The Tax Institute

Tax Update

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Contents

Our tax training notes are prepared by Matthew McKee, Marianne Dakhoul, Jane Harris, Gillian Tam, Hayden Rudd, Aritree Barua, Emily Halloran, Amy Burriss, Luke Hermez, Samiksha Vaidya and Aaditya Kadam.

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
Item 2.2 South Seas Holdings	In this case, interest deductions were denied where purported loans were not genuine and interest was recorded retrospectively to eliminate taxable income. Management fees were also denied due to lack of documentation and evidence of services provided. The case reinforces the need for contemporaneous evidence to substantiate deductions, including evidence of services being rendered in the case of management fees.	Page 12
Items 2.4 and 6.1 Derivation of income	inaccessible interest – Interest is only derived when it has “come home” to the taxpayer — meaning it is received, credited to an account from which the taxpayer can withdraw, or applied at their direction. In *Bennetts* and in a PBR example, income was not derived until actually paid, as the taxpayers had no enforceable entitlement to the funds in earlier years.	Pages 19 and 55
Item 2.5 Hussein and NSW land tax	In this case, the NCAT confirmed that the “excluded residential occupancy” concession for land tax only applies where the tenanted unit or suite of rooms is physically contained within the owner-occupied building. The decision has significant implications for granny flats and similar arrangements in New South Wales, as it confirms that detached dwellings will not obtain a full principal place of residence exemption, only a mixed-use reduction.	Page 20
Item 3.1 Uber and payroll tax	The Court of Appeal of New South Wales has handed down a decision on the relevant contract provisions for payroll tax that underscores the importance of analysing tripartite arrangements to determine whether relevant contracts exist for payroll tax purposes. The decision has practical implications beyond ride-sharing, particularly for medical and allied health arrangements, and for bundled service agreements versus narrow, separate service agreements.	Page 32
Items 3.2 and 7.1 PepsiCo, Royalties and withholding tax	The High Court has dismissed the Commissioner's appeal in the PepsiCo litigation finding for the taxpayer that payments under bottling agreement were not royalties. This decision has significant implications for embedded royalties arrangements. The ATO has also issued draft guidance on low-risk payments for software and when such payments will be subject to withholding tax as a royalty.	Pages 36 and 66

2. Detailed case summaries

2.1 SBXB – alienation of services income

Facts

SBXB is an individual. SBXB implemented a complex business structure using trusts and companies. The core business was the operation of a cattle farm in New South Wales, and an operation involving the testing, processing and development of a silicon rock called diatomaceous earth (**DE**), which is commonly used in pest control.

SBXB controlled the following entities:

1. an Australian discretionary trust, of which BN Ltd was trustee and SBXB, his wife and children as beneficiaries. The trust was referred to as **Family Trust 2** in the ART decision;
2. YSPQ, a company which entered into consulting agreements with A Ltd and S Ltd to provide executive management services. SBXB was the sole director and shareholder of YSPQ;
3. TB Ltd, being the entity that owned the farm land; and
4. Stock Ltd, being the entity that owned all stock on the farm.

BN Ltd had shares in a company referred to as S Ltd. S Ltd was a mining exploration company. BN Ltd also had shares in A Ltd, a company that used some of the land owned by TB Ltd to as part of the testing, processing, development and potentially commercialising the DE.

On 8 October 2008, Deeds of Bare Trust were executed between BN Ltd and YSPQ, TB Ltd and Stock Ltd, stating that each company "*has at all times*" "*continues to*" and "*will in future*" act, hold all assets, receive all income and incur liabilities "*solely as bare sub-trustee for* [BN Ltd as trustee for Family Trust 2]."

The Deeds of Bare Trust also provided that each sub-trustee would:

> *(a) deal with assets, and incur liabilities only as instructed by* [BN Ltd as trustee for Family Trust 2]*;*
> *(b) act promptly in relation to instructions from* [BN Ltd as trustee for Family Trust 2]*; and*
> *(c) be indemnified by* [BN Ltd as trustee for Family Trust 2] *against all liabilities that are incurred from acting as Sub-Trustee.*

Between 1 December 2010 and 1 July 2013, several consulting agreements were entered into. A Ltd signed agreements with SBXB on 1 December 2010 and with YSPQ on 1 July 2013. S Ltd signed agreements with SBXB on 1 March 2011 and with YSPQ on 21 April 2011. These agreements provided for substantial service fees. The agreements described the services as executive management services of SBXB.

On 26 September 2011, 8 September 2011, 15 June 2012 and 13 August 2013, Apparent Purchaser Deeds and a Declaration of Trust were executed in which SBXB was said to hold properties in Sydney, Mittagong and Northbridge as nominee or trustee for BN Ltd or other parties.

Funding for the purchases was allegedly provided to SBXB from Family Trust 2, with financing arranged through bank loans in SBXB's name. SBXB implied that the funding was obtained from the banks in his capacity as bare trustee for the Family Trust 2.

On 5 August 2013, SBXB met with ATO officers in the context of a GST inquiry. On 6 August 2015, a further meeting took place where SBXB explained the trust structure and claimed payments from A Ltd and S Ltd were reimbursements or loan repayments. SBXB told the Commissioner that the business structure meant advances between entities, such as A Ltd, S Ltd, YSPQ and other related companies, were essentially movements of

funds within Family Trust 2 itself. In his view, these were not taxable transactions but internal financing within the trust group.

On 22 May 2015, the Commissioner commenced a risk review of SBXB and his related entities after noting significant deposits in SBXB's bank accounts inconsistent with reported income and that his lifestyle did not reflect a nominal income.

SBXB explained that other than where the payments were for the reimbursement of expenses that SBXB had incurred for A Ltd or S Ltd or the repayment of advances made by SBXB, any payments deposited in SBXB's accounts were received as bare trustee of Family Trust 2.

On 16 May 2016, SBXB lodged overdue personal tax returns for the years ended 30 June 2002 to 30 June 2009.

On 14 June 2016, an income tax audit was formally initiated.

On 5 August 2016, SBXB lodged overdue personal returns with nominal income between zero and three dollars for the income years ended 30 June 2011 to 30 June 2015. He believed he was not required to lodge given there was effectively no income to declare. The tax returns for Family Trust 2 for the relevant years were also prepared in 2016 and sent to the ATO investigation team, but not lodged via the ATO portal.

On 12 December 2017, the Commissioner determined that YSPQ was not a personal services business for the 2013 to 2015 income years, with the result that income should have been attributed to SBXB.

On 12 June 2018, the Commissioner issued amended default assessments to SBXB for the 2011 to 2015 income years, asserting that payments from A Ltd and S Ltd to YSPQ were ordinary or personal services income of SBXB. Administrative penalties of 75% for intentional disregard were imposed and increased by 20% under section 284-220(1) of Schedule 1 to the TAA.

On 27 February 2018 for YSPQ and 11 July 2018 for SBXB, objections were lodged against the assessments.

On 9 December 2021, the Commissioner disallowed both objections.

On 2 February 2022, SBXB and YSPQ applied to the AAT (now the ART) for review of the objection decisions.

SBXB argued that he was not personally liable for tax on the payments in question because he acted solely as a bare trustee for the family trust. SBXB said all assets and liabilities he held, apart from personal clothing, were owned beneficially by Family Trust 2, and any payments received from A Ltd or S Ltd were either reimbursements of expenses he had paid on their behalf or repayments of advances he had made, or otherwise received as bare trustee for Family Trust 2.

SBXB maintained that consultancy services were provided by YSPQ as bare trustee for Family Trust 2under the consultancy agreements, not by him personally, and that any income from those agreements belonged to Family Trust 2. SBXB said any tax on that income would have been offset by substantial losses from the farming business, which he claimed meant Family Trust 2 had no tax liability and, therefore, did not need to lodge returns at the time.

SBXB also claimed that documents showing him as an employee or recipient of salary from A Ltd or S Ltd, including payslips, bank forms and consultancy agreements naming him personally, were not accurate. According to SBXB, these were created on the advice of a mortgage broker to satisfy bank lending requirements and did not reflect the true arrangements.

SXBX claimed that, despite the terms of the consulting agreements, the arrangements with A Ltd and S Ltd were not for services but, instead, were for the use of assets or, in the case of S Ltd, for the results of testing. Accordingly, the income earned from S Ltd and A Ltd was not mainly a reward for the services of SBXB under

the personal services income rules. SBXB contended that, for the purpose of the personal services income rules, the arrangements is substance need to be considered and not merely the contractual terms.

The Commissioner argued that SBXB had failed to prove the amended assessments for the 2011 to 2015 income years were incorrect. Payments from A Ltd and S Ltd were said to be either ordinary income or personal services income derived directly by SBXB, not by YSPQ or Family Trust 2. The Commissioner rejected the claim that SBXB acted solely as a bare trustee for Family Trust 2, pointing to evidence that the companies and SBXB exercised control over assets and engaged in transactions inconsistent with bare trust status. SBXB's wife, due to a lack of memory, was unable to recall what a bare trust was, and admitted that she would often sign documents without knowing their contents and fully trusted her husband as to business decisions.

The Commissioner also contended that SBXB was personally engaged by A Ltd and S Ltd under validly executed consultancy agreements and that bank, loan and property documents, as well as payslips and superannuation contributions, showed he was treated as an employee or direct contractor.

The Commissioner also concluded that the personal services income rules from the arrangements with A Ltd and S Ltd would apply to attribute the income to SBXB.

It was further argued that the tax losses of Family Trust 2 were not substantiated because its returns were lodged late and its claimed bare trustee arrangements were not proven. The Commissioner maintained that there was evasion, justifying unlimited amendment periods, and that penalties of 75% for intentional disregard of the law were correctly imposed and subject to a 20% uplift in most years.

The Commissioner also relied on Part IVA of the ITAA 1936 in the ART as an alternative basis for assessment, on the basis that the structure was entered into or carried out for the dominant purpose of obtaining a tax benefit. However, there was no determination under section 177F of the ITAA 1936, and this matter did not proceed through the General Anti-Avoidance Rules (**GAAR**) Panel in the ATO.

Issues

1. Did SBXB prove that the amended assessments were incorrect, including whether the payments from A Ltd and S Ltd were his ordinary income or personal services income, or instead income of Family Trust 2 received by him as bare trustee?
2. Were the penalties and penalty uplifts lawfully and correctly imposed, and should any of those penalties or the shortfall interest charge be remitted?

Decision

The ART had difficulties accepting SBXB's evidence and credibility. This was mainly due to SBXB constantly shifting blame onto advisers as to the management of trusts and other matters. There were also significant inconsistencies in the evidence, including SBXB's evidence that some of the consultancy agreements were correct, while others were to be ignored and that payslip evidence was prepared to create a false evidential trail for a bank in order to obtain financing.

<u>Existence of a bare trust</u>

The ART examined whether YSPQ, TB Ltd, Stock Ltd, SBXB, SBXB’s wife and other associated companies were acting solely as bare trustees for Family Trust 2, as SBXB claimed.

The ART considered the Deeds of Bare Trust dated 8 October 2008, which on their face required each sub-trustee to hold all assets and liabilities only as directed by BN Ltd as trustee of Family Trust 2. The ART concluded that the bare trust deeds were validly executed, and they were not dated retrospectively. The ART also explored the case law in relation to arrangements which constitute a bare trust arrangement, including that a bare trust is an arrangement where a trustee holds property for a beneficiary, without any interest in the

property, other than by legal title as trustee. The trustee has no duty to perform except to convey upon demand of the beneficiary. In addition, a bare trustee does not have the power to dispose or actively manage trust property, and its duties and rights are limited to protecting the trust assets.

The ART found that the way the entities operated in practice was inconsistent with bare trust status. YSPQ, TB Ltd and Stock Ltd clearly had broad discretion in relation to the management of the trust assets, and that management exceeded what is usually allowed is a bare trust arrangement. The ART found that by engaging in agistment, TB Ltd engaged in duties of active management which are contrary to bare trust status. In addition, income from agistment was derived by Family Trust 2.

The ART noted that it is not satisfactory to have assets said to be bare trust assets disposed of without seeing directions from the ultimate beneficiary directing that happen. There was no evidence that BN Ltd, as head trustee, directed TB Ltd to sell a parcel of land, nor were such directions evident in relation to transactions involving motor vehicles.

The ART also noted that some assets were held for other parties under separate Apparent Purchaser Deeds or declarations of trust, which undercut the claim that all assets were held for Family Trust 2. The absence of trustee resolutions or other contemporaneous instructions, together with inconsistencies in the financial records, further weakened SBXB's case.

In the end, the ART accepted that SBXB acted as a bare trustee only in respect of the specific properties covered by the Apparent Purchaser Deeds and the Declaration of Trust. It was not satisfied, on the balance of probabilities, that YSPQ, TB Ltd, Stock Ltd, SBXB, his wife or the other companies were bare trustees for Family Trust 2 for all assets and liabilities as claimed.

Derivation of income

The ART considered that, given the inconsistencies in the evidence, SBXB had not satisfied the onus that the payments made to him by A Ltd and S Ltd was not his own income. The ART noted that, while some payments made by A Ltd and S Ltd may be reimbursement of expenses, there was insufficient evidence to establish which payments were reimbursements.

Accordingly, the ART considered that SBXB derived ordinary income.

Personal services income

The ART also considered whether the payments from A Ltd and S Ltd met the definition of personal services income (**PSI**) under section 84-5 of the ITAA 1997 and, if so, whether Family Trust 2 qualified as a personal services business (**PSB**) under Subdivision 87-A. Such a finding would mean that the income was assessable income of Family Trust 2, rather than being attributed to SBXB personally.

The consultancy agreements described executive management, corporate oversight, exploration program supervision and public representation of the companies. These were activities carried out personally by SBXB. While some agreements named YSPQ, others named SBXB directly. The ART did not accept SBXB's explanation that the agreements naming him were created only for bank purposes, noting they were validly executed and no independent evidence supported his claim. The ART found that the payments were for SBXB's personal efforts.

The ART then considered whether the Family Trust 2 was a PSB and whether a PSB determination should have been issued.

The first test considered was the results test in section 87-18 of the ITAA 1997. For this test to be satisfied, it was necessary that YSPQ was paid to achieve a specific outcome, was responsible for fixing any problems, and supplied the main equipment needed for the work. The ART found the test was not met. SBXB was paid a

fixed fee regardless of results, did not bear responsibility for rectifying defects and mainly used the clients' resources and premises.

The unrelated clients test in section 87-20 of the ITAA 1997 was considered. If this test had been met, it would have shown that work was gained from at least two unrelated clients as a result of making offers to the public. The ART found this test was not met because almost all the work was done for A Ltd and S Ltd, which were related entities in the same group.

The employment test in section 87-25 of the ITAA 1997 was not met because there were no employees or contractors engaged to perform at least 20% of the principal work. The business premises test in section 87-30 of the ITAA 1997 was not satisfied because there were no business premises used exclusively by Family Trust 2 that were physically separate from the premises of A Ltd and S Ltd.

On the basis that none of the statutory tests were met, the ART concluded that there was no entitlement to a PSB determination. The payments from A Ltd and S Ltd were, therefore, assessable to SBXB under the PSI rules.

Availability of losses

The ART considered at whether the family trust had tax losses available to offset any income.

It noted that returns for the relevant years were prepared in 2016 but not lodged through the ATO portal, and earlier years' returns were also lodged very late. The ART emphasised that tax losses only arise when returns are lodged, so without timely lodgement there were no legally recognised losses to carry forward.

There was also conflicting evidence about whether the family trust even had a tax file number, and the financial statements relied upon were prepared after the Commissioner's investigation began, reducing their weight.

The ART ultimately found it could not be satisfied that valid, available losses existed for the family trust in the relevant years, so no offset could be applied in respect of the amended assessments in dispute.

Penalties

The ART found that the base penalty for intentional disregard of the law was properly applied in each relevant year having regard to the following:

1. failure to lodge returns – neither SBXB nor Family Trust 2 lodged returns before the Commissioner's review, obscuring the source of substantial fees. This was a deliberate decision, not an inadvertent omission;
2. awareness of benefits – SBXB understood the financial advantages of the structure, with millions deposited to personal accounts, and sought to avoid tax by asserting a bare trust arrangement.
3. lack of records – minimal and inconsistent records were kept, much created after the fact, failing to substantiate the bare trust claim;
4. knowledge of non-compliance – the ART rejected the taxpayer's claim of believing they earned no or nominal income, noting the following:
    (a) consultancy agreements validly engaged the taxpayer for services rendered; the taxpayer simply dismissed them as false;
    (b) payments, payslips, and superannuation contributions evidenced income, which the taxpayer ignored;
    (c) bank declarations described the taxpayer as an employee; these were said to be false but were disregarded by the taxpayer;
    (d) the inconsistent characterisation payments as reimbursements or loan repayments, unsupported by corporate records;
    (e) distributions recorded in Family Trust 2 returns were denied without persuasive explanation; and

(f) there were large unexplained deposits were received from multiple sources.

5. dishonest conduct – SBXB accepted making false statements and documents to banks, based on personal views of harm, evidencing willingness to act dishonestly.
6. acceptance of evasion – SBXB did not contest the Commissioner's evasion finding; while distinct from intentional disregard, evasion also requires blameworthy conduct; and
7. implausible income levels – declaring $0–$3 income while controlling large sums had a "too good to be true" quality, making it improbable this was due to innocent error.

On the uplift, the ART determined that paragraph 284-220(1)(a) of Schedule 1 of the TAA, which provides for a 20% uplift in a penalty where a taxpayer hinders or obstructs the Commissioner in an investigation, did not apply because the ART considered that the conduct identified did not prevent or obstruct the Commissioner from discovering the shortfall. Paragraph 284-220(1)(c), which applies where a prior-year penalty exists, was valid for all years except 2011, since there was no earlier penalty for that year.

While the penalties themselves were upheld, the ART noted there was no existing objection decision on remission of penalties, the uplift, or the shortfall interest charge, and those matters were remitted to the Commissioner for reconsideration in line with statutory provisions and the ART's recommendations.

COMMENT – the ART criticised Example 12 of *Practice Statement Law Administration* PS LA 2012/5 for implying that remission of a base penalty uplift cannot be considered where an intentional disregard penalty is applied. It noted that the legislation contains no such restriction and that case law requires the Commissioner to consider all circumstances in each case.

Citation *SBXB and Commissioner of Taxation (Taxation)* [2025] ARTA 999 (General Member J Dunne, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/999.html

2.2 South Seas Holdings – deductibility of interest and management fees

Facts

Vanda Gould is former tax accountant with a large number of associated entities. From the early 2000s, Vanda and his long-time associate, stockbroker John Leaver, allegedly used an internal financing structure often described as the "CVC entities" to channel funds between their various companies. According to Vanda, this arrangement functioned as an in-house bank for his private group, borrowing from offshore funders and then on-lending those funds to Australian entities within the network, including:

1. Southsea Nominees Pty Ltd as trustee for the Gould Family Trust;
2. Philadelphia Investments Pty Ltd (wholly owned by Southsea Nominees Pty Ltd as trustee for the Gould Family Trust);
3. South Seas Holdings Pty Ltd as trustee for the VR Gould Family Settlement Share Trust; and
4. Education Corporation of Australia Pty Ltd as trustee for the Educational Gold Trust.

Over the years 2001 to 2014, these entities claimed significant deductions for interest and management fees.

During the 2002 to 2014 income years, the Gould Family Trust claimed large interest deductions under section 8-1 of the ITAA 1997 for loans to related entities said to have been funded through the CVC entities' offshore borrowings. It also claimed substantial management fees for amounts charged by Melbourne Corporation Pty Ltd, a related company within Vanda's network which provided administrative and financial services to other group entities. Examples included $235,000 in 2006, $87,500 in 2007, $250,000 in 2008, $145,000 in 2009, $200,000 in 2010, and smaller amounts in later years. The Gould Family Trust also applied carried-forward tax

losses to offset income in several years, relying on pre-2001 losses that themselves depended on earlier interest deductions being valid. In 2014, the trustee of the Gould Family Trust was assessed on a deemed dividend under Division 7A of the ITAA 1936. The Commissioner refused to exercise the discretion under section 109RB to treat the deemed dividend as frankable.

Philadelphia Investments Pty Ltd claimed interest deductions on loans from the Gould Family Trust and other related entities said to have been funded via the CVC structure. It also claimed management fees of $50,000 in 2005 from Melbourne Corporation Pty Ltd and $100,000 in 2009 from the Gould Family Trust. In addition, it applied capital losses under Part 3-1 of the ITAA 1997 to reduce capital gains in later years.

The VR Gould Family Settlement Share Trust followed a similar pattern, claiming interest deductions on loans from the Gould Family Trust allegedly funded through the CVC structure. In 2009, it also claimed a $5,000 management fee deduction for a charge from the Gould Family Trust.

The Educational Gold Trust's deductions were linked to direct borrowings from an offshore lender. In 2001, it borrowed $1 million for a Surfers Paradise property purchase. In November 2008, it borrowed $15 million for an intended commercial property investment, which was repaid in November 2009. In February 2009, it borrowed $900,000 to refinance a Broadbeach property, followed by further borrowing in 2010 to repay a Suncorp loan. Interest deductions were claimed for each of these loans under section 8-1 of the ITAA 1997.

The ATO conducted audits into the taxation affairs of the Taxpayers during the 2001 to 2014 income years. The audits focused on the legitimacy of claimed deductions and whether prior-year losses and capital losses had been correctly carried forward. The Commissioner concluded that the deductions were not properly allowable and that some prior-year losses and capital losses had not been substantiated.

Following extensive audits, the Commissioner concluded that the interest and management fee deductions claimed by the four entities were not genuine and that the transactions on which they were based were artificial or circular in nature. Original and amended assessments were issued, with some amendments made under the fraud or evasion provisions in section 170 of the ITAA 1936, enabling reassessment back to 2001. Shortfall penalties of 75% were imposed and remission was refused.

While the taxpayers' objections to these assessments and penalty decisions were still pending, the Commissioner took an additional step. Determinations were made under Part IVA of the ITAA 1936, the general anti-avoidance rules, in respect of all four entities. These determinations stated that, even if the deductions were otherwise allowable under section 8-1 of the ITAA 1997, they should be cancelled because the arrangements giving rise to them were schemes entered into with the dominant purpose of obtaining a tax benefit. This provided the Commissioner with an alternative and independent basis for disallowing the deductions.

In 2019, the Commissioner finalised the objections, wholly disallowing those of two entities and substantially disallowing the others.

The taxpayers sought review of the objection decisions in the Federal Court.

The taxpayers contended that the deductions were supported by valid and enforceable contractual arrangements, most of which had been established by Vanda in his capacity as director of the relevant entities. They argued that the interest deductions related to genuine business loans on reasonable terms, and that the management fees were for actual services provided at reasonable rates. The taxpayers relied on accounting records as evidence of these arrangements, asserting that any imperfections in the evidence or records were explainable given the passage of time. The taxpayers also argued that the Commissioner's finding of fraud or evasion, which allowed assessments to be made back to 2001, was without proper foundation.

The Commissioner argued that the taxpayers had not genuinely incurred the interest or management fee liabilities and that the accounting entries did not reflect real transactions. Instead, the amounts represented

movements of funds between entities controlled by Vanda, undertaken solely for tax purposes. It was said that many amounts were balancing items to minimise tax, with labels such as “interest” and “management fees” applied after the fact as contrived descriptions. The Commissioner contended that interest and management fees were often determined in an opaque manner after year end, on an inconsistent basis, and often to ensure that there was little or no tax liability in the tax year in which they were claimed.

Issues

1. Were the interest expenses claimed by the four entities in the 2002–2014 income years deductible under section 8-1 of the ITAA 1997?
2. Were management fee expenses claimed by the four entities in the 2002–2014 income years deductible under section 8-1 of the ITAA 1997?
3. Was there fraud or evasion within the meaning of section 170 of the ITAA 1936 that permitted the Commissioner to amend assessments outside the usual time limits?
4. Did the taxpayers prove that the administrative penalties imposed at the rate of 75% for intentional disregard of the law were excessive and should be reduced or remitted?

Decision

Interest expenses

The only evidence to support the claim that the interest and management fees were outgoings incurred for a business purpose came from Vanda. The Court found that Vanda's evidence was "lacking in credibility at every turn". The Court concluded that the loans said to give rise to the interest deductions were not genuine arm’s length borrowings, but rather internal, circular movements of funds between entities under Vanda’s control. The CVC structure operated within Vanda’s network was not a true commercial lending arrangement, and the offshore “lenders” involved were ultimately controlled or influenced by him. Many of the “interest” amounts were calculated and recorded retrospectively through end-of-year journal entries, often set at levels that eliminated taxable income, indicating a tax-driven purpose rather than a genuine cost of finance. In light of this, the Court held that the taxpayers had not proved the interest was actually incurred in gaining or producing assessable income, and the Court determined that the interest expenses were not deductible under section 8-1 of the ITAA 1997.

Management fees

The management fees were undocumented, inconsistently applied, and unsupported by any clear explanation of the services said to have been provided. The amounts fluctuated markedly from year to year and were frequently determined late in the financial year through journal entries between related entities. No contemporaneous records demonstrated that substantive management or consultancy services had in fact been performed. These patterns suggested that the charges were contrived for tax purposes rather than arising from genuine commercial transactions. In light of these findings, the Court concluded that the taxpayers had not discharged the onus of proving that the management fees were incurred in gaining or producing assessable income, and therefore held that the amounts were not deductible under section 8-1 of the ITAA 1997.

Fraud or evasion

Justice Colvin considered whether the conduct fell within the meaning of evasion under section 170 of the ITAA 1936, which would permit the Commissioner to amend assessments beyond the usual limitation periods. His Honour found that Vanda engaged in conduct calculated to conceal the true nature of the transactions and to prevent the Commissioner from discovering that there were no genuine outgoings. This conduct included providing misleading information to the ATO about his control over offshore entities, resisting disclosure of relevant information, and presenting the arrangements as legitimate external financing when, in reality, they were not. The Court accepted that these actions amounted to an intentional omission or misrepresentation

which resulted in tax being underpaid. On that basis, the Court concluded that there was evasion, enabling the Commissioner to amend earlier years' assessments outside the normal time limits.

Penalties

The Court found that the taxpayers failed to prove the 75% penalties for intentional disregard of the taxation law were excessive. Justice Colvin held that Vanda's evidence was so inconsistent, incomplete, and lacking in credibility that it could not sustain a finding that he did **not** deliberately ignore the law. While the Court stopped short of making an affirmative finding of dishonesty or intentional disregard, it found that the credibility issues and evasive explanations meant the taxpayers did not discharge their onus to show there was no basis for the penalties.

As to remission, the Court held that the taxpayers needed to show an error of law in the Commissioner's decision not to remit the penalties, but they advanced no substantive argument on that point. Without such a basis, the Court declined to interfere, and the penalties stood in full.

COMMENT – this case is a reminder that neither the Commissioner nor a court is obliged to accept accounting records at face value, even when they are admissible as evidence of the truth of their contents. Their weight will depend on the surrounding evidence, particularly where the credibility of those responsible for the entries is in question. In this case, the Commissioner's challenge went beyond mere accounting entries, focusing on whether the transactions recorded actually occurred, so the ledgers and financial statements carried little persuasive force on their own.

Citation *South Seas Holdings Pty Ltd (Trustee) v Commissioner of Taxation* [2025] FCA 848 (Colvin J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/848.html

2.3 BHMH – income of a child care centre

Facts

On 12 December 2011, BHMH and his wife, NQWK, established a discretionary family trust and incorporated a company to act as trustee. They were the directors and shareholders of the trustee company, and BHMH's sister HYDW was named a secondary beneficiary of the trust.

On 8 May 2012, BHMH and NQWK applied for government approval for the trust to operate a child care service. On 18 June 2012, the department approved the child care service, allowing the trust to access government subsidies such as the Child Care Benefit and Child Care Rebate.

Between April 2012 and August 2015, the child care service engaged 600 to 700 educators to provide family day care to about 5,400 children, mainly in low-income areas. The trustee company charged an administrative fee to each Educator (on a per child, per hour basis) for collecting fees, reporting to the government department and passing the payments to educators. The trustee company subtracted the administrative fee from the subsidies it received from the government department, before paying the balance of the subsidies to educators.

From May 2014, departmental reviews raised concerns about reporting inaccuracies, including sessions recorded where no care occurred.

On 6 August 2014, BHMH and NQWK attended an education session where they acknowledged their responsibility for setting service fees and ensuring compliance with the relevant laws (**Family Assistance Laws**).

On 1 July 2015, the government department advised it was considering cancelling the approval of the child care service provided by the trustee company for non-compliance. Further investigations revealed widespread reporting discrepancies.

On 13 August 2015 the government department cancelled the approval of the child care service provided by the trustee company. NQWK informed her and BHMH's accountant that they would wind up the business. The trustee company was deregistered on 2 February 2017, and the trust was vested on 16 December 2017.

After the child care centre closed, the ATO commenced an audit of the trust. The ATO determined that the trust failed to declare as part of its income the total child care fees charged to parents, being the total subsidy under the Family Assistance Laws and the "gap payment".

In 2018, the Commissioner of Taxation issued amended assessments to the trustee of the trust and alternative assessments to BHMH, NQWK, and HYDW, totalling $9,896.599 and imposed penalties for BHMH and NQWK. The assessments were based on data reported by the child care centre to the government department about the family day care services supposedly provided, the total child care fees charged for each child in care, and the resulting subsidies paid to the child care centre.

On 6 August 2018, objections were lodged against the assessments. The Commissioner’s objection decision in December 2021 upheld the position that the trust had under-reported its income, allowed only part of claimed deductions, and maintained penalties.

BHMH, NQWK and HYDW objected to the assessments. BHMH, NQWK and HYDW argued that the income of the trust was correctly reported for tax purposes (save for a small amount of interest which was overlooked) on the basis that only the administration fees subtracted from the subsidies were income of the trust. BHMH, NQWK and HYDW argued that the total child care fees charged for family day care services were passed on to the educators and were not income of the trust.

The objections were disallowed and BHMH, NQWK and HYDW appealed to the AAT (now the ART).

Before the ART, BHMH, NQWK and HYDW argued that only the administration fees subtracted from the subsidies were income of the trust and that the total child care fees charged for family day care services were not income of the trust.

BHMH, NQWK and HYDW summarised the business model broadly as follows:

1. the trust only reported to the government department the fees that educators said they charged for each session of care, without receiving any fees from parents, as the fees belonged to the educators;
2. the trustee company did not contract with parents, but acted as an agent for each educator, which included remitting Child Care Benefit and Child Care Rebate payments (minus the administrative fee and other deductions) to them;
3. the educators were engaged as contractors, operating as independent business owners with the ability to set their own fees, and their contracts with the trust were documented in application forms, checklists, and the policy handbook;
4. parents were entirely liable to the educators, who contracted directly with them to provide the services, with these arrangements recorded in Educator-Parent Contracts; and
5. the trust's role was to hold Child Care Benefit and Child Care Rebate payments received from the government department and pass them on to educators (after deducting the administrative fee and expenses) on behalf of the parents, who were liable for the full child care fees charged to educators, not to the trust.

In the alternative, BHMH, NQWK and HYDW argued that they had proved their deduction claims and that the amounts paid by the trust to the educators should be treated as allowable deductions.

BHMH, NQWK and HYDW submitted as evidence a small number of enrolment forms, a manual describing the enrolment process, and a small number of contracts. They did not produce any business records of the child care centre, as they had seemingly been lost, misplaced or destroyed. BHMH, NQWK and HYDW also did not call any coordinators of the child care centre, parents or educators to give evidence about the enrolment process.

The Commissioner argued that BHMH, NQWK and HYDW's contention that there was a contractual arrangement between the parents and the educators conflicted with the trust's statutory obligations under the Family Assistance Laws governing operation of an approved child care service.

BHMH, NQWK and HYDW argued the Family Assistance Laws were irrelevant to the present case. BHMH, NQWK and HYDW argued that the Family Assistance Laws merely provided for payment of the subsidies and did not dictate the business model or taxation consequences.

BHMH, NQWK, and HYDW also argued that, if the Commissioner was correct in saying the trustee company had any right to the “gap payments,” it must have assigned that right to the educators as part of their contracts. They said this meant the trustee company had given up any entitlement before receiving the payments, so the gap payments and total child care fees could not be assessable income of the trust. The Commissioner disagreed, pointing out there was no legal or factual basis for such an assignment under the Family Assistance Laws, and no evidence the necessary preconditions for an assignment existed in this case.

Issues

1. Were the total child care fees reported to the government department income of the trust, or was its income limited to the administrative fees and other charges it retained?
2. In the alternative, to what extent were the payments to educators and other claimed business expenses allowable deductions from the trust's assessable income?
3. Did BHMH, NQWK and HYDW prove that the Commissioner’s amended assessments for the 2014, 2015, and 2016 income years were excessive, and what was the correct taxable income for those years?

Decision

Fees included in assessable income

The ART accepted that the educators were engaged as contractors. However, the ART was not persuaded that the educators controlled the fee-setting at the child care centre. The ART was also not satisfied that fees were set with parents by educators.

The ART accepted that the trustee company may have permitted or required the educators to collect the gap payments as part payment for their services. However, the ART did not accept that this proved the educators were contracting with parents independently of the child care centre. Under the Family Assistance Laws, the parents’ liability for the fees was to the child care service operated by the trust, not to the educators. The service was the approved provider, controlled fee setting, reported the fees to the government department, and was legally responsible for their accuracy.

The ART concluded that the total child care fees charged (comprising both the subsidy and the gap payment) were income derived by the trust and distributed to BHMH, NQWK and HYDW for the purposes of section 6-5 of the ITAA 1997. Under the Family Assistance Laws, the trust was reporting to the government department that a recoverable debt had arisen against the parents for the total child care fees charged for the sessions of care provided. It was at this point, for accrual accounting purposes, income was derived, as it triggered the subsidy payment to reduce the parent's lability.

Even if the amounts were later passed to educators, the fees were derived by the Family Trust for tax purposes, as it accounted on an accrual basis and had the legal right to recover them.

The ART concluded that there was no valid assignment of the gap payments to the educators. It found that, under the Family Assistance Laws, liability for the total child care fees was between the parents and the approved child care service provider, and there was no provision for that liability to be assigned to a third party. The ART also noted there was no evidence the Family Trust had the present legal right to the gap payments necessary for an assignment, and the limited evidence about their collection was conflicting. As a result, the gap payments remained part of the Family Trust's assessable income.

Deductions

The ART accepted that payments to educators were deductible, but not in full. The Commissioner had only allowed 70% of these payments as deductions, on the basis that there was insufficient reliable evidence to verify the full amounts claimed. The ART agreed that the lack of complete, accurate records, contrary to the legal obligations under both Family Assistance Laws and tax laws, justified the reduced allowance. As for the other claimed business expenses, the ART found that some were allowable, but again, many could not be substantiated and so were not deductible in full.

Onus of proof

BHMH, NQWK and HYDW had the onus of proving that, on the balance of probabilities, the amended assessments were excessive. Evidence was required to prove that there was a contract between the Educators and the parents. However, the ART found the evidence led by BHMH, NQWK and HYDW was "sparse, highly contrived and conflicted with their own contemporaneous records". There were a number of gaps and inconsistencies in the evidence. For example:

1. the contracts before the ART comprised different versions of the document and did not contain the essential element of consideration (the fees to be charged);
2. the contracts required information to be completed about 'Gap Fee Payment Made Direct to Educator by ….', but many of the contracts before the ART did not have this information. BHMH, NQWK and HYDW also led no evidence about how gap payments were managed and it was as if they had no knowledge about how it worked;
3. the taxpayers contended that the educators were free to set whatever fee they wished, however, in cross examination, BHMH conceded that the trust could control the fees;
4. the records of interview with the former educators contradicted contention that the educators contracted independently with the parents and set their own fees. Many of the educators were vulnerable - migrants with limited education and command of the English language. They were not sophisticated business operators and their recollections in the recording were not accurate; and
5. the records of the trust and the spreadsheets compiled by the Department disclose an enrolment process which is broadly compatible with the Family Assistance Laws.

In the absence of supporting evidence, the ART was not satisfied that the business expenses had been substantiated. The ART found that BHMH, NQWK and HYDW did not discharge their onus of proving that the assessments were excessive.

TIP – the ART referred to *Taxation Ruling* TR 98/1, which describes the earnings (accrual) method of tax accounting as follows:

Under the receipts method, income is derived when it is received, either actually or constructively, under subsection 6-5(4) of the ITAA 1997. The effect of that subsection is that income is taken to have been derived by a person although it is not actually paid over, but is dealt with on his/her behalf or as he/she directs.

TR 98/1 states that for tax purposes, under this method, "income is derived when it is earned. The point of derivation occurs when a 'recoverable debt' is created."

Citation *BHMH & Ors and Federal Commissioner of Taxation* [2025] ARTA 996 (Senior Member J Lye, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/996.html

2.4 Bennetts – timing of derivation of interest

Facts

Darren Bennetts was a bricklayer who worked in Victoria. He was an employee and later worked as a sub-contractor until he retired in 2021 due to ill health.

Darren was a beneficiary of the Construction Industry Long Service Leave Fund. Employers in the building and construction industry are required to make contributions to the Fund, and working sub-contractors, including Darren, could voluntarily elect to participate in the Fund. The purpose of the Fund is to ensure workers can access long service payments after a period of continuous employment, despite moving between jobs but remaining in the industry.

The Fund is managed by a trust deed and is regulated by the *Construction Industry Long Service Leave Act 1997* (Vic). In addition, the Fund is governed by the Rules of the Construction Industry Long Service Leave Fund (**Rules**). Once a number of criteria were met, including a period of continuous service of between 7 to 10 years, beneficiaries of the fund were entitled to claim a 'Long Service Leave Benefit' (**Benefit**). The Benefit comprised the total amount of the Long Service Leave Charge paid by the working sub-contractor for the period of continuous service, together with interest at a rate determined annually by the trustee according to a formula in the governing rules.

The trustee of the Fund was entitled to determine the amount of income which would be payable to the class of beneficiaries under clause 3.1 of the trust deed. Clause 2.3 of the trust deed for the Fund provided that the beneficiaries did not have any right, title or interest in the fund or income, unless they were declared to be presently entitled by the trustee. To become presently entitled, each beneficiary needed to satisfy a number of requirements as set out by the Rules. This included rule 26, which set out the requirements for a sub-contractor to become eligible for the Benefit. Broadly, those included making an election to pay a charge to the Fund, and to be employed for a certain continuous period in the industry. Under rule 26.1, Darren would not be credited with income from the fund until he requested the trustee to make a determination to pay him income under clause 3.1 of the trust deed.

Under the Fund's Rules, a working sub-contractor who leaves the industry because of illness or incapacity can request a Payment in Lieu instead of taking long service leave.

Darren retired in July 2021 due to ill health, which triggered his entitlement under Rule 38.1.2. This rule allowed him to receive his accumulated contributions together with interest calculated under Rule 28

On 6 July 2021, Darren received an interest payment in respect of the contributions to the Fund for him. Darren did not include this payment in his tax return for the 2022 income year, which he lodged on 2 August 2022, on the basis that he did not derive the interest payment in the 2022 income year. Rather, Darren considered that the interest had accrued in earlier years, and the interest had already been credited for his benefit in these earlier income years, stretching back to 1988. That is, the interest payment was not taxable because it had been derived in earlier years and should not be taxed when it was physically paid out after his retirement.

On 22 November 2023, the Commissioner issued an amended assessment to Darren, adding the interest amount to Darren's taxable income for the 2022 year on the basis that it was derived when received. The Commissioner's position was that Darren derived the interest payment in the 2022 income year because he did not have any right, title or an interest to in an amount that the trustee determined to apply to a beneficiary, and

as such, Darren could not apply or deal with the interest accruing. This meant the interest was not derived by him prior to the 2022 income year.

On 14 December 2023, Darren lodged an objection to the amended assessment.

On 19 June 2024, the Commissioner disallowed Darren's objection. Darren applied to the ART for review of the objection decision.

Issue

When was the interest derived on the contributions?

Decision

The ART focused on the application of subsections 6-5(1), 6-5(2), and 6-5(4) of the ITAA 1997. Subsection 6-5(4) deems income to be received when it is "applied or dealt with" on a taxpayer's behalf or as directed.

The ART also considered *Commissioner of Taxes (South Australia) v The Executor Trustee Agency Company of South Australia Ltd* (1938) 63 CLR 108 (**Carden's Case**) and *Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation* (1965) 114 CLR 314. *Carden's Case* established the "come home" principle, which requires that income must be realised or immediately realisable before it can be treated as derived. *Arthur Murray* confirmed that amounts subject to contingencies, such as the possibility of repayment, do not constitute derived income until those contingencies are removed.

The ART noted that under clause 2.3 of the Trust Deed, a beneficiary has no right to any income from the Fund until the trustee declares an entitlement under clause 3.3. The Rules required certain conditions to be met before payment (including a formal written request), meaning that Darren's interest was subject to contingencies and additional steps. The annual calculation of interest under Rule 28 did not itself create an entitlement or amount to income being applied or dealt with on his behalf.

Darren had a mere expectation of income. The ART dismissed Darren's contention that the trustee set out an entitlement annually under clause 3.1 of the trust deed because the trustee had a mere discretion to make a determination. Even where the trustee does make a determination for income, Darren did not have any rights to the income at that point. The ART found that Darren's interest entitlement was contingent upon the trustee's determination and the satisfaction of conditions in the Trust Deed and Rules, meaning it had not "come home" before payment in July 2021.

Darren argued that by joining the Fund, he gave an "implied direction" for interest to be applied to his account each year, so it was derived annually when credited. The ART rejected this, finding that the trustee's obligations arose from the Deed and Rules, not from any direction by Darren. He had no absolute entitlement to the interest until the trustee made the necessary determination and the conditions were satisfied.

The ART concluded that Darren only derived the interest when it was paid to him on 6 July 2021, during the 2022 income year. He had no right or ability to access the interest before that date, and the mere calculation or crediting of interest did not amount to derivation.

Citation *Bennetts and Commissioner of Taxation (Taxation)* [2025] ARTA 1092 (General Member J Dunne, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1092.html

2.5 Hussein – land tax and excluded residential occupancy

Facts

In 2018, Asif Hussein purchased a property in Bonnyrigg Heights, New South Wales. The property was a singe parcel of land and contained three separate dwellings:

1. a Larger House (a six-bedroom multi-story residence with a garage);
2. a Smaller House (a single-level residence); and
3. a separate building used for garage or storage purposes.

For the 2019, 2020, 2021 and 2022 land tax years, Asif lived in the Smaller House and leased the Larger House to tenants.

The Chief Commissioner issued land tax assessments to Asif for the 2019 to 2022 land tax years, with the tax liability ranging from approximately $3,886 to $11,470 per year. None of these assessments included penalties, but, as Asif did not pay by the due dates, late payment interest accrued, increasing the total amount payable to about $68,000.

Asif stated that he did not pay the assessments because his discussions with Revenue NSW officers had led him to believe that the property would be exempt from land tax as long as he could prove he lived there, which he believed he could. Asif stated he was unclear about his obligations and was not intentionally avoiding payment. Rather, he said the position of Revenue NSW was unclear and this continued for a long time.

From around 2020, Asif provided documentation to support his claim that the property was his principal place of residence. In early 2024, Asif formally objected to the assessments. He also expressed concern about the accruing interest and sought information on possible concessions or payment arrangements.

On 8 May 2024, the objection was disallowed on the basis that Asif had not demonstrated that he used and occupied the property as his principal place of residence because the property was continuously tenanted.

On 10 July 2024, Asif filed an application to review with the NCAT.

Clause 4 of Schedule 1A to the *Land Tax Management Act 1956* (NSW) (**LTMA**) provides a concession where land contains one excluded residential occupancy. That is, the use of the excluded residential occupancy can be disregarded for the principal place of residence exemption. The land remains residential for land tax purposes even if income is derived from that excluded occupancy, provided there is no more than one such excluded occupancy.

Clause 10B to Schedule 1A of the LTMA applies where a property has a flat occupied by the owner as their PPR, plus one or more other flats used separately (not qualifying as an excluded occupancy under Clause 4). Such land is treated as mixed-use land for land tax purposes, allowing a reduction in land value attributed to the owner-occupied flat under section 9C of the LTMA. This concession does not apply to strata lots.

The Chief Commissioner accepted the Asif lived in the Smaller House as his principal residence but argued the concession in clause 4 did not apply because the Larger House was not an “excluded residential occupancy” (e.g., not a “suite of rooms” or “flat”). The Chief Commissioner relied on statutory interpretation and dictionary definitions to restrict “suite of rooms” to small dwellings like granny flats or studios. It contended that the concession only applies one way: the owner lives in the main dwelling and leases the smaller unit, not vice versa. Therefore, since Asif lived in the Smaller House and leased the Larger House, the exemption was denied.

The Chief Commissioner cited the NSW Court of Appeal decision *Haddad v Chief Commissioner of State Revenue* [2014] NSWCA 23 (**Haddad**), which confirmed the concession in clause 4 did not apply. The Chief Commissioner accepted clause 10B applied but argued no reduction could be made without a formal application to the Chief Commissioner under section 9C. of the LTMA.

Issue

Did the concession in clause 4 of Schedule 1A to the LTMA apply to exclude the occupancy of the Larger House for the purposes of the principal place of residence exemption?

Decision

Clause 4 concession

The Court of Appeal in *Haddad* clarified that the concession in clause 4 applies only when the owner occupies one or more buildings that *contain* an excluded residential occupancy (e.g., a flat or suite of rooms) used by someone else. Detached or separate dwellings do not meet this "containment" requirement.

In *Haddad*, the land had two separate buildings: a three-bedroom house (tenanted) and a two-bedroom unit (claimed as the principal place of residence). The NCAT and Appeal Panel found the exemption did not apply because the tenanted house was a "single dwelling" and was physically separate from the owner's unit, so it was not "contained" within the owner's residence. The Court of Appeal upheld this, emphasising the ordinary meaning of "contain" and requiring the secondary occupancy to be part of the building(s) the owner occupies. The three-bedroom house did not qualify as an excluded residential occupancy under clause 4.

In the present case, the NCAT confirmed it was bound by *Haddad* and the present provisions in clause 4 are substantively the same as was considered in *Haddad*. The NCAT held that as the Larger House, although a building and defined as a "flat" (a detached separate dwelling), was solely tenant-occupied and not physically contained within the owner-occupied building (i.e. the Smaller House), clause 4 does not apply to exempt it. Consequently, the occupancy of the Larger House could not be disregarded under clause 4, meaning the land did not qualify for the principal place of residence exemption.

Clause 10B

Clause 10B invokes section 9C of the LTMA, which allows a land tax reduction based on an "allowable proportion" of land value attributed to the owner-occupied flat. This proportion can be set by an apportionment factor entered in the Valuer-General's Register or, if none exists, by an application from the owner.

No apportionment factor exists for this property, and Asif did not apply for a reduction. Without such an application, neither the Chief Commissioner nor the NCAT could unilaterally determine the proportion or grant a partial exemption.

Therefore, despite the potential eligibility for clause 10B, the NCAT confirmed the assessments and reduced the premium component of interest to nil.

In respect of the premium component of interest, the NCAT found three reasons to fully remit the premium component of interest: the Chief Commissioner's changed position following *Haddad*, acceptance that clause 10B might reduce tax but no application was made, and the NCAT's inability to reduce or waive the land tax assessed.

COMMENT – this is a very significant decision as the effect is that the excluded residential occupancy exemption does not apply if the occupancy is not contained within the same building occupied by the owner, irrespective of the size of each building. This means, in respect of a granny flat, instead of obtaining a full exemption, the owner will only receive a mixed use reduction under section 9C of the LTMA. The mixed use reduction compares the floor space of each dwelling and does not take into account the other areas of the land that may be used by the owner in association with their own dwelling.

Citation *Hussein v Chief Commissioner of State Revenue* [2025] NSWCATAD 202 (Senior Member J Sullivan, New South Wales)
w https://www.caselaw.nsw.gov.au/decision/19887c1bf14b8aa05d8e7b7b

2.6 HV/LV Solutions – out of time objection

Facts

In 1999, HV/LV Solutions Pty Ltd was incorporated and provided high-voltage electrical services in the Northern Territory. Gavin Arkell is the sole director, and his father, Geoff Arkell, assists with the company's bookkeeping.

Gavin had multiple interactions with the ATO between 2006 and 2012, acknowledging overdue BASs for the period of January 2004 to June 2010 and citing family illness and bereavement as contributing factors.

HV/LV Solutions claimed it had faxed its BASs to the ATO up until around 2004/2005 and that it had then sent them by post to an address in Adelaide.

Most BAS were sent between August 2017 and February 2018 at the request of the ATO as part of a review and later audit. The ATO systems recorded these dates as the dates on which the BASs were lodged and not an earlier date.

In May 2018, the ATO conducted an audit and concluded that HV/LV Solutions was not entitled to GST refunds or credits due to the late lodgment of BASs and failure to notify entitlements within the statutory four-year period. The ATO issued nil assessments for those periods, as most GST liabilities had ceased to be payable, except for two BASs where the ATO had been notified of the unpaid amounts within time.

On 8 November 2018, the Commissioner issued amended GST assessments for most of the periods from 1 January 2004 to 30 June 2010 (**2018 Amended Assessments**).

In April 2019, another audit covered tax periods from July 2010 to December 2014 and reached similar conclusions, issuing amended Assessments (**2019 Amended Assessments**). In May 2019, the company lodged an objection to the 2019 Amended assessments, which was disallowed in January 2021.

In February 2022, the company claimed a GST decreasing adjustment for a bad debt in its BAS for the quarter ended 30 September 2018. The company had entered into a subcontract on a major project, issuing tax invoices to the principal contractor. After initially paying, the contractor stopped, and although the company won an adjudication for about $690,000, it was never paid due to the contractor’s bankruptcy. The company wrote off the debt and sought a GST refund.

On 7 June 2022, the Commissioner denied the adjustment on the basis that HV/LV Solutions was not carrying on an enterprise. The Commissioner later accepted that HV/LV Solutions was carrying on an enterprise, but maintained that the decreasing adjustment was not available.

In February 2024, HV/LV Solutions lodged an objection to the 2018 Amended Assessments and requested an extension of time, arguing it had made taxable supplies and lodged BASs in relation to the disputed periods, and was entitled to both a decreasing adjustment and GST credits. The objection included documentation supporting these claims and cited economic hardship, administrative issues with the ATO, and health-related delays.

The Commissioner told HV/LV Solutions that the reasons must relate specifically to the 2018 Amended Assessments and later deemed the objection invalid.

On 14 May 2024, the company lodged a revised objection claiming the BASs had originally been lodged on time by mail or fax.

Despite these efforts, on 7 October 2024, the Commissioner rejected the request for an extension to the objection to the 2019 Amended Assessments, reasoning that HV/LV Solutions circumstances were not exceptional, that the company was familiar with objection processes as it had lodged other objections on time, and that the delay prejudiced the ATO's ability to assess the case due to lost records and system changes. The Commissioner also considered there was no arguable case, as it maintained the BASs were not lodged until 2017 or later and, therefore, the notification requirement for the input tax credits was not satisfied.

On 25 October 2024, HV/LV Solutions applied to the ART for a review of the refusal, arguing that the ATO failed to properly consider the materials provided and relied selectively on its own internal records.

Issue

Should HV/LV Solutions be granted an extension to object to the 2018 Amended Assessments for the disputed periods?

Decision

Despite concerns about the adequacy of the HV/LV Solutions reasons, the ART accepted that HV/LV Solutions had remained actively engaged with the ATO regarding broader GST issues and had not rested on its rights. The ART found that this demonstrated a continuing dispute rather than abandonment of its position. Although the precise moment HV/LV Solutions realised it needed to object formally was unclear, the ART accepted there was ongoing engagement and attempts to resolve matters, which favoured granting the extension.

Regarding the strength of the underlying case, the ART concluded that HV/LV Solutions had an arguable case and that its claims were not frivolous, even if difficult to prove. The ATO's own records appeared incomplete, and some ambiguity remained as to the completeness of its lodgment system history.

The ART also considered the potential prejudice to both parties. It found that if the extension of time were refused, HV/LV Solutions could be substantially impeded in pursuing related objections, particularly concerning the treatment of a bad debt, which were already before the ART. This weighed strongly in favour of allowing the extension of time. On the other hand, the ART accepted the Commissioner's concern that the significant time elapsed since the relevant tax periods (dating back to 2004) could lead to forensic prejudice due to lost or inaccessible records, especially following system changes in 2010. While this factor weighed against granting the extension, the burden of proof lay with HV/LV Solutions, which reduced the impact on the Commissioner.

The ART reiterated that statutory deadlines should not be lightly disregarded, but found that, in this case, the potential prejudice to HV/LV Solutions and the related proceedings provided good reason to depart from the time limit.

In conclusion, while the ART expressed hesitation and noted that extensions should not ordinarily be granted on the basis of vague or unsupported explanations, the ART granted the extension.

COMMENT – the Commissioner has no discretion to extend the four-year limit in section 105-55 of Schedule 1 to the TAA for GST refunds or credits. The only way to succeed after that period is to prove the BAS was lodged and the entitlement notified within time.

Here, HV/LV Solutions claimed it had lodged on time by fax or post, with later "received" dates reflecting re-lodgements, while the ATO relied on records showing overdue lodgments.

Citation *HV/LV Solutions Pty Ltd v Commissioner of Taxation* [2025] ARTA 976 (General Member C Willis, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/976.html

2.7 Hatziladas – landholder duty exemptions

Facts

Kleanthe Hatziladas, a property developer, and Zelko Maric, a certified practising accountant who also described himself as a close friend and adviser to Kleanthe, acquired shares in companies that held substantial Victorian landholdings. Each acquisition involved entities that held Victorian land valued above $1 million, consequently triggering the application of landholder duty provisions.

The three transactions were:

Year	Company	Acquirer	Property Location	Shares Acquired	Landholder Duty Assessed
2014	277 Bay Road Developments Pty Ltd (**BRDPL**)	Kleanthe	Cheltenham	95%	$183,632.65
2016	JFK Corporation Pty Ltd (**JFK Co**)	Kleanthe	Brighton	66.67%	$136,949.15
2017	JFK Co	Zelko	Brighton	100%	$201,092.32

2014 acquisition

On 18 February 2014, BRDPL was registered with Greg Balderanos as the sole director and holder of all 100 issued shares. Around 10 March 2014, BRDPL entered into a contract to acquire the Cheltenham Property for $2.45 million.

On 17 September 2014, Greg transferred 95 shares to Kleanthe. Kleanthe later explained that he had asked his accountant to register the company under Greg's name because he was concerned about potential liability related to GST obligations on another property he was developing. He said he trusted Greg, a long-time friend and business associate, and they never formalised a trust arrangement for Greg to hold the shares on his behalf.

Kleanthe claimed that the deposit for the Cheltenham Property came from his personal or family trust funds, although he could not identify the specific trust involved. He intended to fund the development via mortgage finance, but Greg was unwilling to provide a guarantee. As a result, they agreed Greg would transfer the 95 shares to Kleanthe or his trust entity, and Greg would resign as director, with Kleanthe stepping in as his replacement.

Kleanthe maintained that the share transfer was made under their informal trust agreement and should be exempt from duty under section 36 of the Duties Act, as it reflected a non-beneficial change. However, no formal share transfer documents or board meeting minutes were produced. The ASIC Form 484 recorded that the shares were held beneficially by Greg before the transfer and by Kleanthe afterward, which contradicted the claim of non-beneficial ownership.

Kleanthe insisted the shares were always his and held on his behalf by Greg. He admitted that he had no alternative at the time but to register the shares in Greg's name to avoid the liability exposure he was concerned about, especially regarding the unresolved GST issue, which he claimed had been settled by the time the shares were transferred.

2016 acquisition

On 16 March 2007, JFK Co was registered, with Kleanthe, his brother Jim, and their associate Fabian each appointed as directors and issued 50 shares.

On 1 October 2015, JFK Co entered into a contract to purchase the Brighton Property.

Kleanthe explained that JFK Co was originally established to pursue property development opportunities. When the Brighton Property opportunity arose, both Jim and Fabian declined to participate in the project. Since JFK Co had been dormant, Kleanthe approached Jim and Fabian about taking control of the company, and they agreed to step aside. However, due to their personal relationships, no formal documents were drawn up to record this arrangement.

Kleanthe claimed that the transfer of shares from Jim and Fabian to him was exempt from duty under section 36 of the Duties Act, as it had been agreed that they were holding their shares on trust for him and his family trust entities. No documentation evidencing such a trust or board resolutions approving the transfer was produced. Furthermore, the ASIC Form 484, lodged on 20 April 2016, indicated that Jim and Fabian held their shares beneficially prior to the transfer, and that Kleanthe held them beneficially afterwards, contradicting the claim that the shares were held on trust.

2017 acquisition

On 10 September 2016, Kleanthe signed a declaration, confirming he held all 150 shares in JFK Co on trust for the FAND Family Trust.

On 1 September 2017, Kleanthe resigned as director and secretary of JFK Co and the board appointed Zelko as his replacement. On the same day, Kleanthe transferred all 150 shares in JFK Co to Zelko, who agreed to hold them as trustee for the Hatziladas Family Trust. However, Zelko also signed a declaration of trust stating he held the shares for the FAND Family Trust, creating an inconsistency as to who the actual beneficiary was.

Kleanthe later explained that he transferred the shares to Zelko due to concerns about potential legal exposure, particularly related to tax debts owed to the ATO. Zelko confirmed he was approached in mid-2017 by Kleanthe to assist by holding the shares on trust and acting as guarantor for the loans that would fund settlement of the Brighton Property. Zelko contributed no funds and acted solely at Kleanthe's request, relying on Kleanthe's verbal promise of indemnity.

Zelko's understanding was that the transfer to him did not represent a change in beneficial ownership, only a change in trustee, and should therefore be exempt from stamp duty. He reiterated that Kleanthe, or his entities, were always the true beneficial owners. While Zelko accepted he was not entirely sure which trust he was holding the shares for, he was clear he did not own them personally.

Kleanthe accepted that ASIC records showed him as the beneficial owner of the JFK Co shares prior to the transfer to Zelko. He admitted they were held in his personal name and described the post-transfer arrangement as Zelko holding the shares "always for me." He acknowledged that the trust named in the board resolution differed from the one in the declaration of trust (FAND Family Trust) but explained both were controlled by him and related to his family. Kleanthe stated that while his advisers prepared the trust documents, he always considered the shares to be his and under his control. He also admitted he did not know if any duty had been paid on the trust declarations, but believed duty would not apply if the trust had no assets.

Assessments

In October 2019, the Commissioner of State Revenue commenced an investigation into the acquisitions for compliance with Chapter 3 of the *Duties Act 2000* (Vic).

On 3 December 2019, the Commissioner issued assessments to Kleanthe for landholder duty, penalty tax, and interest in respect of the 2014 and 2016 acquisitions.

On 4 December 2019, the Commissioner issued an assessment to Zelko in respect of the 2017 acquisition.

Kleanthe objected to the assessments for his 2014 and 2016 acquisitions, and Zelko objected to the assessment for his 2017 acquisition. Kleanthe did not object to the assessment for his October 2014 acquisition of 5 shares in BRDPL.

The objections were disallowed. Kleanthe and Zelko each sought review of the Commissioner's objection decisions in the VCAT

Kleanthe and Zelko accepted that their share acquisitions in BRDPL and JFK Co were prima facie subject to landholder duty because the companies held Victorian land worth over $1 million and the interests they acquired were relevant interests. However, they argued that each acquisition was an exempt acquisition under section 89(a) of the Duties Act.

Their position was that if the acquisitions had instead been direct transfers of the underlying land, no duty would have been payable under the transfer duty provisions in Chapter 2 of the Duties Act.

For the 2014 and 2016 acquisitions, Kleanthe relied on section 36 of the Duties Act, which exempts property passing to beneficiaries of fixed trusts. Kleanthe claimed the shares had been held on trust for him (or his trust entities) and their transfer simply reflected him taking legal ownership of what he already beneficially owned.

For the 2017 acquisition, Zelko relied on section 33, which exempts transfers made solely due to a change of trustees. Zelko claimed he acquired the shares only as trustee for Kleanthe (or his trust entities), with no change in beneficial ownership, and that the transaction was merely a change of trustee.

In both cases, they argued the transactions fell within the relevant Chapter 2 exemptions and so were also exempt from landholder duty under section 89D.

Issue

Did any of the share acquisitions qualify for exemption under section 89D of the Duties Act, which provides that landholder duty does not apply if a direct transfer of land (mirroring the acquisition) would have been exempt under Chapter 2 of the Duties Act?

Decision

2014 acquisition

The VCAT found the evidence unconvincing. There was no formal declaration of trust, no corroborating documents, and ASIC records showed Greg as the beneficial owner.

The arrangement appeared to be based on personal trust and a desire to protect assets from tax exposure, not a legally enforceable trust. It held that any such informal agreement did not satisfy the legal criteria for a fixed trust or clear beneficial ownership. Therefore, the exemption under section 36 of the Duties Act did not apply.

2016 acquisition

The VCAT noted that JFK Co was originally established as a joint venture and there was no evidence that Jim and Fabian held their shares as trustees. ASIC documents listed them as beneficial owners. The VCAT concluded that the applicants failed to prove the existence of a trust or fixed trust arrangement, and the section 36 exemption of the Duties Act was not available.

2017 acquisition

For a transfer to qualify for the duty exemption under section 33 of the Duties Act, it must involve only a retirement of one trustee and the appointment of another, with no change in beneficial ownership.

The VCAT held that there was insufficient clarity or certainty of object, and no consistent trust arrangement was shown to exist before and after the transfer. Additionally, consideration of $150 was paid for the shares, suggesting it was not solely a change in trustee. The section 33 exemption in the Duties Act, for change of trustee failed, and accordingly, the section 89D exemption was also unavailable.

COMMENT – in this case, while it appears that the shares were being held for Kleanthe in some loose sense, there was insufficient evidence to support that there was a sufficient trust relationship given that the ASIC records indicated that the legal owners beneficially held the shares and that Kleanthe was unable to give a clear answer as to whether the beneficiary in respect of some of the shares was him or a family trust he controlled.

TIP – whether shares in a company are being beneficially held is often incorrectly recorded with ASIC. As can be seen from this case, it is important that the capacity in which the shares are held is correct recorded. Whether an error of this type has been made, a Form 492 can be lodged with ASIC to correct the error in the original reporting to ASIC.

Citation *Hatziladas v Commissioner of State Revenue* [2025] VCAT 588 (Senior Member R Tang AM, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2025/588.html

2.8 Shand – duty and change of beneficial ownership

Facts

Robin Shand passed away in 2022. Her will appointed her daughter, Fiona Shand, as the executor. The will provided that the residue of the estate be divided among four testamentary trusts, one for each of Robin's children and their respective families.

Fiona was also nominated as trustee of two of these trusts: the Robin Shand No 1 Testamentary Trust (for Fiona's brother) and the Robin Shand No 2 Testamentary Trust (for Fiona and her children). Fiona's trust was to receive 27.3% of the estate's residue.

On 29 September 2022, probate was granted to Fiona.

Among the estate's assets was an unencumbered property in Bondi Junction. On 15 December 2022, Fiona lodged a transmission application in her capacity as executor and became the registered proprietor of the property. By mid-2023, Fiona had completed most aspects of administering the estate. She had secured the estate's assets, including transmitting other properties, liquidating investments, and settling liabilities.

On 3 October 2023, Fiona arranged for the Bondi Junction property to be sold by public auction. She was the highest bidder and entered into a standard contract for sale on that same day, identifying herself as both the vendor (in her capacity as executor) and the purchaser (in her personal capacity).

On 19 January 2024, Fiona lodged a transfer naming herself as both vendor and purchaser. She paid the full purchase price of $5,010,000, although there was no evidence of how the funds were handled in her executor role.

There was no evidence that any of the testamentary trusts had been formally established at the time, nor that any formal appropriation of the property had been made to satisfy Fiona's entitlement under the will. Crucially, there was no indication that the other beneficiaries were involved in or even aware of the transaction.

On 16 January 2024, the Chief Commissioner of State Revenue issued a notice of assessment. The basis of the assessment was that the contract was a dutiable agreement within the meaning of section 8(1)(b)(i) of the *Duties Act 1997* (NSW).

Fiona objected to the assessment, but the objection was disallowed.

On 9 September 2024, Fiona filed a summons in the Supreme Court in which she applied for a review of the assessment.

Fiona argued that the transaction should be characterised as a surrender of interests in land under section 8(1)(b)(iii) of the Duties Act, rather than an agreement under section 8(1)(b)(i), and that the only interests being surrendered were the interests of the other beneficiaries. She said that the other residuary beneficiaries of her mother's unadministered estate held interests in the Bondi Junction property, in a broad or popular sense of the word "interest", and that those interests were surrendered to her when she acquired the property.

She contended that the term "interest in land" in section 8(1)(b)(iii) should be interpreted in this wider, non-technical sense, which could encompass a residuary beneficiary's rights in relation to estate property before the residue is ascertained. On that basis, and based on the policy surrounding section 63(2) of the Duties Act which relates to appropriations from an estate under a will, she claimed that duty should only be assessed on 72.7% of the property's value (reflecting the proportion "surrendered" by the other beneficiaries), not on the whole value.

The Chief Commissioner rejected Fiona's view that the other residuary beneficiaries held an "interest in land" in the Bondi Junction property before the residue of the estate was ascertained. Relying on authorities such as *Commissioner of Stamp Duties (Qld) v Livingston* [1964] HCA 54, the Chief Commissioner maintained that residuary beneficiaries of an unadministered estate have no proprietary interest in any specific asset, so section 8(1)(b)(iii) could not apply. The effect of this is that Fiona would be assessed on 100% of the property's value.

Fiona also maintained that the contract was **not** an "agreement" for the purposes of section 8(1)(b)(i) because, as the same person acting in two capacities, she could not contract with herself at general law.

Section 8(1)(b)(ix) of the Duties Act provides that duty is charged on "another transaction that results in a change in beneficial ownership of dutiable property, other than an excluded transaction". Fiona contended that section 8(1)(b)(ix) of the Duties Act did not apply `

The Chief Commissioner contended that the term "agreement" in the Duties Act should be given a broad meaning that includes agreements made by the same person acting in distinct capacities.

Issues

1. Was the contract executed by Fiona with herself, as executor and in her personal capacity, an "agreement for the sale or transfer of dutiable property" within the meaning of section 8(1)(b)(i) of the Duties Act?
2. Did the residuary beneficiaries of the unadministered estate have an "interest in land" in the Bondi Junction property for the purposes of section 8(1)(b)(iii) of the Duties Act, and if so, was that interest "surrendered" to Fiona through the transaction?

Decision

Was the contract an agreement?

The Court found that the contract between Fiona, in her personal capacity, and herself as executor could not constitute a legally binding agreement because the law does not recognise a person contracting with themselves. While equity may treat self-dealing by trustees as voidable, such transactions are not valid contracts at law, and the equitable rule does not override this basic requirement.

The Court rejected the Chief Commissioner's argument that a trustee can validly contract with itself acting in another capacity. The Court accepted that section 24 of the *Conveyancing Act 1919* (NSW) permits a person to "assure" property to themselves but clarified that this provision relates to dispositions and conveyances, not to the formation of contracts. It does not, therefore, permit a person to create a binding contract with themselves under the general law or the Duties Act.

The Court concluded that the contract entered into by Fiona, in both her personal and executor capacities, lacked the “intrinsic validity” of a contract and could not be regarded as an "agreement" under section 8(1)(b)(i) of the Duties Act. The Court also rejected the Chief Commissioner's call to interpret “agreement” broadly to include such self-dealings, stating there was no indication in the Duties Act that NSW Parliament intended to override the general law of contract. Although legal consequences can arise from unilateral actions by trustees (such as appropriations), they do not convert those actions into contracts. Therefore, the Court held that the standard contract for sale signed by Fiona was not an agreement for the sale or transfer of dutiable property within the meaning of section 8(1)(b)(i) of the Duties Act.

Surrender of an interest in land

The Court stated that the primary question was whether the interests, if any, which the beneficiaries had in relation to the property as at 3 October 2023 were interests in land within the meaning of section 8(1)(b)(iii) of the Duties Act. If the answer to this question is yes, then it would be necessary to consider whether such interests were surrendered.

The Court noted that it is well established that a beneficiary’s rights in an unadministered estate come from the executor’s duty to properly administer and preserve the assets. Beneficiaries, as a group, have an interest in the estate as a whole, but no individual asset is held on a specific trust for a named beneficiary until the administration is complete.

The Court held that the phrase "interest in land" in section 8(1)(b)(iii) must be interpreted in line with general law concepts, including beneficial ownership, but not extended to include broad, non-specific rights such as those held by residuary beneficiaries in unadministered estates.

In respect of Fiona's arguments that section 8 is to be read with section 63(2) of the Duties Act, the Court held that these provisions deal with different circumstances. The Court confirmed that section 63(2) is concerned with transfers by a legal personal representative to a beneficiary where there has been an agreement to vary the trusts. Where section 63(2) applies, the duty on the transfer is reduced but only to the extent that the dutiable value is referable to the beneficiary’s pre-existing entitlement to the property.

The Court disagreed with Fiona and stated that the policy underlying section 63(2) is not accurately described as ensuring that duty is only payable on the portion of an asset transferred to a beneficiary that exceeds their entitlement. This interpretation overlooks a key requirement, being that the dutiable value of the property is reduced only to the extent that it is *referable* to the beneficiary’s entitlement.

In the present case, the Court held that Fiona did not acquire the property in partial satisfaction of her entitlement under the Will or the Robin Shand No 2 Testamentary Trust. Her entitlement under the trust remained intact and she will continue to receive 27.3% of the estate’s residue. Instead, the estate has

exchanged the property for the cash Fiona paid. Therefore, the only real change is that the estate now holds cash instead of the property. The Court confirmed that the residuary beneficiaries did not surrender their interests in the estate, and their entitlements remained intact.

Change of beneficial ownership

The Court dismissed the summons on the basis that the transaction remained dutiable under section 8(1)(b)(ix), being another transaction that results in a change in beneficial ownership of dutiable property.

TRAP – Trustees should take care when entering into self-dealing transactions in a different capacity. In this case, Robin's Will did permit the executor (Fiona) to sell trust property to herself in her personal capacity as a matter of trust law.

There is an equitable rule against self-dealing, explained by *Megarry V-C in Tito v Waddell (No 2)* [1977] Ch 106 at 241. Broadly, the self-dealing rule is that if a trustee sells the trust property to itself, the sale is voidable by any beneficiary, however fair the transaction. This means any beneficiary may challenge and possibly reverse the transaction. The fair-dealing rule is that if a trustee purchases the beneficial interest of any of the beneficiaries, the transaction is not voidable, but can be set aside by the beneficiary unless the trustee can show that it has taken no advantage of its position as trustee and has made full disclosure to the beneficiary, and that the transaction is fair and honest.

Citation *Shand v Chief Commissioner of State Revenue* [2025] NSWSC 818 (Hmelnitsky J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2025/818.html

3. Cases in brief

3.1 Uber – payroll tax and relevant contract provisions

The Court of Appeal delivered its judgement in the case of *Chief Commissioner of State Revenue v Uber* [2025] NSWCA 172 which was an appeal from the Supreme Court decision in *Uber v Chief Commissioner of State Revenue* [2024] NSWSC 1124. A full summary of the original Supreme Court decision can be found in our September 2024 Tax Training Notes.

The case considered whether payments made by Uber to drivers were subject to payroll tax under the relevant contract provisions in the *Payroll Tax Act 2007* (NSW). For the 2015 and 2020 financial years, the Chief Commissioner had assessed Uber as liable to pay approximately $81 million in payroll tax on the basis that the payments made to its drivers were payments made under a relevant contract.

At first instance, the primary judge found in Uber's favour, revoking the assessment and ruling that payroll tax was not payable on nearly all the payments made to drivers on the basis that the payments made by Uber to the drivers were for Uber's obligation to account to the drivers and were not "for or in relation to the performance of work" as the drivers were already entitled to such amounts in accordance with the contractual arrangements with riders. The Chief Commissioner subsequently appealed the first instance decision, including the order that remitted all penalty interest. In response, Uber lodged a cross-appeal challenging several findings made by the primary judge. Each of these issues, and the Court of Appeal's finings in respect of these issues, are addressed below. A 5 member Court of Appeal was unanimous in its decision.

Issue 1: Whether driving was a service supplied by drivers to Uber "under" the driver contracts (section 32(1)(b) of the PTA)

The primary judge held that the drivers supplied the driving service "to" Uber, and while there was no challenge to this finding, Uber argued that the primary judge failed to explain why driving was found to be supplied to Uber, questioning whether this relied on the ordinary or expanded statutory definition of "supply".

The Court of Appeal held that driving was not merely indirectly helpful; it was essential to Uber's business model and contractual framework. Drivers' performance of driving enabled Uber to collect rider payments, deduct service fees, and exercise contractual rights, making the driving service clearly supplied to Uber under section 32(1)(b) of the PTA.

The Court of Appeal also considered whether the driving service was supplied "under" the driver contracts. The Court of Appeal held that the PTA's extended definition of "contract" includes informal arrangements, and "under" should be understood as services supplied in accordance with, pursuant to, or governed by the contract, and not limited to contracts that impose legal obligations to supply services.

Accordingly, the Chief Commissioner was successful on Issue 1.

Issue 2: Whether rating of passengers by drivers was a service supplied by drivers to Uber under the driver contracts (section 32(1)(b) of the PTA)

The issue was whether driver ratings constituted a service supplied to Uber under the driver contracts for payroll tax purposes. Uber argued that rating was optional, not contractually obligatory, and no part of drivers' remuneration was linked to ratings. Uber also contended that earlier contracts did not impose a rating obligation and that rating was not a service supplied "under" the contracts.

The Court of Appeal held that, even if there was no express contractual obligation, the practical requirement to rate riders via the app was a condition for accessing the benefits of the contract (receiving trip requests). The

contracts regulated the manner of rating (requiring good faith), reinforcing that rating was supplied under the contracts. It was irrelevant whether failure to rate was a breach or whether drivers were paid specifically for it, confirming that rating was integral to exercising contractual rights. Thus, the Court of Appeal upheld that rating was a service supplied to Uber under the driver contracts.

Issue 3: Whether rating was de minimis and should be disregarded

The issue was whether the service of rating riders by drivers was so trivial (de minimis) that it should be. Uber argued rating was insignificant because it only took seconds and involved pressing a few buttons, citing legal principles that the law does not concern itself with trivial matters. Uber contended that the value of rating in aggregate should not affect the characterisation of the individual driver contract or the driving service.

The Court of Appeal found that, although rating might seem brief or minor to drivers, it was a practical requirement and of substantial value to Uber, especially for safety reasons. The frequency and necessity of rating as a condition to continue using the app meant it was not trivial. The Court of Appeal held that rating was not so insubstantial as to be disregarded and upheld the primary judge's rejection of Uber's de minimis argument.

Issue 4: Whether drivers referring other potential drivers to Uber was de minimis

Although the primary judge did not explicitly address Uber's de minimis argument regarding referrals, it was implicitly rejected through the finding that referring was a service supplied under the contract. The Court of Appeal agreed with this view and placed greater weight on the value and function of referrals within Uber's broader operations, rather than the minimal time involved in making a referral. Thus, the Court of Appeal concluded that referrals were not de minimis and upheld the primary judge's findings.

Issue 5: Whether referring was supplied under a contract separate to the driver contract

Uber contended that the referral services provided by drivers, where drivers referred new drivers to Uber in exchange for incentive payments, were not supplied under the driver contracts, but rather under separate contracts created through published offers and acceptance. Uber argued that the primary judge erred by failing to explicitly address this point and by implicitly finding that the referral services were provided under the driver contracts.

The Court of Appeal held that the referral program operated through separate contractual arrangements formed by Uber's offers and the drivers' fulfilment of conditions. The referral activity, therefore, was not governed by the driver contracts and could not be considered a service supplied under them. The referral scheme was optional, external to the core driver services, and the source of rights and obligations related to referrals arose from separate agreements. Accordingly, the Court of Appeal concluded that the primary judge erred in finding that referrals were supplied under the driver contracts.

Issue 6: Whether driving was ancillary to the use of the driver's vehicle (section 32(2)(a) of the PTA)

The primary judge found that the services of driving and referring were not ancillary to the use of the vehicle and therefore did not engage the exclusion in section 32(2)(a) of the PTA, being that the services were ancillary to the conveyance of goods.

The Court of Appeal confirmed that the courts have interpreted "ancillary" to mean subsidiary, incidental, accessory, or auxiliary, but not necessarily minor or subordinate in a strict sense. The Court of Appeal held that two criteria must be assessed:

1. whether the services tend to assist the supply or use of goods i.e. are subsidiary, incidental, or auxiliary; and
2. whether the *principal or dominant characteristic* of the contract is the supply or use of those goods.

Importantly, the Court of Appeal held it is not enough that services merely assist the use of goods, the use of goods must also be the dominant element of the contract overall. The Court of Appeal concluded that the driving service and the use of the vehicle were inseparable and practically identical. In other words, the driver uses their own car to transport riders, which inherently combines the service and the vehicle's use. As a result, the service is not ancillary to the use of the vehicle; it is the primary act itself.

As a result, the contracts between Uber and its drivers do not satisfy the exemption in section 32(2)(a) of the PTA.

Issue 7: Whether rating was ancillary to the use of the driver's vehicle (section 32(2)(a) of the PTA)

The Court of Appeal upheld the primary judge's conclusion that rating was ancillary in the first sense, being subsidiary, incidental, or auxiliary to the use of the vehicle. It found that rating supported the safe and continued use of the vehicle and was practically necessary for the driver's ongoing work under the contract. However, the Court of Appeal clarified that this was not enough to trigger the exemption. For section 32(2)(a) to apply, it must also be shown that the *principal or dominant* characteristic of the contract is the *use of the vehicle*. Since the dominant purpose of the contract was the provision of transport services, not the use of the vehicle, the exemption still did not apply. Accordingly, while rating was ancillary in one sense, the overall nature of the contract meant that Uber could not rely on the exemption in section 32(2)(a).

Issue 8: Whether section 32(2B) disapplied section 32(2) if driving was covered by section 32(2)(a) of the PTA

Section 32(2B) prevents the application of the exemptions in section 32(2)(a)-(d) if any additional services or work, not covered by the relevant paragraph, are performed under the contract. This issue became moot, because the Court of Appeal concluded (contrary to the primary judge) that neither driving nor rating was ancillary to the use of a vehicle in the relevant legal sense. Therefore, the section 32(2)(a) exemption did not apply, so section 32(2B) did not need to be invoked to disqualify it.

Nonetheless, the Court of Appeal clarified that even if the exemption had applied, section 32(2B) would have disqualified it where non-ancillary services (like referrals) were included in the same contract. The Court of Appeal rejected Uber's view that section 32(2B) does not apply when different services in the contract fall under different exemptions in section 32(2). The proper interpretation is that section 32(2B) disqualifies a contract from exemption if any service under the contract falls outside the specific exemption being relied on. As such, the primary judge's conclusion that section 32(2B) disapplied the exemption was upheld, albeit on different reasoning.

Issue 9: Whether amounts collected by Uber from riders and remitted to drivers were "for or in relation to the performance of work" (section 35(1) of the PTA)

The primary judge found that Uber's payments to drivers were not "for or in relation to the performance of work" under section 35 of the PTA, and, therefore, not wages subject to payroll tax. The primary judge held that a required "reciprocity or ascertainable calibration" between payment and work was missing, as Uber's payments were merely obligations to account.

The Court of Appeal held that the primary judge erred in his interpretation of section 35(1), particularly by requiring that payments made must have a degree of reciprocity or calibration with the work performed. This requirement was not supported by the statutory language and imposed an unjustified gloss. The phrase "for or in relation to the performance of work" was intended to have broad operation, covering not only direct payments for work but also those sufficiently connected to the performance of work. The Court of Appeal explained that the words "for" and "in relation to" are not synonymous but overlapping. Further, "in relation to" expands the scope of what is captured, allowing inclusion of payments that are not directly for services performed for the payer, so long as they are work-related.

The Court of Appeal stated that the same statutory phrase appears elsewhere in Division 7, including in section 32(1), and there is no justification for interpreting it differently in section 35(1). The payments from Uber to drivers, although arising from rider fares, were calculated by reference to the driver's work (such as trip time and distance), making them directly related to the performance of that work. Uber's deduction of a service fee from the total fare does not alter this relationship.

Finally, the Court rejected Uber's broader argument that Division 7 was not meant to capture arrangements like Uber's, designed outside the traditional employer-employee model. The Court of Appeal held that the legislative text, interpreted in context, did not support such a narrow construction. As such, the Court of Appeal found that the payments in question were "in relation to the performance of work" and therefore taxable under section 35(1).

Issue 10: Whether amounts collected by Uber from riders and remitted to drivers were "paid or payable" by Uber (section 35(1) PTA)

This issue was whether amounts collected by Uber from riders and then passed on to drivers qualify as "paid or payable" by Uber under section 35(1) of the PTA. Uber argued that since these funds originate from riders and Uber merely acts as a conduit, such payments are not truly "paid or payable" by Uber and therefore should not be subject to payroll tax. Uber acknowledged this view conflicts with prior decisions (*Commissioner of State Revenue v Optical Superstore Pty Ltd* [2019] VSCA 197 and *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40), but contended those cases were wrongly decided. Uber emphasized that "paid" involves providing a pecuniary benefit as a quid pro quo, which does not happen when it simply remits rider fares to drivers.

The Court of Appeal reaffirmed the reasoning from *Commissioner of State Revenue v Optical Superstore Pty Ltd* [2019] VSCA 197 and *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40, rejecting Uber's submissions. Those cases confirm that payments to a person beneficially entitled to them are still "paid or payable" within the meaning of the Act. The Court of Appeal found Uber's claim that it merely acted as a payment collection agent unpersuasive given Uber's active role in setting fares, organising rides, and operating the platform. The Court of Appeal emphasised that overturning established intermediate appellate authority requires compelling reasons, which Uber did not provide. Accordingly, Uber's argument was rejected.

Issue 11: Whether the primary judge erred in ordering remission of any premium interest payable

The final issue concerned whether the primary judge erred by fully remitting Uber's premium interest, citing factors such as the complexity of the case, Uber's cooperation, payment plans, and no wilful default found. The Chief Commissioner had already remitted 50% pre-assessment interest.

The Court of Appeal found that the primary judge erred by effectively reversing the onus of proof on wilful default, which Uber had to prove it did not commit. The complexity of the case and other factors did not excuse wilful default, and Uber failed to show it took reasonable care (e.g., no evidence of legal advice).

Given that the Chief Commissioner's appeal was upheld, the discretion to remit interest must be re-exercised in light of changed circumstances where substantial premium interest is payable.

The Court of Appeal concluded that, despite some remission already agreed by the Commissioner, no further remission of premium interest is warranted. Uber's failure to discharge the onus on wilful default and reasonable care, and the commercial nature of the dispute, weigh against remission beyond what was already granted.

In conclusion, the Chief Commissioner was unanimously successful in his appeal and Uber's cross-appeals were dismissed.

COMMENT - This decision's interpretation of section 35(1) of the PTA may affect whether certain businesses are caught by the PTA's relevant contract provisions and it will likely have implications for the payroll tax obligations in other industries.

Citation *Chief Commissioner of State Revenue v Uber* [2025] NSWCA 172 (Ward ACJ, Mitchelmore JA, Kirk JA, Adamson JA, McHugh JA, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2025/172.html

3.2 PepsiCo – meaning of 'royalty'

PepsiCo Bottling Singapore Pty Ltd (**Seller**), an Australian entity, is part of PepsiCo Inc. (**PepsiCo**) group, which includes Stokely-Van Camp Inc. (**SVC**). Both PepsiCo and SVC are US-based companies.

From July 1, 2017, to June 30, 2019, Schweppes Australia Pty Ltd was the exclusive distributor and bottler of Pepsi, Mountain Dew, and Gatorade in Australia. Schweppes purchased concentrate from PepsiCo Bottling Singapore Pty Ltd, with invoices reflecting concentrate rates, plus freight, insurance, and handling fees under "exclusive bottling arrangements" (**EBAs**).

The EBAs set out the prices for the relevant concentrates. The EBAs also included a grant by PepsiCo/SVC of the right to use the trade marks and other intellectual property associated with each beverage, such as can and bottle designs. It was accepted that the Pepsi EBA implied the grant by law, and the SVC EBA specifically provided a licence to use the designs. There were strict terms for the use of the trade marks and further requirements relating to testing and inspection of bottling facilities.

Neither of the EBAs made any provision for the payment of royalties for the use of the trade marks.

The Commissioner issued to PepsiCo and SVC:

1. notices of royalty withholding tax applying section 128B of the ITAA 1936 and Art 12 of the Australia-US tax treaty, imposing around $3.6 million in RWHT; and
2. in the alternative, DPT assessments applying Part IVA of the ITAA 1936, imposing around $28.9 million in additional tax for the relevant years.

The Commissioner's primary case was that the payments made by Schweppes to the Seller for the concentrate included a royalty component. This is based on the argument that the provisions of the EBA show that payments made by Schweppes to the Seller were in consideration for the use of the trade marks. The Commissioner then construed that the payments were "paid" to PepsiCo/SVC, but that at their direction amounts were physically paid to the Seller. On this basis, the Commissioner considered that amounts were derived as income by PepsiCo/SVC.

In the alternative, the Commissioner argued that if on the proper construction of the EBAs is that there is no royalty component, then PepsiCo entered into a scheme with a "principal purpose" of obtaining a tax benefit, resulting in PepsiCo being liable for diverted profits tax under section 177J of the ITAA 1936. The tax benefits that the Commissioner asserted were obtained by PepsiCo were twofold:

1. that PepsiCo/SVC avoided liability for Australian royalty withholding tax because, under the actual arrangements, there was no identifiable royalty amount on which section 128B(2B) of the ITAA 1936 could operate. In the Commissioner's reasonable alternative postulate, the concentrate price would have been split between a product price and a separate royalty for trade mark and IP rights, with that royalty being Australian-sourced income derived by PepsiCo/SVC and subject to withholding tax; and
2. that by structuring the arrangement without a royalty component, no amount could be brought to tax under foreign (US) law as a royalty, thereby reducing US taxation.

At first instance, the Federal Court agreed that the EBAs included an "embedded" royalty component which could be brought to tax, on the basis that the payments were " *to some extent*, consideration for the use of" the intellectual property rights the subject of licence to Schweppes by those EBAs. The Federal Court also held that, had the Commissioner's first case not been successful, it would have accepted that drafting the EBAs in such a way was a scheme that was entered into for the principal purpose of deriving a tax benefit, for the purposes of the diverted profits tax provision in section 177J.

PepsiCo and SVC appealed the first instance decision to the Full Court of the Federal Court of Australia.

The Full Federal Court overturned the trial judge's finding that part of the payments made by the Australian bottler for concentrate were royalties. On a proper reading of the EBAs, the payments were solely for the concentrate, with the licence to use trade marks being incidental and tightly controlled, rather than a separate commercial right. The payments were made to an Australian subsidiary on its own account, with no agency or "payment by direction" to PepsiCo or SVC. Accordingly, there was no royalty within section 6(1) of the ITAA 1936 and no liability for royalty withholding tax. The Commissioner's alternative case under the diverted profits tax provisions also failed, as there was no reasonable alternative postulate showing that the concentrate price incorporated a royalty, and thus no "tax benefit" under Part IVA. The Full Federal Court allowed PepsiCo/SVC's appeals.

The Commissioner appealed to the High Court.

The majority of the High Court considered that the EBAs must be treated as a is single, integrated and indivisible transaction, having regard to its text, structure and purpose. Where that is the case, the agreement cannot later be divided into component parts for the purpose of identifying any royalty component. Schweppes's limited licence to use PepsiCo/SVC's marks was inseparably linked to the distribution of the products and did not constitute a separate, royalty-bearing right. The payments were made to an Australian subsidiary in its own right, with no agency or redirection to PepsiCo/SVC, so there was no royalty within the meaning of section 6(1) of the ITAA 1936 and no royalty withholding tax liability.

A further key point was that, for royalty withholding tax to apply, the non-resident must have derived Australian-sourced royalty income. The High Court rejected the Commissioner's argument that PepsiCo/SVC nominating its Australian subsidiary as the Seller constituted a direction to satisfy the debt owed to PepsiCo/SVC by payment to the Seller. The High Court concluded that no such debt was ever owed by Schweppes to PepsiCo/SVC. Once PepsiCo/SVC nominated its Australian subsidiary as Seller, Schweppes was contractually obliged entirely to pay that subsidiary. Therefore, there was no derivation of income by PepsiCo/SVC.

The majority of the High Court also rejected the Commissioner's diverted profits tax argument, finding no reasonable alternative postulate showing that the concentrate price incorporated a royalty. Therefore, no "tax benefit" arose for the purposes of Part IVA.

The assessments were set aside and costs awarded to PepsiCo/SVC.

Citation *Commissioner of Taxation v PepsiCo Inc* [2025] HCA 30 (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, Beech-Jones JJ)
w https://www.hcourt.gov.au/cases-and-judgments/judgments/judgments-2000-current/commissioner-taxation-v-pepsico-inc

3.3 Mansfield – bankruptcy and assets held on trust

Jerome Frugtniet was made bankrupt in February 2023 after being unable to service mortgages on four properties in Western Sydney registered in his name. David Mansfield was appointed as trustee of Jerome's bankrupt estate and sought court orders vesting the properties in him. Jerome's parents, Brian and Suzanne

Frugtniet, opposed the application, claiming the properties were held by Jerome on trust for them. Brian and Suzanne said their contributions to deposits, transfer duty and costs, and their role in identifying and managing the investments, meant they were the beneficial owners of the properties.

In arguing that a trust arrangement existed, Brian and Suzanne relied primarily on a document they said was a trust deed dated 2 September 2014. In the alternative, they argued that either:

1. a constructive trust arose, because their contributions were part of a joint endeavour that failed when Jerome became bankrupt; or
2. a resulting trust arose, because their payments towards the purchase price gave them a beneficial interest.

Jerome denied any trust arrangement. He said the properties were bought for his benefit, that mortgages were in his name, and that his parents helped him because they wanted to see him succeed financially.

The Court rejected the express trust claim because the purported trust deed was not stamped as required by section 304 of the Duties Act. Brian could not rely on the exception under section 304(2) of the Duties Act, being where an undertaking is given to ensure the instrument is brought to the attention of the Chief Commissioner, as Stewart J held that Brian could not pay the duty. His Honour found there was no agreement for Jerome to hold the properties on trust, and the evidence from Brian and Suzanne lacked credibility, with signs they had collaborated in preparing their affidavits.

On the constructive trust claim, the Court held there was no joint endeavour between Jerome and his parents. Instead, Stewart J held that the role of Brian and Suzanne was one of assistance which was motivated by love and a wish to see Jerome establish himself in the property market. This relationship and intention were, according to his Honour, inconsistent with the mutual commercial purpose required for a constructive trust.

The resulting trust argument also failed. While Brian and Suzanne contributed funds, Jerome had borrowed the majority of the purchase price through mortgages in his own name. The intention behind the contributions was to benefit Jerome, not to give Brian and Suzanne a beneficial interest.

The Court ordered that the four properties vest in David, as trustee for Jerome's bankrupt estate.

COMMENT – this case is a reminder that an unstamped trust deed cannot be admitted into evidence unless the duty is paid or an undertaking to pay is accepted. Where ad valorem duty would apply and payment is not possible, an express trust claim will necessarily fail.

COMMENT – Courts will closely scrutinise alleged trust arrangements between parents and children, especially where assistance is motivated by love and a desire to help rather than by a commercial joint endeavour. Even in cases where parents contribute funds, the absence of a clear agreement and the presence of parental motives will often be fatal to constructive or resulting trust claims.

Citation *Mansfield (Trustee), in the matter of Frugtniet v Frugtniet* [2025] FCA 803 (Stewart J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/803.html

3.4 Alexander – Release of taxation debts for serious hardship

Yanni Alexander owned a property in Elwood, Victoria and lived there for 10 years before deciding to subdivide the property into two units, Unit 1 and Unit 2. Her intention was to sell one unit to cover the expenses of the redevelopment and live in the other unit.

Yanni had intended to sell Unit 2 but instead sold Unit 1 due to market conditions, rented Unit 2 for six months, then lived in Unit 2 for about 15 years. In 2022, Yanni sold Unit 2 to downsize, pay off her mortgage, and contribute to her superannuation.

After lodging her 2022 tax return, Yanni was assessed as having made a capital gain of $192,195, due to the partial loss of the main residence CGT exemption because Unit 2 was rented briefly. She did not dispute the CGT calculation but applied for release from the tax debt on grounds of financial hardship. At the time, her only income was from the age pension and $600 fortnightly payment from her superannuation. She had limited assets, being an old car, under $4,000 in the bank, and no mortgage or dependants. She had contributed $238,000 to her superannuation from the proceeds of the sale.

In August 2023, Yanni submitted a Debt Release Application, explaining her limited income and expenses. She disclosed a solar panel loan and had paid a $2,000 electrician's bill but had no major debts. The ATO rejected her application in February 2024, arguing that Yanni had paid other creditors instead of her tax debt, and that she had structured her affairs, buying a home outright and contributing to super, in a way that put her in hardship. The ATO also claimed she should have foreseen the CGT liability.

In February 2024, Yanni objected to the decision not to allow debt release, explaining she believed she was fully exempt from CGT due to the main residence exemption. She emphasised her modest lifestyle, age over 70, health issues, and reliance on superannuation for retirement. The ATO rejected her objection, finding that while she passed the income/outgoings and assets/liabilities tests for hardship, she failed the "other relevant factors" test because she did not prioritise the tax debt and delayed lodging her return. Yanni applied to the ART to review the ATO's decision.

The ART accepted that Yanni lived modestly, had no significant discretionary spending, and was not involved in tax avoidance. The ART also found that her use of credit cards, small solar loan repayments, and payment of a one-off electrician bill did not indicate improper prioritisation of other debts.

The ART stated that while PS LA 2011/17 offers guidance relevant to the Commissioner's decision, it is not binding on the ART. When assessing whether a person would suffer serious hardship, the evaluation must be based on the person's circumstances at the time of the decision, not in the past or future, though changes since the original decision may be considered. The ART confirmed the decision process follows two steps: first, determining if paying the tax would cause serious hardship; second, if so, deciding whether to exercise discretion to release the liability. Without a finding of serious hardship, the discretion to release cannot be granted.

The ART noted that 'serious hardship' means that paying the tax debt would leave a person unable to afford basic necessities such as food, clothing, accommodation, or medical care, according to community standards. The ART found that because Yanni could meet her tax liability by drawing on superannuation funds without depriving herself of basic necessities, she would not suffer the 'serious hardship' required for release under Division 340.

While acknowledging Yanni's concerns about future financial uncertainty and medical costs, the ART applied the hardship test based on current circumstances and concluded that Yanni was not entitled to release of the tax liability. Because the first stage of the test (proving serious hardship) was not met, the ART could not consider whether to exercise discretion to release the debt. It did note that even if hardship were established, the fact that some of her superannuation balance represented funds from the untaxed gain on Unit 2 would weigh heavily against relief. The ART noted that should Yanni's financial situation worsen, she could make another application in the future.

Citation *Alexander v Commissioner of Taxation* [2025] ARTA 1163 (General Member C Willis, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1163.html

3.5 PTBS – out of time objection

On 1 December 2014, an ABN was issued in the names of B Ltd, G Ltd, K, M, N Ltd and S Ltd, who were then the participants in the entity later known as PTBS. G Ltd ceased participation on 30 June 2016, and S Ltd was deregistered on 6 January 2024. On 7 August 2014, Mr P or a nominee signed contracts to purchase properties in Victoria. On 14 October 2014, a trust referred to by PTBS as the "professed Trust" was established, and Mr P nominated its trustee to complete the purchases.

On 19 August 2015, PTBS applied for an ABN in the participants' names, obtained a tax file number on 21 October 2015, and registered for GST on 16 November 2015. Around October 2015, property development work began on the purchased properties. BAS for the quarters ending 30 September 2018 and 31 December 2018 (the Relevant Periods) were lodged on 7 August 2019, showing GST payable of approximately $1.7 million. This sum was not paid, but a payment arrangement was entered into with the Commissioner.

On 27 June 2023, some participants received statutory demands, which PTBS says was when it first became aware of the GST issue.

On 10 August 2023, the statutory deadline for objecting to the BAS for the relevant periods expired. PTBS lodged its objection on 16 August 2023, six days late.

On 8 September 2023, PTBS submitted a request for an extension of time to lodge the objection, providing additional information between September and December 2023.

On 30 May 2024, the Commissioner refused to accept the objection as within time and issued written reasons for the decision. On 18 July 2024, PTBS applied to the Administrative Appeals Tribunal for review of the Commissioner's decision. On 14 October 2024, the Administrative Review Tribunal replaced the AAT and the matter continued before it.

The ART considered several key factors in deciding whether to allow PTBS's late objection.

First, the delay was only six days. PTBS explained that its participants only became aware of the GST issue after receiving statutory demands in June 2023, and acted promptly once they knew. The ART accepted this as a reasonable explanation, even though authorised representatives had previously managed the GST filings.

Second, while PTBS's claim that it was a trust rather than a partnership appeared weak and faced legal and evidentiary challenges, the ART emphasised that the test for permitting a late objection is low. It found there was at least some supporting material, such as clauses in the agreement and certain witness statements, so the objection could not be dismissed as frivolous.

Third, the ART assessed potential prejudice. It found that refusing the extension would cause significant prejudice to PTBS by removing its only opportunity to challenge the assessments.

After weighing the short delay, the reasonable explanation, the low merits threshold, and the imbalance of prejudice, the ART concluded that it was in the interests of justice to treat the objection as lodged on time.

COMMENT – The ART emphasised the decision of Hill J in *Brown v Commissioner of Taxation* [1999] FCA 563 and quotes in bold "**Neither the Commissioner nor the Tribunal on review should approach the question of determining whether an extension of time should be granted on the basis that it will only be in an exceptional case that an extension is granted**. (emphasis added)" This statement contrasts with the ATO's position in PS LA 2003/7 which was amended in 2023 to read, "[t]his discretion is an exception to the general rule. The purpose of the discretion is to avoid injustice being caused in a particular case because of the rigid application of a time limit". The paragraph in PSLA 2003/7 previously read "[a]s a general rule, requests for extension of time are to be approached on the basis that extensions will be granted, unless there are exceptional circumstances."

Citation *PTBS and Commissioner of Taxation* [2025] ARTA 1262 (General Member J Dunne, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1262.html

3.6 Aquanorth – apparent purchaser concessional duty

Aquanorth Pty Ltd (**Aquanorth**) is the trustee for the Lynn Brett Bare Trust and the Fields Bare Trust. The beneficiary of the Lynn Brett Bare Trust is BretLynn Pty Ltd as trustee for the Lynn Brett Superannuation Fund (**Lynn Brett Superannuation Fund**).

In 2009, Aquanorth Pty Ltd made a declaration of trust over a commercial property it owned in Tamworth for the Lynn Brett Superannuation Fund. The Lynn Brett Bare Trust deed provided that Aquanorth would hold a 50% interest in a property at Avro Street, Tamworth on bare trust for the Lynn Brett Superannuation Fund.

The declaration of trust was submitted for stamping in 2023. The Chief Commissioner of State Revenue assessed duty of $10,085 plus interest on the transaction, taking the view that it did not qualify for concessional nominal duty under section 55(1)(a)(i) of the *Duties Act 1997* (NSW). That section allows a nominal duty rate where property is vested in an "apparent purchaser" who holds it on trust for a "real purchaser" who provided all the funds for its acquisition. The dispute centred on whether Bretlynn Pty Ltd, as trustee for the Lynn Brett Superannuation Fund, had provided 50% of the purchase price for its 50% interest.

The property was originally purchased in 2010 for $620,000, with adjustments and stamp duty bringing the total outlay to $709,835. After a GST refund, the net cost was $647,686, meaning Bretlynn needed to have contributed $323,843 to satisfy the concession requirements. The purchase was funded by a $403,000 Westpac loan to Fetrona Pty Ltd as trustee for the Fields Superannuation Fund, a $62,000 deposit paid by Aquanorth, and various payments from an Aquanorth "No. 2" account. The statements and records relating to the purchase monies were incomplete. Aquanorth did not prepare a complete analysis of all relevant payments. Revenue NSW attempted to compile one from available statements, but the resulting draft was still incomplete. Aquanorth noted that its accountant had died and some records were destroyed "by an event".

Aquanorth argued that deposits into the No. 2 account came from both superannuation funds, with Bretlynn's contributions including $94,950 on 4 January 2010, $25,050 on 6 January 2010, $31,000 representing half of the GST-refunded deposit repayment in April 2010, and later loan repayments including $30,000 in May 2016.

However, the NCAT found insufficient evidence for some claimed payments, particularly the $25,050 deposit, and noted that only half the April 2010 repayment could be attributed to Bretlynn. While acknowledging that some records had been lost, the NCAT emphasised that Aquanorth bore the onus of proving that Bretlynn had provided the required 50% of purchase funds.

The NCAT confirmed that the declaration of trust was a dutiable transaction under the Duties Act and applied the strict interpretation of section 55 established in prior cases, where partial contributions by the real purchaser are insufficient. As Aquanorth could not prove Bretlynn's contributions reached the necessary threshold, the concessional rate did not apply.

The original duty assessment, including interest, was upheld in full. The NCAT declined to remit interest, noting no exceptional circumstances and no explanation for the delay between the 2019 declaration of trust and its 2023 lodgement for assessment.

COMMENT – the case reinforces the high evidentiary standard required to prove eligibility for the apparent purchaser concession in section 55 of the Duties Act, particularly the need for clear, contemporaneous records showing the source of funds.

TIP – Since 23 October 2014, a declaration of trust for a superannuation bare trust or custodial arrangement would normally be assessed under section 62B of the Duties Act and section 55B. Section 62B is easier to satisfy as compared with section 55 of the Duties Act.

Citation *Aquanorth Pty Ltd v Chief Commissioner of Taxation* [2025] NSWCATAD 180
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/180.html

3.7 Chen – surcharge land tax

On 10 March 2021, Zhou acquired a property in New South Wales. She was a permanent resident of Australia at the time and continued to hold this status throughout the 2023 and 2024 calendar years.

In 2023, Zhou spent 122 days in Australia. In 2024, she spent 278 days in Australia.

On 1 April 2024, Zhou travelled to China to assist her sister due to her brother-in-law's terminal cancer. Her brother-in-law passed away on 6 May 2024. Zhou remained in China until 24 June 2024, helping her sister with funeral arrangements, administrative matters, and an Australian visa application.

Zhou returned to Australia on 24 June 2024 and remained for the rest of the year, spending 191 days in the country from that date onwards.

On 16 September 2024, the Chief Commissioner issued Zhou a land tax assessment notice, determining she was liable for surcharge land tax for the 2024 land tax year. On 18 October 2024, Zhou's son lodged an objection on her behalf. After correspondence between the parties regarding whether an exemption applied, the Chief Commissioner disallowed her objection on 12 December 2024.

On 7 February 2025, Zhou applied to the NCAT to review the Chief Commissioner's decision disallowing her objection.

Surcharge land tax is imposed under s 5A of the *Land Tax Act 1956* (NSW) on certain residential land owned by "foreign persons." A "foreign person" includes someone who is not an Australian citizen and is not "ordinarily resident" in Australia as defined in the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**). Under FATA, a person is "ordinarily resident" only if they have been in Australia for at least 200 days in the 12 months before the taxing date and have no time limitation on their presence in Australia.

Zhou is not an Australian citizen. As at the taxing date for the 2024 land tax year (31 December 2023), she had been in Australia for only 122 days in the preceding 12 months. She therefore did not satisfy the 200-day requirement and was not "ordinarily resident" under FATA. The fact that she spent 278 days in Australia during the actual 2024 calendar year was irrelevant because the test must be satisfied as at the taxing date. As a result, she was a "foreign person" and liable for surcharge land tax under section 5A.

The next issue was whether Zhou could claim the principal place of residence exemption under section 5B of the LTA. This required that she use and occupy the property as her principal place of residence for a continuous period of 200 days in the land tax year. In 2024, she was present in Australia for 86 days from 6 January to 1 April, and 191 days from 24 June to 31 December. The NCAT noted that the legislation strictly requires 200-day continuous presence.

Under section 5B(2B), the Chief Commissioner may waive the continuous residence requirement in exceptional circumstances if the absence is "brief". Zhou's argued that her absence from 1 April to 24 June 2024 (87 days) was due to exceptional circumstances, including her brother-in-law's terminal illness and death, and assisting her sister with funeral and administrative matters. The NCAT accepted these were exceptional circumstances and acknowledged her evidence of a customary mourning period exceeding 40 days.

However, the absence still had to be “brief.” The NCAT found that a “brief physical absence from Australia” cannot be determined by isolating part of a longer absence. For example, the NCAT could not treat the nine days immediately before a 191-day period of presence in Australia as “brief” if those nine days formed part of a longer overall absence. The assessment must be based on the entire actual period of absence. As 87 days comprised 40% of the benchmark period and nearly three months of the calendar year, the NCAT determined that the absence of 87 days was not "brief".

The surcharge land tax assessment was confirmed.

Citation *Chen v Chief Commissioner of State Revenue* [2025] NSWCATAD 189 (Senior Member EA MacIntyre)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/189.html

3.8 Appeal Updates

AusNet

The High Court has refused special leave for AusNet Services Ltd to appeal the decision in *AusNet Services Limited v Commissioner of Taxation* [2025] FCAFC 21 (see our March 2025 Tax Training Notes). The decision concerned the Full Federal Court’s decision upheld that CGT roll-over in Division 615 of the ITAA 1997 applied to its acquisition of shares in AusNet Services (Distribution) Ltd. The Court confirmed that the transaction was a “scheme for reorganising its affairs” and that the shareholder interest ratio test in s 615-20(2) was to be read as referring only to shares issued under the scheme, meaning AusNet did not fail the Division 615 requirements.

COMMENT – the ATO was waiting for *Ausnet* litigation to be concluded to finalise its guidance on back-to-bac rollovers. The ATO website (https://www.ato.gov.au/about-ato/ato-advice-and-guidance/advice-under-development-program/advice-under-development-capital-gains-tax-issues) states that the guidance, which will be in the form of a Draft Practice Compliance Guideline will be completed in late 2025.

Citation *AusNet Services Ltd. v Commissioner of Taxation* [2025] HCADisp 166 (Gageler CJ, Gordon J, Edelman J, Steward J, Gleeson J, Jagot J, Beech-Jones J)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCADisp/2025/166.html

3.9 Merchant

Both the taxpayers and the Commissioner have applied for special leave to appeal to the High Court following the Full Federal Court’s decision in *Merchant & Anor v Federal Commissioner of Taxation* [2025] FCAFC 56 (see our May 2025 Tax Notes).

The case involved a tax arrangement where a family trust sold high-cost shares to a related entity to create a capital loss. This loss was intended to offset a gain from selling a company, with the sale dependent on forgiving $55 million in related-party debt. The primary judge found that both section 177D (a scheme entered into for the dominant purpose of obtaining a tax benefit) and section 177E (a scheme by way of or in the nature of dividend stripping) of the ITAA 1936 applied.

On appeal, the Full Court (by 2:1 majority) upheld most of the primary decision. It rejected the taxpayers’ arguments against the application of section 177D. However, it held that the primary judge erred in how he assessed section 177E’s application to one of the debt forgiveness schemes. The majority clarified that the “effect” of the scheme under section 177E must consider the impact of the Commissioner’s section 177D determinations. They distinguished between “purpose” (intended result) and “effect” (actual outcome), noting that because the capital loss was cancelled, the scheme did not achieve dividend stripping in substance.

3.10 Other tax and superannuation related cases published from 10 July to 12 August 2025

Citation	Date	Headnote	Link
Australian Gold Dealers Pty Ltd v Commissioner of Taxation [2025] ARTA 989	10 July 2025	PRACTICE AND PROCEDURE – application for further directions progressing the application – proceedings were dismissed under section 100 of the Administrative Review Tribunal Act 2024 for failure to comply with Tribunal directions – self-executing directions – whether lack of notice being provided for the purpose of s102(7) of the ART Act voids the effect of a self-executing dismissal direction.	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/ARTA/2025/989.html
NYKS v Commissioner of Taxation [2025] ARTA 1031	11 July 2025	PRACTICE AND PROCEDURE – Applicant sought review of taxation decision – Applicant given directions to file statement of facts issues and contentions and evidence – Applicant repeatedly failed to meet Tribunal directions within a reasonable time – Application dismissed.	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/ARTA/2025/1031.html
Lamir-Pike v Chief Commissioner of State Revenue [2025] NSWCATAD 169	15 July 2025	TAX AND REVENUE – Whether "eligible transaction" for a duty exemption – existing house and shed on land when purchased - existing house rented to tenants – existing shed converted so owner could live there while building a new home on the land – no occupation certificates or approvals for existing house or shed as converted	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCATAD/2025/169.html
Australian Gold Dealers Pty Ltd v Commissioner of Taxation [2025] ARTA 1133	15 July 2025	PRACTICE AND PROCEDURE – application for reinstatement– proceedings were dismissed under section 100 of the Administrative Review Tribunal Act 2024 for failure to comply with Tribunal directions – self-executing directions – application reinstated under section 102(9) of the ART Act.	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/ARTA/2025/1133.html
Tran v Commissioner of Taxation [2025] ARTA 1036	17 July 2025	TAXATION – gambling – poker – record-keeping – whether the Applicant was running a business – administrative penalty – alleged loans	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/ARTA/2025/1036.html
Muscat v Commissioner of State Revenue [2025] QCAT 280	22 July 2025	TAXES AND DUTIES AND HOME OWNERS GRANT – ADMINISTRATIVE DIRECTION – QUEENSLAND – where owner of cane farm entered into a demolition contract of one of the existing homes on the land outside of the eligibility period – where owner entered into a building contract within the eligibility period –whether the building contract a	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QCAT/2025/280.html

Citation	Date	Headnote	Link
		substantial renovation contract – where applicant applied for the HomeBuilder grant for substantial renovation contract – where application for grant rejected because the demolition contract considered part of the substantial renovation contract – whether the unencumbered value of the land was for a substantial renovation contract more than $1.5M making it ineligible under clause 6 of the Administrative Direction	
Mitra v Chief Commissioner of State Revenue (No 2) [2025] NSWCATAD 186	28 July 2025	COSTS – General rule that self-represented litigant cannot recover costs of their own time – abrogation of Chorley exception in Bell Lawyers v Pentelow applies to preclude recovery of costs comprising time of preparation and attendance by a self-represented litigant who is also a lawyer – no special circumstances to warrant an award of costs	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCATAD/2025/186.html
R.C. Land Management v Commissioner of State Revenue [2025] VSC 452	28 July 2025	TAXATION LAW — Addition to grounds of objection by Commissioner — Where proposed additional grounds opposed on lack of proper basis — Whether Appellant is holding the same legal and equitable interests on trust for itself — Taxation Administration Act 1997 s 109 — Leave to add grounds granted. PRACTICE AND PROCEDURE — Application to consolidate six separate proceedings — Where grounds of appeal overlap — Civil Procedure Act 2010 — Aston (Aust) Properties Pty Ltd v Commissioner of State Revenue (2012) 88 ATR 211 — Traditional Values Management Ltd v Taylor & Ors [2012] VSC 299 — Application to consolidate refused.	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2025/452.html
Deputy Commissioner of Taxation, in the matter of Golding [2025] FedCFamC2G 1189	29 July 2025	BANKRUPTCY – Application for review of the exercise of power by a Registrar– Whether there is any sufficient cause why sequestration order ought not be made – Submissions based on pseudo-law – Whether obligation to pay pecuniary liability discharged by a promissory note – Whether promissory note was issued and tendered – Application dismissed - Sequestration order affirmed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FedCFamC2G/2025/1189.html
HJJQ and Commissioner of Taxation (Practice and procedure) [2025] ARTA 1295	1 August 2025	PRACTICE AND PROCEDURE – mode of hearing – discretion of Tribunal in relation to procedure - whether applicant should be directed to travel to Australia	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/1295.html

Citation	Date	Headnote	Link
		from Malaysia to give evidence in person – applicant with multiple medical conditions – circumstances to be taken into account by Tribunal – requirement for Tribunal to be accessible – procedural fairness to respondent where credibility of applicant's evidence at issue – direction that applicant be permitted to give evidence by audiovisual means	
Lee v Commissioner of Taxation (Practice and procedure) [2025] ARTA 879	2 August 2025	PRACTICE AND PROCEDURE – jurisdiction question – Applicant seeks to review Commissioner of Taxation's refusal to determine a hardship application – no reviewable objection decision – application dismissed for lack of jurisdiction PRACTICE AND PROCEDURE – stay application – Applicant seeks to stay recovery and enforcement activity undertaken by the Commissioner of Taxation – review application dismissed for lack of jurisdiction – stay application dismissed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/879.html
Tran v Commissioner of State Revenue [2025] VCAT 581	3 August 2025	Review and Regulation List – *Duties Act 2000* (Vic), ss 57J, 57JA, 57K and 57M – Residence requirement for duty concession and reduction – Applicant has failed to discharge onus of proof to establish that residence requirement met – Assessment confirmed.	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2025/581.html
Kumar v Commissioner of State Revenue [2025] VCAT 695	4 August 2025	Review and Regulation List – Duties Act 2000 (Vic), ss 57K and 57L and Taxation Administration Act 1997 (Vic), ss 30, 32 and 35 – Entitlement to off-the-plan and principal place of residence duty concessions subject to satisfaction of residence requirement, requiring applicant taxpayers to occupy premises as principal place of residence for 12 months commencing within 12 months of settlement – Whether residence requirement could be satisfied where taxpayers lived interstate and rented out the relevant property in a manner precluding occupation within the relevant period – Whether discretion to extend the time for commencement of occupation of relevant property ought to be exercised – Whether taxpayers intentionally disregarded a taxation law – Whether taxpayers took steps to prevent or hinder the respondent from becoming aware of the nature and extent of the tax default – Reassessment of additional tax, penalty	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2025/695.html

Citation	Date	Headnote	Link
		tax and interest confirmed.	
Phan v Chief Commissioner of State Revenue [2025] NSWCATAD 193	4 August 2025	TAXES AND DUTIES – Surcharge purchaser duty – Tax default – Interest and penalty tax – remission	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/193.html
SRSH v Commissioner of Taxation [2025] ARTA 1246	6 August 2025	Catchwords – application for the proceedings to be stayed pending the completion of criminal proceedings – whether the interests of justice require these proceedings to be stayed	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/ARTA/2025/1246.html
Impala Kitchens and Bathrooms Pty Ltd v Chief Commissioner of State Revenue [2025] NSWCATAD 162	7 August 2025	REVENUE LAW - State taxes - payroll tax - assessment - objection - appeal REVENUE LAW - penalties - reasonable care -whether tax default due to matters beyond control of taxpayer - remission - Revenue Ruling PTA 036 - Practice Note CPN 024 ADMINISTRATIVE LAW - reviewable decision - correct and preferable decision - Civil and Administrative Tribunal	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/162.html

4. Federal Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11	9/10	10/10	Lapsed at end of Parliament 21 July 2025. Not proceeding.	
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11	9/10	10/10	Lapsed at end of Parliament 21 July 2025. Not proceeding.	
Universities Accord (Cutting Student Debt by 20 Per Cent) Bill 2025	23/07	29/07	29/07	31/07	02/08

4.2 Student debt cut

The *Universities Accord (Cutting Student Debt by 20 Per Cent) Act 2025* (Cth) has received royal assent. The Act amends laws relating to apprenticeship loans, the Higher Education Loan Program (**HELP**) and other student loans. The Act:

1. provides a one-off 20% reduction to student loan debts, including HELP debts, which were incurred on or before 1 June 2025;
2. changes the way loans are annually indexed. Whilst indexation was previously applied at the annual CPI, it is now capped at the lower of CPI or the Wage Price Index, to prevent debt outpacing the growth in wages. This change is retrospective and applies to indexation from 1 June 2023;
3. increases the minimum repayment threshold from $54,435 (in the 2024-25 financial year) to $67,000 (in the 2025-26 financial year); and
4. introduces a new marginal repayment model which applies a fixed percentage to the income earned in excess of the minimum repayment threshold, being $67,000, rather than as a percentage of total income.

The amendments commence on 3 August 2025.

w https://www.legislation.gov.au/C2025A00030/asmade/text

4.3 Exposure draft clarifying tax treatment of foreign subordinated debt

On 11 July 2025, Treasury released exposure draft regulations to amend the *Income Tax Assessment (1997 Act) Regulations 2021*, extending the concessional debt treatment of APRA-regulated subordinated notes to equivalent instruments issued by entities regulated by comparable foreign prudential authorities. The change ensures that a non-viability condition requiring write-off or conversion to equity does not, by itself, prevent such instruments from qualifying as debt under section 974-20 of the ITAA 1997, allowing interest and related costs to remain deductible if the other debt test requirements are met.

The approach mirrors amendments made in 2012 for domestic instruments following APRA's Basel III reforms. It applies to a wide range of unsecured subordinated debt, regardless of naming conventions, provided the issuer is subject to substantially similar prudential regulation.

The amendments will apply retrospectively to obligations arising on or after 12 December 2012, reflecting existing taxpayer practice. The measure is expected to be wholly beneficial to financial institutions, investment vehicles and multinational groups with exposure to foreign subordinated debt.

Consultation closed on 5 August 2025.

w https://consult.treasury.gov.au/c2025-674586

5. Rulings

5.1 CGT event K6

On 11 December 2024, the ATO issued a draft update to Taxation Ruling TR 2004/18, being Taxation Ruling TR 2004/18DC, which clarified the application of CGT event K6 under section 104-230 of the ITAA 1997 (see our February 2025 Tax Training Notes).

Broadly, CGT event K6 can result in a capital gain (but not a capital loss) if certain CGT events happen to pre-CGT shares in a 'private' company or pre-CGT interests in a 'private' trust where the market value of the entity's post-CGT property is at least 75% of its net value (**75% test**). TR 2004/18 clarified how capital proceeds should be attributed in multi-tier structures.

TR 2004/18DC has now been finalised and an addendum to TR 2004/18 has been introduced. The addendum makes the changes to TR 2004/18 to explain that only one capital gain could arise under CGT event K6 and what constitutes a reasonable attribution of the capital proceeds for the purposes of calculating the capital gain under subsection 104-230(6) will depend on the facts in each case. For example:

1. where there is a single-tier structure, a reasonable attribution of the capital proceeds may be achieved by applying the two-step approach outlined in paragraphs 27 to 33 of TR 2004/18, but that may not always be the case; or
2. where there is a multi-tier structure, it would generally be reasonable to attribute the capital proceeds to the value of the underlying property rather than to the value of interests in the lower-tier entity. However, there may be limited situations where it can be reasonable to attribute the capital proceeds to interests in the lower-tier entity rather than the underlying property (for example, if a lower-tier company holds post-CGT property that has increased in value, but the shares in the lower-tier company itself have no value).

The addendum also amends the examples in TR 2004/18 to clarify how CGT event K6 can apply to multi-tier structures and how the capital gain from CGT event K6 can be calculated for multi-tier structures.

The ATO released a compendium TR 2004/18EC at the time the addendum was issued, which provides a summary of the issues raised by the public when TR 2004/18DC was open for public comment. The ATO made the following comments in TR 2004/18EC:

1. the purpose of the addendum to TR 2004/18 is to reflect the Commissioner's revised view that only one capital gain can arise under CGT event K6, and clarify which property is taken into account in working out the amount of the capital gain;
2. when calculating the capital gain under subsection 104-230(6) of the ITAA 1997, it is not relevant which 75% test has been satisfied and the capital gain should be calculated by reference to all property referred to in subsection 104-230(2) of the ITAA 1997;
3. what is considered reasonable will vary according to the facts of each case (and more than one method may be reasonable in any given case);
4. it would not be appropriate to specify a limit on how many levels of a multi-tier structure taxpayers must trace through; and
5. prior to 23 July 2025, taxpayers may choose to rely on either the original version of TR 2004/18 or the revised version of TR 2004/18.

ATO reference *TR 2004/18A1 – Addendum*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR200418A1/NAT/ATO/00001
ATO reference *TR 2004/18EC*
w https://www.ato.gov.au/law/view/document?docid=CTR/TR2004EC18/NAT/ATO/00001

5.2 Consultation period extended for Land Transfer Duty Ruling (Vic)

The State Revenue Office of Victoria extended the consultation deadline for *Draft Revenue Ruling DA-067* to 5.00pm AEST on 4 August 2025.

The ruling, which is proposed to take effect from 1 July 2025, outlines the Chief Commissioner's views on key aspects of the economic entitlement provisions, including how the transitional rules apply. It also addresses circumstances where acquiring shares in a company or units in a unit trust may fall outside the scope of Victoria's landholder provisions under the *Duties Act 2000* (Vic).

State Revenue Office reference *DA-067*
w https://www.sro.vic.gov.au/about-us/laws-legal-cases-and-rulings/draft-rulings/land-transfer-duty-economic-entitlements-relation-land-key-concepts-and-interpretation

5.3 Draft updates to rulings on residential premises

The ATO has issued draft updates to two GST rulings relating to residential premises in order to align with the AAT's decision in *Domestic Property Developments Pty Ltd a/t for Dals Property Trust v FC of T* [2022] AATA 4436 (**Domestic Property**).

In *Domestic Property*, the taxpayer was a property developer that constructed a development comprising seven home units. The Domestic Property rented two of the newly constructed units to tenants for approximately five years before selling them. Domestic Property paid GST calculated under the margin scheme in relation to the sale of the two units and subsequently lodged an objection against the relevant assessments on the basis that the sale of each unit was input taxed, and sought a refund of the GST paid.

The sale of each unit would have been input taxed supply if it had only been used for making input taxed rental supplies for a period of at least five years, in accordance with section 40-75(2)(a) of the GST Act.

The AAT determined that actively marketing the premises for sale in the course of the developer's enterprise was considered 'use' for the purpose of section 40-75(2)(a) of the GST Act. The AAT found that GST was incorporated into the sale price of the units. The taxpayer had sold the units at prices which exceeded their costs, including substantial amounts erroneously understood to be payable as GST.

GSTR 2009/4

The draft update states that the AAT in *Domestic Property* confirmed the ATO's view that marketing premises for sale is a 'use' of those premises. However, the AAT clarified that the meaning of 'used' in section 40-75 and 'applied' in Division 129 of the GST Act should not be interpreted consistently as a matter of course, and that 'used' takes it ordinary meaning.

GSTR 2003/3

The draft update focuses on the 5-year period in section 40-75(2). In *Domestic Property,* the AAT stated that the 5-year period begins when premises become new residential premises. The Commissioner considers that this is consistent with the ATO's longstanding view that the continuous 5-year may commence any time since (or after) the premises become new residential premises.

ATO reference *GSTR 2009/4DC*
w https://www.ato.gov.au/law/view/document?docid=DGC/GSTR20094DC1/NAT/ATO/00001
ATO reference *GSTR 2003/3DC*
w https://www.ato.gov.au/law/view/document?docid=DGC/GSTR20033DC1/NAT/ATO/00001

5.4 GST supplies of food of a kind marketed as a prepared meal

The ATO has finalised its proposed updates to the Goods and Services Tax Determination GSTD 2024/D3. The finalised determination GSTD 2025/1 *Goods and services tax: supplies of food of a kind marketed as a prepared meal* provides guidance on when, under section 38-3(1)(c) of the GST Act, a supply of food is not GST-free because it is a supply of food of a kind 'marketed as a prepared meal, but not including soup'. The supply of food of this kind is not GST-free under paragraph 38-3(1)(c) of the GST Act, as it is food of a kind specific in column 3 of table item 4 of clause 1 of Schedule to the GST Act (table item 4).

The determination considers what products are food of a kind marketed as a prepared meal by reference to the decision of the Federal Court in *Simplot Australia Pty Limited v Commissioner of Taxation* [2023] FCA 1115.

The determination is intended to be read in conjunction with GST Industry Issue GSTII FL1 *Detailed Food List* (**Detailed Food List**). The Detailed Food List is a public ruling that provides the ATO's view on the GST classification of many food and beverage product lines, including under table item 4 in the GST Act.

The ATO has also issued a public advice and guidance compendium GSTD 2025/1EC in conjunction with the finalised determination. The compendium provides responses to the issues raised during the period of review of the draft determination.

ATO reference *GSTD 2025/1*
w https://www.ato.gov.au/law/view/document?docid=GSD/GSTD20251/NAT/ATO/00001
ATO reference *GSTD 2025/1EC*
w https://www.ato.gov.au/law/view/document?docid=CGS/GSTD2025EC1/NAT/ATO/00001

5.5 GST supplies to non-residents but provided to another entity in Australia

The ATO has finalised its proposed updates to the Goods and Services Tax Ruling GSTR 2005/6. The finalised ruling GSTR 2025/1 *Goods and services tax: supplies of things (other than goods or real property) made to non-residents but provided to another entity in Australia* is about the operation of section 38-190(3) of the GST Act.

Section 38-190(3) essentially negates the GST-free status that would otherwise apply to a supply covered by table item 2 of subsection 38-190(1), where the supply is being made to a non-resident but the supply is to be provided to an entity in the indirect tax zone and the entity in the indirect tax zone is not acquiring the thing wholly for a creditable purpose.

GSTR 2025/1 also incorporates updates following the amendments made by the *Tax and Superannuation Laws Amendment (2016 Measures No 1) Act 2016*, which impact how GST applies to cross-border supplies.

The ATO has also issued a Public advice and guidance compendium GSTR 2025/1EC in conjunction with the finalised ruling. The non-binding compendium provides responses to the issues raised during the period of review of the draft ruling.

ATO reference *GSTR 2025/1*
w https://www.ato.gov.au/law/view/document?docid=GST/GSTR20251/NAT/ATO/00001
ATO reference *GSTR 2025/1EC*
w https://www.ato.gov.au/law/view/document?docid=CGR/GSTR2025EC1/NAT/ATO/00001

5.6 GST supplies where effective use or enjoyment of the supply occurs outside Australia

The ATO has finalised its proposed update to the Goods and Services Tax Ruling GSTR 2007/2. The finalised ruling GSTR 2025/2 *Goods and services tax: supplies of things (other than goods or real property) where effective use or enjoyment of the supply takes place outside Australia* examines the circumstances in which the effective use of a supply takes place outside Australia for the purposes of paragraph (b) of Item 3 of the Table in section 38-190(1) of the GST Act.

A supply is GST free under Item 3, except where it relates to goods or real property in the indirect tax zone, where the supply is made to a recipient who is not in the indirect tax zone when the thing supplied is done and the effective use or enjoyment of which takes place outside the indirect tax zone.

GSTR 2025/2 also incorporates updates following the amendments made by the *Tax and Superannuation Laws Amendment (2016 Measures No 1) Act 2016*, which impact how GST applies to cross-border supplies.

The ATO has also issued a Public advice and guidance compendium GSTR 2025/2EC in conjunction with the finalised ruling. The non-binding compendium provides responses to the issues raised during the period of review of the draft ruling.

ATO reference *GSTR 2025/2*
w https://www.ato.gov.au/law/view/document?docid=GST/GSTR20252/NAT/ATO/00001
ATO reference *GSTR 2025/1EC*
w https://www.ato.gov.au/law/view/document?docid=CGS/GSTD2025EC1/NAT/ATO/00001

5.7 Administration of private rulings

The ATO has released a draft ruling TR 2006/11DC *Private Rulings* which proposes to amend the ATO's approach to the system of private rulings to incorporate updates following the enactment of the *Taxation (Multinational – Global and Domestic Minimum Tax) Act 2024* and other related Acts.

The proposed updates refer to the Commissioner's power to decline to rule on applications, per the broad power under section 359-35(2)(c) of Schedule 1 to the TAA. TR 2006/11DC states that the Commissioner may decline to rule where they consider that the application is regarding:

1. Australian IIR tax (income inclusion rule tax);
2. Australian UTPR tax (undertaxed profits rule tax);
3. Australian DMT tax (domestic minimum top-up tax);
4. where the Organisation for Economic Co-operation and Development/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Framework) has published guidance relating to the matter, which the government is planning on incorporating into domestic law but has not yet done so;
5. where the matter relates to an issue that the Inclusive Framework has identified as requiring guidance, or for which it is drafting guidance and has yet to publish an agreed version of that guidance; or
6. where the issuing of a ruling would require the Commissioner to consider how other jurisdictions apply their respective domestic tax laws.

Comments on the draft ruling are due by 29 August 2025.

ATO reference *TR 2006/11DC*
w https://www.ato.gov.au/law/view/document?docid=DTC/TR200611DC1/NAT/ATO/00001

5.8 NSW duties ruling on shared equity schemes

Revenue NSW has released a ruling which explains the process for requesting approval for a shared equity scheme and for accepting a person as a shared equity partner.

Where a home is jointly purchased by a home buyer (who has exclusive right to occupy the property) and an equity partner under an approved shared equity scheme, the property will, in effect, be treated under the *Duties Act 1997* (NSW), First Home Owner Grant and *Shared Equity Act 2000* (NSW) and *Land Tax Management Act 1956* (NSW) as if the home buyer had purchased the whole property (with the equity partner providing finance for the purchase as a mortgagee).

Section 281 of the Duties Act provides:

1. that the Chief Commissioner may approve a shared equity scheme;
2. what a shared equity scheme is;
3. that the scheme only applies where the equity partner is an approved equity partner;
4. who an approved equity partner for the Treasurer to issue guidelines for the approval of shared equity schemes that the Chief Commissioner is to comply with; and
5. the Treasurer has published guidelines which set out the criteria under which the Chief Commissioner may approve a shared equity scheme.

Requests must be made in writing, addressed to the Chief Commissioner of State Revenue, and submitted via email to private.ruling@revenue.nsw.gov.au. The request must either:

1. be signed by a duly authorised officer of the organisation; or
2. if submitted by a third party (e.g. an agent or representative), be accompanied by a written and signed statement from the person seeking to be prescribed, authorising the request and confirming the accuracy of the information provided.

Revenue NSW reference *DUT 052*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/duties/dut-052

5.9 QLD practice directions for homeowner grants and transfer duty

On 1 August 2025, the Queensland Revenue Office issued new practice directions relating to home owner grants and transfer duty. These cover:

1. eligible transactions involving oral contracts (FHOGA005.1.1);
2. interests subject to a trust (FHOGA008.1.1);
3. instalment contracts (FHOGA019.1.1); and
4. variations to land transfer agreements executed by deed or through solicitor correspondence (DA501.1.1).

The new directions replace previous public rulings FHOGA005.2, FHOGA008.1, FHOGA019.1 and DA501.1.

w https://qro.qld.gov.au/2025/08/new-practice-directions/

6. Private rulings

Taxpayers cannot rely on private rulings obtained by other taxpayers. Private rulings are not binding on the Commissioner in relation to taxpayers other than the rulee(s) and provide no protection (including from any underpaid tax, penalty, or interest). Additionally, private rulings are not an authority for the purposes of establishing a reasonably arguable position for taxpayers to apply to their own circumstances. For more information on the status of edited versions of private advice and the reasons the ATO publishes them, refer to PS LA 2008/4.

6.1 Timing of derivation of interest

Facts

The taxpayer is an Australian resident for tax purposes.

In XX/20XX, the taxpayer arrived in Australia as a refugee from Country X and was granted permission to stay under a visa. The taxpayer later became an Australian citizen.

The taxpayer owns of a savings account and an investment certificate held in Country X. However, the account has become inactive, and the taxpayer does not have control over it.

The taxpayer cannot return to Country X to reactivate the account, and Australia has no branches of the bank in question. For security reasons, the taxpayer cannot travel to any country where the bank operates.

The taxpayer is unable to access the bank's online services or appoint a power of attorney to activate the account.

Interest is credited to the account every X months, and unless a withdrawal request is made, the interest continues to accumulate. The taxpayer does not currently have control over the account and has made no withdrawals during the ruling period.

On XX/XX/20XX, the bank informed the taxpayer that the identification number linked to the account was dormant and could only be reactivated at a branch, enabling online access thereafter. The bank also advised that it could not send statements by email and that the applicable interest rate was XX per annum.

Question

Is the interest that accumulates in the account assessable as ordinary income under section 6-5 of the ITAA 1997?

Ruling

The ATO ruled no.

The ATO determined that the interest credited to the taxpayer's overseas savings account is not assessable as ordinary income under subsection 6-5(4) of the ITAA 1997 at this time, because it has not yet been "derived" for tax purposes.

Under subsections 6-5(1) and (2) of the ITAA 1997, an Australian resident's assessable income includes ordinary income from all sources, whether in or outside Australia. Ordinary income includes amounts that are earned, expected, relied upon, and have an element of regularity, such as interest credited half-yearly to a bank account.

However, subsection 6-5(4) provides that income is only considered derived when it is received, applied, or otherwise dealt with on the taxpayer's behalf or as the taxpayer directs. The ATO referred to *Commissioner of Taxes (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1938) 63 CLR 108, which established that income must have "come home" to the taxpayer before it is assessable.

Although the taxpayer earned interest on the overseas account, the funds were inaccessible. The account was dormant, no withdrawals were possible, and the taxpayer could not instruct the bank to deal with the money in any way. The inability to access the interest meant it had not "come home" to the taxpayer and therefore was not derived in the relevant income years.

The Commissioner concluded that the interest will only become assessable once the taxpayer is able to access it or direct its use, satisfying the derivation requirement in subsection 6-5(4) of the ITAA 1997.

ATO reference *Edited Private Advice Authorisation No. 1052404298782*
w https://www.ato.gov.au/law/view/document?docid=EV/1052404298782

6.2 Deduction for losses on CFD trading

Facts

In the 20YY and 20YY financial years, the taxpayer participated in share trading with the intention of generating income. They purchased software to track their share trading activities and used trading platforms to buy and sell shares.

The taxpayer sold a rental property and had sufficient funds to repay their home loan. Instead of doing so, they withdrew funds from the loan to purchase larger parcels of shares.

The taxpayer is employed as a fly-in fly-out worker on a week-on, week-off roster at a mine. The mine has internet reception, and while on site, the taxpayer uses both a laptop and a mobile phone to execute trades. Trades are set up while working and monitored throughout the trading day. When at home, the taxpayer operates from a home office, using a laptop to conduct research.

Although the taxpayer's trading activities do not follow a structured system, they research market trends through various communities. They have actively traded on the ASX for the past XX years, focusing on XX stocks.

In 20YY, the taxpayer executed XX trades, investing a total capital of $XX, and incurred a loss of $XX. In 20YY, they executed XX trades, invested $XX in total capital, and again incurred a loss of $XX. The taxpayer does not have specific systems in place to preserve capital.

Trades are entered based on specific market conditions and events, with timing determined by the taxpayer's analysis and assessment. This irregular approach is a deliberate strategy, aimed at capitalising on short-term market fluctuations, although it has sometimes led to hasty decisions and losses. The taxpayer has faced challenges in accurately predicting market movements, resulting in returns that did not meet expectations.

Trading activities are documented using software to record transaction dates and amounts. The taxpayer dedicates time to monitoring markets, analysing potential trades, and conducting research to inform decisions.

Prior to January 20YY, the taxpayer had not undertaken any formal share trading courses. Since that date, they have participated in a trading community to learn about trading Contracts for Difference (**CFDs**). They have maintained consistent trading activity while fulfilling work commitments.

Questions

1. Is the income that the taxpayer has received from share transactions assessable as business income under section 6-5 of the ITAA 1997?
2. Are losses incurred by the taxpayer in the 20YY-YY and 20YY-YY financial years from trading in CFDs deductible under section 25-40 of the ITAA 1997?

Ruling

Share trading business

The ATO determined that the taxpayer was **not carrying on a business of share trading** for the financial years ended 30 June 20YY and 30 June 20YY.

In reaching this conclusion, the ATO considered factors from *TR 97/11*, *Case 6297* (1990) 21 ATR 3747; 90 ATC 621, and *Hartley v FCT* (2013) AATA 601. Key indicators against the existence of a business included:

trading was not regular or routine, with significant month-to-month variation in trade numbers;
there was no business plan, structured system, or capital preservation measures in place; and
activities were not conducted in a business-like manner and lacked permanency.

Although the taxpayer intended to generate profit, this was not supported by structured operations, consistent trading patterns, or formal planning. Consequently, the ATO concluded the activities did not amount to a share trading business, and income was therefore not assessable as business income under section 6-5 ITAA 1997.

Deductibility of losses from CFD trading

For the relevant years, the ATO accepted that the taxpayer's losses from trading in CFDs were deductible under section 25-40 of the ITAA 1997. The Commissioner found that the CFD activities were not of a scale or regularity sufficient to constitute a business. The trades lacked consistent volume and the capital invested was relatively modest. However, the taxpayer had entered into CFD trades with a clear and identifiable profit-making purpose, supported by ongoing participation in a trading community to improve their knowledge and skills in this area.

The ATO applied the principles in *TR 2005/15*, which explain the tax treatment of financial contracts for differences. Under paragraphs 13 and 14 of that ruling, where a CFD transaction is part of a profit-making undertaking or scheme rather than a business, any gain from the transaction is assessable under section 15-15 of the ITAA 1997. Correspondingly, any loss from such a transaction is deductible under section 25-40 of the ITAA 1997.

In this case, the taxpayer's CFD activities were undertaken with the primary aim of generating short-term trading profits in response to market movements. The transactions were commercial in nature and involved deliberate decision-making based on market analysis, even though the overall approach lacked the consistency expected of a business. As a result, the ATO concluded that while the taxpayer was not carrying on a CFD trading business, the losses were still deductible because they arose from a genuine profit-making undertaking.

COMMENT – in the ruling, no consideration was given to whether the loss from the CFD activities were on revenue account under the second strand in *Commissioner of Taxation v The Myer Emporium Ltd* (1987) 163 CLR 199. That is, the CFD transactions were isolated transactions for a profit, as recently considered in *Greig v Federal Commissioner of Taxation* (2020) 275 FCR 445 and *Bowerman and Commissioner of Taxation* (Taxation) [2023] AATA 3547. It should not have necessary, in order for the losses to be deductible, that the activities amount to the carrying on of a business.

ATO reference *Edited Private Advice Authorisation No. 1052396915278*
w https://www.ato.gov.au/law/view/document?docid=EV/1052396915278

6.3 Deduction for loss on realisation of JV interest

Facts

Company A and Company B, through their wholly owned subsidiaries, entered into a joint venture using a special purpose unit trust (**Trust**) to undertake a property development (**Project**). Each company holds 50% of the units in the Trust.

Company A is the head company of a tax consolidated group.

Under the development agreements, when the developed properties of the Project are sold, a developer's fee will be paid to the Trust. This fee effectively represents the net cash proceeds from sales of the developed properties. After deducting expenses, the Trust will distribute the remaining net cash proceeds to Company A and Company B in proportion to their unit holdings.

A unitholder agreement governs the joint venture, establishing a management committee with oversight of the Project and authority to make decisions on behalf of the unitholders. Both companies have representation on this committee, which has met regularly since the joint venture began.

The unitholders will derive their share of the Trust's net income as cash distributions from the property development activities carried out under the development agreements. The Trust will be wound up once the Project is completed, and after all liabilities are repaid, the remaining proceeds will be distributed in line with unit holdings. The profit distribution and wind-up are expected to occur as part of a single course of events.

Cash distributions from the Trust are taxable to Company A. Upon completion of the Project and disposal of all developed properties, the Trust will be wound up. Company A expects to realise a loss on the realisation of its units in the Trust. The tax cost base of these units for Company A consists of the initial acquisition price and other associated investment costs, such as legal fees.

Question

Is the loss incurred by Company A on the realisation of units in the joint venture unit trust (the Trust) deductible to Company A as head entity of the tax consolidated group (TCG) under section 8-1 of the ITAA 1997?

Ruling

The single entity rule in section 701-1 of the ITAA 1997 treats subsidiary members of an income tax consolidated group as part of the head company for income tax purposes. As head company of its tax consolidated group, Company A is treated as having undertaken the actions and transactions of its subsidiaries, including acquiring and disposing of the Trust units.

Section 8-1 of the ITAA 1997 allows deductions for losses or outgoings incurred in gaining or producing assessable income, provided they are not capital in nature. Company A acquired the Trust units in the course of participating in a property development project that directly produced assessable income through cash distributions. The loss on realisation of the units is therefore connected to its income-producing activities and satisfies the positive limb of section 8-1 of the ITAA 1997.

The ATO then considered whether the loss was of a capital nature under subsection 8-1(2) of the ITAA 1997. The ATO considered that the joint venture partners' ownership of units provides them with an interest in the assets of the trust as a whole, but not a divisible interest in any particular asset. The income of the unit trust is

assessed to the unitholders in accordance with their own tax characteristics. In a build-and-sell project, the trust derives income from the sale of properties developed through the project. According to the ATO, acquisition of units in a joint venture trust undertaking such a project enables the joint venture partners to derive income from that project, which is of limited duration, and the benefit or advantage obtained cannot be regarded as lasting or enduring in nature.

Accordingly, the loss was not of a capital nature, and the deduction under subsection 8-1(1) of the ITAA 1997 was available.

COMMENT – a common question is whether units in a unit trust that are on capital or revenue account where the underlying assets are clearly on revenue account. In this ruling, the ATO has concluded that the profit making nature of the enterprise stamped the units with a revenue character.

ATO reference *Edited Private Advice Authorisation No. 1052390728993*
w https://www.ato.gov.au/law/view/document?docid=EV/1052390728993

6.4 Deduction for interest on loan to pay tax debt

Facts

The taxpayer operated independently as a sole trader, performing procedures at a specified facility. A receptionist was employed to manage appointments. The taxpayer billed clients directly.

The taxpayer maintained a floating line of credit, which was used to pay for income-earning expenses as well as PAYG instalments and income tax liabilities. This line of credit accrued interest costs.

Question

Is the taxpayer entitled to a deduction under section 8-1 of the ITAA 1997 for interest incurred on borrowings used to pay income tax and PAYG instalments, to the extent that the payments relate to income from their private consultation practice?

Ruling

The ATO determined that the taxpayer is entitled to a deduction under section 8-1 of the ITAA 1997 for interest incurred on money borrowed to pay income tax and PAYG instalments, but only to the extent that these obligations arise from the taxpayer's private consultation practice business.

Consistent with *Taxation Ruling* IT 2582, interest on borrowings connected to meeting business-related tax liabilities is a normal incident of carrying on a business for the purpose of producing assessable income. However, interest on borrowings used to pay tax liabilities from non-business income, such as employment or investment earnings, is not deductible.

Where borrowings are used to meet mixed business and non-business tax liabilities, the interest must be apportioned on a reasonable basis. The taxpayer must also meet general substantiation requirements to show the borrowings were used for business-related tax obligations.

TRAP – interest on borrowings to pay personal tax is not deductible.

ATO reference *Edited Private Advice Authorisation No. 1052396922664*
w https://www.ato.gov.au/law/view/document?docid=EV/1052396922664

6.5 Accidental sale of shares

Facts

The taxpayer is an Australian-incorporated company and resident for tax purposes. It holds shares and units as long-term investments, all of which were acquired after 20 September 1985, meaning they are post-CGT assets. These investments are neither trading stock nor depreciating assets under Division 40 of the ITAA 1997.

The investments are kept in an account operated by an investment platform, whose operator neither provides financial advice nor has authority to act without the taxpayer's prior consent.

The taxpayer engages a separate financial adviser for investment advice. The adviser also cannot implement transactions without the taxpayer's agreement.

On a specified date, the investment platform operator, acting outside the instructions of both the taxpayer and the adviser, mistakenly sold certain parcels of shares. Details of the affected assets were documented.

When the unauthorised sales were discovered, the adviser met with the platform operator to address the issue. The operator admitted the transactions occurred due to an administrative oversight and confirmed this in writing. To correct the error, the operator restored the taxpayer's investment account to its prior position by repurchasing the same shares using the proceeds from the mistaken sales.

The market value of the replacement shares was higher than the original cost base for most holdings, except for a particular parcel of shares, where the market value was lower than their original cost base.

The taxpayer does not seek roll-over relief under Subdivision 124-B of the ITAA 1997 for this parcel of shares, where a capital loss will arise.

Questions

1. Did CGT event C1 happen when the taxpayer's shares were incorrectly sold as a result of an error by the operator of the investment platform?
2. Can the taxpayer apply CGT roll-over relief under Subdivision 124-B of the ITAA 1997 to disregard the capital gain resulting from the sale of shares?
3. If the taxpayer can apply roll-over under Subdivision 124-B of the ITAA 1997, will the cost base of the new replacement shares and date of acquisition for capital gains discount under section 115-25 be the same as the cost base and date of acquisition of the original shares?

Decision

CGT event C1

The ATO determined that CGT event C1 happened when the taxpayer's shares were sold without their consent due to the investment platform operator's error. This was because the unauthorised sale meant the taxpayer's ownership of the shares was lost, triggering section 104-20 of the ITAA 1997. Although CGT event A1 also applied as a disposal of a CGT asset, subsection 102-25(1) requires using the most specific event, which in this case was CGT event C1. The ATO considered the circumstances comparable to ATO ID 2010/124, which dealt with a similar unauthorised sale caused by a broker's mistake.

Roll-over relief

The ATO found the taxpayer could apply roll-over relief under Subdivision 124-B to disregard the capital gain. The shares were considered lost under paragraph 124-70(1)(b) of the ITAA 1997 because they were sold without consent due to the platform operator's mistake. Replacement shares were received, and they did not

become trading stock or depreciating assets under Division 40. Since the market value of the replacement shares (in most cases) exceeded the cost base of the original shares, the rollover conditions in subsection 124-80(3) were met.

Cost base and acquisition date under roll-over

The ATO confirmed that, as the original shares were post-CGT assets, the replacement shares would inherit the same cost base as the originals under subsection 124-90(3) of the ITAA 1997. For CGT discount purposes, the acquisition date of the replacement shares is taken to be the date the original shares were acquired, as per item 2 in the table in section 115-30 of the ITAA 1997.

ATO reference *Edited Private Advice Authorisation No. 1052392554788*
w https://www.ato.gov.au/law/view/document?docid=EV/1052392554788

6.6 CGT concession stakeholders

Facts

A company was incorporated with four shareholders as follows:

Shareholder	Share Class	Number of shares
A	A class	1
B	B class	1
C	C class	1
D	D class	1

The Company's constitution provided for various share classes, including ordinary shares, with A, B, C and D class shares all carrying voting rights. Other classes of shares existed but did not carry voting rights. The constitution also allowed for dividends or distributions of capitalised profits to be paid in different amounts across different share classes, at the discretion of shareholders.

The shareholders' agreement outlined the Company's capitalisation, financing, management, and operation. It stated that the balance of available profits would be distributed to ordinary shareholders according to the number of ordinary shares held, with adjustments for partly paid shares. However, in practice, dividends had been paid equally to the four shareholders for at least the past five years.

In 202X, the shareholders considered selling the Company's business and obtained a valuation. Discussions with a potential purchaser took place, but negotiations fell through due to disagreement over sale contract terms. Following this, C and D offered to purchase the shares held by A and B, with the sale price to be based on the valuation and the agreed purchase price.

Before proceeding, the Company obtained tax advice. It was discovered that, contrary to the shareholders' long-held belief, their shares did not legally carry an entitlement to 25% of dividends each. To correct this, both the constitution and the shareholders' agreement were amended to reflect the shareholders' true intention that each share would entitle its holder to 25% of dividends.

After these amendments, A and B sold their shares to C and D, respectively. A and B intend to access the small business CGT concessions in relation to the sale.

Questions

1. Were the A and B CGT concession stakeholders in the Company just before they sold their respective shares in the Company pursuant to section 152-60 of the ITAA 1997?

2. Will Part IVA of the ITAA 1936 apply to cancel any tax benefit the taxpayers obtain from the sale of their shares?

Ruling

CGT concession stakeholders

To access the small business CGT concessions in Division 152, additional conditions apply where the CGT asset is a share in a company. One of these conditions is that the seller must be a CGT concession stakeholder just before the CGT event. Under section 152-60 of the ITAA 1997, a person is a CGT concession stakeholder if they are either a significant individual in the company (section 152-55) or the spouse of one who holds a non-zero participation percentage.

A "significant individual" is someone with a small business participation percentage of at least 20%. This percentage is the sum of the direct and indirect percentages held, calculated under sections 152-65, 152-70 and 152-75 of the ITAA 1997. For companies, the direct percentage is determined by voting power, entitlement to dividends, and entitlement to capital distributions, with the lowest of these figures applying if they differ.

In this case, the company's constitution and shareholders' agreement were amended before the sale to reflect the shareholders' long-standing intention that each of the four main shareholders had equal voting rights and entitlement to dividends (25% each).

After the amendments, A and B each held a 25% small business participation percentage, making them significant individuals under section 152-55. The ATO determined that this satisfied the definition of CGT concession stakeholder in section 152-60, meaning A and B met this aspect of the basic conditions in section 152-10 for the small business CGT concessions.

Part IVA

Part IVA can apply if three elements are present:

1. a "scheme" as broadly defined in section 177A of the ITAA 1936;
2. a "tax benefit" connected with that scheme, as defined in section 177C (and section 177CB for schemes after 16 November 2012); and
3. a dominant purpose, determined under section 177D, of enabling the taxpayer to obtain that tax benefit.

The ATO accepted that a scheme existed, comprising the amendments to the company's constitution and shareholders' agreement, followed by the sale of shares by A and B to C and D. The potential tax benefit was that, because of these amendments, A and B became CGT concession stakeholders and could potentially reduce or eliminate their capital gains through the small business CGT concessions.

However, when considering the "dominant purpose" test in section 177D, the ATO found the evidence pointed against a tax-driven motive. The amendments corrected an error and aligned the documents with the shareholders' genuine long-standing commercial intention that all four shareholders had equal voting and dividend rights. This was supported by the fact that equal dividends had been paid for many years before the sale was contemplated.

The ATO concluded that the primary purpose of the amendments was to give legal effect to this original intention, not to obtain a tax benefit. Therefore, the "purpose" element in section 177D was not satisfied.

As a result, the Commissioner determined that Part IVA would not apply to the transaction, and any tax benefits A and B obtained from accessing the CGT concessions would not be cancelled under section 177F.

COMMENT – While the ATO determined that it would not apply Part IVA in this case, care should be taken where steps are taken to meet the eligibility criteria for the small business CGT concessions. Simply making a

choice to apply the concessions is not, in itself, tax avoidance; however, entering into arrangements for the dominant purpose of creating the circumstances necessary to make that choice may attract Part IVA.

ATO reference *Edited Private Advice Authorisation No. 1052394240134*
w https://www.ato.gov.au/law/view/document?docid=EV/1052394240134

6.7 CGT marriage breakdown roll-over

Facts

The taxpayer married Person A and they jointly purchased a property, which they occupied as their home for several years before it was later used for rental purposes.

They subsequently purchased another property, Property X, also in joint names, which became their residence.

After some years, the taxpayer and Person A formally separated. Person A vacated the original property and moved into Property X, which has remained their main residence since that time.

The taxpayer and Person A made a verbal agreement to transfer their respective ownership interests in the two properties to each other to enable the release of funds from Person A's refinancing of loans. Under this arrangement, the taxpayer transferred their interest in the original property to Person A, and Person A transferred their interest in Property X to the taxpayer.

A Financial Agreement under section 90C of the *Family Law Act 1975* was prepared by a legal firm to reflect these transfers, resulting in the taxpayer having sole ownership of Property X and Person A having sole ownership of the original property. However, the Agreement is undated and remains unsigned by both parties.

Question

Is any capital gain or capital loss the taxpayer makes in relation to the transfer of their ownership interest in the original property to Person A disregarded under the marriage breakdown roll-over in section 126-5 of the ITAA 1997?

Ruling

The ATO considered whether the taxpayer's transfer of their ownership interest in the Property to Person A qualified for the marriage breakdown roll-over under section 126-5 of the ITAA 1997.

The legislation allows CGT roll-over relief when a CGT asset is transferred between spouses or former spouses as a result of a formal, legally recognised arrangement following a relationship breakdown. This relief applies only if the transfer occurs because of a qualifying agreement, such as a court order, binding financial agreement under section 90G of the *Family Law Act 1975*, or another equivalent arrangement set out in section 126-5. Transfers made under private or informal arrangements are not eligible.

In the taxpayer's case, the ATO found that while the parties had separated and made a verbal agreement to exchange their ownership interests in the original property and Property X, the transfer occurred before any qualifying legal agreement was in place. Although a Financial Agreement under section 90C of the *Family Law Act 1975* had been prepared, it was undated and unsigned, and therefore not legally binding.

Relying on the principles in TD 1999/53, the ATO concluded that the transfer was not "because of" a qualifying agreement, but rather due to the private verbal arrangement aimed at enabling Person A's loan refinancing. Since the transfer did not meet the conditions in section 126-5, the marriage breakdown roll-over could not apply.

As a result, CGT event A1 occurred when the taxpayer disposed of their interest in the original property. The taxpayer must therefore recognise any capital gain or capital loss from the transfer in calculating their net capital gain for the relevant income year, with the market value substitution rule applying due to the non-arm's length nature of the transaction.

COMMENT – this would likely also raise issues for transfer duty as the concessions available for transfer under a relationship breakdown in each jurisdiction have similar requirements to CGT, in relation to the transfer

occurring because of a qualifying agreement, such as a court order, binding financial agreement under the *Family Law Act 1975.*

ATO reference *Edited Private Advice Authorisation No. 1052394916231*
w https://www.ato.gov.au/law/view/document?docid=EV/1052394916231

6.8 CGT main residence exemption

Facts

The taxpayer purchased XX hectares of land (Property A) in 19XX. In 19XX, a house was built on Property A.

In 20XX, a fire swept through the area and destroyed the house. At the time of the fire, the house was the taxpayer's main residence. For the purposes of this ruling, Property A is divided into two parts: Part A, being the land on which the house previously stood along with adjacent land totalling up to two hectares; and Part B, comprising the remaining land area of approximately XX hectares. Property A was used exclusively for private and domestic purposes.

In the same year as the fire, the taxpayer and their spouse purchased a new house (Property B). The taxpayer has chosen to continue the main residence exemption in accordance with section 118-160 of the ITAA 1997 following the destruction of the house at Property A.

The taxpayer intends to transfer the entirety of Property A to their child within the ruling period for no consideration. Following the bushfire, Property A was rezoned as C3 Environmental Management, which will allow the child to construct a house on the land.

Questions

1. Can the taxpayer apply the full main residence exemption to Part A of Property A when they dispose of the property?
2. Can the taxpayer disregard any capital gain on Part B of Property A when they dispose of the property?
3. Will the market value substitution rule in subsection 116-30(2) of the ITAA 1997 apply when the taxpayer disposes of Property A?

Ruling

Full exemption for Part A of Property A

Part A comprised the land on which the house previously stood, plus adjacent land of up to two hectares.

Section 118-160 of the ITAA 1997 provides that where a person's main residence is accidentally destroyed and a CGT event occurs in relation to the land without another dwelling being erected on it, the person may choose to treat the land as if the original dwelling had not been destroyed and continued to be their main residence until their ownership interest ends. If they make this choice, they cannot treat any other dwelling as their main residence during that period, except in circumstances covered by section 118-140 concerning changes in main residences.

The ATO determined that the taxpayer could apply the full main residence exemption under section 118-160 of the ITAA 1997 to the transfer of Part A of Property A. The exemption applied because the house was the taxpayer's main residence until it was destroyed by fire, the taxpayer had chosen to continue the exemption following destruction, and the land was used solely for private and domestic purposes. This meant that the transfer of Part A to the taxpayer's child would not trigger a capital gain.

Capital gain on Part B of Property A

Under section 118-160 of the ITAA 1997, the main residence exemption can only apply to the house site and up to two hectares of adjacent land. Any land beyond this limit is excluded, even if it is used solely for private purposes. Part B of Property A exceeded this size limit, meaning any capital gain or loss on disposal must be calculated either by separate valuation or by apportioning proceeds and cost base according to area or value. As the taxpayer had owned the property for at least 12 months, the general 50% CGT discount would apply.

Market value substitution

Subsection 116-30(2) of the ITAA 1997 applies when a CGT event occurs without market value consideration, particularly in non-arm's length transactions. In this case, the taxpayer planned to gift Property A to their child for no consideration, meaning the transaction was not at arm's length. The market value substitution rule therefore required that the taxpayer be taken to have received the property's market value at the time of disposal. Based on this reasoning, the ATO determined that the rule would apply to the transfer of Property A.

TIP – Generally the destruction of part of a CGT asset gives rise to CGT event C1 (see the legislative note in section 104-20(1) of the ITAA 1997, TD 1999/79 and ATO ID 2002/633). A subsequent sale of the vacant land would not be eligible for the main residence exemption, as there would be no dwelling. The specific exception in section 118-160 of the ITAA 1997 relied on by the applicant for this ruling applies where a dwelling is accidentally destroyed and the land is sold without a new dwelling being erected. This exemption would not apply if the dwelling had been deliberately demolished prior to sale.

ATO reference *Edited Private Advice Authorisation No. 1052384398109*
w https://www.ato.gov.au/law/view/document?docid=EV/1052384398109

7. ATO and other materials

7.1 Draft guidance on low-risk payments relating to software

Following the release of *Draft Taxation Ruling* TR 2024/D1 Income tax: royalties – character of payments in respect of software and intellectual property rights (**Draft Ruling**) (see our February 2024 Tax Training Notes), the ATO has issued a companion practical compliance guideline, *Draft Practical Compliance Guideline* PCG 2025/D4 (**Draft Guideline**).

The Draft Ruling will not be finalised until after the High Court has handed down its decision on the appeal from *PepsiCo, Inc. v Commissioner of Taxation* [2024] FCAFC 86 (**PepsiCo**).

Under the ATO's approach in the Draft Ruling, a wide variety of payments made for the right to access software under software distribution arrangements may be treated as royalties, potentially giving rise to withholding tax obligations for Australian distributors. Importantly, the Draft Ruling rejected the previous understanding that a payment made by an Australian distributor for the right to distribute software to purchaser who make "simple use" of the software is not a royalty.

The Draft Guideline sets out the ATO's compliance approach to software payments. The Draft Guideline contains a risk assessment framework, under which taxpayer can self-assess the compliance risk of payments relating to software. The risk assessment framework contains two zones as follows:

1. a white zone, where any of the following apply:
   (a) the taxpayer settlement agreement or an advance pricing arrangement (APA) with the ATO that expressly addresses the Australian withholding tax consequences of the arrangement for the current year, and has complied with the agreement's terms;
   (b) a court or tribunal, in proceedings to which you were a party, has determined whether a payment under your arrangement is or is not a royalty;
   (c) the arrangement has been reviewed or audited by the ATO for that income year, and has received either a 'low risk' rating or a 'high assurance' rating (as part of a justified trust review) in respect of the arrangement's royalty risk.
2. a green zone, where the payment relates to the acquisition of:
   (a) software acquired solely for private or domestic use
   (b) software which is:
      (i) installed and used in the course of the taxpayer's own business
      (ii) generally available to the public from other sources and is not substantially customised;
      (iii) not further sold, licensed or otherwise exploited as a primary object of the taxpayer's business
   (c) finished tangible goods of which software is an inherent or practically inseparable part, the software is to enable the tangible goods to perform their intended function, and the goods are acquired for resale to retail customers; or
   (d) software copies stored on physical media in the course of a business of reselling the software copies and the taxpayer and its associates do not require or have the rights to use offshore IP (for example, the right to sublicence any IP).

The following example is contained in the Draft Guideline of a green zone arrangement:

> *Example 3 – software copies stored on physical media acquired by a retailer*
>
> *41. Electronics Retail Co is a large Australian retail company that sells consumer electronics and white goods at stores located throughout Australia.*

42. Electronics Retail Co also sells software such as productivity programs on physical media. Electronics Retail Co has wholesale agreements with offshore software companies which enables Electronics Retail Co to purchase the software on physical media at reduced prices.

43. Under the wholesale agreements, Electronic Retail Co has no rights to copy, modify or sublicence, nor has any other rights to use the software copyright of the offshore companies.

44. For the purposes of this Guideline, the payment by Electronics Retail Co to the offshore software providers under the wholesale agreements are categorised in the green zone as the software copies on physical media are acquired in the course of Electronics Retail Co's business of reselling the software copies and Electronics Retail Co does not require or have the rights to use the IP of the offshore software companies.

For taxpayers, being in the white or green zone means the ATO will generally not allocate compliance resources to review royalty risk (other than to verify that the relevant zone criteria are met).

When finalised, this Draft Guideline will apply to arrangements entered into both before and after its date of issue.

Consultation on the Draft Guideline is open to 17 September 2025.

COMMENT – the High Court's decision on the appeal from *PepsiCo* is being handed down on 12 August 2025, after the preparation of these August 2025 Tax Training Notes. The decision will be covered in our September 2025 Tax Training Notes.

ATO Reference *Draft Practical Compliance Guideline* PCG 2025/D4
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2025D4/NAT/ATO/00001

7.2 ATO to re-examine 'double death' CGT rollover relief

The ATO has indicated it is preparing a draft Taxation Determination to clarify the Commissioner's view on the application of the CGT rollover concession in Division 128 of the ITAA 1997 when a beneficiary of a deceased estate dies before a CGT asset of the deceased estate passes to them. The issue likely concerns whether the asset is an asset of the second deceased person at that time of his or her death, which is a condition for the Division 128 concession.

The draft Determination is expected to be publicly released in late 2025, with targeted consultation currently underway and expected to be completed in August 2025.

w https://www.ato.gov.au/about-ato/ato-advice-and-guidance/advice-under-development-program/advice-under-development-capital-gains-tax-issues

7.3 Common CFC disclosure errors of private groups

On 23 July 2025, the ATO published a statement emphasising the importance of correctly applying the controlled foreign company (**CFC**) provisions. It also warned that compliance reviews continue to identify a high rate of errors in CFC disclosures by privately owned and wealthy groups.

Common issues include under-reporting attributable income due to misapplication of the active income test or failure to recognise tainted income, omission of deemed dividends from unlisted country CFCs, and incorrect

International Dealings Schedule (IDS) reporting, such as overlooking associate-inclusive control and misreporting CFC revenue or acquisition/disposal numbers.

To reduce the risk of errors, the ATO urges taxpayers to review its CFC guidance under the Private Wealth International Program, seek specialist advice, and keep advisers informed of structural changes.

CFC compliance remains a priority for the Tax Avoidance Taskforce, and incorrect disclosures risk lengthy reviews, amendments, and interest charges.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/getting-the-cfc-provisions-right
w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/private-groups-watch-out-for-common-cfc-errors

ATO letters scrutinised by the Tax Ombudsman

The Tax Ombudsman has reviewed the ATO's use of high-volume letter templates, finding shortcomings in clarity, tone and audience focus.

The review examined six bulk-letter templates and concluded that while the ATO has a strong letter-design framework, it is applied inconsistently. Messaging often reflects the ATO's perspective rather than taxpayer needs, with technical or accusatory language, limited empathy, and assumptions about English literacy. There is no tailored approach for communicating with diverse or vulnerable taxpayers, and letters are occasionally sent to the wrong address. Only 41% of templates included measures of clarity or effectiveness.

The report made the following four recommendations:

1. standardising processes and support information for diverse taxpayers;
2. creating a consultation and testing framework with diverse participants;
3. introducing feedback and
4. analytics to measure impact; and improving use of communication preferences and address accuracy.

The ATO has agreed to implement all recommendations, noting the need to balance technical precision with plain language.

w https://www.taxombudsman.gov.au/publications/review-letters-from-the-ato/

7.4 Determining eligibility for the remote zone tax offset

The remote zone tax offset is a concessional tax measure intended to help compensate individuals for the higher costs of living and isolation associated with residing in certain remote or isolated parts of Australia.

On 21 July 2025, the ATO clarified that eligibility for the remote zone tax offset is based on where a taxpayer's *usual place of residence* is located and how long they have lived there during the income year. Generally, a taxpayer must reside in a remote zone for at least 183 days in the income year, although the days need not be consecutive. A five-year rule may apply if the 183-day threshold was not met in the first year of residence, provided the combined days across the first year and current year reach 183, and the current residence includes 1 July.

Fly-in fly-out and offshore oil or gas rig workers are typically ineligible unless their usual residence is in the zone. Temporary stays in employer-provided accommodation do not qualify if the usual place of residence is outside the zone.

The ATO publishes a non-exhaustive list of eligible locations, but geographic location determines eligibility, not whether the specific place is listed.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/remote-zone-tax-offset-determining-eligibility

7.5 Foreign resident capital gains withholding (FRCGW) – claiming credits at tax time

On 18 July 2025, the ATO published a reminder that amounts withheld under the FRCGW rules from a property sale can be claimed as a credit in the tax return for the year the contract was signed.

A return must be lodged, even if income is below the tax-free threshold, and the sale reported with any capital gain or loss. A payment confirmation notice should be obtained from the ATO or the purchaser.

A full refund may be available if there are no tax debts, no CGT payable, and, for foreign residents, no other Australian-sourced income resulting in tax payable.

Purchasers must withhold unless provided with a clearance certificate (in the case of Australian residents) or a variation notice (in the case of foreign residents). The FRCGW rate is 12.5% for properties valued at $750,000 or more until 31 December 2024, increasing to 15% for all property from 1 January 2025. Delays in obtaining a clearance certificate, which can take up to 28 days, may result in withholding for Australian residents, while foreign residents are subject to withholding unless a variation to nil is obtained before settlement.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/claim-frcgw-as-a-credit-this-tax-time

7.6 Arrangements designed to improperly obtain GST refunds

The ATO has released *Taxpayer Alert* TA 2025/2 Arrangements designed to improperly obtain good and services tax refunds to respond to an emerging trend of fraudulent GST refund schemes involving artificial, collusive arrangements which are designed to claim inflated or non-existent GST credits.

The key features of the arrangements addressed by TA 2025/2 include:

1. supplies and purchasers that are related entities, or have opaque connections (e.g. involving 'straw directors');
2. invoices that refer to acquisitions of goods and services at inflated prices that are not verifiable;
3. services which are vaguely described in order to be difficult to verify, e.g. consultancy or project management;
4. non-lodgment of BAS statements, avoiding corresponding GST liabilities; and
5. entities involved in the arrangements often liquidate once refunds are received, to avoid compliance action by the ATO.

These schemes constitute tax fraud, allowing entities to obtain an unfair competitive advantage and undermining the integrity of the GST system.

The ATO is actively scrutinising transactions to identify these schemes and is engaging with taxpayers to ensure compliance. The ATO encourages taxpayers to consider whether the issues raised in the Taxpayer Alert apply to them, and to make a voluntary disclosure in order to reduce the risk of penalties.

w https://www.ato.gov.au/law/view/document?docid=TPA/TA20252/NAT/ATO/00001

7.7 Extension of time for GST margin scheme

The ATO has updated PS LA 2005/15 regarding when the Commissioner will exercise discretion to extend the time in which the agreement in writing must be made to apply the margin scheme under section 75-5(1A) of the GST Act.

The updates to PS LA 2005/15:

1. clarify that the Commissioner's discretion can only be exercised if the ATO is satisfied neither the recipient nor the supplier have reported their GST obligations based on the margin scheme not applying;
2. note that the request should confirm, with supporting documentation, that all other requirements to apply the margin scheme are met.

w https://www.ato.gov.au/law/view/document?docid=PSR/PS200515/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=TPA/TA20252/NAT/ATO/00001

7.8 Guidance on using GST analytical tool

On 6 August 2025, the ATO published updated guidance on the GST Analytical Tool (**GAT**). The GAT is applied during GST assurance reviews (unless a business is predominantly input taxed) and involves analysing revenue and expenses to identify taxable, GST-free, input-taxed, and out-of-scope supplies, as well as GST-bearing and non-bearing expenses.

The method statement for revenue or expenses approach to using the GAT involves four steps: reconciling statutory accounting and GST groups, making profit and loss adjustments, capital and balance sheet adjustments, and other industry-specific or offsetting adjustments. These steps produce adjusted revenue and expenses to calculate effective GST rates.

The guidance also sets out what constitutes objective evidence (primary and secondary sources, as well as proxies), how adjustments are rated in a GST assurance review, and how overall ratings are determined. Ratings range from “High assurance” to “Red flag,” based on the ATO’s ability to understand and verify variances.

The document includes definitions of key terms, calculation formulas, and expectations for ongoing use of proxies in future reviews. It is intended to help taxpayers prepare accurate reconciliations and improve the clarity and quality of their GST reporting.

w https://www.ato.gov.au/law/view/document?docid=JTR/GAT

7.9 Consultation on reforms to improve retirement phase of superannuation

Treasury has released two superannuation consultation papers for feedback as part of broader reforms to the retirement phase of superannuation announced in November 2024.

The first consultation paper proposes a new Retirement Reporting Framework to increase transparency on retirement phase offerings and outcomes. It would require registrable superannuation entity (RSE) licensees to

report annually on product offerings, member outcomes, and cohorting practices, using specified indicators and metrics. APRA will consult further on implementation. Submissions on this paper close on 5 September 2025.

The second consultation paper sets out voluntary best practice principles to guide trustees in designing and delivering high-quality retirement income solutions under the Retirement Income Covenant. The principles focus on understanding the membership base, increasing access to suitable products and features, and communicating effectively with members. They are intended to complement, not replace, existing legal and prudential obligations, with no additional compliance action linked to adherence. Submissions on this paper close on 18 September 2025.

w https://consult.treasury.gov.au/c2025-685228
w https://consult.treasury.gov.au/c2025-672325

7.10 Focus on property and construction

The ATO's latest "Getting it right" campaign focuses on the property and construction industry, a major sector in the small business market and a frequent source of tax tip-offs. Common compliance issues include omitting income, incorrectly classifying income, overclaiming expenses and GST credits, misreporting private expenses as business costs, failing to apportion mixed-use expenses, not registering for GST when required, and using business funds or assets for personal purposes.

The ATO encourages builders, contractors and tradespeople to review their reporting practices, avoid these errors, and meet their obligations. The ATO stresses the importance of accurate record-keeping and strong reporting habits to minimise mistakes.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/getting-it-right-a-focus-on-property-and-construction

7.11 Recommended phase-out of FBT electric vehicle exemption

On 3 August 2025, the Productivity Commission released its interim report on the Net Zero Transformation. The Commission recommends phasing out the FBT exemption for electric vehicles and ending state and territory stamp duty and registration concessions. It considers these measures are duplicative now that the New Vehicle Efficiency Standard (NVES) is in place, as both aim to encourage the uptake of low-emissions vehicles. The NVES is designed to broaden the availability of electric and fuel-efficient light vehicles, while existing tax concessions subsidise only electric vehicle purchases.

In the report, the Commission proposes introducing an emissions-reduction incentive for heavy vehicles to complement the NVES. This inquiry is one of five supporting the government's productivity growth agenda.

Submissions on the interim report are open until 15 September 2025.

w https://www.pc.gov.au/inquiries/current/net-zero/interim

7.12 Productivity commission recommends corporate tax reform

On 31 July 2025, the Productivity Commission released its interim report on Creating a More Dynamic and Resilient Economy. The Commission proposes cutting the company tax rate to 20% for businesses with revenue under $1 billion and introducing a 5% net cashflow tax that allows immediate expensing of capital costs, removes interest deductibility, and permits uplifted losses to be carried forward. The reforms aim to boost

investment and align Australia's rates with OECD norms, though some large firms without new investment may face higher tax.

The Commission also recommends a whole-of-government regulatory reform agenda, stronger scrutiny of new regulations, and improved regulatory practice, including an independent Commissioner to oversee the Office of Impact Analysis.

Submissions on the interim report close 15 September 2025, with the final report due in December 2025.

w https://www.pc.gov.au/inquiries/current/resilient-economy/interim

7.13 Transitional approach to global and domestic minimum tax lodgment obligations

The ATO has published *Draft Practical Compliance Guideline* PCG 2025/D3, setting out the ATO's proposed compliance approach to lodgment obligations and penalties under Australia's implementation of a 15% global and domestic minimum tax. The transitional period covers fiscal years commencing on or before 31 December 2026 and ending on or before 30 June 2028.

The minimum tax regime implements the OECD's Global Anti-Base Erosion (GloBE) Rules, a key aspect of Pillar 2 of the OECD/G20 Two-Pillar Solution to address tax challenges arising from the digitalisation of the global economy. The regime imposes additional lodgment obligations on certain multinational enterprise (MNE) groups, specifically MNE groups that have annual revenue in their consolidated financial statements equal to or greater than EUR750 million for at least 2 of the 4 fiscal years immediately preceding the tested fiscal year.

The draft PCG's transitional approach will apply to MNE groups that can demonstrate that they have acted in good faith and taken 'reasonable measures' to understand and comply with their lodgment obligations, which include, but are not limited to:

1. timely preparation of lodgments;
2. maintaining adequate records of positions undertaken;
3. proactively engaging with the ATO where there are anticipated delays in lodgment;
4. timely remedying of mistakes or errors; and
5. evidence of proactive measures to remedy mistakes.

The draft PCG:

1. provides guidance on lodgment obligations for the GloBE Information Return and the Combined Global and Domestic Minimum Tax Return;
2. details the penalties applicable MNE groups that fail to lodge; and
3. provides details of possible remission of penalties and suspension of lodgment enforcement action on overdue lodgments where MNE groups can demonstrate reasonable measures taken to comply.

Comments on the draft PCG 2025/D3 are due on 29 August 2025.

w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2025D3/NAT/ATO/00001

7.14 Limited recourse borrowing factsheet published by the Tasmania Revenue Office

The Tasmania Revenue Office has published a factsheet which outlines how limited recourse borrowing arrangements (**LRBAs**) work for regulated superannuation funds and how to process related transactions in Tasmanian Revenue Online (**TRO**).

Under an LRBA, a custodian holds the purchased asset in a bare trust until the loan is repaid, potentially triggering duty on the initial transfer to the custodian, the declaration of trust, and the final transfer to the fund trustee.

The factsheet provides TRO entry instructions, required trust details, relevant duty concessions or exemptions, and supporting evidence requirements.

w https://www.sro.tas.gov.au/Documents/limited-recourse-borrowing-arrangements-tro-factsheet-no-16.pdf

8. Not-for-profit spotlight

8.1 Guidance for charities on completing their 2025 Annual Information Statement

The ACNC has released guidance on its website to assist charities with completing the 2025 AIS. The guidance explains each question in the AIS and provides detailed instructions for completion. Charities can also use the 2025 Annual Information Statement Hub, which includes a checklist of the information required.

COMMENT - Of note, the 2025 guidance includes information on the disclosure requirements for reportable related party transactions, which came into effect from 1 July 2023. From 1 July 2023, all charities registered with the ACNC will be required to report related party transactions in their AIS.

The ACNC defines the term 'related party' differently according to a charity's size. For small charities (annual revenue under $500,000), the ACNC adopts a simplified definition of a related party, being "a person or organisation that is connected to the charity and has significant influence over the charity." This definition includes a charity's Responsible People and their close family members. For all other charities, the ACNC adopts the definition of 'related party' in AASB 124 *Related Party Disclosures* .

Related party transactions may include:

1. Fees paid to a related party for providing goods or services to the charity;
2. Loans from or to a related party;
3. Salary or wages paid to a related party's relative;
4. Transfer of charity property or assets to a related party;
5. Charity goods or services provided at a discount to a related party;
6. Significant use of charity property by a related party;
7. Investment in a related party.

Basic religious charities are exempt from lodging financial reports and are not required to disclose related party transactions in their AIS. However, if a medium or large basic religious charity opts to prepare and submit a financial report, it must comply with the same reporting obligations as other medium or large charities, including the disclosure of related party transactions.

For registered charities with a financial reporting period ending 30 June, the AIS must be submitted with the ACNC by 31 December of the same calendar year. However, the Commissioner has extended the 2025 ACNC AIS due date to 31 January 2026.

All registered charities must submit an Annual Information Statement. Medium and large sized charities are also required to submit an annual financial report. Failure to submit an AIS for two or more years may result in the ACNC revoking a charity's registration. This will also result in the ATO revoking entitlements to charity tax concessions.

w https://www.acnc.gov.au/tools/guides/2025-annual-information-statement-guide

8.2 Deductible Gift Recipient reforms

On 13 September 2021, the Government implemented reforms to streamline and enhance the transparency of deductible gift recipients (DGR). These reforms centralised the administration of DGR categories under the

ATO and introduced new compliance and governance requirements for endorsed entities. The key changes are summarised below.

Centralised DGR Administration

The ATO is now the sole administrator for all DGR categories, including those previously overseen by other departments. Prior to the reforms, charities with a purpose aligned to the above government departments had to apply for DGR endorsement with the relevant department. After the reforms, the categories have now been consolidated, and it is solely the ATO that looks after the process of DGR endorsement streamlining applications, procedures and oversight.

Mandatory ACNC Registration

On 13 September 2021, the *Treasury Laws Amendment (2021 Measures No. 2) Act 2021* (Cth) became law. As a result, most DGR's are now required to be registered as charities with the Australian Charities and Not-for-profits Commission (ACNC) to be eligible for or maintain DGR endorsement. It applies to the following 11 categories of DGRs that were previously not required to be registered charities:

1. public fund for hospitals;
2. public fund for public ambulance services;
3. public fund for religious instruction in government schools;
4. Roman Catholic public fund for religious instruction in government schools;
5. school building fund;
6. public fund for rural school hostel building;
7. approved research institute;
8. public fund for persons in necessitous circumstances;
9. fire and emergency services fund;
10. environmental organisation;
11. cultural organisation.

Affected entities must ensure they are registered as charities and maintain ongoing compliance with both the ACNC and ATO. Affected organisations had until 14 December 2022 to apply for a 3-year extension to register with the ACNC. Affected organisations from the above categories that were approved for this extension of time for registration are now required to register by 14 December 2025, or their DGR endorsement will be revoked.

Entities registered with the ACNC must now adhere to the ACNC’s governance standards, lodging annual information statements, and maintaining appropriate record-keeping practices in line with both charity law and tax law requirements.

8.3 New DGR categories

The *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024* (Cth) introduced key changes in the ITAA 1997 and TAA 1953 to include 2 new DGR categories. Effective from 29 June 2024, the following categories could be eligible for DGR endorsement:

1. community charity trust; and
2. community charity corporations.

To qualify for DGR endorsement under either category, a trust or company must be named in a ministerial declaration currently in force. Entities wishing to be considered for inclusion in such a declaration need to contact Treasury directly. Guidelines regarding this procedure are to be published shortly.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/getting-started/getting-endorsed-for-tax-concessions-or-as-a-dgr/is-my-organisation-eligible-for-dgr-endorsement/rules-and-tests-for-dgr-endorsement/dgrs-required-to-be-a-registered-charity
w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/getting-started/getting-endorsed-for-tax-concessions-or-as-a-dgr/is-my-organisation-eligible-for-dgr-endorsement/deductible-gift-recipient-reforms

8.4 Not-for-Profit self-review assessment

The Federal Government has formally responded to the Senate Economics References Committee's final report on tax assessments for not-for-profit (**NFP**) entities. The Committee's report, originally released on 1 November 2024, focused on improving the self-review assessment regime introduced for NFPs that are not registered as charities with the ACNC.

The report made five key recommendations aimed at easing compliance burdens and improving regulatory coordination. These included:

1. introducing turnover thresholds to exempt smaller, low-risk NFPs from the self-review requirement;
2. extending the 31 March 2025 deadline for lodgement of the self-review return;
3. assessing whether the ACNC, rather than the ATO, would be better placed to administer the self-review regime;
4. harmonising guidance between the ATO and ACNC and ensuring the ACNC updates its materials relating to charity registration; and
5. improving consultation with the sector to ensure genuine engagement and resolution of ongoing implementation issues.

On 24 July 2025, the Government tabled its response, noting all five recommendations and confirming it would support the ATO and ACNC in fulfilling their respective roles. While the Government has not committed to immediate legislative reform, it has signalled openness to working with both regulators and the sector to address key concerns raised in the report.

TIP - The requirement to provide a self-review return already incorporates a risk-based approach by excluding entities that do not have an ABN. Only self-assessing NFP with an active ABN are required to lodge a self-review return.

TIP - Whilst the NFP self-review return is required to be lodged by 31 October every year (for NFPs that have adopted a 30 June tax year) the TAA allows the Commissioner to defer a deadline for a return. For the 2024 income year, the Commissioner extended the deadline to 31 March 2025.

COMMENT - The new requirement for non-charitable self-assessing entities to lodge a self-review return with the ATO from the 2024 income year does not change the criteria for tax exemption for self-assessing entities. In addition, there is no separate new requirement for entities with only charitable purposes to register with the ACNC as a condition of being exempt from income tax. This requirement has existed since the establishment of the ACNC in 2012.

w https://treasury.gov.au/publication/p2025-677464#:~:text=On%201%20November%202024%2C%20the,recommendations%20raised%20in%20the%20report.

8.5 Pitfalls when updating NFP details

On 7 July 2025, the ATO updated its website to highlight common mistakes not-for-profits (NFPs) make when updating their details, and how to avoid them.

Keeping details current ensures smooth tax and super administration, enables prompt ATO contact, and maintains access to Online services for business. NFPs should regularly update their ABN details with the Australian Business Register, financial institution details with the ATO, and authorisations in the Relationship Authorisation Manager (RAM).

The following key pitfalls were identified:

1. assuming there is only one update method – Details can be updated online (via the ABR, Online services for business, through a tax/BAS agent, or RAM), by phone (authorised contacts only), or using the paper form NAT 2943 (the slowest option);
2. losing touch with authorised contacts – If a principal authority is unavailable, a newly appointed official can notify the ATO using NAT 2943 with proof of appointment (such as meeting minutes or a board notification). Processing may take 4–8 weeks;
3. incomplete Change of registration details forms – All relevant sections must be completed (including NFP information, contact details, new associate details, and signed declaration) and evidence must be attached to avoid delays; and
4. delaying updates – Certain changes, including entity name, ACN/ARBN, associates, public officer, contact details, financial accounts, and main activity, must be updated within 28 days. The period around the AGM is an ideal time to review and refresh records.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/avoid-these-pitfalls-when-updating-nfp-details