Volume 57(7)
February 2023

The Tax Institute

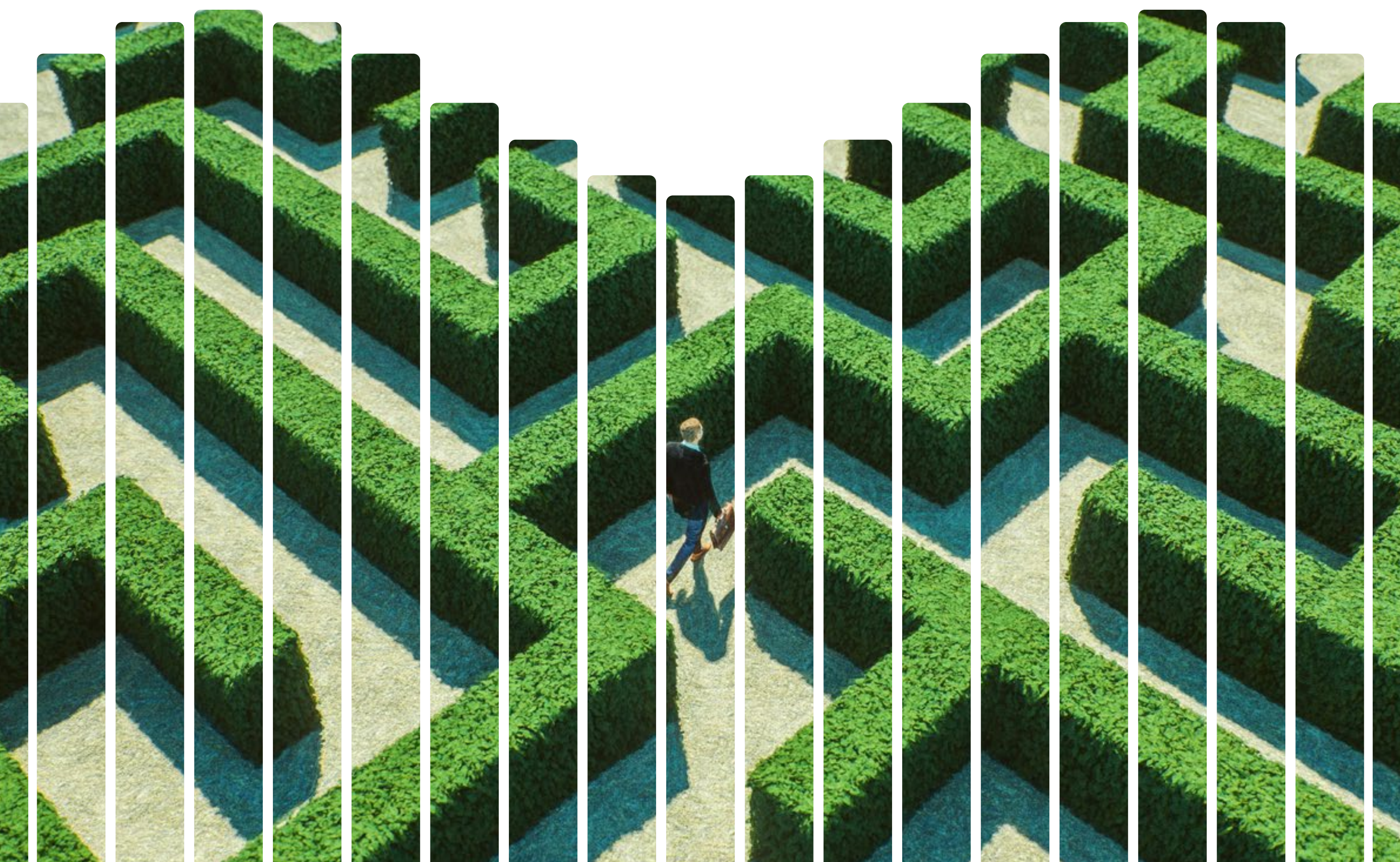
Taxation in Australia

INSIGHTS FROM TheTaxSummit Shine Together

Partnership tips and traps
John Ioannou, CTA

Commercial and agricultural FIRB applications
Charlotte Brierley

Recent trends: capital versus revenue
Melanie Baker SC, CTA



Contents

Cover article

390

Partnership tips and traps

John Ioannou, CTA, Principal Lawyer, Macpherson Kelley

Feature articles

398

Commercial and agricultural FIRB applications

Charlotte Brierley, Director, Tax Controversy, PwC

403

Recent trends: capital versus revenue

Melanie Baker SC, CTA, Barrister, Victorian Bar

Insights from the Institute

372 President's Report

373 CEO's Report

376 Tax Counsel's Report

Regular columns

371 Tax News – at a glance

377 Tax News – the details

381 Tax Tips

385 Mid Market Focus

389 Higher Education

417 Superannuation

419 Successful Succession

422 Events Calendar

423 Cumulative Index

Invitation to write

We welcome original contributions that are of interest to tax professionals, lawyers, academics and students.

For details about submitting articles, please see Guidelines for Publication on our website taxinstitute.com.au, or contact publisher@taxinstitute.com.au.

Tax News – at a glance

by TaxCounsel Pty Ltd

December/ January – what happened in tax?

The following points highlight important federal tax developments that occurred during December 2022 and January 2023. A selection of the developments is considered in more detail in the "Tax News – the details" column on page 377 (at the item number indicated).

AAT to be replaced

The Attorney General, in a media release on 16 December 2022, announced that the government will abolish the Administrative Appeals Tribunal and replace it with an administrative review body that serves the interests of the Australian community. **See item 1.**

Employee or independent contractor

The Commissioner has released a draft ruling (TR 2022/D3) and a draft practical compliance guideline (PCG 2022/D5) which consider the issue of whether an individual is an employee of an entity for the purposes of the PAYG withholding provisions of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA53) that apply in relation to salary, wages, commission, bonuses or allowances that are paid to an individual as an employee (whether or not the paying entity is the employer). **See item 2.**

GST: margin scheme

The Full Federal Court (Wigney, Moshinky and Hespe JJ) has unanimously rejected the Commissioner's appeal from a decision of Thawley J at first instance and held that the sale under a single contract of several lots of land constituted a separate supply of each lot for the purposes of applying the GST margin scheme (*FCT v Landcom* [2022] FCAFC 204). **See item 3.**

Rental property not an active asset

The AAT has held that a capital gain made by the taxpayer from her disposal of a rental property was not eligible for the CGT small business concessions because the asset was not an active asset (*Del Castillo and FCT* [2022] AATA 4233). **See item 4.**

GST: residential premises and passing on issues

In a recent decision, the AAT has considered two important GST issues that arose out of the disposal of residential units that had been constructed by the taxpayer company and rented out (*Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and FCT* [2022] AATA 4436). **See item 5.**

Foreign investment penalties doubled

The maximum financial penalties for contraventions of provisions in the *Foreign Acquisitions and Takeovers Act 1975* (Cth) that relate solely to residential land have been doubled from 1 January 2023.

Deregistration of tax agent

In a media release on 23 January 2023, the Tax Practitioners Board (TPB) announced that a former tax partner at PricewaterhouseCoopers (PwC) had been deregistered as a tax agent for integrity breaches, with a two-year ban on becoming a registered tax practitioner.

An investigation carried out by the TPB revealed that the then tax agent, while a partner of PwC, was part of a confidential consultation by Treasury in relation to improving the tax laws. This included new rules to stop multinationals avoiding tax by shifting profits from Australia to tax and secrecy havens. The then tax agent made unauthorised disclosures of this confidential law reform information to partners and staff of PwC.

The TPB found that the then tax agent had failed to act with integrity, as required under his professional, ethical and legal obligations, and terminated his tax agent registration.

In addition, the TPB investigation determined that PwC had failed to properly manage conflicts of interest when this confidential law reform information was shared with partners and staff in its tax practice. PwC had breached its obligations under the law and the Code of Professional Conduct. The TPB ordered PwC to have processes and training in place to ensure that conflicts of interest were adequately managed.

In other tax agent registration news, a former tax agent who made false statements in a business activity statement (BAS) and tax return was sentenced to 20 months' imprisonment, released immediately on entering into a $10,000 recognisance to be of good behaviour for two years.

When the ATO audited the former tax agent, it found that he had drastically understated his income and GST on sales. The business's 2017 tax return understated his income by $386,973, resulting in a tax shortfall of $194,603.79. Also, from a GST perspective, the former tax agent only began reporting GST on his BAS from 1 July 2017, even though his business income had exceeded the reporting threshold a year earlier and one of the BAS he had lodged understated the amount of GST on sales by $71,666.

President's Report

by Marg Marshall, CTA

Connecting with you in 2023

A new year in a new world of work is an opportunity to continue developing our member experience, writes President Marg Marshall.

Welcome to 2023 at The Tax Institute, and what a privilege it is to be penning this report to you as the President. I hope that 2023 has started well for you, with plenty of rejuvenation, optimism and motivation for the year ahead.

I'd like to first extend my thanks and congratulations to Jerome Tse, CTA, for all he achieved during his presidency last year. Those thanks also extend to the Board, councils and committees at the Institute, which are so instrumental in our work and will be supporting our achievements in the year to come.

This year, I want to continue the wonderful work that has been started in previous years. This includes the investments we have made in our digital experience, events and member resources, which you can expect to see the benefits of in the coming year. It also includes the commitment to a diverse and inclusive membership and development of our Institute team to better serve your needs.

As an SME practitioner myself, I know the immense value that the Institute offers to those of us who work in small practices. It is all too easy to feel unsupported in a role that lacks the kind of resources larger firms enjoy, or to feel disconnected from the wider profession when you work in a small team, or on your own. Being a part of the Institute has always helped me to find that support and connection, whether as a member, a volunteer, or indeed now as President.

This year, I am dedicated to exploring deeper and more meaningful ways to connect with all of our members, but particularly those SME practitioners whose experience I understand so well. In a new world of work, 80 years from when the Institute was first established, it's important that we stay sharp and grow with the profession.

For many of us, the lines between personal and professional, home and office have been blurred over the past few years. You may consider that a good thing – I know many of us have benefitted from more flexible schedules and remote working environments – or you may have come up against challenges. I for one found that setting boundaries around my personal time has become even more crucial than ever before in order to keep a clear, productive mind when I am on the clock.

Your member experience should reflect work in the tax profession today. Some of our most exciting initiatives this year will support you in increasingly flexible and digital-friendly ways. This is good news for all members, and particularly for our SME members, who will benefit greatly from new and improved resources and tools.

Educating tomorrow's tax stars

Continual learning, allowing for specialisation, exploration and upward mobility, is a core part of a modern career. And just as work has changed in the past few years, education has too. We are continually developing new education and learning programs to better equip our members and the wider tax profession with the skills and knowledge they need to thrive.

We have recently launched two new, TEQSA-accredited programs through our structured education arm, the Graduate Certificate in Applied Tax Law and the Graduate Certificate in Applied Tax Advisory. These programs create new avenues for learners at all levels to gain advanced tax knowledge in a specialisation of their choice. A further tax technology subject is to be launched later this year.

All of the hard work that has gone into our Tax Academy offering will also come to fruition in 2023. This is a truly modern approach to upskilling in tax and something that I am excited to introduce to you and your teams.

An improved TKE experience

We are also hard at work updating the digital experience of Tax Knowledge Exchange. Last year, a wise decision was made to separate the TKE refresh from the wider website rejuvenation project to give us time and resources to do justice to our beloved database. TKE is an archive of some of the tax profession's best work. I'm excited to share a new digital experience, which does justice to the incredible time, generosity and expertise TKE encapsulates, with you all this year.

Keeping connected locally and nationally

Last but not least, be sure to take a look at our CPD event calendar for 2023. The value of in-person interaction cannot be overstated, both for the future progression of your career and for a satisfying day-to-day working environment.

From Local Tax Clubs practically in your backyard, to our biggest, grandest event, The Tax Summit, coming to Melbourne in September, I hope to see you at an event or two – or three or four – this year. Please don't be shy in introducing yourself, I would love to meet more of our members. I am also looking forward to connecting with members outside of events. One of the best ways to reach me, and others at the Institute, is through our Community platform.

I am looking forward to representing our members as President of the Institute this year, as we celebrate our 80th year as a community.

CEO's Report

by Giles Hurst

Humble beginnings, big ideas, bright future

In the Institute's 80th year, we remain a united community working towards a positive future for the tax profession.

Kicking off a new year at The Tax Institute, I'm pleased to welcome Marg as our new President and to welcome back our council and committee members, all of our valued volunteers and, of course, our members.

While Marg has outlined her vision for the Institute's future in this month's report, I'd like to take a look at our past.

The Tax Institute was founded in July 1943 by Sydney accountant Harold Irving. It was known then as The Taxation Institute of Australia and was formed with the goal of improving the position of tax agents, tax law and its administration.

In 2023, The Tax Institute celebrates its 80th birthday. We are still advocating for the betterment of the tax system, tax law and the position of all those working within the profession.

In 1943, Irving set out goals, including the improvement of complex tax law, the reduction of compliance costs, and improved relations with tax officers. Though much has changed, today we continue our work in advocating for tax reform. Complexity and red tape in the tax system are not easy hurdles to tackle, but rest assured that our Tax Policy and Advocacy team, along with our councils and committees, remain committed to being the public voice of holistic and meaningful reform. We have also built strong bridges with various government branches, including Treasury and the ATO, which allow us to better advocate for our members' needs.

Also in 1943, women won seats in the Parliament of Australia for the first time. Today, some of our strongest leaders in the political and business worlds are women, including many wonderful professionals who the Institute is proud to count among our members and volunteers. We are still a community built on strong ties and generosity of spirit – even stronger for the fact that our membership is now more diverse and inclusive of tax professionals from all walks of life, backgrounds and genders.

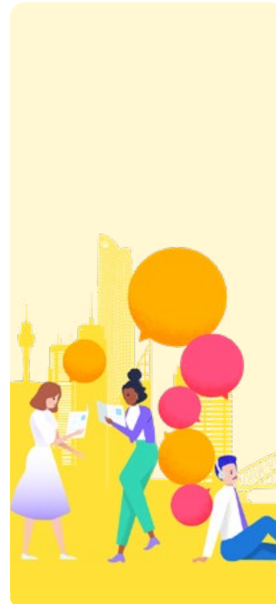
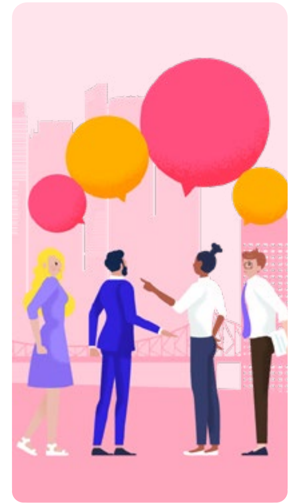
And as Irving was establishing the Institute in 1943, the world was also in the midst of the conflict of World War 2. It was a turbulent and uncertain time – a description that may also sound familiar to you from the last three years. Just as our community came together then, in what Irving described as a "professional brotherhood", we have weathered a globally significant event and the changing world together.

Since 1943, educating the profession also grew as a priority for our organisation. In her report this month, Marg has highlighted some of our new ventures in the learning space. In particular, Tax Academy is something very new for all of us. We are building a learning experience that meets the needs of tax professionals in a changing, fast-paced professional environment, and it represents the Institute that we all want to be part of – modern, future-focused and committed to excellence in all areas.

As a result of our community's collective knowledge and expertise, we have also become the home of tax knowledge, with a database of resources that spans decades. Our Tax Knowledge Exchange, soon to be housed in a new digital experience, is not just an invaluable tool for today's practitioners, but also a record of our history as a community.

I believe that Harold Irving would be proud of how our organisation has grown, the community we have maintained, and the progress we have made in advocating for the profession and the tax system. I know I am. I'm also excited for our future and look forward to another year of being connected with you.

From everyone at the Institute, happy 80th birthday to all of you.

Tax Forum Season

March – May 2023

Your capital city

up to 14 CPD hours

Australia's largest network of tax events, on offer from coast to coast

SA Tax Forum

8–9 March | Adelaide Oval

The biggest event on the SA event calendar, the SA Tax Forum is a must-attend for professionals at every level.

Explore topics such as not-for-profits, carbon farming, section 100A and a 2-part workshop on technical trust and tax law.

Hurry, register before midnight 10 February to save $200!

WA Tax Forum

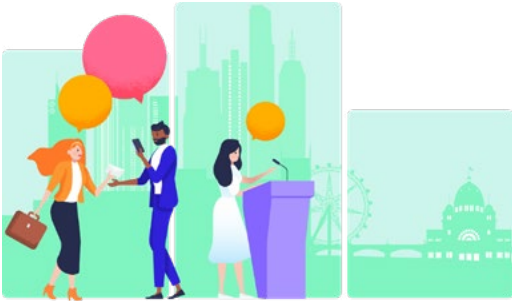
22–23 March | The Westin

Join us in Perth for a top-quality program addressing key tax issues, such as succession structures, residency, distribution resolutions and data security.

Plus, exceptional speakers and unbeatable networking opportunities make this a not-to-be-missed experience.

Register now to save $200! Offer ends 24 February.

23-004EVT_02/23



VIC Tax Forum

3–4 May | Grand Hyatt Melbourne

Boasting the most expansive program on the Victorian CPD calendar, the VIC Tax Forum offers a smorgasbord of corporate, SME and hot topics to suit any tax practitioner.

It's the place to be for the Victorian tax profession.

Register now to save up to $200!
Offer ends 24 March.

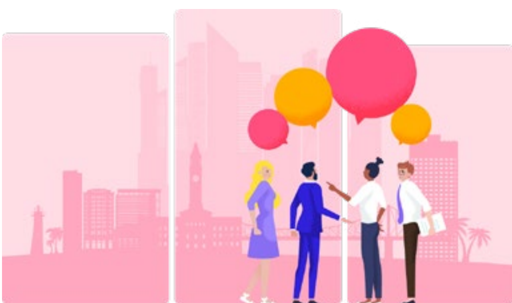
NSW Tax Forum

17–18 May | Sofitel Sydney Wentworth

The NSW Tax Forum is designed for discussion, incorporating hot tax topics with everyday issues to bring you up to speed on the entire tax landscape.

Connect and collaborate with your colleagues in NSW.

Hurry, only 2 weeks left to save up to $400!
Offer ends 15 February.



QLD Tax Forum

24–25 May | vocoBrisbane

The NSW Tax Forum is designed for discussion, incorporating hot tax topics with everyday issues to bring you up to speed on the entire tax landscape.

Connect and collaborate with your colleagues in NSW.

Register now to save up to $400!
Offer ends 22 February.

Find out more
taxinstitute.com.au

Tax Counsel's Report

by Julie Abdalla, FTI

The future of the Administrative Appeals Tribunal

With the government's announcement to abolish the Administrative Appeals Tribunal, we explore its history and the next steps in designing a replacement administrative review body.

On 16 December 2022, the government announced that it would abolish the Administrative Appeals Tribunal (AAT) and replace it with a new administrative review body (new review body). This was not unexpected, with recommendation 3 of the Senate Legal and Constitutional Affairs Committee's (Committee's) interim report, tabled on 31 March 2022 (2022 report), suggesting that this action be taken.

The Administrative Appeals Tribunal

The AAT plays a crucial role in reviewing the administrative decisions made under Commonwealth Acts and legislative instruments by the government and its agencies. Its importance as a review mechanism has been demonstrated by the increasing number of applications that it has received annually since 2016–17. According to the Attorney-General's Department (AGD) submission, this number has been between 50,000 and 60,000 each year.

The 2022 report

The objective of the AAT, as defined in s 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) (the Act), is to provide an accessible, fair, economical and quick mechanism of review that promotes trust and confidence in the AAT's decision-making. However, the 2022 report indicates that the AAT has not satisfied these objectives. Rather, there are concerns that the AAT has undermined the public trust in the integrity and effectiveness of the merits review system in Australia.

The Committee recognised that several of the 102 recommendations made by the Administrative Review Council's (ARC's) Better decisions: review of Commonwealth Merits Review Tribunals report delivered in September 1995 were still outstanding in the AAT's current operations. A cycle of recommendations made with no significant improvement has existed over the several decades that the AAT has operated. Accordingly, the Committee saw no option but to recommend the abolition of the AAT and to design a new review body that would satisfy the objectives of the Act.

Of particular importance, and as noted in The Tax Institute's submission, the Committee further recommended the reestablishment of the ARC as a matter of urgency. The ARC was defunded in 2015 and its function was transferred to the AGD. However, the 2022 report found that the ARC's role was unable to be replicated by the AGD. Furthermore, a legislative obligation existed in the Act that the ARC must exist and operate, and this was not met by the defunding of the ARC.

Next steps

The government has announced that a taskforce within the AGD will consult with stakeholders on the design of the new review body. This taskforce will be advised by the Expert Advisory Group led by former Justice of the High Court of Australia, the Hon. Patrick Keane AC KC. Matters that are currently before the AAT will continue to be heard during the design process and will be transitioned to the new review body.

What do we want to see in this new review body?

Our submission in regard to the performance and integrity of Australia's administrative review system highlighted several recommendations and can be applied to the design of a new review body. Our key recommendations include:

- more stringent member selection – the complexity of tax laws and the availability of ATO alternative dispute resolution options result in higher complexity of tax cases that are heard by the AAT. Ensuring that AAT members have relevant expertise in tax (and other relevant areas) ensures that correct decisions are made and that matters are reviewed in a timely manner;
- adequate funding – a key factor contributing to delays in the AAT is outdated funding arrangements. With the increasing complexity of cases, the funding arrangements do not incentivise the prompt finalisation of decisions. Better aligning the funding arrangements of divisions to allow for complexities and changes over time will facilitate appropriate resourcing to ensure that correct decisions are made in a timely manner;
- greater transparency – improved public transparency of the new review body's performance, such as the average wait until a case is heard and the average length of time between the hearing and final outcome, will ensure that members are held accountable for unreasonable delays in making decisions; and
- Small Business Taxation Division – there has been an increasing number of matters heard before this division. It is important that there continues to be a dedicated division for these taxpayers in the design of the new review body and that its service is promoted and accessible.

Lastly, it is crucial that the new review body is accompanied with the reestablishment of the ARC (or a similar body) to ensure that there is independent oversight over tribunals, judicial review, privative clauses and administrative discretions.

Tax News – the details

by TaxCounsel Pty Ltd

December/ January – what happened in tax?

The following points highlight important federal tax developments that occurred during December 2022 and January 2023.

Government initiatives

1. AAT to be replaced

The Attorney General, in a media release on 16 December 2022, announced that the government will abolish the Administrative Appeals Tribunal and replace it with an administrative review body that serves the interests of the Australian community.

The Attorney General said that the government is committed to restoring trust and confidence in Australia's system of administrative review – beginning with the establishment of a new administrative review body that is user-focused, efficient, accessible, independent and fair.

Over the coming months, the government will consult with stakeholders on the design of the new body. This work will be led by a dedicated taskforce within the Attorney-General's Department, and be informed by an Expert Advisory Group led by the Hon. Patrick Keane AC KC, a former Justice of the High Court of Australia.

A central feature of the new body will be a transparent and merit-based selection process for the appointment of non-judicial members.

Matters currently before the AAT will be unaffected – they will continue to be heard as the reform progresses and will transition to the new review body once it is established.

The Hon. Justice Susan Kenny AM has been appointed as the Acting President of the AAT.

The AAT provides an essential review function in relation to taxation matters. It can review an objection decision of the Commissioner on the merits. Importantly, in the case of a discretion conferred by a taxation law, the AAT can itself exercise the discretion, something that a court is unable to do.

The Commissioner's perspective

2. Employee or independent contractor

The Commissioner has released a draft ruling (TR 2022/D3) and a draft practical compliance guideline (PCG 2022/D5) which consider the issue of whether an individual is an employee of an entity for the purposes of the PAYG withholding provisions of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA53) that apply in relation to salary, wages, commission, bonuses or allowances that are paid to an individual as an employee (whether or not the paying entity is the employer).

TR 2022/D3 does not deal with payments for work and services which are subject to withholding under other provisions, such as payments to directors or office holders, labour-hire payments, and alienated personal services income.

The term "employee" is not defined in the TAA53 and, so, has its ordinary meaning. Whether a person (that is, a worker) is an employee of an entity (the "engaging entity") under the term's ordinary meaning is a question of fact to be determined by reference to an objective assessment of the totality of the relationship between the parties, having regard only to the legal rights and obligations which constitute that relationship.

To ascertain the relevant legal rights and obligations between the worker and the engaging entity, the contract of employment must be construed in accordance with the established principles of contractual interpretation. The task is to construe and characterise the contract at the time of entry into it. For the purposes of that exercise of construction, recourse may be had to events, circumstances and things external to the contract which are objective, known to the parties at the time of contracting, and assist in identifying the purpose or object of the contract.

Where the worker and the engaging entity have comprehensively committed the terms of their relationship to a written contract, and the validity of that contract has not been challenged as a sham nor have the terms of the contract otherwise been varied, waived, discharged or the subject of an estoppel or any equitable, legal or statutory right or remedy, it is the legal rights and obligations in the contract alone that are relevant when determining whether the worker is an employee of an engaging entity. Evidence of how the contract was performed, including subsequent conduct and work practices, cannot be considered for the purposes of determining the nature of the legal relationship between the parties.

However, evidence of how a contract was actually performed may be considered for other purposes that are consistent with general contract law principles, including to:

- establish formation of the contract;
- identify the contractual terms that were agreed to, for example, where the contract is wholly or partially oral;
- demonstrate that a subsequent agreement has been made varying, waiving or discharging one or more of the terms of the original contract;
- show that the contract was a sham; or
- establish evidence of an estoppel, rectification or other legal, equitable or statutory rights or remedies.

The central question is whether the worker is working in the business of the engaging entity, based on the construction of the terms of the contract, having regard to the indicia of employment identified in case law. This evaluative exercise should not be approached on the basis that there is some checklist against which ticks and crosses may be placed to produce the answer.

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

The "label" which parties choose to describe their relationship, whether within a written contract or otherwise, is not determinative of, or even relevant to, the characterisation issue. It is the legal rights and obligations which constitute their relationship which are relevant, and "labels" used to describe the relationship which are inconsistent with those rights and duties have no meaning.

An arrangement between parties that is structured in a way that does not give rise to a payment for services rendered but rather a payment for something entirely different, such as a lease or a bailment, does not give rise to an employment relationship for the purposes of the TAA53.

PCG 2022/D5 applies in situations where an entity that carries a business (the engaging entity) engages a worker and describes how and when the ATO will allocate compliance resources to cases investigating the worker's classification.

PCG 2022/D5 is relevant for a variety of tax and superannuation obligations for both the engaging entity and the worker, where the worker contracts directly with the engaging entity.

Recent case decisions

3. GST: margin scheme

The Full Federal Court (Wigney, Moshinky and Hespe JJ) has unanimously rejected the Commissioner's appeal from a decision of Thawley J at first instance and held that the sale under a single contract of several lots of land constituted a separate supply of each lot for the purposes of applying the GST margin scheme (*FCT v Landcom*[1]).

So far as is relevant, Landcom, a state-owned corporation, was a state for the purposes of GST and was registered for GST. Landcom sold freehold interests in four lots of land pursuant to one contract.

In a private ruling application, Landcom asked the Commissioner to rule on whether, for the purposes of applying the margin scheme, the sale of the freehold interests in the four lots would be a single supply or whether the sale of the freehold interest in each of the four lots would each be a single supply. The Commissioner ruled that there was one supply, not four supplies. On the Commissioner's disallowance of its objection against the ruling, Landcom appealed to the Federal Court.

At first instance, Thawley J allowed Landcom's appeal. His Honour held that, for the purposes of the GST margin scheme, the margin is to be calculated by reference to the particular freehold interest sold, irrespective of whether or not that particular freehold interest was sold under a contract for the sale of other freehold interests.

In a joint judgment, the Full Federal Court has now affirmed the decision of Thawley J. Their Honours said that the construction contended for by the Commissioner was inconsistent with the structure of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GSTA99) and the statutory language. After considering aspects of that structure and language, their Honours said that the Commissioner's contention ultimately depended on whether the reference to "a freehold interest" in s 75-10 encompasses the plural as well as the singular. In this respect, the Commissioner relied on s 23(b) of the *Acts Interpretation Act 1901* (Cth) which, subject to any contrary intention, provides that words in the singular number include the plural and words in the plural number include the singular.

Their Honours said that, having regard to the structure and language of Div 75 GSTA99 and the language of s 75-10 (with its focus on "the interest, unit or lease in question"), they did not consider that the singular "interest" in s 75-10 included a reference to the plural.

Their Honours rejected the Commissioner's complaint that this interpretation would result in undue complexity because of a need to apportion an undissected purchase price over the four freehold interests. That a construction of the GSTA99 may give rise to issues of apportionment and valuation was hardly antithetical to the operation of the Act.

4. Rental property not an active asset

The AAT has held that a capital gain made by the taxpayer from her disposal of a rental property was not eligible for the CGT small business concessions because the asset was not an active asset (*Del Castillo and FCT*[2]).

The taxpayer purchased a block of vacant land in Lawnton in 2003. In her statement, she said that she had it in mind that she would develop a "multi-dwelling" on the land which she could use as part of what she described as a "residential letting business". Once the purchase was complete, and after she obtained finance and approvals, she constructed four residential dwellings on the property. She had rented three of the dwellings to tenants by February 2007, and she came to occupy the fourth dwelling herself in April of that year.

The taxpayer retired from her full-time occupation on medical grounds in July 2009. Thereafter, she devoted herself to managing the rental properties. Rent from the three dwellings was her principal source of income. With the exception of the 2007 year when the dwellings were first let, the taxpayer said that her business was profitable every year until the property comprising the four dwellings was sold in September 2017. The taxpayer claimed that the capital gain that she realised from the sale qualified for the CGT small business concessions that are provided for in Div 152 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

The AAT held that the main use of the asset by the taxpayer was to derive rent and that the asset was, therefore, not an active asset for the purposes of the concessions (s 152-40(4)(e) ITAA97). The word "rent" is well-understood and its most obvious meaning was a payment derived under a lease in return for exclusive possession of real estate. There was no contextual basis for concluding that the parliament intended the words "main use ... to derive ... rent" in s 152-40(4)(e) to comprehend anything other than a reference to real estate assets used to derive payments under a lease – a description which neatly captured what the taxpayer was doing, whether as part of a small business or not.

Having concluded that the taxpayer was precluded from accessing the concessions because she was unable to satisfy the requirement that the asset in question was an "active asset" for the purposes of Div 152, the AAT said that there was no point in considering whether she was engaged in a business.

5. GST: residential premises and passing on issues

In a recent decision, the AAT has considered two important GST issues that arose out of the disposal of residential units that had been constructed by the taxpayer company and rented out (*Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and FCT*[3]).

The taxpayer company, a property developer, constructed a development comprising seven home units, and GST issues arose in respect of two of those units (unit 1 and unit 3). The taxpayer rented these two newly constructed units to tenants for around five years before selling them. Although it paid amounts as GST to the Commissioner, calculated under the margin scheme, on both sales, the taxpayer contended that this was an error as the sales were input taxed.

The "liability issue" (unit 1)

It was common ground that the sale of unit 3 was an input taxed supply. However, the Commissioner did not accept that the sale of unit 1 was an input taxed supply.

Broadly, the sale of "new residential premises" by a developer is a taxable supply and, therefore, subject to GST. However s 40-75(2)(a) GSTA99 provides that residential premises are not "new residential premises" (and, therefore, their sale would be input taxed):

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

For a supply to be input taxed because of s 40-35(1)(a), it must be a supply of residential premises that is by way of lease, hire or licence.

The AAT said that, if a developer constructs residential premises, immediately leases the premises to a tenant, and the premises are used only for the making of supplies by way of lease, hire or licence for at least five years from completion of construction, a subsequent sale will be input taxed.

The liability issue raised constructional issues concerning s 40-75(2)(a) that have not previously been the subject of judicial or tribunal consideration. These issues concerned the requirement that, "for the period of at least 5 years", the premises "have only been used" for the making of supplies by way of lease, hire or licence. In particular, the issues were whether premises that are marketed for sale during the five-year period can be said to have only been used for the making of supplies by way of lease, hire or licence and whether the five-year period must be a continuous period.

The AAT said that, putting aside use for rental or occupation for display or other purposes, in ordinary parlance, a newly constructed unit that had merely been marketed for sale might not be regarded as "used". However, in the context of carrying on an enterprise (which is relevant for the purposes of s 40-75(2)(a)), "used" embraces being applied by a developer, through active marketing, as premises for sale in the course of the developer's enterprise.

Accordingly, unit 1 ceased to be used only for making rental supplies when it was first marketed for sale.

The "passing on issue" (unit 1 and unit 3)

The Commissioner contended that, even if he was wrong and the sale of unit 1 was an input taxed supply, the taxpayer would be denied a refund by the provisions of Subdiv 142-A GSTA99 because any overpaid amount was passed on to the purchaser. In respect of the sale of unit 3, which the Commissioner accepted was an input taxed supply, the Commissioner also submitted that that Subdivision operated to deny the taxpayer a refund of the excess GST.

After considering the relevant facts, the AAT concluded that the taxpayer had not proved that the excess GST was not recovered in the selling prices of the units.

TaxCounsel Pty Ltd
ACN 117 651 420

References

1 [2022] FCAFC 204.

2 [2022] AATA 4233.

3 [2022] AATA 4436.

Launching our new graduate certificate!

A postgraduate degree is your path to a specialised career in tax

Do you want a specialised qualification to put you on the path to in-demand tax skills and knowledge?

The Graduate Certificate in Applied Tax Advisory is made up of four subjects, including your choice of specialisation.

It's ideal for learners of all levels – from recent accounting and law graduates to experienced tax and financial specialists – looking to build on their tax knowledge and meet their professional goals in 2023.

You will:

- Choose a specialisation in trusts, superannuation or corporate entities
- Gain detailed knowledge of core tax issues and the expertise to provide professional client advice
- Add the Graduate Certificate in Applied Tax Advisory to your CV and watch your career soars.

"If you have speciality knowledge, that is your career opportunity in front of you."

Brian Richards, CTA
Convenor Tax for Trusts

Optional: complete CTA3 Advisory to graduate with a postgraduate qualification and meet the education requirements to become a **Chartered Tax Adviser** in one step.

Register now
taxinstitute.com.au/education

The Tax Institute

HEPCO Pty Ltd trading as The Tax Institute Higher Education PRV14349.

23-006EDU_02/23

Tax Tips

by TaxCounsel Pty Ltd

Is there a contract?

Whether a contract has been made will be a crucial issue in many tax situations.

Background

The time when a contract is entered into to acquire or dispose of property can be of fundamental importance for the purposes of the operation of the income tax laws.

Perhaps the most well-known circumstance where this will be so is when determining whether and, if so, when CGT event A1 (disposal of a CGT asset) happens (s 104-10(3)(a) of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)). Thus, if the disposal of a CGT asset is effected by a contract, while CGT event A1 can only happen if the relevant contract is completed, the time of the disposal (and hence the time of the happening of CGT event A1) is effectively back-dated to the time the disposal contract was entered into.

Conversely, where there is a contract for the acquisition of a CGT asset, the time of the acquisition of the asset will be taken to be the time when the contract was entered into (s 109-5 ITAA97).

And these two times, that is, of the acquisition and the disposal of a CGT asset, will in most cases be relevant for the purposes of determining whether the 12-month ownership period that is a precondition for the CGT discount capital gains tax concession to apply has been satisfied (s 115-25 ITAA97).

Also, if the time of acquisition is before 20 September 1985, a capital gain or loss that would otherwise be made from the happening of CGT event A1 will be disregarded.

Further examples of where the date of a contract will be relevant are provided by CGT event C2 and CGT event D1. CGT event C2 happens if the taxpayer's ownership of an intangible CGT asset ends by the asset being redeemed, cancelled etc. Where there is a contract that results in the asset ending, CGT event C2 happens when the taxpayer enters into the contract (s 104-25 ITAA97).

CGT event D1 happens if a taxpayer creates a contractual right or other legal or equitable right in another entity. The time of the event is when the taxpayer enters into the contract or creates the other right (s 104-35 ITAA97).

While in most situations it will be apparent whether the parties to a document have in fact created a contract that will be relevant, this will not be so in some cases.

For instance, there may be an issue of whether a document in fact creates a contract or whether the correct construction of the document is that the parties envisage that a further document will be brought into existence that will be the contract between them.

There may also be cases where an issue arises whether, where the parties to a concluded contract make some change to the contract, there is not merely an amendment of the contract, but rather a rescission of the contract and its replacement with another contract.

The case law on the issues that arise is substantial but this article seeks to refer to some of the relevant issues and decisions.

The broad approach

Before referring to the issues that arise, it is necessary to refer to the fundamental way that the courts approach the existence or otherwise of a contract.

That approach was explained by Mason J in *Perri v Coolangatta Investments Pty Ltd*[1] as follows:

> "Generally speaking the court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to the conclusion that the stipulation is a condition precedent to the formation or existence of a contract. In most cases it is artificial to say, in the face of the details settled upon by the parties, that there is no binding contract unless the event in question happens. Instead, it is appropriate in conformity with the mutual intention of the parties to say that there is a binding contract which makes the stipulated event a condition precedent to the duty of one party, or perhaps of both parties, to perform. Furthermore, it gives the courts greater scope in determining and adjusting the rights of the parties. For these reasons the condition will not be construed as a condition precedent to the formation of a contract unless the contract read as a whole plainly compels this conclusion."

Masters v Cameron

The leading decision in Australia that sets out the circumstances in which there will be a binding contract is the decision of the High Court in *Masters v Cameron*.[2] In that case, the High Court described three kinds of case:

> "Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express

> or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."

The court went on to explain that, in each of the first two cases but not in the third, there was a binding contract:[3]

> "[I]n the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common."

The High Court explained that the third class was "fundamentally different":[4]

> "They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own … The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document … or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed."

The High Court went on to consider the question of how the contract was to be construed and, in particular, the effect of expressions such as "subject to contract" and said:[5]

> "The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape."

After considering the natural meaning of "subject to contract", "subject to the preparation of a formal contract", and expressions of similar import, the High Court said that it had been recognised throughout the cases on the topic that such words prima facie create an overriding condition, so that what has been agreed on must be regarded as the intended basis for a future contract and not as constituting a contract.

In *The Edge Development Group Pty Ltd v Jack Road Investments Pty Ltd*,[6] the Victorian Court of Appeal pointed out that there is a fourth category. The court said that this class of case was where the parties are content to be bound immediately and exclusively by the terms which they had agreed on, while expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms. This kind of case amounts to a variation on the first of the categories set out in *Masters v Cameron*, the difference being that the parties contemplate agreeing on future terms which will be added to the existing, binding, arrangement, rather than envisaging only the creation of a document to the same effect as the terms already agreed on. A document falling within this fourth category would be an immediately binding contract.

A recent decision

More recently, in *Wong v Wong*,[7] Halley J considered the issues that arise where there is a question of whether a contract has been concluded. His Honour said that the *Masters v Cameron* classifications were no longer, if they ever were, applied as strict categories into which such cases must fall. Rather, as McHugh JA stated in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*:[8]

> "… the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances …"

Halley J said that the relevant principles were summarised by Sackville AJA (with whom Macfarlan and Gleeson JJA agreed) in *Mushroom Composters Pty Ltd v IS & DE Robertson Pty Ltd*.[9] These principles (case references omitted) were:

1. in Australia, the "objective" theory of contract has been accepted. Consequently, when determining whether a binding contract has been concluded, the law is concerned not with the parties' subjective intentions, but with "the outward manifestations of these intentions". Thus, what matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. In a case where the ordinary process of offer and acceptance has taken place, the court inquires as to what a reasonable person would infer or deduce from observing the exchanges between the parties;
2. it is not necessary, when determining whether a contract has been formed, to identify a precise offer or acceptance; nor is it necessary to identify a precise time at which an offer or acceptance can be identified. The questions to be asked are: "in all the circumstances can an agreement be inferred? Has mutual assent been manifested? What would a reasonable person in the position of, say, the plaintiff and a reasonable person in the position of the defendant think as to whether there was a concluded bargain?";
3. an agreement that is incomplete will not give rise to an enforceable contract; and
4. an alleged contract will fail for incompleteness if, even though the parties have used clear language, a term which is regarded as essential as a matter of law has not been agreed.

Halley J went on to say that, if the parties have not agreed on all essential terms, for example, because they have left one such term to be settled by future agreement, the contract is incomplete no matter what the parties themselves may think.

Further, the acceptance must correspond with the offer and must be clear and unqualified, and will fail to take effect if it attempts to vary the offer or add new terms. Whether a communication accepts the terms of an offer without

modification, or instead varies its terms, is a question of construction.

His Honour said that amendment of an offeror's offer by the offeree in a material respect is a counter-offer, not acceptance. However, a variation in the alleged acceptance which favours the offeror is not treated as a material variation.

Normally, an apparent variation in the acceptance of the terms in the offer, or the introduction of some additional term, will prevent the purported acceptance from being an acceptance. Instead, if it relates to the subject-matter of the offer, it may be a counter-offer, operating as a rejection of the original offer, revocable at any time before its acceptance but capable of creating a contract if the original offeror accepts it.

Also, a reply which propounds a new term is not an acceptance.

Implied rescission

The question can arise as to whether the entry into of a contract may in fact mean that an earlier contract is rescinded.

This kind of case is illustrated by the decision of Mason J in *Annalong Pty Ltd v FCT*.[10] In that case, a question arose under the first limb of the former s 26(a) of the *Income Tax Assessment Act 1936* (Cth) (profit arising from the sale of property acquired for the purpose of sale) as to whether the relevant time for determining the taxpayer company's purpose was the time when the contract for the purchase of certain land was entered into on 24 December 1963, or whether the relevant time was the date of a second contract to purchase the land that was entered into on 2 March 1965.

Mason J held that it was the taxpayer company's purpose at the time the second contract was entered into that was relevant. Mason J said:[11]

> "In my opinion the first contract was on foot immediately before the making of the second contract. But the taxpayer cannot in any sense be described as a willing purchaser under it; in fact, although anxious to buy the land at a reduced price, it did not desire to complete the contract according to its terms. It wished to renegotiate the contract on terms more favourable to it and with that end in view the directors indicated to the vendor that it was repudiating the contract. By reason of its conduct the taxpayer would not have been able to enforce specific performance and it would not have been able to resist rescission had the vendor chosen to exercise its rights in that respect following repudiation by the taxpayer …
>
> The changed circumstances affecting the use to which the taxpayer could profitably put the land, the emergence of Lend Lease Development Ltd. and the Shell Company as willing purchasers of the major part of the land at a lower price than the contract price and the intention expressed by the taxpayer's directors to repudiate the first contract are all consistent with a desire on the part of the taxpayer to bring the first contract to an end and arrive at a new agreement in its place.
>
> In my opinion the second contract impliedly rescinded the first contract. The second contract … contained the whole of the bargain between the parties; it set forth comprehensively and exclusively the rights and obligations of the parties … There was no need to supplement it by reference to the earlier contract because, in so far as the content of its provisions were not altered by the new agreement, they were repeated in that agreement.
>
> Moreover, there were substantial alterations in the contractual provisions."

Relevance of conveyancing practice

The relevance of conveyancing practice when considering when a contract for the sale and purchase of land is entered into was considered by the Full Federal Court in *McDonald v FCT*.[12] The issue in that case was whether the taxpayer had acquired certain land in New South Wales before 20 September 1985.

Stone J (Beaumont ACJ agreeing) said:[13]

> "In *Allen v Carbone* [1975] HCA 14 …, the High Court commented that the 'usual method of selling real estate in New South Wales is by means of the signing and exchange of contracts in the form approved by the Real Estate Institute of New South Wales'. It relied on this practice to support an inference that the parties did not intend an informal agreement for the sale of the property to be binding. In *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, McHugh JA in the NSW Court of Appeal referred to the method of exchange at 634 and stated that 'even though the parties agree in writing that real estate is sold for a specified price, the presumption is that no binding contract exists until "contracts" are exchanged'. This presumption or expectation has been accepted in many other cases …
>
> In this case … the agreed facts show that the parties were aware of this method of selling land and contemplated that contracts of the usual kind would be exchanged in due course … All of these factors tend to confirm that the parties here adopted the usual method of sale and purchase of land in New South Wales and that they did not intend to be bound by the oral agreement between them."

Stone J went on to say that neither her comments nor the authorities she had cited should be taken as denying that it is possible for a contract for the sale of land in NSW to be effected other than by exchange of contracts. Ultimately, the intention of the parties as to whether they enter into binding obligations is decisive.

Stone J also said that no special form of words was necessary to ensure that an agreement is binding or not binding, but the practice in NSW of proceeding by exchange of contracts was so entrenched that a party contending for

an intention to proceed other than in accordance with the established procedure would need clear evidence to support the contention.

Observations

It will be appreciated that considerable difficulty may arise in some cases when seeking to determine whether a contract has been concluded.

When negotiating the terms of a document, the advisers acting for each of the parties should seek to ensure that the position of their respective client is clearly stated.

TaxCounsel Pty Ltd

References

1 [1982] HCA 29 at [17].

2 [1954] HCA 72 at [9].

3 [1954] HCA 72 at [10].

4 [1954] HCA 72 at [11].

5 [1954] HCA 72 at [12].

6 [2019] VSCA 91. As to the fourth category, reference may also be made to *Rossi Recycling Pty Ltd v Buckland Valley Pty Ltd* [2022] VSC 467.

7 [2022] FCA 78.

8 (1986) 40 NSWLR 631 at 634.

9 [2015] NSWCA 1.

10 [1972] HCA 45. See also *Cobalt Data Centre 2 LLP and Cobalt Data Centre 3 LLP v The Commissioners for His Majesty's Revenue And Customs* [2022] EWCA Civ 1422.

11 [1972] HCA 45 at [31]–[34].

12 [2001] FCA 305.

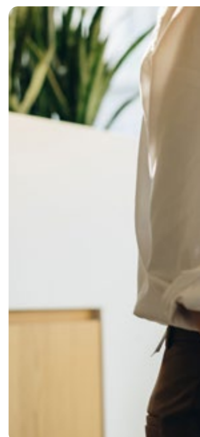
13 [2001] FCA 305 at [18] and [19].

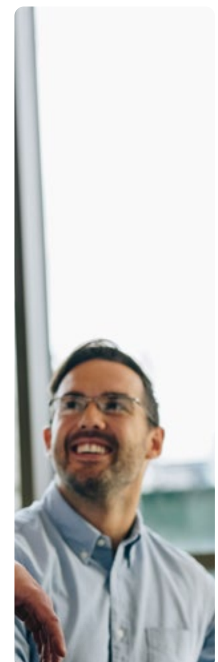
Simplify your graduate onboarding process

Presented by our team of experts, this 5-hour video series will help standardise your graduate induction experience.

Without assuming any prior learning in Australian tax, it breaks the system into its core components and uses everyday terms to clearly explain concepts.

Corporate discounts available.





Find out more
taxinstitute.com.au

23-0001TA_02/23

Mid Market Focus

by Peter Bardos, CTA, HLB Mann Judd

Assessable non-assessable income

A review of the tax treatment for the ultimate beneficiary of non-assessable income received by companies and fixed trusts.

Introduction

During its lifetime, an entity may receive income and other receipts that are excluded from its assessable income. This article explores the tax consequences of distributing some common examples of non-assessable receipts to the ultimate beneficiary. This may be done throughout the life of the entity, on vesting, deregistration, or liquidation, resulting in varying tax outcomes.

Examples of non-assessable income covered in this article include:

- small business entity (SBE) CGT concessions;
- distributions subject to family trust distributions tax;
- cash flow boost payments;
- pre-CGT capital gains; and
- non-portfolio dividends and capital gains from foreign shares.

Key terms and principles

Before addressing examples of non-assessable income distributions, set out below are some key principles and helpful knowledge to assist in interpreting the analysis.

Company distribution outside liquidation

Although there are various mechanisms for a company to distribute amounts to shareholders, outside liquidation and some other specific exclusions, the tax outcomes for the shareholder will generally either be an assessable dividend or a return of capital.

Liquidator's distributions

A distribution to shareholders from a liquidator is a capital return unless it is deemed to be a dividend. A liquidator's distribution is deemed to be a dividend where the distribution is sourced from income derived by the company.[1] Income is expanded to include ordinary income, assessable income and net capital gains.

Ordinary income

Income under ordinary concepts is not defined and has been interpreted to be income sufficiently connected with an income-earning activity with a periodic and regular nature.

This is important to consider in the context of liquidation. Even where the source of income was non-assessable, it may still be income according to ordinary concepts and deemed to be a dividend.

CGT event on liquidation

Where the liquidator's distribution is not deemed to be a dividend, it will be capital proceeds under either CGT event C2 or CGT event G1. Where the company ceases to exist within 18 months of the distribution, CGT event G1 is disregarded and CGT event C2 applies.[2] CGT event C2 and CGT event G1 have similar outcomes, being a reduction in cost base before a capital gain applies. Note that the time of the CGT event differs: for CGT event C2, the time is when the asset ends, for CGT event G1, it is the time of the payment.

CGT concessions on liquidation

Further CGT concessions can be applied to a capital gain resulting from liquidation, including the general CGT discount and SBE CGT concessions, which are often overlooked at the shareholder level of a liquidation.

Liquidate or deregister

There are various considerations when deciding on a deregistration or liquidation. Commercially, a liquidation is generally more expensive and a lengthier process, but it provides more certainty than deregistration. From a tax perspective, a liquidation can be much more attractive due to the ability of the liquidator to make capital distributions.

However, a capital distribution may not always be preferential to a dividend, ie liquidation does not always result in a better tax outcome than deregistration. A number of factors can contribute to the ultimate tax outcome, including the tax profile of the retained profits and reserves, the amount of franking credits within the company, and the tax profile of the shareholder(s).

Distributions from a trust

Unlike a company, a trust generally distributes its income each year in accordance with its deed and trustee decisions. From a tax perspective, a unit trust has a flow-through effect. Accordingly, there are less provisions about distributions deemed to be assessable. There is also less complexity on winding up a trust. Taxation on the vesting process of a trust does not depart from the provisions that apply throughout the life of the trust.

Non-assessable payments: CGT event E4

CGT event E4 happens where a beneficiary of a fixed trust receives a distribution and some or all of the distribution is not included in the unitholder's assessable income ("the non-assessable amount").[3] The non-assessable amount

reduces the cost base of the units and results in a capital gain where the cost base is exceeded.

There are a number of exemptions and reductions applicable to CGT event E4. For example, pre-CGT units, the non-assessable amount is reduced by non-assessable, non-exempt (NANE) income and a number of other reductions, including adjustments for capital losses and CGT discounts.[4]

SBE CGT concessions

Small business entity CGT concessions are a minefield on their own. The distribution of the concessional amounts is another layer for practitioners to digest and, perhaps even harder, explain to taxpayers. Within the SBE CGT concessions, there are differing tax outcomes from the payment of the concessions depending on the concession and entity type. This is summarised in Table 1 and illustrated with an example.

15-year exemption

Under the 15-year exemption, a capital gain may be disregarded by an entity, whether a company or trust, in its entirety.[5] Relevantly, the entity may make a payment to a CGT concession stakeholder of their share of the exempt gain if paid within two years.[6]

Small business 50% reduction

The small business 50% reduction is a common example of non-assessable income causing unusual tax outcomes. Accordingly, the legislation allows taxpayers to "opt out" of this concession. There are no exclusions that reduce the amount of a dividend, a capital gain from a liquidation distribution or CGT event E4. The reduction may only provide a deferral of tax and can reduce the benefit of the retirement exemption that would otherwise allow a tax-free amount to be distributed.

Retirement exemption

The retirement exemption allows all or part of a capital gain to be disregarded, subject to an individual's lifetime limit of $500,000.[7] Where the gain is derived by a company or trust, the entity must make a payment to a CGT concessional stakeholder, either directly or to their superannuation fund.[8] Unlike the 15-year exemption, this payment is not optional and there is no discretion to extend the time frame for the payment to be made.

Other non-assessable income

Income subject to family trust distribution tax

Family trust distribution tax arises where a trustee makes a distribution to a beneficiary outside the family group.[9]

Table 1.

Type of entity/payment	Company (ongoing/deregistration)		Company (in liquidation)		Trust	
SBE CGT – 15-year CGT exemption						
Paid to significant individual?	Yes	No	Yes	No	Yes	No
Timing requirement	< 2 years	N/A	< 2 years	N/A	< 2 years	N/A
Tax treatment on payment	Tax-free	Dividend	Tax-free	CGT event C2/G1	Tax-free	CGT event E4
Other comments	If outside timing, then same as non-significant individual		An act done by the liquidator is an act done by the company		Carve out of CGT event E4 requires payment to meet s 152-125 ITAA97 conditions	
SBE CGT – 50% reduction						
Tax treatment on payment	Dividend		CGT event C2		CGT event E4	
Other comments	Likely insufficient franking credits		Eligible for general CGT discount		Gain is deferred rather than disregarded	
SBE CGT – retirement exemption						
Tax treatment on payment	Tax-free		Tax-free		Tax-free	
Other comments	Caution in accounting – this should not be a loan and Div 7A ITAA36 does not apply		An act done by the liquidator is an act done by the company		Retirement exemption payment is NANE income	
Cash flow boost						
Tax treatment on payment	Dividend		Deemed dividend		Tax-free	
Other comments	Likely insufficient franking credits		Ordinary income per PBR 1051973166830		Cash flow boost is NANE income	
Pre-CGT capital gain						
Tax treatment on payment	Dividend		CGT event C2/G1		CGT event E4	
Other comments	Likely insufficient franking credits		Consider whether shares are pre-CGT		Consider whether units are pre-CGT	

Example

A company or trust disposes of a property for $10m, with a cost base of $100,000. The entity passes the SBE CGT basic criteria and applies the 50% reduction. There is one individual shareholder/unitholder with a cost base of the shares units, which have been held for more than 12 months, of $100,000. The individual tax rate is assumed to be 47%.

For the company under liquidation, it is assumed that the company did not cease to exist within 18 months after payment of the interim distribution by the liquidator.

	Company (ongoing) $	Company (in liquidation) $	Unit trust $
Entity			
Capital proceeds	10,000,000	10,000,000	10,000,000
Less: cost base	(100,000)	(100,000)	(100,000)
Capital gain	9,900,000	9,900,000	9,900,000
Less:			
50% CGT discount	–	–	(4,950,000)
50% active asset reduction	(4,950,000)	(4,950,000)	(2,475,000)
Assessable capital gain	4,950,000	4,950,000	2,475,000
Entity tax (30%)	1,485,000	1,485,000	–
Cash to distribute (gain only)	8,415,000	8,415,000	9,900,000
Shareholder/unitholder			
Net capital gain from trusts	N/A	N/A	2,475,000
Capital gain (CGT event G1/E4):			
Capital proceeds	N/A	4,950,000	2,475,000
Less: cost base	N/A	(100,000)	(100,000)
Gross capital gain (CGT event G1/E4)	N/A	4,850,000	2,375,000
Net capital gain (CGT event G1/E4)	N/A	2,425,000	1,187,500
Assessable capital gain	–	*2,425,000*	*3,662,500*
Dividend to shareholder	8,415,000	3,465,000	N/A
Franking credits	1,485,000	1,485,000	N/A
Assessable dividend (franked and unfranked)	*9,900,000*	*4,950,000*	–
Assessable income	*9,900,000*	*7,375,000*	*3,662,500*
Holder tax (47% less franking credit)	3,168,000	1,981,250	1,721,375
Total cash gain	9,900,000	9,900,000	9,900,000
Total tax	(4,653,000)	(3,466,250)	(1,721,375)
After-tax cash	5,247,000	6,433,750	8,178,625
Effective tax rate	*47%*	*35%*	*17%*
Remaining cost base	100,000	–	–

An amount subject to family trust distribution tax is NANE income in the hands of the beneficiary.[10]

A distribution of trust income is ordinarily not considered to be income under ordinary concepts. Accordingly, the distribution by a liquidator should not be deemed to be a dividend. Care should therefore be taken when accounting for such amounts received by a company.

Cash flow boost

During COVID-19, there were various government stimulus payments. To assist with spending, cash flow boost payments, among others, were deemed to be NANE income.

The ATO has privately ruled that the cash flow boost is ordinary income.[11] Its reasoning was the nexus between receipt of the payment and the carrying on of a business.

Pre-CGT gains

A common example of non-assessable amounts distributed is pre-CGT gains. There are a number of integrity provisions with respect to pre-CGT gains which are outside the scope of this article. It is common knowledge that pre-CGT profits can only retain their tax profile when distributed by a liquidator. This is due to the payment by a company resulting in a dividend, compared to a liquidator's distribution which, if the shares are pre-CGT, may be a disregarded CGT event G1 or CGT event C2.

Similarly, the payment of a pre-CGT gain by a unit trust will result in CGT event E4. This is disregarded where the units held by the unitholder are pre-CGT.

Non-portfolio foreign shares owned by a company

An interesting comparison arises when comparing the payment by a liquidator of a dividend and capital gain in respect of a non-portfolio interest in a foreign resident company. Both the dividend and capital gain are NANE income when derived by the company.[12] However, as a dividend is ordinary income, their treatment differs when paid by a liquidator. The exempt dividend is deemed to be a dividend and the exempt capital gain remains a capital distribution to the shareholder(s).

Conclusion

The tax treatment of non-assessable income paid to the ultimate beneficiaries varies greatly depending on the type of income, the type of entity and the mechanism of payment. Care should be taken when accounting for non-assessable income, as well as considering the tax effect on a payment.

Where possible, consideration should also be given to the appropriate vehicle to engage in activities that will result in non-assessable income.

Peter Bardos, CTA
Director
HLB Mann Judd

References

1 S 47 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).
2 S 104-135(6) of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).
3 S 104-70(1) ITAA97.
4 S 104-71 ITAA97.
5 S 152-110(1) ITAA97.
6 S 152-125 ITAA97.
7 S 152-320(1) ITAA97.
8 S 152-325 ITAA97.
9 S 271-10 of Sch 2F ITAA36.
10 S 271-105(1) of Sch 2F ITAA36.
11 PBR 1051973166830.
12 Subdiv 768-A and Subdiv 768-G ITAA97.

Financial Services Taxation Conference

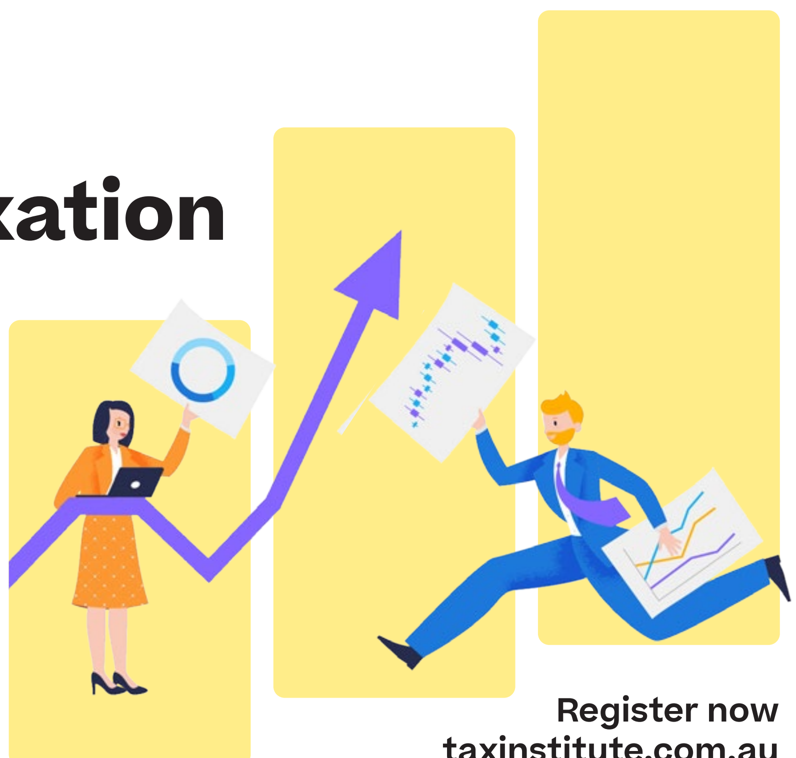
Presented by industry experts, this is Australia's premier event for the financial services industry.

16–17 March 2023

W Melbourne

11 CPD hours

23-002EVT_02/23



Higher Education

Gaining confidence in legal research and law interpretation

The dux of CTA2A Advanced for Study Period 1 2022 discusses the value of studying tax for an accounting graduate working in law.

Hayley Hyytinen
Law Interpretation Officer, ATO, Queensland

Provide a brief background of your tax career.

I worked in various small accounting firms before leaving full-time work to start a family in 2002. While my children were small, I worked part-time doing book-keeping and admin work for our local kindy. I graduated from the University of Southern Queensland in 2018 with a Bachelor of Commerce majoring in accounting and completed the degree remotely while operating my own book-keeping business. Since then, I have had contract accounting positions in the mining industry, management accounting and financial accounting before joining the ATO as part of their graduate program in 2021.

Why did you choose to study with The Tax Institute Higher Education?

The subject was part of the Law Design and Practice (LDP) Associate Training Program at the ATO which I was lucky enough to participate in. Both The Tax Institute's CTA2A Advanced and CTA2B Advanced subjects were offered by the ATO to all graduate program members working in the LDP area to develop core technical capabilities.

What skills and knowledge have you taken away from the CTA2A Advanced subject?

There is so much content packed into this subject. I found the superannuation module very interesting as it wasn't something I'd had a lot of experience in before the program. I also really enjoyed learning about capital gains and small business concessions.

How have you applied the skill or knowledge learned to your current role?

As an accounting graduate working in law, the subject gave me confidence in general areas of legal research and law interpretation. While I don't deal with the topics specifically covered by the subject in my current day-to-day work, studying tax has helped me to understand the challenges and issues relevant to the ATO, so I am sure it will help me throughout my career.

Do you have any tips for others on studying and managing the workload?

Life is busy for everyone. However, I was lucky that my employer offered leave which allowed me to balance work, family and study commitments. What helped me when studying was going over the content multiple times. Often things that don't make sense initially become clearer when revisited. Also, working through the examples, activities and mock exams helped me to put the theory into practice.

What advice do you have for other tax professionals considering undertaking further education?

Do it! There is so much to learn in tax, and I am someone who believes in lifelong learning.

If you want to develop your core tax capabilities, enrol in one of our accredited tax education programs. Our online and interactive programs not only provide you with the flexibility to study remotely, but also give you the skills, knowledge and expertise you need to succeed. Ready to continue your education in tax?

Partnership tips and traps

by John Ioannou, CTA, Principal Lawyer, Macpherson Kelley

As the introduction suggests, most will have encountered partnerships in their professional life. For many though, that encounter is often limited to advising on a discrete issue and often only for the benefit of a partner as opposed to the partnership. These discrete issues are often identified and dealt with in contexts that are relevant for that issue only. This article attempts to identify a framework that advisers can use to better contextualise issues and appreciate how they can impact other aspects of the partnership and the partners. This is important as there is a lack of harmony in respect of partnerships, partnership interests, and how they are dealt with from a tax, duty and commercial perspective. This can be exacerbated by the fact that each state and territory has its own treatment of partnerships from a duty and commercial perspective. In that regard, this article only focuses on Queensland.

Introduction

Partnerships are curious things. Most will have heard of them, some will understand them, and fewer will be able to explain them.

Aside from the familiar concept of joint and several liability of partners, confusion can quickly set in when analogous concepts such as shares or units are used to describe a partner's interest in a partnership. When those concepts influence drafting or analysis of partnership issues, problems quickly arise. Similarly, that the *Income Tax Assessment Act 1997* (Cth) (ITAA97) treats partnerships as an entity[1] often provides a false sense of security.

Despite these issues, partnerships remain relatively commonplace. The reason is set out quite well by Keith Fletcher who lectured the author on partnerships and corporations as an undergraduate. At para 1.15 in his ninth edition of *The Law of Partnership in Australia*, he outlines:

> "The participatory model of partnership organisation is often better suited to the needs of small business than the division between investors and managers provided by a company structure but the choice between the formal and regulated organisation or a registered company and the freedom of the partnership structure has been regarded as secondary to the benefit of limited liability for all shareholders which most business persons recognise as justification for the expenses involved in registering and remaining registered under the companies legislation. In consequence, partnership has come to be regarded as a form of association for persons in professional callings, especially those which forbade their members the right to practice in professional corporations, *and those unwilling to pay for the opportunity to enjoy an overtly statute-regulated existence*." (emphasis added)

It is fair to say that "unwillingness" is a shared theme between legal representatives and accountants, although, when reflecting on some of the issues canvassed by this article, you can appreciate the legitimacy of preferencing a corporate by business folk.

That Fletcher's text is some 400 pages long with almost nothing devoted to taxation ought to suggest from the outset that there is a well-established body of law to help guide us and determine whether we are in fact dealing with a partnership or something else.

Overview

While the purpose of this article is not to recite all the nuances of partnership law, for the sake of interest, some fundamental principles of partnership law and their impact on tax incomes are covered.

Accepting for many that dealing with partnerships is commonplace, often the hardest part of an engagement is having clients understand what exactly it is that they have and the consequences that they need to deal with, given they very likely took steps without taking advice or, having taken advice, proceeded based on assumptions.

Some of the more interesting aspects (at least from the author's perspective) to be covered are:

- partnership basics;
- the concept of a partnership of trusts;
- limited partnerships;
- the use of service trusts by partnerships;
- no goodwill partnerships; and
- professional standards and regulations.

There are many others, noting that, in many post-graduate courses, the taxation of partnerships is a standalone subject. This ought to flag that, while partnerships are seen as the structure of the "common folk", there are several taxation specific issues to address (almost always on formation, dissolution, and entry and exit – not unlike tax consolidation, having put it that way).

Basics

By stating the obvious, the first step to undertake before advising on the tax consequences of an arrangement that a client may describe as a partnership is to work out whether you do in fact have a partnership by reference to basic principles.

When is there a partnership?

For a general law partnership to exist:

- at least two persons,
- are required to associate themselves in an activity,
- where they are seen to be carrying on a business in common, with a view to profit.

That is a straightforward definition but it is worth pausing to draw out some basic requirements, including:

- there must be more than one person;
- they must be carrying on a business; and
- it must be carried on by those persons in common.

You would think the first element is a straightforward one, but you need to appreciate that not everyone starts with partnership law. If your starting position was s 960-100 ITAA97 and you are told (mind you, for tax purposes) that all manner of legal structures and relationships are *entities*, you quickly appreciate how confusion might arise.

Take a common example of, say, the establishment of several discretionary trusts, intended to benefit different groups of individuals who have agreed to use that structure described as "a partnership of trusts" for a business venture. The appeal is clear:

- if there are losses, they can access their proportionate share;
- if they have small business CGT concessions in mind, they do not need to worry about complexities associated dealing with shares or units; and
- if the discretionary trusts do nothing else or own nothing else other than the venture, their asset protection position is pretty good.

But, in having all of these advantages, the clients flag that having multiple trustees who are required to sign documents will be impractical. The solution may appear straightforward: establish each of the trusts with a common trustee. Alternatively, each trust could have its own trustee, but the "partnership" agrees to appoint a company as nominee.

Either circumstance ought to identify an immediate issue and put an adviser on notice that they may not be dealing with a general law partnership.

In the first instance, despite there being multiple entities for tax purposes, there is only one "person" for general law purposes, that is, the common trustee. In the second, and subject to documentation, it may be that each of the trustees cannot be said to be carrying on the business in common.

This issue will be canvassed in more detail below.

Written agreement

Because a partnership requires consensus between at least two persons, agreement between the two of them is necessary. Therefore, the basics of partnership law are founded in contract law and most would appreciate that a contract can be formed without reducing it to writing, provided the basic requirements can be identified. So it is for partnerships. Where there is agreement, consideration and the intention of parties to create a legal relationship, a partnership can be formed.

Clients would still be well-advised, however, to reduce the agreement to writing to ensure that partner expectations and matters required to be dealt with in the course of the partnership are dealt with by agreement between the original partners from the outset. This ensures that, if any of them have cause to deal with a legal representative of another, those matters are dealt with on an expected, as opposed to unexpected, basis.

You will find that, in the absence of a written partnership agreement, the partnership Acts of the various states and territories comprehensively deal with partnership matters. In Queensland, for example, and leaving aside the carve-outs for limited liability and incorporated limited partnerships, there are provisions that deal with:

- the nature of a partnership;
- the relations of partners to persons dealing with them;
- the relations of partners to one another; and
- the dissolution of partnerships and its consequences.

It is fair to say that the opportunity to have a tailored partnership agreement when dealing with partnerships should be a welcome one. In the author's experience, there is yet to be a client who has had an outcome align with their expectations when there has been no written agreement.

A more detailed consideration of what such an agreement might include is provided later in this article.

What is a "partnership interest"?

Common law

While analogies of shares and units are useful in conveying a concept to a client, they are just that, analogies.

For example, the rights of an ordinary shareholder would generally include the right to notice of meetings, the right to vote, the right to a dividend, and the right to surplus capital on winding up. These are a collection of discrete legal rights that reside within a separate asset described as a "share". That a body corporate is a separate legal entity from its shareholders makes the distinction clearer; the rights of the shareholder are limited to those described. They do not provide a right to claim that, by virtue of holding a share, there is therefore a right to a particular asset of a body corporate.

A partnership is not a separate legal entity from the partners. Like a trust, it is the description of a legal relationship that exists between persons who have agreed to associate themselves to carry out a business in common with a view to profit.

From that legal definition of a partnership, a partner's interest in the partnership is correctly described as their proportionate share of partnership net income or loss as determined at the end of the financial year or on the earlier

dissolution of the partnership. What follows is that each partner has an interest in each asset of the partnership and bears a proportionate share of associated liabilities but cannot assert a right to control or claim any particular asset.

Duty purposes

To be clear though, it is well established that a partner's interest in a partnership includes a separate bundle of rights, distinct from the assets that comprise the partnership itself. Various duties Acts attempt to capture this by using language clarifying that:

- a partner means a person;[2]
- a partnership interest is:
  - the proportion that the value of the partner's entitlement as a partner bears to the value of the entitlements of all partners in the partnership expressed as a percentage, where the partner has a variable partnership interest;[3]
  - if the partner has provided consideration or has been required to contribute to the capital of the partnership so as to be entitled to a share in the profits of the partnership, that partner's profit-sharing percentage; or[4]
  - the greater of:
    - the percentage of the capital of the partnership that the partner has contributed or is obliged to contribute; or
    - the percentage of the losses of the partnership that the partner is required to bear.[5]

This language is used against the backdrop of it being clear that references to partnerships holding property for duty purposes is a reference to the holding of the property by the partners for the partnership.[6]

For duty purposes, legal title in respect of partnership interests becomes of paramount importance, noting that, at least in Queensland, partnership interests are excluded from being dutiable property.[7]

Income tax purposes

The focus on the persons who are partners in the partnership for duty purposes is in stark contrast to income tax. For that purpose, a partnership calculates its net income or loss for an income year as if it were a resident taxpayer.[8] This makes sense, given the deeming of a partnership to be an entity in s 960-100 ITAA97. It may be for this reason that there is case law around the inability of a partner to take a salary.[9] Instead, an amount that is treated as salary for commercial purposes is disregarded when working out a partnership's net income or loss, and rather is accounted for when determining a partner's allocation of net income or loss. Where a partnership agreement is entered into to authorise a partner to take a "partnership salary", the better view is that it amounts to an agreement between the partners to vary the interests of the partnership and, to be effective for a particular year, must be done within that year.[10]

CGT purposes

From a CGT perspective, the ITAA97 makes clear what was implicit in the ITAA36: a partnership is not an entity which is distinct from the partners. The coming and going of partners must be dealt with in a manner that shows that they have an interest in each asset of the partnership.[11]

Section 106-5 ITAA97 confirms that:

- the partners individually make a capital gain or loss;
- each partner has a separate cost base and reduced cost base for the partner's interest in each CGT asset of the partnership;
- if a partner leaves a partnership, the remaining partners acquire separate CGT assets to the extent that the remaining partners acquire a share of the departing partner's interest in a partnership asset; and
- if a new partner is admitted to a partnership, the new partner acquires a share of each partnership asset and the existing partners are treated as having disposed of part of their interest in each partnership asset to the extent that the new partner has acquired it.

Commercially

In summary:

- from a general law perspective, the partners' rights refer to "what's left over";
- from a duty perspective, the focus is on legal title;
- from an income tax perspective, the partnership is treated as an entity; and
- from a CGT perspective, each partner has an interest in each CGT asset.

It should come as no surprise, then, that the formation, dissolution, entry and exits of partners in a partnership is by no means straightforward and requires a mastery of all these concepts.

Partnership agreements

Partnership agreements fall into the broader category of governance agreements. This category could also be said to include shareholder and unitholder agreements. As touched on earlier, they are intended to operate as "expectation setters" for the orderly conduct of an enterprise.

As Fletcher notes, the partnership Acts deal in some considerable detail with the implications and consequences of the partnership contract, but they do not regulate the entry into a partnership agreement except where it has been induced by fraud or misrepresentation. As the various partnership Acts contemplate that rules of equity and common law are to apply, except where they are inconsistent with express provision of the various Acts, the essentials of a contract to enter into a partnership must be viewed in light of those rules.

Provided the basic rules of contract are adhered to, partners have considerable freedom to document the terms of their

partnership. For the most part, starting positions outlined in the partnership Acts can be overridden by agreement between partners.

The following discussion highlights what you would expect to find in these agreements, although, at a minimum, you may still find basic "buy/sell" provisions that outline details on how to manage trigger events, valuation methodology and funding the exit of a partner.

Run-of-the-mill provisions

In any partnership agreement, you would expect to find:

- a description of the business to be carried on by the partnership;
- the proportion in which profits and losses are to be shared by each partner;
- capital contribution requirements, which may include interest on capital and advances (although budgets and cashflow are often dealt with separately);
- indemnities by the partnership in respect of liabilities incurred by a partner in the ordinary and proper conduct of the business or necessarily done for the preservation of the business, property or partnership;
- a right of management, noting that, even if a "junior partner" has some restrictions imposed on them by virtue of a partnership agreement, those restrictions are of no effect on persons dealing with a partnership without notice of such;
- no partner being entitled to remuneration for acting in the partnership business, noting that, as a partner, if you are entitled to act, you have a duty to fellow partners to do so, to the best of your ability, without a claim for remuneration;
- consent to the inclusion of additional partners;
- dispute resolution provisions;
- access to books of the partnership;
- the mechanics of expelling a partner; and
- an ability to vary the terms of the partnership.

Continuation clauses

Without an express continuation clause in a partnership agreement, partnerships are dissolved and reconstituted on the death or retirement of a partner or where a new partner is admitted into the partnership.

Leaving aside the issue of judicial support for the view that such clauses are ineffective, the ATO will treat a partnership as a continuing entity (allowing it to maintain its TFN and ABN) where a continuation clause exists in the partnership agreement.[12]

For larger partnerships with at least 20 partners and where a change of partners represents less than 10%, the ATO will treat the partnership as a continuing entity (allowing it to maintain its TFN and ABN) irrespective of what the partnership agreement provides.

Common trustee/nominee

There needs to be a clear distinction between the use of a common trustee and a nominee. As already stated, in circumstances where several trusts share a common trustee, it *cannot* be said that there exists a partnership of trusts for general law purposes.

However, few consequences may flow from this from an income tax perspective if such an arrangement is characterised as a trust. That broad statement would nevertheless need to be qualified as:

- GST is likely not to have been accounted for correctly;
- carry forward losses are likely trapped at the "trustee level" and not available to "partners";
- there will be difficulties in passing through franked distributions; and
- the structure may breach professional regulation requirements.

On the other hand, it makes commercial sense for a single entity to act on behalf of multiple parties to ease the day-to-day practice and administration. The use of a nominee entity would resolve these practical issues, provided the relationship is properly documented and implemented. Without either, there is a significant risk that the use of a nominee can give rise to a separate trust estate.

> "While analogies of shares and units are useful in conveying a concept to a client, they are just that, analogies."

Consequently, either as part of the partnership agreement or in a separate suite of documents, it should be clear that:

- the partners are entitled to the assets held by the nominee and can call for them, noting that the use of a nominee is for convenience only;
- the nominee can only act in accordance with the directions and instructions of partners and all decisions are made at the partner level and not by the nominee or its directors;
- the nominee can issue tax invoices as agent for the partnership and reflect the requirements set out in Subdiv 152-B of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and
- income and expenses should flow through the partnership account.

Limited liability partnerships

What are they?

In short, limited liability partnerships are general law partnerships that choose to register[13] as partnerships with limited liability under the partnership Acts.[14] As the name

suggests, there is a fundamental difference of liability in respect of limited liability partnerships, as there is a general partner who is responsible for all debts and obligations of the partnership. It is usual for the interest of the general partner in the partnership to be nominal.

A limited partner is only liable to contribute towards the liabilities of the firm for an amount that does not exceed the amount shown on the register.[15] This is not dissimilar to the liability of a shareholder to pay the subscription amount for shares that are issued to them.

While a limited liability partnership is formed under state law, once registered in a state or territory, there are mechanisms to recognise them in other states and territories that have similar frameworks.[16] Given the fundamental differences between a limited liability partnership and a general law partnership, it is a statutory requirement that a limited liability partnership always make it known to third parties that the partnership is a limited liability partnership by using the words "a limited partnership" after the business name[17] in every business document.[18]

Duty issues

On the assumption that a general law partnership exists, there are no duty implications in forming a limited liability partnership on the basis that existing partnership proportions can remain "as is". Once registered as a limited liability partnership, noting the change of treatment for income tax purposes, a limited liability partnership continues to be treated as a partnership for duty purposes and *not* a proprietary limited company.

Tax issues

Again, on the assumption that a general law partnership exists, there are no tax implications in forming a limited liability partnership on the basis that the existing partnership proportions remain "as is". Once registered, the relevant taxing provisions cease to be Div 5 ITAA36 and instead become Div 5A ITAA36.

The upshot of this change means that the limited liability partnership is treated as a company for tax purposes,[19] and for "closely held limited liability partnerships", that treatment equates them to being taxed as private companies[20] (noting that Div 7A ITAA36 would have application).

While it appears odd, it needs to be considered as achieving a similar result as a general law partnership undertaking a roll-over under Subdiv 122-B ITAA97. Each partnership interest is treated in a manner akin to shares in a company[21] on which franking credits can be paid where those partners receive distributions on those interests.[22] Once registered, a limited liability partnership is deemed to be a company for all purposes of the income tax law.[23] This means a loss of access to the discount capital gain. Had the general law partnership been eligible for small business concessions, the limited liability partnership would continue to be eligible, but the same hurdles would be required to be addressed had the assets been owned in a proprietary limited company.

Why bother?

Prior to Queensland's introduction of the small business restructure duty concession,[24] "roll-ups" of sole traders, trusts and partnerships were dutiable in any circumstance. A restructure using a limited liability partnership essentially allowed a duty efficient restructure where a business could mimic a Subdiv 122-A or Subdiv 122-B ITAA97 roll-over without the associated duty costs.

Limited liability partnerships are, however, unusual entities from a commercial perspective and are very unlikely to be the structure of choice if a proprietary limited company is available.

Partnership agreement

It is worth noting that the drafting of an agreement for a limited liability partnership must be done in a manner that contemplates profit retention and accumulation, as well as the maintenance of a franking account.

Service entities

The use of service entities continues to be commonplace and provides an arrangement where assets and services used to carry on a business are held in a structure that is separate from the structure (historically, a partnership of persons) that carries on the business. That "service entity" commonly is owned by related trusts or individuals to those carrying on the business. As well as preserving those assets and services from any liabilities that befall the trading structure, a service entity provides a means to flow income from the business away from the partners generating it and to related trusts or persons.

The seminal case of *Phillips*[25] saw the court consider whether the fees for services offered by a service trust established by a firm were properly deductible from the income of the partnership. In that case, following a professional negligence judgment handed down against a similarly sized firm of chartered accountants, Fell & Starkey (the firm) established a unit trust, with the units in that trust held by the partner's wives, family trusts and companies. The firm sold all of its furniture and equipment to the service trust, and it provided typing, secretarial, photocopying and other services to the firm. The service trust also leased all necessary furniture and equipment to the firm.

Although the service trust was not specifically restricted to only offering services to the firm, with the exception of a few other clients, that is predominantly what it did. The motivation behind moving all these services to the trust was to provide asset protection to the partners in the event of any litigation and to reduce taxes paid to the partnership.

Central to the court's decision (that the service fee expenses incurred by the partnership were deductible) was the finding that the rates charged by the service trust were commercially realistic and were not in excess of commercial rates. In essence, because the firm could have found the services elsewhere on the market and paid similar fees for

obtaining them, the fact alone that the firm had set up the structure was not fatal to the deductibility of the expenses.

The court considered that the central question for determining whether the fees paid to the service entity were deductible is whether the fees could be seen as money paid in the furtherance of gaining income.[26] Once answered in the affirmative, the Commissioner cannot step in to disallow a deduction merely on the basis that the Commissioner disapproves of the amount of the expenditure.[27] The court therefore remarked that, provided the outgoing is reasonably and genuinely incurred by the partnership in generating its assessable income, service fees are properly deductible.

This outcome was accepted by the Commissioner (as outlined in IT 276) but, in doing so, the Commissioner noted that the fact the rates charged were realistic and not in excess of commercial rates was crucial,[28] as well as the rearrangement being for commercial reasons.[29]

Unfortunately, less than 20 years later, the ATO commenced audit activity of professional partnerships following the introduction of the personal services income regime and quickly uncovered inappropriate service trust use that either had no commercial rationale or involved charging unrealistic rates.

The period of audit culminated in the issue of TR 2006/2 which reaffirmed the position set out in IT 276: if the benefits conferred by a service entity provide an objective commercial explanation for the expenditure, the fees will be deductible without any further examination. If not, closer examination will be warranted, noting that TR 2006/2 flags the potential application of Pt IVA ITAA36 to arrangements that have the dominant purpose of obtaining a tax benefit.[30]

The ATO further supplemented this position by issuing NAT 13086[31] which sets out how service arrangements can be appropriately used and what considerations the ATO will consider when looking at service entities.

No goodwill partnerships

In 2016, the ATO released guidelines[32] relevant to its position on the administrative treatment of acquisitions and disposals of interest in "no goodwill" professional partnerships, trusts and companies. Put simply, these are arrangements where the relevant entity agrees that, when a new practitioner enters the practice, they will not be required to pay an amount that reflects a value for any goodwill of the practice. Similarly, when the practitioner exits, they will not be entitled to receive an amount which reflects a value for the goodwill of the practice.

Broadly, these guidelines are concerned with the application of relevant provisions in the tax law which apply to entities carrying on "no goodwill" professional practices. The ATO will apply different administrative treatment depending on the tax issues, noting that:

- for the calculation of the cost bases and reduced cost bases of the partnership interests, the market value of the interest at the time of acquisition is treated as being equal to the amount that the incoming partner pays (including nil) in respect of the acquisition; and
- for the calculation of the capital proceeds in respect of a CGT event happening to a partnership interest, the market value for the interest at the time of disposal is treated as being equal to the amount that the partner receives (including nil) in respect of the disposal.

For the administrative treatment to apply, the taxpayer (so called practitioner entity) must satisfy all of the following requirements:

- the practitioner entity must be:
  - a partner in a partnership carrying on the practice;
  - a shareholder in a company carrying on the practice; or
  - a beneficiary of a trust carrying on the practice; and
- the governing documents of the partnership provide that:
  - consideration payable and receivable will be nil or a nominal amount in respect of goodwill;
  - there are no further provisions relating to consideration for practice interests; and
  - there is an arm's length relationship immediately before the acquisition or disposal.

Professional requirements

It should go without saying that professional practice requirements ought to be front of mind when considering an appropriate structure. Partnerships are, of course, synonymous with professional practice.

At the time of writing this article, the requirements for Queensland legal and accounting practice structures are as outlined below.

Legal Profession Act 2007 (Qld)

In Queensland, the statutory requirements are contained in the *Legal Profession Act 2007* (Qld).

Partnerships

The definition of "law firm" refers to a partnership consisting only of Australian legal practitioners, or one or more Australian legal practitioners and one or more Australian-registered foreign lawyers. Therefore, for a partnership, the only requirement is that all partners must hold a principal practising certificate.

Partnerships of trustees

The starting point in Queensland is that the definition of a law practice or law firm refers to individual Australian legal practitioners/foreign lawyers. Therefore, a partnership of corporate trustees would not be within the definition and would not be compliant.

In noting this, the Queensland Law Society's position is that, provided the structure falls within the definition of a law practice under the relevant Act, there are no specific restrictions imposed on structures featuring trusts or trustees. Accordingly, a partnership between trusts with

individual trustees is possible, provided the individual trustees each have principal practising certificates.

Incorporated legal practices

A legal practice in Queensland can be operated via a corporate entity, provided it meets the following requirements:

- the legal practice must have at least one legal practitioner director (holding a principal practising certificate);[33]
- the legal practice must notify the Queensland Law Society of the intention to practice as a corporation (by lodging QLS Form 23);[34] and
- the legal practice must also comply with the requirements imposed on corporate entities, that is to say:
  - it must be registered with ASIC; and
  - it must comply with the *Corporations Act 2001* (Cth).

Chartered practising accountants

Chartered practising accountants (CPAs) have the choice of operating as a sole trader, partner, corporate, trust or any other structure that the CPA Australia Board has approved.

Partnerships

Under CPA Australia by-law 9.3(a)(i), the partners of a partnership comprise:

- only members who hold a public practice certificate; or
- at least one member who holds a public practice certificate together with only the following persons:
  - members who do not hold a public practice certificate but are members of another specified body whose constitution permits the provision of public accounting services; and/or
  - other persons as permitted by the CPA Australia Board, taking into account:
    - tertiary or other professional qualifications possessed by the person;
    - competence, experience or skill demonstrated by the person in their profession or calling;
    - the commercial, community or education status of the person.

Unlike the legal profession, an accounting practice may operate as a partnership between corporate entities or trusts. However, this would be subject to the approval or discretion of the CPA Australia Board and would also need to comply with the specific requirements set out for those entities under the by-laws.

Incorporated practices

Under by-law 9.3(b), a corporate entity would be required to have the directors as both members and holding public practising certificates, or at least one director who satisfied this requirement and one who satisfied the requirements set out above under “Partnerships”.

Any change of control mut be notified to CPA Australia within 10 business days prior to the change occurring.

Trusts

Under by-law 9.3(c), an accounting practice operating via a trust would be required to have trustees which comprise:

- a member or members who holds a public practising certificate;
- a corporate entity that complies with the requirements set out above under “Incorporated practices”; or
- a combination of the two.

Again, any change of control must be notified to CPA Australia within 10 business days prior to the change occurring.

Conclusion

Dealing with partnerships (whether general law or otherwise) is not straightforward. Depending on the issue for which your advice is sought, it is likely that you will only have one of the many facets of partnerships and partnership interests in your line of sight.

Hopefully, this article provides a useful framework to assist those advising partners and partnerships.

John Ioannou, CTA
Principal Lawyer
Macpherson Kelley

This article is an edited and updated version of “Partnership tips and traps” presented at The Tax Summit held in Sydney on 19 to 21 October 2022.

References

1 S 960-100 ITAA97.

2 For example, the *Duties Act 2001* (Qld) and the *Duties Act 2008* (WA).

3 S 42(1)(a) of the *Duties Act 2001* (Qld).

4 S 42(1)(b) of the *Duties Act 2001* (Qld).

5 S 42(1)(c) of the *Duties Act 2001* (Qld); s 74 of the *Duties Act 2008* (WA).

6 S 40 of the *Duties Act 2001* (Qld); s 71 of the *Duties Act 2008* (WA).

7 S 10(2)(b) of the *Duties Act 2001* (Qld).

8 S 90 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).

9 For example, *Scott and FCT* [2002] AATA 778.

10 TR 2005/7.

11 Ss 106-5, 108-5(2) and Subdiv 106-A ITAA97.

12 See para 163 of GSTR 2003/13 and the minutes of the ATO Tax Practitioner Forum meeting on 2 November 2001.

13 S 50 of the *Partnership Act 1891* (Qld).

14 S 49 of the *Partnership Act 1891* (Qld.

15 S 53 of the *Partnership Act 1891* (Qld).

16 S 54 of the *Partnership Act 1891* (Qld).

17 S 56 of the *Partnership Act 1891* (Qld).

18 In Queensland, this is defined as any letter, notice, publication, offer, contract, order for goods or services, invoice, bill of exchange, promissory note, cheque, negotiable instrument, endorsement, letter of credit, receipt, or statement of account.

19 S 94A ITAA36.

20 S 109BB ITAA36.

21 S 94P ITAA36.

22 S 94L ITAA36.

23 S 94J ITAA36, but excluding some matters contained in the section.

24 Ss 413A to 413I of the *Duties Act 2001* (Qld)

25 *FCT v Phillips* [1978] FCA 28.

26 *Robert G Nail v FCT* (1937) 57 CLR 695 per Dixon J at 712.

27 *Ronpibon Tin NL v FCT* (1949) 78 CLR 477 at 60; *Cecil Bros Pty Ltd v FCT* (1964) 11 CLR 430 at 434.

28 Para 3 of IT 276.

29 Para 4 of IT 276.

30 Para 16 of TR 2006/2.

31 Australian Taxation Office, *Your service entity arrangements*, NAT 13086. Available at www.ato.gov.au/DownloadAssetCDN.aspx?id=10381.

32 Australian Taxation Office, *Administrative treatment: acquisitions and disposals of interests in "no goodwill" professional partnerships, trusts and incorporated practices.* Available at www.ato.gov.au/business/income-and-deductions-for-business/in-detail/professional-firms/administrative-treatment--acquisitions-and-disposals-of-interests-in--no-goodwill--professional-partnerships,-trusts-and-incorporated-practices/.

33 Ss 24 and 117 of the *Legal Profession Act 2007* (Qld).

34 S 114 of the *Legal Profession Act 2007* (Qld).

The Tax Institute | Higher Education

"Knowledge is the most valuable tool for any professional."

How are you going to build your career?

Our accredited programs and qualifications will give you the tax knowledge and skills needed to help you become a tax leader.

Enrol before 17 February to save $100.

	Subjects	CTA3 Advisory
Early bird closes	17 Feb 2023	24 Mar 2023
Enrolments close	8 Mar 2023	19 Apr 2023
Commencement	13 Mar 2023	24 Apr 2023

Enrol today
taxinstitute.com.au/education

23-003EDU_02/23

HEPCO Pty Ltd trading as The Tax Institute Higher Education PRV14349.

Commercial and agricultural FIRB applications

by Charlotte Brierley, Director, Tax Controversy, PwC

Australia's management of inbound investment is arguably one of the more robust inbound investment frameworks currently in place. However, in accepting this, we must appreciate the critical difference between "robustness" and "restriction". Understanding the difference will allow an applicant to properly engage with the framework in a manner that optimises outcomes for taxpayers and administrators alike. While this article will focus on the consideration of taxation through the process and the interplay between the ATO and Treasury, many of the insights are applicable to multiple stakeholders and will also assist in understanding the Treasury process more broadly.

Australia's management of foreign investment through the Foreign Investment Review Board (FIRB) relies on the following legislation: the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA); the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth); the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth); and the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Cth).

The starting point of the framework is that foreign investment should be welcomed for the significant benefits that it provides.[1] It is that fundamental proposition that has pushed the regime into one that does not aim to restrict/ prevent foreign investment in Australia in any way, but rather seeks to welcome and "manage" investment. At times, the manner in which it is managed may be considered overly robust.

The ATO as a key stakeholder

Professionals working in this space will be familiar with the significant changes that occurred in 2015 and the ensuing rate of change which has continued to this day. While some changes were temporary, such as the zero-dollar threshold measures that were introduced during the COVID-19 pandemic and removed in early 2021, the changes in 2015 fundamentally altered the way FIRB engaged with the ATO and the functions that the ATO assumed from that point onwards.

First, the ATO became a co-administrator of the FATA, taking over the primary responsibility for vetting foreign purchases of residential property, along with various ownership registers and the administration of the FIRB fee system. These functions were new to the ATO and came with a significant increase in resources, as well as a refreshed focus on the FIRB process and the ATO's role in it, not just on the newly assigned functions but also on the existing functions.

The ATO had provided advice on foreign investment applications for decades, long before the 2015 changes. However, the ATO did not have a coordinated and centralised management of this work until additional resourcing was provided in 2015 to facilitate increased ATO responsibility for FIRB. At times, this led to differences in the form and/or approach to the advice provided which made it challenging to routinely collate and share insights.

Current ATO framework

With the 2015 changes came the centralisation of the FIRB tax consult advisory function (the function of advising Treasury and FIRB) into a single team (the Foreign Investment Portfolio (FIP) Tax Consult team). This team is located within the FIP in the international section of Public Groups and International (PG&I), with Hector Thompson as the current Deputy Commissioner.

The FIP Tax Consult team is responsible for coordinating the provision of advice on commercial and agricultural applications. The team's primary responsibility is to provide the technical analysis, which includes the involvement of appropriate ATO stakeholders as required. Some applications, for example, those from taxpayers in the ATO's top 100 program, may have increased stakeholder engagement. However, the FIP Tax Consult team will ensure that the advice provided is consistent with advice provided to other taxpayers on comparable issues or facts.

The function that the FIP Tax Consult team provides in ensuring the equality of advice across applications is important given the different scope of a tax consult review compared to other ATO products, that is:

1. a tax consult review is prospective in nature which fundamentally sets it apart from audits and reviews;
2. the application is made as part of a broader commercial process which the taxpayer is obliged to follow and is therefore quite different to a ruling that a taxpayer might pro-actively seek from the ATO. This process also requires that Treasury is an intermediary between the taxpayer and the ATO which is quite different from the normal process of the ATO providing advice to taxpayers;
3. quite importantly, the advice provided by the ATO is subject to the national interest protections and cannot be obtained by the taxpayer or any other enquiring minds; and
4. the ATO is not being asked to provide technical advice on the interpretation of a narrow issue based on defined facts, but rather advice on whether or not a proposed

transaction is “in the national interest” in light of any tax concerns.

Prospective in nature

While ATO products will normally rely on lodged positions and contemporaneous evidence to form a view, the prospective nature of a FIRB application does not permit this. This means that more mechanical provisions such as ACA calculations are out and strategic structural risks are in, ie financing, the selection of vehicles in Australia and overseas, broader transfer pricing concerns, and considering what the tax consequences may be in the event of a disposal. Further commentary on the scope of the ATO’s review is contained in *Guidance Note 12* published on the Treasury website.[2]

Broader commercial process

Applications are referred to the FIP Tax Consult team by Treasury, with an initial 10-day time frame for completion (that is, 10 calendar days not workdays, which, if a referral is made on a Friday afternoon, will leave a case officer with six working days to complete an application). Given that a team of approximately eight people are required to review around 1,200 applications a year, the significance of the tight time frame becomes apparent.

The applications do not necessarily provide pertinent tax information, despite a tax checklist being available on the Treasury website. This leaves ATO officers having to piece together commercial information that has been drafted for other consult partners (eg the ACCC or state governments) to determine the tax risks, and significantly increases the number of requests for information issued by the ATO during the process.

National interest protections

Given the content of the advice is the ATO providing a view on a hypothetical future and an assessment of how risks may manifest themselves based on hypothetical facts, it is very important that the content of the advice is not widely available. In addition, it is not uncommon for the ATO advice on a FIRB application to reference multiple taxpayers. As such, it would not be appropriate for individual taxpayers to view the ATO advice as they would be viewing information directed at another, often entirely unrelated, taxpayer. Finally, the nature of the advice that the ATO provides is akin to a high-level risk assessment. This is a reflection of the uncertainty that typically exists at the time of the FIRB application which would render it difficult, if not impossible, to provide definitive advice. Making such information available to the public, including other taxpayers, would risk them unreasonably relying on it as providing some type of transactional “sign off”.

Is the transaction in the national interest?

The question being posed to the ATO “is this transaction in the national interest” is an entirely different request to what the ATO would commonly be charged with answering. While the national interest test itself is very broad the ATO is tasked with purely looking at it through the lens of tax compliance and administration. The broader commercial concerns or concerns with the applicant’s character are left for other more appropriate consult partners to comment on. The ATO’s position is that, prima facie, any tax issues/risks should be able to be managed by the ATO as part of a transaction’s normal commercial life. The ATO may form the view that these normal, business as usual, risk and compliance processes are not sufficient to manage the potential transactional risks. However, traditionally, this has been in limited circumstances.

With improvements in data-matching, the ability for the ATO to understand a taxpayer’s previous compliance history (which for FIRB applicants may pertain to previous Australian investments) has led to the development of “tax character” as a risk. Broadly, this relates to the taxpayer’s overall behaviour when engaging with the ATO, as distinct from their tax technical positions adopted, ie deductions claimed or income declared. An example of this is the timely lodgment of tax returns or other filings, or the payment of tax liabilities when due. There is an expectation that FIRB applicants will ensure that their Australian investments reliably meet their administrative requirements. Failure to do so is likely to increase the ATO’s appetite to advise that the application is not in the national interest.

What happens when the ATO considers a transaction poses a tax risk?

When the ATO has concerns about a FIRB application, the case will be allocated for subsequent review by the Foreign Acquisitions Engagement and Assurance (FAEA) team. This is a dedicated review team which sits in the Operations division of PG&I. The team’s mandate is to review the cases of concern coming from the FIP Tax Consult team. This includes considering, where relevant, any additional risks that may not have been identified at the time of the application or may not have arisen due to a change of circumstances.

Should any responses to conditions be provided in relation to these cases, the FAEA team will review them as a matter of priority. While the FAEA team will review all cases within its ambit, this is not necessarily a public-facing review. Internal reviews will be undertaken, as they are with many ATO programs, to determine the cases that merit engagement with the taxpayer. At times, these taxpayers are already part of an existing ATO program, ie the top 100 or top 1,000 taxpayers, and the risks identified during the FIRB process are better addressed through those planned engagement strategies.

The FAEA team has a lot of discretion as to what cases it selects for an external review which involves further engagement with the taxpayer, instead of seeking to resolve the relevant issue through an internal review. While financing is a key risk that the ATO has been examining through multiple channels, the FAEA team will ensure that more bespoke risks are also considered.

The primary goal of the FAEA team is to better understand the transaction and engage with the taxpayer to reach agreement on an appropriate way to mitigate risks that are present. Ideally, these engagements occur without the case having to progress to a formal audit.

Conditions

The conditions are one of the most relevant and significant areas of concern for most taxpayers involved in the FIRB process. They are genuinely imposed at the Treasurer's discretion, reflected in the unilateral imposition of standard tax conditions by the Treasurer where he considers it appropriate and warranted. The ATO plays a significant role in recommending what tax conditions may be appropriate for the Treasurer and FIRB to impose. However, there are a number of circumstances where the ATO's desired condition may not be able to be imposed due to the nature of the FIRB framework and which entity can be legally bound by the conditions.

"There have been very few test cases to help us understand what non-compliance looks like."

The standard tax conditions were developed in conjunction with the 2015 changes to impress on foreign investors their obligation to comply with Australian tax laws and to leave them in no doubt that they are expected to engage and cooperate with the ATO. Of course, by and large, the conditions only require things that would otherwise be required under the income tax Acts which often raises questions around their value. However, the FIRB conditions (which include standard tax conditions) are often being elevated within an organisation beyond tax managers to the C-suite, and the ATO is of the view that there is value in making senior management and business owners aware of these obligations. Additionally, the FIRB conditions introduce additional consequences for non-compliance.

One condition which is not otherwise required under taxation law is the reporting condition (the disposal notification has now moved from being a standard tax condition to a general condition imposed by Treasury). The reporting condition causes quite a degree of confusion among taxpayers who are unsure about the depth of information and the scope of the questions. They tend to be interpreted narrowly, with questions only being answered by reference to the specific transaction that is subject to the FIRB notification. This is not the view adopted by the ATO and could inadvertently result in misleading disclosures which do not comply.

The desired scope of the responses is very broad. It is intended to cover all tax affairs of the taxpayer and any additional taxpayers within its control group. For example, condition 2 is that a taxpayer and the entities within its control group must be compliant with Australian tax laws. This does not relate solely to the transaction approved by FIRB but is taken by the ATO to apply to any tax affairs of the applicant entity. In simple structures, this interpretation is often obvious. However, where the condition is imposed on a head company of a larger, more complex group with multiple investment advisers or taxpayers, the applicant may be inclined to inappropriately narrow down their interpretation. The appropriate scope is *all* tax affairs of the entity and its subsidiaries (depending on the entities that are captured by the conditions). There have been very few test cases to help us understand what non-compliance looks like. However, there have been instances where the ATO has advised that a proposed transaction is not in the national interest due to an applicant's non-compliance with prior applications' conditions and therefore the issue should be taken very seriously.

What happens after condition responses are submitted?

Responses to the conditions are submitted to Treasury but the responsibility for reviewing and considering the responses rests with the ATO. There can be a significant delay between responses being submitted to Treasury and being received by the ATO Tax Consult team. Once the conditions are received by the ATO, they go through a similar triage/consideration process to the initial assessment.

The overall ATO approach is to determine what the risk rating would have been for the transaction had that information been received at the time of the transaction. Accordingly, the transaction is then reassessed into either high, medium or low-risk categories. This risk assessment is not shared with Treasury or FIRB. Short of answers being too brief they are effectively non-compliant, or information being supplied which is contradictory to other intelligence that the ATO already holds (which would also suggest non-compliance), the ATO does not communicate the responses with Treasury. The reassessment process is used for determining subsequent ATO compliance resources through the FAEA team or otherwise.

Can conditions be avoided?

Some conditions can be avoided by providing the information as part of the original application. The natural justice process is also an opportunity to revise the conditions. The natural justice process occurs once the Treasury has formed a view and advised taxpayers of what conditions they are minded to impose. The taxpayer/applicant then has an opportunity to engage with the Treasury to modify or, if appropriate, remove those conditions. If the conditions come through and information could be provided that would address any concerns, the ATO will be open to receiving that information during the natural justice phase. However, this part of the process often happens at a time-critical moment for the transaction, so information as part of the initial application is the best approach.

Special conditions

The special conditions are of greater value to the ATO as they provide more specific taxpayer information on key risks. The primary risk that is commonly considered through special tax conditions is the financing of the entities and the transaction. Generally, the special conditions will only ask for information and/or documentation. However, occasionally the action required is more involved, such as applying for a private binding ruling or engaging with a particular team like the Private Equity team.

A positive aspect of the special conditions is that they tend to be for a limited time, and once taxpayers have responded to them, they do not generally present an ongoing compliance burden. Having said that, sometimes the response time is quite remote from the initial transaction, for example, special conditions around private equity transactions where notification prior to disposal is required which may easily be five years from the original transaction. It is important to diarise condition requirements like this to ensure that they are not missed. It is not just a question of penalties under the FIRB framework in relation to that specific transaction that need to be considered, but also the overall impact that a significant failure will have on a foreign investor's future ability to invest in Australia. A failure to comply with a condition may cause more concern than any substantive tax issue with the information provided, and it may be interpreted as an unacceptable level of carelessness regarding tax governance.

Compliance burden and areas for improvement

The compliance burden created by the initial application process is proportional to the importance of the assessment, at least in regard to tax, and could be minimised further if taxpayers provided the information requested in Treasury checklists at the time of the initial application. However, the conditions present a higher compliance burden and, in many ways, ensuring appropriate compliance with the standard conditions is probably the most burdensome tax requirement of the process.

For the reporting requirement to be appropriately complied with, a taxpayer is arguably required to annually review its tax position (including whether there are any concerns around taxpayer alerts etc) and to disclose this position to the ATO, along with any missed payments, audit or review activity etc. It also requires a taxpayer to have a reasonably arguable position on issues or otherwise be at risk of non-compliance.

However, having to complete this report annually almost ad finitum is quite burdensome. At times, the condition can remain in place even after the foreign investor has disposed of the interests to a new acquirer. Flaws like this raise two areas of potential improvement which would not only ease the compliance burden on taxpayers, but also ease the regulatory burden on the ATO which has to allocate resources to reviewing reports which are often lacking in useful information.

One suggestion for improvement would be to introduce a sunset clause into the standard tax condition reporting of somewhere between three and five years. This would enable the ATO to focus more on the reports provided being done correctly and would ensure that taxpayers in the first few years of an investment start off with the correct focus on administration.

Another suggestion, which would offer significant benefits all round, would be to reduce the fees for changes to tax conditions. Recently, the fee for making a change to a tax condition increased to around $20,000. There are numerous situations where there are administrative benefits for both taxpayers and the ATO if conditions can be amended to better accommodate the current circumstances.

Summary

In summary, there is a lot that can be done to speed up the FIRB process and to eliminate unnecessary questions from the ATO if information is shared from the outset. It is worthwhile paying particular attention to compliance with the conditions, including compliance with the standard conditions, as a failure to comply can have a significant impact on a taxpayer's ability to undertake further investment activity in Australia (even if it does not have a significant impact on the transaction they have been imposed on). Always remember that the ATO's management of data and intelligence is improving exponentially each year, and where an investment was previously subject to FIRB approval, the original application may be relevant to future plans around restructures or changes in business direction.

Charlotte Brierley
Director, Tax Controversy
PwC

References

1 Australian Government, *Australia's Foreign Investment Policy*, 1 January 2021. Available at https://firb.gov.au/sites/firb.gov.au/files/2021-01/Australias_foreign_investment_policy.pdf.

2 Available at https://firb.gov.au/sites/firb.gov.au/files/guidance-notes/GN12_Taxconditions.pdf.

Tax Disputes Masterclass

The knowledge you need for efficient and effective management of tax disputes

Examine key technical and practical issues that arise in the large corporate and private wealth market.

- Cover transfer pricing, Part IVA, section 100A and more
- Hear from ATO officers, tax counsel and leading tax controversy professionals
- Join colleagues in person, or from the comfort of your office
- Attend online, and dig deeper with 6 months' session access post-event

1 March 2023

Sofitel Melbourne on Collins & Online

7 CPD hours

Register now
taxinstitute.com.au

23-010EVT_02/23

Recent trends: capital versus revenue

by Melanie Baker SC, CTA,
Barrister, Victorian Bar

The recent cases dealing with the characterisation of outgoings as being either on revenue or capital account serve as a reminder that the borderline cases remain as difficult to resolve as ever. Although these cases have revealed some themes in terms of how parties have sought to argue their cases, and the High Court introduced the concept of the counterfactual in *Sharpcan*, arguably the main "trend" in the recent cases is that the result often comes down to answering a prior question: what was the amount really paid for?

Introduction

The distinction between income and capital has always been a fertile area for disputes between the Commissioner of Taxation and taxpayers. On the income side, a receipt of capital is only taxable if specifically brought to account by the income tax law. However, on the deductibility side, Australia's income tax legislation has long denied the deductibility of a loss or of an outgoing of capital (or that is capital in nature),[1] leaving such expenditure to be dealt with under the depreciation provisions, the capital gains tax rules or, more recently, s 40-880 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97), if applicable.

Nonetheless, the income tax legislation has never contained any definition of "income" or "capital". Therefore, it has been left to the courts to determine their own indicia with respect to the characterisation of both receipts and expenditure.

The session that this article has been written to accompany is too short to do justice to exploring the hallmarks that the courts have identified for distinguishing between income and capital in respect of both receipts and expenditure or losses. On the basis that it is "wrong to assume exact congruence between the capital or revenue character of a sum as a receipt and its character as expenditure", and that the "assertion of such congruence or symmetry diverts attention from the fundamental inquiry",[2] I have decided to focus on recent developments in the jurisprudence dealing with the distinction between capital and revenue with respect to expenditure only.[3] I will therefore leave the principles that govern the identification of income on the receipts side, which includes the High Court's embrace of the "metaphor of severance" of the fruit from the tree in *FCT v Montgomery*[4] and *FCT v McNeil*,[5] to another presenter at another time.

That is not to say that, by focusing on the distinction in the context of expenditure, my task is any easier; rather, it is simply somewhat smaller in scope. After all, the basis for distinguishing between expenditure on revenue and capital account has long been criticised as being indefinite and uncertain, with Lord Greene MR famously saying in *Inland Revenue Commissioners v British Salmson Aero Engines Ltd*[6] that "a spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons" in many cases. Others are not so pessimistic. The plurality (French CJ, Kiefel and Bell JJ) in *AusNet Transmission Group Pty Ltd v FCT*[7] (*AusNet*) began their judgment with the following observations:

> "14. The evaluative judgment required to distinguish between expenditure on capital or revenue account is made under the guidance of approaches developed in decisions of this Court over many years. Those approaches have necessarily been expressed with a degree of generality sometimes criticised for unpredictability in the outcomes they yield. However, as Dixon J observed in *Hallstroms Pty Ltd v Federal Commissioner of Taxation*, the courts, having been given by the income tax law 'a very general conception of accountancy, perhaps of economics', have proceeded with the task 'in the traditional way of stating what positive factor or factors in each given case led to a decision assigning the expenditure to capital or to income as the case might be'.
>
> 15. The distinction between capital and revenue expenditure is readily discerned in cases close to the core of each of those concepts. A once and for all payment for the acquisition of business premises would be treated as an outlay of capital. A rental payment under a lease of the same premises would be treated as an outgoing on revenue account. The distinction is not so readily apparent in penumbral cases. They may require a weighing of factors including the form, purpose and effect of the expenditure, the benefit derived from it and its relationship to the structure, as distinct from the conduct, of a business. Some of those factors may point in one direction and some in another. Definitive and specific criteria are not, and never have been, in abundance in Australia …" (footnotes omitted)

This passage serves as a reminder that there are no absolute rules that govern characterisation of expenditure as being either on revenue or capital account. Rather, there are guiding principles which must be considered based on the facts of each particular case.

Guiding principles

The relevant guiding principles may be traced back to the criteria defined by Dixon J in *Sun Newspapers Ltd v FCT*[8] (*Sun Newspapers*), where his Honour stated:

"There are, I think, three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrency may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment."

However, in identifying these three criteria, Dixon J made it clear that the focus of the distinction between expenditure on revenue and capital is the role that expenditure plays with respect to the taxpayer's "profit-yielding structure". His Honour said (at 359–360):

"The distinction between expenditure and outgoings on revenue account and on capital account corresponds with the distinction between the business entity, structure or organisation set up or established for the earning of profit and the process by which such an organisation operates to obtain regular returns by means of regular outlay … In the same way expenditure and outlay upon establishing, replacing and enlarging the profit-yielding subject may in a general way appear to be of a nature entirely different from the continual flow of working expenses which are or ought to be supplied continually out of the returns or revenue."

Subsequently, in *Hallstroms Pty Ltd v FCT*[9] (*Hallstroms*), Dixon J (in dissent) added the following comments to his criteria for distinguishing between expenditure on revenue account and on capital account:

"[T]he contrast between the two forms of expenditure corresponds to the distinction between the acquisition of the means of production and the use of them; between establishing or extending a business organisation and carrying on the business; between the implements employed in work and the regular performance of the work in which they are employed; between an enterprise itself and the sustained effort of those engaged in it …

What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process."

Subsequent cases have therefore made it clear that, of the three criteria identified by Dixon J in *Sun Newspapers*, the nature of the advantage sought by the making of the expenditure is the principal consideration.[10] Thus, the enquiry must always begin by identifying the advantage sought in incurring the expenditure.[11] To that end, the enquiry often begins with the question of what the money was really paid for, before then asking whether the asset is, in truth and substance, a capital asset.[12] Both questions may be answered by reference to the transaction documents, but the court is not limited to the transaction documents and may, in appropriate circumstances, examine the wider context and surrounding circumstances to determine what the expenditure is calculated to effect from a practical and business point of view.[13]

Of course, the statements of principle set out above do not necessarily assist in illuminating how the law should be applied in the borderline cases. As Edmonds J[14] stated in *FCT v Ashwick (Qld) No. 127 Pty Ltd*[15] in respect of a similar summary of principle:

"So much may be accepted, although there are nuances which come out of the labyrinth of cases that have been decided by the courts of this country over nearly 100 years of federal income tax legislation on the capital/income distinction in the context of the construction and application of s 51(1) (s 8-1) that, arguably, give lie to its accuracy or, at best, entitle one to criticise it as an over-simplification. More importantly, as a statement of principle it takes us nowhere. As has often been said of the distinction, it is not so much the principles that are in doubt, but the application of those principles to a given set of facts."

"Recent trends"

An analysis of the basic principles invites the question: if the guiding principles are established, what then is a "recent trend" in the case law dealing with the distinction between capital and revenue in the context of expenditure? It is an interesting question because it strikes me that, with the possible exception of the High Court's use of a "counterfactual" analysis in *FCT v Sharpcan Pty Ltd*[16] (*Sharpcan*) (Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ), not much has changed from the expression of the guiding principles in *Sun Newspapers*. The real trends may be found in how the guiding principles are applied and, in particular, how parties have sought to argue their cases by reference to them.

In that regard, if one begins with the High Court's decision in *AusNet* in 2015 and examines the subsequent cases dealing with the distinction between revenue and capital, arguably, three principal themes emerge in terms of how parties have sought to argue their cases:

1. many parties have sought to reason by analogy, by seeking to assimilate their fact pattern with previous cases in which expenditure was found to have been incurred on revenue account;
2. there appears to be a number in cases in which arguments based on substituted expenditure, or whether they can be expressed in terms of an economically equivalent income stream, have been invoked in an attempt to influence characterisation; and
3. there is an open question as to whether the way in which an outgoing was calculated might be relevant to answering the question as to what the expenditure is incurred for, and what it is calculated to effect from a practical and business point of view.

It might be that, although these themes are present in recent cases, none of them are, in truth, particularly

"recent". The first – reasoning by analogy – was actively endorsed by Lord Denning MR in *Heather (HM Inspector of Taxes) v P-E Consulting Group Ltd*[17] as a potential way of overcoming the difficulty of characterisation:

> "The question – revenue expenditure or capital expenditure – is a question which is being repeatedly asked by men of business, by accountants and by lawyers. In many cases the answer is easy; but in others it is difficult. The difficulty arises because of the nature of the question. It assumes that all expenditure can be put correctly into one category or the other; but this is simply not possible. Some cases lie on the border between the two; and this border is not a line clearly marked out; it is a blurred and undefined area in which anyone can get lost. Different minds may come to different conclusions with equal propriety. It is like the border between day and night, or between red and orange. Everyone can tell the difference except in the marginal cases; and then everyone is in doubt. Each can come down either way. When these marginal cases arise, 8 then the practitioners – be they accountants or lawyers – must of necessity put them into one category or the other; and then, by custom or by law, by practice or by precept, the border is staked out with more certainty. In this area, at least, where no decision can be said to be right or wrong, the only safe rule is to go by precedent. So the thing to do is search through the cases and see whether the instant problem has come up before. If so, go by it. If not, go by the nearest you can find."

Similarly, in *FCT v Montgomery*,[18] a case which was concerned with the question of whether a lease inducement paid by the lessor of a property was received by the lessee as a revenue or capital receipt, the majority of the High Court (Gaudron, Gummow, Kirby and Hayne JJ) observed at [64] that, because the distinction between income and capital has been considered so often by the courts, attempts to classify a particular receipt often proceed by seeking to draw analogies with decided cases. That approach was said to be "helpful", but the majority also cautioned that "resort to analogy should not be permitted to obscure the essential nature of the inquiry", which in the case of determining whether a receipt should be treated as income was to determine whether the receipt was income according to ordinary concepts.

The arguments about substituted expenditure bring to mind the observation of Gageler J in *AusNet* at [74] that, in characterising expenditure from a practical and business perspective, it is not relevant to "inquire into whether the expenditure is similar or economically equivalent to expenditure that might have been incurred in some other transaction".

There is also some echo in the new arguments about substituted expenditure of the old argument that expenditure that is incurred with the purpose of increasing trading profits should be treated as being on revenue account. The High Court has previously cautioned against attempting to use some kind of "purpose of the expenditure" test in *Mount Isa Mines Ltd v FCT*[19] (*Mount Isa*) as an alternative to characterising expenditure by reference to established principles.[20] Specifically, in footnote 45 in *Mount Isa*, a case that concerned expenditure incurred in demolishing obsolete equipment, the High Court referred to a passage in the speech of Lord Edmund-Davies in *Tucker v Granada Motorway Services Ltd*[21] in which his Lordship made the observation that the "purpose of the expenditure" test too readily invites the answer that the purpose is to increase trading profits. In the relevant passage of *Tucker* referred to by the High Court in *Mount Isa*, Lord Edmund-Davies said (at 693):

> "To apply that as the sole or principal test is unsatisfactory, for, as the respondents have rightly submitted, the purpose of any payment will generally be to improve a company's trading profits, even if the purchase is of an obvious capital asset. This could lead to the conclusion (contrary to many longstanding decisions in the field) that the purchase of any asset must be regarded as involving revenue expenditure if it be made in order to reduce recurrent expenditure charged against profits ..."

It is clear from that quote that Lord Edmund-Davies left open the possibility that, although the "purpose of the expenditure" should not be treated as the sole or principal test, there might nonetheless be a role for that type of analysis as part of the task of characterising expenditure. However, it appears that it is simply a matter to be evaluated as part of applying the guiding principles set out in *Sun Newspapers* and it should not be elevated beyond that point. Therefore, it falls within the broader category of matters that may have some relevance, but which are not determinative – like how the parties describe a payment,[22] the accounting treatment of expenditure,[23] non-refundability[24] and, in some instances, how the amount was calculated.[25]

The skill therefore is to be able to identify when arguments based on analogies with previously decided cases, or by reference to substituted expenditure, methods of calculation and other matters, are likely to be useful analytical tools, as opposed to being likely to distort the inquiry with respect to characterising expenditure.

The recent High Court cases

AusNet

One might have thought that the flow of cases dealing with the characterisation of expenditure as being either on capital or revenue account might have been stemmed somewhat after the High Court considered the issue in 2015 in *Ausnet*. Broadly speaking, *AusNet* concerned the deductibility of certain payments made by the taxpayer on its acquisition of the assets of a state-owned electricity transmission company (called Power Net Victoria or "PNV"), which included a transmission licence. In addition to paying the purchase price for the assets, AusNet also agreed to pay certain statutory charges imposed on PNV under the *Electricity Industry Act 1993* (Vic) in respect of the transmission licence transferred to AusNet. The charges

were to be paid directly to the state Treasurer in quarterly instalments over three years.

In *AusNet*, the payments were held to be on capital account, and therefore not deductible. However, in reaching that conclusion, the plurality began with the observations set out above, recognising the difficulty in characterising expenditure as either on capital or on revenue account that exists in borderline (or "penumbral") cases.

There was no question in *AusNet* that it was necessary to consider the three matters set out by Dixon J in *Sun Newspapers* (*AusNet* at [22]). However, although the High Court restated the principles set out in *Sun Newspapers*, the decision in *AusNet* ultimately turned on the prior question of what the payments were made for – citing the "real question" identified by Gibbs ACJ in *SA Battery Makers* at 655 (*AusNet* at [23]).

On the one hand, if the payments could be viewed as consideration for the acquisition of a business, that would have weighed heavily in favour of its character as a capital outlay. But on the other hand, if the payments were instead licence fees, that might reasonably have been seen to favour a revenue character, based on, among other things:

- *Citylink* – a case in which concession fees paid under a licence agreement for a right to operate the road system and to collect tolls (ie a right to use capital assets) were held to be on revenue account; and
- *Cliffs International Inc v FCT*[26] – a case which involved royalty payments on iron ore mined by the taxpayer that were paid to the vendors of the shares acquired by the taxpayer in a mining company that held certain tenements, in which the payments were held to be on revenue account notwithstanding that they formed part of the consideration for the purchase of shares.

Ultimately, the majority (Nettle J in dissent) rejected the taxpayer's arguments and distinguished *Cliffs International* and *Citylink*. Gageler J rejected the taxpayer's arguments at [76]–[77] in the following terms:

> "76. The question cannot be answered, as AusNet seeks to have it answered, either by attempting to liken the expenditure to a simple case of a payment of land tax or an adjustment for rates made on the settlement of a contract for the sale of land, or by attempting to liken the expenditure to the contractual payments which gave rise to the division of opinion in the peculiar circumstances considered in *Cliffs International Inc v Federal Commissioner of Taxation* or in *Federal Commissioner of Taxation v Citylink Melbourne Ltd*.
>
> 77. Those cases can be taken to illustrate the negative proposition that the fact that a promise to make the expenditure formed part of the consideration for the acquisition of an asset does not foreclose the question of whether the expenditure when made is calculated to effect the acquisition of the asset. Other considerations - including the frequency of the expenditure, the circumstances in which it is to be paid and the method by which it is to be calculated – might yet lead to the conclusion that the expenditure when made is more appropriately to be characterised from a practical and business perspective as referable to the subsequent use of the asset or to some other circumstance." (footnotes omitted)

The plurality similarly rejected the taxpayer's attempt to characterise the payments having regard to the reason why they were imposed. The plurality rejected that approach on the basis that the question is to be asked from AusNet's perspective (at [66]):[27]

> "Undue emphasis on the purpose of the charges, however, is apt to direct the inquiry away from the critical question – from AusNet's perspective what was the character of the advantage sought? – or, as Fullagar J put it in *Colonial Mutual Life*, what was the money really paid for? The answer to that question has already been reached. AusNet did not pay the charges in order to reimburse the State for excess revenue it might generate as licence holder. From a practical and business point of view, the assumption of the liability to make the expenditure was calculated to effect the acquisition of the Transmission Licence and the other assets the subject of the Asset Sale Agreement …"

Sharpcan

Given *AusNet* was decided by the High Court in 2015, it was unusual to see the issue of capital versus revenue return to the High Court as soon as it did in *Sharpcan* in 2019, and yet the High Court took the opportunity to consider the issue again by granting special leave to appeal in respect of the decision of a majority of the Full Federal Court in *FCT v Sharpcan Pty Ltd*[28] (Greenwood ACJ and McKerracher J, Thawley J in dissent). However, in *Sharpcan*, the issue was not just what were the payments made for, but also one of characterisation once the advantage sought was identified.

By way of background, the trustee of the Daylesford Royal Hotel Trust had purchased the business of the Royal Hotel in Daylesford from Tattersalls in 2005. The taxpayer was the sole beneficiary of the Daylesford Royal Hotel Trust.

After the purchase, the trustee ran the business of the hotel (accommodation, pub and gaming business), but Tattersalls continued to own and operate the 18 gaming machines.

Subsequently, in 2008, the Victorian government announced a new regulatory regime which meant that Tattersall's gaming operator licences would not be renewed when they expired in 2012. When the government put the gaming machine entitlements (GMEs) up for auction, the trustee bid $600,300 for 18 new entitlements. Each entitlement allowed the trustee to operate one gaming machine for 10 years at the hotel.

The trustee was to pay the cost in instalments over the life of the gaming machine entitlements. There was evidence in the case that the trustee had determined the amount it bid on the basis of the likely revenue to be derived from operating the gaming machines over the 10-year life of the entitlements.

The taxpayer had argued that the outgoings were incurred on revenue account and were therefore deductible under s 8-1 ITAA97 because they were incurred to enable the trustee to continue carrying on substantially the same business in substantially the same way. In the alternative, the taxpayer relied on s 40-880 ITAA97 to claim a deduction for 1/5th of the price.

The taxpayer succeeded before the tribunal and then before a majority of the Full Court of the Federal Court. The majority of the Full Federal Court equated the purchase price of the GMEs to the payments made by BP Australia to service station proprietors to ensure that they would stock only BP Australia products under what was described as a "tying" arrangement, which were held to be deductible in *BP Australia Ltd v FCT*[29] (*BP Australia*).

The High Court allowed the appeal, concluding that the GMEs were a "capital asset of enduring value acquired by the Trustee as the means of production necessary for the Trustee to conduct gaming activities following expiration of the Trustee's arrangements with Tattersall's" (*Sharpcan* at [17]). Relevantly, in characterising the expenditure, the High Court again focused on the trustee's purpose in paying the purchase price of the GMEs at [17]:

> "… It was not to the point that the Trustee intended to recoup the purchase price of the GMEs over time out of every day's trading. It was not to the point that the purchase price of the GMEs may have reflected the economic value of the income stream expected to be derived from gaming. It was not to the point that the Trustee's hotel business was an integrated business which would have been significantly prejudiced and possibly failed if the Trustee had not purchased the GMEs. And it was not to the point that the reason the Trustee determined to acquire the GMEs was the change in the law that made it necessary for a venue operator to own GMEs rather than dealing through Tattersall's. *The Trustee's purpose in paying the purchase price of the GMEs was to acquire, hold and deploy the GMEs as enduring assets of the hotel business for the purpose of generating income from gaming. There can be no question that the purchase price was incurred on capital account.*" (emphasis added)

After deciding what the expenditure had been incurred for, the High Court once again restated the relevant principles for determining whether expenditure should be characterised as being on revenue or capital account at [18]:

> "Authority is clear that the test of whether an outgoing is incurred on revenue account or capital account primarily depends on what the outgoing is calculated to effect from a practical and business point of view. Identification of the advantage sought to be obtained ordinarily involves consideration of the manner in which it is to be used and whether the means of acquisition is a once-and-for-all outgoing for the acquisition of something of enduring advantage or a periodical outlay to cover the use and enjoyment of something for periods commensurate with those payments. *Once identified, the advantage is to be characterised by reference to the distinction between the acquisition of the means of production and the use of them; between establishing or extending a business organisation and carrying on the business; between the implements employed in work and the regular performance of the work in which they are employed; and between an enterprise itself and the sustained effort of those engaged in it. Thus, an indicator that an outgoing is incurred on capital account is that what it secures is necessary for the structure of the business.*" (footnotes omitted and emphasis added)

In *Sharpcan* at [19], the High Court found that the GMEs were a capital asset of enduring value as it was the very means of production necessary for the trustee to conduct gaming activities. It was a legal requirement for the trustee to hold the GME, and without the GME, it was unlawful for the trustee to continue operating the business. The High Court was clear that it did not consider the circumstances surrounding the purchase of the GMEs and that it only considered the purpose of the acquisition of the GMEs, which was ultimately for the generation of income.

In finding that the rights to use the GMEs were an enduring advantage, the High Court distinguished *Citylink* on the basis that the concession agreement in issue in that case had been a licence agreement to use capital assets for the limited period of the concession (*Sharpcan* at [21]). This was in contradistinction to the purchase price payable in instalments for the GMEs (*Sharpcan* at [22]). The fact that there might have been some risk of early termination of the GMEs did not change that analysis (*Sharpcan* at [25]).

As to the taxpayer's argument that it was necessary to purchase the GMEs to deal with an obstacle to the continued trade of their integrated hotel business as a result of the change in the regulatory environment, the High Court posited a counterfactual test rather than a historical analysis in *Sharpcan* at [33]:

> "As has been observed, the determination of whether an outgoing is incurred on capital account or revenue account depends on the nature and purpose of the outgoing: specifically, whether the outgoing is calculated to effect the acquisition of an enduring advantage to the business. *And the identification of what (if anything) is to be acquired by an outgoing ultimately requires a counterfactual, not an historical, analysis: specifically, a comparison of the expected structure of the business after the outgoing with the expected structure but for the outgoing, not with the structure before the outgoing.* Other things being equal, it makes no difference whether the outlay has the effect of expanding the business or simply maintaining it at its present level. If a once-and-for-all payment is made for the acquisition of an asset of enduring advantage which, once acquired, forms part of the profit-earning structure of the business, the payment is incurred on capital account. (footnotes omitted and emphasis added)

Interestingly, the High Court rejected several arguments based on the economic value of the income stream, that is, it was not held to be relevant that the trustee had calculated what it was prepared to bid for the GMEs on the basis of

a projection of the likely return from the GMEs: "… the purchase price for the GMEs was a lump sum paid for the acquisition of the GMEs which was payable regardless of the amount of income that might be earned from them" (*Sharpcan* at [27]). Instead, the "proper analysis" of what the acquisitions of the GMEs was calculated to effect from a practical and business point of view "required taking account of the legal rights and obligations thereby created and their expected consequences for the trustee's business" (*Sharpcan* at [27]).

Similarly, an argument that suggested that the price of the GMEs was "in effect equivalent to a stream of regular and recurrent payments over the lifetime of the GMEs for the use of them throughout that period" did not assist because there is nothing in principle or authority that supports the idea that it is relevant that the present discounted value of the income stream that an asset was expected to generate is relevant, subject to one statement made by Lord Pearce in *BP Australia* which was said to be "problematic" (*Sharpcan* at [29]). After explaining how Lord Pearce's dictum should be understood, the High Court clarified that: "A taxpayer's acknowledgment that a capital outlay can be expressed in terms of an economically equivalent projected stream of income payments does not convert the capital outlay into a revenue outgoing" (*Sharpcan* at [31]).

Sharpcan distinguished the decision in *BP Australia*. At [38], the High Court identified the "main thrust" of their Lordship's analysis in *BP Australia* as being based on the following five considerations:

1. that the tying arrangements were not of such duration as to indicate that the ties were a structural solution;
2. that the payments were made to particular customers to secure their particular custom;
3. that the benefit of each payment to BP Australia was to be used in the continuous and recurrent struggle to get orders and sell petrol;
4. that, although not strictly "bundles of orders", the agreements were the basis of orders and made orders inevitable; and
5. that, for a durable company operating in the wholesale petroleum market after the rapid change from multi-brand franchises to solo-brand sites, the payments were essentially recurrent.

The High Court therefore stated in *Sharpcan* at [39]:

> "In the result, *BP Australia* is perhaps best understood as a decision that, where an oil company paid particular customers on a recurrent basis to induce those customers to buy quantities of a product which the oil company sought to sell to those customers on a recurrent basis, the payments were an expense incurred on revenue account in gaining or producing sales and, therefore, deductible."

In contradistinction, the High Court characterised the acquisition of the GMEs as a significant, one-off, structural change to the way the business operated, and would secure for the trustee the ability to conduct gaming for a period of 10 years (*Sharpcan* at [40]). This was not expenditure which would need to be repeated over and again as a necessity of trade, as distinct from the situation in *BP Australia*. The benefit of the trustee of purchasing the GMEs was also not analogous to "bundles of orders" from customers seeking to play the gaming machines. Thus, the benefit from the purchase of GMEs was the acquisition of an enduring asset as part of the profit-earning structure of the trustee's business from which to derive gaming income.

Finally, the High Court rejected an argument, which was also apparently based on *BP Australia*, that the fact that the need to purchase the GMEs was "foisted" on the trustee was somehow relevant to the payments being on revenue account (*Sharpcan* at [41]). This argument was said to be "misplaced" because the real question was whether the asset in respect of which the expenditure was incurred was acquired as part of the profit-earning structure of the business.

The recent Full Federal Court cases

Watson

Watson as trustee for the Murrindindi Bushfire Class Action Settlement Fund v FCT[30] (*Watson*) was concerned with whether the costs incurred by the scheme administrator of the Murrindindi Bushfire Class Action Settlement Distribution Scheme in administering the scheme were deductible. The case is principally concerned with the positive limbs of s 8-1 ITAA97. However, the question of whether the administration costs were on revenue or capital account also arose. Two points emerge in support of the Full Court's conclusion that the costs were on capital account because they were incurred in the course of effecting the distribution of the settlement sum to claimants entitled to share in the settlement sum (*Watson* at [48]):

1. the legal rights and obligations cannot be ignored when answering the question of what outgoings are calculated to effect from a practical or business point of view, meaning that the purpose and terms of the distribution scheme itself were relevant (*Watson* at [45]); and
2. the character of the administration costs was not to be determined by the source of the funds out of which the costs were paid. As such, it was irrelevant that they were paid out of interest (*Watson* at [46]).

Healius

FCT v Healius Ltd[31] (*Healius*) was concerned with the deductibility of lump sum payments made by Idameneo (one of the subsidiaries of Primary Health Care Ltd which subsequently changed its name to Healius Ltd) to medical practitioners (principally general practitioners) during the 2003 to 2007 income years.

Idameneo had paid 505 lump sum amounts to medical practitioners during the 2003 to 2007 income years, during a period of significant growth of Idameneo's business which involved establishing new medical centres in New South Wales and other states, and effectively changing its

business model (*Healius* at [9]–[10]). The number of medical centres operated by Idameneo increased from 17 to 35 over the five-year period (*Healius* at [3] and [38]).

The payments by Idameneo were made on each practitioner contracting with Idameneo to move their existing practice to a new medical centre established and operated by Idameneo, to practice from the centre for five years, and to pay Idameneo a service fee for providing them with premises and administrative and support services. The agreement between Idameneo and each practitioner described the payments as being for the sale of the practitioner's "goodwill" to Idameneo, although, as the learned primary judge found, there was in fact no transfer of the practitioner's goodwill to Idameneo.[32] The 505 payments were individually negotiated with practitioners and made regularly throughout the assessment period.

Idameneo was successful at first instance in arguing that it made the payments principally to secure medical practitioners as customers for its business of providing facilities and services to medical practitioners based on an analogy with *BP Australia*, the case that involved the deductibility of payments made to service station operators under "tying" arrangements. The primary judge's decision in *Healius* at first instance was overturned on appeal, principally having regard to the nature of Idameneo's business, the role the agreements played in that business, and the commitments made by the medical practitioners under the agreements, which relevantly included agreeing to a restraint of trade.

A summary of the *Healius* decision is set out at [12]–[15] of the Full Court's judgment:

> "12 For the following reasons, and with due respect to the careful analysis of the primary judge, the Commissioner has demonstrated that the Lump Sum payments were capital outgoings. That is principally because they were not simply payments to secure medical practitioners as customers who would then pay to use the facilities and support services provided by the Centre. Rather, they were payments made for the practitioner (a) to cease operating an existing practice (or otherwise practising independently of the Centre); (b) to commence trading as part of the Centre by adopting Idameneo's required mode of practice; and (c) during the arrangements as well as thereafter to accept a restraint on establishing a medical practice that would compete with the Centre.
>
> 13 Therefore, the arrangements with practitioners for which they were paid Lump Sums were not directed to simply securing each practitioner as a customer of Idameneo. *The arrangements were essential to the operation of the Centres because they enabled Idameneo to control the way those medical practitioners conducted their practices from the Centres in all significant respects save for the professional judgments to be made in providing medical services. They enabled the Centres to be operated in a particular manner that was planned and implemented by Idameneo in order to attract patients to the Centres. The arrangements also afforded substantial protection from competition for the business conducted by Idameneo from the Centres by preventing medical practitioners from conducting their practices in close proximity to the Centre for a number of years after they ceased to practice from a Centre.* Significantly, the restraint was not concerned with whether those practitioners purchased services from a supplier other than Idameneo, but rather whether they offered medical services to patients in proximity to the Centre.
>
> 14 *The arrangements enabled Idameneo to earn ongoing revenues that were determined on the basis of a percentage (usually 50%) of the fees rendered by medical practitioners conducting practices at its Centres. As such they were the means by which Idameneo profited from the adoption of a mode of practice by medical practitioners at its Centres that formed an essential part of Idameneo's business structure, a mode of practice that was instigated and directed by Idameneo.* Further, commitments from the medical practitioners of the requisite character needed to be in place from the outset in order for each Centre to be opened and operated. The connections then developed by the business conducted from the Centre with patients who sought medical services at the Centre were protected by the restraint. The Lump Sum amounts were paid to put in place that structure and they thereby created and protected the goodwill in the Centres that was associated with the operation of the Centres in the manner required by Idameneo.
>
> 15 *Fundamentally, the business of operating the Centres depended upon arrangements whereby practitioners were committed to adopting Idameneo's required mode of practice and, for a number of years (up to eight), were unable to establish a practice that would compete with the provision of medical services from the Centre.* Securing the commitment of medical practitioners to conduct their practice in the manner required by Idameneo was an essential part of Idameneo's business. Together with the physical assets comprising each Centre, those commitments formed the commercial infrastructure that was then deployed by Idameneo to earn its revenue by attracting patients to its Centres. This was facilitated by the arrangement with each practitioner by which the ongoing payment to be made to Idameneo was a function of the fees rendered to patients. Idameneo's revenue was not confined to the payment of a licence fee for the provision of a place to practise and service fees for reception and other services at agreed rates. Rather, the arrangements made required each medical practitioner to pay an amount determined by reference to the revenue earned by the medical practitioner. Consequently, Idameneo's revenue was a function of the success of each Centre in attracting patients. Its commercial success was linked to whether the mode of practice that it required the medical practitioners at its Centres to adopt was successful in attracting patients. It then protected that commercial interest by the restraint that it required practitioners at the Centre to accept that would restrict where those practitioners could provide medical services but left them entirely free as to the arrangements they

might make for the provision of practice services." (footnotes omitted and emphasis added)

The distinction with *BP Australia* was considered in *Healius* at [118]–[126]. The Full Court observed at [124] that it was important in the Privy Council's analysis in *BP Australia* that the tying payments had been found to be part of the cost of performing income-earning operations, rather than amounts paid to "create, enlarge or acquire the business structure of BP" because of its finding about the nature of the market. Making payments of that type were "the form in which oil companies competed for the custom of service station owners". The Full Court found that the same could not be said of the payments made in *Healius* because sales of services to practitioners could be achieved without the practitioners assuming all of the commitments set out in the sale deed and practitioner contract.

Other attempts to draw analogies with cases in which outgoings were found to be on revenue account and therefore deductible were also dismissed. For instance:

- *National Australia Bank Ltd v FCT*,[33] which dealt with a payment made by National Australia Bank (NAB) to the Commonwealth to secure the exclusive right for 15 years to be the lender under a housing scheme for the Australian Defence Force, was distinguished on the basis that the payments made in that case did not secure anything that might be added to the framework of NAB's business to allow it to lend money (*Healius* at [131]). In contradistinction, Idameneo needed to secure the arrangements with medical practitioners by which the medical practitioners would commit to its business model; and
- *Tyco Australia Pty Ltd v FCT*,[34] which concerned payments made to secure assignments of three-year customer service agreements procured by Tyco's authorised dealers that were found to be directly referable to securing the customer and therefore on revenue account, was similarly distinguished in *Healius* at [136], where the court stated:

  "Here, for reasons already given, the payments made did not simply secure the opportunity for Idameneo to be able to supply services to the medical practitioners for the term of the agreements. Under the arrangements made, Idameneo secured much more than the custom of the practitioners. Any resolution of the question whether the Lump Sums were paid for the opportunity to secure their custom must take account of the significance of the other commitments secured by the arrangements."

Mussalli

The issue for determination in *Mussalli v FCT*[35] was whether the trustee for the Mussalli Family Trust (MFT) was entitled to deduct under s 8-1 ITAA97 certain upfront payments that it made to McDonald's Australia Ltd (MAL) pursuant to what was described as an "option to prepay rent" under:

- the letters that offered an opportunity to enter into a lease and licence to operate a McDonald's Family Restaurant in respect of four restaurants referred to as the "Group One restaurants"; or
- cl 2.02 of the lease comprising part of the "full lease and licence" executed by the parties in respect of three further restaurants, which were referred to as the "Group Two restaurants".

Each franchisee entered into a full lease and licence to operate a McDonald's restaurant, with licence, service and system fees, as well as contributions to marketing. In addition, the premises were leased to the franchisee, with the offer stating that that there would be a base rent amount plus a percentage rent amount, calculated by reference to gross monthly sales — and the percentage rent would be either a higher or lower figure depending on whether the franchisee exercised an option that was variously described as a "prepayment" or an "option to reduce the percentage rent".

The Group One restaurants were never leased to the franchisee at the higher percentage rent if the franchisee opted to pay the upfront lump sum amount to reduce the percentage rent. In contrast, the Group Two restaurant leases were executed as part of the full lease and licence, and then the upfront payment was made pursuant to an option in the lease.

Broadly speaking, at first instance in *Mussalli v FCT*[36] (*Mussalli PJ*), the applicants' emphasis had been on characterising the up-front payments as prepaid rent, meaning that a significant part of the case at first instance had been argued by reference to the question of whether the upfront payments truly answered that description.

Ordinarily, rent is on revenue account because it is recurrent expenditure paid in respect of an obligation that accrues periodically in the process of operating a business to secure the ongoing use of the business premises. That is not to deny that an amount that is properly understood to be "rent" can be prepaid. However, the learned primary judge concluded that the upfront payments under consideration in *Mussalli PJ* were not prepayments of rent, properly understood, because it could not be said that the upfront payments related in any way to an obligation to pay rent that accrued periodically under the transaction documents. No obligation to pay the higher amount of percentage rent periodically ever existed in respect of the Group One restaurants, and the obligation was extinguished by the exercise of the option in respect of the Group Two restaurants.

Her Honour concluded that the payments were made for an enduring advantage in the form of a right to pay the lesser rent for the term of the lease and licence, and most likely longer (*Mussalli PJ* at [115]). This gave the MFT a preferable profit-making structure (*Mussalli PJ* at [118]) because MFT made the upfront payments to secure a right to operate each restaurant on better terms as to rent than would otherwise have been the case (*Mussalli PJ* at [115], [117] and [123]). That is, the MFT secured a "preferable business structure" by making the upfront payments. Relevantly, the primary judge reached that conclusion

irrespective of whether the transaction documents were considered in isolation or in the context of the supporting circumstances, either in isolation from or together with the accounting evidence (*Mussalli PJ* at [115] and [124]). The preferable business structure was the right to operate the relevant McDonald's restaurant under the single integrated arrangement implemented by the relevant full lease and licence on better terms as to rent (*Mussalli PJ* at [92], [93], [115] and [117]).

On appeal, the appellants largely embraced the primary judge's finding in *Mussalli PJ* at [115] that the making of the upfront payments had the *effect* of negating or extinguishing any obligation to pay the higher percentage rent, but then argued (among other things) in favour of a principle that a payment made in substitution for a revenue outgoing was itself a revenue outgoing.

However, the upfront payments were found not to have been made in substitution for future revenue outgoings.[37] That was because they were found not to have been made to secure the right to occupy the premises and they had no relationship with the period over which any benefit associated with them was to be enjoyed. Rather, the Full Court held that the upfront payments were made to extinguish any obligation to pay the higher percentage rent that would have been payable if the turnover rent exceeded the base rent,[38] meaning that it was more accurate to describe the upfront payments as possibly obviating or removing the need for the future revenue outgoings.[39] Therefore, the argument about substituted expenditure did not arise on the facts.

In any event, the Full Court held that there is no general principle that a payment that substitutes future revenue outgoings will always be a revenue outgoing.[40] Thawley J stated the position at [111]–[112] as follows:

> "111. It may be accepted that a payment which is made to put an end to an ongoing revenue expense would, absent other purposes associated with the expenditure often itself be a revenue expense: *Anglo-Persian Oil Company Ltd v Dale* [1932] 1 KB 124 at 139; *W Nevill & Company Ltd v Federal Commissioner of Taxation* (1937) 56 CLR 290. That principle has no application to the present facts.
>
> 112. It may also be accepted that a lump sum payment made in substitution for future revenue expenses would, absent other purposes for incurring the lump sum payment, often constitute a revenue expense: *Federal Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199 at 218-219; *Hancock v General Reversionary & Investment Company Ltd* [1919] 1 KB 25. Again, that principle has no application to the present facts."

There was something of a tension in the appellants' case with respect to the substituted expenditure point in *Mussalli*. Although the appellants sought to argue that the upfront payments were effectively commutations of the higher amount of rent paid in substitution for the recurrent outgoings, they also sought to argue that the expert accounting evidence with respect to how MAL had calculated the amounts was irrelevant – despite the fact that they had got their own expert to answer that evidence.

The controversy was this: the character of the advantage sought to be obtained by a taxpayer in incurring expenditure is to be determined objectively from the perspective of the entity that incurred the expenditure. However, based on the facts found by the primary judge, the amount of each upfront payment was unilaterally determined by MAL.

Although not a matter of central importance in the Full Court's judgments, the primary judge's conclusion about the way in which the payment had been calculated (based on the expert evidence) was taken into account as an objective fact that formed part of the wider commercial context, which reinforced the conclusion that the upfront payments were not substituted expenditure and that the advantage sought to be obtained by making the upfront payments was a preferable business structure. However, it was apparent that the method of calculation was not determinative of the conclusion that the upfront payments were on capital account; both the primary judge in *Mussalli PJ* and the Full Court in *Mussalli* were able to conclude that the payments were on capital account based on an analysis of the role that the payments played in the MFT's profit-making structure.[41]

Advanced Holdings

There were a number of issues in dispute in *Advanced Holdings Pty Ltd as Trustee for The Demian Trust v FCT* (*Advanced Holdings*),[42] including issues relating to the failure to follow relevant procedures for the removal and replacement of the trustee in a unit trust set out in the unit trust's deed. However, the relevant issue for present purposes concerned the deductibility of amounts paid to discharge refinanced loans – noting that, as a threshold issue, the relevant appellant in *Advanced Holdings* was trying to bring themselves within the trading stock exception to the general principle that borrowings and repayments of loans are ordinarily on capital account, unless made by a finance company in the ordinary course of their business or by a trading company to purchase trading stock.[43]

In *Advanced Holdings*, Lewisham Estates Pty Ltd (LEPL), in its capacity as trustee of the Lewisham Estates Trust, was a property developer. It was also an entity that was part of a group of companies and trusts associated with Mr Charbel Demian, which was known as the "Demian Group".

LEPL, in its capacity as the trustee of the Lewisham Estates Trust, was the registered proprietor of land known as "the Lewisham Properties". Before the global financial crisis (GFC), the development of the Lewisham Properties was originally undertaken solely by LEPL as trustee of the Lewisham Estates Trust. However, following the GFC, LEPL sought financial support from Abacus Funds Management Ltd (Abacus). Consequently, LEPL, personally and as trustee, and two other entities, entered into a facility agreement with Abacus for finance up to a $20m limit. Under the facility agreement, the purpose to which the funds could be applied was limited to repaying "amounts owing by the Borrower or secured against property of the Borrower".

The evidence was that some portion of the finance made available by Abacus under the facility agreement was used to repay LEPL's borrowings from NAB and Capital Finance Ltd (Capital Finance).

At the same time as the parties entered into the facility agreement, LEPL, another entity and Abacus entered into a call option agreement that effectively granted Abacus an option to acquire a 50% joint venture interest in the development of all but one of the Lewisham Properties. Abacus subsequently exercised that option, and as a result the Lewisham Properties were developed and sold by a joint venture between Abacus as trustee of the Abacus Mortgage Fund and LEPL as trustee of the Lewisham Estates Trust.

In addition, the parties entered into a payment deed, which bound LEPL to apply the proceeds of sale from the Lewisham Properties to the repayment of its debt under the Abacus facility, as well as the debts of the other entities in the Demian Group owed to Abacus.

Subsequently, in September 2012, following the first sale of the Lewisham Properties, LEPL as trustee of the Lewisham Estates Trust paid the net proceeds of sale, of approximately $48m, to Abacus. The proceeds were allocated in such a way that the first $24m repaid the debt owed by LEPL under the facility with Abacus, the second amount of $2m was paid to Abacus to effectively cancel Abacus' call option over the Lewisham Properties, and the remaining amount of approximately $21m was applied by Abacus to discharge the debts owed to it by other entities in the Demian Group. The second and third amounts were referred to as the "excess amounts" as they exceeded the amounts in fact owed to Abacus under the facility agreement.

In so far as is relevant, the issue in dispute was whether LEPL was entitled to a deduction for that part of the excess amount that was equal to the principal drawn down by LEPL under the facility with Abacus to discharge the original loans with NAB and Capital Finance. LEPL contended that, to that extent, the excess amount was used to acquire trading stock (ie the Lewisham Properties) and therefore was on revenue account. However, the Full Court upheld the learned primary judge in rejecting that contention for four reasons:

1. the evidence did not establish that the original borrowings by LEPL to acquire the Lewisham Properties were on revenue account. It was not enough that the funds were used to purchase trading stock; rather, the borrowings had to be shown to be an incident of the commercial operations by which the taxpayer acquired trading stock, and it had not demonstrated that to be the case (*Advanced Holdings* at [101]);
2. in any event, the funds drawn down under the Abacus facility were not a mere substitution of the loans to purchase the Lewisham Properties, but rather were borrowings made to consolidate and restructure the capital and profit-earning structure of the Demian Group as a whole. The Full Court therefore concluded at [102]: "Whatever the character of the original borrowings may have been to purchase the Lewisham Properties, borrowings made under the Abacus facility were not on revenue account";
3. the repayment of the excess amount which related to borrowings of other entities of the Demian Group was wholly separate from LEPL's acquisition of trading stock, and it did not have a demonstrated nexus with income-earning activities (*Advanced Holdings* at [103]); and
4. in any event, the taxpayer had not proven its basis for apportionment for quantifying its claim to a deduction (*Advanced Holdings* at [104]).

Clough

Two employee incentive schemes were operated in *Clough Ltd v FCT* (*Clough*):[44] a share option scheme and an incentive scheme which entitled employees to choose either cash or shares. At the relevant time, the employees had rights under these schemes which had not yet vested.

The majority owner of Clough wanted to buy out the minority shareholding, making Clough a wholly owned subsidiary. After some negotiations, a scheme of arrangement was proposed which involved terminating the unvested rights of the employees under the scheme. The scheme was approved by members and implemented, and a subsidiary of Clough made payments totalling $15m to various employees who had agreed to cancel their rights.

In short, the taxpayer argued that the employee share option scheme and employee incentive scheme were intended to incentivise and reward senior employees for their performance and tenure. It followed that the payments to cancel the related share options and rights were incurred, or necessarily incurred, in the course of producing assessable income because they discharged the taxpayer's obligation to remunerate eligible employees under these schemes.

The judgment of Thawley J, with whom Kenny and Davies JJ agreed, deals with both the positive and negative limbs of s 8-1 ITAA97, with Thawley J capturing both the nub of the issue and his Honour's conclusion in *Clough* at [18]–[19]:

> "18. Questions of characterisation are ones about which minds often differ. *The difficulty this case presents is that the payments were made both to facilitate a change in control of Clough and also to honour legal or commercial obligations to employees arising out of the fact that Clough had granted options and rights to its employees in the course of running its business and for the purpose of rewarding and incentivising those employees. For the reasons which follow, in a practical business sense, the payments are better characterised as payments made pursuant to an agreement to secure a change in control rather than as meeting employee entitlements on a change of control.* The payments were made to effect a reorganisation of the capital structure of Clough, through a takeover by Murray & Roberts and the delisting of Clough from the ASX. The bringing to an end of the various rights of the employees under the employee schemes was necessary to secure the

reorganisation of the company's capital structure for the enduring advantage of the business. There is no doubt that the payments would not have been made unless the employees had entitlements under the employee schemes and that those schemes had been designed to incentivise and reward those employees. The rights were granted to the employees in gaining or producing assessable income. However, the occasion of the outgoings lay in the takeover and the object behind making the payments was the bringing to an end of the employees' rights, at the one time, to facilitate the takeover by Murray & Roberts and the delisting of Clough.

19. Accordingly, the payments were not deductible. The payments did not fall within the positive limbs of s 8-1 and were payments on capital account. It follows that the primary judge did not err on the issue which remained in dispute between the parties at trial." (emphasis added)

In so far as the case dealt with the characterisation of the payments as being on revenue or capital, Thawley J concluded that the "immediate advantage which Clough sought by making the payments was to bring the various options and rights to an end permanently" and to complete the takeover (*Clough* at [87]). Those advantages were matters that went to the capital structure of Clough, as well as securing an enduring change in that Clough would become wholly owned (*Clough* at [88]–[89]). In addition, the amount of the payments was calculated by reference to the share price and not the term of service or satisfaction of performance criteria (*Clough* at [91]).

These features were sufficient for Thawley J to conclude that the payments were on capital account, notwithstanding the number of payments made (ie to each relevant employee).

The conclusion that the amounts were on capital account was not denied by the fact that, if the takeover had not occurred, the performance rights, if paid in cash rather than the issue of shares, might have been characterised as being on revenue account (*Clough* at [94]). In reaching this conclusion, Thawley J both referred to the case of *Royal Insurance Co v Watson*[45] in which the payment of a fixed salary to a continuing employee by the purchaser of a business was held to be on capital account because of its role as part of the consideration for the acquisition of a business (*Clough* at [94]-[95]), and again rejected the principle that an amount paid in substitution for outgoings that would be deductible will *always* be deductible (*Clough* at [96]).[46] Instead, his Honour made the point in *Clough* at [98] that it is an error to assume that, merely because an outgoing relates to employees, it will be deductible:

"The important point is that the occasion of the outgoing, and identification of what the outgoing is for (*Colonial Mutual Life Assurance Society Ltd v Federal Commissioner of Taxation* (1953) 89 CLR 428 at 454 (Fullagar J); *GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation* (1990) 170 CLR 124 at 136–137), is not as simple as merely observing that the outgoing relates to employees or that one of the reasons the payments were made was the existence of rights or expectations arising from dealings between employer and employee."

Thawley J at [115]–[126] also addressed the taxpayer's reliance on an analogy with *W Nevill & Co Ltd v FCT*[47] (*Nevill*), which was a case that concerned the character of a payment made to remove the managing director of a business in circumstances where it was not in the interests of the efficient conduct of the business to keep him. *Nevill* could be distinguished on the basis that the purpose of the payments made by Clough was to cancel the employees' options and rights to facilitate the takeover, and could not therefore be regarded as simply a payment "connected with the ever recurring question of personnel" (*Clough* at [122]–[123]). In addition, as his Honour observed at [124]–[126]:

"124. Second, the payment in *Nevill* was one which was seen to have the effect of reducing ongoing expenditure on salary. Such a payment is not necessarily deductible simply because of the fact that it replaces a future expense which would be deductible. There is no freestanding principle or rule to that effect. The question always remains one of characterisation of the expenditure taking into account all of the circumstances, including in *Nevill* the fact that the expenditure was incurred to replace future expenditure which would have been deductible. The fact that the payment in *Nevill* was made in part to reduce ongoing revenue expenditure on salaries is relevant in the process of characterisation. The purpose of employing Mr King and agreeing to pay him an annual salary of £1,500 was 'for the production of assessable income'. The purpose was ultimately considered better fulfilled by commuting the expenditure on salary to an immediate lump sum payment and a residual to be met by promissory notes. That is easily seen as a revenue expense in the absence of other predominating purposes.

125. In the present case, the payments as a whole were not ones which can properly be regarded as reducing future revenue expenses. Absent the change in control, those employees who held options or rights ultimately may have received shares in Clough pursuant to the Option Plan and Incentive Scheme, but that would not involve any expenditure on Clough's part; it would result in a dilution of capital. Some employees who held performance rights may have received cash payments, if Clough had so elected.

126. The payments the subject of this appeal were not ones made on the basis of considerations about where to deploy revenue expenditure on salary. Rather, the payments were made as part of an agreement for Murray & Roberts to acquire the minority shareholding in Clough."

Sharpcan's "counterfactual" analysis: some concluding thoughts

Pausing here, it is a little more difficult to apply the counterfactual approach endorsed in *Sharpcan* to the cases

in which the taxpayer unsuccessfully ran the "substituted expenditure" analysis, such as *Mussalli* and *Clough*. The counterfactual analysis arguably works most clearly to reveal expenditure on the profit-yielding structure where something like an asset is acquired, or the taxpayer expands their profit-making structure, as was the case in *Sharpcan* and *Healius*. It is perhaps a little less clear where the enduring advantage is something more ephemeral, such as the removal of a disadvantageous asset or contract as was the case in *Mussalli*, or to achieve the ultimate objective of taking over a business as was the case in *Clough*. However, the counterfactual is plainly not answered by saying "absent the expenditure the taxpayer would have been making recurrent, deductible payments".

Instead, in *Mussalli PJ* at [117], the primary judge explained that the relevant comparison was to be made between the "expected structure of the business after the outgoing with the expected structure but for the outgoing", which led to the conclusion that the trustee of the MFT gained the advantage of "a business with a different profit-making structure for the duration of the leases and thereafter on any renewal".

There is no reference to the counterfactual in *Clough*, but it seems reasonable to assume that, absent the payments, the option and incentive schemes would have continued (with payments under the incentive scheme being deductible), but the takeover also would not have succeeded. Therefore, in each case, the counterfactual does reveal that the expenditure was capital in nature.

The same would hold true if the counterfactual analysis was applied retrospectively to the fact pattern under consideration in *Mount Isa*, in which expenditure was incurred to remove dangerous and obsolete plant. The character of the expenditure was not found in the purpose served by the demolished structures, but rather the fact that the expenditure incurred in the demolitions was to remove a disadvantageous asset. It did not matter that expenditure that would otherwise have been incurred in repairing and maintaining the asset, had it not been removed, would have been deductible because that would be to obscure the real test for identifying expenditure on capital account by applying a "purpose of expenditure" test (see above). It also did not matter that the expenditure in *Mount Isa* did not give rise to any tangible asset capable of being described as an enduring benefit.

Arguably, some greater difficulty might be found in applying the counterfactual to cases where expenditure was found to be on revenue account and therefore deductible. In fact, it appears that a "but for" argument was expressly rejected by Spender J in *Cape Flattery Silica Mines Pty Ltd v FCT*[48] (*Cape Flattery*).

Cape Flattery was concerned with the deductibility of certain payments made by a sand mining company to the Hope Vale Aboriginal Council (HVAC), as trustee of land for the benefit of the aboriginal inhabitants, on the basis that the company's mining leases were located within the Hope Vale Aboriginal Reserve. The making of payments to the Department of Community Services for the benefit of the Hope Vale Aboriginal community was a condition of the original mining leases being granted to the company and, after a protracted dispute in which HVAC initially opposed the mining leases being renewed, the taxpayer company and HVAC eventually reached a settlement by which the taxpayer would pay, in addition to its ongoing payments to the Department of Community Services, 3% of its gross sales to the HVAC and pay a training bursary to a local indigenous person.

In deciding that the payments to the HVAC were on revenue account, Spender J took into account the terms of the compensation scheme established by the *Mineral Resources Act 1989* (Qld), as well as the terms of the deeds of compensation entered into by the taxpayer and HVAC to resolve the dispute. Although his Honour concluded that the payments could not strictly be described as "royalties" because HVAC did not own the minerals (at 368), Spender J was prepared to find that the payments were in the nature of a rental, which could not "sensibly be distinguished from the judgment of the High Court in the *Cliffs International* case".[49] His Honour also considered the position "but for" the expenditure at 372:

> "The factual position in this case is that HVAC was aware that before the taxpayer could be granted a mining lease by the Crown, the taxpayer had to satisfy the requirements of s 7.38 of the *Mineral Resources Act*. In my opinion, the history of the litigation earlier outlined indicates that HVAC was attempting to make life as difficult as possible for the taxpayer, with the intention of extracting the best deal possible in respect of the obligation imposed by s 7.38 on the taxpayer, as a condition precedent to the grant of a mining lease to the taxpayer by the Crown under the *Mineral Resources Act*.
>
> This is not a case, such as *Broken Hill Theatres Pty Ltd v Federal Commissioner of Taxation* [1952] HCA 75; (1951-52) 85 CLR 423, where an amount is paid in order to protect or preserve the profit yielding structure. Of course there would be no lease (and hence no mining and therefore no profit) granted to the taxpayer without it satisfying the requirements of s 7.38 of the *Mining Resources Act*. However, that factor does not necessarily make the payments on capital account.
>
> Unless rent for a factory is agreed to be paid to the landlord, there can be no occupation of the factory (and hence no production, and therefore no profit), yet it is clear that payments pursuant to the agreement to pay rent are not on capital account.
>
> In each case it is necessary to determine the character of the payment. To determine what it is that the moneys were paid for in this case requires one to focus on what the deed says, but as Jacobs J pointed out in *Cliffs Case* (supra) at 172, the problem is to be solved by reference to the 'many aspects of the whole set of circumstances, some of which may point in one direction, some in the other', adopting the phrase of Pearce LJ in *BP v Federal Commissioner of Taxation* [1965] UKPCHCA 2; (1965) 112 CLR 386 at 397."

At first blush, his Honour's rejection of the "but for" test in *Cape Flattery* might be seen to be inconsistent with applying the counterfactual analysis endorsed by the High Court in *Sharpcan* at [33], in the sense that agreement to make the payments was a condition precedent for the grant of the mining lease. However, on reflection, it appears from the passage above that the critical point was that the payments in *Cape Flattery* were not genuinely "for" the mining lease. Similarly, taking the example given by Spender J of the lease referred to above, the rent paid under a lease is not genuinely "for" the grant of the lease, but rather for the use and occupation of the premises secured only for the period that the recurrent payments of rent are actually made, with the obligation to make the payments accruing periodically. Thus, rent is deductible to a taxpayer that carries on a business because it is a recurrent payment made in the process of operating a business to secure the ongoing use of the business premises. In contradistinction, a premium paid for the grant of a lease would be of capital or capital in nature.[50]

In the circumstances, it seems to me that the counterfactual analysis endorsed in *Sharpcan* is simply another way of bringing the analysis back to the guiding principles established in *Sun Newspapers*. Viewed in that way, the counterfactual analysis seems to be a reminder not to become distracted by other considerations that might be thought to be relevant if one were to take reasoning by analogy too far, or if one erroneously elevates matters that have been held to be "relevant but not determinative" in characterising expenditure to absolute rules. However, in each case, the application of the "counterfactual" will require some close examination.

Melanie Baker SC, CTA
Barrister
Victorian Bar

This article is an edited and updated version of "Recent trends: capital versus revenue" presented at The Tax Summit held in Sydney on 19 to 21 October 2022.

References

1 S 8-1(2)(a) ITAA97 and former s 51(1) of the *Income Tax Assessment Act 1936* (Cth).

2 *FCT v Montgomery* [1999] HCA 34 at [99] (Gaudron Gummow, Kirby and Hayne JJ).

3 Consequently, I have not dealt with *Greig v FCT* [2020] FCAFC 25, being a case that dealt with the deductibility of a loss made in the course of a business, or as part of a commercial transaction entered into as part of profit-making undertaking.

4 [1999] HCA 34 at [65]–[67].

5 [2007] HCA 5 at [21]–[22].

6 [1938] 2 KB 482 at 498.

7 [2015] HCA 25 at [14]–[15].

8 (1938) 61 CLR 337 at 363.

9 (1946) 72 CLR 634 at 648.

10 *AusNet* at [21]-[25], [27], [46] and [66] (French CJ, Kiefel and Bell JJ) and [73]–[75] and [77] (Gageler J) and *FCT v Citylink Melbourne Ltd* [2006] HCA 35 (*Citylink*) at [92] and [148] (Crennan J).

11 *AusNet* at [23] (French CJ, Kiefel and Bell JJ) and *FCT v South Australian Battery Makers Pty Ltd* (1978) 140 CLR 645 (*SA Battery Makers*) at 655-656 and 659 (Gibbs ACJ, with whom Stephen and Aickin JJ agreed).

12 *Colonial Mutual Life Assurance Society Ltd v FCT* (1953) 89 CLR 428 at 454 (Fullagar J).

13 *FCT v Star City Pty Ltd* [2009] FCAFC 19 (*Star City*) at [26]-[36], [59]-[70] (Goldberg J) and [260]-[270] (Jessup J). See also *AusNet* at [74] (Gageler J).

14 With whom Bennett and Middleton JJ agreed.

15 [2011] FCAFC 49 at [108].

16 [2019] HCA 36 at [33].

17 (1972) 48 TC 293 at 321.

18 [1999] HCA 34.

19 (1992) 176 CLR 141 at 149.

20 See also *FCT v Pine Creek Goldfields Ltd* [1999] FCA 1267 at [75] (Gyles J, with whom Lindgren J agreed).

21 [1979] 1 WLR 683.

22 *SA Battery Makers* at 655 (Gibbs ACJ); *FCT v Broken Hill Pty Co Ltd* [2000] FCA 1431 at [36] (Hill J, with whom Heerey and Merkel JJ agreed at [76]); and *Star City* at [61]–[63] (Goldberg J) and [264] (Jessup J).

23 *Associated Portland Cement Manufacturers Ltd v Commissioners of Inland Revenue* [1946] 1 All ER 68 at 70 (Lord Greene MR). See generally *FCT v Citibank Ltd* (1993) 44 FCR 434 at 443 (Hill J, with whom Jenkinson and Einfeld JJ agreed).

24 *Star City* at [87] (Goldberg J) and [195] (Dowsett J).

25 See, for example, *National Australia Bank Ltd v FCT* (1997) 80 FCR 352 at 362E and 367B-D (the court); *FCT v Creer* (1986) 11 FCR 52 at 59-60 (Fisher J); and *Labrilda Pty Ltd v DCT* (1996) 65 FCR 119 at 138BG (Ryan J). See also *AusNet* at [77] (Gageler J).

26 [1979] HCA 8.

27 See also *AusNet* at [90] (Gageler J).

28 [2018] FCAFC 163.

29 [1965] UKPCHCA 2.

30 [2020] FCAFC 92.

31 [2020] FCAFC 173.

32 *Healius Ltd v FCT* [2019] FCA 2011 at [38] (Perram J).

33 [1997] FCA 514.

34 [2007] FCA 1055.

35 [2021] FCAFC 71.

36 [2020] FCA 544.

37 *Mussalli* at [91] and [96] (McKerracher and Stewart JJ, and at [110] and [112] (Thawley J).

38 *Mussalli* at [91]–[92] (McKerracher and Stewart JJ).

39 *Mussalli* at [74] (McKerracher and Stewart JJ).

40 *Mussalli* at [74] (McKerracher and Stewart JJ), and [111]–[112] (Thawley J).

41 *Mussalli* at [32], [37] and [88]-[91] and [99] (McKerracher and Stewart JJ), and at [106]–[107] (Thawley J). See also *Mussalli PJ* at [124] and [127].

42 [2021] FCAFC 135.

43 See the discussion of *FCT v Hunter Douglas Ltd* [1983] FCA 229, a case concerned with foreign exchange losses, in *Advanced Holdings* at [91] (the court).

44 [2021] FCAFC 197.

45 [1897] AC 1.

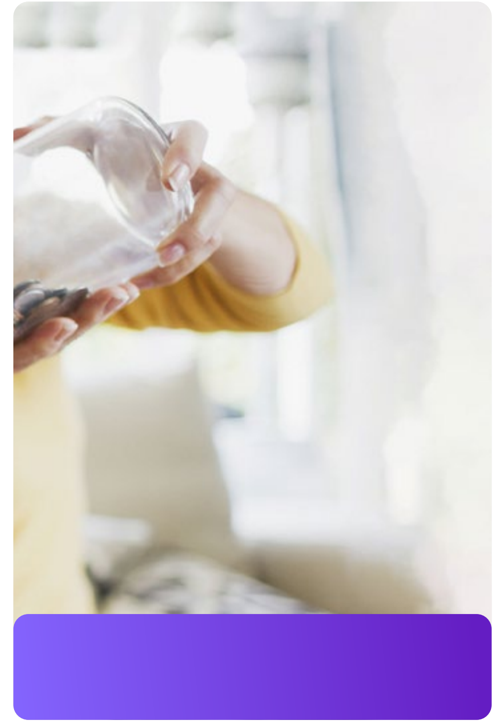
46 Although his Honour expressly acknowledged that not all the payments being substituted would have been deductible given the Option Plan actually required the issue of shares: *Clough* at [97].

47 [1937] HCA 9.

48 [1997] FCA 706.

49 *Cape Flattery* at 373.

50 See, for example, *FCT v Krakos Investments Pty Ltd* (1995) 61 FCR 489 at 503 D–E (Hill J, with whom von Doussa and O'Loughlin JJ agreed).



Superannuation Intensive

Highly practical online program presented by industry experts

Get up to speed with all the latest developments in the superannuation industry.

- Explore contributions, SMSF property investment, NALE and much more
- Join expert speakers offering the 'how to' of implementation and resolution
- Attend online, and dig deeper with 6 months' session access post-event

30 – 31 March 2023

Online

8 CPD hours

Register now
taxinstitute.com.au

23-010EVT_02/23

Superannuation

by Daniel Butler, CTA, DBA Lawyers

Greater certainty with SMSF BDBNs

This article examines BDBNs after the landmark High Court decision on indefinite or non-lapsing BDBNs in *Hill v Zuda Pty Ltd.*

Indefinite or non-lapsing BDBNs

A binding death benefit nomination (BDBN) is a direction made by a fund member to a superannuation fund trustee compelling the trustee to pay the member's death benefits in a certain way to:

- the member's dependant(s); and/or
- the member's legal personal representative (LPR).

The LPR in this context is typically the executor/executrix of the deceased member's will or otherwise an administrator appointed under letters of administration where a fund member has died without a will (ie intestate).

In *Hill v Zuda Pty Ltd*,[1] the High Court confirmed that BDBNs made in respect of self-managed superannuation funds (SMSFs) can last beyond three years.

Impact of superannuation legislation on BDBNs

The option of making an indefinite or non-lapsing BDBN is generally not available for large APRA-regulated superannuation funds. This is because BDBNs for non-SMSF funds are generally subject to the onerous restrictions in reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SISR). Such BDBNs must typically be renewed every three years to remain valid and binding on the trustee.

The finding in *Hill v Zuda Pty Ltd* that reg 6.17A does not apply to BDBNs in an SMSF is consistent with the Commissioner of Taxation's view in SMSFD 2008/3, and a number of prior state Supreme Court decisions, subject to the SMSF deed not expressly or impliedly importing a lapsing provision based on the SISR rules. Thus, *Hill v Zuda Pty Ltd* confirms the legal position that a BDBN by an SMSF member can last indefinitely. Moreover, this confirmation is by the High Court which applies on an Australia-wide basis, meaning that other lower courts, including each state Supreme Court, must follow the High Court's decision.

This means that each BDBN made by each SMSF member should be reviewed, as many SMSF deeds have been incorrectly drafted on the basis that BDBNs for SMSFs were limited to three years.

Note that there is a reasonably high level of risk relating to legal disputes involving BDBNs and therefore it is worthwhile having BDBNs and related SMSF deeds checked by an experienced SMSF lawyer.

It is also strongly recommended that each "SMSF will", and similar documents such as a "death benefit rule", be reviewed in this regard by an experienced SMSF lawyer as many have significant weaknesses. While these documents may have a different name or label (compared to a BDBN), they may also be covered by reg 6.17A SISR and be subject to a three-year limitation period (assuming they are valid and effective).

There is no defined or fixed meaning of what a BDBN is, and SMSF wills and death benefit rules may be treated under the same legislation despite the different label. The High Court in *CPT Custodian Pty Ltd v Commissioner of State Revenue*[2] states that:

> "… 'unit trust', like 'discretionary trust', in the absence of an applicable statutory definition, does not have a constant, fixed normative meaning …"

Moreover, the High Court in *Hill v Zuda Pty Ltd* did not entertain arguments that BDBN provisions included in the SMSF deed should be treated in a different manner to a BDBN in relation to the three-year rule.

BDBN strategies depend on the fund's document trail

Importantly, the decision of *Hill v Zuda Pty Ltd* highlights the fact that SMSF BDBNs are, in both form and substance, a creature of the relevant SMSF deed. In particular, the option of making an effective BDBN depends on the SMSF deed including appropriate and robust BDBN provisions.

This is why obtaining a well-drafted SMSF deed is so important. Furthermore, it is also important to obtain deed updates and variations from "quality" and qualified suppliers. Relevantly, all deeds of variation in an SMSF's document trail must comply with the variation power in the prior deed, with any relevant consents and notifications obtained, and any other appropriate legal formalities complied with.

If the applicable formalities are not complied with in relation to each document comprising the fund's document trail, the fund's latest deed may not be valid and effective. The implication of this is that BDBNs and other strategies undertaken on the basis of flawed documents may be rendered unreliable and possibly invalid.

Even a well-drafted BDBN instrument that has been diligently prepared on the basis of a fund's latest deed may not be effective if the fund's document trail has deficiencies that give rise to legal uncertainties, including questions regarding which deed contains the operative governing rules.

Accordingly, SMSF trustees and members who wish to implement succession planning strategies that rely on BDBNs should ensure that any older or outdated deeds that they may have in place are reviewed and updated with an appropriate deed that supports indefinite or non-lapsing BDBNs.

The fund's full document trail should be reviewed by an experienced SMSF lawyer to ensure that there are no deficiencies or problems that need to be addressed. Identifying potential issues and taking remedial steps in a timely manner is generally more cost and time-effective than defending a legal challenge from an aggrieved beneficiary where the fund's document trail gives rise to any uncertainty.

SMSF BDBNs should be regularly reviewed

Despite the High Court confirming that a member of an SMSF can make a BDBN that can last indefinitely on an appropriately drafted SMSF deed, it is important to emphasise that BDBN strategies should not be implemented on a "set and forget" basis.

It is recommended that SMSF members review their BDBNs at least every three years, or sooner if the member's circumstances change, eg in the event of:

- a death in the family;
- separation or divorce; or
- there being a new partner/spouse for the member.

The ongoing appropriateness of a BDBN should also be considered with regard to any changes in the member's estate and succession plans.

In summary, expert advice should be sought to ensure that the BDBN reflects the member's current circumstances in conjunction with the member's estate and succession planning documents.

Conclusion

Hill v Zuda Pty Ltd indicates that the SMSF deed – not reg 6.17A SISR – is the supreme governing document for SMSFs. Accordingly, this allows SMSF deeds to have BDBNs that can last indefinitely.

Given the fact that most SMSF deeds are of questionable quality, SMSF members who wish to implement a BDBN should have their SMSF deed document trail reviewed, updated and, where relevant, rectified. As noted above, a full document trail review should be undertaken to ensure that the BDBN and the fund's latest SMSF deed is not based on "shaky" foundations.

Instead of seeking to rely on SMSF wills or death benefit rules, it is recommended that, given the clarity provided by the High Court in *Hill v Zuda Pty Ltd*, BDBNs be used based on a quality deed. In particular, advisers preparing SMSF wills or death benefit rules face significant risks following the High Court decision and are best advised to rely on an indefinite BDBN as approved by the High Court.

Daniel Butler, CTA
Director
DBA Lawyers

References

1 [2022] HCA 21.

2 [2005] HCA 53 at [15].

The Tax Institute

Private Business Tax Retreat

Do you advise private SME clients? This expert-driven program examines important issues for you and your clients.

16–17 February 2023

JW Marriot Gold Coast Resort & Spa

13 CPD hours

23_0001_02/23

Successful Succession

by Tim Donlan, ATI, Donlan Lawyers, and Archana Manapakkam, ATI, Velocity Legal

Tax on dying of a broken heart … two years on

A new private ruling gives a glimmer of hope to beneficiaries of an estate in a "double death" scenario.

Generally, a capital gain or loss arising from the death of an Australian resident owner of a capital gains tax asset is disregarded under Div 128 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).[1] In particular:

- any capital gain or loss made by the deceased on the devolution of the asset to their legal personal representative (LPR) or the passing of an asset to a beneficiary of the estate is disregarded;[2] and
- any capital gain or loss made by the LPR on the passing of the asset to a beneficiary is disregarded.[3]

Instead, the capital gain or loss is deferred (or rolled over) until a subsequent disposal of the property by the LPR or beneficiary, with the LPR or beneficiary being deemed to have acquired the asset as at the deceased's date of death at a cost base determined in accordance with the legislation.[4]

The Commissioner of Taxation treats the trustee of a testamentary trust in the same way as an LPR for the purposes of Div 128.[5]

Significantly, Div 128 only applies in respect of assets owned by the deceased "just before" they died.[6] This gives rise to difficulties in the context of a "double death" scenario, where the beneficiary of a deceased estate dies before the CGT asset passes to them.

The double death conundrum

As discussed in the article "Tax on dying of a broken heart" (published in the April 2021 issue of this journal),[7] the roll-over may not apply where CGT assets pass from a deceased estate to the estate of a beneficiary and then to the beneficiaries of this second deceased estate. In this regard, the article demonstrates, through a case study involving the passing of assets from one elderly spouse to the other (who died before probate was obtained for the first deceased estate) and then to their adult child, the following:

- if the second deceased owned the asset jointly with the first deceased before the first deceased's death: the roll-over applies to disregard a capital gain or loss on the passing of the asset to a beneficiary of the second deceased estate; and
- in all other cases: the roll-over does not apply on the passing of the asset to a beneficiary of the second deceased estate.

(For the purposes of the case study, it is assumed that all individuals are residents of Australia for tax purposes.)

The reason that the roll-over applies in respect of jointly owned assets is that, for property law purposes, the second deceased would have become the sole owner of the asset on the first deceased's death by operation of the principle of survivorship. For CGT purposes, this means that the second deceased would have become the owner of the first deceased's CGT asset (being a notional 50% share in the asset)[8] immediately on the first deceased's death and therefore owned that share (in addition to their original notional 50% share) "just before" they died, thereby satisfying the requirement in s 128-15(1)(b) ITAA97. This means that the roll-over would apply on the second deceased's death when this asset passes to the second deceased's beneficiaries.

In contrast, where the asset is not an asset that was jointly owned by the first and second deceased, the second deceased did not own the relevant CGT asset "just before" their death. Rather, all the second deceased had was a right to due administration of the first deceased's estate which does not amount to a CGT asset equivalent to the asset to be inherited.

Treasury and Commissioner's interpretation

Until recently, both the Treasury and the Commissioner interpreted the legislation in the above manner. In this regard:

- Treasury identified this as a technical deficiency in the law and proposed an amendment to the legislation to permit the roll-over to apply in the case of double death by deeming the second deceased to have owned the asset just before their death (this proposal was subsequently abandoned);[9] and
- the Commissioner considered whether they could exercise their remedial power to address the issue, but ultimately decided that it was not appropriate to do so as it would be inconsistent with the intended purpose or object of the relevant provision.[10]

Private ruling on double death

Early last year, a private ruling was issued by the Commissioner on the CGT implications arising from a double death situation.[11] The ruling potentially signals a shift in the Commissioner's approach to the matter.

The facts in the ruling are broadly as follows:

- the first deceased (who was the second deceased's parent) owned land that had been acquired prior to 20 September 1985 (ie the land was a pre-CGT asset);

- the first deceased died prior to 20 September 1985 without a will (ie on a pre-CGT date);
- the second deceased died after 19 September 1985 with a will (ie on a post-CGT date);
- by operation of the intestacy rules at the time of the first deceased's death, the second deceased was to inherit a certain percentage share of the land;
- the second deceased's will gave the residue of the estate to the second deceased's sons in equal shares;
- letters of administration for the first deceased estate were issued after 19 September 1985 (ie on a post-CGT date);
- the land was sold some time after the deaths of both the first deceased and the second deceased (ie on a post-CGT date); and
- while not explicitly stated in the ruling, it would appear that:
  - the LPR of the first deceased estate was the registered proprietor of the entirety of the land immediately before it was sold;[12] and
  - had the second deceased's share in the land been registered in their name prior to their death, that share would have fallen into the residue of their estate and passed to their sons as tenants in common in equal shares in accordance with their will.

In the ruling, the Commissioner was asked to rule on when the estate of the second deceased estate acquired the share in the land and whether that share was a pre-CGT asset.

The Commissioner ruled that the LPR of the second deceased estate acquired the share in the land as at the second deceased's date of death (ie a post-CGT date) by operation of s 128-15(2) and that the share was a post-CGT asset in the LPR's hands. The Commissioner's reasoning was as follows:

- the LPR of the first deceased estate was deemed to have acquired the land when the first deceased died (ie on a pre-CGT date) such that the asset was a pre-CGT asset in their hands;[13]
- the share in the land to which the second deceased had been entitled had "passed" to the second deceased within the meaning of s 128-20(1)(b) (ie by operation of intestacy law) as at the date of death of the first deceased, such that the second deceased had owned the share just before their death;[14] and
- as the second deceased had owned the share in the land just before their death, s 128-15(2) applied to the devolution of the asset to the LPR of the second deceased estate.

Implications of the private ruling

As all tax practitioners are aware, private rulings should be approached with caution as they are only binding on the Commissioner in respect of the relevant taxpayer (should the taxpayer rely on it) and not the public at large. However, they can give insight into how the Commissioner is likely to apply the law to a particular set of circumstances, which can be particularly valuable where the relevant circumstance does not appear to have been contemplated by the drafters of the legislation and there are no cases or public rulings on the matter (as in the case of double death).

In the circumstances, the private ruling discussed above is significant because the Commissioner found that the second deceased had owned the relevant CGT asset just before their death, notwithstanding that the asset had not been transferred to them before their death. While this may have been driven by the desire to achieve a practical outcome in the revenue's favour,[15] by making the finding, the Commissioner has opened up the possibility that, in a double death scenario, s 128-15 also applies on the passing of an asset to a beneficiary of the second deceased estate (as this also only applies where the asset was owned by the deceased just before their death).

This gives rise to an intriguing possibility: that the Commissioner may now provide an administrative "patch" to the gap in the legislation in the context of double death through the private ruling process, by ruling that the second deceased owned the CGT asset just before their death.

Certainly, such a patch would solve many complex issues if the second deceased would otherwise be regarded as not having owned the CGT asset just before their death, for example:

- Does Div 128 apply on the passing of the asset from the LPR of the first deceased estate to the LPR of the second deceased estate? While the Commissioner ruled that it does in the private ruling, there is a strong argument to the contrary.[16]
- If the answer is "no":
  - Does the market value substitution rule apply?
  - Who bears any CGT liability arising from the transaction? Who bears the economic burden?
  - If the asset is transferred shortly afterwards to the beneficiary of the second deceased estate (and the market value substitution rule applies on the transfer between the two estates), does it matter whether Div 128 applies on the transfer to the beneficiary?
  - If the asset was a pre-CGT asset in the hands of the first deceased and they died on a pre-CGT date:
    - Was the asset a pre-CGT asset in the hands of the LPR of the first deceased estate? While this was found this to be the case in the private ruling, it would appear that the answer would turn on the probate and administration act in the relevant jurisdiction.
    - If the answer is "yes", would there be an incentive to delay the administration of both estates and retain the asset in the first deceased estate until such time as the asset is to be sold? Is this against the public interest, both in terms of tax base erosion and in terms of finalising the affairs of a deceased in as prompt a fashion as possible?

- Does this undermine the operation of CGT event K3 (which applies where a CGT passes to a beneficiary that is an exempt entity, foreign resident or trustee of a superannuation fund)?

The private ruling reveals that the Commissioner may now be inclined towards overcoming the inadvertent tax consequences arising from a double death scenario through the private ruling process. In the vast majority of cases, overcoming these consequences will be in the taxpayer's favour; however, in some cases, it may not be. Given this, and in the absence of binding authority on the matter, the appropriate strategy will turn on the particular facts and circumstances and the risk profile of the parties involved.

In view of the private ruling and the Commissioner's objective of promoting consistency of treatment for all taxpayers, it is the authors' view that taxpayers in a double death situation should consider applying for a private ruling to obtain clarity on the operation of Div 128 to their circumstances. Where appropriate to the taxpayer's circumstances, it may be that, through the process, the double death conundrum may be successfully navigated.

Tim Donlan, ATI
Principal
Donlan Lawyers

Archana Manapakkam, ATI
Special Counsel
Velocity Legal

References

1 S 128-10 ITAA97. There are exceptions to this rule, eg where the asset passes to a beneficiary that is an exempt entity, a foreign resident or the trustee of a superannuation fund.

2 S 128-15(1) ITAA97.

3 S 128-15(3) ITAA97.

4 S 128-15 ITAA97.

5 PS LA 2003/12.

6 Ss 128-10 and 128-15(1) ITAA97.

7 T Donlan and K Peiros, "Tax on dying of a broken heart", (2021) 55(9) *Taxation in Australia* 488.

8 Under s 108-7 ITAA97, individuals who own a CGT asset as joint tenants are treated as if they each owned a separate CGT asset constituted by an equal interest in the asset and as if each of them held that interest as a tenant in common.

9 Treasury, *Minor amendments to the capital gains tax law*, proposals paper, May 2011. The proposal was subsequently rejected by the then government on completion of its review of announced but unenacted tax and superannuation measures. Refer to the then Assistant Treasurer's media release "Integrity restored to Australia's taxation system", 14 December 2013.

10 ATO advice and guidance regarding when the Commissioner's remedial power has been considered but not applied for individuals. Available at www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/Commissioner-s-remedial-power-not-applied---individuals.

11 Private ruling authorisation no. 1051943938848, 28 January 2022.

12 This is based on the subject matter of the private ruling (which includes the phrase "double death") and analysis (which includes consideration of whether "the entitlement in the property will be considered an asset owned by the …[second deceased] just before they died").

13 This was by operation of s 44(1) of the probate and administration legislation in the relevant jurisdiction, which provided that, on the grant of probate or letters of administration, title vests in the LPR as at the date of death. The Commissioner presumably could not rely on the deeming provision regarding the acquisition date in s 128-15(2) ITAA97 because the first deceased died before the CGT regime was introduced.

14 The Commissioner does not provide any analysis in support of this finding.

15 Presumably, the Commissioner's finding that the second deceased had owned the asset just before their death was not just made to effect symmetry with the acquisition date for the LPR of the first deceased estate, but also to counter the potential argument that the asset had retained its pre-CGT status when it was eventually sold (on the basis that the LPR of the first deceased estate remained the owner of the asset).

16 In terms of a contrary interpretation, while the LPR of the second deceased estate can receive the second deceased's entitlement as a beneficiary on their behalf, the scheme of the legislation (which draws a distinction between a beneficiary and an LPR) would appear to not support the interpretation that Div 128 applies.

Events Calendar

Upcoming months

FEBRUARY
16–17
Thu–Fri

QLD

Private Business Tax Retreat

13 CPD hours

MARCH
1
Wed

VIC Online

Tax Disputes Masterclass

7 CPD hours

MARCH
8–9
Wed–Thu

SA

SA Tax Forum

12 CPD hours

MARCH
16–17
Thu–Fri

VIC

Financial Services Taxation Conference

11 CPD hours

MARCH
22–23
Wed–Thu

WA

WA Tax Forum

12 CPD hours

MARCH
30–31
Thu–Fri

Online

Superannuation Intensive

8 CPD hours

For more information on upcoming events, visit taxinstitute.com.au/events.

Cumulative Index

The following cumulative index is for volume 57, issues (1) to (7). Listed below are the pages for each issue:

Vol 57(1): pages 1 to 56
Vol 57(2): pages 57 to 126
Vol 57(3): pages 127 to 182
Vol 57(4): pages 183 to 242
Vol 57(5): pages 243 to 302
Vol 57(6): pages 303 to 370
Vol 57(7): pages 371 to 434

15-year small business exemption
non-assessable income 386
50% small business reduction
non-assessable income 386
2021 Intergenerational Report 61

A

ABN reforms 309, 310
Absentee owner surcharge 78
Account-based pensions
minimum pension payments 352–354
Accountancy practices
partnerships (Qld) 395, 396
Accounting periods
substituted, petroleum resource rent tax 83
Acknowledgment of trust
dutiable property (NSW) 50
Active assets
carbon farming 216
CGT small business reliefs 256
definition 256
earnout payments 267
rental properties 378, 379
small business 50% reduction 386
Adjacent land
main residence exemption 138
Administration
ATO 206–208, 306
correct reporting 204–206
funding 206, 207
lodgment 203, 204
on-time payments 206
property tax 80, 81
registration 203
state revenue authorities 206, 207
Administrative Appeals Tribunal
replacement 376, 377
Administrative penalties
unexplained bank deposits 133–135
Administrative Review Council 376
Adult children
superannuation death benefits 155
Advance pricing arrangements 43
Affordable housing
stamp duty liability 79
Age limits
superannuation contributions 25, 28
Age pension
women 29
Agreements
carbon farming 213
Intergovernmental Agreement on Federal Financial Relations 147, 148
partnerships (Qld) 391–393
reimbursement agreements 36
settlement agreements 43
whether enforceable 382
Agribusinesses — see also **Primary production land**
Foreign Investment Review Board applications 398–401
Alcohol duties 88
Amalgamated land
GST margin scheme 117–119
Amended assessments
bank deposits
– gaming 190
– unexplained 133–135
onus of proof 162–165
Amnesty
superannuation guarantee system 26, 27
Announced but unenacted measures 247, 306
Announced changes deferred 309
Announced changes not proceeding 309
Anti-avoidance rules
intangibles, low- or no-tax jurisdictions 309
Anti-discrimination laws 29
Appeals
ATO 207
Applicable fund earnings
pension transfers (UK) 220–222
Arm's length transactions
private companies 264
Arrangement 39
Assessable income
bank deposits, gaming 190
loans for producing 191, 194, 195
Assessments
excessive 191, 192
payroll tax, security industry 279–282
small business entities, shorter period of review 188, 189
Asset protection
gift and loan back arrangements 274, 275
superannuation death benefits 157
Assets — see also **CGT assets; Intangible assets**
depreciation, effective life of assets 63, 64, 308
Associations, societies or clubs
games and sports exemption 249, 250
Audits
ATO focus 207
Australia
Australia–India DTA 132
Australia–UK DTA 331, 332
Australian Capital Territory
foreign purchaser surcharge duty 78
land tax rates 78
widely held trusts 338, 339, 347
Australian Carbon Credit Units
active asset test 216
generation 212
GST 217
income from sale 215
non-commercial loss rules 216, 217
sale 216
tax regime 213, 214, 216
Australian discretionary trusts
foreign beneficiaries 259–261
Australian financial services licence
carbon farming 213
Australian Government contracts
tendering, residency disclosure 132, 309
Australian public companies
reporting obligations 309
Australian Small Business and Family Enterprise Ombudsman 209
Australian tax system
administration 203–208
education 205, 206
federalism 72, 73
GST 144–153
policy development 202, 203, 208, 209
transparency 208, 247
trust 207, 208
vertical fiscal imbalance 72, 73
Australian Taxation Office
administration 206–208, 306
appeals and objections 207
client register 203
compliance programs 308
COVID-19 responsiveness 206
debt recovery, small businesses 5
education 205, 206
Foreign Investment Review Board interactions with 398–401
focus on audits 207
funding 207
increased funding to 247
independent contractor/employee distinction 377, 378
legal professional privilege 62
market valuations for tax purposes 355–357
minimum pension payments 352–354
objections, management 306
organisation 207
record-keeping course 131
reimbursement agreements 62, 63, 306
Second Commissioners 208
stapled structures 289
state revenue authorities 207
Taxpayer Charter 208
Australian Treasury
FBT draft amendments 248
Foreign Investment Review Board interactions with 398–401
forgone revenue 146
international corporate tax reforms 248
tax integrity package, multinational enterprises 131, 132
Auxiliary equipment
fuel tax credits 198
Award entitlements
underpayment 8

B

Baby boomers 270
Bad debts
deductions for expenditure 194
Bank account deposits
amended assessments 190
unexplained, onus of proof 133–135
Bankruptcy protection
superannuation 170
Base erosion and profit shifting
OECD action plan 173
Pillar Two Global Anti-Base Erosion Rules 174
Behavioural change
alcohol duties 88, 89
motor vehicle use 87
Benchmark interest rate
Div 7A 63
Beneficial ownership
change of (NSW) 49, 50
public register 308
Binding death benefit nominations 22, 157, 158, 170–172, 276, 277, 417, 418
non-lapsing 276, 277, 417
Bitcoin 58, 62, 308
Black Economy Taskforce 310
Board of Taxation
corporate tax residency 247
review, digital asset taxation 58, 306
role 209
Bright line rules
residency tests 252, 310
Budget — see **Federal Budget**
Budget deficit 184
Buildings
sale of land after demolition 137
Burden of proof
excessive assessments 134
omission of income 190
reform, tax disputes 162–165
Bushfire
effects on tax return lodgment 204
non-commercial business losses 6, 251
Business activity statement 77
Business losses
non-commercial 6, 251, 252
– carbon farming 216, 217
Business turnover tax
payroll tax alternative 76, 77
Buy-back of shares
off-market share buy-back rules 244
reimbursement agreements 252, 253, 255–258

C

Callaghan review 82, 85
Capital account or revenue account 94, 403–415
Capital allowance deductions
primary production write-offs 215, 216
Capital gains
Div 6 source concept 189
foreign resident beneficiaries 259–261
rental properties, disposal 378, 379
Capital gains tax — see also **CGT events; Small business CGT concessions**
main residence
– building concession 137–139
– knockdown rebuild 136–139
Capital raising
franked distributions 248
Car limits
GST and luxury car tax 7
Carbon farming
active asset test 216
Australian Carbon Credit Units 212, 213, 216
commercial and legal issues 213
contracts 212, 213, 216
deductions for expenditure 213–217
eligible offsets projects 211, 212, 215–217
income derived from 215
non-commercial losses 216, 217
primary production income 215
structuring issues 216
taxation issues 213, 214
Cars — see **Electric vehicles; Motor vehicles**
Cash flow boost 27, 64, 387
Cash flow management
small business 206
Casual employees 47, 48
Centrelink
non-reversionary versus reversionary pension 159
CGT assets
building dwellings on pre/post-CGT land 138
definition 136
disposal or acquisition, contract completion 381–384
"double death" scenario 419–421
land and buildings 136
loss or destruction 136
share trading or speculating 319–321
CGT business reliefs — see **Small business CGT concessions**
CGT events
event A1 381
event C1 136, 137
event C2 381, 385, 386, 388
event D1 381
event E4 385–388
event G1 385–388
event K3 421

CGT roll-over relief
private companies 263–265
Change of beneficial ownership (NSW) 49, 50
Charities
exemptions 80
Chartered practising accountants
partnerships 396
Childcare 184, 247
Children
superannuation death benefits 132, 156, 170, 171, 275, 276
Clawbacks
unit trusts 346
Clean energy
carbon farming 211
Client register
ATO 203
Clubs, societies or associations
games and sports exemption 249, 250
Commercial and legal issues
carbon farming 213
Commercial businesses
Foreign Investment Review Board applications 398–401
Commissioner of Taxation
additional roles 203
advance pricing arrangements 43
arm's length transactions 264
declaratory relief 43
discretion, non-commercial losses 6, 251, 252
disputes, burden of proof 162–165
Div 7A determination 132, 133
excessive assessments 134, 162, 191, 192
independent contractor/employee distinction 377, 378
legal professional privilege 62
litigation under Pt IVC 43
oral rulings 43
private companies, restructuring 266
private rulings — see **Private rulings**
public rulings 42, 43
settlement agreements 43
Common law
partnership interests 391, 392
Common trustees/nominees
partnerships (Qld) 393
Compliance
Foreign Investment Review Board applications 401
GST 146
legal professional privilege 62
payroll tax 73–77
Computer-assisted technology
legal professional privilege 62
Concessional contributions
current caps and thresholds 21
current concessional measures 22
inadequacy 23, 24
indexation 23
women, catch-up contributions 29
Concessions
land-owning trusts 337
property tax 80
small business — see **Small business CGT concessions**
Congestion charges 81, 87, 88
Consolidated groups
payroll tax 77
Consumption tax — see **Goods and services tax**
Continuation clauses
partnership agreements 393
Contractor/employee distinction
ATO guidelines and rulings 377, 378
casual employees 47, 48
multi-factorial test 113–115
PAYG withholding rules 46, 47
security industry 279–282
superannuation guarantee 47
Contracts
carbon farming 212, 213, 216, 217
conveyancing practice 383
employee/contractor distinction 377, 378
implied rescission 383
whether completed 381–384
Conveyancing
whether contract enforceable 383
Core R&D activities 105–108
Corporate reconstruction rules
unit trusts 346
Corporate tax
international tax reforms 248, 249
Corporate tax residency
need for reform 247
Correct reporting 204–206
Cost-of-living increases
Federal Budget measures 247
fuel excise duty 197
Country-by-country tax reporting
multinational enterprises 132, 175
COVID-19 impacts
economic downturn 23
GST revenue 144, 145, 148
non-commercial business losses 6, 251, 252
superannuation balance erosion 23
superannuation guarantee amnesty 25, 27
tax return lodgment 204
COVID-19 measures
ATO responsiveness 206
business grants 308
cash flow boost 27, 64, 387
economic response package 23
JobKeeper 27
Crime victims
early access to superannuation 5
Cryptocurrencies 58, 62
Custodians
unit trusts 346
Customs duties 88

D

Data sharing 204
De minimis threshold 174
Death benefit rules 417, 418
Death benefits — see **Superannuation death benefits**
Debt recovery
small business 5
Deceased estates
BDBNs 170
CGT assets, "double death" scenario 419–421
family provision claims 231–233
present entitlement 314–318
Declaratory relief 43
Declared public unit trust schemes (Vic) 339
Declared wholesale unit trust schemes (Vic) 342, 343
Deductibility of expenditure
bad debts 194
capital account or revenue account 403–415
carbon farming 213–217
difficulties for individuals 130
interest 194, 195
management fees 192–194
overtime meal expenses 63
primary production write-offs 215, 216
rental income 253
self-education expenses 5, 131, 133
travel expenses 63
work-related expenses 130
working from home 310
Default assessments
onus of proof 162–165
Defence forces
death benefits 132
Defined benefit pensions (UK) 332, 333
Demergers
genuine 266, 267
restructuring 266
roll-over relief 265–267
Depreciation
car limits 7
effective life of assets 63, 64
intangible assets 308
primary production write-offs 215, 216
Deregistration
tax agents 190, 371
Derivation of income
carbon farming project 215
Digital assets
taxation 58, 306
Digital currencies 58, 62, 308
Digital economies
international corporate tax 248, 249
multinational enterprise profits 132
on-time payments 206
work recognition 129
Digital technologies
investment boost 5, 188
legal professional privilege 62
Disclaimers
beneficiaries of discretionary trusts 33–36, 66
Disclosure of information
high-risk arrangements 175
notice to produce documents 7
Discretionary trusts
beneficiaries
– adding 66, 67
– capital gains, foreign residents 259–261
– disclaimers by 33–36, 66
– private companies, Div 7A 63, 132, 133
– real and genuine consideration 225–227, 349, 350
distributions 271
– challenging 225–227
– non-assessable income 386, 387
– voidable transactions 349, 350
litigation 66–69
present entitlement
– deceased estates 314–318
– trust income 33, 34
stapled structures 289–291
trust deeds
– construction 66
– lost 68, 69, 283–285
– rectification 67, 68
trustees
– duties and powers 270, 271, 349, 350
– removal 350
Dispute resolution
objections and appeals 207
R&D eligibility 105–111
Distributable income
assessable or non-assessable 386, 387
calculation 35
present entitlements 33, 34
Diversity and inclusion 2, 304
Dividends
treaty shopping 133
Division 7A
need for reform 247
private companies
– benchmark interest rate 63
– trust entitlements 63, 132, 133
Divorce — see **Relationship breakdowns**
Documentation — see also **Contracts**
core R&D activities 105, 109–111
FBT record-keeping 248
legal professional privilege 62
lost trust deeds 68, 69, 283–285
non-reversionary versus reversionary pension 159
notice to produce 7
petroleum resource rent tax 83
share trading or speculating 320, 321
SMSF deeds, BDBNs 417, 418
transfer pricing disputes 324–329
unexplained bank deposits 133–135
"Double death"
CGT assets 419–421
Double tax agreements
Australia–India 132
Australia–UK 331, 332
treaty shopping 133
UK–Ireland tax treaty 291
Downsizer contributions 25, 247
superannuation 131
Drafting legislation 255–257
Dutiable property (NSW)
acknowledgment of trust 50
change of beneficial ownership 49
Dwellings
building on pre/post-CGT land 138
CGT main residence rule 135–139
loss or destruction 136

E

e-commerce 188
e-invoicing 206
Earnout payments
private companies 267
Economic disasters 75
Economic downturns
COVID-19 23
government debt 247
GST 145
Economic growth
disincentives 75, 76
real property transfers 77
Economic rents
taxation 81
Education
Australian tax system 205, 206
self-education expenses $250 threshold 5
Effective life
depreciating assets 63, 64
El Salvador 62
Electric vehicles
electric car discount 5, 131, 187, 309
GST 152, 153
luxury car tax 86, 87
Electricity industry
income or capital expenditure 405, 406
Electronic platform operators 131
Eligible offsets projects
carbon farming 211, 212, 215–217
Embedded royalties 174
Emissions reduction 211
Employee/contractor distinction
ATO guidelines and rulings 377, 378
casual employees 47, 48
multi-factorial test 113–115
PAYG withholding rules 46, 47
security industry 279–282
superannuation guarantee 47
Employee share schemes
termination, income or capital expenditure 412, 413
Employee–employer relationship 75, 113
Employees
concept of "worker" 75
meaning and use of "employee" 75, 377, 378
"SG employee", definition 29
underpayment 8
Employers
superannuation guarantee liability 26
underpayment of employees 8
Employment agency contracts
payroll tax 279–282
Equal value exchange requirement
CGT roll-over relief 263–265
Evasion or fraud
onus of proof 164
Evidence
excessive assessments 191, 192
expert evidence
– R&D 109, 111
– stapled structures 290
fraud or evasion 164
transfer pricing disputes 324–329
unexplained bank deposits 133–135
Excess concessional contributions
complex rules 24
taxation 21
timing issues 27
Excessive assessments 134, 162, 191, 192
Excise duties 88, 147, 150
fuel tax credits 197–199
Exempt current pension income 157, 159
Exemptions
charities 80
payroll tax, SMEs 76
property tax 80
Expenditure
characterisation 403–415

deductibility – see **Deductibility of expenditure**
Experimental activities ... 105–111
Expert evidence
R&D ... 109, 111
stapled structures ... 290
transfer pricing disputes ... 324–329
Exploration permits ... 82, 83, 85

F
Fairness
ATO ... 208
fair share of tax ... 244, 270
GST margin scheme ... 12
trust beneficiaries, present entitlement ... 35
Fame of an individual
use of for a fee ... 250, 251
Family provision claims
public policy considerations ... 231–233
Family trusts – see **Discretionary trusts**
Farmers – see **Primary production land**
Federal Budget 2016–17 ... 247
Federal Budget 2020–21 ... 248
Federal Budget 2021–22
self-education expenses ... 5
small business debt recovery action ... 5
Federal Budget 2022–23 ... 184, 186, 244, 245, 306
announced but unenacted measures ... 247, 306
announced changes deferred ... 309
announced changes not proceeding ... 309
ATO
– compliance programs ... 308
– increased funding to ... 247
cost-of-living ... 247
COVID-19 business grants ... 308
deficit repair ... 184
digital currency ... 308
electric car discount ... 309
foreign investment, residential land penalties ... 309
intangible assets, depreciation ... 308
intangibles held in low- or no-tax jurisdictions ... 309
off-market share buy-backs ... 308
penalty units ... 309
primary production income ... 215
small business measures ... 5, 61
tax transparency ... 309
thin capitalisation rules ... 308, 309
training ... 5
updated Budget ... 247, 306, 308
Fifteen-year small business exemption
non-assessable income ... 386
Fifty per cent small business reduction
non-assessable income ... 386
Financial dependant
superannuation beneficiaries ... 156
Financial services industry
GST ... 150, 151
First home buyers
stamp duty ... 78
Fixed trusts
whether unit trusts qualify as ... 228, 229
Flexible access drawdown ... 330
Floods
non-commercial business losses ... 6, 251
Foreign currencies
conversions, pension transfers (UK) ... 222, 223
cryptocurrencies ... 58, 62
Foreign income tax offsets ... 331, 332
Foreign investment
Foreign Investment Review Board applications ... 398–401
residential land penalties ... 309, 371
Foreign Investment Review Board
commercial and agricultural applications ... 398–401
Foreign pensions
Australian taxation ... 219–223, 330–335
Foreign purchaser ... 100
Foreign purchaser surcharges
general land tax rates ... 78
maximum duty rates ... 78
New South Wales ... 50
residential property ... 77
Victoria ... 100
Foreign residents – see **Non-resident companies; Non-residents**
Foreign trusts
foreign purchaser surcharge ... 100
Franked distributions ... 306
Franking credits
distributions for capital raising ... 248
Fraud or evasion
onus of proof ... 163, 164
Freehold interest in land
GST margin scheme ... 10–14, 117–119, 378
Freezing orders
variation ... 7, 8
Fringe benefits tax
electric car discount ... 5, 131, 187, 309
record-keeping ... 248
Fuel-efficient vehicles
definition ... 187
GST ... 152, 153
luxury car tax thresholds ... 86, 131
Fuel excise scheme ... 87
claiming fuel tax credits ... 197–199
Functional currency
petroleum resource rent tax ... 82
Funds managers ... 344

G
Games and sports exemption ... 249, 250
Gaming
bank deposits, assessable income ... 190
Gaming machine entitlements
income or capital expenditure ... 406–408
Gender inequality
superannuation ... 23, 29
General anti-avoidance provisions
stamp duty (NSW) ... 50, 51
stapled structures ... 289–291
Genuine demergers ... 266, 267
Gifts ... 273
gift and loan back arrangements ... 274, 275
Global minimum corporate tax rate ... 248, 249
Global Reporting Initiative ... 174
Goods and services tax
background ... 144
broadening the base ... 149
compliance burden ... 146
COVID-19 effects on revenue ... 144, 145, 148
declining ratio to GDP ... 146
depreciation car limits ... 7
economic downturns ... 145
eligible emissions units ... 217
exemptions ... 146
financial services industry ... 149, 150
fuel tax credits ... 197–199
luxury items ... 153
margin scheme ... 10–14, 117–119, 378
partnerships, input tax credits ... 253
rates ... 150
residential premises, passing on issues ... 379
revenue issues ... 144–152
small-scale property developments ... 96–100
tax reform ... 145, 148–153
Goodwill
fame of an individual ... 250, 251
"no goodwill" partnerships ... 395
Government debt ... 247
Grant of options
stamp duty (NSW) ... 49
Greenfield liquefied natural gas ... 84
Greenhouse gas emissions
carbon farming ... 211
target ... 187
Groups
payroll tax ... 77

H
Harmonisation
meaning and use of "employee" ... 75
payroll tax ... 73–75, 281, 282
Henry review ... 81, 144
High-income households
GST tax mix ... 145
Higher education – see **Tax education**
Home office expenses
deductions ... 130
Housing affordability
stamp duty liability ... 79
Hybrid mismatch targeted integrity rule ... 174

I
Imminent wholesale unit trust schemes (Vic) ... 342
Income
assessable and non-assessable ... 385–388
fame of an individual ... 250, 251
primary production ... 215
Income of the trust estate
calculation ... 35
Income tax
small-scale property developments ... 92–96
Income tax returns
lodgment ... 203, 204
unexplained bank deposits ... 133–135
Independent contractor/employee distinction
ATO guidelines and rulings ... 377, 378
multi-factorial test ... 113–115
superannuation guarantee ... 47
India
Australia–India DTA ... 132
Individuals
fame, use of for a fee ... 250, 251
residency tests ... 252, 310
Information disclosure
electronic platform operators ... 131
notice to produce documents ... 7
Information-gathering
data sharing ... 204
legal professional privilege ... 62
private rulings ... 39, 40
Innovation
R&D activities ... 105, 106
Input tax credits
partnerships ... 253
Inspector-General of Taxation ... 209
Inspector-General of Taxation and Taxation Ombudsman ... 202, 207, 208, 306
Instant asset write-off ... 5
Insurance levies ... 89
Intangible assets
depreciation ... 308
Intangibles
low- or no-tax jurisdictions ... 309
multinational enterprise tax deductions ... 132, 174, 309
Integrity measures
franked distributions and capital raising ... 248
multinational enterprises ... 131, 132, 308
Inter vivos transactions
family provision claims ... 231–233
Interdependency relationships
superannuation beneficiaries ... 156
Interest
borrowing to preserve trust corpus ... 195
definition ... 194, 195
Intergenerational wealth transfer ... 270
Intergovernmental Agreement on Federal Financial Relations ... 147, 148
International payments
pension transfers (UK) ... 219–223
unexplained bank deposits ... 133–135
International tax
corporate tax reforms ... 248, 249
International transfers
UK pensions ... 219–223, 330–335
Intestacy
CGT assets, "double death" scenario ... 419–421
Invalidity pension payments
veterans ... 132
Investment – see also **Foreign investment**
technology boost, small business ... 5, 188
Ireland
UK–Ireland tax treaty ... 291

J
JobKeeper ... 27

K
Knockdown rebuild
main residence exemption ... 136–139

L
Labor Government ... 5, 173, 247
Land
adjacent to dwelling, CGT exemption ... 138
foreign purchaser additional duty (Vic) ... 100
GST margin scheme ... 10–14, 117–119, 378
subdivision and construction of dwelling ... 139
vacant
– disposal after subdivision ... 139
– sale after demolition of buildings ... 137
Land tax absentee owner surcharge ... 337, 338, 341
Land taxes
exemptions ... 79
foreign purchaser surcharges
– general land tax rates ... 78
– maximum duty rates ... 78
– New South Wales ... 50
– Victoria ... 100
real property transfers ... 77–81
unit trusts ... 229
Landholder duty
SMSF roll-overs (Vic) ... 166–168
unit trusts
– all jurisdictions ... 337, 338
– common issues ... 346
– declared public unit trust schemes (Vic) ... 339
– declared wholesale unit trust schemes (Vic) ... 342
– imminent wholesale unit trust schemes (Vic) ... 342
– qualified investors (Vic) ... 341, 342
– trust acquisitions (Qld) ... 338
– wholesale trusts ... 341–346
– widely held trusts ... 338–340
Legal personal representatives
CGT assets, "double death" scenario ... 419–421
death benefit nominations ... 155–157
duties ... 316, 317
superannuation beneficiaries ... 156
Legal practices
partnerships (Qld) ... 395, 396
Legal professional privilege ... 62
Life insurance
SMSFs ... 159
Lifetime allowance charge ... 331, 332
Lifetime caps ... 22, 23
Limited liability partnerships ... 393, 394
Limited recourse borrowing arrangements ... 166, 168
Liquefied natural gas ... 84
Liquidation
company distributions ... 385–388
Listed trusts
land-owning, concessions ... 337
Litigation
discretionary trusts ... 66–69
transfer pricing disputes ... 324–329
Loans
Div 7A, benchmark interest rate ... 63
for producing assessable income ... 191, 194, 195
gift and loan back arrangements ... 274, 275
"interest", definition ... 194, 195
repayment, income or capital expenditure ... 411, 412
to preserve trust corpus ... 195
Local government charges ... 79
Lodgment
tax returns ... 203, 204

Losses
non-commercial ... 6, 251, 252
– carbon farming ... 216, 217
partnerships, cash flow boost ... 64
Lost trust deeds ... 68, 69, 283–285
Low-emission vehicles ... 87, 187
Low-income earners
superannuation ... 23
Low-income households
GST tax mix ... 145
Low-rate lender rule ... 174
Lump sum superannuation benefits
historical rules ... 19
reasonable benefit limits ... 20
taxation ... 20, 219–223
UK pension transfers
– residency ... 219, 220
– uncrystallised funds pension lump sum ... 330, 334, 335
Luxury cars
GST ... 153
luxury car tax
– depreciation limit ... 7
– fuel-efficient vehicles ... 131
– reform ... 86, 87
Luxury items
GST ... 152, 153

M

Main residence
building concession ... 137–139
sale, downsizer contributions ... 131
Main residence exemption
adjacent land issues ... 138
building dwellings on pre/post-CGT land ... 138
knockdown rebuild ... 136–139
small-scale property developments ... 95
Majority trust acquisition rules (Qld) ... 338
"Managed investment scheme" ... 340
Management fees
deductions for expenditure ... 192–194
Margin scheme
GST ... 10–14, 117–119, 378
Market valuations
ATO guidance ... 355–357
market value concept ... 355
Master–servant control test ... 46, 48, 114
Material tax risks ... 132, 173, 175
Matrimonial property
held in one spouse's name ... 310, 311
Medical practices
income or capital expenditure ... 408–410
Medicare levy ... 157, 158, 160
Member Profile
Aldrin De Zilva ... 18
Mergers and acquisitions
earnout payments ... 267
private/public companies ... 263–268
– demerger roll-over relief ... 265–267
Mid-Year Economic and Fiscal Outlook ... 247
Military superannuation benefits ... 132
Mineral resource rent tax ... 81
Minimum corporate tax rate ... 248, 249
Mining industry
resource rent taxes ... 81–85
Motivation
work recognition ... 129
Motor vehicles
car limits ... 7
cents per kilometre deduction ... 187
congestion charges ... 81, 87, 88
electric car discount ... 309
electric cars ... 5, 86, 87, 131, 187
fuel tax credits ... 197–199
GST ... 7
low-emission vehicles ... 87, 187
luxury car tax ... 7, 86, 87
pollution charges ... 88
taxes ... 87, 88
travelling on public roads ... 197, 198
"vehicle", definition ... 197
zero or low-emission vehicles ... 87, 187
Multi-factorial test
employee/contractor distinction ... 46–48, 113–115
Multinational enterprises
fair share of tax ... 244, 270
government election priorities ... 306
integrity measures ... 308
international corporate tax ... 248, 249
reporting obligations ... 309
tax integrity proposals ... 131, 132, 173–175
thin capitalisation rules ... 132, 173, 174, 247, 308, 309

N

National Fraud or Evasion Advisory Panel ... 164
National interest
foreign investment ... 399
Natural disasters ... 61, 75
Natural gas ... 84
Networking ... 128
New knowledge ... 108–110
New South Wales
foreign purchaser surcharge duty ... 78
land tax rates ... 78
notional estate rules ... 275, 276
payroll tax, security industry ... 279–282
stamp duty changes ... 49–51
widely held trusts ... 338, 339, 347
New Zealand
GST ... 149, 151, 152
tax registration ... 204
Non-arm's length income provisions
effect on superannuation balances ... 247, 306
safe harbour ... 5
Non-assessable income
tax treatment ... 385–388
Non-commercial losses
carbon farming ... 216, 217
safe harbour ... 6, 251, 252
Non-concessional contributions
UK pension transfers ... 332–334
Non-fixed trusts
extra capital gains, foreign-resident beneficiaries ... 189
Non-resident companies
non-portfolio shares, capital gains ... 388
Non-residents
amounts "attributable to sources in Australia" ... 189
beneficiaries of discretionary trusts ... 259–261
non-fixed trusts, capital gains ... 189
pension transfers (UK) ... 219–223
Non-reversionary pensions
superannuation death benefits ... 158–160
Northern Territory
foreign purchaser surcharge duty ... 78
land tax rates ... 78
widely held trust rules ... 347
Not-for-profit clubs
games and sports exemption ... 249, 250
Notional estate rules
superannuation ... 275, 276

O

Objections
ATO management of cases ... 207, 306
OECD
BEPS action plan ... 173
global minimum corporate tax rate ... 248, 249
multinational enterprise profits, digitalisation ... 132
tax compliance, four pillars of ... 203
VAT/GST rates ... 151
Off-market share buy-back rules ... 244, 308
Offshore corporations
significant economic connection to Australia ... 247
Offshore petroleum resources ... 81, 82
On-time payments ... 206
Onus of proof
fraud or evasion ... 163, 164
reform, tax disputes ... 162–165
trust expenditure ... 195
unexplained bank deposits ... 133–135
Oral rulings ... 43
Ordinary family and commercial dealings ... 306
Ordinary income
fame of an individual ... 250, 251
Ordinary time earnings
SG contributions ... 25, 26
Overtime meal allowances ... 63

P

Paid Parental Leave scheme ... 247
Part-time employees
superannuation ... 25
Partnership agreements
Queensland ... 392, 393
Partnership interests
common law ... 391, 392
Partnerships
GST input tax credits ... 253
losses, cash flow boost ... 64
Queensland ... 390–396
– a partnership of trusts ... 391
– agreements ... 391–393
– basic principles ... 390, 391
– common trustees/nominees ... 393
– limited liability ... 393, 394
– no goodwill ... 395
– partnership interests ... 391, 392
– professional practice requirements ... 395, 396
– service entities ... 394, 395
Passing on
residential premises, GST ... 379
PAYG withholding rules
employee/contractor distinction ... 46, 47
"SG employee", definition ... 29
Payroll tax
alternatives ... 76
– business turnover tax ... 76, 77
– state income tax ... 76
compliance costs ... 73–77
consolidated groups ... 77
economic growth disincentives ... 75, 76
employment agency contracts ... 279–282
exemptions, SMEs ... 76
harmonisation ... 73–75, 281, 282
rates and thresholds ... 74–76
record-keeping ... 76
security industry ... 279–282
Single Touch Payroll ... 76
tax revenue ... 73, 74
Penalties
assessment of shortfalls ... 191
bank deposits, assessable income ... 190
deductions for expenditure ... 195
foreign investment, residential land ... 309, 371
penalty units ... 309
significant global entities, default ... 50
superannuation guarantee non-compliance ... 5, 26
transfer balance account ... 25
unexplained bank deposits ... 133–135
Pension payments
death benefit instructions ... 157
minimum pension payments ... 352–354
veterans ... 132
women ... 29
Pension transfers (UK)
applicable fund earnings ... 220–222
Australian contribution provisions ... 332
Australian taxation ... 219–223, 330–335
benefits, options to access ... 330
defined benefit pensions ... 332, 333
double taxation ... 331
foreign currency conversions ... 222, 223
foreign income tax offset ... 331, 332
strategies ... 333–335
Personal services income
fame of an individual ... 250, 251
Persuasive value ... 258
Petroleum market
income or capital expenditure ... 408, 410
Petroleum resource rent tax
distribution of profits ... 82, 83
filing of returns ... 83
functional currency ... 83
issues and options ... 82
production licence, reversion ... 85
rate of tax ... 82
substituted accounting periods ... 83
tolling arrangements ... 84
Pollution charges ... 88
Pooled investment vehicles ... 337, 338, 346
Pooled public investment unit trust (Qld) ... 345, 346
Pre-CGT gains
assessable or non-assessable income ... 388
Premium transfer duty (NSW) ... 49
Present entitlement
deceased estates ... 314–318
distributable income ... 33, 34
Presumption of advancement ... 311
Primary production business ... 215
Primary production income ... 215
Primary production land
carbon farming ... 211–217
foreign purchaser surcharge (Tas) ... 78
Primary production write-offs ... 215, 216
Principle purpose test ... 291
Private companies
arm's length transactions ... 264
CGT roll-over relief ... 263–265
demerger roll-over relief ... 265–267
Div 7A
– benchmark interest rate ... 63
– trust entitlements ... 63, 132, 133
earnout payments ... 267
mergers and acquisitions ... 263–268
public companies compared ... 263–268
record-keeping ... 264
scrip-for-scrip roll-overs ... 263–265
Private rulings
deceased estates, "double death" ... 419–421
favourable/unfavourable ... 40
information-gathering ... 39, 40
refusal/failure to rule ... 40, 41
relevant provision ... 39
self-assessment and ... 205
whether to apply ... 38–44
withdrawn or superseded ... 40
Probate — see **Succession and estate planning; Wills**
Production licences
petroleum resource rent tax ... 85
Property
sale or disposal, whether contracts are completed ... 381–384
Property development
small-scale, tax issues ... 92–102
Property settlements
unpaid present entitlements ... 36
Property tax
administration ... 80, 81
choice of payment ... 79
concessions and exemptions ... 80
housing affordability ... 79
local governments ... 80
reform ... 79–81
revenue neutrality ... 80
thresholds ... 80
Protected information
notice to disclose ... 7
Public companies
compared with private companies ... 263–268
Public policy
family provision claims ... 231–233
Public register
beneficial ownership ... 308
Public roads
vehicles travelling on ... 197, 198
Public rulings ... 42, 43

"Public unit trust scheme" 339, 340
Public unit trusts
ceasing to qualify as 346
declared schemes (Vic) 339
land-owning, concessions 337
Purpose of expenditure test 405, 414

Q

Qualified investors
Victoria 341, 342
Queensland
foreign purchaser surcharge duty 78
land tax rates 78
majority trust acquisition rules 338
partnership issues 390–396
pooled public investment unit trusts 345, 346, 348
trust acquisition duty 337, 338, 341, 345
wholesale trusts 341
wholesale unit trusts 343–345, 348
widely held trusts 339, 340, 347

R

Ralph review 263
Rates of tax
global minimum corporate tax 248, 249
GST 150
petroleum resource rent tax 82
R&D
core activities 105–108
dispute resolution 105–111
eligibility disputes 105–111
expert evidence 109, 111
new knowledge 108–110
supporting activities 108, 109
tax incentive 105, 106, 111
Real and genuine consideration
discretionary trust beneficiaries 225–227, 349, 350
Real estate industry
rental property investments, reporting 204
small-scale developments 92–102
Real property transfers
land taxes 77–81
stamp duties 77, 78
Reasonable benefit limits 20
Recognised overseas pension scheme 330, 333
Reconstruction rules
unit trusts 346
Record-keeping
ATO tax education 131
FBT draft amendments 248
lost trust deeds 68, 69, 283–285
payroll tax 76
private companies 264
unexplained bank deposits 133–135
work-related expenses 130
Reforms — see also **Tax reform**
ABN system 309, 310
superannuation 27–30
– superannuation guarantee system 25
– taxation of contributions 27
– transfer balance cap 28
Registered emissions units 213
Registration
tax administration 203
Reimbursement agreements
administration 62
definition 255, 256
disclaimers by beneficiaries 36
ordinary family and commercial dealings 306
share buy-back 252, 253, 255–258
trust provisions 62, 63
Relationship breakdowns
BDBNs 170
SMSF roll-overs 166
unpaid present entitlements 36
Relevant provision 39
Remote technical services
Australia–India DTA 132
Rent prepayment
income or capital expenditure 410, 411
Rent taxes
resources 81–85

Rental income
deductions for expenditure 253
Rental property investments
correct reporting 204
whether active assets 378, 379
Reporting obligations
multinational enterprises 175, 244
superannuation guarantee 29
tax administration 204–206
transfer balance account 24, 25
transparency 309
Research and development — see **R&D**
Residency
Australian Government contract tendering 132, 309
lump sum foreign superannuation benefits 219, 220
offshore corporations 247
Residency tests
individuals 252, 310
Resident of Australia 252, 310
Residential land penalties
foreign investment 309, 371
Residential property
foreign purchaser surcharge 77, 78
GST, "passing on" issues 379
held in one spouse's name 310, 311
Residuary beneficiaries
deceased estates 314–318
Resource rent taxes 81–85
Resource super profits tax 81
Restructuring
demerger provisions 266
estate planning by willmaker 271–274
public/private companies 263–268
securitisation trusts 289
unit trusts 346
Retirement
defence forces 132
gender inequality 23, 29
pension transfers (UK) 219–223
Retirement exemption
non-assessable income 386
superannuation contributions rules 24
Returns
income tax — see **Income tax returns**
petroleum resource rent tax 83
unexplained bank deposits 133–135
Revenue account or capital account 94, 403–415
Reverse mortgages 81
Reversionary pensions
superannuation death benefits 157–160
Risk management
carbon farming 213
The Tax Institute 304
unit trusts, variation of deeds 228, 229
Road user charge 197
Roll-overs — see also **CGT roll-over relief**
scrip-for-scrip 263–265
SMSFs, landholder duty (Vic) 166–168
Royalties
mining and natural resources 72, 81, 82
multinational enterprise tax deductions 132, 174
treaty shopping 133

S

Safe harbour
non-arm's length income 5
non-commercial losses 6, 251, 252
Sale of land
after demolition of buildings 137
GST margin scheme 10–14, 117–119, 378
Scheme 39
Scrip-for-scrip roll-overs
private companies 263–265
Second Commissioners 208
Securitisation trusts 289
Security industry
employment agency contract 279–282
Self-assessment
correct reporting 205

depreciation, intangible assets 308
minimum pension underpayments 352, 353
Self-education expenses 5, 131, 133
Self-managed superannuation funds
BDBNs 158, 170–172, 417, 418
– non-lapsing 276, 277, 417
death benefit nominations 155–160
life insurance 159
minimum pension payments 352–354
roll-overs, landholder duty (Vic) 166–168
trust deeds 417
Service entities
partnerships (Qld) 394, 395
Settlement agreements 43
SG employee 29
Sham transactions 191, 193, 232, 233
Share buy-back
off-market share buy-back rules 244, 308
reimbursement agreements 252, 253, 255–258
Share option schemes
termination, income or capital expenditure 412, 413
Share trading
or speculating 319–321
Shareholders
material tax risks 132, 173, 175
Shortfall interest charge
unexplained bank deposits 134
Shortfalls
superannuation guarantee 26, 27
"Significant economic connection to Australia" 247
Significant global entities
definition 175
penalty tax 50
reporting obligations 309
Significant interest threshold 338, 339, 341, 343, 345, 346
Single Touch Payroll 76, 204
Single women
retirement equity 29
Skills and training
boost for small business 5, 61, 188
Small business
ATO debt 5, 206
cash flow management 206
Skills and Training Boost 5, 61, 188
Technology Investment Boost 5, 188
Small business 50% active asset reduction
non-assessable income 386
Small business CGT concessions
"active assets", definition 256
non-assessable income 386, 387
rental property, whether an active asset 378, 379
retirement exemption 24
Small business entities
AAT stay order 131
assessments, shorter period of review 188, 189
Small-scale property developments (Vic) 92–102
duty, transfer of land 100–102
GST 96–100
income tax 92–96
main residence exemption 95
windfall gains tax 102
Small to medium-sized businesses
exemptions from payroll tax 76
Societies, associations or clubs
games and sports exemption 249, 250
Sole trader businesses
cash flow boost 64
Source concept
Div 6, capital gains 189
South Australia
foreign purchaser surcharge duty 78
land tax rates 78
widely held trusts 338, 339, 347
Special leave to appeal
statutory construction 257, 258

Sport
games and sports exemption 249, 250
Spouse
BDBNs 170, 171
residential property held in one spouse's name 310, 311
SMSF roll-overs 166
superannuation beneficiaries 132, 156, 160, 171
Stamp duties
housing affordability 79
insurance 89
real property transfers, effects on 77, 78
Stamp duty (NSW)
acknowledgment of trust 50
change of beneficial ownership 49
foreign purchaser surcharge duty 50
foreign surcharge land tax 50
general anti-avoidance provisions 50, 51
penalty tax 50
Stapled structures
discretionary trusts 289–291
Start-up phase concessions 340, 345, 346
State income tax
payroll tax alternative 76
State revenue authorities
administration and funding 206, 207
Statutory interpretation
capital gains, non-resident beneficiaries 259–261
reimbursement agreements 255–257
Stay orders
small business entities 131
Structuring issues
carbon farming 216
Sub-sales duty
transfer of land (Vic) 100
Sub-trust arrangements
Div 7A 132, 133
Subcontractors — see **Contractor/employee distinction**
Subdivision of land
construction of dwelling 139
Substituted accounting periods
petroleum resource rent tax 83
Succession and estate planning
BDBNs 22, 157, 158, 170–172, 417, 418
– non-lapsing 276, 277, 417
CGT assets, "double death" scenario 419–421
company restructure by willmaker 271–274
death benefit nominations 155–160, 170–172
family provision claims 231–233
gift and loan back arrangements 274, 275
notional estate rules 275, 276
present entitlement 314–318
trust distributions 271
trustee duties and powers 270, 271, 349, 350
Superannuation
balances, non-arm's length income provisions 247, 306
contributions
– age limits and $450/month limit 25, 28
– caps and thresholds 21–24, 27, 28
– concessional contributions cap, inadequacy 23, 24
– rules 24
– taxation 21, 22
designing a sustainable system 19–30
downsizer contributions 25, 131
early access 5, 23
historical overview 20, 21
minimum pension payments 352–354
notional estate rules 275, 276
part-time employees 25
pension transfers (UK) 219–223, 330–335
reform 30
succession and estate planning 155–160, 170–172

transer balance cap ... 24, 25, 28
unaddressed Budget issues ... 247
veteran invalidity pension payments ... 132
vulnerable workers ... 23
withdrawal of benefits ... 19, 22

Superannuation death benefits
BDBNs ... 22, 157, 158, 170–172, 276, 277, 417, 418
children ... 156, 275, 276
death benefit pensions ... 157
defence forces ... 132
exempt current pension income ... 157, 159
financial dependant ... 156
legal personal representative ... 155–157
nomination options ... 155–160
non-reversionary pensions ... 158–160
reversionary pensions ... 157–160
spouse ... 132, 156, 160, 171

Superannuation guarantee
amnesty ... 26, 27
calculation ... 25, 26, 29
contractor/employee distinction ... 47
design failure issues ... 26
employer liability ... 26
harmonisation of SG contributions ... 25
legislation ... 21
non-compliance ... 5, 26
"SG employee", definition ... 29
shortfalls ... 26, 27
timing of contributions ... 26, 27

SuperFund Lookup ... 29

Supply
GST margin scheme ... 12, 118, 378

Supporting R&D activities ... 108, 109

Surcharge purchaser duty – see **Foreign purchaser surcharge duty**

T

Tasmania
foreign purchaser surcharge duty ... 78
land tax rates ... 78
widely held trusts ... 340, 347

Tax administration – see **Administration**

Tax advisers
minimum pension payment errors ... 354
share trading or speculating ... 319–321

Tax agents
termination of registration ... 190, 371

Tax avoidance
stapled structures ... 290
tax integrity package, multinational enterprises ... 131, 132

Tax debts
disclosure of information ... 7
freezing orders varied ... 7, 8
small business ... 5, 206

Tax disputes
objections and appeals ... 207
onus of proof, reform ... 162–165

Tax education
CommLaw3 Dux Award, study period 1, 2022
– Raveena Paul ... 262
CommLaw3 Property Law Dux Award, study period 2, 2021
– Albert Meintjes ... 16
CTA1 Foundations Dux Award, study period 2, 2022
– Michael Walkom ... 322
CTA2A Advanced Dux Award, study period 1, 2022
– Hayley Hyytinen ... 389
CTA2B Advanced Dux Award, study period 3, 2021
– Runxiang Wang ... 143
– Vicky Tang ... 200
CTA3 Advisory Dux Award, study period 3, 2021
– Clare Pendlebury ... 70
Graduate Certificate in Applied Tax Advisory ... 372
Graduate Certificate in Applied Tax Law ... 372
Graduate Diploma of Applied Tax Law
– 2021 graduates ... 141
Tax Adviser of the Year Award finalists ... 186, 245

Tax evasion
bank deposits, assessable income ... 190

Tax file number ... 203

Tax incentives
R&D, eligibility ... 105–107

Tax integrity measures
multinational enterprises ... 131, 132, 173–175

Tax liability
on-time payments ... 206

Tax minimisation
gift and loan back arrangements ... 274, 275

Tax policy development ... 202, 203, 208, 209

Tax practitioners
discretionary trusts, drafting deeds ... 68, 69
family provision claims ... 233
lapsed tax measures ... 5
M&A toolbox ... 263
networking ... 128
work recognition ... 129

Tax Practitioners Board
termination of tax agent registration ... 190, 371

Tax reform – see also **Reform**
2021 Intergenerational Report ... 61
GST ... 145, 148–153
international corporate tax ... 248, 249
land taxes ... 77–81
luxury car tax ... 86, 87
motor vehicle taxes ... 87
payroll tax ... 76, 77
petroleum resource rent tax ... 82, 85
policy development ... 208, 209
property tax ... 79–81
unaddressed Budget issues ... 247
wine equalisation tax ... 88

Tax revenue
excise and customs duties ... 88
GST ... 144–152
payroll tax ... 73, 74
petroleum resource rent tax ... 82, 83
revenue-raising ... 73
stamp duty ... 78

Tax risks
private rulings ... 38–44
shareholders, material tax risk ... 132, 173, 175

Taxation laws
statutory construction ... 255–257

Taxpayers' Charter ... 208, 306

Technological changes
e-invoicing ... 206
motor vehicle use ... 87

Technology Investment Boost
small business ... 5, 188

Termination of registration
tax agents ... 190, 371

The Tax Institute
2021 Intergenerational Report ... 61
Chair of National Council
– Clare Mazzetti ... 58
diversity and inclusion ... 2, 304
governance ... 304
Incoming Government Brief ... 61, 306
networking ... 128
risk management ... 304
submissions to
– Board of Taxation ... 306
– Senate Legal and Constitutional Affairs Committee ... 376
Tax Academy ... 304, 373
Tax Knowledge Exchange ... 184, 186, 372, 373
Tax Policy and Advocacy team ... 244, 245
Tax Summit 2022 ... 59, 128, 129, 184, 244, 245
training ... 305
wellbeing ... 2, 3, 305
work recognition ... 129

Thin capitalisation rules
multinational enterprises ... 131, 132, 173, 174, 247, 308, 309

Thodey report ... 89

Timing issues
CGT assets, "double death" scenario ... 419–421
excess concessional contributions ... 27
minimum pension payments ... 352–354
non-reversionary versus reversionary pension ... 158
on-time payments ... 206
superannuation guarantee contributions ... 26, 27
trust income, present entitlements ... 34
unit trusts, acquisitions of land ... 346
whether contracts are completed ... 381–384

Tobacco excise rates ... 147

Tolling arrangements
petroleum resource rent tax ... 84, 85

Tourism
GST revenue ... 145

Training
boost for small business ... 5, 61, 188
The Tax Institute ... 305

Transfer balance account
non-reversionary versus reversionary pension ... 158, 159
reporting obligations ... 24, 25

Transfer balance cap
proportional indexation ... 25
reform ... 28
rules ... 24
taxation of excess ... 24
transfer balance account ... 24, 25

Transfer duty (Vic)
small-scale property developments ... 100–102

Transfer pricing
disputes ... 324–329

Transitional compliance approach
fame of an individual ... 250, 251

Transparency
Australian tax system ... 208, 247
beneficial ownership, public register ... 308
multinational tax integrity proposals ... 131, 132, 173–175
new reporting rules ... 309
new review body ... 376

Travelling on public roads ... 197, 198

Treaty shopping
withholding tax rates ... 133

Trust acquisition duty
Queensland ... 337, 338, 341, 345

Trust beneficiaries
adding a beneficiary ... 66, 67
disclaimers of rights ... 33–36, 66
private companies, Div 7A ... 63, 132, 133
unfairness ... 35

Trust deeds
amendment, adding a beneficiary ... 66, 67
construction ... 66
lost ... 68, 69, 283–285
rectification ... 67, 68
SMSFs ... 417
variation ... 228, 229

Trust distributions
borrowing to preserve trust corpus ... 195
discretionary trusts ... 271
– voidable transactions ... 349, 350
non-assessable income, tax ... 385

Trust income – see **Distributable income**

Trustees
discretionary trusts
– duties and powers ... 270, 271, 349, 350
– exercise of discretion ... 225–227, 349, 350
– removal ... 350
non-residents, amounts "attributable to sources in Australia" ... 189

Trusts – see also **Discretionary trusts; Unit trusts**
accounting practices ... 396
acknowledgment of ... 50
change of beneficial ownership ... 49
partnership of trusts ... 391
reimbursement agreements ... 62, 63
service entities ... 394, 395

U

Uncrystallised funds pension lump sum ... 330, 334, 335

Underpaid award entitlements ... 8

Unfairness – see **Fairness**

Unit trusts
landholder duty
– all jurisdictions ... 337, 338
– common issues ... 346
– SMSF roll-overs (Vic) ... 166–168
– trust acquisitions (Qld) ... 338
– wholesale trusts ... 341–346
– widely held trusts ... 338–340
variation of deeds ... 228, 229

United Kingdom
Australia–UK DTA ... 331, 332
defined benefit pensions ... 332
pension transfers ... 219–223, 330–335
UK–Ireland tax treaty ... 291

Unlisted public unit trusts
land-owning, concessions ... 337

Unpaid present entitlements
disclaimers by trust beneficiaries ... 33–36

V

Vacant land
disposal after subdivision ... 139
sale after demolition of buildings ... 137
Victoria ... 78

Valuations
ATO guidance ... 355–357
GST margin scheme ... 11, 12, 119

Value added tax – see **Goods and services tax**

Vehicles – see **Motor vehicles**

Vertical fiscal imbalance
Australian tax system ... 72, 73

Veteran invalidity pension payments ... 132

Victoria
declared public unit trust schemes ... 339
declared wholesale unit trust schemes ... 342, 343
foreign purchaser additional duty ... 100
foreign purchaser surcharge duty ... 78
imminent wholesale unit trust schemes ... 342
land tax rates ... 78
landholder duty ... 166
qualified investors ... 341, 342
small-scale property developments ... 92–102
wholesale trusts ... 341–343
wholesale unit trusts ... 348
widely held trusts ... 339, 347
windfall gains tax ... 102

Voluntary Tax Transparency Code ... 174

Vulnerable workers
superannuation ... 23

W

Wash sales ... 58

Wellbeing ... 2, 3, 305

Western Australia
foreign purchaser surcharge duty ... 78
land tax rates ... 78
widely held trust rules ... 347

Wholesale investors ... 344

Wholesale unit trusts
land-owning, concessions ... 337
landholder duty ... 341–346
Queensland ... 341, 343–345
rules, summary ... 348
Victoria ... 341–343

Widely held unit trusts
Australian Capital Territory ... 338, 339
land-owning, concessions ... 337
New South Wales ... 338, 339
Queensland ... 339, 340
rules, summary ... 347
South Australia ... 338, 339
Tasmania ... 340
Victoria ... 339

Wills
CGT assets, "double death" scenario ... 419–421

death benefit rule ... 417, 418
family provision claims, public policy ... 231–233
powers of willmaker ... 271–274
present entitlement, deceased estates ... 314–318
Wine equalisation tax
reform ... 88
Withholding system
small business ... 206
Withholding tax
treaty shopping ... 133
Without prejudice privilege ... 326, 327
Witnesses
transfer pricing disputes ... 325
Women
retirement equity ... 29
superannuation ... 23
Work recognition ... 129
Work-related expenses
record-keeping ... 130
self-education expenses ... 131
Work test
superannuation contributions, age limits ... 25
Workers
concept of worker ... 75
employment contracts ... 377, 378
low-income earners ... 23
vulnerable, superannuation ... 23
Working from home ... 2, 27
deductions
– office expenses ... 130
– revised fixed rate method ... 310
Workplace culture ... 2
Write-offs
primary production ... 215, 216

Z

Zero or low-emission vehicles ... 87, 187

Legislation

A New Tax System (Commonwealth-State Financial Arrangements) Act 1999
s 11(1) ... 147
Sch 2 ... 147
A New Tax System (Goods and Services Tax) Act 1999 ... 10, 144, 253
Div 51 ... 96
Div 75 ... 10, 11, 13, 14, 117, 378
Div 129 ... 98
Subdiv 38-J ... 103, 218
Subdiv 38-O ... 103, 218
Subdiv 40-C ... 103
Subdiv 129-C ... 99
Subdiv 142-A ... 379
Subdiv 152-B ... 393
s 7-1(1) ... 103
s 7-1(2) ... 103
s 9-5 ... 13, 103
s 9-40 ... 103
s 11-5 ... 103
s 11-30(3) ... 98
s 27-40 ... 98
s 38-590 ... 218
s 40-35(1)(a) ... 379
s 40-65(2)(b) ... 103
s 40-75(2)(a) ... 379
s 51-5 ... 96
s 51-5(1)(a) ... 103
s 51-5(1)(e) ... 103
s 51-5(1)(eb) ... 103
s 51-10 ... 96
s 75-5 ... 13
s 75-5(1) ... 13, 103
s 75-5(1)(a) ... 12, 13
s 75-5(1)(b) ... 12
s 75-5(1)(c) ... 12
s 75-5(1A) ... 103
s 75-5(2) ... 13
s 75-5(3) ... 103
s 75-10 ... 13, 378
s 75-10(1) ... 103
s 75-10(2) ... 12, 103
s 75-10(3) ... 10–12, 117, 118
s 75-10(3)(a) ... 12, 13
s 75-11(1) to (7) ... 13
s 75-16 ... 13
s 75-22 ... 13
s 93-5 ... 253
s 129-20(1) ... 98, 103
s 129-25 ... 103
s 184-1(1) ... 103
s 184-1(1A) ... 103
s 195-1 ... 103
A New Tax System (Goods and Services Tax) Regulations 2019
reg 51-5.01(1)(f) ... 103
A New Tax System (Luxury Car Tax) Act 1999
s 25-1(4) ... 187
Acts Interpretation Act 1901
s 23(b) ... 378
Administration and Probate Act 1958 (Vic) ... 233
Administrative Appeals Tribunal Act 1975
s 2A ... 376
Administrative Decisions (Judicial Review) Act 1977 ... 41, 162
Sch 1(e) ... 164, 165
Australian National Registry of Emissions Units Act 2011 ... 217
Bankruptcy Act 1966
s 116(2)(d) ... 170
Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 ... 64
s 5(1)(f) ... 64
s 5(5)(a) ... 64
Carbon Credits (Carbon Farming Initiative) Act 2011 ... 211
Pt 5 ... 217
s 5 ... 217
s 11 ... 217
s 12 ... 217
s 13 ... 217
s 15 ... 217
s 16(2) ... 217
s 18(2) ... 217
s 20 ... 217
s 22 ... 217
s 23(1)(g) ... 217
s 27(3)(e) ... 217
s 27(3)(f) ... 217
s 27(4)(e) ... 217
s 53 ... 217
s 53A ... 217
s 54 ... 217
s 69(2) ... 217
s 69(3) ... 217
s 69(4) ... 217
s 69(5) ... 217
s 76(1)(c) ... 217
s 76(1)(d) ... 217
s 76(1)(e) ... 217
s 135 ... 217
s 150 ... 217
s 150 to 153 ... 217
s 157A ... 217
Carbon Credits (Carbon Farming Initiative) Rule 2015 ... 211
Climate Change Bill 2022 ... 187
Commonwealth of Australia Constitution Act
s 51(ii) ... 72
s 96 ... 147
s 114 ... 10
Corporations Act 1989
s 82 ... 340
Corporations Act 2001 ... 213, 308, 344, 353, 396
Ch 5C ... 340
s 181 ... 272
s 601ED(2) ... 345
s 1305 ... 165, 192, 193, 196
Duties Act 1997 (NSW) ... 49, 50
Ch 9 ... 90
s 3(1) ... 347
s 3(2) ... 347
Duties Act 1999 (ACT) ... 347
Duties Act 2000 (Vic) ... 166
Ch 2
– Pt 4A ... 100
Ch 3 ... 167
s 3 ... 100, 339
s 3(1) ... 103, 347
s 3(5) ... 347
s 3B ... 103
s 3B(2) ... 103
s 12 ... 103
s 18A ... 102
s 27 ... 101
s 27(1) ... 101
s 27(2) ... 102
s 28A ... 102
s 32B ... 103
s 32I ... 103
s 32P ... 103
s 35 ... 103
s 36 ... 103
s 36A ... 103
s 36B ... 103
s 40 ... 167, 168
s 40(1) ... 168
s 40(1)(c) ... 167, 168
s 41 ... 103
s 41A ... 103
s 43 ... 103
s 43A ... 103
s 56 ... 103
s 71 ... 166, 167
s 71(1) ... 167
s 77 ... 167, 168
s 78 ... 167, 168
s 79(1) ... 167
s 79(2)(a) ... 167
s 80 ... 167
s 89D ... 167
s 89D(a) ... 167
s 89D(d) ... 167, 168
s 89P ... 341
s 89P(1) ... 341, 342
s 89P(1)(a) ... 342
s 89P(1)(b) ... 342
s 89P(1)(c) ... 342
s 89P(1)(e) ... 342
s 89P(1)(f) ... 342
s 89P(1)(g) ... 342
s 89P(1)(h) ... 342
s 89P(1)(i) ... 342
s 89P(1)(j) ... 342
s 89P(1)(k) ... 342
s 89P(4) ... 341
s 89P(4)(a) ... 342
s 89P(4)(b) ... 341, 342
s 89Q ... 339, 343
s 89R ... 339
s 89R(3) ... 339
s 89S ... 347
s 89U ... 342, 343
s 89U(3) ... 343
s 89V(1) ... 347
s 89X ... 343
s 89X(1) ... 343, 347
s 89X(3) ... 347
s 89X(3)(c) ... 343, 347
s 89X(5) ... 339, 343
Duties Act 2001 (Qld) ... 396
Ch 2
– Pt 12 ... 347
– Pt 13 ... 347
Ch 3 ... 339
s 10(2)(b) ... 396
s 40 ... 396
s 42(1)(a) ... 396
s 42(1)(b) ... 396
s 42(1)(c) ... 396
s 58 ... 347
s 61 ... 340, 345
s 70(1) ... 340
s 70(1)(c) ... 340
s 70(2) ... 347
s 70(5) ... 340
s 71 ... 347
s 71(1) ... 347
s 71(3) ... 347
s 72(1)(b) ... 344, 348
s 72(3) ... 347
s 74 ... 344
s 74(a) ... 344
s 75(1)(a)(ii) ... 345
s 75(2) ... 347
s 76(1) ... 347
s 76(2) ... 347
s 77 ... 345
s 78 ... 345, 347
s 78(3) ... 345
s 78A ... 347
s 78B ... 347
s 81 ... 347
s 82 ... 347
s 413A to 413I ... 397
Sch 6 ... 347
Duties Act 2001 (Tas)
s 3 ... 347
Duties Act 2008 (WA) ... 396
s 71 ... 396
s 154B ... 347
Duties Regulations 2013 (Qld) ... 347
Electricity Industry Act 1993 (Vic) ... 405
Evidence Act 1995
s 69 ... 196
s 131 ... 326
s 140(2) ... 192
Excise Tariff Act 1921 ... 81
Fair Work Act 2009 ... 26
Family Law Act 1975
s 4 ... 156
s 79 ... 36
Family Provision Act 1969 (ACT) ... 233
Family Provision Act 1970 (NT) ... 233
Family Provision Act 1972 (WA) ... 233
Federal Court of Australia Act 1976
s 21 ... 42, 43
s 22 ... 43
Finance Act 2004 (UK)
s 214 ... 331
s 217 ... 331
Foreign Acquisitions and Takeovers Act 1975 ... 371, 398
Foreign Acquisitions and Takeovers Fees Imposition Act 2015 ... 398
Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 ... 398
Foreign Acquisitions and Takeovers Regulation 2015 ... 398
Fuel Tax Act 2006 ... 197
s 43-10(4) ... 198
Income Tax Act 1986
s 5 ... 37
s 7 ... 37
Income Tax (Earnings and Pensions) Act 2003 (UK)
s 636A ... 331
Inheritance (Family Provision) Act 1972 (SA) ... 233
International Tax Agreements Act 1953 ... 132, 331
ITAA36 ... 76
Pt III
– Div 5 ... 37
– Div 6 ... 33–35, 189, 255, 256
– Div 6E ... 256
– Div 7A ... 36, 63, 132, 273, 386
Pt IVA ... 133, 196, 250, 289–291, 395
Div 5 ... 394
Div 5A ... 394
Subdiv 6E ... 259
Subdiv 45B ... 266
s 6(1) ... 252, 273, 310
s 6(5) ... 219
s 6(10) ... 219
s 10(5) ... 219
s 26(a) ... 255, 383
s 44 ... 266, 273
s 44(3) ... 266
s 44(4) ... 266
s 45B ... 266
s 45B(2)(c) ... 266
s 45B(8) ... 266
s 45BA ... 266
s 45C ... 266
s 47 ... 388
s 51(1) ... 415
s 73B ... 105
s 73B(1) ... 105
s 73B(2B) ... 106
s 82A ... 131
s 90 ... 396
s 94A ... 396
s 94J ... 397
s 94L ... 397
s 94P ... 397
s 95AAA ... 37
s 96 ... 34, 35
s 97 ... 33–36
s 97(1) ... 33–35, 316
s 98 ... 34, 35, 189
s 98(2A) ... 189
s 98A(2) ... 189
s 99 ... 34, 35, 316

s 99A 34, 35, 256, 273
s 100A 36, 62, 63, 252, 253, 255, 306
s 100A(7) 255, 256, 258
s 103A(1) 268
s 109BB 397
s 109D(1) 63
s 109E(5) 63
s 109J(b) 273
s 109N(1)(b) 63
s 109XB 63
s 159GZZZP 252
s 160AF(1) 331
s 170(1) 165
s 177D 291
s 177D(1)(a) 44
s 177D(2) 266, 290
s 190(b) 165
Sch 2F 228
– s 271-10 388
– s 271-105(1) 388

ITAA97 ..... 50, 76, 131
Pt 2-42 250
Pt 3-30 332
Div 6E 256
Div 35 216
Div 40 ..... 63, 216, 218
Div 43 ..... 188, 216
Div 70 214
Div 104 260
Div 115 93
Div 125 ..... 263, 265, 266
Div 128 ..... 270, 419–421
Div 152 ..... 93, 218, 267, 315, 378, 379
Div 293 31
Div 302 277
Div 313 ..... 22, 31
Div 355 111
Div 392 218
Div 393 218
Div 420 ..... 213, 214
Div 855 259
Subdiv 40-F 215, 216
Subdiv 40-G 215
Subdiv 106-A 396
Subdiv 108-D 136
Subdiv 115-C 189, 259, 260
Subdiv 118-B 93, 95
Subdiv 118-I 267
Subdiv 122-A 394
Subdiv 122-B 394
Subdiv 124-D 93
Subdiv 124-M 263, 264
Subdiv 290-B 31
Subdiv 295-I 31
Subdiv 328-G 218
Subdiv 768-A 388
Subdiv 768-G 388
Subdiv 815-B 328
Subdiv 855-A 259
Subdiv 900-B 63
s 6-5 250
s 8-1 ..... 191, 194–196, 214, 218, 253, 407, 408, 410, 412, 413
s 8-1(1) 194
s 8-1(2)(a) 218, 415
s 25-35 ..... 191, 194, 196
s 26-95 31
s 35-10(2)(b) 251
s 35-10(2E) 6, 251
s 35-10(4) 218
s 35-55(1)(a) 6, 251
s 40-25 63
s 40-30(1) 218
s 40-30(1)(a) 218
s 40-30(3) 218
s 40-95 63
s 40-100 63
s 40-100(5) 63
s 40-525 218
s 40-880 ..... 403, 407
s 50-45 249
s 50-70 249
s 70-10 218
s 70-12 218
s 70-25 218
s 82-160 21
s 103-25 139
s 104-10(3)(a) 381
s 104-20 136
s 104-20(4) 136
s 104-25 381
s 104-35 381
s 104-70(1) 388
s 104-71 388
s 104-135(6) 388
s 106-5 ..... 392, 396
s 108-5(2) 396
s 108-5(2)(a) 136
s 108-7 421
s 108-55(2) 136
s 108-70 139
s 109-5 381
s 110-25 265
s 112-25 103
s 112-30 137
s 112-30(2) 137
s 112-30(3) 137
s 112-30(4) 137
s 115-25 381
s 115-30 268
s 115-45 265
s 115-45(4) 268
s 115-45(5) 265
s 115-45(6) 268
s 115-45(7) 268
s 115-215 260
s 115-215(3) 189, 259, 260
s 115-220 ..... 189, 259
s 115-222 189
s 115-225(1)(a) 260
s 118-15 218
s 118-110 103
s 118-115 136
s 118-115(2) 103
s 118-120 103
s 118-120(1) 138
s 118-120(2) 138
s 118-130 136
s 118-140 137–139
s 118-150 ..... 137, 138
s 118-150(2) 138
s 118-150(3) 137
s 118-150(4) 137
s 118-150(5) 137
s 118-155 139
s 118-165 103
s 118-240 to 118-255 139
s 118-560(2)(a) 268
s 124-780(1)(d) 268
s 124-780(2)(c) 264
s 124-780(4) 264, 268
s 124-782 265
s 124-783(6) 268
s 124-783(7) 268
s 124-783(9) 268
s 125-70(1) 266
s 125-70(1)(c) 268
s 125-80(2)(b) 268
s 125-80(3) 268
s 125-155 268
s 128-10 421
s 128-15 ..... 420, 421
s 128-15(1) 421
s 128-15(1)(b) 419
s 128-15(2) 420, 421
s 128-15(3) 421
s 128-20(1)(b) 420
s 152-40 ..... 216, 256
s 152-40(4)(e) 216, 218, 379
s 152-110(1) 388
s 152-125 ..... 315, 386, 388
s 152-320(1) 388
s 152-325 388
s 202-45 248
s 207-35(4) 257
s 207-35(5)(c) 256
s 207-35(6) 256, 257
s 207-35(6)(b) 256
s 207-55 256
s 207-57 256
s 207-150 253
s 207-150(1) 252
s 207-155 ..... 252, 253
s 290-60 31
s 290-170 31
s 290-230 ..... 22, 31
s 291-20(2) 21
s 291-20(3) 22, 31
s 291-465 31
s 292-85(2) 21
s 292-85(2)(b) 30, 31
s 292-85(3) to (4) 22, 31
s 292-85(5) to (7) 21
s 292-95 31
s 292-100 31
s 292-102 ..... 22, 31
s 292-105 21
s 293-20 21
s 294-35 21
s 294-50 354
s 294-80(1) 354
s 294-135 21
s 295-200 222
s 302-195(1) 160
s 305-60 219
s 305-70 ..... 219, 220
s 305-70(2) 221
s 305-75 220
s 305-75(3)(a)(i) 221
s 305-75(3)(a)(ii) 221
s 305-75(3)(b) 221
s 305-80 ..... 222, 332, 333
s 305-80(1)(d) 222
s 306-10 ..... 222, 332
s 307-345 21
s 307-550 21
s 355-5 ..... 110, 111
s 355-25 ..... 105–107, 109, 111
s 355-25(1) 106, 107, 109–111
s 355-25(1)(a) 107, 109
s 355-25(1)(b) 109
s 355-25(2)(b) 110
s 420-5 217
s 420-10 217
s 420-12 216
s 420-12(1) 217
s 420-15 217
s 420-15(4) 218
s 420-25 217
s 420-42 217
s 420-45 217
s 420-50 218
s 420-51 218
s 420-55 218
s 420-55(4) 218
s 420-55(5) 218
s 420-57(1) to (3) 218
s 420-57(5) 218
s 420-57(6) 218
s 420-57(7) 218
s 420-57(8) 218
s 420-65 218
s 420-70 218
s 770-5(1) 332
s 770-10(1) 331
s 770-15(1) 331
s 815-130(2) 328
s 815-130(3) 328
s 815-130(4) 328
s 855-10 ..... 189, 259, 260
s 855-10(1) 259, 260
s 855-15 259
s 855-40 ..... 189, 259, 260
s 960-100 ..... 390–392, 396
s 995-1 ..... 39, 103, 215, 260

Judiciary Act 1903
s 39B 43, 162
s 39B(IA)(c) 42

Land Tax Act 2005 (Vic)
s 3 347

Land Tax Management Act 1956 (NSW) 49
s 3A(3B) 228

Landcom Corporation Act 2001 (NSW)
s 17 10

Legal Profession Act 2007 (Qld) 395
s 24 397
s 114 397
s 117 397

Life Insurance Act 1995 ..... 342, 345

Major Bank Levy Act 2017 39

Mineral Resources Act 1989 (Qld) 414
s 7.38 414

Minerals Resource Rent Tax Act 2012 81

Minerals Resource Rent Tax Repeal and Other Measures Act 2014 81

New International Tax Arrangements (Managed Funds and Other Measures) Bill 2004 259

Partnership Act 1891 (Qld)
s 49 396
s 50 396
s 53 396
s 54 396
s 56 396

Partnership Act 1958 (Vic)
s 5(1) 103

Payroll Tax Act 1971 (Qld)
Div 2 90

Payroll Tax Act 2007 (NSW)
s 32 287
s 32(1)(b) 287
s 35(1) 287
s 37 ..... 277, 278, 281
s 38 to 40 280
Sch 2 90

Payroll Tax Act 2007 (Vic)
Sch 2 90

Pension Schemes (Information Requirements — Qualifying Overseas Pension Schemes, Qualifying Recognised Overseas Pensions Schemes and Corresponding Relief) Regulations 2006 (UK) 330

Petroleum Resource Rent Tax Assessment Act 1987 82
s 4 85
s 5 85
s 20 85
s 37 85

Petroleum Resource Rent Tax Assessment Amendment Act 2012 90

Petroleum Resource Rent Tax Assessment Regulation 2015 82

Petroleum Resource Rent Tax Assessment Regulations 2005 90

Probate and Administration Act 1898 (NSW)
s 44 316
s 74A 316
s 92 317

Product Grants and Benefits Administration Act 2000
s 8 39

Security Industry Act 1997 (NSW) 280

Stamp Duties Act 1923 (SA)
s 97(1) 347
s 97(2) 347

State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022 (NSW) 49

State Taxation Acts (Tax Reform) Bill 2004 (Vic) 347

Succession Act 1981 (Qld) 232, 233
s 41 ..... 232, 233

Succession Act 2006 (NSW) 233
Pt 3.3
– Div 1 233
s 59 315
s 80(2)(a) 277
s 80(2)(b) 277

Superannuation (Excess Non-concessional Contributions Tax) Act 2007 31

Superannuation (Government Co-contribution for Low Income Earners) Act 2003 ..... 22, 31
s 9 21
s 10A 21
s 12E 21

Superannuation Guarantee (Administration) Act 1992 21
Pt 7 ..... 5, 26

s 12 ... 29, 47
s 12(3) ... 47, 113, 115, 288
s 15 ... 21, 31
s 15A ... 31
s 19AA ... 22
s 19AB ... 22
s 19AC ... 22
s 23 ... 31
s 27(2) ... 21, 28
s 28 ... 28
s 31 ... 31
s 49(3) ... 31
s 62(3) ... 31
s 62(4) ... 31

Superannuation Industry (Supervision) Act 1993 ... 342, 344
Pt 3A ... 31
s 10 ... 160
s 32A to 32ZAA ... 31
s 59 ... 276
s 59(1)(a) ... 277
s 59(1A) ... 277
s 66 ... 168
s 66(1) ... 168
s 66(2A)(a)(iv) ... 168
s 67A ... 166, 168
s 67A(2)(b) ... 168
s 71(1)(j) ... 168

Superannuation Industry (Supervision) Regulations 1994 ... 168, 352
Pt 7 ... 332
reg 1.06(9A)(a) ... 352
reg 6.17A ... 158, 170, 171, 276, 417, 418
reg 6.17A(7) ... 276, 277
reg 6.21 ... 160
reg 6.44 ... 31
reg 7.04 ... 31
reg 13.22C ... 168
reg 13.22C(2) ... 168
Sch 7 ... 21, 352

Supreme Court (General Civil Procedure) Rules 2015 (Vic)
ord 54.02 ... 351

Tax Agent Services Act 2009
Div 30 ... 190
s 20-5(1)(a) ... 190
s 20-5(3)(a) ... 190

Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015 ... 187

Tax Laws Amendment (2006 Measures No. 4) Act 2006 ... 260

Tax Laws Amendment (Research and Development) Bill 2010 ... 105, 112

Taxation Administration Act 1953 ... 117, 131
Pt IVC ... 40, 42–44, 111, 162, 165
Div 95 ... 31
Div 131 ... 31
Div 138 ... 31
Div 268 ... 31
Div 269 ... 31
Div 357 ... 39
Div 359 ... 38
Div 384 ... 31
s 14ZVA ... 40
s 14ZYA ... 41
s 14ZZ ... 162
s 14ZZK ... 162
s 14ZZK(b) ... 165
s 14ZZO ... 162
s 14ZZO(b) ... 165
Sch 1 ... 377
– Pt 2-5 ... 46
– Subdiv 265-C ... 31
– s 10-1 to 20-80 ... 46
– s 12-35 ... 46
– s 16-182 ... 31
– s 97-20 ... 31
– s 97-25 ... 31
– s 260-5 ... 31
– s 284-90(1) ... 196
– s 325-30 ... 325
– s 353-10 ... 325
– s 355-25 ... 7
– s 355-50 ... 7
– s 355-50(1) ... 7
– s 355-75 ... 7
– s 357-60 ... 40, 196
– s 357-75(1) ... 40
– s 357-85 ... 40
– s 357-90 ... 40, 41
– s 357-105 ... 39, 40
– s 357-110 ... 40
– s 357-120 ... 40
– s 358-5(1) ... 42
– s 359-5 ... 39, 40
– s 359-10(3) ... 40
– s 359-15 ... 39, 40
– s 359-20 ... 39, 40
– s 359-25 ... 39
– s 359-35 ... 40
– s 359-50 ... 41
– s 359-50(3) ... 41
– s 359-50(4) ... 41
– s 359-55 ... 39, 40
– s 359-60 ... 39
– s 359-60(1) ... 40
– s 359-60(2) ... 40
– s 359-60(3) ... 40
– s 360-5(2A) ... 43

Taxation Administration Act 1996 (NSW) ... 49, 50

Taxation Laws Amendment (No. 3) Act 1991 ... 165

Testator's Family Maintenance Act 1912 (Tas) ... 231, 233

Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 ... 31

Treasury Laws Amendment (2022 Measures No. 2) Bill 2022 ... 131

Treasury Laws Amendment (Electric Car Discount) Bill 2022 ... 131, 187

Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 ... 354

Treasury Laws Amendment (Recovering Unpaid Superannuation) Act 2020 ... 31

Trustee Act 1893 (NT)
s 11 ... 351

Trustee Act 1898 (Tas)
s 13 ... 351

Trustee Act 1925 (ACT)
s 6 ... 351

Trustee Act 1925 (NSW)
s 6 ... 351

Trustee Act 1936 (SA)
s 14 ... 351

Trustee Act 1958 (Vic)
s 41 ... 351

Trustees Act 1962 (WA)
s 7 ... 351
s 92 ... 67

Trusts Act 1973 (Qld)
s 12 ... 351

Uniform Civil Procedure Rules 2005 (NSW)
r 21.10 ... 7

Rulings and other materials

Australian Prudential Regulation Authority
Prudential Practice Guide SPG 280 ... 277

Australian Taxation Office
FTD 2016/1 ... 198
FTR 2008/1 ... 197, 198
GSTR 2002/2 ... 154
GSTR 2003/9 ... 154
GSTR 2004/1 ... 154
GSTR 2004/2 ... 103
GSTR 2006/3 ... 154
GSTR 2006/4 ... 98, 154
GSTR 2008/1 ... 154
GSTR 2009/2 ... 103
GSTR 2009/4 ... 98, 103
GSTR 2012/5 ... 103
ID 2003/810 ... 137
ID 2004/498 ... 264, 268
ID 2004/634 ... 216
ID 2004/800 ... 265
ID 2004/809 ... 223
ID 2009/124 ... 221
ID 2012/48 ... 221
ID 2012/49 ... 221
ID 2015/7 ... 223
IT 210 ... 215
IT 225 ... 218
IT 276 ... 395, 397
IT 2167 ... 253
IT 2622 ... 314, 318
IT 2650 ... 252
MT 2006/1 ... 103
NAT 13086 ... 395, 397
NAT 749757 ... 44
PBR 78681 ... 331
PBR 1012047019192 ... 321
PBR 1012927800595 ... 218
PBR 1012998424429 ... 321
PBR 1013032138063 ... 218
PBR 1051237204348 ... 218
PBR 1051426020916 ... 103
PBR 1051757260120 ... 103
PBR 1051786568488 ... 103
PBR 1051799201069 ... 277
PBR 1051973166830 ... 386, 388
PCG 2016/11 ... 198
PCG 2017/D11 ... 250, 251
PCG 2020/6 ... 31
PCG 2022/1 ... 251
PCG 2022/D1 ... 62, 63
PCG 2022/D2 ... 6, 310
PCG 2022/D4 ... 310
PCG 2022/D5 ... 377, 378
PS LA 2003/12 ... 421
PS LA 2005/21 ... 266, 267
PS LA 2008/6 ... 165
PS LA 2010/4 ... 63, 133
PS LA 2020/4 ... 31
QC 39769 ... 352, 353
SGR 2005/1 ... 47
SMSFD 2008/3 ... 277
TA 2018/2 ... 174
TA 2020/1 ... 174
TA 2022/2 ... 133
TD 7 ... 103
TD 92/147 ... 137
TD 92/148 ... 93, 103
TD 1999/43 ... 139
TD 1999/79 ... 136
TD 2000/13 ... 139
TD 2000/14 ... 139
TD 2012/21 ... 229
TD 2013/2 ... 218
TD 2014/25 ... 58
TD 2017/13 ... 138
TD 2019/D6 ... 259
TD 2019/D7 ... 259
TD 2020/6 ... 266
TD 2022/10 ... 63
TD 2022/11 ... 64, 132, 133
TD 2022/12 ... 189, 259, 261
TD 2022/13 ... 189, 259, 261
TD 2022/D1 ... 36, 63
TD 2022/D3 ... 250, 251
TR 92/3 ... 102, 103
TR 93/30 ... 310
TR 98/17 ... 252
TR 2005/7 ... 396
TR 2005/16 ... 46
TR 2005/19 ... 268
TR 2006/2 ... 395, 397
TR 2006/10 ... 44
TR 2010/1 ... 31
TR 2010/3 ... 63, 132, 133
TR 2013/5 ... 160, 352, 353
TR 2014/5 ... 273
TR 2021/3 ... 64
TR 2022/1 ... 63, 64
TR 2022/2 ... 249, 250
TR 2022/D1 ... 62
TR 2022/D2 ... 252
TR 2022/D3 ... 377

CPA Australia
by-law 9.3(a)(i) ... 396
by-law 9.3(b) ... 396
by-law 9.3(c) ... 396

Double tax agreements
Australia–India
– art 12(3)(g) ... 132
– art 23 ... 132
Australia–UK ... 332
– art 17 ... 331
UK–Ireland ... 291

European Union
Global Reporting Initiative GRI 207 ... 175

Federal Government
Intergovernmental Agreement on Federal Financial Relations ... 147, 148

Foreign Investment Review Board
Guidance Note 12 ... 399

Queensland Government
Public Ruling DA000.1.3 ... 347

Queensland Law Society
QLS Form 23 ... 396

Revenue NSW
Ruling DA.017 ... 101, 102
Ruling PTA 027 ... 282
Ruling PTA 028 ... 282
Ruling PTA 029 ... 282

State Revenue Office Victoria
Revenue Ruling DA.061 ... 341, 342
Revenue Ruling DA.062 ... 343, 347
Revenue Ruling DA.063v2 ... 339

Cases

A

Addy v FCT [2019] FCA 1768 ... 252
Advanced Holdings Pty Ltd as Trustee for The Demian Trust v FCT [2021] FCAFC 135 ... 412
Alan Gough and Vision Business Group Pty Ltd and Tax Practitioners Board [2022] AATA 2757 ... 190
Algama v Minister for Immigration & Multicultural Affairs [2001] FCA 1884 ... 258
Anglo American Investments Pty Ltd (Trustee) v FCT [2022] FCA 971 ... 191, 196
Annalong Pty Ltd v FCT [1972] HCA 45 ... 383
Ashwick (Qld) No. 127 Pty Ltd; FCT v [2011] FCAFC 49 ... 404
Associated Portland Cement Manufacturers Ltd v Commrs of IR [1946] 1 All ER 68 ... 415
Atia v Nusbaum [2011] QSC 44 ... 274
Attorney-General (Cth) v Breckler (1999) 197 CLR 87 ... 225
Auctus Resources Pty Ltd v FCT [2020] FCA 1096 ... 258
Aurizon Holdings Ltd v FCT [2022] FCA 368 ... 38
AusNet Transmission Group Pty Ltd v FCT [2015] HCA 25 ... 403, 405, 406
Australian Securities and Investments Commission v Rich [2009] NSWSC 1229 ... 192
AXA Asia Pacific Holdings Ltd; FCT v [2010] FCAFC 134 ... 268

B

Bamford; FCT v [2010] HCA 10 ... 34, 35, 259
Barns v Barns [2001] SASC 303 ... 231–233
Barry McMahon Nominees Pty Ltd, Application by [2021] VSC 351 ... 284
BBlood Enterprises Pty Ltd v FCT [2022] FCA 1112 ... 252, 255
Begg v DCT (SA) [1937] SASR 97 ... 195
Bellinz Pty Ltd v FCT 98 ATC 4634 ... 41, 43
Benz v Armstrong [2022] NSWSC 534 ... 170, 275
Birch v Cropper (1889) 14 AC 525 ... 268
Bonner v Chief Commr of State Revenue [2022] NSWSC 441 ... 279
Bosanac v FCT [2022] HCA 34 ... 310
Bowcock (dec'd), Re; Box v Bowcock [1968] 2 NSWR 697 ... 272

BP Australia Ltd v FCT [1965] UKPCHCA 2 ... 407–410, 414
Brady King Pty Ltd v FCT [2008] FCAFC 118 ... 12
Branir Pty Ltd v Owston Nominees (No. 2) Pty Ltd [2001] FCA 1833 ... 192, 193
Bridgwater v Leahy (1998) 194 CLR 457 ... 233
Broken Hill Pty Co Ltd; FCT v [2000] FCA 1431 ... 415
Broken Hill Theatres Pty Ltd v FCT [1952] HCA 75 ... 414
Brooks v Burns Philp Trustee Co Ltd [1969] HCA 4 ... 232
Burlington Loan Management DAC v HMRC [2022] UKFTT 290 ... 291
Byrnes v Kendle [2011] HCA 26 ... 277, 284

C

Calvert v Badenach [2015] TASFC 8 ... 231
Camalic Pty Ltd and Innovation and Science Australia [2020] AATA 1590 ... 110
Cantor Management Services Pty Ltd v Booth [2017] SASCFC 122 ... 276
Cape Flattery Silica Mines Pty Ltd v FCT [1997] FCA 706 ... 414, 415
Cardaci v Filippo Primo Cardaci as executor of the estate of Marco Antonio Cardaci (No. 5) [2021] WASC 331 ... 351
Carey v Field [2002] FCA 1173 ... 42
Carr v Douglass [2016] NSWSC 854 ... 276
Carter; FCT v [2022] HCA 10 ... 33–36, 66
Casimaty v FCT [1997] FCA 1388 ... 102, 103
Cassaniti; FCT v [2018] FCAFC 212 ... 162, 165
Cecil Bros Pty Ltd v FCT (1964) 11 CLR 430 ... 397
Certain Lloyd's Underwriters v Cross [2012] HCA 56 ... 261
Chase v Chase [2020] NSWSC 1689 ... 284
Chevron Australia Holdings Pty Ltd v FCT [2015] FCA 1092 ... 329
Chhua and FCT [2022] AATA 2593 ... 190
Chief Commissioner of State Revenue v Benidorm Pty Ltd [2020] NSWCA 285 ... 50
Chief Commissioner of State Revenue v E Group Security Pty Ltd [2022] NSWCA 115 ... 279, 281
Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd [2017] NSWCA 184 ... 37
Citibank Ltd; FCT v (1993) 44 FCR 434 ... 415
Citylink Melbourne Ltd; FCT v [2006] HCA 35 ... 406, 415
Clark; FCT v [2011] FCAFC 5 ... 196, 229
Cleeve Group Pty Ltd, Re [2022] VSC 342 ... 68, 284
Cliffs International Inc v FCT [1979] HCA 8 ... 406, 414
Clough Ltd v FCT [2021] FCAFC 197 ... 412–414
Cloutte v Storey [1911] 1 Ch 18 ... 351
Coal of Queensland Pty Ltd and Innovation and Science Australia [2020] AATA 126 ... 110
Coal of Queensland Pty Ltd v Innovation and Science Australia [2021] FCAFC 54 ... 110
Cobalt Data Centre 2 LLP and Cobalt Data Centre 3 LLP v Commrs for His Majesty's Revenue And Customs [2022] EWCA Civ 1422 ... 384
Colonial First State Investments Ltd v FCT [2011] FCA 16 ... 228
Colonial Mutual Life Assurance Society Ltd v FCT (1953) 89 CLR 428 ... 406, 413, 415
Commissioner of State Revenue v Challenger Listed Investments Ltd (as Trustee for Challenger Diversified Property Trust 1) [2011] VSCA 272 ... 347
Commissioner of State Revenue v Landrow Properties Pty Ltd [2010] VSCA 197 ... 347
Commissioner of State Revenue v The Optical Superstore Pty Ltd [2018] VSC 525 ... 287
Commissioner of State Revenue v The Optical Superstore Pty Ltd [2019] VSCA 197 ... 288
Commissioner of State Revenue (Vic) v Australand Investments Ltd [2012] VSCA 152 ... 347
Commonwealth of Australia v Kupang Resources Pty Ltd (ACN 098 773 785) [2022] NSWCA 77 ... 7
Consolidated Media Holdings Ltd; FCT v [2012] HCA 55 ... 259, 260
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 ... 47, 48, 113, 114
Cooling; FCT v [1990] FCA 204 ... 255
Cooperative Bulk Handling Ltd v FCT [2010] FCA 508 ... 45
Corporate Affairs Commission (SA) v Australian Central Credit Union [1985] HCA 64 ... 347
Corporate Business Centres International Pty Ltd v FCT [2004] FCA 458 ... 41
Cowan v Scargill [1984] 2 All ER 750 ... 277
CPT Custodian Pty Ltd v Commr of State Revenue [2005] HCA 53 ... 171, 228, 417
Creer; FCT v (1986) 11 FCR 52 ... 415
CTC Resources NL v FCT [1994] FCA 947 ... 41
Cunningham v Gapes [2017] FCA 787 ... 170

D

Dalco; FCT v [1990] HCA 3 ... 163
Del Castillo and FCT [2022] AATA 4233 ... 378
Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118 ... 47, 114, 115, 288
Dinshaw v Bombay Commr of Income Tax (1934) 50 TLR 527 ... 194
Docklands Science Park Pty Ltd and Innovation Australia [2015] AATA 973 ... 106
Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and FCT [2022] AATA 4436 ... 379
Donnelly v Edelsten [1994] FCA 992 ... 275
Douglas; FCT v [2020] FCAFC 220 ... 132

E

E Group Security Pty Ltd v Chief Commr of State Revenue [2021] NSWSC 1190 ... 280, 282
Eichmann; FCT v [2019] FCA 2155 ... 45
Eichmann v FCT [2020] FCAFC 155 ... 45, 256
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [2004] HCA 55 ... 193
Executors of the Estate of Subrahmanyam; FCT v [2001] FCA 1836 ... 41

F

Fabig; FCT v [2013] FCAFC 99 ... 265
Finch v Telstra Super Pty Ltd [2010] HCA 36 ... 160, 225
Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq) [2002] FCAFC 285 ... 229
FKYL and FCT [2016] AATA 810 ... 103
Futuris Corporation Ltd; FCT v [2008] HCA 32 ... 45

G

Galland; FCT v (1986) 162 CLR 408 ... 37
Gauci v FCT [1975] HCA 54 ... 164
Glencore Investment Pty Ltd; FCT v [2020] FCAFC 187 ... 329
Glencore Investment Pty Ltd v FCT [2019] FCA 1432 ... 329
Goldsworthy and FCT [2022] AATA 2472 ... 133
Gonzales v Claridades [2003] NSWSC 508 ... 316
GP International Pipecoaters Pty Ltd v FCT (1990) 170 CLR 124 ... 413
GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631 ... 382, 383
Granby Pty Ltd v FCT [1995] FCA 1217 ... 268
Grofam Pty Ltd v FCT [1997] FCA 660 ... 45
Guardian AIT Pty Ltd ATF Australian Investment Trust v FCT [2021] FCA 1619 ... 253
Guttikonda and Sheth and FCT [2022] AATA 1325 ... 8
GXCX and FCT [2009] AATA 569 ... 103

H

H2O Exchange Pty Ltd and Innovation and Science Australia [2019] AATA 4195 ... 110
H2O Exchange Pty Ltd v Innovation and Science Australia [2021] FCA 11 ... 110
Hallows v Lloyd [1888] UKLawRpCh 144 ... 277
Hallstroms Pty Ltd v FCT (1946) 72 CLR 634 ... 403, 404
Hancock v Rinehart [2015] NSWSC 646 ... 351
Harding v FCT [2019] FCAFC 29 ... 252
Harmer v FCT [1991] HCA 51 ... 37
Hastings-Bass, Re [1975] Ch 25 ... 351
Havilah Resources Ltd and Innovation and Science Australia [2020] AATA 933 ... 110
Hay's Settlement Trusts, Re [1981] 3 All ER 786 ... 226
Healius Ltd; FCT v [2020] FCAFC 173 ... 408, 409
Healius Ltd v FCT [2019] FCA 2011 ... 415
Heather (HM Inspector of Taxes) v P-E Consulting Group Ltd (1972) 48 TC 293 ... 405
Hill v Zuda Pty Ltd [2021] WASCA 59 ... 276
Hill v Zuda Pty Ltd [2022] HCA 21 ... 160, 171, 276, 417, 418
Hitch v Stone (Inspector of Taxes) [2001] STC 214 ... 194
Hollis v Vabu Pty Ltd [2001] HCA 44 ... 47, 48, 114
Huang; DCT v [2021] HCA 43 ... 8
Huang (No. 4); DCT v [2022] FCA 618 ... 7
Hunter Douglas Ltd; FCT v [1983] FCA 229 ... 415

I

Inland Revenue Commissioners v British Salmson Aero Engines Ltd [1938] 2 KB 482 ... 403
Ireland v Retallack [2011] NSWSC 846 ... 272

J

Jacob Morris, Re (1943) 43 SR (NSW) 352 ... 232
Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 ... 47, 115
JHKW and FCT [2022] AATA 2875 ... 253
JLSP and Innovation Australia [2016] AATA 23 ... 105–107
Johnson and FCT [2007] AATA 1322 ... 93
Jonshagen v FCT [2016] FCA 1545 ... 45
Jordan, Commissioner of Taxation v Second Commr of Taxation [2019] FCA 1602 ... 165
JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd (1985) 9 ACLR 593 ... 229

K

Karger v Paul [1984] VR 161 ... 225
Kelly v Deluchi [2012] NSWSC 841 ... 277
Kingston v Keprose (1987) 11 NSWLR 404 ... 258
Klug v Klug [1918] 2 Ch 67 ... 349
Krakos Investments Pty Ltd; FCT v (1995) 61 FCR 489 ... 415

L

Labrilda Pty Ltd v DCT (1996) 65 FCR 119 ... 415
Landcom; FCT v [2022] FCAFC 204 ... 378
Landcom v FCT [2022] FCA 368 ... 38, 41
Landcom v FCT [2022] FCA 510 ... 10, 12–14, 117–119
Leigh's Will Trusts, Re [1970] Ch 277 ... 272
Lend Lease Funds Management Ltd v Commr of State Revenue [2009] VSC 360 ... 347
Lewis v Lewis [2020] NSWSC 1306 ... 271
Lewis's Will Trusts, Re [1985] 1 WLR 102 ... 272
Linter Textiles Australia Ltd (in liq); FCT v [2005] HCA 20 ... 347
Loughnan v McConnell [2006] QSC 359 ... 277
Ludwig v Jeffrey (No. 4) [2021] NSWCA 256 ... 351

M

Ma v FCT [1992] FCA 359 ... 163
Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42 ... 277
Mantovani v Vanta Pty Ltd (No. 2) [2021] VSC 771 ... 270, 283, 285
Masters v Cameron [1954] HCA 72 ... 381, 382
McCurry v FCT [1998] FCA 512 ... 102, 103
McDonald v FCT [2001] FCA 305 ... 383
McMahon; FCT v 97 ATC 4986 ... 42, 44
McNee v Lachlan McNee Family Maintenance Pty Ltd [2020] VSC 273 ... 351
McNeil; FCT v [2007] HCA 5 ... 403
Mercanti v Mercanti [2016] WASCA 206 ... 66, 351
Miller v Cameron [1936] HCA 13 ... 349
Minerva Financial Group Pty Ltd v FCT [2022] FCA 1092 ... 289–291
Moana Sand Pty Ltd v FCT [1988] FCA 401 ... 102
Montgomery; FCT v [1999] HCA 34 ... 403, 405, 415
Moreton Resources Ltd and Innovation and Science Australia [2018] AATA 3378 ... 112
Moreton Resources Ltd v Innovation and Science Australia [2019] FCAFC 120 ... 105–107, 111
Mount Isa Mines Ltd v FCT (1992) 176 CLR 141 ... 405
Mount Pritchard & District Community Club Ltd v FCT [2011] FCAFC 129 ... 42
Munro v Munro [2015] QSC 61 ... 276
Mushroom Composters Pty Ltd v IS & DE Robertson Pty Ltd [2015] NSWCA 1 ... 382
Mussalli v FCT [2020] FCA 544 ... 410, 411, 414
Mussalli v FCT [2021] FCAFC 71 ... 410
Myer Emporium Ltd; FCT v [1987] HCA 18 ... 194, 195

N

National Australia Bank Ltd v FCT (1997) 80 FCR 352 ... 415
National Australia Bank Ltd v FCT [1997] FCA 514 ... 409
National Speakers Association of Australia Inc v FCT 97 ATC 5131 ... 41, 44
Nicholls v Louisville Investments Pty Ltd (1991) 10 ACSR 723 ... 351
North Ganalanja Aboriginal Corporation & Waanyi People v Queensland [1996] HCA 2 ... 258

O

O'Callaghan (dec'd), Re [1972] VR 248 ... 272, 273
On Call Interpreters and Translators Agency Pty Ltd v FCT (No. 3) [2011] FCA 366 ... 47, 48, 114

Owies v JJE Nominees Pty Ltd [2022] VSCA 142 ....225, 226, 271, 349–351
Owners of Shin Kobe Maru v Empire Shipping Co Inc (1994) 181 CLR 404 256

P

Palmer v Bank of New South Wales [1975] HCA 51 233
Paul Geoffrey Mason, Application of [2022] NSWSC 808 67
Pauling's Settlement Trust, Re [1964] Ch 303 349
Permewan, Re [2021] QSC 151 274
Permewan No. 2, Re [2022] QSC 114 .... 231, 233, 274, 275
Perri v Coolangatta Investments Pty Ltd [1982] HCA 29 381
Peter Greensill Family Co Pty Ltd (trustee) v FCT [2020] FCA 559 .... 259, 261
Phillips; FCT v [1978] FCA 28 394
Pike v FCT [2019] FCA 2185 252
Pine Creek Goldfields Ltd; FCT v [1999] FCA 1267 415
Pitt v Holt [2013] UKSC 26 ....271, 349
PKWK and Innovation and Science Australia [2021] AATA 706 ....105–107, 111
Prestige Motors Pty Ltd; FCT v [1998] FCA 221 257
Prestige Motors Pty Ltd as Trustees of the Prestige Toyota Trust v FCT [1998] HCATrans 279 .... 257, 258

R

Radilo Enterprises Pty Ltd; FCT v (1997) 72 FCR 300 194
Raftland Pty Ltd (as Trustee of the Raftland Trust) v FCT (2006) 227 ALR 598 233
Raftland Pty Ltd v FCT [2008] HCA 21 193
Razzy Australia Pty Ltd v Commr of State Revenue [2021] VSC 124 167
Rizkallah and FCT [2022] AATA 3081 253
Robert G Nail v FCT (1937) 57 CLR 695 397
Roberts and Smith; FCT v [1992] FCA 363 195
Robertson v DFC of Land Tax [1941] HCA 40 316
Ronpibon Tin NL v FCT (1949) 78 CLR 477 397
Rosgoe Pty Ltd v FCT [2015] FCA 1231 42
Rossi Recycling Pty Ltd v Buckland Valley Pty Ltd [2022] VSC 467 384
Royal Insurance Co v Watson [1897] AC 1 413
Royal Wins Pty Ltd and Innovation and Science Australia [2020] AATA 4320 ....110, 111
Ruhamah Property Co Ltd v FCT [1928] HCA 22 102

S

Scott and FCT [2002] AATA 778 396
Scott v FCT (No. 2) (1966) 40 ALJR 265 ....191, 193
Sharpcan Pty Ltd; FCT v [2018] FCAFC 163 ....406–408, 413, 415
Sharpcan Pty Ltd; FCT v [2019] HCA 36 ....404, 406
Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 18 FCR 449 193
Shord and FCT [2022] AATA 1536 62
Smorgon v ES Group Operations Pty Ltd [2021] VSC 608 271
SNF (Australia) Pty Ltd; FCT v [2011] FCAFC 74 329
SNF (Australia) Pty Ltd v FCT [2010] FCA 635 329
South Australian Battery Makers Pty Ltd; FCT v (1978) 140 CLR 645 ....406, 415
Spencer v Commonwealth of Australia [1907] HCA 82 355
St Hubert's Island Pty Ltd (in liq); FCT v [1978] HCA 10 103
Star City Pty Ltd; FCT v [2009] FCAFC 19 415
State of Western Australia v Rothmans of Pall Mall (Australia) Ltd [2001] WASCA 25 139
Statham v FCT [1988] FCA 463 103
Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1 114
Stevenson v FCT [1991] FCA 224 103
Sun Newspapers Ltd v FCT (1938) 61 CLR 337 ....403–406, 415
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34 255

T

Taxation Appeals, Re [1990] AATA 249 319
Taylor v The Owners – Strata Plan No. 11564 [2013] NSWCA 55 258
Taylor v The Owners – Strata Plan No. 11564 [2014] HCA 9 257
Telstra Super Pty Ltd v Flegeltaub [2000] VSCA 180 226
The Edge Development Group Pty Ltd v Jack Road Investments Pty Ltd [2019] VSCA 91 382
The Optical Superstore Pty Ltd v Commr of State Revenue (Review and Regulation) [2018] VCAT 169 287
Thiele and FCT [2022] AATA 2123 64
Thomas and Naaz Pty Ltd (ACN 101 491 703) v Chief Commr of State Revenue [2022] NSWCATAP 220 288
Thomas and Naaz Pty Ltd v Chief Commr of State Revenue [2021] NSWCATAD 259 287
TOC Processing Pty Ltd and FCT [2022] AATA 2479 133
Trust Company of Australia Ltd v Commr of State Revenue [2006] VSC 64 347
Trustee for the Estate of the late AW Furse No. 5 Will Trust v FCT (1990) 21 ATR 1123 268
TT88/98 and FCT [1988] AATA 367 319
Tucker v Granada Motorway Services Ltd [1979] 1 WLR 683 405
Tyco Australia Pty Ltd v FCT [2007] FCA 1055 409

U

Ultimate Vision Inventions Pty Ltd and Innovation and Science Australia [2019] AATA 1633 106
Union-Fidelity Trustee Co of Australia Ltd v FCT [1969] HCA 36 37
UNSW Global Pty Ltd v Chief Commr of State Revenue [2016] NSWSC 1852 279–281

V

Vidler v FCT [2010] FCAFC 59 103
Vigolo v Bostin [2005] HCA 11 233

W

W Nevill & Co Ltd v FCT [1937] HCA 9 413
Walker v Walker [2022] NSWSC 1104 314–318
Wardy v Salier [2014] NSWSC 473 276
Wareham v Marsella [2020] VSCA 92 351
Watson as trustee for the Murrindindi Bushfire Class Action Settlement Fund v FCT [2020] FCAFC 92 408
Wentworth Securities Ltd v Jones [1980] AC 74 257
Westfield Management Ltd v AMP Capital Property Nominees Ltd [2012] HCA 54 232
Wheatland Holdings Pty Ltd as Trustee for the Rodney Manuel Family Trust [2022] WASC 211 66
Wheatley v Lakshmanan [2022] NSWSC 583 273
Wheatley v Lakshmanan (No. 2) [2022] NSWSC 851 274
White v Commr of Stamp Duties [1968] Qd R 140 347
Whitfords Beach Pty Ltd v FCT 79 ATC 4648 102
Whitfords Beach Pty Ltd v FCT [1983] FCA 97 102
Whiting; FCT v (1943) 68 CLR 199 316
Williams; FCT v [1972] HCA 31 102
Wong v Wong [2022] FCA 78 382
Wood, Re; Ebert v Union Trustee Co of Australia Ltd [1961] Qd R 375 277
WorkPac Pty Ltd v Rossato [2021] HCA 23 ....47, 48, 114
WR Carpenter Holdings Pty Ltd v FCT [2008] HCA 33 329

X

X7 v R [2014] NSWCCA 273 258

Y

YDXM and FCT [2022] AATA 2382 133
Yeung v FCT 88 ATC 4193 195
Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15 277

Z

Zeta Force Pty Ltd v FCT [1998] FCA 728 37
ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2 ....47, 48, 113, 114, 288

Authors

A

Abdalla, J
Tax Counsel's Report
- Looking back on 2022 306
- Setting tax priorities in an uncertain environment 61
- The future of the Administrative Appeals Tribunal 376
- Updated Federal Budget 2022-23 247

Arblaster, K
Alternative Assets Insights
- Stapled structures and Pt IVA 289

B

Backhaus, S
Superannuation
- Varying unit trust deeds to minimise risk 228

Bailey, K
Superannuation death benefits: nomination options 155

Baker, M
Recent trends: capital versus revenue 403

Bardos, P
Mid Market Focus
- Assessable non-assessable income 385

Bobb, R
Reversing the onus of proof in tax matters 162

Brierley, C
Commercial and agricultural FIRB applications 398

Briglia, P
A Matter of Trusts
- Unit trusts, landholder duty and SMSF roll-overs 166

Broderick, P
A Matter of Trusts
- Owies – end of trustees' discretion? 225

Burgess, M
Tax and estate planning in 2023: the road ahead 270

Burns, A
Mid Market Focus
- Fuel tax credits: a reminder 197

Butler, D
Superannuation
- BDBNs: what to look out for and what to avoid 170
- Employee or contractor – clarifying the multi-factorial test: part 2 113
- Employee or contractor – PAYG and SG: part 1 46
- Employee or contractor – payroll tax: part 3 286
- Failing to pay minimum pension payments before 30 June 352
- Greater certainty with SMSF BDBNs 417
- Varying unit trust deeds to minimise risk 228

C

Chen, S
R&D: navigating disputes 105

Collins, B
Case note: E Group Security appeal 279
High Court decides FCT v Carter 33

D

De Zilva, A
Member Profile 18

Donald, A
Associate Tax Counsel's Report
- Getting tax ready for electric vehicles 187
- Post-election uncertainty 5

Donlan, T
Successful Succession
- Public policy and provision avoidance 231
- Tax on dying of a broken heart … two years on 419

F

Fettes, W
Superannuation
- BDBNs: what to look out for and what to avoid 170
- Employee or contractor – clarifying the multi-factorial test: part 2 113
- Failing to pay minimum pension payments before 30 June 352

Figot, B
Superannuation
- Employee or contractor – PAYG and SG: part 1 46

G

Gandhi, N
Mid Market Focus
- Non-resident discretionary CGT distributions 259

Guruge, A
Case note: E Group Security appeal 279

H

Harding, C
M&A: the public/private company dichotomy 263

Harnischmacher, J
A Matter of Trusts
- Owies: removal of trustee and voidable transactions 349

Hirst, A
Alternative Assets Insights
- Stapled structures and Pt IVA 289

Hua, T
Alternative Assets Insights
- Stapled structures and Pt IVA 289

Hurley, C
Superannuation
- BDBNs: what to look out for and what to avoid 170
- Employee or contractor – payroll tax: part 3 286

Hurst, G
CEO's Report
- A busy October for the Institute and our members 186

- A year of investment in the Institute 305
- Humble beginnings, big ideas, bright future 373
- Recognition for work well done 129
- The Tax Summit: bigger and brighter in 2022 59
- The Tax Summit 2022: Monumental and magnificent 245

I

Ioannou, J
Partnership tips and traps 390

J

Jury, J
Carbon farming: tax issues for primary producers 211

K

Kinkade, I
Alternative Assets Insights
- Landcom case: GST implications 117

M

Malone, J
Alternative Assets Insights
- Multinational tax integrity proposals 173

Manapakkam, A
Successful Succession
- Tax on dying of a broken heart … two years on 419

Marateo, D
Carbon farming: tax issues for primary producers 211

Marshall, M
President's Report
- Connecting with you in 2023 372

McNab, P
Private rulings: are they worth it? 38

Milner, C
Duties: land-owning unit trusts 337

Monotti, W
A Matter of Trusts
- Lost trust deeds 283

Muscat, P
Alternative Assets Insights
- ATO guide: market valuations for tax purposes 355

O

Ou, D
M&A: the public/private company dichotomy 263

P

Pfaff, J
Alternative Assets Insights
- Landcom case: GST implications 117

Phillips, T
Resolving transfer pricing disputes 324

Phung, J
Mid Market Focus
- Share trading versus speculating 319

Price, J
Acting CEO's Report
- Keep the good, leave the bad behind 3

S

Sanderson, J
UK pension transfers: part 1 219
UK pension transfers: part 2 330

Sealey, M
Alternative Assets Insights
- NSW duties: significant law changes 49

Seve, A
Resolving transfer pricing disputes 324

Shekhawat, A
Associate's Report
- Australia's approach to work-related expenses 130

Slegers, P
Carbon farming: tax issues for primary producers 211

Stewart, N
Alternative Assets Insights
- ATO guide: market valuations for tax purposes 355

T

TaxCounsel Pty Ltd
Tax News – what happened in tax?
- June 2022 6
- July 2022 62
- August 2022 131
- September 2022 188
- October 2022 248
- November 2022 308
- December 2022/ January 2023 377

Tax Tips
- CGT main residence: knockdown rebuild 136
- Construction points 255
- Deceased estates: present entitlement issues 314
- Discretionary trusts: non-tax litigation 66
- GST margin scheme issues 10
- Is there a contract? 381
- Some basic tax principles 191

The Tax Institute
Design of a sustainable superannuation system 19
Reshaping the GST for the future 144
State taxes and indirect taxes 72
Tax policy development and tax administration 202

Thompson, J
Alternative Assets Insights
- Multinational tax integrity proposals 173

Tian, T
Duties: land-owning unit trusts 337

Tse, J
President's Report
- Big ticket moments to round out 2022 244
- Good tax policy is key to our future 184
- The importance of a professional network 128
- The importance of authenticity 2
- This year's achievement and future opportunities 304
- Welcome to our new governance Chair 58

V

Vann, R
Alternative Assets Insights
- Stapled structures and Pt IVA 289

Verma, R
Small-scale property developments: tax issues 92

Contacts

National Council

Chair
Clare Mazzetti

President
Marg Marshall, CTA

Vice President
Todd Want, CTA

Treasurer
Paul Banister, CTA

National Councillors
Leanne Connor, CTA
David Earl, FTI
Eddy Moussa, CTA
Tim Sandow, CTA
Ian Heywood, CTA
Bill Keays, CTA

National Office

CEO: Giles Hurst

Level 37, 100 Miller Street
North Sydney, NSW 2060

T 02 8223 0000
E ceo@taxinstitute.com.au

State Offices

New South Wales and ACT
Chair: Glen Hutchings, FTI

Level 37, 100 Miller Street
North Sydney, NSW 2060

T 02 8223 0031
E nsw@taxinstitute.com.au

Victoria
Chair: Fiona Knight, CTA

c/o Level 37, 100 Miller Street
North Sydney, NSW 2060

T 03 9603 2000
E vic@taxinstitute.com.au

Queensland
Chair: John Ioannou, CTA

Level 11, Emirates Building
167 Eagle Street
Brisbane, QLD 4000

T 07 3225 5200
E qld@taxinstitute.com.au

Western Australia
Chair: Bill Keays, CTA

Level 32, Central Park
152 St Georges Terrace
Perth, WA 6000

T 08 6165 6600
E wa@taxinstitute.com.au

South Australia and Northern Territory
Chair: Nick Wilkins, CTA

The Tax Institute, WOTSO Adelaide
217/219 Flinders Street
Adelaide, SA 5000

T 08 8463 9444
E sa@taxinstitute.com.au

Tasmania
Chair: Ian Heywood, CTA

The Tax Institute, WOTSO Adelaide
217/219 Flinders Street
Adelaide, SA 5000

T 1800 620 222
E tas@taxinstitute.com.au

Taxation in Australia ISSN 0494-8343

Publishing House
The Tax Institute
ABN 45 008 392 372

Level 37, 100 Miller Street
North Sydney, NSW 2060

Editorial Board (appointed September 2021)
Michael Walpole, CTA, Professor, UNSW (Chair)
Celeste Black, FTI, Associate Professor, The University of Sydney
David W Marks KC, CTA, Queensland Bar
Helen Hodgson, CTA, Professor, Curtin University
Paul O'Donnell, CTA, Principal, Deloitte

General Manager – Commercial Transformation & Special Projects
James Paterson

Content Delivery Manager, Knowledge & Learning
Carla Reddy

Managing Editor
Deborah Powell

Graphic Designers
Mei Lam; Nicole Welch; Claus Huttenrauch

Typesetter
Midland Typesetters, Australia

Advertising
Business Relationship Manager
Brian Martin 08 6165 6600

© 2023 The Tax Institute
This journal is copyright. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission.

Disclaimer
Unless otherwise stated, the opinions published in this journal do not express the official opinion of The Tax Institute. The Tax Institute accepts no responsibility for accuracy of information contained herein. Readers should rely on their own inquiries before making decisions that touch on their own interests.

The Tax Institute

23-004RES_01/23