Company which resulted in the proceedings brought by APL against the Company being stayed.

On 6 December 2013, XPTC, APL and HLPL entered into a deed of Settlement on a without admissions basis (**Settlement Deed**). Under the Settlement Deed, XPTC was to pay APL $200,000 and each party was to pay their own costs. XPTC sought tax advice from both his accountant and a lawyer relating to the settlement. The amount eventually paid by XPTC was paid by him in consideration for APL not proceeding with its various claims against him and that he would not make any claims against APL.

On 6 December 2023, the parties also entered into a deed of release (**Deed of Release**). The terms of the Deed of Release included (among other things) an agreement by APL not to publish or republish defined matters concerning XPTC’s conduct, and character and that APL would pay XPTC $180,000.

On 29 January 2014, the parties agreed in a document titled ‘Acknowledgement of Settlement’ to set off their respective obligations under the Deed of Release and the Settlement Deed so that XPTC paid $20,000 to APL.

The liquidator's records disclose that the shares in HLPL were sold for $20,000 to avoid the need to make an application for a winding up order and that there was a loan from the Company to XPTC for $200,000 of which $177,170 had not been repaid.

On 16 November 2018, XPTC lodged his income tax return for the 2014 income tax year which included deductions in the amount of $272,554. The Commissioner sought further information from XPTC about the deductions.

On 21 January 2019, XPTC told the Commissioner that the deductions were for legal expenses which comprised of the $200,000 paid as the settlement amount and $72,554 paid for legal costs. Amongst the total costs there were amounts totalling $615 that were claimed to have been incurred in respect of taxation advice. It was not clear whether the legal fees solely related to the claim made by APL against XPTC, or the cross claim made by XPTC.

On 6 May 2019, the Commissioner wrote to XPTC advising him that the Commissioner had disallowed the deductions of $272,554.

On 14 May 2019, the Commissioner issued a Notice of Assessment to XPTC in respect of the 2014 tax year which assessed XPTC's taxable income as $216,792.

On 15 July 2019, XPTC objected to the Commissioner's Notice of Assessment on the basis that XPTC (and not the Company) had incurred the expenses in gaining or producing XPTC's assessable income, that it was not relevant that the deduction was claimed in a year later than in which the liability arose.

On 13 November 2019, the Commissioner disallowed the objection.

XPTC applied to the AAT for a review of the Commissioner's decision.

Issues

1. Was the settlement payment of $200,000 incurred by XPTC in the course of gaining or producing assessable income, or necessarily incurred by XPTC in carrying on a business for the purpose of gaining or producing assessable income as contemplated by section 8-1(1) of the ITAA?
2. Were the legal expenses of $72,554 paid by XPTC to his lawyers incurred by XPTC in the course of gaining or producing assessable income, or necessarily incurred by XPTC in carrying on business for the purpose of gaining or producing assessable income as contemplated by section 8-1(1) of the ITAA?
3. If either the settlement sum or the legal expenses are within section 8-1 of the ITAA, are the expenses outgoings of capital or of a capital nature, or of a private or domestic nature so that it is precluded from being a deductible expense because of section 8-1(2) of the ITAA?
4. Is XPTC entitled to deduct that part of legal fees totalling $615 exclusive of GST as a cost of managing his tax affairs because of the operation of section 25-5 of the ITAA?

Decision

Was the Settlement incurred in gaining or producing assessable income by XPTC?

The AAT considered whether the settlement sum was a loss or outgoing incurred in gaining or producing assessable income, or alternatively, necessarily incurred in carrying on a business for the purpose of producing assessable income.

The AAT referred to various decision including the decision in *Clough Limited v Commissioner of Taxation* [2021] FCA 108 which quoted the following passage from *Fletcher v Federal Commissioner of Taxation* [1991] HCA 42:

> *The question whether an outgoing was ... wholly or partly 'incurred in gaining or producing the assessable income' is a question of characterization. The relationship between the outgoing and the assessable income must be such as to impart to the outgoing the character of an outgoing of the relevant kind. It has been*

> *pointed out on many occasions in the cases that an outgoing will not properly be characterized as having been incurred in gaining or producing assessable income unless it was 'incidental and relevant to that end'.*

The AAT stated that, under this approach, it was necessary to identify the 'essential character' of the settlement payment. In other words, it needed to identify the commercial character of the payment and whether it was occasioned by producing assessable income.

The AAT first considered the circumstances which gave rise to the settlement payment. These circumstances involved activities undertaken by XPTC as an employee of the Company which included him negotiating leasing finance deals for APL. XPTC gained assessable income from undertaking this work. In the proceedings, APL claimed that it had entered into unauthorised transactions in the course of XPTC undertaking its activities for the Company and providing leasing negotiations.

The AAT determined that the settlement money paid by XPTC resulted from the performance of XPTC's work for the Company for which he was paid. Therefore, the AAT concluded that the settlement payment bore the '*essential character in a practical business sense*' of a payment related directly to the activities that XPTC performed in negotiating leasing deals for APL. It was out of those activities that XPTC gained or produced assessable income albeit that that assessable income was derived by reason of his position with the Company.

<u>Were the legal fees incurred in gaining or producing assessable income by XPTC?</u>

The character of the legal fees is informed by what the fees were incurred for. The AAT found that the legal fees were incurred for a range of reasons.

The AAT determined that the legal fees incurred by the Company but paid for by XPTC, the legal fees relating to the liquidation of the Company and XPTC's threatened defamation proceedings were not incurred in the course of activities which can be characterised as gaining or producing assessable income.

The AAT noted that the invoices for legal expenses were not clear as to what costs were incurred as a result of XPTC defending the proceedings regarding the authorised transactions or the cross claim as opposed to the costs incurred for the Company's defence or liquidation. The former would be characterised as activities that involved gaining or producing assessable income, the latter would not.

<u>Are Settlement Sum or legal fees capital in nature or private and domestic in nature?</u>

In respect of the settlement fees, the AAT concluded that the settlement payment did not have the characteristics of a capital payment as it was not made for producing a longer-term benefit that might endure. Further, the AAT determined that the settlement payment was not of a domestic or personal in nature, it was commercial in nature having its origins in the Applicant’s work activities from which he generated assessable income.

In respect of the legal fees, as the AAT determined that the legal fees not incurred in gaining or producing assessable income, this issue did not need to be considered

<u>Was part of the legal fees deductible?</u>

The AAT was not satisfied, based on the entries provided in an invoice by XPTC, that the amount of $615 was incurred in managing XPTC's tax affairs.

The AAT determined to vary the Commissioner's decision to allow XPTC to deduct from his assessable income in the 2014 tax year the $200,000 settlement payment made on 29 January 2014.

Citation *XPTC v Commissioner of Taxation* [2022] AATA 4147 (Member R Reitano, Sydney) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/4147.html

2.12 Wang – surcharge land tax

Facts

Zhongxuan Wang and Ji Chen are permanent residents of Australia who jointly own residential property in Sydney (the **Property**). Zhongxuan and Ji migrated to Australia in 2012.

From 8 August 2015 to 1 August 2018, the Property was leased to various tenants, except for 6 days in 2016 and 100 days in 2017. It appears that Zhongxuan was living in the property in the 2017 to 2020 land tax years.

In early 2020, Zhongxuan and Ji travelled to China. Due to the COVID-19 pandemic, Zhongxuan and Ji were prevented from returning to Australia. During the period from early 2020 to September 2021, Zhongxuan and Ji caused their belongings to be stored, and rented the Property out on a temporary basis.

In September 2021, Zhongxuan returned to Australia to live in the Property. Ji remained in Shanghai to care for Zhongxuan's parents (as is customary in China) and due to the concern that, if Ji left China, he would be unable to return due to quarantine laws.

For the 2021 tax year, the Chief Commissioner assessed Zhongxuan for surcharge land tax in respect of her interest in the Property. For the 2017 to 2022 tax years, the Chief Commissioner assessed Ji for surcharge land tax in respect of his interest in the Property.

Zhongxuan sought review by the NCAT of her 2021 assessment on the basis that at all relevant times, the Property was her principal place of residence.

Ji sought review by the NCAT of the assessments for the 2017 to 2022 tax years on the basis that:

1. at all relevant times, the Property was his principal place of residence, including the period where he resided overseas or lived elsewhere in Sydney;
2. despite his desire to return to Sydney, he felt obliged to remain in China to care for Zhongxuan's elderly parents, who had significant health issues and were need of care.

Relevantly, section 5A of the *Land Tax Act 1956* (NSW) (**LTA**) imposes surcharge land tax on residential property owned by foreign persons. Chapter 2A of the Duties Act, which adopts the meaning set out in the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), provides that a foreign person is one who is not 'ordinarily resident' in Australia.

Section 5 of the FATA provides that an individual who is not an Australian citizen is ordinarily resident in Australia if:

> "*…the individual has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time.*"

The words 'has actually been in Australia' require an individual to have been physical present in Australia. From the 2018 tax year, section 5A(4)(g) of the LTA provides an exemption for a principal place of residence, if the person is eligible under section 5B.

The eligibility criteria in section 5B are as follows:

1. the person was a permanent resident at midnight on 31 December of the preceding year;
2. the Chief Commissioner is satisfied that they intend to use and occupy the land as the principal place of residence during the tax year in accordance with the residence requirement;
3. the person lodges a declaration of that intention with their land tax return.

The residence requirement requires the person to use and occupy the land as the person's principal place of residence for a continuous period of 200 days in the land tax year. Whether a house is a person's principal

place of residence is to be assessed objectively, having regard to the actual occupation of the dwelling. If the residence requirement is not met, surcharge land tax is assessable as if the exemption from liability had never applied (section 5B(a) of the LTA).

Issues

1. Did Zhongxuan and Ji fall within the definition of 'foreign persons' in each relevant tax year?
2. Did Zhongxuan satisfy the residence requirement under section 5B of the LTA for the 2021 land tax year?
3. In the 2017 tax year, was any exemption afforded by legislation? If so, did Ji satisfy the criteria for eligibility?
4. In respect of the 2018 to 2022 tax years, did Ji satisfy the residence requirement under section 5B of the LTA?

Decision

Were Zhongxuan and Ji foreign persons?

The NCAT determined that Zhongxuan fell within the definition of ‘foreign person’ in respect of the 2021 tax year, because she was not in Australia for 200 days or more during the period of 12 months preceding 31 December 2020.

Did Zhongxuan satisfy the residence requirement for the 2021 land tax year?

The NCAT considered uncontested evidence that the Property was leased to tenants from 18 January 2020 to 26 July 2021, except for 10 days in January 2021. The NCAT stated that a lease provides the tenant with a right to exclusive occupation which is inconsistent with ‘use and occupation’ by an owner as their principal place of residence.

On this basis, the NCAT confirmed the assessment for the 2021 tax year as Zhongxuan did not meet 200-day residence requirement. The NCAT confirmed the assessments for the 2021 tax year.

Did Ji satisfy an exemption for the 2017 land tax year?

The NCAT noted that the exemption afforded by section 5A of the LTA was not available in the 2017 tax year. The NCAT also highlighted that no discretion is provided to the Chief Commissioner or to the NCAT on review to exempt a taxpayer from payment of surcharge land tax or to reduce such amount in any tax year.

The NCAT confirmed the Chief Commissioners assessment for the 2017 tax year.

Did Ji satisfy the residence requirement for the 2018 to 2022 land tax years?

2018 Tax Year

The NCAT first considered the circumstances which gave rise to the assessment of surcharge land tax. These circumstances involved that fact that Ji leased the Property to tenants while residing elsewhere, except for a period of 100 days in 2017 and the period of less than 200 days from August 2018 to December 2018. The nature of the lease provides the tenants with exclusive occupation.

Consequently, the NCAT confirmed the Chief Commissioner's assessment for the 2018 tax year on the basis that Ji did not use and occupy the Property as his principal place of residence for 200 days in the 2018 tax year.

2019 Tax Year

The NCAT considered a statement made by Zhongxuan which relevantly provided that from 2019 to 2022, Ji resided in a property in Shanghai. Ji spent 94 days in Australia in 2019.

The NCAT noted that it was thus required to determine whether Ji used and occupied the Property as his principal place of residence while in Shanghai for an additional period of 106 days.

While the NCAT considered that Ji desired to reside in the Property, no evidence was presented to demonstrate that Ji was forced to remain in China. Given that Ji resided at the property in Shanghai for most of the time, it appeared to be his principal place of residence.

The NCAT, therefore, confirmed the assessment for the 2019 tax year.

2020 and 2021 Tax Years

The NCAT considered uncontested evidence that the Property was leased to tenants from 18 January 2020 to 26 July 2021, except for 10 days in January 2021.

The NCAT concluded that Ji did not meet the residence requirement in 2020 or 2021 and did not qualify for an exemption under 5B.

The NCAT confirmed the assessments for the 2020 and 2021 tax years.

2022 Tax Year

The NCAT noted that at the hearing date, Ji had remained living in Shanghai for the whole of 2022. It followed that Ji was unable to satisfy the 200-day residency requirement for the 2022 tax year.

The NCAT confirmed the assessments for the 2022 tax year.

COMMENT – from the 2023 land tax year, the LTA now requires that, in order to meet the residency requirement under section 5B of the LTA, a person must be physically in Australia for at least 200 continuous days.

Citation *Wang v Chief Commissioner of State Revenue* [2023] NSWCATAD 1 (Senior Member R J Perringnon, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/1.html

2.13 Other tax and superannuation related cases in period of 4 Nov 2022 – 7 Feb 2023

Citation	**Date**	**Headnote**	**Link**
Worsley v Tax Practitioners Board [2022] AATA 3742	4 November 2022	TAX AGENTS – termination of registration as tax agent – whether applicant breached Code of Professional conduct – whether applicant 'fit and proper person' – where applicant breached stay order – whether applicant's personal circumstances mitigate breach – whether to exercise discretion to terminate registration – reviewable decision affirmed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3742.html
McEwan v Office of the Australian Information Commissioner (No 2) [2022] FCA 1488	8 November 2022	ADMINISTRATIVE LAW – judicial review – review of decision of the Australian Information Commissioner – where the Australian Information Commissioner determined not to investigate complaint further – where applicant alleged that officers within the Australian Taxation Office made disclosures of information protected under the Privacy Act 1988 (Cth) during an investigation – where decision of	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/1488.html

		Australian Information Commissioner not to investigate was based on construction of s 355-50 of schedule 1 to the Taxation Administration Act 1953 (Cth) – whether s 355-50 permitted disclosure of protected information by a taxation officer in the course of an investigation of federal offences stemming from a taxation audit – where disclosure complained of permitted under the Privacy Act 1988 (Cth) – where no jurisdictional error in decision of Australian Information Commissioner – application dismissed	
Nguyen v Chief Commissioner of State Revenue [2022] NSWCATAD 354	10 November 2022	TAXES AND DUTIES — Surcharge purchaser duty — whether temporary visa means person is subject to a limitation as to time imposed by law and not 'ordinarily resident'	https://www.caselaw.nsw.gov.au/decision/1845576abb0facd52f809323
Chami and Commissioner of Taxation (Taxation) [2022] AATA 3797	11 November 2022	TAX – cancellation of Australian Business Number and GST registration – business activity statements revised to NIL – whether the applicant carried on an enterprise for GST and ABN purposes – where no corroborating independent material to support the applicant's claim – where applicant claimed all corroborating material lost in flood – decision under review affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3797.html
Cammarano and Commissioner of Taxation (Taxation) [2022] AATA 3910	21 November 2022	TAXATION – audits undertaken – amended assessments issued – unexplained and unreported income – gambling- whether assessment incorrect or excessive – standard of proof not satisfied – objection decision affirmed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3910.html
SVYR and Commissioner of Taxation (Taxation) [2022] AATA 3994	24 November 2022	TAXATION – GOODS AND SERVICES TAX – mobile telephone and tablet accessories – where telecommunications provider granted credit to customer of its licensed retail mobile telephone and accessories outlet for purchase of accessories – where amount paid by telecommunications provider to retail outlet less than financed price repaid by customer – whether creditable acquisition by retail outlet – whether retail outlet has decreasing adjustment – significance of contractual terms – no taxable supply by telecommunications provider to retail outlet – no creditable acquisition – no decreasing adjustment – decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3994.html
SNSV and Commissioner of Taxation (Taxation) [2022] AATA 4047	29 November 2022	TAXATION – allocation of matters to Small Business Taxation Division – where applicant denied he carried on a business – whether a 'small business taxation decision' - matter allocated to Taxation and Commercial Division	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/4047.html
Picone and anors v Chief Commissioner of State Revenue [2022] NSWCATAD 382	1 December 2022	TAXES AND DUTIES — Land tax — Surcharge land tax — Foreign person	https://www.caselaw.nsw.gov.au/decision/184c59db1019dd5cf49134db
The Trustee for the NFTA Unit Trust and Commissioner of Taxation (Taxation) [2022] AATA 4132	5 December 2022	TAXATION – goods and services tax (GST) – input tax credits (ITCs) – eligibility to claim input tax credits – taxpayer's burden to prove assessment excessive or otherwise incorrect – lack of substantiation – GST applied in a blanketed manner – lack of corroborating evidence to link transaction to creditable purpose – ITCs properly disallowed – recklessness shown on the evidence – taxpayer's burden to prove the decision should not have been made or should have been made differently - decisions under review affirmed.	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/4132.html

Peng v Chief Commissioner of State Revenue [2022] NSWCATAP 378	7 December 2022	APPEALS – Revenue Law – eligibility for First Home Owner grant	https://www.caselaw.nsw.gov.au/decision/184e0803532c64cdb23ea0ed
Nugawela v Commissioner of Taxation [2022] FCA 1474	8 December 2022	TAXATION - appeal from a decision of the Administrative Appeals Tribunal under s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) - where applicant sought review in the Tribunal of six income tax assessments and was made bankrupt following commencement of review application - where Commissioner sought dismissal of those review applications in circumstances where bankruptcy trustee did not seek to pursue applications - where on remittal Tribunal required to determine whether Commissioner's dismissal application should be held in abeyance pending the outcome of applicant's proceedings in the Federal Court challenging the trustee's decision to abandon review applications - whether the appeal raises a question of law - application dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/1474.html
Jones and Commissioner of Taxation (Taxation) [2022] AATA 4382	16 December 2022	TAXATION – Income Tax – objections to tax assessments – payment of invalidity payments in accordance with the Military Superannuation and Benefits Trust Deed - Whether payments should be taxed as a superannuation income stream benefit – Whether payments were to be taxed as a superannuation lump sum – Whether an election was made in the relevant periods – Applicant's taxation objections misconceived – objections decisions affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/4382.html
Fujun Pty Ltd ATF Ni Family Trust v Chief Commissioner of State Revenue [2022] NSWCATAD 412	22 December 2022	MERITS REVIEW – STATE TAXES – surcharge land tax – onus – claimed retrospective effect of amendments to trust deed.	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/412.html
Middleton v Chief Commissioner of State Revenue [2022] NSWCATAD 411	22 December 2022	TAXES AND DUTIES – Land tax – Surcharge land tax – Foreign person – temporary visa holder	https://www.caselaw.nsw.gov.au/decision/18531e10935c325657c48072
Dermatis and Commissioner of Taxation (Taxation) [2023] AATA 13	13 January 2023	PRACTICE AND PROCEDURE – jurisdiction question – decision of Commissioner of Taxation to refuse a request to remit a shortfall interest charge – applicant seeks to review decision - application to dismiss for lack of jurisdiction – right to object against such a decision provided the shortfall interest charge that was not remitted is more than 20% of the tax shortfall amount – shortfall interest charge less than 20% - definition of 'taxation decision' under the Taxation Administration Act 1953 (Cth) - application dismissed	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA//2023/13.html
Oueik v Chief Commissioner of State Revenue [2023] NSWCATAP 26	3 February 2023	APPEAL – Land tax – Where taxpayer defaulted in payment of land tax – Where Tribunal affirmed respondent's decision not to remit premium component of land tax – Whether Tribunal misunderstood its role – Whether Tribunal erred in exercise of discretion – Whether Tribunal misconstrued s 25 of Taxation Administration Act 1996 (NSW) by failing to recognise that it confers a broad discretion	https://www.caselaw.nsw.gov.au/decision/1860f0abfcdc93e569bcec34

3. Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2022 Measures No. 2) Bill 2022	3/8	26/9	26/9	28/11	12/12
Treasury Laws Amendment (2022 Measures No. 3) Bill 2022	8/9	27/10	27/10	28/11	5/12
Treasury Laws Amendment (Electric Car Discount) 2022	27/7	8/9	8/9	25/11	12/12
Income Tax Amendment (Labour Mobility Program) 2022	8/9	27/10	27/10	28/11	5/12
Treasury Laws Amendment (2022 Measures No. 4) Bill 2022	23/11	30/11	1/12		
Treasury Laws Amendment (2022 Measures No. 5) Bill 2022	30/11	1/12	1/12		

3.2 Duties Amendment (Excluded Transactions) Regulation 2022

On 16 December 2022, the *Duties Amendment (Excluded Transactions) Regulation 2022* received Royal Assent (**Regulation**).

The Regulation prescribes that a transaction which results in an increase in a person's interest in dutiable property under an agreement entered into between the person and the State under a shared equity scheme is an excluded transaction for the purposes of the *Duties Act 1997* (NSW).

The shared equity scheme is discussed at item 4.9 of these notes.

Duties Amendment (Excluded Transactions) Regulation 2022
w https://legislation.nsw.gov.au/view/pdf/asmade/sl-2022-784

3.3 Period of review – access to 2-year period restricted

The *Income Tax Assessment (1936 Act) Amendment (Period of Review) Regulations 2022* amends the *Income Tax Assessment (1936 Act) Regulation 2015*.

The purpose of the amendment regulation is to exclude certain entities with complex tax affairs or international tax arrangements from the 2-year review period for income tax assessments. Subject to the criteria set out in section 170(1) of the ITAA 1936 and the 1936 Act Regulation, the shortened 2-year review period may be applicable to individuals and to small and medium businesses with an aggregated turnover of up to $50 million.

The 4-year review period will continue to apply to taxpayers considered to have complex tax affairs or significant international tax dealings, including taxpayers that:

1. have entered into a transaction with an associate that has income tax consequences relevant to the entity's assessable income where any of the following apply:
   (a) the parties were not dealing with each other at arm's length in relation to the transaction (this was formerly part of the regulation);
   (b) the transaction results in an amount of $200,000 or more being included in or allowable as a deduction from the assessable income of any of the parties in respect of the assessment year; or

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   (c) the transaction involves one or more CGT events, and the sum of the capital proceeds from the events is $200,000 or more;
2. have (together with their connected entities and affiliates) received assessable income of more than $200,000 from sources other than Australian sources;
3. are foreign controlled Australian entities within the meaning of the ITAA 1997 or non-residents;
4. engage in schemes captured by either the Diverted Profits Tax (DPT) or the Multinational Anti-Avoidance Law (MAAL);
5. have 10 or more other entities that are 'connected with' or affiliates of the taxpayer within the meaning of the ITAA 1997;
6. claimed an R&D tax offset or are eligible to other R&D related deductions or adjustments;
7. have chosen to obtain CGT roll-over relief under:
   (a) Division 125 of the ITAA 1997 (demerger relief);
   (b) Subdivision 126-B of the ITAA 1997 (companies in the same wholly-owned group), whether the taxpayer is the transferor or the transferee; or
   (c) Division 615 of the ITAA 1997 (business restructure roll-over); or
8. have disregarded a capital gain or capital loss under section 855-10 of the ITAA 1997 (foreign resident gains on non-Taxable Australian Property).

The amended regulations apply to income tax assessments made after 9 December 2022 that relate to income years starting on or after 1 July 2021.

TRAP – it is important to consider section 14 of the *Income Tax Assessment (1936 Act) Regulation 2015* when determining an amendment period. For instance, under that regulation a Division 7A deemed dividend from a company that has a 4-year amendment period results in a shareholder or associate affected by the deemed dividend having a 4-year amendment period in respect of the deemed dividend.

Income Tax Assessment (1936 Act) Amendment (Period of Review) Regulations 2022 w https://www.legislation.gov.au/Details/F2022L01604

3.4 GST requirements to hold tax invoices

On 25 November 2022, the ATO released a series of draft legislative instruments (determinations) that waive the requirement for a recipient to hold a tax invoice for a creditable acquisition for an input tax credit to be attributable to a tax period in certain situations, provided that the recipient holds a document that meets the information requirements specified in the determination. The situations covered include the following creditable acquisitions:

1. acquisitions under an agency arrangement (but not in respect of circumstances relating to reimbursements governed by Division 111 of the GST Act) (LI 2022/D16);
2. acquisitions from or by a beneficiary of a bare trust (LI 2022/D17);
3. acquisitions by recipients using electronic purchasing systems (LI 2022/D18);
4. acquisitions where the total consideration is not known, where the total price:
   (a) was not known at the time the recipient made an acquisition, and the supplier issued a document specifying an interim amount of consideration payable; and
   (b) was subsequently known, and the supplier issued a further document specifying the remainder of the consideration payable rather than the total price (LI 2022/D19);
5. acquisitions where the recipient holds offer documents or renewal notices (LI 2022/D20);
6. acquisitions from or by a partnership (LI 2022/D21);
7. acquisitions made through a property manager (on behalf of a principal) (LI 2022/D22);
8. acquisitions of taxi travel, where the recipient holds a document that meets the information requirements, including the taxi driver's licence or accreditation number and the taxi driver's ABN (LI 2022/D23). This includes circumstances relating to reimbursements governed by Division 111 of the GST Act;
9. acquisitions following a sale of a reversionary interest in commercial premises (LI 2022/D24); and
10. acquisitions of motor vehicles under a novated lease arrangement (but not in respect of circumstances relating to reimbursements governed by Division 111 of the GST Act) (LI 2022/D25).

Comments on the draft determinations were due to the ATO by 16 December 2022.

TIP – it is important to be aware of these rules when preparing a BAS for a client and considering whether they meet the requirement to have a tax invoice to include a claim in their BAS for input tax credits.

ATO Legislative Instrument LI 2022/D16
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D16/00001
ATO Legislative Instrument LI 2022/D17
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D17/00001
ATO Legislative Instrument LI 2022/D18
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D18/00001
ATO Legislative Instrument LI 2022/D19
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D19/00001
ATO Legislative Instrument LI 2022/D20
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D20/00001
ATO Legislative Instrument LI 2022/D21
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D21/00001
ATO Legislative Instrument LI 2022/D22
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D22/00001
ATO Legislative Instrument LI 2022/D23
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D23/00001
ATO Legislative Instrument LI 2022/D24
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D24/00001
ATO Legislative Instrument LI 2022/D25
w https://www.ato.gov.au/law/view/document?docid=GLD/LI2022D25/00001

3.5 Treasury Laws Amendment (2022 Measures No. 4) Bill 2022

The Treasure Laws Amendment (2022) Measures Bill has introduced a number of measures, including:

- the digital games tax offset
- changes to clarify digital currency is not foreign currency for tax purposes;
- giving the Commissioner of Taxation power to determine FBT record keeping requirements;
- the skills and training boost; and
- the technology boost.

Digital games tax offset

The Government announced in the 2021-2022 Budget a 30% refundable tax offset in relation to eligible expenditure incurred in the development of digital games.

The Digital Games Tax Offset applies to qualifying Australian development expenditure incurred from 1 July 2022 for eligible game developments.

To be eligible for the tax offset, broadly:

1. the entity claiming the offset must be an Australian resident company or a permanent establishment of a foreign tax resident;
2. the digital game will need to be able to be classified in Australia and not include gambling or gambling like elements, or be used for advertising or other commercial purpose;
3. the game will need to be available over the internet, predominantly played through the internet or operate only when a player is connected to the internet;
4. there are rules about the types of expenditure that are eligible for the offset, predominantly expenditure that relates to development roles will be eligible, with caps on certain related party expenditure;
5. the offset requires a certificate to be issued by the Arts Minister, in relation to a new game, the porting of a game or the ongoing development of a game, and requires minimum expenditure (possibly over multiple years) of $500,000; and

6. the offset is capped at $20m per company, its connected entities and its affiliates.

This amendment will commence on the day after it receives Royal Assent.

Taxation treatment of digital currency

This Bill amends the ITAA 1997 to clarify that digital currencies (such as Bitcoin) will continue to be excluded from the income tax treatment of foreign currency. This prevents gains or losses from being automatically on revenue account.

The term digital currency does not include digital currencies issued by, or under the authority of a government agency. This means that if a country issues a form of digital currency (as opposed to adopting an existing one) that it will still be 'money' and so foreign currency for tax purposes.

The amendment to the definition of foreign currency in the ITAA 1997 applies to income years that include 1 July 2021 and later.

The amendment to the GST Act and GST Regulations apply in relation to supplies or payments made on or after 1 July 2021.

Reducing the compliance burden of record keeping for fringe benefits tax

This Bill amends the *Fringe Benefits Tax Assessment Act 1986* by empowering the Commissioner to rely on adequate alternative record holding all prescribed information instead of seeking that information by way of statutory evidentiary documents.

The aim is to simplify and reduce FBT records keeping requirements for employers.

This measure was announced in the 2020-2021 Budget.

This amendment will commence on the day after it receives Royal Assent.

Skills and Training Boost

This Bill amends the *Income Tax (Transitional Provisions) Act 1997* to provide small businesses (with an aggregated annual turnover of less than $50 million) with access to a bonus deduction equal to 20% of eligible expenditure for external training that is provided to their employees.

To be eligible for the extra deduction the expenditure must be:

1. for training employees (i.e. not sole traders, partners, contractors, etc) either in person in Australia or online;
2. be charged directly or indirectly by a registered training provider – where the charge is indirect, any commission or markup charged will not be eligible for the extra deduction;
3. charged by a training provider that is not the small business or an associate of the small business.
4. already be deductible under tax law; and
5. in respect of enrolment in a course (which is assessed on a subject by subject) that occurs at or after 7.30pm (ACT time) on 29 March 2022.

As an example of the enrolment requirement, the EM provides:

> *For example, if an employee of an eligible small business is midway through a university degree on 29 March 2022, any enrolments into courses or classes after 29 March 2022 will result in the expenditure on those courses being eligible for the bonus deduction, provided that the other criteria for the bonus deduction are met, including that the small business incurs the expenditure within the specified period.*
>
> *The employee's enrolment in the broader degree prior to 29 March 2022 does not preclude this outcome.*

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The training costs can include incidental costs, such as text books and materials, so long as they are charged for by the registered training provider.

The amendments apply to eligible expenditure from 7.30pm (ACT time) on 29 March 2022 and ending on 30 June 2024.

This measure was announced in the 2022-2023 Budget. Claims for the boost, once it is law, can be made in the 2023 tax returns. Special rules apply to early and late balancing entities.

COMMENT – it would appear that the training boost would be available in relation to prepayments for courses as long as the prepayment is deductible in the period that the boost is claimable (that is, the education does not need to be provided by 30 June 2024).

Technology Boost

This Bill amends the *Income Tax (Transitional Provisions) Act 1997* to provide small businesses (with an aggregated annual turnover of less than $50 million) with access to a bonus deduction equal to 20% of eligible expenditure on expenses and depreciating assets for the purposes of their digital operations or digitalising their operations.

The bonus deduction applies to the total of eligible expenditure up to $100,000 per income year or specified time period, up to a maximum bonus deduction of $20,000 per income year or specified time period.

To be eligible for the bonus deduction:

1. the expenditure must be otherwise deductible under tax law (i.e. outside of the bonus claim), either immediately or over time;
2. if in relation to a depreciating asset the asset must be used or installed ready for use by 30 June 2023;
3. if in relation to a depreciating asset the asset it cannot have been disposed of by 30 June 2023, unless the disposal was involuntary; and
4. the expenditure must be incurred wholly or substantially for the purposes of an entity's digital operations or in digitising the entity's operations.

Expenditure that is eligible for the R&D tax incentive will also be eligible for the extra deduction and the extra deduction will not impact on the amount of the tax offset.

Examples of expenditure included in the EM are:

- digital enabling items – computer and telecommunications hardware and equipment, software, internet costs, systems and services that form and facilitate the use of computer networks;
- digital media and marketing – audio and visual content that can be created, accessed, stored or viewed on digital devices, including web page design;
- e-commerce – goods or services supporting digitally ordered or platform-enabled online transactions, portable payment devices, digital inventory management, subscriptions to cloud-based services, and advice on digital operations or digitising operations, such as advice about digital tools to support business continuity and growth; or
- cyber security – cyber security systems, backup management and monitoring services.

Expenditure that is allocated to a software development pool will also be eligible for the extra deduction.

Repairs and improvements to depreciating assets are eligible for the extra deduction.

The amendments apply to eligible expenditure incurred from 7.30pm on 29 March 2022 and ending on 30 June 2023.

This measure was announced in the 2022-2023 Budget. Claims for the boost, once it is law, can be made in the 2023 tax returns. Special rules apply to early and late balancing entities.

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COMMENT – there is no mention of the expenditure needing to be of a 'new' kind for the business, so that recurring subscriptions to cloud based services would be eligible for the extra deduction under this measure.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6946

3.6 Government's response to the Review of TPB

In November 2020, the former Government released its response to the final report into the effectiveness of the Tax Practitioners Board (TPB) and *Tax Agent Services Act 2009* (TASA).

In November 2022 stakeholders were invited to submit their views to the Government in relation to the following recommendations:

1. Recommendation 2.1 – amending the object clause of the TASA to make it more contemporary and to better align with the role and responsibilities of the TPB;
2. Recommendation 3.1 – enhancing the financial independence of the TPB by establishing a Special Account;
3. Recommendation 4.6 – amending the TASA to strengthen the disclosure requirements to prohibit tax practitioners from employing or using disqualified entities in the provision of tax agent services without approval from the TPB;
4. Recommendation 4.7 – converting the 3-year registration cycle to annual registration to align with the administrative annual declaration process of the TPB; and
5. Recommendation 5.1 – amending the TASA to give the relevant Minister the power to supplement the TASA Code of Professional Conduct (the Code) to address emerging or existing behaviours and practices.

The consultation period closed on 11 December 2022.

w https://treasury.gov.au/consultation/c2022-338098

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

The Government has released a consultation paper which considers options to amend the non-arm's length income (NALI) provisions which apply to superannuation funds.

The NALI provisions are aimed at preventing income from being diverted into superannuation funds to benefit from lower rates of tax compared to other entities. Where income is deemed to be derived from a non-arm's length transaction, it is taxed at 45%.

Superannuation industry stakeholders have raised concerns that the broad nature of the NALI provisions will lead to disproportionately severe outcomes for breaches of these rules, particularly relating to general expenses of a fund.

For the purposes of stakeholder consultation, Treasury has developed potential policy changes to the NALI provisions, where they relate to general expenses. These potential amendments would be intended to apply to general expenses which have a sufficient nexus to all ordinary and statutory income derived by the fund. They are as follows:

1. SMSFs and SAFs would be subject to a factor-based approach which would set an upper limit on the amount of fund income taxable as NALI due to a general expenses breach. The maximum amount of fund income taxable at the highest marginal rate would be 5 times the level of the general expenditure breach, calculated as the difference between the amount that would have been charged as an arm's length expense and the amount that was actually charged to the fund. Where the product of 5 times the breach is greater than all fund income, all fund income will be taxed at the highest marginal rate; and

2. large APRA-regulated funds would be exempted from the NALI provisions for general expenses.

Interested parties are invited to lodge submissions on this consultation paper. The closing date for submissions is 21 February 2023.

w https://treasury.gov.au/consultation/c2023-323132

3.8 Treasury consultation – Strengthening the ABN system

The 2019 – 2020 Budget included a proposal by the former government to make ongoing ABN registration contingent on ABN holders meeting two additional obligations:

1. to comply with income tax return lodgement requirements; and
2. to update the accuracy of their details on the Australian Business Register annually.

The Government has published exposure draft legislation to implement these changes. The changes are intended to make ABN holders more accountable for meeting government obligations and to minimise regulatory impacts on businesses adhering to the rules.

The consultation period closed on 29 November 2022.

w https://treasury.gov.au/consultation/c2022-332618

3.9 PSI withholding variation

The ATO has issued a draft legislative instrument in relation to withholding variation for an entity receiving personal services income.

The draft legislative instrument replaces an existing legislative instrument which is set expire and is largely on the same terms.

The effect of the legislative instrument is to vary withholding to nil where the entity pays salary or wages to the relevant individual within 14 days of the PAYG payment period and the amount of salary or wages paid is at least 70% of the personal services income received by the entity.

w https://www.ato.gov.au/law/view/pdf/ldt/li2023-d001.pdf

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4. Rulings

4.1 Personal services income and personal services businesses

The ATO finalised its guidance on personal services income (**PSI**) and personal services businesses (**PSB**) on 23 November 2022. The guidance is contained in new *Taxation Ruling* TR 2022/3. The ruling combines Taxation Rulings TR 2001/7 *Income tax: the meaning of personal services income* and TR 2001/8 *Income tax: what is a personal services business*, both of which have been withdrawn. The ruling maintains the principles set out in the now withdrawn rulings, while taking into account legislative and case law changes.

Some of the key changes in the new ruling as compared with the withdrawn rulings are as follows:

1. this ruling states that there where is a chain of interposed entities, the nature of the income as being personal services does not change as result of it being transferred through the chain of entities;
2. this ruling expressly states that, for the purpose of the 80% rule, where a person contracts through a labour hire firm, it is the labour hire firm that has the contractual obligation to pay the amount and hence the labour hire firm is the source of the work, not the underlying clients;
3. this ruling notes that, for the results test, whilst custom or practice in an industry is relevant to ascertaining whether one of the three conditions is met, those customs and practices cannot override the actual requirements. The ATO gives an example that, just because participants in a particular industry are generally paid based on time, it will not have the effect that the income is for producing a result if the agreement clearly provides that the service provider is not being paid for producing a result; and
4. this ruling states that, for the unrelated clients test, a word of mouth referral is not generally considered to the satisfy the requirement of making an offer of invitation to the public or a section of the public. The ATO notes that an exception to this is where the person is operating in a specialised or niche industry where there are a small number of acquirers of the services. The ATO suggests that this exception will only be available in limited circumstances.

The ATO also comment in their compendium of comments and changes from the draft ruling in relation to making offers through LinkedIn ‘Using digital platforms such as LinkedIn would require something more than simply having a profile. The taxpayer would need to show how their profile was making an offer to a section of the public.’

The ruling was first released as draft ruling TR 2021/D2, which was covered in our March 2021 Tax Training Notes. The key change between the draft ruling and the finalised ruling was the increased clarity around the term 'test individual'.

The term 'test individual' has been amended by the ATO to make clear that it is the person who is contracted to perform the services or who is responsible for performing the services that generates their PSI when working as a sole trader or through a personal services entity (**PSE**). The ruling also provides that where a PSE is being used, there can be more than one test individual.

The ATO amended Example 12, which now reads as follows:

> *181. Kim is a project manager who works through her company, Winner Pty Ltd, which does not meet any of the PSB tests. Winner Pty Ltd enters into a single 6-month contract with Big Co which states Kim is to provide the services. Kim is the test individual as she has contracted to perform, and is responsible for performing, the services that generate her PSI.*
>
> *182. In the final month of the contract, Kim finds that she has too much work and employs David, a friend with project management skills, to assist her for that month.*
>
> *183. In that final month, Kim does 45% of the work on the Big Co contract and David does 55%.*

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184. The net PSI generated under the contract is wholly attributable to Kim even though she employed David to assist her for the final month as Kim is the only test individual working through the PSE and the 6-month contract with Big Co is mainly for Kim's personal efforts and skills.

The ruling also includes new Example 13, which reads as follows:

185. Matthew is a management consultant who works through his company MC Pty Ltd, which enters into a contract with BC Energy Pty Ltd to provide its broad range of services. The contract does not stipulate a particular individual who is required to provide any of the particular services. MC Pty Ltd engages 3 subcontractors who, along with Matthew, perform the various services.

186. BC Energy Pty Ltd issues work orders for separate pieces of work required to be completed under the contract.

187. MC Pty Ltd issues invoices to BC Energy Pty Ltd each month for the work performed during the month on each work order. The invoices state which individual performed the services. While the contract between MC Pty Ltd and BC Energy Pty Ltd is broad, the relevant business records and communications (for example, invoices and emails) provide factual clarity that each individual performed specific work and it is their personal effort and skills that are being rewarded. Each discrete amount of income invoiced and received by MC Pty Ltd will be the PSI of the test individual who generated it as it is mainly a reward for their individual personal efforts and skills and may be attributed to and included in the assessable income of each test individual depending on whether MC Pty Ltd passes or fails the PSB test by reference to each test individual.

188. Each of the individuals are test individuals. The invoices issued under the contract evidence that they were responsible for performing the services that utilise their personal efforts and skill.

The ruling also includes an example of when Part IVA may apply to an arrangement (which was in the draft ruling):

Example 41 - potential application of Part IVA of the ITAA 1936

267. Jason Banks is a computer systems analyst who provides his personal services through a family trust, The JB Trust. He also forms a company, JB Pty Ltd, to be trustee of The JB Trust. The beneficiaries of The JB Trust are Jason, his wife and 3 children. Jason's wife and 3 children are in the lowest marginal tax bracket. JB Pty Ltd (in its capacity as trustee) enters into an agreement with XYZ Pty Ltd to perform specific computing tasks, for a total contract price of $120,000 in the income year, to provide the personal services of Jason. The work will be performed by Jason. No work will be performed by any of the other beneficiaries. Instalments of the contract price are payable on achieving agreed milestones. The contract also provides that JB Pty Ltd provide the necessary equipment and is liable for the cost to remedy any defects.

268. In the income year, JB Pty Ltd pays Jason a salary of $50,000, which is less than the contracted price for Jason's services, and claims deductions amounting to $25,000. JB Pty Ltd distributes the balance of The JB Trust's net income, namely $45,000, to each of the 3 children who receive $416 (making a total of $1,248) and the remainder to Jason's wife. No trust income is distributed to Jason as a beneficiary of The JB Trust. No tax is payable by Jason's children and Jason's wife pays tax on her trust distribution at her marginal tax rate, but the total amount of tax paid between Jason, his wife and children is less than what would have been paid if Jason had returned the entire net PSI from his personal effort and skills in his personal tax return. The splitting of any of the income that is mainly the reward for Jason's personal effort and skill to an associate that results in less overall tax being paid is a tax benefit.

269. The JB Trust is a PSE because its income includes the PSI of the individual who does the work. JB Pty Ltd is able to self-assess because it meets the results test in relation to at least 75% of the PSI. The JB Trust self-assesses it is a PSB because it meets the results test in respect of the PSI of Jason. Accordingly, JB Pty Ltd determines that the PSI rules will not apply to Jason's PSI. However, in this case, the

> *Commissioner would consider the application of Part IVA to cancel the tax benefit. Part IVA would apply if, having regard to the matters in subsection 177D(2) of the ITAA 1936, it would be concluded that there was a dominant purpose of enabling Jason to obtain a tax benefit by splitting the income. This would require a detailed consideration of all the circumstances. A likely conclusion would be that the dominant purpose of the arrangement is income splitting to which Part IVA applies.*

The ruling applies to years of income commencing both before and after its date of issue, but will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the ruling.

The ruling is intended to be read in conjunction with Taxation Rulings TR 2003/6 *Income tax: attribution of personal services income* and TR 2003/10 *Income tax: Deductions that relate to personal services income.*

ATO reference *Taxation Ruling TR 2022/3* w https://www.ato.gov.au/law/view/document?docid=TXR/TR20223/NAT/ATO/00001

4.2 Section 100A reimbursement agreements

On 8 December 2022, the ATO finalised *Taxation Ruling TR 2022/4 Income tax: section 100A reimbursement agreements* (previously published as TR 2022/D1 – see our March 2022 Tax Training Notes).

TR 2022/4 provides the ATO's views in relation to the application of section 100A to reimbursements agreements, including exceptions for agreements which do not have a tax reduction purpose or which are entered into in the course of ordinary family or commercial dealings.

What is required for section 100A to apply?

TR 2022/4 explains the application of section 100A where three requirements are present:

1. a 'connection requirement', being broadly a present entitlement to trust income and a connected agreement or understanding as to how the benefit of that present entitlement is to be applied;
2. the payment of money (including via loans or the release, abandonment, failure to demand payment of or the postponing of the payment of a debt), transfer of property to or provision of services or other benefits for one or more persons other than the beneficiary alone; and
3. a tax reduction or tax deferral purpose.

When considering the benefits being provided to another person, TR 2022/4 notes at paragraph 19:

> *In particular, there is no requirement that the relevant money, property, services or other benefits provided to a person other than the beneficiary alone, be sourced from, equal to or otherwise be referrable to the share of trust income the beneficiary is presently entitled to receive, was paid or that was applied on their behalf.*

TR 2022/4 states that a tax reduction purpose may be present whether or not the person whose tax liability is intended by one of the parties to the agreement to be reduced is themselves a party to the agreement, and whether or not a reduction in their tax liability or deferral of their tax liability is actually achieved.

In relation to purpose, TR 2022/4 states that 'actual purpose' may be determined by reference to the parties' own evidence as well as objective facts and circumstances including the financial, taxation and other consequences of the transaction entered into. The purpose of an adviser may be imputed to a party to the relevant agreement who acts in accordance with the adviser's advice.

COMMENT – the comment about an adviser's purpose may need to be reconsidered by the ATO in light of the *Guardian* decision discussed earlier in these notes.

Ordinary family or commercial dealings

Agreements 'entered into in the course of ordinary family or commercial dealing' are not reimbursement agreements for the purposes of section 100A. TR 2022/4 sets out twelve examples that shed some light on the ATO's views of when section 100A will apply, including what kinds of arrangements could be 'ordinary family and commercial dealings' and, therefore, could be excluded from the operation of section 100A.

TR 2022/4 states at paragraph 27 that all relevant circumstances should be considered when testing whether there is an ordinary family or commercial dealing, including:

1. what is sought to be achieved by the dealing (in particular, whether it is explained by the family or commercial objectives it will achieve);
2. whether the steps that comprise the dealing will likely achieve those objectives;
3. the historical behaviour of the parties;
4. whether the dealing:
   (a) is artificial or contrived;
   (b) is overly complex;
   (c) contains steps that are not needed to achieve the family or commercial objectives; or
   (d) contains steps that might be explained instead by objectives different to those said to be behind the ordinary family or commercial dealing.

The ruling notes that the ordinary dealing exception does not apply simply because all parties to an agreement are family members nor because the arrangement is common within family groups. To be in the course of ordinary dealing, the transactions between family members and their entities must be able to be explained as achieving normal family or commercial objectives. To be an ordinary commercial dealing, the parties would be expected to advance their respective interests and commercial objects.

Paragraph 28 states:

> *If the objective of a dealing can properly be explained as the payment of less tax to maximise group wealth, rather than some other objective which is a family or commercial objective, it is not an ordinary family or commercial dealing.*

Key changes on finalisation of ruling

Recent case law

A section has been added at paragraph 47 onwards that summarises recent Federal Court decisions in *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation* [2021] FCA 1619 and *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112.

Relevance of cultural factors

In response to stakeholder feedback, three examples have been added that highlight when cultural practices will inform whether a dealing is to achieve family or commercial objectives. Paragraph 112 states that cultural factors refer to the distinct and observable ideas, customs or practices of people or certain groups within a society. The existence of a cultural factor which is not widely understood in the broader community can be demonstrated by evidence.

For example, in Example 2, section 100A would not be applied where a grandmother gifts money to her grandchildren out of her trust entitlement in accordance with a cultural practice of giving gifts during the festive season. Example 3 addresses a cultural practice of supporting older relatives:

> *Jack lives by the practices that have been common for centuries in the culture that he draws his heritage from. One of those practices is that children will meet the needs for shelter and living of their parents and other older relatives when they are no longer participating in the workforce. This is founded in notions of respect for elders and is practiced irrespective of what means those relatives would have to fund their own*

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needs from available resources. This cultural practice is relevant in considering whether Jack's direction to the trustee of a trust to apply his entitlements to meet mortgage repayments for his aunt, who has retired from her employment working in a factory, is in the course of ordinary family or commercial dealing.

However, Example 4 states that where a beneficiary has a cultural practice (such as religious reasons) for not accepting an entitlement from the trust, the circumstances do not, without more, explain the objectives for resolving to distribute to that particular beneficiary in the first place.

Non-commercial loan between family members

The example relating to loans between family members has been updated to specifically highlight that arrangements where parents on lower marginal tax rates repeatedly loan trust entitlements to children on higher marginal tax rates (or vice versa) raise the question whether the arrangements are meant to achieve a tax reduction objective, rather than any family or commercial objective.

Scope of section 100A beyond trust stripping

A section has been added from paragraph 177 onwards that sets out the Commissioner's view that section 100A is not intended to be limited to 'trust stripping' arrangements that were provided as examples in the Explanatory Memorandum when section 100A was introduced in 1978.

The ruling should be read in conjunction with Practical Compliance Guideline PCG 2022/2 *Section 100A reimbursement agreements – ATO compliance approach* (see item 4.1 of these notes)

COMMENT – an appeal decision has been handed down in relation to the *Guardian* case since TR 2022/4 was published (see item 1.1 of these notes). The *BBlood* case is currently on appeal.

4.3 PAYGW – who is an employee?

On 16 December 2022, the ATO released draft *Taxation Ruling TR 2022/D3* which explains when an individual is an 'employee' of an entity for the purposes of section 12-35 of Schedule 1 to the TAA. The Ruling replaces *Taxation Ruling TR 2005/16*.

For the purposes of section 12-35 of the TAA, the ATO considers the term 'employee' has its ordinary meaning.

The ruling sets out that whether a worker is an employee of an entity under the term's ordinary meaning is a question of fact to be determined by reference to an objective assessment of the totality of the relationship between the parties.

The task is to construe and characterise the contract of employment at the time it is entered into. For the purposes of that exercise of construction, recourse may be had to events, circumstances and things external to the contract which are objective, known to the parties at the time of contracting and assist in identifying the purpose or object of the contract.

Where the worker and the engaging entity have comprehensively committed the terms of their relationship to a written contract, and the validity of that contract has not been challenged, it is the legal rights and obligations in the contract alone that are relevant in determining whether the worker is an employee of an engaging entity.

Evidence on how the contract was performed, including subsequent conduct and work practices, cannot be considered for the purpose of determining the nature of the legal relationship between the parties. However, evidence of how a contract was actually performed may be considered for other purposes consistent with general contract law principles, including to:

1. establish formation of the contract;
2. identify the contractual terms that were agreed to (i.e. wholly or partly oral);

3. demonstrate that a subsequent agreement has been made varying, waiving, or discharging one or more of the terms of the original contract;
4. show the contract was a sham; or
5. establish evidence of an estoppel, rectification or other legal, equitable or statutory rights or remedies.

The fact that a worker may be conducting their own business, including having an ABN, is not determinative of whether a worker is an independent contractor. The ATO states that a person conducting their own business may separately be an employee in the business of another.

The 'label' which parties choose to describe their relationship is not determinative of, or even relevant to, the characterisation. 'Labels' used to describe the relationship which are inconsistent with those rights and duties in the contract of engagement have no meaning.

In the explanation section of the ruling, the ATO states that in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contacting Pty Ltd* [2022] HCA 1 the High Court confirmed that in determining the nature of a relationship is employment it is the 'totality of the relationship' that needs to be undertaken, by reference solely to the legal rights and obligations which constitute that relationship.

The ATO noted that the indicia of employment identified in case law remain relevant, but are to be considered only in respect of the legal rights and obligations between the parties.

While no one factor will be determinative, in the ATO's view the more control the engaging entity can exercise over how, when and where the worker performs their work under the contract, the more likely the worker is to be an employee of the engaging entity.

<u>The tests to be applied in determining if a relationship is one of employment</u>

The ATO discusses in the draft ruling the various factors that could indicate employment:

- Serving in the engaging entity's business – serving in as an employee as opposed to providing services to a business as a contractor
- Characterising an engaging entity's business – determining what the 'employer' does
- Whether or not the worker conducts their own business is not determinative
- Presenting as an emanation of the business
- Control
- Other rights that confer a capacity to control – rights to terminate without notice, or a 'worker' indemnifying an engaging entity
- Ability to delegate work indicates contracting relationship
- 'Results' contracts – indicate less likely an employment relationship
- Provision of tools an– equipment - consider the nature, scale and cost of the tools involved
- Risk
- Generation of goodwill – recognise that not all businesses generate goodwill
- Labels given to parties in the contract and other descriptors of their relationship
- Where a business engages with a non-individual entity there is less likely to be an employment relationship
- Neither employee nor independent–contractor - lease or bailment

ATO reference *Draft Taxation Ruling TR 2022/D3*
w https://www.ato.gov.au/law/view/document?DocID=DTIR2022D3/NAT/ATO/00001

4.4 Alcohol Excise – meaning of 'legally and economically independent'

The ATO has issued draft Excise Ruling 2022/D1, which sets out the Commissioner's view on the meaning of the phrase 'legally and economically independent' for the purposes of the excise remission scheme and the excise refund scheme.

The draft ruling notes:

> *An eligible alcohol manufacturer that is* ***legally and economically independent*** *from 1 July 2021 will be entitled to receive an automatic remission of their excise duty liability up to a maximum of $350,000 each financial year. An eligible alcohol manufacturer that is legally and economically independent and pays their excise duty prior to 1 July 2021 for goods entered up to 31 May 2021 will be entitled on application to a refund of 60% of the excise duty liability up to a maximum of $100,000 each financial year. A transitional rule applies for goods entered for home consumption from 1 June 2021 to 30 June 2021 (inclusive) when the duty is paid on or after 1 July 2021. This transitional rule allows for a refund claim to be made under the Refund Scheme up to a maximum amount of $8,333.*

Comments on ER 2022/D1 were due to the ATO by 16 December 2022.

ATO reference *Draft Excise Ruling ER 2022/D1*
w https://www.ato.gov.au/law/view/documl?docid=DXR/ER2022D1/NAT/ATO/00001

4.5 NSW duty and declaration of trust in an agreement for sale

Revenue NSW has updated ruling DUT031V2 – Declaration of trust in an agreement for sale. The Ruling supersedes the original version of the ruling, DUT031.

The Ruling addresses the changes to the *Duties Act 1997* (NSW) which commenced from 19 May 2022 following the case of *Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285.

In particular, the Ruling addresses the new section 8AA of the Duties Act which imposes duty on an acknowledgement of trust on the making of a statement that:

1. purports to be a declaration of trust over dutiable property;
2. merely has the effect of acknowledging that identified property vested, or to be vested, in the person making the statement is already held, or to be held, in trust for a person or purpose mentioned in the statement.

For the purpose of charging the duty:

1. the making of the statement is taken to be a declaration of trust over dutiable property and, accordingly, is a dutiable transaction;
2. the property vested, or to be vested, in the person making the statement is taken to be the property transferred;
3. the person making the statement is taken to be the transferee; and
4. the transfer is taken to occur when the statement is made.

The updated Ruling includes three new examples of when making a statement that appears to be a declaration or acknowledgement of trust in a contract or in contractual arrangements will be liable to duty, including:

> **Example 1**: *PSQ Pty Ltd purchases a property as trustee for ANT Pty Ltd. The purchaser under the contract is described as PSQ Pty Ltd as trustee for ANT Pty Ltd. There is no prior declaration of trust between PSQ Pty Ltd and ANT Pty Ltd. The contract is liable to duty on the purchase of the property as well as a declaration of trust. This is because the contract also declares that PSQ Pty Ltd is purchasing the property of behalf of ANT Pty Ltd.*

> **Example 2**: *PSQ Pty Ltd purchases a property on behalf of ANT Pty Ltd. The purchaser under the contract is PSQ Pty Ltd and there is no evidence of a declaration of trust. After the purchase of the property, PSQ Pty Ltd & ANT Pty Ltd issue a statement acknowledging that PSQ Pty Ltd as trustee acquired the property for ANT Pty Ltd as beneficiary. The statement is liable as an acknowledgement of trust. The person liable is the person declaring/acknowledging the trust i.e., PSQ Pty Ltd.*

> **Example 3**: *If after the contract is executed but before the transfer is completed PSQ Pty Ltd declares or acknowledges that the property is being purchased on behalf of ANT Pty Ltd, this will also be liable to duty as a declaration or acknowledgment of trust.*

It should be noted that it is possible that only concessional duty (instead of ad valorem duty) may apply in instances where, for example, the bare trustee provisions under section 55 apply (and such an application is supported by the requisite evidence).

The Ruling clarifies that an instrument will not be considered to be liable to duty as a declaration of trust or an acknowledgement of trust where, the trust is pre-existing and a person is described:

1. as trustee;
2. as trustee for the estate of a named person;
3. as trustee for a named trust;
4. as trustee for a named superannuation fund;
5. as trustee for a company to be formed or incorporated;
6. as custodian for the trustee for the estate of a named person;
7. as custodian for the trustee for a named trust;
8. as custodian for the trustee for a named superannuation fund;
9. as custodian for the trustee for a company to be formed or incorporated.

The reason the instrument is not liable as a declaration or acknowledgement of trust is because the words in the instrument are merely descriptive of the person's capacity as trustee/custodian and the beneficiaries of the trust are not mentioned (i.e., the beneficiaries are not named) in the instrument.

The Ruling confirms that words that merely refer to an existing trust or an existing trust deed will not amount to a declaration of trust or acknowledgement of trust. Generally, documents such as statutory declarations requested by Revenue NSW or other Government bodies will not be liable for duty as a declaration or acknowledgement of trust.

To be a declaration of trust or an acknowledgement of trust there must be a statement by the trustee that the relevant dutiable property is held or is to be held on trust for identified persons.

DUT 031v2 (NSW) *Declaration of trust in an agreement for sale v2*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/duties/dut031-v2

4.6 NSW Land Tax exemptions – boarding houses and low-cost accommodation

The NSW Land Revenue has issued ruling LT 113 to provide guidance to landowners of boarding houses for the 2023 land tax year and to explain which exemptions or reductions land owners are entitled to.

Land used as a NSW boarding house is exempt from land tax, if the following criteria are met:

1. the land was used as a boarding house for the whole or part of the 2022 calendar year;
2. in respect of at least 80% of the total accommodation was actually occupied during the period of operation as a boarding house in 2022;
3. the occupants were long term residents;
4. the owners agree that in respect of at least 80% of accommodation will be occupied in 2023; and
5. the maximum tariffs charged were no more than the tariff limits specified or calculated in accordance with paragraph 4 for that year.

If only part of the land is used for a boarding house, a pro rata reduction in the land value will be calculated. A partial exemption may apply.

Owners must apply for the exemption by completing the declaration online at NSW Revenue by 31 March 2023 or within 30 days of receiving a notice of assessment.

Revenue NSW reference *LT-113 Exemption for Land used and occupied primarily for a boarding house*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/land/lt113

4.7 QLD payroll tax – relevant contracts and medical centres

On 22 December 2022, the Commissioner of State Revenue (Qld) issued Public Ruling PTQ000.6.1 which explains the application of the relevant contract provisions in the *Payroll Tax Act 1971* (Qld) (**PTA**) to entities that conduct medical centre businesses, including dental clinics, physiotherapy practices, radiology centres and similar healthcare providers who engage medical, dental and other health practitioners (**Medical Centre**).

The Ruling provides that a contract between an entity that conducts a Medical Centre business and a practitioner is a relevant contract if all of the following apply:

1. the practitioner carries on a business or practice of providing medical-related services to patients;
2. in the course of conducting its business, the medical centre provides members of the public with access to medical-related services and engages a practitioner to supply services to the medical centre by serving patients on its behalf; and
3. an exemption under section 13B(2) of the PTA does not apply.

In summary, if a Medical Centre engaged a practitioner to practice from its centre or holds out to the public that it provides patients with access to the medical services of a practitioner, then it is likely the contract between the Medical Centre and practitioner will be a relevant contract unless an exemption applies (see below).

The Ruling confirms the Commissioner's view that both the Medical Centre and practitioner conduct separate and related business, with the former providing patients access to medical services and providing services and facilities to the practitioner.

In effect, the Medical Centre is taken to be the employer as it receives the services of the practitioner who serves the patients. The practitioner, being the person who performs the work required under the contract, is taken to be the employee.

The Ruling summarises the recent Tribunal decisions in *The Optical Superstore Pty Ltd v Commissioner of State Revenue* [2018] VCAT 169 and *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259.

Wages

Under section 13E(1) of the PTA amounts paid or payable under a relevant contract by a Medical Centre are wages for payroll tax purposes if the payments are in relation to the performance of work relating to the relevant contract by the deemed employee. The Ruling confirms that it does not matter if the payments to the practitioner are paid from money received by the medical centre on behalf of practitioners or whether from patient fees or Medicare payments. The Ruling confirms the Commissioner's position that when the practitioner's entitlement is recognised and the money is paid or becomes payable, it constitutes wages for payroll tax purposes.

The Ruling also confirms that third-party payments under a relevant contract that would be wages if paid by an employer to an employee under the contract, are taken to be wages for the PTA. For example, if the practitioner assigns their fees to a related company, P Co, and P Co is required to pay 30% of its revenue to the Medical Centre and 70% to the practitioner, the payments by P Co to the practitioner are wages for the purposes of the PTA.

Exemptions

The Ruling considers the following three exemptions which may apply to a contract between a Medical Centre and practitioner:

1. *where the practitioner provides services to the public generally*: prior to claiming this exemption, the principal (medical centre) is required to apply to the Commissioner for a determination (unless using the 10 days or less per month method as set out in PTA021);
2. *where the practitioner performs work for no more than 90 days in a financial year*: Each calendar day on which the practitioner performs work counts as 1 day, regardless of the time spent working on a particular day (see PTA014 for an explanation of the exemption); and
3. *where the services are performed by two or more persons*: The second person that provides services to or for the practitioner may be a company, but the work must be performed by a natural person. The work must be performed under the contract between the Medical Centre and practitioner. This exemption will not apply if the Medical Centre engages the second person or the second person provides general business-related services (e.g. tax or accounting services).

Other Matters

The Ruling clarifies that a tenancy contract is not a relevant contract if the practitioner does not supply work-related services to patients for or on behalf of the landlord. In these circumstances, the Commissioner requires that the practitioner operate their own independent medical practice, be responsible for advertising and attracting patients, managing patient appointments and records and directly submitting claims for medical benefits to Medicare.

A contract with an administration entity that provides administration and support services to practitioners may be a relevant contract depending on the terms and conditions of each contract. In addition, the Ruling states that this administration entity may be grouped with the practitioner (or practitioner entity) under the grouping provisions in the PTA (see PTA017).

The Commissioner confirms that the fact a practitioner is required to obtain their own medical provider number from Medicare does not alter the outcome that, under a relevant contract, where a practitioner is engaged by a medical centre to serve patients for or on behalf of the medical centre, the practitioner is still providing medical services to the medical centre and to the patients.

The Commissioner will look to the substance of the arrangement between the Medical Centre and practitioner. In that if an arrangement identifies the practitioner as the 'principal' or 'tenant', this itself is not determinative.

The Ruling reiterates that records must be kept by Medical Centres for a minimum of 5 years after the end of the financial year in which the wages were paid or became payable.

The Ruling takes effect from the date of issue, 22 December 2022.

COMMENT – the Mercury (mercury.com.au) reported on 24 January 2023 that the Federal Health Minister Mark Butler will speak with the RACGP about the 'payroll tax crisis' impacting QLD clinics.

Queensland is the first state to publish a ruling on the operation of the relevant contractor provisions to Medical Centres, but it is understood that Revenue NSW have similar views on the operation of those provisions in NSW.

Revenue QLD References Public Ruling PTQ000.6.1 (Qld) *Relevant contracts – medical centres*
w https://www.treasury.qld.gov.au/resource/ptaq000-6/

4.8 QLD Duty – additional foreign acquirer duty

The Queensland Treasury has updated its public rulings and guidance in relation to additional foreign acquirer duty (**AFAD**) imposed under Chapter 4 of the *Duties Act 2001* (Qld).

The key update across each ruling is that eligible retirement visa holders (i.e., 'specified foreign retirees') are, in certain circumstances, exempt from AFAD on purchases of a principal place of residence occurring on or after 1 January 2023.

Revenue QLD References Public Ruling DA232.1.2, Public Ruling DA000.14.3 and Public Ruling DA000.15.3
w https://www.treasury.qld.gov.au/resource/da232-1/; https://www.treasury.qld.gov.au/resource/da232-2/; https://www.treasury.qld.gov.au/resource/da000-14/; https://www.treasury.qld.gov.au/resource/da000-15/

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5. ATO and other materials

5.1 Section 100A – ATO compliance approach

On 8 December 2022, the ATO finalised PCG 2022/2 (previously draft PCG 2022/D1) which sets out how the ATO differentiates risk for a range of trust arrangements to which section 100A could apply and how ATO compliance resources may applied in those cases. The guideline provides three coloured zones for the different risk ratings as compared to four in the draft PCG (the ATO removed the blue zone).

Green zone

The ATO provides three scenarios and 13 examples of those circumstances that it considers to be in the green zone (low risk). In the absence of other factors, the ATO will not dedicate compliance resources to consider the application of section 100A to green zone arrangements, other than to confirm that the features of the relevant scenario are present.

The three scenarios include:

1. income is used for benefit of an individual beneficiary and their spouse or dependants (including in a jointly-held bank account) when only one receives a distribution;
2. where the beneficiary's entitlement is received within 2 years of becoming presently entitled and the beneficiary uses the entitlement; and
3. retention of funds in a trust to provide working capital for a business or to acquire income producing assets.

Arrangements, including those set out in the scenarios above, will not be in the green zone where any of the following apply:

1. the arrangement is in the red zone;
2. the beneficiary gifts the trust entitlement to someone else, except in the case of scenario 1 above;
3. the beneficiary disclaims or releases their entitlement;
4. the trust law income is less than tax law income due to income re-characterisation power or a trust deed amendment;
5. the beneficiary's trust entitlement is paid by funds sourced from that beneficiary, such as dividends, including where a trustee:
   (a) pays a corporate beneficiary's trust entitlement or makes a loan repayment by way of set-off against a dividend paid by that corporate beneficiary;
   (b) issues units in the trust to the beneficiary and sets off the value against the beneficiary's trust entitlement; or
   (c) pays a corporate beneficiary's trust entitlement or makes a loan repayment by way of set-off against the trust's entitlement to income from a different trust that has received franked distributions from the corporate beneficiary;

The following are new exclusions from green zone arrangements:

1. the beneficiary is a loss company or loss trust that uses its trust entitlement to fund a distribution to its members and that distribution compromises the ability of the beneficiary to repay its existing or future liabilities;
2. the beneficiary is a private company or trust that uses its trust entitlement to fund a distribution that is made directly or indirectly to the trustee that made the beneficiary presently entitled to income;
3. the trustee has not notified the beneficiary of their entitlement to trust income by the earlier of the trustee's due date and actual date of lodgment;
4. where the beneficiary has not lodged their tax return or has understated or omitted their share of trust net income; or
5. the beneficiary uses the trust entitlement to pay excessive consideration where the parties are not dealing at arm's length.

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Red zone

Red zone (high risk) scenarios include arrangements where the beneficiaries' entitlements appear to be motivated by sheltering the trust's (taxable) net income from higher rates of tax. Red zone scenarios also include arrangements with contrived elements directed at enabling someone other than the presently entitled beneficiary to have use and enjoyment of the economic benefits referable to the trust's net income. The ATO is dedicating compliance resources to reviewing these scenarios and will look to apply section 100A.

The scenarios outlined as being in the red zone are:

1. arrangements where entitlements are lent or gifted to another person;
2. 'washing machine' arrangements where UPEs of corporate beneficiaries owed by trustees are set off against dividends paid to those trustees;
3. unitisation arrangements where a corporate beneficiary's entitlement is satisfied by the issue of units for more than market value, or where the trustee uses a power to issue units to discharge a UPE;
4. where a beneficiary's entitlement to trust income is less than their entitlement to tax law income as a result of the use of a trustee power, or an amendment to a deed to introduce such a power;
5. where an entity with losses receives a distribution but not the benefit of the distribution; and
6. where the arrangement is covered by a taxpayer alert.

White zone

The ATO has indicated that it will not commence any new compliance activities to consider the application of section 100A for income years ended before 1 July 2014, unless the arrangements are outside the green zone and any of the following apply:

1. the ATO is otherwise considering your income tax affairs for those years;
2. you have entered into an arrangement that continues before and after that date; or
3. the trust and beneficiary tax returns that were required to be lodged for those years were not lodged before 1 July 2017.

Key changes on finalisation

The previous draft contained a 'Blue Zone' with examples of scenarios that did not fall clearly within any of the other coloured zones. The 'Blue Zone' has been removed in the final guideline.

The additional examples that were circulated to industry groups in September 2022 have been incorporated in the finalised examples.

A section has been added at paragraph 49 onwards that sets out the ATO's expectations in relation to record keeping. The guideline acknowledges that that family arrangements are typically conducted more informally than dealings between unrelated parties, but notes that the trustee or their registered tax agent should maintain contemporaneous records which demonstrate the objectives an arrangement was intended to achieve and how it would achieve them.

PCG 2022/2 should be read together with draft Taxation Ruling TR 2022/4 (discussed above), which sets out the ATO's interpretative position on the application of section 100A.

ATO reference *Practical Compliance Guideline PCG 2022/2* w https://www.ato.gov.au/law/view/document?docid=COG/PCG20222/NAT/ATO/00001

5.2 Deputy Commissioner's comments on finalised 100A guidance

On 8 December 2022, Louise Clarke, Deputy Commissioner, Private Wealth at Australian Taxation Office published a blog post on LinkedIn regarding the finalisation of TR 2022/4 and PCG 20222/2.

The blog post notes that the ATO has not retrospectively changed its view of how the law applies in respect of section 100A. Rather, the ruling is intended to set out a more detailed explanation of the ATO view and is consistent with how the ATO has applied the law in its compliance activities.

The blog post also states that the ATO appreciates the valuable comments provided during consultation that have shaped the final versions of TR 2022/4 and PCG 20222/2.

A link is provided to a short video published by the ATO outlining the finalised guidance: https://publish.viostream.com/play/bi9or7ods4pf5i

w https://www.linkedin.com/pulse/weve-finalised-our-guidance-trust-reimbursement-louise-clarke/

5.3 Corporate residency CM&C test – ATO compliance approach

A company is a resident of Australia for tax purposes if:

1. it is incorporated in Australia; or
2. it is not incorporated in Australia, but it carries on business in Australia and has either its:
   (a) voting power controlled by shareholders who are resident of Australia (the voting power test of residency), or
   (b) central management and control in Australia (the central management and control test of residency).

In 2017, the High Court held in *Bywater Investments Limited & Ors v Commissioner of Taxation; Hua Wang Bank Berhad v Commissioner of Taxation* [2016] HCA 45 that a company with central management and control in Australia will necessarily be carrying on business in Australia, even if it has no operations in Australia. This was contrary to the Commissioner's previous view in TR 2004/15 that both business operations and central management and control in Australia were required for a company to be a resident.

In the 2020-21 Budget, the former Government announced technical amendments to clarify the corporate residency test and re-align the definition with the view in TR 2004/15. Legislation to implement this announcement has not been enacted.

PCG 2018/9 sets out a practical guidance to assist foreign incorporated companies and their advisors to determine the residency of corporations by applying the principles set out in Taxation Ruling TR 2018/5 regarding the central management and control test for residency. It includes a transitional period where the Commissioner will not apply resources to review or seek to disturb a foreign-incorporated company's status as a non-resident, pending enactment of the announced legislation.

On 22 December 2022 the Commissioner updated the PCG 2018/9 to extend the transitional compliance period to 30 June 2023. Prior to this, the transitional period was due to expire on 31 December 2022. The Commissioner has noted, however, that the transitional period will not be extended beyond 30 June 2023.

ATO reference *Practical Compliance Guideline 2018/9*
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20189/NAT/ATO/00001

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5.4 GST and residential colleges – ATO compliance approach

The ATO has finalised the draft PCG 2022/D3 and released Practical Compliance Guideline PCG 2022/3. The guideline sets out the ATO's compliance approach for universities and residential colleges supplying accommodation, meals, tertiary residential courses and religious services to resident students, and claiming input tax credits.

The guideline applies from 1 January 2023.

The Commissioner has prepared the PCG to assist residential colleges that are endorsed charities in determining how GST applies to supplies they make under resident student contracts.

For endorsed charities, section 38-250 of the GST Act provides that supplies are GST-free if the supply is:

1. a supply of accommodation for less than 75% of the GST-inclusive market value of the supply (accommodation market value test);
2. a supply other than a supply of accommodation for less than 50% of the GST-inclusive market value of the supply (non-accommodation market value test);
3. a supply of accommodation for less than 75% of the cost to the supplier of providing that accommodation (accommodation cost test); or
4. a supply other than a supply of accommodation for less than 75% of the consideration the supplier provided, or was liable to provide, for acquiring the thing supplied (non-accommodation cost test).

The guideline considers the accommodation market value test and the non-accommodation market value test.

Difficulties that arise in determining how the GST law applies are set out as including:

1. determining the apportionment of fees where a contract with a student contains multiple supplies (or components) for a single fee;
2. comparing that apportioned fee for each component to the relevant market value of the relevant supply to determine if section 38-250 is satisfied;
3. determining the GST classification of each component and any GST payable;
4. where some supplies are input taxed, determining the extent of creditable purpose where an acquisition
5. relates to supplies that are both input taxed and GST-free or taxable.

The Commissioner has developed the ATO charity benchmark market values for use by certain charities in certain circumstances in applying section 38-250. The purpose of these 'proxy' values is to reduce compliance costs for relevant charities and provide assurance that the Commissioner will not allocate compliance resources to review GST outcomes for accommodation and meals where the ATO charity benchmark values has been correctly applied.

Residential colleges may, but are not required to, use the ATO charity benchmark market values. If a residential college chooses to apply the ATO charity benchmark market values, it must do so in accordance with the Commissioner's guidance in *GST and supplies by charities benchmark market values*.

The PCG considers how the ATO charity benchmark market values can be applied in relation to accommodation and meals.

ATO reference *Practical Compliance Guideline 2022/3*
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20223/NAT/ATO/00001

5.5 Employee or contractors – ATO compliance approach

On 15 December 2022, the Commissioner released *Draft Practical Compliance Guideline PCG 2022/D5*) which outlines the Commissioner's compliance approach and risk framework for worker classification.

The review of an arrangement may be the result of proactive case selection or the result of an unpaid superannuation query from a worker where they believe they were entitled to superannuation because:

1. they should have been classified as an employee and not an independent contractor; or
2. they satisfy the extended definition of employee for superannuation purposes.

Risk Framework

The risk framework is made up of 4 zones:

1. very low – whereby no further compliance resources will be applied;
2. low – compliance resources will be applied to test whether the worker meets the extended definition of employee under the *Superannuation Guarantee (Administration) Act 1992* (Cth);
3. medium – compliance resources will be applied to test the correct worker classification for the arrangement but will be given lower priority than arrangements that are rated high risk;
4. high – compliance resources will be applied to test the correct worker classification for the arrangement and will be given the highest priority resourcing. Businesses may be subject to higher penalties if it is found they failed to correctly classify their workers.

Very low-risk arrangements

An arrangement will fall into the very low-risk zone if all of the following are met:

1. there is evidence to show that both parties agreed for the arrangement to have a given worker classification;
2. there is evidence that the parties both understood the tax and superannuation consequences of that classification and intended for that to be the classification;
3. the performance of the arrangement has not deviated significantly from the contractual rights and obligations agreed to by the parties;
4. the relying party obtained specific professional advice confirming that their classification was correct under both the common law definition of employee and the extended definition;
5. the relying party is meeting the correct tax, superannuation and reporting obligations that arise for that classification.

Low-risk arrangements

An arrangement will fall into the low-risk zone if all of the following are met:

1. there is evidence to show that both parties agreed for the arrangement to have a given worker classification;
2. the performance of the arrangement has not deviated significantly from the contractual rights and obligations agreed to by the parties;
3. the relying party obtained specific professional advice confirming that their classification was correct under both the common law definition of employee and the extended definition;
4. the relying party is meeting the correct tax, superannuation and reporting obligations that arise for that classification.

Medium risk arrangements

An arrangement will fall into the medium-risk zone if all of the following are met:

1. there is evidence to show that both parties agreed for the arrangement to have a given worker classification;
2. the relying party obtained specific professional advice confirming that their classification was correct under both the common law definition of employee and the extended definition.

High risk arrangements

An arrangement will fall into the high-risk zone if it does not fall in the very low, low or medium-risk categories.

Material changes to arrangement

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Where a party to an arrangement self-assessed into one of the risk categories in this Guideline when an arrangement was entered into, and circumstances have materially changed, the party will need to reassess to ensure their risk rating has not increased.

ATO reference *Draft Practical Compliance Guideline 2022/D5*
w https://www.ato.gov.au/law/view/document?DocID=DPC/PCG2022D5/NAT/ATO/00001

5.6 DGR Registers reform

Treasury has released for public consultation the exposure draft legislation to change the administration of DGR entities, as part of the wider DGR reforms announced in December 2017.

There are 52 DGR categories set out in Division 30 of the ITAA 1997. Four of the categories are currently administered by portfolio agencies, being the Register of Cultural Organisations, the Register of Environmental Organisations, the Register of Harm Prevention Charities and the Overseas Aid Gift Deductibility Scheme.

The remaining categories are administered by the ATO. The reform will transfer the administration of the remaining four DGR categories to the ATO.

Responses to the consultation may be submitted up to 19 February 2023.

Treasury Consultation- Deductible Gift Recipient (DGR) Registers Reform
w https://treasury.gov.au/consultation/c2023-354087

5.7 NSW duty – leases and change in beneficial ownership

The Chief Commissioner of State Revenue has published *Commissioner's Practice Note CPN 027: Leases and change in beneficial ownership* concerning the circumstances when a grant of a lease will be dutiable in New South Wales.

Recent changes to the *Duties Act 1997* (NSW) now impose duty on a change in beneficial ownership of dutiable property. This includes a grant or extinguishment of a lease of land, unless it is considered to be an excluded transaction.

Excluded Transactions

Creation, variation or termination of a lease for no consideration will not attract duty. In particular, the following transactions are considered to be 'excluded transactions':

1. where there is no consideration exchanged, a grant, renewal or variation of a lease will be considered to be an excluded transaction;
2. the creation, variation or surrender of a tenant's interest in fixtures included in the fit out of a commercial premises provided that no consideration has been exchanged;
3. a tenancy under a lease has changed for no consideration;
4. the expiration, termination or merger of one or more leases provided there is no consideration exchanged.

Where a transaction is already subject to duty under the Duties Act, further duty will not be payable where there is a change in beneficial ownership for the same transaction. Likewise, where a transaction is otherwise exempt from duty, there will be no liability to pay duty where there is a change in beneficial ownership as a result of the same transaction.

However, under section 8(2A) of the Duties Act, an excluded transaction that results in a change in beneficial ownership of dutiable property may be subject to duty if it is part of a scheme or arrangement that, in the Chief Commissioner's opinion, was made with a collateral purpose of reducing the duty otherwise chargeable.

Consideration for a Lease of Land

In the context of the Duties Act, consideration includes monetary consideration and the value of non-monetary consideration. Consideration does not include outgoings paid in respect to a leased property.

The Chief Commissioner notes that if a lease is granted for monetary consideration, duty will be calculated on the consideration paid or to be paid and a valuation will generally not be required.

Consideration does not include payment for use of the right to use the land that is subject to a lease. Rent is considered to be payment for the right to occupy or use the property and is not considered to be payment for the grant or renewal of a lease. Therefore, where only rent is payable under a lease, the grant, renewal or extinguishment will not be subject to duty.

Reference *NSW Commissioner's Practice Note CPN 027: Leases and change in beneficial ownership*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/cpn-027-leases-and-change-in-beneficial-ownership

5.8 NSW duty – change in beneficial ownership

On 1 November 2011, the Commissioner issued CPN 025 which outlines the circumstances for when certain transactions will or will not be dutiable, including imposing duty on transactions that result in a change in beneficial ownership of dutiable property.

The term beneficial ownership has a wide meaning and extends beyond equitable ownership. A person may obtain beneficial ownership if the capacity in which that person holds the dutiable property changes. A change in beneficial ownership includes:

1. the creation of dutiable property;
2. the extinguishment of dutiable property;
3. a change in equitable interests in dutiable property;
4. dutiable property becoming the subject of a trust; and
5. dutiable property ceasing to be the subject of a trust.

The Act also contains a number of excluded transactions, even though they affect a change in beneficial ownership, such as:

1. the purchase, gift, allotment or issue of a unit in a unit trust scheme;
2. the cancellation, redemption or surrender of a unit in a unit trust scheme;
3. the abrogation or alteration of a right relating to a unit in a unit trust scheme;
4. the payment of an account owing for a unit in a unit trust scheme;
5. the grant, renewal or variation of a lease for no consideration;
6. the grant of an easement for no consideration;
7. the grant of a profit a prendre for no consideration;
8. the provision of a security interest within the meaning of the PPSA;
9. a change in trustee's right of indemnity; and
10. the creation of an interest in dutiable property be statute.

The duty applies retrospectively to transactions first executed on or after 19 May 2022.

Revenue NSW reference *CPN 025: Change in Beneficial Ownership*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/cpn-025-change-in-beneficial-ownership

5.9 NSW Shared Equity Home Buyer Scheme launched

The New South Wales Government has launched its Shared Equity Home Buyer Helper initiative. The initiative assists eligible persons to buy a home with a 2% deposit. The initiative involves the NSW Government paying up to 40% of the purchase price and retaining it as equity until such time as the person remains eligible for the shared equity.

Applicant Eligibility Requirements

In order to be eligible for the initiative, applicants must:

1. be 18 years of age or older;
2. be Australian or New Zealand citizens, or permanent Australian residents;
3. have at least a 2% deposit and be able to demonstrate an ability to save over time;
4. be ready to occupy the property as their principal place of residence from the day of settlement (or in the case of multiple applicants, at least one must be ready to occupy the property);
5. require the shared equity contribution from the government to be able to buy a home;
6. be able to secure approval for a home loan from a participating lender;
7. only be able to service a mortgage with the government contribution; and
8. be:
   (a) a single parent of a dependent child or children; or
   (b) single and 50 years of age or older; or
   (c) a key worker i.e. a nurse, midwife, paramedic, teacher, early childhood educator or police officer.

Applicants must not:

1. currently own any land or property;
2. have a gross income of more than $90,000 (in the case of singles) and $120,000 (in the case of couples);
3. not have financial assets (e.g. currency, deposits and investments) worth more than:
   (a) 30% of the purchase price, for joint applicants with a combined gross annual income of more than $90,000; or
   (b) 45% of the purchase price, for applicants with a combined annual income up to $90,000; or
   (c) 65% of the purchase price, for single applicants who are 50 years of age or older.

Eligible properties

The maximum purchase price for a property is capped at $950,000 in Sydney and major regional centres such as Newcastle and Lake Macquarie, Illawarra, Central Coast and North Coast of New South Wales, and $600,000 in other regional areas of NSW.

The property must be:

1. either a house, townhouse, strata unit, company title unit flat or duplex purchased through an eligible agreement of sale; or
2. land, together with an eligible comprehensive home building contract.

The property must not be primary production land, land used for business or a business premises or a holiday home.

w https://www.revenue.nsw.gov.au/grants-schemes/first-home-buyer/shared-equity-home-buyer-helper

5.10 Proposed abolition of AAT

On 16 December 2022, Attorney-General Mark Dreyfus published a media release stating that the Government intends to replace the Administrative Appeals Tribunal (**AAT**) with an administrative review body.

Matters before the AAT will be unaffected and will gradually transition as the new body is set up. Current staff of the AAT will be supported and will transition to the new body once it is established.

w https://www.markdreyfus.com/media/media-releases/albanese-government-to-abolish-administrative-appeals-tribunal-mark-dreyfus-kc-mp/

5.11 SMSFs and schemes involving asset protection

The ATO has identified concerns with SMSF's entering into a 'Vestey Trust' asset protection scheme.

A Vestey Trust is a discretionary trust established by deed. It is claimed that the trust is set up to acquire the equity in SMSF's assets through an equitable mortgage.

The equitable mortgage is supported by the execution of a promissory note by the SMSF to the Vestey Trust. It is recognised as a debt owed by the SMSF to the Vestey Trust. The mortgage is supported by a caveat over the real property.

The ATO's concerns for such schemes are:

1. the arrangement is unnecessary due to the super system already protecting assets from creditors;
2. there are compliance risks and the arrangement may contravene super laws; and
3. an SMSF money cannot be used for costs related to asset protection arrangement entered into by members to protect both their personal and business assets, as these expenses are not incurred in the management of a SMSF.

The ATO encourage anyone involved in such an arrangement to make a voluntary disclosure.

w https://www.ato.gov.au/General/Tax-planning/In-detail/SMSFs-and-schemes-involving-asset-protection/

5.12 Update to ATO website guidance on NFTs

On 7 November 2022, the ATO updated its website guidance on the income tax and GST treatment of non-fungible tokens (NFTs).

For the purposes of income tax, the treatment of an NFT will depend on the circumstances of the taxpayer, how the NFT is used and the reasons for holding and transacting with the NFT.

The ATO has advised that income tax may be payable on a transaction involving an NFT:

1. as a CGT asset;
2. on revenue account as trading stock;
3. as part of a business;
4. as a profit-making scheme.

For the purposes of GST, an NFT is not considered a form of digital currency. GST will be applicable where the transaction involving the NFT is a taxable supply.

For entities that operate NFT marketplaces, that entity will be responsible for GST on NFT transactions facilitated on the marketplace that involve offshore sellers to Australian consumers.

w https://www.ato.gov.au/individuals/investments-and-assets/crypto-asset-investments/transactions---acquiring-and-disposing-of-crypto-assets/non-fungible-tokens/

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5.13 Simplified transfer pricing record-keeping options

The ATO has updated PCG 2017/2 to simplify transfer pricing record-keeping options. The ATO acknowledges that documenting transfer pricing to meet all requirements of Subdivision 284-E of Schedule 1 to the *Taxation Administration Act 1953* can create a disproportionate administrative burden when compared to the low risk of certain entities not complying with the transfer pricing rules. As such, there have been simplified record keeping options developed for transactions and entities the ATO considers are low risk in the context of international related-party dealings.

There are 7 transfer pricing record-keeping options available for (these are ATO headings):

1. small taxpayers;
2. distributors;
3. low value adding intra-group services;
4. low-level inbound loans;
5. materiality;
6. technical services; and
7. low-level outbound loans.

These options are available for taxpayers to apply to income years commencing on or after 1 July 2018. The options are available to companies, trusts and partnerships, if they meet the eligibility criteria. Each of the 7 categories has specific eligibility criteria which must be met in order to apply the simplified record keeping option.

ATO reference *Practical Compliance Guideline 2017/2*
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20172/NAT/ATO/00001

5.14 Updates to COVID-19 concessions for TPB

Annual declaration concessions

The Tax Practitioners Board (TPB) has extended the exemption to complete annual declarations due prior to 30 July 2023. This means that annual declarations due for 30 June 2023 do not need to be completed until 2024 or 2025.

CPE activities

CPE requirements of a 25% cap for relevant technical/professional reading activity in TPB CPE policy were reinstated on 1 January 2023. All other elements of TPB CPE requirements continue to apply.

Educative health and well-being activities

On 1 July 2022, the TPB began to allow 10% of the total CPE to include activities for mental health and wellbeing which can include activities such as attending webinars about how to manage stress and self-care.

Board approved courses

If supervised assessments for TPB approved courses do not adhere to TPB requirements, the TPB may consider the use of alternative assessment arrangements.

w https://www.tpb.gov.au/support-tax-practitioners-affected-coronavirus-covid-19

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5.15 Taxpayer Alert – interposed companies and Division 7A

On 8 February 2023 the ATO released a taxpayer alert concerning the following arrangement:

1. a private company is owned by an individual and has retained earnings;
2. a company is interposed between the private company and the individual, and a CGT rollover is used;
3. the original company pays a dividend of all of its retained earnings to the interposed company;
4. the interposed company loans the amount received to the shareholder and no Division 7A loan agreement is put in place;
5. no deemed dividend arises under Division 7A as the effect of the dividend and the interposition is that neither company has a distributable surplus; and
6. the original company is then wound up.

The ATO considers that, viewed objectively, the arrangement has the dominant purpose of avoiding tax.

The ATO considers that the concerning aspects of the arrangement are whether:

- there is any intention for the purported 'loan' to the individual to be repaid or whether the amount may be taken to be an assessable dividend paid to the individual pursuant to section 109C of Division 7A[8]
- the arrangements comprise a 'dividend stripping' scheme or operation, such that
  - section 177E applies to include the amount of the purported loan in the taxpayer's assessable income, and
  - section 207-145 of the ITAA 1997 applies to cancel the franking credit on the dividend paid to the interposed company, or
- this is a scheme under section 177D to which the general anti-avoidance provisions in Part IVA apply.

ATO reference *Taxpayer Alert 2023/1*
w https://www.ato.gov.au/law/view/document?docid=TPA/TA20231/NAT/ATO/00001