THE TAX INSTITUTE

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1. Cases

1.1 Carter – trust disclaimers

Facts

The Whitby Trust (the **Trust**) was established on 27 July 2005.

The beneficiaries of the Trust included Allen Caratti, Alisha Caratti, Christina Caratti, Nicole Caratti and Natalie Carter. Allen's son Ben Caratti was also a beneficiary but was a minor.

Under the trust deed, the trustee could distribute the income in favour of trusts and companies connected to Allen, his spouses and children, with the consent of the guardian named in the trust deed. Christina, Alisha, Nicole, Natalie and Ben were entitled to the income of the trust in a year if the trustee did not make a distribution.

The Commissioner conducted an audit of the affairs of the Whitby Trust and concluded that the Whitby Trust had derived trust income in the 2011 to 2014 income years. The trustee alleged it was another trust, the MNWA Trust, that conducted the relevant business venture.

The Commissioner issued various assessments to the trustee of the Whitby Trust under section 98 of the ITAA 1936 on account of Ben's share to the default entitlement and to Christina, Alisha, Nicole and Natalie under section 97 of the ITAA 1936 for their share of the default entitlement for the 2011 to 2013 income years. The Commissioner issued an alternative assessment to the Whitby Trust under 99A of the ITAA 1936, on the basis that no beneficiaries were entitled to the trust income.

In or around June 2014, Christina, Alisha, Nicole, Natalie and Ben disclaimed their interest in the income for the years ended 30 June 2011 to 30 June 2013 (**First Disclaimers**).

The First Disclaimers provided:

1. *I hereby disclaim absolutely and irrevocably any and all of my right title and interest to or in the income, or any part of the income, of the Trust for each of the years ending 30 June 2011 to 30 June 2013.*
2. *Without limiting the generality of the disclaimer in paragraph 1, I disclaim any entitlement to any income which might otherwise have accrued under clause 3.7 of the Trust Deed.*

The Commissioner accepted that, in respect of Christina, Alisha, Nicole and Natalie, the First Disclaimers were effective and withdrew the assessments which had been issued to them. Instead, the Commissioner issued assessments to the trustee of the Whitby Trust on the basis that the income that had previously been distributed to Christina, Alisha, Nicole and Natalie for the relevant year was income to which no beneficiary was presently entitled.

The Commissioner did not accept Ben's disclaimer on account of his legal incapacity, and the assessment issued to the trustee of Whitby Trust in respect of Ben's share of the income was not withdrawn.

On 27 October 2015 the Commissioner issued assessments to Christina, Alisha, Nicole, Natalie and to the trustee of the Whitby Trust (in respect of Ben's entitlement to the income) for the year ended 30 June 2014

In or around November 2015, Christina, Alisha, Nicole and Natalie disclaimed (in equivalent terms of the First Disclaimers) their default entitlement to the income for the year ended 30 June 2014 (the **Second Disclaimers**). However, the Commissioner did not accept the Second Disclaimers were effective on the basis that they only sought to disclaim an entitlement to the income for the 2014 year and did not disclaim their entitlements in any income year as a default beneficiary.

On 20 December 2015 Christina, Alisha, Nicole and Natalie objected to the assessments issued to them for the year ended 30 June 2014. On 9 and 23 September 2016 the objections were disallowed.

On 30 September 2016 Christina, Alisha, Nicole and Natalie executed further deeds of disclaimers in broader terms (the **Third Disclaimer**). The Third Disclaimer expressly disclaimed

> *1. I absolutely and irrevocably any and all of my right title and interest (whether vested or contingent) conferred by the Trust deed to or in the income or any part of the income, including without limitation all those rights to income under the Trust deed I owned before the commencement of the income year commencing 1 July 2010 which gave rise to an alleged present entitlement to a share of the income of the Trust for each of the years ending 30 June 2011 to 30 June 2014 (and whether or not those disclaimed rights might also give rise to a present entitlement to a share of the income of the Trust in any other years).*
> *2. Without limiting the generality of the disclaimer in paragraph 1, I disclaim absolutely and irrevocably any and all of my right title and interest conferred by clause 3. 7 of the Trust deed.*

The trustee of the Whitby Trust applied for review in the AAT in respect of the assessments issued to it in the year ended 30 June 2011 to 2014. Christina, Alisha, Nicole and Natalie applied for review in the AAT in respect of the 2014 income year.

The AAT held that the First and Second Disclaimers were ineffective as the beneficiaries had failed to disclaim within a reasonable time. While the Third Disclaimer was wide enough to capture any gift from the Trust, the failure to disclaim the gift in its entirety in the First and Second Disclaimers meant that there was an implicit acceptance of the gift under the default entitlement provisions in the trust deed. The AAT noted that to disclaim a default entitlement, it is necessary to disclaim the entitlement entirely and not just for a single year, referring to *FCT v Ramsden* [2005] FCAFC 39, and that as this had not occurred the gift of the default entitlement had been accepted. Once there was acceptance of the gift of the default entitlement, that gift could not be later disclaimed by the Third Disclaimer.

Alisha, Nicole and Natalie appealed the AAT decisions to the Federal Court. The trustee of the Whitby Trust and Christina did not appeal to the Federal Court. The appeal was heard by the Full Federal Court.

Decision in the Full Federal Court

Two issues before the Full Federal Court were whether the Second and Third Disclaimers were effective and whether the disclaimers could operate retrospectively.

The Full Court did not agree with the AAT that the execution of the First Disclaimer and the Second Disclaimer before executing the Third Disclaimer was a tacit acceptance of the gift. The Full Court accepted that the First and Second Disclaimer did not disclaim the default entitlement of the children in the trust entirely.

The Full Court accepted that a qualified disclaimer may constitute implied consent to a gift but considered that there was nothing in the terms of the First and Second Disclaimers that supported the inference that the children intended to retain any part of the gift to them under the default entitlement provisions of the trust deed. The Full Court considered that the AAT had erroneously considered that an ineffective disclaimer of a gift, as a matter of principle, necessarily involved a tacit acceptance of the gift.

The Full Court noted that the principle to be applied, based on the decision in *Ramsden*, in determining whether income can be disclaimed is 'whether in all the circumstances acceptance of the gift should be inferred from the absence of dissent from the donee, and the passage of time'.

The Full Court accepted that the First Disclaimer and Second Disclaimer had been prepared on an incorrect belief that income of a particular year could be disclaimed and considered that while the default beneficiaries may have misunderstood the effect of the First Disclaimer and the Second Disclaimer, it was not their intention to accept the default income distribution in the relevant years by executing legally ineffective documents.

Accordingly, as the gift of the default entitlement had not been accepted, the Third Disclaimers were effective.

Issue

Whether the beneficiary's present entitlement for the purposes of section 97(1) of the ITAA 1936 was to be determined before the end of the income year or whether circumstances and events after the income year could be considered and alter this determination.

Decision

The High Court allowed the appeal of the Commissioner of Taxation.

The High Court held that the question of a beneficiary's present entitlement was to be determined prior to the end of the income year. This cannot be altered by facts or events after the close of the income year.

It was noted section 97 of the ITAA 1936 is expressed in the present tense. It refers to the legal relationship existing immediately before the end of the income year for the purposes of assessing the tax liability of beneficiaries presently entitled to the net income of a trust. The tax assessment of beneficiaries is determined by assessing the beneficiary's share of the income of the trust at the point in time immediately prior to the end of the income year. This coheres with the practical steps under section 97(1) of the ITAA 1936 to be followed. The court stated the '… stepped process in s 97(1) identifies the beneficiaries who are to be assessed at the end of the income year, permits the 'net income of the trust estate' to be determined for that income year in the usual way and then enables the quantum of tax payable by the beneficiary to be calculated and subsequently assessed.'

That the relevant period to determine a beneficiary's present entitlement is immediately prior to the end of the income year was also evidenced by the second element of section 97(1). That is, that the beneficiary must not be under any legal disability and is a resident. This is a determination that can only be ascertained by the present facts available during the income year and cannot be altered by any future circumstances or events.

Whilst it was argued for the taxpayers that the determination of who is presently entitled should be read as a reference to who 'really is' presently entitled, the High Court rejected this. Though they acknowledged that examples of competing constructions of Division 6 (where section 97(1) sits) could give rise to unfair tax outcomes, they considered any unfairness arises because Division 6 is based on presently entitlement and not receipt.

This construction of section 97(1) meant that the Third Disclaimers could have no retrospective effect for tax purposes.

The Court also addressed the Carters' contention that beneficiaries were not presently entitled to the income under the trust until they assented to the distribution The High Court rejected this, holding that there is a presumption of law that persons are presumed to have assented to a gift. The presumption applied to the period immediately before the end of the income year and was not rebuttable by any circumstances after that time.

Citation *Commissioner of Taxation v Carter* [2022] HCA 10 (Gageler, Gordon, Edelman, Steward and Gleeson JJ) w http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/10.html

1.2 Water West – small business entity and cashflow boost

Facts

Water West Pty Limited was incorporated on 24 October 2013 as a subsidiary of BPIH Pty Limited, which traded as Brookfield Infrastructure Group. Companies in the BPIH group managed large infrastructure assets.

Water West's parent company was based in Canada and as such, Water West applied to the Commissioner in September 2014 for permission to change its accounting period to a substituted accounting period to achieve synchronisation with its parent. The SAP application noted that the combined entities had total business income exceeding $250 million in a normal 12-month period.

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The BPIH's consolidated group income was $1,598,686,340 for the year ended 31 December 2018 and $2,292,788,921 for the year ended 31 December 2019. The group's GST inclusive sales in the first six months of the 2020 calendar year ranged from $73.4 million in one month to $80.4 million in another, for a total of $457,784,413 during the period. During this time, BPIH held 73% of the shares in Water West.

On 10 December 2019, BPIH transferred all its shares in Water West to three other entities, Azure Capital Investments Pty Ltd, Azure Capital Securities Pty Ltd and Mr Jeffrey Strahan as trustee for the Strahan Family Trust. These three entities had an aggregated turnover at all relevant times of less than $10 million.

On 3 March 2020, Azure Capital Investments and Azure Capital Securities sold all their shares in Water West to Local Utility Pty Ltd. Jeffrey also sold most of his shareholding in Water West to Local Utility. The Local Utilities group of companies, including Water West, had an aggregated turnover of less than $10 million.

Following the 3 March 2020 change of ownership, on 20 March 2020 Water West applied to revert to a balance date of 30 June to synchronise with the accounting period of its new parent, Thixotropic Holdings Pty Ltd. That document did not mention Local Utility. Thixotropic was said to own 95% of the shares in Water West. Both Local Utility and Thixotropic were part of the Dahl group of companies.

On 8 April 2020 the Commissioner accepted the SAP application and confirmed that the transitional accounting period to achieve the change resulted in the 2020 income year commencing on 1 January 2019 and ending on 30 June 2020.

Water West lodged activity statements declaring PAYG withholding amounts for the months ending 31 March, 30 April, 31 May and 30 June 2020 and ‘applied’ for cash flow boost in the months of March, April, May and June 2020.

In order for Water West to satisfy the criteria in section 5(1)(d)(ii) of the Cash Flow Boost Act, Water West needed to be a small business entity in ‘the income year in which the period starts’.

Section 328-110(1) of the ITAA 1997 provides that an entity will be a 'small business entity' in an income year if:

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

'Income year' for the purposes of the Cash Flow Boost Act adopts the definition under the ITAA 1997 and assumed the income year is the financial year unless an exception applies, including where the Commissioner has allowed a SAP pursuant to section 18 of the ITAA 1997. In this case, the relevant income year in which all of the periods started was 1 January 2019 through 30 June 2020. As at 1 January 2019, Water West was still part of the BPIH group.

On 19 March 2021, Water West applied for a new SAP with an early balance date of 31 December 2019 but the application was rejected by the Commissioner. Consistent with the Commissioner’s decision, Water West lodged its tax return for the year 1 January 2019 to 30 June 2020 on 28 May 2021.

The Commissioner determined that Water West was not eligible for cash flow boost, as it was not a small business entity during the income year in which the relevant cash flow boost period started, being the income year from 1 January 2019 to 30 June 2020.

Water West objected to the Commissioner’s decision and was unsuccessful and subsequently appealed to the AAT.

Water West noted that section 5(1)(d)(ii) refers to the Commissioner being satisfied on a reasonable basis that Water West was a small business entity in the relevant year of income. Water West submitted that the Commissioner should take account of the change of ownership that occurred when it exited the BPIH group in late 2019, and the further change in ownership that occurred in March 2020 which the Commissioner had knowledge of by at least 4 March 2020.

It was contended that the Commissioner, having regard to the ownership change, the fact that Water West did not have an aggregated turnover of greater than $10 million following the change in ownership, and the beneficial intent behind the Cash Flow Boost Act, had a reasonable basis for concluding Water West was a small business entity in the relevant year of income.

The Commissioner submitted that the question of whether Water West was a small business entity must have regard to the definition of small business entity in section 328-110 of ITAA97. Water West could not satisfy section 328-110(1)(a) or section 328-110(1)(b) because the timing of the income year meant the turnover of the BPIH group companies had to be taken into account.

Issue

Was Water West a small business entity during the income year in which the relevant accounting period started?

Decision

The AAT considered that Water West was not a small business entity in the relevant year of income.

The AAT noted that section 5(1)(d)(ii) does not authorise the Commissioner to determine whether a particular year of income is reasonable. The power to change the default income year is found in section 18 of the ITAA 1997, which the Commissioner declined to exercise in 2021.

COMMENT – it appears that the AAT only focused on section 328-110(1) of the ITAA 1997, which involves the small business entity test being determined at the beginning of the income year, and did not have regard to alternative small business entity test in section 328-110(4) of the ITAA 1997, which is determined at the end of the income year. However, in any event, section 328-115 answers the question as for the purpose of both tests, aggregated turnover includes the annual turnover of an entity that was 'connected with' the relevant taxpayer ***at any time during the income year*** but then the turnover of the entity is only included for the period that it was connected to the taxpayer. Neither the AAT nor Water West appear to have considered that provision.

Citation *Water West Pty Limited and Commissioner of Taxation (Taxation)* [2022] AATA 427 (DP McCabe, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/427.html

1.3 Hyder – multiple assessments

Facts

On 29 June 2015, EMH IV Pty Ltd as trustee for the EMH IV Family Trust distributed the net income of the trust for the 2015 income year to 6 beneficiaries in particular amounts in a particular sequence, and the balance to the Screaming Eagle Partnership (the **Partnership**) in which Screaming Eagle Pty Ltd (**SEPL**) held a 99% interest and Elton Hyder held a 1% interest.

On 16 October 2015, EMH IV Pty Ltd lodged a 2015 income year tax return for the Trust, disclosing distributions made to the Partnership as $18,028,722 and Elton's share as $156,780.

On 19 May 2016, SEPL lodged a tax return for the 2015 income year, which disclosed the distributions received from the Trust, resulting in tax payable of $5,354,424.

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SEPL failed to pay the tax due and owing and was placed into voluntary administration on 28 October 2016. SEPL was deregistered after the Commissioner lodged a proof of debt with the liquidator and the proof went unsatisfied.

On 15 June 2016, the Commissioner issued an assessment to Elton showing taxable income of $114,104 and tax payable of $30,165 less a refundable offset of $98. Elton's income tax liability arising out of the assessment was discharged by reason of his PAYG credits.

On 24 April 2018, the Commissioner commenced an audit of the affairs of the Partnership.

On 17 May 2019, Elton commenced proceedings in the Supreme Court of Queensland to cause SEPL to be reinstated on the basis that the liquidator had failed to identify SEPL's entitlement under the Partnership as a significant asset.

On 3 October 2019 orders were made by the QLD Supreme Court for reinstatement and that SEPL pay its full tax liabilities to the Commissioner.

On 7 November 2019, SEPL paid the Commissioner $5,577,228.

In May 2020, Elton was issued with amended assessments for the 2015 and 2016 income years. The Notice of Amendment Assessment for the 2015 income year recited Elton's previous taxable income of $114,104 and amended it to $13,364,104. The additional $13,250,000 in taxable income represented withdrawals made by Mr Hyder from the Partnership bank account during the 2015 income year which the Commissioner deemed for personal use.

As to the 2016 income year, the Notice of Amended Assessment recorded an amended taxable income of $4,677,654 with tax payable of $2,262,660.

The Commissioner did not accept that the Partnership was a bona fide commercial partnership.

On 20 May 2020, the Commissioner issued an alternative notice of assessment to EMH IV Pty Ltd as the trustee of the EMH IV Family Trust (in alternate to the assessment issued to Elton) for the 2015 income year recording taxable income as $18,028,722 resulting in tax payable of $8,833,943.65. The assessment was made by the Commissioner on the basis that the Partnership was not presently entitled to the net income of the EMH IV Family Trust represented by the distribution of $18,028,722 made to the Partnership and that no beneficiary of the EMH IV Family Trust was presently entitled to the income of the trust for year.

On 28 May 2020, Ms Cupay of the ATO emailed Elton's solicitors advising that the debt of Elton and the EMH IV Family Trust had been allocated to her for debt management. The email included the following statements:

1. Elton and the EMH IV Family Trust must provide securities for the liabilities; and
2. the Commissioner was empowered to initiate recovery action for collection of unpaid disputed debts at any time, including before determination of an objection, based on an analysis of the risk associated with the case (PSLA 2011/4).

On 11 June 2020, Elton sought a deferral (under s 255-10(1) of Schedule 1 of the TAA) of the time at which the assessments were to be due and payable (**Deferral Request**), emphasising that:

1. an amount of $5,577,228 for income tax previously assessed to SEPL for the year ended 30 June 2015 plus interest charges had been paid; and
2. if SEPL's earlier payment was taken into consideration, the primary assessment to Mr Hyder was satisfied to the extent of 61.2%.

On 16 June 2020, Ms Cupay advised that the Deferral Request had been denied on that basis that the debt was substantial and poses a risk to the revenue. No reference was made by Ms Cupay as to the tax paid by SEPL.

On 17 July 2020, Elton and EMH IV Pty Ltd lodged objections to the primary assessments and shortfall interest charge notices issued

On 21 July 2020, the ATO acknowledged that due to an oversight, reasons were not provided as to the decision to refuse the Deferral Request. However, the ATO advised that the Deferral Request was refused on the basis that:

1. the issue of notices of assessment or amended assessment is conclusive evidence of the due making of an assessment and, except in proceedings in relation to a review or appeal, that the assessment is valid, and the amount and particulars of the assessment are correct; and
2. despite SEPL having 'made payments', the notices of assessments issued to the taxpayers were payable, and were separate and distinct from the income tax returns lodged by SEPL and the payment it had made.

On 7 August 2020, Elton and EMH IV Pty Ltd requested that the ATO provide a Statement of Reasons under the ADJR Act in respect of the decision to refuse the Deferral Request on the basis that no reasons were provided for not deferring recovery action.

On 7 September 2020, notices of 'assessment for a shortfall penalty' were issued by Deputy Commissioner Smith. Elton's tax-related liabilities under all of the 'primary' amended assessments and notices amounted to $15,021,359.41, and the tax liability of EMH IV Pty Ltd amounted to $13,250,915.45 (leaving aside the GIC in each case), amounting in all to $28,272,274.86.

On 15 September 2020, the ATO provided Mr Wojtasik a Statement of Reasons under the ADJR Act outlining the basis of the ATO's decision to refuse the Deferral Request. In the Statement of Reasons, the ATO:

1. did not identify how PSLA 2006/7, concerning alternative assessments, was taken into account;
2. noted the proposition put to the ATO that the amended assessments issued to Mr Hyder and the alternative assessment to the Trustee of the Trust are properly considered as alternative assessments to SEPL's assessment, and the proposition that there is no basis on which the Commissioner can collect tax on two alternative assessments;

On 1 October 2020, Elton and EMH IV Pty Ltd lodged objections in relation to the penalty assessments.

On 8 February 2021, the objections were disallowed.

On 18 February 2021, Elton and EMH IV Pty Ltd filed a notice of appeal against the objection decision.

On 17 March 2021, the ATO advised the Deferral Request had again been denied and that the objection were disallowed in full. In a Statement of Reasons, the ATO noted that:

1. Elton had entered into a contrived arrangement to avoid tax through a purported partnership with SEPL as a partner and then utilised the private company's profits for private purposes or retained profits for working capital purposes;
2. it was not satisfied that the circumstances of the taxpayers warrant the exercise of the Commissioner's discretion under s 255-10 of Schedule 1 of the TAA;
3. decisions of the Federal Court make clear that the taxpayers' prospects of success are not a factor that the Commissioner can reliably take into account, unless the outcome is obvious in that the taxpayer's objection is bound to succeed; and
4. despite alternative assessments had been issued to EMH IV Pty Ltd, that was not a ground to defer the time by which the tax liability became payable.

On 9 October 2020, proceedings were commencing in the Federal Court.

On 27 July 2021, the solicitors for the Commissioner acknowledged that a notice of assessment having been issued to SEPL and tax paid and that in respect of the amended assessments, the Commissioner now only sought to recover against Elton in the 2015 and 2016 income years.

Elton, EMH IV Pty Ltd, and SEPL applied to the Federal Court for relief under section 39B of the *Judiciary Act 1903* (Cth) to restrain the Commissioner from oppressively seeking to recover income tax from Elton, or from EMH IV Pty Ltd in the alternative for the 2015 income year, in circumstances where the alternative assessments to each of them included income tax already assessed on the same source of trust income distributed to and already paid by SEPL in the same income year.

Issues

1. Whether the assessments were invalid.
2. Whether the conduct of the Commissioner was 'oppressive'.
3. Whether the ATO decision of 28 February 2021 is infected by error of law on the grounds that the decision-maker failed to take into account relevant considerations, took into account irrelevant considerations and the decision is otherwise legally unreasonable.

Decision

Issue 1

The Court noted the following:

1. exclusion of the income from the assessment to SEPL is not an essential condition of the power to include the income in the subsequent amended assessments to Elton or the assessment to EMH IV Pty Ltd;
2. the Commissioner has the power to assess more than one taxpayer in respect of the same income by issuing alternative assessments;
3. once it becomes 'clear' that the Commissioner is seeking to render two persons severally liable each in their own right by inclusion of the same income in their individual assessments for the same income year, the Commissioner has a duty to relieve one of them of the liability to the relevant tax or account to the relevant taxpayer for the tax already paid.

The Court noted, even if the exercise of the power to issue an amended assessments to Elton and to EMH IV Pty Ltd without appropriating the earlier tax paid by SEPL in reduction of each assessment made the assessments invalid, it was not appropriate to order the relief sought by Elton and EMV IV Pty Ltd as they could challenge the validity of the assessments through the tax objection and appeal process.

Issue 2

The Court concluded that by the Commissioner seeking up until 27 July 2021 to enforce recovery of the full amount owing under the alternative assessments before a resolution of the genuine dispute about the correctness of the alternative assessments, was oppressive.

The Court concluded that the Commissioner's agreement on 27 July 2021 to only enforce against Elton, consistent with the approach outlined in PS LA 2006/7 in relation to alternative assessments, would not have occurred but for the commencement of the legal proceedings.

The Court noted that in *Deputy Commissioner of Taxation v Moorebank* (1988) 165 CLR 55 it was observed that it would be oppressive for the Commissioner to seek to enforce payment of the full amount due under a notice of assessment before the final resolution of a genuine dispute about the correctness of the assessment and that the Commissioner issues a number of assessments on an alternative basis to different taxpayers in respect of the same income, was an obvious example of oppressive conduct.

Issue 3

The Court concluded that the decision-maker fell into error by failing to take into account relevant considerations.

The Court considered that the use of the Commissioner's discretion under section 255-10 of Schedule 1 of the TAA requires a decision maker to observe the 'fact' of the objection or appeal and consider the essential basis of the challenge to the assessment to determine whether the merits are 'so obvious' that that circumstance should inform the exercise of the discretion.

The decision-maker must also take into account whether the determination of the 'correctness' of the assessment is 'so imminent' that that circumstance should also inform the exercise of the discretion.

The Court held that the decision of the ATO failed to take into account that, because the Commissioner had issued alternative assessments to Elton and EMH IV Pty Ltd, the Commissioner had held 'genuine doubt about where the final liability to tax rests' which, under PS LA 2006/7 involved acceptance by the Commissioner of multiple assessments being issued on same underlying amount.

Citation *Hyder v Commissioner of Taxation* [2022] FCA 264 (Greenwood J, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/264.html

1.4 Collins – GST registration

Facts

Ian Collins and Mieneke Collins acquired two adjoining lots, Lots 11 and 12 in 1986 and 1992 respectively. The lots comprised 60 acres.

Ian and Mieneke established the Collins Retirement Fund, a superannuation fund, in 1995.

In 2004, Ian and Mieneke leased out Lots 11 and 12 to a tenant for a four-year term with 2 four-year options to renew, and around the same time sold their nursery business to the tenant.

In 2008, before exercising the first option to renew, the tenant offered to purchase Lots 11 and 12. The offer was not accepted as Ian and Mieneke consider the offer to be too low.

In 2012, the tenant exercised the second option to renew in August 2012.

On 28 January 2014 Ian obtained from Survey Plus, a firm of surveyors, planners and engineers, a quote for the cost of three stages of work to be carried out in respect of the Lots 11 and 12:

1. preliminary feasibility assessment and concept plan preparation for a cluster subdivision plan;
2. DA preparation and lodgement, project management and council negotiation;
3. preparation of final plans following DA approval.

On 13 May 2014, Survey Plus proceeded to carry out work referenced in its quotation, including preparing an initial and revised draft plan of subdivision in advance of meeting with the local council.

By 11 June 2014, Ian also obtained a valuation report from John Virtue Valuers, valuing Lots 11 and 12 at $2,500,000 exclusive of GST.

In August 2014, Flora Pacific Pty Limited, a company controlled by Ian and Mieneke, acquired Lots 11 and 12 as bare trustee for the Collins Retirement Fund.

On 31 July 2015, Flora submitted a development application to the local authority, seeking approval to subdivide Lots 11 and 12 into 11 community title rural residential lots and one community association lot. The DA was approved on 23 February 2016.

The Collins Retirement Fund applied to cancel its GST registration with effect from 1 October 2016 and the Commissioner cancelled the registration.

Subdivision work was completed on Lots 11 and 12, and the subdivision plan was registered on 16 June 2017. The subdivision cost totalled $4,538,757.64.

The Collins Retirement Fund sold 10 of the residential lots between 26 June 2017 and 16 November 2017 for around $1million per lot. The remaining residential lot was transferred to Mr and Mrs Collins in June 2018.

On 8 August 2019, the Commissioner issued notices of assessment of the Collins Retirement Fund's net amounts for the tax periods ended 30 June 2017, 30 September 2017 and 31 December 2017, in the amounts of $136,859, $489,008 and $66,612 respectively, on the basis that the sales of the residential lots were subject to GST calculated under the margin scheme.

The Collins Retirement Fund objected to these assessments on 21 October 2019. The Commissioner disallowed the objection on 17 August 2020. The Collins Retirement Fund subsequently appealed to the AAT.

The Collins Retirement Fund submitted that the sales of the residential lots were the mere realisation of a capital asset and as such would be disregarded in calculating GST registration turnover threshold under section 188-25(a) of the GST Act. Alternatively, the Collins Retirement Fund submitted that the sales of the residential lots were disregarded as each sale was made solely as a consequence of the Collins Retirement Fund ceasing to carry on an enterprise or substantially and permanently reducing the size or scale of an enterprise.

The relevant provisions under section 188-25 of the GST Act provides the following supplies are to be disregarded in working out an entity's projected GST turnover:

(a) 'by way of transfer of ownership of a capital asset' (section 188-25(a)); or
(b) 'solely as a consequence of . . . ceasing to carry on an enterprise' (section 188-25(b)(i)); or
(c) 'solely as a consequence of . . . substantially and permanently reducing the size or scale of an enterprise' (section 188-25(b)(ii)).

The Commission disputed this contention that submitted the sales were not supplies of capital assets, nor were the sales solely as a consequence of the Collins Retirement Fund ceasing to carry on an enterprise or substantially and permanently reducing the size or scale of an enterprise.

The Commissioner submitted that, the context of the characterisation of the supply of an asset as a transfer of ownership of a capital asset in section 188-25(a) of the GST Act, is quite different to the role played by the revenue/capital distinction in determining the assessability of receipts or deductibility of outgoings or losses. In an income tax context, whether an amount is received in the course of a commercial or business-like transaction may be a significant or determinative factor. In contrast, the application of section 188-25(a) would only arise for consideration where the supply under consideration is or would be made in the course of an enterprise the taxpayer carries on.

Accordingly, the Commissioner submitted that, whether the taxpayer had a profit-making intention at the time of the acquisition of the asset, is not determinative for the purpose of section 188-25(a) of the GST Act. The focus must be on the time a supply of the asset is made or is likely to be made. The Commissioner further submitted that, to determine if the residential lots were capital assets, the profit-making intention need not be the sole intention as long as profiting by the means undertaken was a 'not insignificant' object of the Collins Retirement Fund, and that its subjective intention or purpose is not relevant.

The Collins Retirement Fund accepted that subjective intention is not determinative but submitted that it is relevant. In evidence, Ian stated that the Collins Retirement Fund acquired Lots 11 and 12 not to subdivide the land and sell the subdivided lots, but to provide for a higher retirement income, and in that regard to enable access to the Collins Retirement Fund's cash reserves to fund remediation works which in turn would enhance the rental income able to be derived from the property. Ian stated that the DA approval was sought because the Collins Retirement Fund thought it was necessary to do so to obtain approval of remediation works.

In respect to the alternative argument that the sales of the residential lots were disregarded as each sale was made solely as a consequence of the Collins Retirement Fund ceasing to carry on an enterprise or substantially and permanently reducing the size or scale of an enterprise, the Commissioner submitted that the enterprise referred to in section 188-25(b) of the GST Act must be the same enterprise that the Collins Retirement Funds acknowledges it carried on, that is, carrying out activities as trustees of a complying superannuation fund, which it did not cease to carry on. Further, the Collins Retirement Fund's undertaking amounted to more than a mere realisation of the property in an enterprising way, as the works required to achieve the subdivision were substantial.

Issue

Did the sales of the residential lots count towards determining the GST registration turnover threshold for the Collins Retirement Fund?

Decision

The AAT affirmed the objection decision.

The AAT noted that Ian's assertion as to intention was difficult to accept in light of contemporaneous evidence, being instructions provided to Survey Plus and the valuer, and the cost of proceeding to the meeting with Council. These points to the fact that the Collins Retirement Fund contemplated a subdivision and sale of the subdivided lands at the time the Lots 11 and 12 were transferred to it. Further, the AAT did not consider that the subdivision and sale was a mere realisation of a capital asset in an enterprising way given the extensive works and costs involved.

The AAT also reject the Collins Retirement Fund's assertion that the sales were made solely as a consequence of ceasing to carry on the land development enterprise. The AAT considered that the sale of land was the central objective of a land development enterprise and occurred as a consequence of the ongoing conduct of the enterprise.

The AAT disagreed with the Commissioner’s assertion that all enterprises must be ceasing in order to attract the operation of section 188-25, noting the provision refers to ‘an enterprise’.

Citation *Ian Mark Collins & Mieneke Mianno Collins ATF The Collins Retirement Fund and Commissioner of Taxation (Taxation)* [2022] AATA 628 (Senior Member R Olding, Sydney) w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/628.html#fnB10

1.5 McMillan – bankruptcy and transfers to defeat creditors

Facts

In 1990, Brian McMillan commenced a panel beating and spray-painting business through McMillan Prestige Car Repairs Pty Ltd

In May 1995, Brian and his wife, Karin, purchased a property in Strathfield as joint tenants for $320,000, which was funded by a $103,000 loan from the CBA, a loan of $32,000 from Karin’s mother and the balance from the proceeds of sale received by Brian and Karin for a property in Georges Hall. The Georges Hall property had been acquired in 1991 from the proceeds of sale of two properties owned solely by Karin.

In around late 2000 to early 2001, Brian considered operating a car dealership for Rolls Royce and Bentley in addition to his car repair business and McMillan Prestige Car Repairs was appointed as authorised dealer. In the process of obtaining the dealership, concerns were raised by Rolls Royce and Bentley about Brian's finances and that he was relying on personal investments to cash flow the business, including a lack of separation between Brian's business financial affairs and his personal financial affairs.

Various financing arrangements were entered into where ultimately St George Bank was owed money in connection with the business. In November 2001 Brian in his own right and pursuant to a power of attorney on behalf of Karin executed a mortgage over the Strathfield property in favour of the St George Bank.

In May 2002, Brian and Karin retained a law firm to provide advice on 'General Personal Affairs' and 'Estate Planning', including with respect to 'the change in Trustee'.

On 22 May 2002, Brian and Karin obtained a valuation of the Strathfield property and it was valued at $800,000.

Between 19 June 2002 and 8 July 2002 Brian transferred his interest in the Strathfield property to Karin for $1. The explanation for this transfer is that Karin wanted the property in her name given she had funded the purchase of the Georges Hall property and Brian agreed.

On 18 July 2002 Karin executed a mortgage over the Strathfield property in favour of the St George Bank.

On 12 December 2002, the CBA provided an $850,000 facility to the trustee of the McMillan Family Trust, secured by mortgages over the Strathfield property and personal guarantees from Brian and Karin and McMillan Prestige Car Repairs.

On 6 November 2018 a sequestration order was made against the bankrupt estate of Brian and Anthony John Warner was appointed on that date as trustee of Brian's bankrupt estate.

Mr Warner contended that the transfer of Brian's interest in the Strathfield property was void against the trustee in accordance with section 121 of the *Bankruptcy Act 1966* (Cth) and commenced proceedings against Karin in the Federal Court.

Section 121 of the BA relevantly provides as follows:

> *121 Transfers to defeat creditors*
>
> *Transfers that are void*
>
> *(1) A transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferor's bankruptcy if:*
>
> *(a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and*
>
> *(b) the transferor's main purpose in making the transfer was:*
>
> *(i) to prevent the transferred property from becoming divisible among the transferor's creditors; or*
>
> *(ii) to hinder or delay the process of making property available for division among the transferor's creditors.*
>
> *...*
>
> *Showing the transferor's main purpose in making a transfer*

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(2) The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become insolvent.

At the first instance, the trial judge did not accept Brian's explanation for why the property was transferred. Brian was considered to be 'loose with the truth'. The trial judge held that Brian's main purpose in transferring the property to Karin was either to prevent the property becoming divisible among his creditors or to hinder or delay the process of making that property available for division among his creditors. Therefore, the transfer was void against the trustee under section 121 of the BA.

In coming this conclusion, the trial judge referred to the fact that Karin did not guarantee a business related finance facility and had resigned as a director of McMillan Prestige Car Repairs around the same time and also that this all coincided with Brian taking on risker ventures.

Karin appealed to the Full Federal Court on a number of grounds, including that the trial judge should not have considered that Brian was not a witness of truth and that his main purpose was to prevent, hinder or delay the property from becoming divisible among his creditors

Issue

Whether the transfer of the property was void against the trustee under section 121 of the BA?

Decision

The Full Court allowed Karin's appeal.

The Full Court considered that the trial judge failed to take into account a number of matters in inferring that Brian's main purpose in transferring his interest in the Strathfield property was to prevent, hinder or delay the property from becoming divisible among his creditors including the following:

1. the subsequent dealings by Karin to guarantee loans and grant mortgages over the Strathfield property; and
2. the length of time between the transfer and the liabilities that resulted in Brian's bankruptcy. In this respect, the Full Court did not consider that, contrary to the finding of the trial judge, Brian's new ventures were riskier.

The Full Court considered that the trial judge erred in placing reliance on Karin's resignation as a director of McMillan Prestige Car Repairs and that she did not guarantee the finance facility.

The Full Court noted that an inference that the main purpose of a bankrupt in making a transfer of property was to defeat his or her creditors must be a reasonable and definite inference, not merely one of a number of conflicting inferences with equal degree of probability. In this respect, the Court noted that an equally compelling reason for making the property transfer was the concern raised by Rolls-Royce of the lack of separation between Brian's personal and business affairs.

The Full Court also noted that the length of time was a significant reason why drawing an inference that the transfer was hinder or delay the property from becoming divisible among Brian's creditors was inherently problematic.

Citation *McMillan v Warner (Trustee)* [2022] FCAFC 20 (Logan, Farrell and Halley JJ, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2022/20.html

1.6 Thomas and Naaz – Appeal Update

Dr Thomas and Ms Naaz have appealed the NCAT decision in *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259.

In *Thomas and Naaz*, the issue for the Tribunal was whether payments made by three medical centres operated by the taxpayer to contracted doctors were subject to payroll tax. The medical centres provided facilities and administrative services for the doctors. The doctors bulk billed their patients and the doctors were given the Medicare benefits of the patients. The medical centres claimed the Medicare benefits on behalf of the doctors and received the fees on behalf of the doctors into a separate bank account.

NCAT upheld Revenue NSW's assessment that payments made to contracted doctors were subject to payroll tax. The doctor's provided a necessary service for the taxpayer to operate their medical centres. The payments were paid to the doctors for or in relation to the performance of work and attracted payroll tax.

The appeal will have significant implications for taxpayers operating administrative services entities and common medical practice structures.

1.7 Other tax and superannuation related cases in period of 10 March 2022 – 7 April 2022

Citation	Date	Headnote	Link
Kais Jewellery (Syd) Pty Ltd v FC of T [2022] AATA 425	11 March 2022	TAXATION – GOODS AND SERVICES TAX – whether applicant entitled to input tax credits on purported acquisitions of scrap gold – where neither purported supplier paid GST on purported supplies – where no evidence of how suppliers sourced scrap gold - whether acquisitions made – weight to be given to statement provided by witness who died before hearing – applicant's burden of proof not discharged – decision affirmed TAXATION – INCOME TAX - whether large cash withdrawals from company bank account income of director or consideration for acquisitions of scrap gold paid in cash – applicant's burden of proof not discharged – decision affirmed TAXATION – ADMINISTRATIVE PENALTY – where taxpayer sought to discharge burden of proving penalty assessments excessive only by proving there were no primary tax shortfalls – where taxpayer failed to prove primary tax assessments are excessive – where taxpayer made no submission that base penalty was otherwise incorrect or should be remitted – decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/425.html
Commissioner of Taxation v PricewaterhouseCoopers [2022] FCA 278	25 March 2022	TAXATION – legal professional privilege – where Commissioner of Taxation served notice to produce documents on partner of multi-disciplinary partnership and its client – where the partner of the firm and the client refused to produce certain documents on the ground of legal professional privilege – where the Commissioner sought declaratory relief to the effect that the documents were not privileged – applicable principles – application of principles in the context of services provided by a multi-disciplinary partnership	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/278.html?

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Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation (No 2) [2022] FCA 260	22 March 2022	TAXATION – transfer pricing – form of final orders to give effect to Court's reasons for judgment – whether carried forward loss was to be taken into account for one year of income PRACTICE AND PROCEDURE – costs – whether costs should be awarded on an indemnity basis in light of failure to accept offer to compromise and Calderbank offer	http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/260.html?query
Solar Juice Pty Ltd and Comptroller-General of Customs [2022] AATA 550	24 March 2022	CUSTOMS – importation of goods – whether separate or composite goods – whether dumping duty payable – whether goods within scope of Dumping Notice – decision set aside and remitted	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/550.html
Philip Morris Limited and Comptroller-General of Customs [2022] AATA 548	23 March 2022	ELIGIBILITY FOR DRAWBACK OF IMPORT DUTY PAYABLE IN RESPECT OF GOODS DESPATCHED FROM AUSTRALIAN WAREHOUSES FOR EXPORT IN JULY AND AUGUST 2019 – whereas the applicant made an application for drawback of import duty payable – whether the applicant gave notice in writing as required under Regulation 37 – whether there is a discretion to pay the drawback notwithstanding non-compliance with Regulation 37 – applicant was ineligible for drawback payments because the applicant did not comply with the requirement to give notice – decision under review affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/548.html
Le and Commissioner of Taxation (Taxation) [2022] AATA 610	30 March 2022	TAXATION AND COMMERCIAL – default assessments – onus of proof – non-lodgement of tax returns – asset betterment – unexplained wealth – administrative penalties – remittal of penalties – decision affirmed	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/610.html
XGPH and Commissioner of Taxation (Taxation) [2022] AATA 567	29 March 2022	TAXATION – income tax – deductions – employee – work-related car expenses – work- related travel expenses – other work-related expenses – incurred – in the course of deriving assessable income - substantiation of expenses – decision under review varied	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/567.html

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2. Legislation

2.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2020 Measures No. 4) 2021	28/10	25/3	11/5		
Treasury Laws Amendment (2021 Measures No. 7) 2021	25/8	18/10	19/10		
Treasury Laws Amendment (Cost of Living Support and Other Measures) 2021	30/3	30/3	30/3	30/3	
Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) 2021	92/	17/2	30/3	30/3	
Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) 2022	9/2				
Treasury Laws Amendment (Modernising Business Communications) 2022	17/2				
Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022	17/2				
Treasury Laws Amendment (Tax Concession for Australian Medical Innovations) 2022	10/2				

2.1 State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022

On 22 March 2022, the *State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022* was introduced into NSW Parliament.

The Bill proposes significant changes to the *Duties Act 1997* (NSW) and *Taxation Administration Act 1996* (NSW).

Change in beneficial ownership of dutiable property

The Bill proposes to insert a broad provision which imposes duty on a transaction which results in a change in beneficial ownership of dutiable property, other than an 'excluded transaction'.

A 'change in beneficial ownership' not only includes the creation of dutiable property, but the extinguishment of dutiable property, a change in the equitable interest in dutiable property, dutiable property becoming the subject of a trust and dutiable property ceasing to be the subject of a trust. This has wide-reaching consequences for a number of transactions, including the vesting of a trust with dutiable property, the removal of a beneficiary of a discretionary trust where the trust holds dutiable property or the grant of an option to purchase land.

Beneficial ownership is defined in the *Duties Act* to include ownership of dutiable property by a person as a trustee of a trust.

An 'excluded transaction' is limited to transactions which, for example, concern dealing with units in a unit trust scheme, the grant, renewal or variation of a lease for no consideration, the grant of an easement for no consideration or creation of an interest in dutiable property by statute. However, an 'excluded transaction' will be dutiable if it is part of a scheme or arrangement that, in the Chief Commissioner's opinion, was made with a collateral purpose of reducing the duty otherwise chargeable.

Acknowledgment of a declaration of trust

The Bill proposes changes to impose duty on statements which have the effect of acknowledging that identified property has been vested in trust. This amendment is in direct response to the decision in *Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285. In *Benidorm* it was held that a document which does not effect a transaction but merely acknowledges an existing legal position is not dutiable under the *Duties Act*.

Surcharge purchaser duty and surcharge land tax

Surcharge purchaser duty of 8% is imposed on dutiable transactions relating to the acquisition of interests in residential related property by a foreign person. Surcharge land tax of 2% is imposed on land held by foreign persons as at 31 December in each land tax year.

The proposed amendment gives the Chief Commissioner the power to provide a surcharge refund and relief in respect of land used wholly or predominantly for commercial or industrial purposes. It will operate in a similar way to the existing surcharge relief provisions and the Chief Commissioner has powers to impose conditions for any relief granted.

Primary production transfers between family members

At present, the exemption from duty on primary production land transfers between family members only applies if the transferee is an individual. The proposed amendments seek to extend the exemption so that it also applies when the transferee is not an individual but is instead a deceased estate, a trust, a superannuation fund, a private unit trust scheme or a proprietary limited company.

In that case, the family member must, instead of being the transferee, be the person directing the transferee. In addition, if the transferee is a proprietary limited company or a trustee of a discretionary trust or of a private unit trust scheme, the person directing the transferee must, for the exemption to apply, maintain the person's minimum 25% interest in the transferee for 3 years after the transfer.

Anti-avoidance provisions

The Bill proposes to remove the existing Chapter 11A anti-avoidance rules from the *Duties Act* and instead inserts a new anti-avoidance regime in the *Taxation Administration Act*. The purpose of this is to extend the anti-avoidance provisions to apply to all tax liabilities, not just duty.

A 'tax avoidance scheme' is a scheme that a person, whether alone or with others, enters into, makes or carries out for the sole or dominant purpose of enabling a tax liability to be avoided.

A 'scheme' is defined broadly to include:

1. a trust, contract, agreement, arrangement, understanding, promise or undertaking, including all steps and transactions by which it is carried into effect, including if it is oral, in writing, express or implied, or whether or not it is intended to be enforceable by legal proceedings;
2. a scheme, plan or proposal, whether implemented or not; or
3. an action, a course of action or a course of conduct.

To 'avoid' tax or a payment of tax includes postponing the payment of tax, and to avoid a tax liability includes reducing or postponing that tax liability.

The proposed amendments list 8 matters which must be taken into account when determining whether a scheme is a tax avoidance scheme, including the way in which the scheme was entered into, made or carried out, the form and substance of the scheme, when the scheme was entered into, a change in the person's financial position and the circumstances surrounding the scheme.

If a tax avoidance scheme is found, the person will be liable to pay the amount of tax avoided. The liability to pay the tax avoided arises on the date the amount of tax would have been payable had the scheme not been entered into. Therefore, a tax default is taken to occur which means that penalty tax and interest may also be charged.

A person is not liable to pay an amount of tax avoided by the person as a result of a tax avoidance scheme if the Chief Commissioner is satisfied that the person did not know, and could not reasonably be expected to have known, that the scheme was a tax avoidance scheme.

Promotion of tax avoidance schemes

The Bill also introduces new provisions prohibiting the promotion of tax avoidance scheme.

A person is a promoter of a tax avoidance scheme if the person markets the scheme or otherwise encourages the growth of the scheme or interest in it. A person is not a promoter of a scheme if they merely provide advice regarding the scheme or distribute material or information about the scheme prepared by another person.

If found to be a promoter of a tax avoidance scheme, the penalties can include:

1. civil penalties imposed by the Supreme Court of up to 10,090 penalty units ($1,109,900) for individuals and 50,450 penalty units ($5,549,500) for corporations. However, the Bill also allows for civil penalties not to be imposed if the scheme is based on treating a taxation law as applying in a particular way and that way agrees with advice given by the Chief Commissioner or in a publication approved in writing by the Chief Commissioner. Also, the Chief Commissioner cannot make an application for civil penalties more than 6 years after the person last engaged in conduct that resulted in the person being a promoter;
2. injunctions imposed by the Supreme Court to stop promoter behaviour; or
3. enforceable voluntary undertakings under which the Chief Commissioner may accept an undertaking by a promoter to implement remedial action and publish such undertakings.

Penalty taxes

The Bill proposes amendments aimed to reform the penalty tax system to operate similarly to the penalty tax regime set by the Australian Taxation Office which take into account the nature of the taxpayer. The changes include:

1. increasing the base penalty rate to 50% for ‘significant global entities’ as defined by the ITAA1997 i.e., large multinational entities whose global income is $1 billion or more; and
2. empowering the Chief Commissioner to provide penalty relief for genuinely inadvertent errors made by individuals or small businesses in accordance with guidelines published by the Chief Commissioner.

State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022
w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3950

2.2 Supply of declared health goods GST-free

The Minister for Health and Aged Care has made a determination under the GST Act for the purposes of declaring goods the supply of which is GST-free. The goods declared under the Determination are:

1. condoms;
2. barrier dams, femidoms and harness devices;
3. personal and surgical lubricants that are water-soluble and suitable for use with condoms;
4. preparations for use by humans that contain folic acid as the only active ingredient and have a recommended daily dose of 400 to 500 micrograms of folic acid;
5. sunscreen preparations for dermal application that are marketed principally for use as sunscreen and are SPF15 or higher; and

6. nicotine for use as an aid in withdrawal from tobacco smoking where the nicotine is administered in preparations for transdermal use or mucosal use.

The effect of the Determination is that the supply of the declared goods are exempt from the application of GST for the purposes of the GST Act.

The Determination repeals and replaces the former *GST-free Supply (Health Goods) Determination 2011*, which was due to sunset on 1 April 2022, without any substantial changes.

A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022
w https://www.legislation.gov.au/Details/F2022L00420

2.3 Superannuation Legislation Amendment (Superannuation Drawdown) Regulations 2022

The *Superannuation Legislation Amendment (Superannuation Drawdown) Regulations 2022* (the Regulations) amend the *SIS Regulations* and the *Retirement Savings Accounts Regulations 1997* to give effect to the Government's Budget 2022-23 measure to extend the temporary reduction in minimum payment amounts for account-based pensions, allocated pensions and market linked pensions for the 2022-23 financial year. The measure allows a 50% temporary drawdown reduction of the superannuation minimum drawdown rates.

The temporary reduction extends the measure that was introduced for the 2020 and 2021 financial years as part of the government's response to the COVID-19 pandemic and the ongoing financial market volatility, and is designed to assist pension and annuity account balances to recover from capital losses.

Superannuation Legislation Amendment (Superannuation Drawdown) Regulations 2022 (Legislative Instrument F2022L00498)
w https://www.legislation.gov.au/Details/F2022L00498

2.4 Cryptocurrency – Treasury NSW and Board of Taxation

Following the Senate inquiry into digital payment transactions and cryptocurrency assets, recommendations were made to change the tax treatment of cryptocurrency.

On 8 December 2021, the Government agreed in-principle to recommendations made by the Senate in respect of consulting on a licensing and custody regime for crypto asset secondary service providers. The March 2022 consultation paper released by Treasury covers the first stage of a broader token mapping exercise, to be completed by the end of 2022.

Treasury is seeking feedback on the proposals and options outlined in the consultation paper to support minimum standards of conduct by crypto asset secondary service providers and safeguards for consumers. Feedback is required to be submitted by 27 May 2022.

It is intended that the Board of Taxation will also advise the Government on necessary reforms to the taxation of digital payment transactions and cryptocurrency assets, as part of wider regulatory reform. On 21 March 2022, the Government released terms of reference for a review by the Board of Taxation.

The Board of Taxation has been asked to:

1. consider the current Australian taxation treatment of digital assets and transactions and emerging tax policy issues;
2. consider the awareness of the taxation treatment by both retail and wholesale investors and those transacting in digital assets as part of their business;
3. consider the characteristics and features of digital assets and transactions in the market, including the rapid evolution of technology supporting the broader digital asset ecosystem;

4. analyse the taxation of digital assets and transactions in comparative jurisdictions and consider how international experience may inform the taxation of digital assets and transactions in Australia; and
5. consider whether or not any changes to Australia's taxation laws and/or their administration are warranted in the context of digital assets and transactions, both for retail and wholesale investors.

The Board of Taxation has been asked to complete its review by 31 December 2022.

Treasury Consultation Paper, '*Crypto asset secondary service providers: Licensing and custody requirements'* (March 2022)
Australian Government, *'Review of the tax treatment of digital assets and transactions in Australia'*
w https://treasury.gov.au/consultation/c2022-259046; https://taxboard.gov.au/review/digital-assets-transactions-aus

2.5 Treasury consultation – Digital Games Tax Offset

In the 2021-22 Budget, the Government announced the Digital Economy Strategy targeting investment in emerging technologies. On 21 March 2022, the Treasury issued the exposure draft legislation *Treasury Laws Amendment (Measures for Consultation) Bill 2022: Digital games tax offset*, which once passed, will introduce the new Digital Games Tax Offset (DGTO) under a new Division 378 of the Income Tax Assessment Act 1997.

The DGTO will provide a 30 per cent refundable tax offset for eligible business that spend a minimum of $500,000 on qualifying Australian development expenditure related to the development of eligible games from 1 July 2022.

To be eligible for the DGTO, an entity will need to be:

1. an Australian resident company, or an Australian permanent establishment of a non-resident company
2. issued a certificate by the Arts Minister for the completion of a new game, the porting of a digital game to a new platform, or for ongoing development of one or more existing digital games during an income year; and
3. the company claims the offset in its income tax return in respect of the income year.

The amount of the DGTO will be capped at $20 million per company per income year, even if the company applied for multiple certificates in the income year. The $20 million cap will apply to DGTO for a single company. Integrity measures will form part of the scheme, so that the cap would apply to any amount of cumulative offset to which a group of related companies (worked out under the 'connected' and 'affiliate' tests in sections 328-130 and 328-150) would be entitled to.

When the cumulative offset for a company and its related companies exceeds $20 million, the company and its related companies must each provide the Commissioner with a notice in the approved form specifying an amount that will be that company's DGTO in relation to that income year. Failing to do so will cause the company and its related companies' DGTO to be reduced to nil.

The consultation period is open to 18 April 2022.

Treasury Laws Amendment (Measures for Consultation) Bill 2022: Digital games tax offset
w https://treasury.gov.au/consultation/c2022-255934

2.6 Treasury consultation – distribution guidelines for ancillary funds

Treasury has released a consultation paper on the distribution guidelines for ancillary funds.

An ancillary fund is a trust set up and maintained solely for the purpose of providing money, property or benefits to type 1 deductible gift recipients (DGRs). 'Type 1' DGRs are entities meeting the description in item 1 of the table at section 30-15 of the ITAA 1997. Type 1 entities typically undertake charitable work, whereas ancillary funds are known as type 2 DGRs that act as intermediaries between donors and type 1 DGRs.

Ancillary funds are required to comply with guidelines made under the *Taxation Administration Act 1953* to ensure ancillary funds meet their philanthropic goals. Those guidelines include:

- setting minimum distributions that an ancillary fund is to make to type 1 DGRs each financial year; and
- prohibiting ancillary funds from transferring funds to other ancillary funds.

The Government acknowledges circumstances exist where a uniform approach to regulation of ancillary funds may limit alternative approaches to supporting the charitable activities of type 1 DGRs.

Minimum distribution

Specifically, the requirement for funds to make a minimum distribution each financial year might restrict ancillary funds working with type 1 DGRs to support larger-scale projects which may require substantial capital such as health or research infrastructure.

The Commissioner has a discretion to reduce the minimum distribution rate for ancillary funds, but must consider certain factors in exercising that discretion. Those relevant factors do not contemplate circumstances where an ancillary fund may wish to apply to have a lower minimum distribution rate to allow greater capital accumulation to support a large capital-intensive project.

The consultation paper proposes an alternative factor to allow the exercise of the discretion, and proposes limiting the number of years that funds may accumulate funds, to ensure that ancillary funds still fulfil the philanthropic purpose of making distributions to type 1 DGRs.

Prohibition on transfer between funds

In addition, the limitation on moving assets between ancillary funds prevents private ancillary funds contributing to the work of public ancillary funds that may be better placed to support particular types of type 1 DGRs.

The consultation paper seeks feedback on proposals to provide greater flexibility to ancillary funds while preserving their philanthropic nature. These options consider integrity measures or additional compliance requirements to provide assurance that ancillary funds ultimately distribute to type 1 DGRs.

The consultation period is open to 6 May 2022.

Treasury Consultation - Distribution guidelines for ancillary funds
w https://treasury.gov.au/consultation/c2022-259124

2.7 ACT Duty – off the Plan

On 24 March 2022, the *Taxation Administration (Off the Plan Unit Duty Exemption Scheme) Determination 2022* was notified on the ACT Legislation Register.

Under the Determination, off the plan residential unit purchases (including apartments and townhouses) valued at less than or equal to $600,000 will be exempt from duty in ACT from 1 April 2022. This is an increase from the existing threshold of $500,000

The determination sets out the types of eligible property, the eligibility requirements, including transaction type and residency, and the concession amounts.

Taxation Administration (Off the Plan Unit Duty Exemption Scheme) Determination 2022
w https://legislation.act.gov.au/di/2022-31/

2.8 Director Identification Number Laws (Application) Data Standard 2022

The *Director Identification Number Laws (Application) Data Standard 2022* repeals and replaces the *Corporations Director Identification Number Data Standard 2021* registered on 16 April 2021.

The data standard sets out the following in relation to the director identification number (**DIN**) regime:

1. what information may be requested and collected by the Registrar (being the Commissioner of Taxation);
2. how such information may be collected;
3. how an application for a DIN is to be made;
4. when information is to be given to the Registrar;
5. how the Registrar will use information to authenticate, verify or validate information;
6. how information held by the Registrar will be recorded, corrected and stored;
7. the manner and form of communication between the Registrar and directors (and others entitled to the information such as government bodies); and
8. that a person who makes an application for a DIN must provide a signed declaration.

The repealed data standard applied only to DINs issued under the *Corporations Act*. The new instrument expands the scope to also apply to DINs issued under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Director Identification Number Laws (Application) Data Standard 2022 w https://www.legislation.gov.au/Details/F2022L00331

2.9 Director Identification Number Laws (Other Government Bodies) Disclosure Framework 2022

The *Director Identification Number Laws (Other Government Bodies) Disclosure Framework 2022* provides for a disclosure framework relating to the disclosure of protected information that is director ID information. The instrument was previously released for consultation as draft ABRS 2021/D2.

The *Corporations Act 2001* and the *Commonwealth Registers Act 2020* authorise the disclosure of DIN information to certain government entities. Public governance, performance and accountability bodies (such as ASIC, APRA and the Reserve Bank of Australia), multi-agency taskforces and courts and tribunals, do not fall within the definition of 'government entity'. The new instrument sets out the circumstances in which the Registrar (being the Commissioner of Taxation) may disclose DIN information to these bodies, in the same way as government entities.

Director Identification Number Laws (Other Government Bodies) Disclosure Framework 2022 w https://www.legislation.gov.au/Details/F2022L00361

2.10 Land Tax QLD – special disability trust

The *State Penalties Enforcement (Modernisation) Amendment Bill* 2022 has been passed which amends the *Land Tax Act 2010* (QLD) to make various changes to State Laws, including changes to ensure that trustees of Special Disability Trusts (SDTs) are subject to the higher tax-free threshold and lower land tax rates that apply to individuals.

The Act commences on 30 June 2022 and 20 November 2022, depending on the provisions.

State Penalties Enforcement (Modernisation) Amendment Bill 2022 w https://www.legislation.qld.gov.au/view/html/bill.first/bill-2021-060

2.11 Land tax (Tas) – Bill to double land tax threshold

The *Land Tax Rating Amendment Bill 2022 (Tas)* (the Bill) has passed the Tasmanian House of Assembly.

The Bill amends the *Land Tax Rating Act 2000* (Tas) by making land of a value less than $100,000 not subject to land tax. The upper tax threshold has also been increased to $500,000. The tax rate has also been reduced from 0.55% to 0.45% for land with a value between $100,000 and $500,000.

Land Tax Rating Amendment Bill 2022 (Tas)
w https://www.parliament.tas.gov.au/Bills/current/6_of_2022.html

2.12 Indirect Tax Concession Scheme (ITCS) packages for India, Malaysia and UK

Under the *Vienna Convention on Consular Relations 1963* (Articles 32, 49, 60 and 66), consular posts and accredited staff are exempt from paying direct taxes. Although not required by the Convention, it is international practice to afford relief from indirect taxes as well. Australia negotiates packages with each country to provide indirect tax concessions and the level of concessions provided is broadly based on reciprocity.

The Minister for Foreign Affairs can make a determination under section 10A of the *Consular Privileges and Immunities Act 1972* (Cth) for the Commissioner of Taxation to pay the head of a consular post (or a person in a class of persons determined by the Minister) an amount equal to the indirect tax payable (if any) in respect of an acquisition covered by the Minister's determination.

On 17 March 2022, the Minister made a determination to upgrade the Indirect Tax Concession Scheme (ITCS) package for India, Indonesia, Malaysia and the United Kingdom by providing indirect tax concessions to their consular posts in Australia and staff accredited to those posts. The concessions granted relate to the acquisition of one motor vehicle for personal use within 6 months of the employee's installation in Australia.

Reference *Consular Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (India, Indonesia, Malaysia and the United Kingdom) Determination 2022*
w https://www.legislation.gov.au/Details/F2022L00366

3. 2022/22 Federal Budget

The 2022/23 Federal Budget was delivered on 29 March 2022. The tax measures are summarised below, there were few tax changes affecting business in the budget.

3.1 PAYG instalments

3.1.1 Uplift factor for instalments

The GDP uplift factor for PAYG and GST instalments will be set at 2 per cent for the 2022-23 income year. This uplift factor is lower than the 10 per cent that would have applied under the statutory formula.

The lower uplift rate is stated to provide cash flow support to small businesses, including sole traders, and other individuals with investment income, helping them to invest and grow. Around 2.3 million taxpayers are expected to benefit from this measure.

The 2 per cent GDP uplift rate will apply to small to medium enterprises eligible to use the relevant instalment methods (up to $10 million annual aggregated turnover for GST instalments and $50 million annual aggregated turnover for PAYG instalments) in respect of instalments that relate to the 2022-23 income year and fall due after the enabling legislation receives Royal Assent.

3.1.2 Changes to instalment system

Companies will be able to choose to have their PAYG instalments calculated based on current financial performance, extracted from business accounting software, with some tax adjustments. This is intended to support business cash flow by ensuring instalments reflect current performance.

The Budget sets out that subject to advice from software providers about their capacity to deliver, it is anticipated that systems will be in place by 31 December 2023, with the measure to commence on 1 January 2024, for application to periods starting on or after that date.

3.2 Skills and training boost

Small businesses (with aggregated annual turnover of less than $50 million) will be able to deduct an additional 20 per cent of expenditure incurred on external training courses provided to their employees, i.e. spend $100, deduct $120. The external training courses will need to be provided to employees in Australia or online, and delivered by entities registered in Australia.

This ‘boost’ will apply to eligible expenditure incurred from 7:30pm AEDT on 29 March 2022 (Budget night) until 30 June 2024.

Some exclusions are said to apply, such as for in-house or on-the-job training and expenditure on external training courses for persons other than employees.

The boost for eligible expenditure incurred by 30 June 2022 will be claimed in tax returns for the following income year. The boost for eligible expenditure incurred between 1 July 2022 and 30 June 2024, will be included in the income year in which the expenditure is incurred.

3.3 Technology investment boost

Small businesses (with aggregated annual turnover of less than $50 million) will be able to deduct an additional 20 per cent of the cost incurred on business expenses and depreciating assets that support their digital adoption, such as portable payment devices, cyber security systems or subscriptions to cloud-based services, i.e. spend $100, deduct $120.

This 'boost' will apply to eligible expenditure incurred from 7:30pm (AEDT) on 29 March 2022 (Budget night) until 30 June 2023.

The boost for eligible expenditure incurred by 30 June 2022 will be claimed in tax returns for the following income year. The boost for eligible expenditure incurred between 1 July 2022 and 30 June 2023 will be included in the income year in which the expenditure is incurred.

An annual cap will apply in each qualifying income year so that expenditure up to $100,000 will be eligible for the boost.

COMMENT – this technology investment boost ends one year before the skills and training boost.

3.4 Patent box treatment extended

The patent box regime currently before Parliament will be expanded so that concessional tax treatment is available to corporate taxpayers who commercialise their eligible patents linked to agricultural and veterinary (agvet) chemical products listed on the Australian Pesticides and Veterinary Medicines Authority (APVMA), PubCRIS (Public Chemicals Registration Information System) register, or eligible Plant Breeder's Rights (PBRs).

Eligible corporate income will be subject to an effective income tax rate of 17 per cent for PBRs and patents granted or issued after 29 March 2022 and for income years starting on or after 1 July 2023. Eligible income will be taxed at the concessional tax rate to the extent that the research and development of the innovation took place in Australia.

The Government stated it will consult with industry before settling the detailed design of the patent box expansion to agriculture.

3.5 Employee share schemes

The budget included a measure that is said to expand access to employee share schemes and reduce red tape. The budget document stated:

Where employers make larger offers in connection with employee share schemes in unlisted companies, participants can invest up to:

- *$30,000 per participant per year, accruable for unexercised options for up to 5 years, plus 70 per cent of dividends and cash bonuses; or*
- *any amount, if it would allow them to immediately take advantage of a planned sale or listing of the company to sell their purchased interests at a profit.*

The Government will also remove regulatory requirements for offers to independent contractors, where they do not have to pay for interests.

COMMENT – it is not clear whether this is a taxation or corporations law change.

3.6 Minimum pension drawdowns

The Government has extended the 50 per cent reduction of the superannuation minimum drawdown requirements for account-based pensions and similar products for a further year to 30 June 2023.

3.7 Low and middle income tax offset

The Government will increase the low and middle income tax offset (LMITO) for the 2021-22 income year.

The LMITO for the 2021-22 income year will be paid from 1 July 2022 when tax returns are submitted for the 2021/22 income year. This proposal will increase the LMITO by $420 making the maximum LMITO benefit in 2021-22 to $1,500 for individuals and $3,000 for couples.

Other than those that do not require the full offset to reduce their tax liability to zero, all LMITO recipients will benefit from the full $420 increase. Taxpayers with incomes of $126,000 or more will not receive the additional $420.

3.8 $250 payment for concession card holders

A $250 payment will be made in April 2022 to eligible recipients of the following payments and to concession card holders:

- Age Pension
- Disability Support Pension
- Parenting Payment
- Carer Payment
- Carer Allowance (if not in receipt of a primary income support payment)
- Jobseeker Payment
- Youth Allowance
- Austudy and Abstudy Living Allowance
- Double Orphan Pension
- Special Benefit
- Farm Household Allowance
- Pensioner Concession Card (PCC) holders
- Commonwealth Seniors Health Card holders
- eligible Veterans' Affairs payment recipients and Veteran Gold card holders.

The payments will be exempt from taxation and will not count as income support for the purposes of any income support payment. A person can only receive one economic support payment, even if they are eligible under 2 or more of the categories outlined above. The payment will only be available to Australian residents.

3.9 Medicare levy low-income thresholds for 2021/22

Consistent with what occurs each year, the Government has announced retrospective changes to the medicare levy thresholds from 1 July 2021.

The threshold for singles will be increased from $23,226 to $23,365. The family threshold will be increased from $39,167 to $39,402. For single seniors and pensioners, the threshold will be increased from $36,705 to $36,925. The family threshold for seniors and pensioners will be increased from $51,094 to $51,401. For each dependent child or student, the family income thresholds will increase by a further $3,619 instead of the previous amount of $3,597.

3.10 More Covid-19 business grants designated NANE

The budget included a measure that was originally announced on 13 September 2020.

Government has made the following state and territory grant programs eligible for NANE treatment until 30 June 2022 since the 2021-22 MYEFO:

- New South Wales Accommodation Support Grant
- New South Wales Commercial Landlord Hardship Grant
- New South Wales Performing Arts Relaunch Package
- New South Wales Festival Relaunch Package

- New South Wales 2022 Small Business Support Program
- Queensland 2021 COVID-19 Business Support Grant
- South Australia COVID-19 Tourism and Hospitality Support Grant
- South Australia COVID-19 Business Hardship Grant.

3.11 Concessional tax treatment of carbon credit and biodiversity credit certificate income

Currently, proceeds from selling Australian Carbon Credit Units (ACCUs) are treated as non-primary production income and are generally ineligible for concessional tax treatment under the FMD scheme or tax averaging. ACCU holders are taxed based on changes in the value of their ACCUs each year, which can result in tax liabilities prior to sale.

The proceeds from the sale of ACCUs and biodiversity certificates generated from on-farm activities to be treated as primary production income for the purposes of the Farm Management Deposits (FMD) scheme and tax averaging from 1 July 2022. The Government will also change the taxing point of ACCUs for eligible primary producers to the year in which they are sold, and extend similar treatment to biodiversity certificates issued under the Agriculture Biodiversity Stewardship Market scheme, from 1 July 2022. Eligible primary producers are those who are currently eligible for the FMD scheme and tax averaging.

3.12 Taxable payments data reporting – option to link to BAS lodgement cycle

The Government will allow businesses the option to report *Taxable Payments Reporting System* data (via accounting software) on the same lodgment cycle as their activity statements, with the measure to commence on 1 January 2024, for application to periods starting on or after that date.

Subject to advice from software providers about their capacity to deliver, it is anticipated that systems will be in place by 31 December 2023.

3.13 STP data to be shared with States and Territories

The Government will commit $6.6 million for the development of IT infrastructure required to allow the ATO to share single touch payroll (STP) data with State and Territory Revenue Offices on an ongoing basis.

The Budget document states that funding will be deployed following further consideration of which states and territories are able and willing to make investments in their own systems and administrative processes to pre-fill payroll tax returns with STP data, to reduce compliance costs for businesses.

3.14 Apprentice wage subsidy support extension

The Budget included measures to support employers to engage and retain new apprentices by:

- introducing a new *Australian Apprenticeships Incentive System* from 1 July 2022, providing support to employers and apprentices in priority occupations;
- extending the *Boosting Apprenticeship Commencements and Completing Apprenticeship Commencements* wage subsidies by 3 months to 30 June 2022; and
- increasing apprenticeship In-Training Support by an additional 2,500 places for young Australians aged 15-20 years.

3.15 Extra funds for ATO tax avoidance taskforce

The Budget provides $325.0 million in 2023-24 and $327.6 million in 2024-25 to the ATO to extend the operation of the Tax Avoidance Taskforce by 2 years to 30 June 2025.

The Taskforce was established in 2016 and undertakes compliance activities targeting multinationals, large public and private groups, trusts and high wealth individuals. It also scrutinises specialist tax advisors and intermediaries that promote tax avoidance schemes and strategies.

This Budget set out that this measure is estimated to increase receipts by $2.1 billion, and increase payments by $652.6 million over the forward estimates period.

4. Rulings

4.1 Aggregated Turnover – corporate limited partnership

The ATO has published Taxation Determination TD 2022/5 (former draft TD 2021/D3) concerning the application of the 'aggregated turnover' test to corporate limited partnerships.

The concept of 'aggregated turnover' is used in a number of provisions in income tax law, including the temporary full expensing and loss carry back provisions, the small business CGT concessions and other small business entity concessions.

What is a corporate limited partnership?

A limited partnership is defined in subsection 995-1(1) of the ITAA 1997 as:

> *(a) an association of persons (other than a company) carrying on business as partners or in receipt of * ordinary income or * statutory income jointly, where the liability of at least one of those persons is limited; or*
> *(b) an association of persons (other than one referred to in paragraph (a)) with legal personality separate from those persons that was formed solely for the purpose of becoming a * VCLP, an * ESVCLP, an * AFOF or a * VCMP and to carry on activities that are carried on by a body of that kind.*

Under section 94D of the ITAA 1936, a corporate limited partnership is a limited partnership formed after 19 August 1992 (and in some cases before that date), but does not include the venture capital vehicles, such as a Venture Capital Limited Partnership, an Early Stage Venture Capital Limited Partnership, an Australian Venture Capital Fund of Funds or a Venture Capital Management Partnership.

Aggregated turnover of corporate limited partnerships

A 'corporate limited partnership' is treated as a company for the purposes of the aggregated turnover rules in subdivision 328-C. The relevant 'control' tests are the 'general control test' which relate to entitlements to receive at least 40% of the income or capital from the entity, and the 'voting control test' which relates to the right to exercise at least 40% of the voting power. The specific control tests for partnerships do not apply to corporate limited partnerships.

As a 'corporate limited partnership' is treated as a company, in the ATO view it is capable of being an affiliate of other entities within the meaning of section 328-130.

ATO reference *Taxation Determination TD 2022/5* w https://www.ato.gov.au/law/view/document?DocID=TXD/TD20225/NAT/ATO/00001

4.2 Aggregated Turnover – public entity exemption to the indirect control test

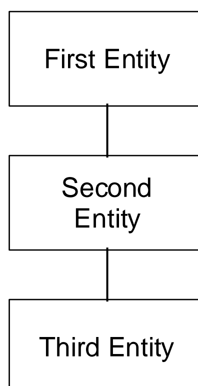
The ATO has published a Taxation Determination TD 2022/6 (former draft TD 2021/D4) concerning the application of the public entity exemption to the indirect control test when determining aggregated turnover.

Under section 328-125 an entity is connected with another entity if it 'controls' that entity or if both entities are 'controlled' by a third entity.

An entity will also be connected with another entity if it indirectly controls the other. Indirect control is defined in subsection 328-125(7) as follows:

> *This section applies to an entity (the **first entity**) that directly controls another entity (the **second entity**) as if the first entity also controlled any other entity that is directly, or indirectly by any other application or applications of this section, controlled by the second entity.*

Example of indirect control



The indirect control test is designed to look through business structures that include interposed entities. In this example the first entity is connected with the third entity because the first entity directly controls the second entity and the second entity directly controls the third entity.

Exception for public entities

Where entities are publicly owned there is therefore an exception where the interposed 'second entity' is a public entity. If a public entity is interposed between a first and a third entity, the first entity will not control the third entity merely because of its interest in the interposed public entity.

Subsection 328-125(8) states that the indirect control test will not apply where the 'second entity' is any of the following:

> *(a) a company shares in which (except shares that carry the right to a fixed rate of dividend) are listed for quotation in the official list of an approved stock exchange;*
> *(b) a publicly traded unit trust;*
> *(c) a mutual insurance company;*
> *(d) a mutual affiliate company;*
> *(e) a company (other than one covered by paragraph (a)) all the shares in which are owned by one or more of the following:*
> > *(i) a company covered by paragraph (a);*
> > *(ii) a publicly traded unit trust;*
> > *(iii) a mutual insurance company;*
> > *(iv) a mutual affiliate company.*

The fact that the second entity is a public entity of the kind listed in subsection 328-125(8) does not mean that the first entity will never be connected with the third entity. If a public entity is interposed in an ownership structure, the first entity may still control the third entity through direct control.

ATO reference *Taxation Determination* TD 2022/6 w https://www.ato.gov.au/law/view/document?DocID=TXD/TD20226/NAT/ATO/00001

4.3 Aggregated Turnover – partnerships, foreign hybrids and non-entity joint ventures

The ATO has published a *Taxation Determination* TD 2022/7 (former draft TD 2021/D2) concerning the application of the 'aggregated turnover' test to partnerships, foreign hybrids and non-entity joint ventures.

Partnerships

A partnership is treated as a separate entity to the partners for the purposes of subdivision 328-C. The partnership is the relevant entity for determining whether it controls another entity, not the individual partners in their capacity as partners.

If an entity is controlled by a partnership, it will be necessary to consider whether it is indirectly controlled by any other entities that control the partnership, including the individual partners in their capacity as partners of the partnership. These indirect controllers (e.g. partners) could also be connected entities of the test entity. Similarly, when testing a partner that directly controls a partnership, it will be necessary to consider whether the partner indirectly controls any entities that the partnership controls.

A partnership is not capable of being an 'affiliate' within the meaning of section 328-130, a partnership because only an individual or a company can be an affiliate.

Foreign hybrids

'Foreign hybrid limited partnership' is defined in subsection 830-10(1) of the ITAA 1997. Broadly, it covers non-resident structures formed in a foreign country where the partners are subject to foreign income tax (not the 'entity') and the structure is a controlled foreign company for Australian tax purposes.

'Foreign hybrid company' is defined in subsection 830-15(1) of the ITAA 1997. Broadly, it covers non-resident companies that are treated as partnerships for the purposes of foreign income tax laws.

Both of these kinds of 'foreign hybrids' are treated as partnerships for the purposes of the aggregated turnover rules in subdivision 328-C and the 'voting control test' for determining whether an entity directly controls a company does not apply to determining direct control of a foreign hybrid.

Non-entity joint ventures

'Non-entity joint venture' is defined in subsection 995-1(1) of the ITAA 1997 as:

> *an arrangement that the Commissioner is satisfied is a contractual arrangement:*
> *(a) under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties; and*
> *(b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties.*

A 'non-entity joint venture' is not considered to be an entity or partnership for the purposes of the aggregated turnover rules. The parties to the contractual arrangement are tested separately in their individual capacities. The parties will not necessarily be considered to be 'affiliates' merely because of their business relationship.

TRAP – that a partnership is an entity for the purposes of income tax law is an issue for arrangements where income is derived jointly, such as where a rental property is owned by 2 or more entities, as the joint derivation of income is a partnership for income tax purposes. For the purposes of the aggregated turnover test and the maximum net asset value test as applied to an entity connected to the partnership, this can mean that the aggregated turnover of the partnership is counted, as is the net market value of the partnership's assets.

ATO reference *Taxation Determination* TD 2022/7
w https://www.ato.gov.au/law/view/document?DocID=TXD/TD20227/NAT/ATO/00001

4.4 ESS Deferred Taxing Point – genuine disposal restrictions

The ATO has published a finalised version *Taxation Determination* TD 2022/4 (formerly draft TD 2021/D5 which was covered in our November 2021 training notes). There have been no substantive changes from the draft determination

ATO reference *Taxation Determination* TD 2022/4
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20224/NAT/ATO/00001

4.5 ESS establishment expenses not deductible

The ATO has published a *Taxation Determination TD 2022/8* (formerly published in draft form as TD 2022/D2) concerning the deductibility of expenses for establishing and administering an employee share scheme. There have been no substantive changes from the draft determination which was covered in our March 2022 training notes.

ATO reference *Taxation Determination* TD 2022/8
w: https://www.ato.gov.au/law/view/document?docid=TXD/TD20228/NAT/ATO/00001

4.6 FBT 2022/2023 rates

The Commissioner has published a webpage and 2 determinations setting out various FBT rates and thresholds for the FBT year commencing on 1 April 2022.

TD 2022/2 provides for reasonable amounts under section 31G of the *Fringe Benefits Tax Assessment Act* 1986 for food and drink expenses incurred by employees receiving a living-away-from-home allowance within Australia and overseas.

TD 2022/3 provides the rates to be applied where the cents per kilometre basis (other than a car) method is used for the FBT year commencing on 1 April 2022.

w https://www.ato.gov.au/Rates/FBT/
w https://www.ato.gov.au/law/view/document?DocID=TXD/TD20222/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?DocID=TXD/TD20223/NAT/ATO/00001

5. Private Binding Rulings

5.1 Active asset test

Facts

In the 1990s the trustee of a Trust purchased a residential property located at X for $X.

The Trust has a company as trustee. The specified beneficiaries of the Trust are A and B. A and B hold half each of the issued shares in the trustee company and are directors of the trustee company.

C Pty Ltd as trustee of D Trust restructured their business in 19XX, relocating from X (A was the sole director and shareholder of C Pty Ltd.)

From 19XX C Pty Ltd occupied rooms at the front of the residential property, repurposed to function as the office, for their business activities until 20XX.

Dividing doors were installed between the front part of the house and the back section to provide a division between office and private use.

The Trustee of the Trust and C Pty Ltd entered into an agreement in terms of which the company paid the Trust for the use of the residential property for more than 15 years.

In 20XX C Pty Ltd and F formed a joint venture establishing a new company, and they concurrently occupied part of the residential property to conduct their business activities.

Later F relocated to another premises.

In 20XX the arrangement between the Trust and C Pty Ltd for business use of the residence was terminated as the residential property was being prepared for sale.

C Pty Ltd relocated their business premises.

The trustee of the Trust refurbished the residential property, including converting the remaining office space back into residential use and refurbishing the downstairs bathroom to ensure it was presented as residential accommodation.

On XX 20XX the Trustee accepted an offer and entered into a contract for the sale of the residential property. On XX 20XX the sale of the residential property was settled.

Question

Does the residential property satisfy the active asset test for the purposes of the small business CGT concessions?

Ruling and reasons

Yes.

The active asset test requires that an asset be an active asset for the lesser of 7.5 years and half the time it has been owned. A CGT asset will be an active asset at a time if, at that time, you own the asset and the asset was used or held ready for use by you, an affiliate of yours, or by another entity that is 'connected with' you, in the course of carrying on a business.

An asset cannot be an active asset at a point in time if its main used in the business being carried on is to derive rent.

Without setting out their analysis the ATO determined that the D Trust and the Trust were connected with each other.

The ATO then set out that Taxation Determination TD 2006/78 considers, amongst other issues, what the main use of an asset is where there is part business and part rental use of an asset. It states that an asset owned by a taxpayer and used partly for business purposes and partly to derive rent can be an active asset under section where it is considered that the main use of the premises is not to derive rent. In deciding if the property was mainly used to earn rent the Commissioner will consider a range of factors such as:

- the comparative areas of use of the premises (between rent and business)
- the comparative levels of income derived from the different uses of the asset.

In this case, the ATO set out that Trust owned a CGT asset that was used in the course of carrying on a business by a connected entity. As part of the property had been used to produce rental income, it was necessary to consider the main use of the asset.

A comparison had apparently been provided of the business income earned by the connected entity and the rental income earned from the property. The majority of the income from the property is business income generated by the connected entity.

As the vast majority of the income generated from the property was business income, the ATO did not consider that the main use of the property was to derive rent.

The ATO therefore considered the active asset test was passed.

COMMENT – presumably A and B in this PBR were spouses, so that the Trust and the D Trust were commonly controlled, and so connected with each other.

COMMENT – it is not clear from this PBR whether the back part of the property was being used to produce rental income or was used privately. If used to derive rent, the analysis here is what would be expected. If not, following *Rus and FCT* [2018] AATA 1854, it is unclear how much of a property needs to be used in a business for it to be an active asset, in that case 10% use was not enough.

ATO reference *Private Binding Ruling Authorisation No. 1051907670123*
w https://www.ato.gov.au/law/view/document?docid=EV/1051907670123

5.2 Repairs and initial repairs

Facts

A residential investment property is a Californian bungalow weatherboard house built around 19XX to 19XX.

The owner's parent conducted an inspection prior to the purchase of the property. The parent was satisfied there were no existing defects to the stumps, sewerage pipes and stormwater drainage at the time of purchase.

Neither the owner or the parent have a background in the building or construction industry.

The owner did not obtain a building inspection report prior to purchasing the property and relied on the parent's judgment to assess the property. The parent inspected underneath the house and did not identify any issues at the time.

The property was purchased at auction and photos were provided prior to the purchase which the owner believed showed no pre-existing defects. A link to photos located on a real estate website was provided showing the condition of the property prior to purchase.

The property was genuinely available for rent from settlement date until 20XX. The owner did not rent out the property after the last tenants vacated as they intended to reside in the property as their main residence.

There was a period in the 20XX financial year where the property was vacant, however the property manager actively looked for another tenant and it was eventually tenanted again.

In 20XX, tenants reported raw sewerage smell coming from underneath the property. It was discovered an old terracotta sewer pipe had broken because a tree root had grown inside of the pipe.

The property manager engaged a plumber to remove the tree root from the drain and unblock the drain in 20XX.

In 20XX, significant issues were identified with the wooden stumps situated underneath the property. The stumps had rotted and moved, causing pressure on other stumps to move as well.

A builder was engaged to perform repair works and extensive improvements to the property.

The builder advised the issues with the wooden stumps were most likely due to the poor stormwater drainage and sewer pipes.

A structural damage report was not obtained as the builder was hired to repair the stumps. They performed an inspection and only provided a basic quote.

The owner did not obtain a rental inspection report prior to renting out the property to tenants.

The owner was unable to provide a timeline on when the issues with the stormwater drainage and sewage pipes started and was unable to identify when the issue occurred.

The parent suspects when the sewerage drain problem was fixed in 20XX, digging and the removal of dirt may have left a passage for stormwater to find its way underneath the house at the high point and traversed to the low point.

A spreadsheet was provided with a summary of expenses which contains both repair and improvement expenses. Deductions were sought to be claimed for the highlighted items:

- Table 1 - Re-stumping
- **Remove broken floorboards & strip damaged plaster and remove debris from site**
- **Lift & re-block stumps, replace water damaged bearers & floor joist**
- **Electric re-wiring**
- **New floorboards to replace existing, damaged floorboards (replaced like for like or modern-day equivalent)**
- **New plaster works**
- **Replace 2 brick pillars at front (removed due to stumping)**
- **Weatherboards 80mtrs**

- Table 2 - Exterior repairs
- **Replace & repoint roof**
- **Wash & respray roof tiles**
- **Repair windows**
- **Repair and restore front door**
- **Replace worn front veranda floorboards**

- **Plinth boards 160mtrs**
- **Fascia boards 60mtrs**
- **Labour to remove boards and installation**
- Outdoor excavation labour and machine to support stumping, and sewer line/storm water

- Table 3 - Drains and Gutters
- **Gutters & drains**
- **Sewer line & storm water**

In relation to the re-stumping category, it was stated:

- The house was required to be re-stumped, and the bearers were required to be replaced. Only the stumps that were damaged were replaced.
- The original stumps were made from wood. The stumps were replaced with a concrete material.
- The floorboards also had to be removed and replaced. The floorboards were originally timber and were replaced with timber. Parts of the living room, corridor/hallway and the two bedrooms had floorboards replaced.
- The plaster for the interior of the property was also required to be re-plastered. All internal walls were re-plastered due to existing damage as well as further damage caused by re-stumping work.
- The interior plaster was made of old lime and sand coated timber. The plaster cracked due to the movement that occurred to the property and parts of the plaster became mouldy and peeled.
- Only the damaged weatherboards were replaced. The lower section of the weatherboards was damaged due to dampness. The old weatherboards were replaced with new weatherboards.

In relation to the exterior repair's category, it was stated:

- The process of re-stumping had a flow on effect and the property had moved slightly to re-align back into place afterwards.
- The re-alignment affected the roof and the front veranda. The roof had become sunk in the middle.
- Some trusses and tiles were replaced on the roof. The roof tiles are terracotta and were replaced with the same material.
- The front door had two wooden and glass panels restored and repaired.
- The window replaced had structural damage to the wood window panel and border. This was replaced with a similar material.
- The floorboards on the front veranda were replaced due to the re-stumping and removal of two pillars at the front of the house. The old floorboards were made of timber and replaced with timber.

In relation to the drains and gutters category, it was stated:

- The pipes had cracked underneath the stumps and the drains had blockages that were required to be fixed.
- Work completed to the drainage included removing and changing the discharge points and installing new drainage underneath the house. The downpipes were also replaced.
- The gutters were replaced due to rusting.

Questions

Is the expenditure incurred on repairs deductible?

Ruling and reasons

The ATO ruled that only the following three items of expenditure were deductible:

- Replace & repoint roof

- Wash & respray roof tiles
- Repair and restore front door.

The ATO stated that the restumping, some exterior works and work to the gutter and drains undertaken were considered to be an initial repair to remedy damage, deterioration or defects that existed when the property was purchased, even though the owner may have not been aware of the issue at the time. Therefore, these expenses are capital in nature and are not deductible as repairs.

The initial repair expenses were not considered to be capital works expenditure and so not deductible under Division 43 of the ITAA 1997. The ATO set out that the expenses could be included in the fourth element of the cost base of the property.

Exterior works done in relation to replacing damaged roof tiles/trusses, re-pointing, washing, respraying roof tiles, and replacing panels on the front door did not change the efficiency or the character of the property, did not replace an entirety and was not an initial repair. Therefore, these expenses were deductible.

In relation to the initial repairs point the ATO stated that as there was no third party confirmation that the property was not damaged at the time of purchase, considering '… the age of the property relative to [the] period of ownership and the drainage issues which occurred shortly after [acquiring] ownership, [the ATO] consider the damage, defects, and deterioration in the re-stumping, some of the exterior works and drains & gutters categories are more likely to have been present prior to [you acquiring] ownership'.

TIP – a building report obtained at or around the time of purchase would have been able to demonstrate whether or not the repairs were initial repairs. Obtaining such a report may be beneficial for both tax and commercial reasons.

ATO reference *Private Binding Ruling Authorisation No. 1051918868459* w https://www.ato.gov.au/law/view/document?docid=EV/1051918868459

5.3 CGT – deceased estate dwelling

Facts

A post CGT property was owned by a person who died.

The property was the deceased's main residence at the time of their death and was not then being used for the purpose of producing assessable income.

Probate was granted on XX/XX/XXXX to the deceased's appointed executor.

The executor did not administer the estate in accordance with the terms of the will and did not sell or otherwise distribute the inherited dwelling to the residuary beneficiaries.

On XX/XX/XXXX the Supreme Court of X revoked the executor's grant of probate and a new representative was appointed as administrator of the estate.

There was a further significant period of delay before the property was sold due to actions taken in an attempt to improve the sale price.

Question

Would the Commissioner grant an extension to the usual 2-year period in which the dwelling could be sold CGT free?

Ruling and reasons

No.

Under section 118-195 of ITAA 1997 a dwelling owned by a deceased person can in some instances be sold CGT-free during the period of up to 2 years after death. The Commissioner is given a discretion to extend the period in which the dwelling can be sold CGT-free.

The ATO set out that in their Practical Compliance Guideline PCG 2019/5: *The Commissioner's discretion to extend the two-year period to dispose of dwellings acquired from a deceased estate* outlines the factors that the Commissioner will consider when determining whether or not to exercise the discretion to extend the two-year period. Generally, the Commissioner will allow a longer period where the sale of the dwelling could not be settled within two years of the deceased's death due to reasons beyond your control.

The ATO noted that the original executor did not administer the estate in accordance with the will and was subsequently removed. However, once the rulee was appointed administrator of the estate and gained title to the property, it was within their power to sell the property. The ATO stated that they could understand that the administrator and the beneficiaries wished to achieve a higher sale price. However they noted, it was still possible to sell the property without taking the actions that resulted in the further delay.

PCG 2019/5 states that delays due to trying to achieve a higher sale price, such as waiting for the market to improve or refurbishing the property, would weigh against the exercise of the discretion.

The ATO in the circumstances stated that as there was a significant period of delay that was not outside of your control, the Commissioner would not exercise the discretion to grant an extension of time.

ATO reference *Private Binding Ruling Authorisation No. 1051921663482*
w https://www.ato.gov.au/law/view/document?docid=EV/1051921663482

5.4 Sale of property and GST

Facts

On dd/mm/yyyy a woman purchased ‘the Property’.

The original intention in purchasing the Property was to demolish the original premises and build three units, two to lease out and provide rental income to you and one to live in as a residence.

Sometime later a planning permit was issued in relation to the subdivision of the Property into three lots. It was approved by the Council subject to various infrastructure and telecommunications, landscaping and environmental requirements.

Demolition of the Property commenced in dd/mm/yyyy and construction began in dd/mm/yyyy.

The woman continued with her plans to rent Units Y, Z and reside in Unit X.

Unit Z was initially rented and then a contract to sell Unit Z to XXXX was entered into. This property settled on dd/mm/yyyy. XXXX is an unrelated third party.

Unit Y was rented from when it was built up until the present time.

Unit X was moved into in approximately dd/mm/yyyy after landscaping and decorating was completed.

There was a period after this in early YYYY, as the marriage having been in a state of flux for some time, the woman moved back to her husband's house but kept Unit X as a back-up while trialling a reconciliation. The marriage was finally reconciled and it was decided to sell the husband's residence and both then moved back to Unit X in dd/mm/yyyy. With the marriage firmly stabilised after about a year, another residence was purchased, and it was decided to sell unit 1 on dd/mm/yyyy.

On dd/mm/yyyy a contract was entered into to sell Unit X for $xxx,xxx.

Question

Is the sale of Unit X a taxable supply?

Decision and reasons

No. The supply of Unit X is not a taxable supply.

The ATO stated that the woman's intention from the time of purchasing the Property on dd/mm/yyyy until the sale was to live in Unit X as a private residence. Therefore, the sale of Unit X, despite being a supply of new residential premises, was part of a private activity and is not in the course of an enterprise and is therefore not subject to GST.

COMMENT – what is of interest in this ruling is that no explanation or rationale was given for why Unit Z was sold. Whilst the initial plan may have been to rent two units and live in one, unless Unit Z was rented for a substantial period of time, its sale could be used to infer selling 1 or more units was always part of an enterprise.

ATO reference *Private Binding Ruling Authorisation No. 1051936863556*
w https://www.ato.gov.au/law/view/document?docid=EV/1051936863556

5.5 Rental business

Facts

An individual owns XX rural properties which are rented to Company A.

The individual holds 100% of share capital in Company A which operates a farming enterprise on land owned by the individual and pays a commercial rent with GST.

The total land leased to Company A by the individual is XXXha.

Rent is approximately $XXX per year and the monthly rent received is based on market valuations by Elders Rural Services Australia Limited.

The lands and residential residences are leased on commercial terms under the terms of formal leases.

In addition to the rural lands and residences the individual also holds a residential property in XXXX NSW which is also rented.

There is a business plan in place for this pursuit which outlines the land held; the business purpose of the land held and activities connected to improving the agricultural land.

The individual provides facilities, lands and support to XXXX Holdings Pty Ltd necessary to conduct its grazing and farming operation.

The activity is conducted with the intention of making a profit. This activity has always produced a profit over XX years.

The individual has wide commercial experience and detailed knowledge of grazing and farming requirements, holds a Bachelor of Industrial Engineering BE (Honours), a Master of Business Administration (MBA), was a Fellow of the Australian Institute of Management (FAIM) until 20XX and is a Fellow of the Australian Institute of Company Directors (FAICD)

Separate invoices for rural and residential leases are produced each month for income tax and Business Activity Statement purposes, as well as the preparation of monthly management accounts.

Question

Was a business of letting properties being carried on?

Decision and reasons

Yes. The ATO provided no analysis in support of the decision.

TIP – if a rental business is being carried on, property can be transferred to a related SMSF as business real property.

TRAP – without a ruling it is not clear how much turnover or number of properties need to be owned for the activity of leasing property to be a business.

COMMENT – what is unusual in this instance is that no analysis was done of the factors in TR 97/11 that set out whether a business is carried on.

ATO reference *Private Binding Ruling Authorisation No. 1051935114161* w https://www.ato.gov.au/law/view/document?docid=EV/1051935114161

5.6 Genuine redundancy payment

Facts

A person commenced employment with their employer several years ago. The employer terminated their employment before the person turned 65. A lump sum payment was made consisting of a payment in lieu of notice and unused annual leave.

The termination was said to be because the person's position was redundant and written confirmation of this was provided.

The amount paid in lieu of notice was three months pay, and such a payment was a requirement of the employment contract.

Question

Was the payment a genuine redundancy payment, and if so, was the tax offset available to cap the tax rate on the unused annual leave payment at 30%?

Decision and reasons

No.

For a payment to be a genuine redundancy payment a number of conditions have to be met. Section 83-175 of the ITAA 1997 states:

(1) A genuine redundancy payment is so much of a payment received by an employee who is dismissed from employment ***because the employee's position is genuinely redundant*** *and* ***exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of dismissal****.*

(2) A genuine redundancy payment must satisfy the following conditions:

(a) the employee is dismissed before the earlier of the following:
(i) the day he or she turned 65;
(ii) if the employee's employment would have terminated when he or she reached a particular age or completed a particular period of service the day he or she would reach the age or complete the period of service (as the case may be);
(b) if the dismissal was not at arm's length the payment does not exceed the amount that could reasonably be expected to be made if the dismissal were at arm's length;
(c) at the time of the dismissal, there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after dismissal.
(3) However, a genuine redundancy payment does not include any part of a payment that was received by the employee in lieu of superannuation benefits to which the employee may have become entitled at the time the payment was received or at a later time.

The ATO then have a ruling on what constitutes a genuine redundancy, TR 2009/2 *Income tax: genuine redundancy payments*.

18. Paragraph 11 of TR 2009/2 states:

There are four necessary components within this requirement:

- *The payment must be received 'in consequence of' an employee's termination.*
- *That termination must involve an employee being dismissed from employment.*
- *That dismissal must be caused by the redundancy of the employee's position.*
- *The redundancy payment must be made genuinely because of a redundancy.*

The ATO considered that the almost all of the requirements were satisfied, however they stated:

> *Paragraph 64 of the TR 2009/2 states that:*
>
> *a.A payment in lieu of notice can be a genuine redundancy payment provided that such a payment would not be expected on voluntary termination.*
>
> *59. Your employment contract entitled you to a payment of three months in lieu of notice.*
>
> *60. The director sent you an email confirming the employer's understanding of this entitlement.*
>
> *61. You confirmed that the payment was calculated according to the terms of your contract.*
>
> *62. As such, it cannot be a genuine redundancy payment.*

COMMENT – it would be unusual for a payment to be made in lieu of notice if an employee chose to resign.

ATO reference *Private Binding Ruling Authorisation No. 1051907670123*
w https://www.ato.gov.au/law/view/document?docid=EV/1051907670123

6. ATO and other materials

6.1 PCG 2016/5

On 21 March 2022, the ATO amended PCG 2016/5 which outlines the safe harbour terms for SMSFs that enter into limited recourse borrowing arrangements (LRBA) when acquiring an asset.

The key amendment to the guideline is the insertion of new paragraph 17A. The ATO will not apply compliance resources to review LRBAs established in the 2014-2015 financial year (or before) that are impacted by the non-arm's length income (NALI) expense provisions if a SMSF trustee has taken steps to place the LRBA on terms that are consistent with an arm's length dealing by 31 January 2017. The 31 January 2017 date was the date by which LRBA arrangements in existence when the PCG was released needed to be brought to an end, or put on arm's length terms to avoid the Commissioner looking at the 2014-2015 or earlier income years.

ATO reference *PCG 2016/5*
w https://www.ato.gov.au/law/view/view.htm?docid=%22COG%2FPCG20165%2FNAT%2FATO%2F00001%22

6.2 ATO online guidance – IBOR reform

The ATO has published online guidance concerning common tax implications arising from changes made to financial arrangements driven by Inter-bank offered rate (IBOR) reforms. Banks worldwide have historically used interest rate benchmarks such as the London Inter-Bank Offered Rate (LIBOR), Euro Inter-bank Offered Rate (EURIBOR), and the US Effective Federal Funds Rate to determine interest rates and payment obligations for a wide range of financial arrangements such as loans, bonds and derivatives.

Globally, banking institutions are transitioning away from using IBORs, instead using alternative near Risk Free Rates (RFRs). RFRs are structurally different from IBORs and financial arrangements that provide for IBOR-based payments will need to be modified to accommodate this transition. The ATO's online guidance applies to taxpayers who make changes to their contracts for the sole purpose of responding to a transition from a particular IBOR to an alternative RFR or other replacement benchmark rate. Examples of the kinds of changes are included in the guidance.

General income tax implications

The ATO set out that amendments to contracts need to be analysed to determine whether they are variations of existing arrangements or whether the result in new contracts being entered into. The ATO state that in respect of a variation, outside of TOFA (below), the ordinary income and deduction provisions, and Division 16E of ITAA 1936 need to be considered. In respect of a new contract coming into existence, outside of TOFA, consideration would need to be given to the provisions of section 26BB or 70B (where the arrangement is a traditional or qualifying security), Division 16E, or the CGT rules.

TOFA implications

Where an IBOR amendment results in the variation of the contract, and the contract represents a financial arrangement that is subject to the TOFA regime, there may be an assessable gain or deductible loss for tax purposes depending on the particular TOFA tax-timing methods which apply.

Where an IBOR amendment to the contract results in all the taxpayer's rights and/or obligations under the relevant financial arrangement ceasing, this will give rise to a balancing adjustment under Subdivision 230-G of the TOFA regime.

Transfer pricing

Where parties to the arrangement are related, it will be necessary to consider whether the contract amendments could give rise to a transfer pricing benefit.

<u>Other tax implications</u>

The tax impact of additional payments made in response to IBOR reforms to maintain existing economic positions will depend on the source and character of the payment.

Lending arrangements that are modified solely to respond to IBOR reform will generally continue to receive any withholding tax exemptions they previously received.

ATO reference *QC 68045 Inter-bank Offered Rate (IBOR) reform*
w https://www.ato.gov.au/Business/Inter-bank-Offered-Rate-reform/

6.3 Decision Impact Statement – CFMMEU

This Decision impact statement outlines the ATO's response to the decision in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 which concerned whether Mr McCourt was an employee of Personnel Contracting Pty Ltd for the purposes of the *Fair Work Act 2009*.

The Commissioner noted that the most significant clarification arises in examining the terms of the written contract between the parties to establish the character of the relationship, where that contract is an accurate and accepted record of the agreement struck between the parties.

The Commissioner notes that the decision in this case considers that a Court may look beyond a written contract and consider the conduct of the parties in circumstances where:

1. the contract is an oral contract, or is partly written and partly oral to determine when the contract was formed and the contractual terms that were agreed;
2. the terms of the written contract have been varied;
3. the terms of the written contract are being challenged as invalid (for example, being a sham);
4. a party to the contract asserts rectification, estoppel or any other legal, equitable or statutory rights or remedies.

The ATO consider the long-established employment indicia are still relevant when characterising the contractual relationship between the parties. However, they are to be considered through the examination of the contractual terms.

As a result of the decision the ATO note that they will review the following products:

- Superannuation Guarantee Ruling SGR 2005/2 Superannuation guarantee: work arranged by intermediaries
- Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee?
- Taxation Ruling TR 2005/16 Income tax: Pay As You Go - withholding from payments to employees
- Taxation Ruling TR 2013/1 Income tax: the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties
- Superannuation Guarantee Ruling SGR 2009/1 Superannuation guarantee: payments made to sportspersons
- ATO Interpretive Decision ATO ID 2014/28 Superannuation Guarantee Status of the Worker: Pizza delivery drivers as employees.

The Commissioner is inviting comments regarding the decision to the ATO by 6 May 2022.

ATO Decision Impact Statement *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1
w https://www.ato.gov.au/law/view/document?DocID=LIT/ICD/P5/2021/00001

6.4 Draft Section 100A guidance comments and questions

On 21 March 2022, Louise Clarke, Deputy Commissioner, Private Wealth at the Australian Taxation Office published an article on LinkedIn summarising her comments from her presentation to the Chartered Accountants ANZ Sharing Knowledge Meet Up in relation to the recent ATO guidance on section 100A and Division 7A. For notes on the recent guidance, please refer to our March 2022 Training Notes.

The article addresses several key questions that have been raised by members of the tax profession and set out the key points she made, two were of particular interest:

1. *Importantly, the Commissioner will stand by the administrative position reflected in the previous factsheet published in 2014 for trust distributions made on or before 30 June 2022 (i.e. the 2022 financial year).*
2. *to ensure the community has certainty about our administration well before the commencement of the 2023 income year – the guideline has been provided early to allow practitioners sufficient time to consider it before they meet with their clients to discuss their tax affairs for the 2023 income year.*

COMMENT – the 2014 guidance included that the ATO considered that section 100A could apply where a beneficiary's entitlement was gifted to lent interest free to another person, but that a family dealing could include an interest free loan where the principal of the loan will in fact be paid back.

Question - Retrospective application?

In response to the question of whether the ATO intends to apply its views retrospectively, the article states:

> *The ATO is not developing a compliance program to commence looking at cases that pre-date 1 July 2014. The Commissioner will only apply compliance resources to review arrangements which pre-date 1 July 2014 in limited specific circumstances, such as fraud or evasion. Our experience is that most taxpayers do not engage in arrangements where section 100A could apply so the number of potentially impacted taxpayers with pre-1 July 2014 arrangements is very small.*
>
> *We will continue to administer section 100A consistently with the 2014 factsheet where it is more favourable than the draft PCG up to 30 June 2022.*

However, the article also states that the ATO will continue to include section 100A as part of its review or compliance activities.

Question - Promoter penalties?

Taxpayer Alert 2022/1 noted that penalties may apply to participants in, and promoters of arrangements covered by the alert. It also noted that the ATO may refer Registered Tax Agents promoting such schemes to the Tax Practitioners Board consider whether there has been a breach of the *Tax Agent Services Act 2009.* The article notes that references to promoter penalties are a standard statement in Taxpayer Alerts. Specifically, the article states:

> *The reference also should not be construed as an indication that we are embarking on a project to specifically seek out these arrangements so that agents can be referred to the TPB.*

Question - When will the draft guidance be finalised?

The article states that the ATO is expecting to receive a lot of feedback on the draft guidance and that it will not rush finalisation. While the ATO would prefer to finalise the draft Division 7A guidance as close to the start of the 2023 income year to provide the community with certainty, it will properly consider all feedback provided.

w https://www.linkedin.com/pulse/draft-section-100a-reimbursement-agreements-division-7a-louise-clarke/

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6.5 Government to ensure non-arm's length expense provisions operate as intended

On 22 March 2022, the Morrison Government issued a media release advising that it intends to make legislative changes to ensure the non-arm's length expense provisions, which can apply to tax the income of a superannuation fund at the top marginal rate, operate as envisaged.

The proposed changes follow concerns from industry stakeholders around the ATO's interpretation of these provisions in a recent law companion ruling and the potential implication this may have on APRA-regulated funds and SMSFs.

The Government will undertake a consultation process with relevant industry stakeholders. Further details of the consultation process will be provided as soon as practicable.

It is intended that the legislative changes will apply from 1 July 2022.

w https://ministers.treasury.gov.au/ministers/jane-hume-2020/media-releases/government-ensure-non-arms-length-expense-provisions

6.6 ATO Reassurance to Flood Victims

The ATO is to provide support to those impacted by the floods in New South Wales and Queensland.

The due date for business activity statements and instalment notices has been extended from 28 February 2022 or 1 March 2022 to 28 March 2022 for small business and individuals in flood-affected local government areas. If those taxpayers are unable to lodge by the extended date, taxpayers can apply for a deferral.

The ATO will also provide tailored support for individuals and small businesses affected by the floods on a case-by-case basis.

The ATO will re-issue copies of income tax returns, activity statements and notice of assessments for taxpayers whose records have been destroyed or lost in the floods.

Taxpayers also have the ability to change their GST reporting cycle to monthly reporting and payment and can vary their PAYG instalments in their tax circumstances have changed due to the floods.

w https://www.ato.gov.au/Media-centre/Media-releases/ATO-reassures-flood-victims/

6.7 Revenue NSW publication for new build-to-rent (BTR) Housing Projects

The NSW Government has introduced a 50% discount in land tax for new build-to-rent housing projects until 2040 and a new Housing Diversity SEPP. Build-to-rent projects will also receive an exemption from foreign investor duty and land tax surcharges. The purpose of this discount is to provide more housing options for renters and support the construction industry.

Build-to-rent projects may be eligible for the discount if they commenced construction after 1 July 2020 and will be available until the land tax year 2040. To be eligible, the parcel of land must contain at least 50 self-contained dwellings that are specifically intended to be build-to-rent. At least 10% of construction workers involved in the project must involve special classes of workers including apprentices, trainees, graduates, long term unemployed workers, workers requiring upskilling, workers with barriers to employment or Aboriginal job seekers.

w https://www.revenue.nsw.gov.au/news-media-releases/land-tax-build-to-rent

6.8 Media Release Registration for financial advisors

The Financial Services and Credit Panel of the Australian Securities and Investments Commissioner has been expanded, and given its own legislative functions and powers as the new single disciplinary body regulating financial advisers.

The FSCP operates separately, but alongside ASIC, in considering a range of misconduct, including lower-level misconduct by financial advisers.

In accordance with Recommendation 2.10 of the Royal Commissioner into Misconduct in the Banking, Superannuation and Financial Services Industry, all financial advisers who provide personal financial advice to retail clients must be registered with ASIC as a relevant provider. This includes relevant providers who were previously registered as individual tax (financial advisers) with the Tax Practitioners Board. Relevant advisers must be registered from 1 January 2023.

Those who are providing tax advice services but are not eligible to be registered with ASIC as a relevant provider will need to be registered with the TPB as tax agents. A temporary extension to register as a tax agent with the TPB applies until 31 December 2022 for these entities under the transitional arrangements.

w https://www.tpb.gov.au/news-media/news/financial-services-and-credit-panel-regulates-financial-advisers

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