The Tax Institute

Tax Update

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1. Tax Update Pitstop

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

Tax Update Matter	Impact Summary	Further Detail
VTBL	The Administrative Appeals Tribunal had handed down a decision in an assessment betterment case which is interesting in a number of respects, including that: • it provides an insight into the difficult evidentiary burden on taxpayers in such matters, although confirms that this burden can be met by taxpayers armed with sufficient evidence; and • disagrees with ATO's view in the 20% uplift penalty where the ATO issues multiple penalties of the same type at the same time	Page 7
Paltos v Milevski	This considers the meaning of "goodwill" and where there has been a transfer of "goodwill" by conduct of the parties. This may be relevant in a tax context in a number of ways, including whether CGT event A1 has happened when a business starts to be commenced out of a different entity.	Page 11
Andrews Superannuation Fund	This is a decision of the Full Federal Court that considers when superannuation contributions can be set aside as against a person's bankruptcy trustee after the person is made bankrupt. Importantly, the Court concluded that large number of superannuation contributions had not been made with the intent of defeating creditors.	Page 16
Proposed superannuation tax changes	The Commonwealth government has provided outlined details of its measure to increase the tax on superannuation funds with a balance of $3million or more.	Page 27
NSW surcharges and treat obligations	Revenue NSW has publicly acknowledged that the surcharge duty and surcharge land tax provisions are contrary to Australia's obligations under tax treaties with various countries (Germany, Finland, South Africa and New Zealand) and that, as a result, Revenue NSW will be issuing refunds for surcharge paid b from 1 July 2021. It can be expected other States may need to adopt a similar approach.	Page 45

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2. Cases

2.1 VTBL – asset betterment assessment

Facts

VTBL is an individual. Since 2001 VTBL has undertaken various property development projects in Western Australia with her de facto spouse, A. VTBL and A used various entities to facilitate these projects.

VTBL's main sources of income were director's fees paid from a related entity, G Holdings Pty Ltd and a salary received from M Nominees Pty Ltd, another related entity.

Generally, the development projects undertaken by VTBL and A involved the acquisition of rural land which would be rezoned for residential development. The land would then be subdivided into lots which would then be sold.

These projects would be funded through a joint venture with a related entity, typically a trust, which was ultimately the developer and the beneficial owner of the land. VTBL would acquire a loan from a financier for the purchase price. The related entity would provide the deposit for the purchase of the land, stamp duty and the subsequent holding costs. VTBL would be the registered owner of the land as the purported trustee for the beneficial owner.

VTBL would make the loan repayments through direct debits from her NAB Flexi Account. This account was primarily used to facilitate developments being undertaken by the related parties. VTBL otherwise did not pay any further costs in relation to the developments or the acquisition of land for the developments.

VTBL also made loans to G Holdings Pty Ltd (**G Holdings**) as part of these arrangements. The loan liability owing to VTBL was recorded in the accounts of G Holdings. VTBL was a director and shareholder of G Holdings.

VTBL and A had undertaken approximately 230 development projects that adopted this or similar arrangements.

<u>2009, 2010 and 2011 income years</u>

VTBL lodged income tax returns for the 2009, 2010 and 2011 income years, disclosing $44,067 of taxable income in the 2009 income year, $37,536 in the 2010 income year and $25,905 in the 2011 income year.

On 4 May 2012, the Commissioner commenced an audit of VTBL. As a result of this audit, the Commissioner issued default assessments to VTBL for the 2009, 2010 and 2011 income years in January 2015, increasing her income to $3,774,815 in the 2009 income year, $5,420,274 in the 2010 income year and $4,097,663 in the 2011 income year. The Commissioner also issued shortfall interest charges and shortfall penalties for each year.

The Commissioner used the asset betterment test to calculate the amended assessable income. In particular, the Commissioner used the '*Increase/Decrease'* calculation method. The Commissioner purported to calculate the assets of VTBL which comprised cash in 7 bank accounts and credit cards in the name of VTBL, shares in 12 companies and the proceeds of sale of eight properties. The balances of related party loans were also recorded in the calculation of VTBL's total assets. The Commissioner then deducted VTBL's total liabilities from the total assets.

On 1 April 2015 VTBL lodged an objection in respect to the default assessments and the shortfall penalty assessment. One of the grounds of objection was that the default assessments were excessive. This is largely

because the Commissioner had accounted for the proceeds of sale from 21 properties that VTBL held on trust for other entities. VTBL contended that she was not the beneficial owner of these properties.

Similarly, the Commissioner had assessed VTBL on withdrawals from bank accounts in the name of VTBL. In regard to the accounts used to facilitate the loan arrangements, the Commissioner contended that because VTBL was named as the borrower and mortgager, she did not hold the bank accounts on trust.

VTBL claimed that these withdrawals were not for her benefit. Rather, these accounts were specially used for the business transactions of third parties. Accordingly, VTBL had accounted for all income included in the asset betterment test.

VTBL also claimed that the Commissioner had not appropriately exercised his discretion to remit the penalties.

VTBL contended that the Commissioner did not have the authority to issue amended assessments for the 2009 and 2010 income year on the basis that the Commissioner could not have considered that the shortfall amounts were as a result of fraud or evasion or that the Commissioner's opinion was based on a mistaken or inadequate understanding of facts or error of law.

The Commissioner partially allowed the objection in respect to the 2009, 2010 and 2011 default assessments as well as the penalty assessment. This was based on the acceptance that 11 of the 21 properties had been held on trust by VTBL. The Commissioner also acknowledged that a further two properties had been sold in 2008 and should not have been included in the assessment for the 2009 year.

The Commissioner contended that the onus was on VTBL to establish that the default assessments were excessive and VTBL was also required to show what her actual taxable income was for the relevant years. The Commissioner concluded that VTBL had not discharged this burden and did not establish that the default amendments were excessive.

The Commissioner also contended that he was entitled to issue amended assessments for the 2009 and 2010 income years due to the significant disparity between VTBL's declared income and the income calculated in accordance with the asset betterment approach.

2016 Income Year

VTBL acquired a property at 676 Anketell Road, Anketell, Western Ausrtalia, in November 2005 for $1.4 million. VTBL purported to hold the Anketell property on trust for the G Holdings Trust. In December 2015, VTBL as trustee for the G Holdings Trust sold the Anketell property for $3,696,000 (GST inclusive).

VTBL contended that there was a valid trust because there was trust property, being the Anketell property, an intention to create a trust and there was an identifiable beneficiary. VTBL also claimed that there was evidence of the trust in writing which satisfied the written requirement in Western Australia, although the creation of the trust had not been in writing.

The Commissioner issued a special assessment under section 168 of the ITAA 1936 for the income year ended 30 June 2016 on the basis that VTBL had a taxable income of $1,960,000. On 6 March 2017 VTBL objected to this special assessment. This objection was disallowed by the Commissioner.

VTBL argued that, in the alternative of holding the Anketell property as bare trustee for the G Holdings Trust, she was a constructive trustee for the G Holdings Trust and another entity involved in the property development arrangements, M Pty Ltd. This was on the basis that VTBL did not provide any funds towards the purchase price of the Anketell property or the outgoings in respect to this property. Furthermore, the rental income derived from the property was paid to a third party even though VTBL was the registered proprietor.

If it could not be established that there was a trust in respect to the Anketell property, VTBL asserted that the proceeds from sale on the property were on capital account and should not be classified as income. This was

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on the basis that the proceeds of sale were not income according to ordinary concepts and VTBL was not conducting a business of property development.

The Commissioner contended that there were no valid trusts because the formalities of a trust deed had not been observed, or to the extent that there were executed trust deeds provided, these documents were a sham and there was never any intention of giving effect to the trust relationship.

In respect to the shortfall amounts in the default assessments and the special assessments, the Commissioner imposed a base penalty amount calculated at 75%. The Commissioner also imposed an uplift of 20% on the basis that VTBL had prevented the Commissioner from uncovering the sources of income that resulted in the shortfall amounts.

Issues

1. Were the default assessments for the 2009, 2010 and 2011 years and the special assessment for the 2016 year excessive?
2. Was the Commissioner correct to issue shortfall penalties and should those penalties be remitted?
3. Were the 2009 and 2010 default assessments validly issued by the Commissioner?

Decision

Were the default assessments for the 2009, 2010 and 2011 years and the special assessment for the 2016 year excessive?

The AAT considered that for VTBL to establish that the default assessments were excessive, VTBL had the onus of establishing what her actual income was for the 2009, 2010 and 2011 income years. This necessarily involved a consideration of the two issues identified by VTBL:

1. whether VTBL held the relevant properties on trust for other entities; and
2. whether the relevant bank accounts and credit card accounts should be included in VTBL's assessable income.

In respect to the Nab Flexi Account, the AAT considered the analysis of a forensic accountant, David May. David considered the nature and application of amounts withdrawn from the Nab Flexi Account and the nature and source of funds deposited in that account. The AAT accepted David's analysis that all amounts from the NAB Flexi Account except $48,897 of $9,335,636 were sourced from developers and beneficial owners of the properties that VTBL was developing. This was accepted to be consistent with VTBL's contention that the account was used to facilitate the loan arrangements for the development projects.

David also provided an analysis of the G Holdings loan account. David considered that the transactions from this account reflected ordinary and reasonable dealings for a private company.

In respect to the eight properties in issue, the AAT considered how the proceeds of sale were treated for income tax purposes. The AAT found that the proceeds of sale for five of these properties were recorded in the income tax returns for the related entities. Three of these properties were not accounted for in the tax returns for any of the related entities.

The AAT found that the Commissioner did not provide sufficient evidence to demonstrate that VTBL had other sources of income, namely income generated from the relevant properties and bank accounts.

The AAT considered that David's analysis of the Nab Flexi account showed the source and destination of the funds used to acquire the properties in issue. Accordingly, the AAT considered that this showed the flow of funds which established that VTBL was not receiving the funds passing through the account for her own benefit.

In respect to another account used to facilitate the property purchases, an Investec Account, the AAT found that this account was used for the benefit of VTBL. There was no evidence to support the conclusion that the

withdrawals from this account were applied for the benefit of the related entities. Accordingly, the funds that passed through this account were treated as income of VTBL.

The AAT considered the evidence concerning another account with Bendigo Bank that was included in the Commissioner's asset betterment test. The AAT considered that the source of the funds in this account was from a related entity and was connected to the acquisition of a particular property. The AAT concluded that this account was used purely for the purchasing and holding of that property. Accordingly, the AAT found that the funds in this account were not for the benefit of VTBL and should not be included in her assessable income.

In respect to a second account with Bendigo Bank, the AAT noted that this account related to a property that was not identified by the Commissioner as being beneficially held by VTBL. As VTBL was holding this property on trust for another entity and this account was used purely to facilitate the purchase of and costs related to that property, the AAT was satisfied that the account was not used for the benefit of VTBL.

The AAT then considered a loan repayment from the related entity, G Holdings Pty Ltd, which resulted in VTBL receiving a payment of $1,000,000. The AAT considered that there was insufficient evidence to establish the loan arrangement that resulted in this payment. The AAT concluded that this amount should be included in her assessable income.

Ultimately the AAT found that one of the Bendigo Bank accounts and the Nab Flexi account were not for the benefit of VTBL and should not be included in her assessable income.

The AAT did not accept the Commissioner's argument that the lack of formalities in relation to trust deeds meant that there was no valid trust. Furthermore, the Commissioner failed to establish that there was never any intention of giving effect to the trust relationship. In respect to the properties, VTBL and A engaged in a common practice of carrying out subdivisional developments. This practice involved VTBL purchasing and holding properties on trust for other entities. VTBL did not bear the costs of these developments and did not benefit from the sale of the developments. Therefore, the AAT concluded that these properties were not beneficially owned by VTBL and that they were, in fact, held on trust by VTBL.

Therefore, the AAT found that the default assessments and the special assessment were excessive or otherwise incorrect. The AAT determined that the eight properties and the two bank accounts should not be included in VTBL's assessable income and, therefore, the assessments for the 2009, 2010, 2011 and 2016 years should be reduced accordingly.

Was the Commissioner correct to issue shortfall penalties and whether those penalties should be remitted?

The fact that the assessments were determined to be excessive had a bearing on the amount of the penalties, but not necessarily whether or not those penalties should have been imposed.

The AAT considered that although the properties and some of the bank accounts should not have been included in VTBL's assessable income, some of these bank accounts were deemed to be for the benefit of VTBL. Accordingly, these accounts should have been accounted for in VTBL's tax returns. VTBL had failed to do this and this demonstrated an intentional disregard for her obligations under tax law.

Furthermore, the AAT found that VTBL was an astute businesswoman and was financially literate. Therefore, VTBL could be assumed to have a sound understanding of her taxation affairs and requirements to lodge accurate tax returns.

The AAT determined that the penalty at the rate of 75% of the shortfall should be imposed in respect to the sources of income that were omitted in VTBL's tax returns.

However, as the AAT did not consider that VTBL prevented the Commissioner from uncovering the shortfall amounts, the AAT found that the 20% uplift on these penalties should not be imposed.

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The AAT also considered whether the Commissioner could impose the 20% uplift on the basis of there being multiple instances of amended assessments in respect of the same matter. The relevant part of section 284-220 states that the base penalty is increased by 20% where 'the base penalty amount was worked out using item 1, 2 or 3 of the table in subsection 284-90(1) and a base penalty amount for you was worked out under one of those items previously'. The Commissioner's practice in relation to penalties in PSLA 2012/5 states:

> *15K. The increase will apply regardless of whether the previous penalty was assessed during a previous interaction, or whether it occurs on the same day. There is no requirement for the entity to be aware of the penalty for the increase to apply. This means that, where we assess multiple penalties of the same type at the same time, the increase will apply to the second and subsequent statements*.

The Deputy President considered the Commissioner's position to be incorrect, and based on the former wording of section 284-220 which imposed the uplift where a penalty had been applied 'for a previous accounting period'. On that basis, there was no uplift to be imposed.

Considering the circumstances of VTBL, including her knowledge of commercial and taxation affairs, the AAT did not consider it to be appropriate to remit the penalties in relation to the undeclared sources of income.

Were the 2009 and 2010 default assessments validly issued by the Commissioner?

The AAT considered whether it was appropriate for the Commissioner to issue assessments outside of the four year review period on the basis that there had been fraud or evasion.

The AAT considered that there had been reasonable grounds on which the Commissioner based his opinion that there had been fraud or evasion committed by VTBL in respect to the 2009 and 2010 income years.

Accordingly, the AAT determined that the Commissioner had the power to issue amended assessments for the 2009 and 2010 income years.

COMMENT – the decision of the AAT to remit the 20% penalty uplift despite there being intentional disregard of the law is contrary to the approach the ATO would normally take. ATO *Practice Statement* PS LA 2012/5 provides that the ATO will usually remit a 20% uplift where the base penalty amount has increased because two or more penalties were issued at the same time, the entity has not been advised of a previous penalty (usually because of concurrent calculation), and the behaviour is not intentional disregard of the law.

COMMENT – interestingly, despite the taxpayer in this case arguing that her correct taxable income was that set out in her tax returns for the relevant years, the Tribunal decided to vary the objection decision to remove amounts from being assessable to the taxpayer. It could be expected that as the taxpayer could not prove her correct taxable income, that the taxpayer would have been unsuccessful.

Citation *VTBL and Commissioner of Taxation (Taxation)* [2023] AATA 168 (DP Boyle, Perth)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/168.html

2.2 Paltos v Milevski – no transfer of goodwill

Facts

Dennis Paltos commenced practice as a solicitor in 1979 and in 2000, started his own law firm, Paltos & Co, Solicitors. Peter Milevski was employed as a law clerk at Paltos & Co, and subsequently employed as a solicitor in 2003.

On 29 June 2010, Dennis and Peter entered into a deed of agreement of partnership. The agreement between Dennis and Peter provided that Peter was to purchase a 30% interest in the practice of Paltos & Co for consideration of about $232,000, payable in three tranches over a two-year period. The partnership

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commenced trading on 1 July 2010. The partnership traded under the name Paltos Briggs, Family Lawyers in January 2011 and later traded under the name Paltos Milevski Family Lawyers in 2014.

In addition to the partnership deed, Peter and Dennis entered into a put and call option agreement which provided that on the death or total and permanent disablement of one of the partners, the other partner would be entitled to purchase that partner's interest.

In December 2015 Dennis suffered several strokes resulting in his hospitalisation. Dennis stopped attending the practice and was unable to undertake legal work. Peter took over supervision of his files. In January 2016, Peter discovered that Dennis had made substantial unauthorised withdrawals of partnership funds leaving his capital account with the partnership in debit.

Both Dennis and Peter retained solicitors in relation to their partnership dispute but were unable to reach agreement as to their ongoing relationship. On 18 April 2016 Peter commenced proceedings to wind up the partnership.

On 21 April 2016 Sackar J made orders for the partnership to be dissolved and wound up under the direction of Court-appointed receivers. The orders further authorised the receivers to realise the value of the partnership assets including goodwill, that accounts be taken, and that either party be permitted to purchase partnership assets.

Prior to the orders being made, Peter had incorporated Milevski Family Lawyers Pty Ltd (**MFL**), through which he intended to commence his own practice. MFL's offices was located on Castlereagh St Sydney.

The receivers were unable to carry on the partnership business, as they were not practicing lawyers. The receivers formed the view that they had to make urgent arrangements for the ongoing carriage of the firm's matters in order to best secure recovery of debts and works in progress. The receivers terminated the employment of all but one of the existing staff. Seven of the terminated staff were subsequently employed by MFL. The receivers transferred almost all files of the partnership to MFL on the basis that MFL was to account to the partnership for fees relating to work done prior to the partnership dissolution. Precedents, practice manuals and other documents held by the partnership were also delivered to MFL. The partnership telephone number was transferred to MFL, and for a temporary period, the partnership website traffic was also rediverted to the website of MFL. However, the business name Paltos Milevski Family Lawyers was not taken over by MFL.

Dennis subsequently recovered from his strokes and operated his own family law practice.

The partnership underwent a complicated litigious history. A creditor of the partnership, Westpac Banking Corporation, brought debt recovery proceedings against Dennis and Peter. Dennis claimed against the receivers for breaches of fiduciary duty in transferring assets to MFL without requiring proper payment for their value. In addition, Dennis sued his former solicitors for damages for negligent advice given in connection with the disintegration of the partnership.

The main issue in the dispute in the Supreme Court concerned Dennis' claim for his 70% interest of the value of the goodwill. Dennis claimed that the whole business of Paltos Milevski Family Lawyers, including its goodwill, had been acquired by Peter from the receivers. As a result, Dennis claimed he was entitled, in the taking of the partnership accounts, to be credited with 70% of the value of the firm's goodwill which represented Dennis' share of the partnership. Dennis claimed that the value of the goodwill of the partnership which had been transferred to Peter, through the receivers, was of $723,640, of which Dennis' interest of 70% was $506,548.

Dennis adduced expert evidence of Rebecca Conoulty a forensic accountant. Rebecca's evidence was based on the premise that Peter was carrying on substantially the same business within MFL as the business that was operated by the partnership. Rebecca's reasoning was that there was a continuity of the files, staff, procedure

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manual, telephone number and internet presence. The main exceptions were that Dennis did not participate in the business of MFL, and that MFL operated out of different premises.

Rebecca valued the business adopting the method of capitalisation of maintainable earnings. An adjustment was made to reflect that the business conducted by MFL would not derive income generated from Dennis. The valuation of the business was a range of $667,975 to $779,304.

Parker J in the Supreme Court found that the forensic accountant's valuation failed to take into account the possibility that a purchaser of the business would face competition from Peter and Dennis, as the former partners were not subject to any ongoing restraint on competition. The primary judge determined that the appropriate enquiry was what the asset would have fetched if sold on the open market.

The primary judge relied upon the decision of Windeyer J in *Page v McKensey* (Supreme Court of New South Wales, 17 December 1993), which set down principles as to matters to be taken into account in valuing goodwill in circumstances where a partnership is dissolved with no terms of agreement. In such a case, an outsider purchasing goodwill would take into consideration that the former partners would be entitled to practice in the immediate vicinity, the former partners would be entitled to let their circumstances be known to any former clients but not to solicit them, the former partners would be entitled to take over any files under instruction of the former clients of the dissolved partnership if fees to the date of dissolution were paid to the old firm, and the former partners would not be entitled to use the name of the former partnership.

Accordingly, the forensic accountant was not entitled to have regard to any special value that Peter may have to the practice by his familiarity with the clients or business. The primary judge concluded that Dennis had not established he was entitled to be credited in the taking of accounts with any sum representing the acquisition by Peter of any goodwill of the partnership. However, the primary judge did not go so far as to make a finding that goodwill had not been transferred to Peter.

Dennis appealed to the Court of Appeal on the single ground that the Court at first instance failed to properly determine the value of the goodwill, business and intangibles due to Dennis.

Issue

Whether Peter, in substance, acquired the partnership practice's goodwill?

Decision

The Court found that the goodwill had not been transferred to MFL. The Court referred to the case of *Commissioner of Taxation v Murry* (1998) 193 CLR 605, which defined goodwill as '*the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business*'.

The Court inferred that the partnership's source of custom was generated by the names and reputations of its two partners. However. at the date of the Court's order dissolving the partnership, the partners had ceased practice together and the business name Paltos Milevski Family Lawyers had ceased to be used. Peter had commenced his own practice using his name and practiced at different premises. The partnership business had been brought to an end by the parties' conduct, such that there was no continuity of the business that might have resulted in the preservation of its goodwill. While the assets that were acquired by Peter may have had individual value, those assets did not carry with them a right to conduct the former partnership's business.

Therefore, goodwill ceased to exist such that Peter had not acquired any goodwill of the partnership for which he was required to give credit on the taking of the partnership accounts.

The Court further found that the primary judge was correct in finding that the valuation of the goodwill relied on by Dennis was flawed. The forensic accountant's valuation proceeded on the incorrect assumption that the purchaser of the goodwill of the partnership would have the benefit of covenants by former partners not to compete with the purchaser. The restraint on a departing partner was limited to a prohibition on solicitation of

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the firm's clients. It did not prevent former partners from otherwise effectively competing with a purchaser including by practising in the immediate vicinity.

The valuation had not taken into account that a hypothetical third-party purchaser would not have the benefit of an express covenant against competition with the previous partners. The valuation also incorrectly considered what the assets were worth to Peter, rather than what a third-party purchaser might have paid for them.

COMMENT – if the goodwill of the partnership ceased to exist, this would be an example of CGT event C2 (cancellation, surrender and similar endings) where market value would be deemed to have been received at the time of the CGT event.

Citation *Paltos v Milevski* [2023] NSWCA 7 (Macfarlan JA, Kirk JA and Basten AJA, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2023/7.html

2.3 Auckram – franked dividend

Facts

Brian Auckram was the sole director of Integrity Consulting Pty Ltd (**Integrity**) from the date of its incorporation on 5 March 2001 until 30 June 2017. Brian was also the sole shareholder of Integrity from 5 March 2001 until it was deregistered by the ASIC on 21 July 2019.

Brian was an Australian tax resident for the income tax year ended 30 June 2016.

On 28 July 2016, the income tax returns for Brian and Integrity were lodged for the 2016 year.

Brian's tax return reported (amongst other amounts) a franked dividend of $40,415 and franking credits of $17,321 from Integrity.

Integrity's tax return reported (amongst other amounts) $40,415 as the total amount of franked dividends paid and $86,574 as its franking credit balance.

On 4 August 2016, the Commissioner issued a notice of assessment to Brian for the 2016 year on the basis that the franked dividend was included in Brian's assessable income.

Subsection 44(1) of the ITAA 1936 relevantly provides that the assessable income of a shareholder in a company who is a resident includes dividends that are paid to the shareholder by the company out of the profits derived by it from any source.

On 12 May 2021, Brian objected to the assessment and provided copies of the AAT's decisions in the following proceedings:

1. Mr Brian Auckram and Mrs Fiona Auckram and Secretary, Chief Executive Centrelink (**Centrelink AAT Decision**); and
2. Auckram and Secretary, Department of Social Services (Social services second review) [2018] AATA 2976 (**Centrelink AAT Appeal Decision**).

The Centrelink AAT Decision and the Centrelink AAT Appeal Decision were decisions to deem assets of Integrity to be assets of Brian for social security purposes in accordance with Part 3.18 of the *Social Security Act 1991* (Cth).

Brian objected to the assessment on the basis that Integrity 'ceased to exist' as a result of the Centrelink AAT Appeal Decision and accordingly, a dividend payment could not have been made to Brian. Brian also submitted that the Centrelink AAT Appeal Decision and associated legislation made it clear that the assets of Integrity

became his personal property and, in accordance with the separate entity principle, Integrity therefore ‘ceased to exist’ as a separate legal and financial entity on 16 March 2016.

On 6 July 2021, the Commissioner disallowed Brian's objection in full.

On 22 August 2021, Brian applied to the AAT for a review of the objection decision.

The Commissioner contended that the franked dividend was assessable income to Brian on the basis that:

1. Integrity 'existed' during the entirety of the 2016 year;
2. Brian failed to discharge the burden of proof that Integrity 'didn’t exist' at the time of making of the dividend payment; and
3. the Centrelink AAT Appeal Decision applied only to the administration of the Social Security Act in relation to Brian's specified circumstances in that decision.

Issue

Should the franked dividend be included in Brian’s assessable income for the 2016 income year?

Decision

During the proceedings, the AAT referred to the following points in reaching its decision:

1. the evidence before the AAT was that Brian met the requirements of section 41(1) of the ITAA 1936. That is, Brian was an Australian resident, the sole shareholder of Integrity and received a franked dividend of $40,415 from Integrity ;
2. section 601AD of the Corporations Act makes clear that a company registered with ASIC ceases to exist on deregistration. Accordingly, Integrity ceased to exist on 21 July 2019, the date of deregistration;
3. during the 2016 year, Integrity was a 'controlled private company' with Brian being a 100% 'attributable stakeholder';
4. as the AAT noted in the Centrelink AAT Appeal Decision, the Social Security Act does not effect a transfer of a property to the individual. Rather, its effect ‘is to deem an amount equivalent to the value of an asset of a private company controlled by an individual, to that individual solely for the purpose of the 'asset' test under the legislation’.

Accordingly, the AAT affirmed the objection decision on the basis that Brian had failed to discharge the onus on him under section 14ZZK of the TAA to demonstrate that the assessment was excessive or otherwise incorrect.

Citation *Auckram v Commissioner of Taxation (Taxation)* [2022] AATA 4691 (Senior Member Dr L Kirk, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/4691.html

2.4 Ambrus – co-ownership and application for appointment of trustees for sale

Facts

Eva Ambrus was a co-owner of land located at 193 Hidden Valley Road in Mount Warning, New South Wales, known as 'Derrilin'. Derrilin was owned by 12 other individuals all as tenants in common.

Michael Donkin had purchased his interest in Derrilin in 1982, at which time David Butler, another co-owner, provided a copy of the 'Derrilin Policies' to Michael. The Derrilin Policies was a 5 paged document which was intended to act as a guiding principle for the security of the tenure in Derrilin and to bind all the co-owners who purchased shares in Derrilin .

Each co-owner's interest in Derrilin was referred to as a 'Sphere of Influence'. The co-owner had a permanent right of occupation in their Sphere of Influence and could improve their Sphere of Influence by construction of dwellings and roads. Derrilin has been used as a multiple occupancy since 1982.

The Derrilin Policies referred to the co-owners as shareholders, stated that no sub-division or separate free-hold titles would be allowed and the sale of the whole of Derrilin must have the unanimous consent of all of the co-owners. The Derrilin Policies also stated that once a Sphere of Influence had been split, it could not be split again.

Michael and Eva commenced their relationship in 1993. Eva would visit Michael at Derrilin and would stay up to 4 to 6 weeks at a time. It was during this time that Eva became aware that Derrilin did not have council approval for any of the developments on Derrilin.

Eva and Michael's relationship ended in 2001. However, Eva and Michael kept in contact.

In 2007 Michael moved out of Derrilin and Eva moved into the dwelling in his Sphere of Influence.

Eva and Michael sought advice together in early November 2011. The advice was in relation to splitting Michael's Sphere of Influence with Eva and their respective wills.

Eva paid Michael $60,000 to split his Sphere of Influence (**Transaction**).

Michael did not get consent from the other co-owners of Derrilin prior to the Transaction.

Eva now held a 1/56th share in Derrilin. Eva never built on her Sphere of Influence, instead Eva lived in the dwelling on Michael's Sphere of Influence.

In 2012, Eva and Michael fell into dispute about whether the Transaction had included the grant of a life interest by Michael to Eva in Michael's share or dwelling. Eva's solicitors wrote to Michael's solicitors offering to transfer back to Michael, Eva's share and reserving her rights to make an application to the Court under section 66G of the *Conveyancing Act 1919* (NSW).

Eva vacated Michael's dwelling in consideration for a payment of $50,000 from Michael.

In June 2020, Kathleen Tepana contacted Eva to purchase her Sphere of Influence. Eva said she was willing to accept $40,000 for the sale.

Eva engaged a real estate agent, Paul Stobbie, who was familiar with Derrilin . Paul had sold several Spheres of Influence over the years. Paul attended Derrilin and was approached by Michael who expressed his dissatisfaction with the sale.

Paul wrote to Eva and advised that she could expect a price around $150,000 for the sale of her Sphere of Influence. Paul said to Eva she needed access to her Sphere of Influence which did not go through Michael's Sphere of Influence. Based on this advice, Eva did not actively market her share.

On 1 June 2021, Eva commenced these proceedings seeking an order under section 66G of the *Conveyancing Act 1919* (NSW). Under that provision the court can appoint a trustee for sale or partition of the property.

The other 12 co-owners opposed the order.

Kathleen offered $25,000 to Eva shortly after these proceedings were commenced.

Issue

Whether Eva has the right to an order under section 66G of the Conveyancing Act?

Decision

There are a number of grounds the Court considers when deciding whether an order under section 66G should be declined.

These grounds include where the order:

1. is inconsistent with a proprietary right;
2. is inconsistent with a contractual or fiduciary obligation; and
3. there is an equitable or conventional estoppel against the application.

The arguments relied upon by the other co-tenants in defence of Eva's application were:

1. the application would be manifestly unjust;
2. Eva breached her fiduciary duty to the other tenants;
3. the doctrine of promissory estoppel precludes Eva from making the application;
4. Eva would receive an unconscionable benefit higher than the market value of her share.

The Court relied on the following to reach its conclusion:

1. unfairness and hardship are not a basis for refusal of an order under section 66G;
2. Eva purchased an interest in Derrilin as a tenant in common and was not informed about the Derrilin Policies prior to her acquiring her interest. The Derrilin Policies were a mere guideline and not a legal binding document. The co-owners failed to demonstrate that Eva owed any fiduciary duty to the other co-owners, let alone a duty that precluded her from exercising her right to apply for the application;
3. the Derrilin Policies were never provided to Eva and most of the practices in the Derrilin Policies had been abandoned by the time Eva acquired her interest in Derrilin. Eva was not aware of the assumptions of the other co-tenants and was free to exercise her right to invoke her application at any time;
4. there is no issue in Eva's delay in bringing an application even though it was 8 years since she reserved her right to bring the application; and
5. to the extent that the proceeds of sale of the whole of Derrilin are derived from value added by historical improvements, each co-owner will benefit from that proportionate increase to their interest in the land, and Eva's share of any such benefit cannot be singled out as unconscionable.

The Court ordered that Eva's application was successful.

The Court ordered that Derrilin shall be vested in the Trustees and that Derrilin can be sold in accordance with section 66G of the Conveyancing Act via auction or by private treaty.

TIP – the ability of co-owners to seek section 66G relief should be contrasted with unit holders that invest through a unit trust being unable to seek similar relief in relation to trust property. This difference should be taken into account in deciding on an investment structure for multiple parties.

TRAP – the appointment of a trustee for sale could trigger CGT events A1, E1 or E2, and the ATO have provided private rulings on the consequences that have differed over the years. The most recent PBR 1051841862158 determined that CGT event A1 occurred when a trustee for sale was appointed, but as they were required to pay out the sale price, that was the cost base for the trustee. A different outcome arose in a 2017 1051309485542 private ruling where the ATO determined that CGT event A1 occurred, but that the cost base was not the sale price.

Citation *Eva Joy Ambrus v Lee Ellen Buchanan* [2022] NSWSC 1628 (Williams J, New South Wales)
w https://www.caselaw.nsw.gov.au/decision/184c0190fa3bbbded76643af

2.5 Andrew Superannuation Fund – bankruptcy and superannuation contributions

Facts

On 18 June 2004, Gungahlin Market Place Dental Centre Pty Ltd (**Gungahlin**) entered into a lease for the premises known as Suite 1.6 Gungahlin Marketplace, ACT (**Premises**). Tien Dung Do (also known as Tein Dung Do) was the sole director of Gungahlin and also a guarantor of the lease.

From around February 2000 to the middle of 2007, Tien made additional contributions to a superannuation fund via salary sacrifice. Tien claimed that, in or around 2009, his accountant advised him to contribute as much as he could to his superannuation fund to obtain tax benefits and ensure savings for his retirement.

On 22 April 2009, A Trustful Builder Pty Ltd (**Trustful Builder**) was incorporated with Tien as sole director.

On or about 1 October 2009, the Andrew Superannuation Fund (**ASF**) was established. From the time of the establishment of the ASF until about 28 August 2012, Tien and his former wife, Van Thu Nguyen Trinh, were the trustees of the ASF. Since 28 August 2012, Do Construction Pty Ltd (**Do Construction**) has been the trustee of the ASF.

Trustful Builder

In October 2011, Trustful Builder was placed into liquidation. The liquidator of Trustful Builder conducted public examinations of Tien and indicated that they were considering taking action to recover funds from him.

On 23 December 2013, the liquidator commenced a proceeding against Tien in the Federal Court of Australia.

On 2 October 2014, Tien and the liquidator entered into a deed of settlement and release which resulted in Tien paying a settlement sum of $20,000.

Family Law proceedings

On 29 August 2012, the Family Court of Australia made orders by consent between Tien and Van. In accordance with the orders and among other things, Tien transferred his share in the matrimonial home to Van and Van transferred her interest in ASF to Tien.

Gungahlin

In the middle of 2010, Gungahlin ceased trading.

On 15 April 2013, Tien informed the landlord that he returned the keys for the Premises 'last Friday'. The lease of the Premises was not set to expire until 31 July 2014 and the landlord required Gungahlin to continue to meet its obligations under the lease, namely the obligation to pay rent. In a letter dated 21 June 2013, the lawyers representing the landlord wrote to Tien and advised that the landlord was calling upon the bank guarantee and would apply those funds towards partial reduction of the rental arrears currently owing.

In 2014, the landlord commenced proceedings against Tien in the ACT Magistrates Court to enforce his guarantee of the lease. On 7 July 2015, the Magistrates Court made an order in the landlord's favour, requiring Tien to pay $50,000.

On 13 May 2016, the landlord served a bankruptcy notice on Tien. Following Tien's failure to comply with the notice, the landlord filed a creditor's petition in the Federal Circuit Court of Australia. On 30 September 2016, a sequestration order was made, and Nick Combis and Louisa Sijabat were appointed as trustees of Tien's bankrupt estate.

Contributions to ASF

From November 2009 to June 2015, Tien made contributions to ASF which are listed in the table below. As can be seen from the table, Tien made contributions to ASF whilst the events set out above took place. Of particular importance is the payments totalling $437,767 made by Tien in the financial year ended 30 June 2013 (**FY13 Transfers**), which are in **bold**.

Date	Contribution Type	Contribution
24 November 2009	Concessional	$7,155
1 February 2010	Concessional	$10,000
22 March 2010	Concessional	$7,844.05
1 October 2009	Non-concessional	$374
12 November 2009	Non-concessional	$250
20 January 2010	Non-concessional	$59,992
29 January 2010	Non-concessional	$107,500
1 February 2010	Non-concessional	$250
5 March 2010	Non-concessional	$211,130
22 March 2010	Non-concessional	$66,982
30 June 2010	Non-concessional	$3,520
27 June 2011	Concessional	$25,000
31 January 2013	**Concessional**	**$25,000**
19 July 2012	**Non-concessional**	**$5,000**
31 October 2012	**Non-concessional**	**$50,000**
31 January 2013	**Non-concessional**	**$357,767**
12 December 2013	Concessional	$13
18 December 2013	Concessional	$5,100
26 June 2014	Concessional	$2,045
29 June 2015	Concessional	$25,000

Section 128B of the *Bankruptcy Act 1966* (Cth) states that superannuation contributions that are made to defeat creditors, where the contributor later becomes bankrupt, are void. Such amounts can be recovered from the superannuation fund by the trustee in bankruptcy and used by the trustee to repay debts of the bankrupt person.

Section 128B of the Bankruptcy Act applies where:

1. there is contribution to an eligible superannuation fund;
2. the property contributed would probably have become part of the transferor's estate or been available to creditors of the transferor; and
3. the main purpose of making the transfer was to prevent the property from being made available to creditors, or to hinder or delay the process of making the property available to creditors.

In determining the 'main purpose', regard must be had to whether the transferor had an established pattern of making superannuation contributions and whether the transfer in question is out of character. However, the transferor's 'main purpose' will be deemed to be to defeat creditors if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent. For the purposes of the Bankruptcy Act a person is solvent if, and only if, the person is able to pay all of their debts as and when they become due and payable.

Section 128B(5) of the Bankruptcy Act provides that it will be presumed that the person who made a transfer was insolvent or about to become insolvent if that person did not keep proper books or accounting records in respect of their business, or if they have not preserved those records.

Primary judgment

Louisa Sijabat (**Trustee**), as Tien's bankruptcy trustee, commenced proceedings in the Federal Circuit and Family Court of Australia against Tien (in his capacity as a former joint trustee of ASF), Do Construction (in its capacity as the current trustee of ASF) and Van (though Van did not take an active part in the proceedings). The primary judge made the following declarations and orders, on the basis that Tien was or was about to become insolvent, on the basis that he did not keep proper books or accounting records:

1. declaration that payments made by or on behalf of Tien totalling $437,767, $7,159 and $25,000 in the financial years ended 30 June 2013, 2014 and 2015 respectively into ASF are void;

2. an order that Do Construction pay the sum of $549,682 to the Trustee, comprising the payments referred to in point 1 and interest of $79,756 (**Payment Order**); and
3. an order that Tien and Do Construction pay the Trustee's costs in relation to the declarations and the Payment Order.

Appeal

Tien and Do Construction appealed the declaration that the payment of $437,767 by or on behalf of Tien into ASF in the financial year ended 30 June 2013 is void against the Trustee, the Payment Order insofar as it relates to the sum of $437,767 and the costs order. The grounds of appeal required the Court to consider the application of the rebuttable presumption in section 128B(5) of the Bankruptcy Act.

Tien and Do Construction submitted that the Trustee has the onus of establishing to the Court's satisfaction that the rebuttable presumption in section 128B(5) of the Bankruptcy Act had been engaged. The Trustee submitted that section 128B(5) of the Bankruptcy Act was satisfied as no one knew what Tien's business was and the documents produced were not sufficient to establish his solvency.

Notice of Contention

The Trustee filed a notice of contention in each appeal, contending that the primary judge erred in finding that the payments made by or on behalf of Tien to ASF in the financial year ending 30 June 2013 did not have the main purpose of preventing the transferred property from becoming divisible among Tien's creditors or hindering or delaying the process of making property available for division among his creditors.

The Trustee argued that Tien was aware in the early part of the 2013 financial year of his exposure to the liquidator of Trustful Builder and as guarantor of the lease of the Premises and that from that time until April 2013, assets were moved out of his name and into ASF. The Trustee argued that an inference could be drawn that Tien took this action to avoid the possibility of assets becoming available to creditors. In support of the inference, the Trustee pointed to there being no satisfactory evidence from Tien as to the nature of the transfers. On the other hand, Tien and Do Construction argued that weight should be placed on Tien's history of payments to ASF as he had a history of transferring large sums of money to ASF in the financial years prior to FY13 Transfers.

Issues

1. Was it reasonable to infer that Tien was insolvent, or about to become insolvent, at the time he made the FY13 Transfers to ASF?
2. Did the payments Tien made to ASF have the main purpose of preventing the transferred property from becoming divisible among Tien's creditors or hindering or delaying the process of making property available for division among his creditors?

Decision

Was it reasonable to infer Tien was insolvent at the relevant time?

The Court held that the transferor bears the onus of establishing that the transferor was not, or was not about to become, insolvent at the time of the impugned transfer. The rebuttable presumption in section 128B(5) of the Bankruptcy Act focuses on the business of the transferor and whether the records kept in relation to that business were consistent with commercial practice. The Court considered that the wording of the section meant that it only applied to individuals carrying on a business.

At the time of each of the FY13 Transfers, Tien had no personal debts because at the relevant times no claim had been made by the landlord or by the liquidator of Trustful Builder. Therefore, it was not established that Tien was insolvent at the time the FY13 Transfers.

What was the main purpose of the transfers to ASF?

In the absence of insolvency, the Trustee needed to establish that Tien's main purpose of making the transfers to ASF was to defeat creditors. Section 128B(3) of the Bankruptcy Act requires any established pattern of contributions to an eligible superannuation plan be taken into account in determining whether a person's main purpose in making the transfers was the purpose described in section 128B(1)(c) of the Bankruptcy Act. The Court did not find any error in the primary judge's reasoning because Tien had a history of transferring large sums of money to ASF in the financial years prior to the FY13 Transfers and the available evidence did not prove that the main purpose of making the FY13 Transfers was to defeat creditors.

The Court allowed the appeal and dismissed the notices of contention. The contributions to the ASF were not void.

Citation *Do (Trustee), in the matter of Andrew Superannuation Fund v Sijabat* [2023] FCAFC 6 (Markovic, Halley and Goodman JJ, ACT)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/6.html

2.6 Ellasil – lost trust deed

Facts

Daycom Communications Pty Ltd Superannuation Fund was the self-managed superannuation fund for James and Jean Day.

There is evidence that the fund was first established in 1979, under the name 'Stewart Electronic Components Pty Ltd Superannuation Fund'. However, the original deed of the Fund cannot be located (**1979 Deed**).

On 9 October 1989, a deed of amendment relating to the Fund was signed by James and Jean (who were trustees of the Fund at the time) (**1989 Deed**). The schedule to the 1989 Deed states that the date of the 1979 Deed is 25 June 1979, and refers to deeds of amendment dated 12 February 1980, 18 May 1982, 16 June 1982 and 22 June 1982.

Clause 6 of the 1989 Deed provided that 'the power appointing and removing Trustees shall be as provided in the Rules'. Rule 2 of the 1989 Deed provided as follows:

> *'…the Trustees shall be comprised of either at least two individuals or a sole corporation appointed by notice in writing from the Principal Employer the directors of which are appointed and have their proceedings governed, in a manner which complies with the Relevant Requirements and is agreeable to both the Principal Employer and the Members…'*

In September 1993, James and Jean caused to be incorporated Daycom Communications Pty Ltd (**Daycom**) of which they were the sole directors. On 30 May 1994, minutes of the meeting of the directors of Daycom resolved to accept Daycom's appointment as trustee of the Fund, and retirement of James and Jean as trustees.

On 1 July 1996, a deed of appointment of trustee was executed between Stewart Electronic (as principal employer under the Fund), Daycom and Ellasil Pty Ltd (**Ellasil**) which purported to appoint Ellasil as trustee of the Fund (**1996 Deed**). James and Jean signed the 1996 Deed in their capacities as directors of each of the companies. In addition, Ellasil executed a consent to its appointment as trustee and resolutions were executed by Daycom and Ellasil resolving to appoint Ellasil as the new trustee of the Fund.

On 14 October 1996, Davies French Pty Ltd, the former accountant for James and Jean, wrote to BZW Investment Management Australia Ltd with reference to the Fund, enclosing a copy of the 'Resolution of Members confirming change of trustee'.

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In 1999 and 2000, regulatory changes concerning SMSFs occurred. On or around 1 November 1999, a deed of amendment was executed in respect of the Fund (**1999 Deed**). The 1999 Deed cannot be located. In approximately 2000, James and Jean retired, and the Fund was updated so that there was no reference to a 'principal employer'.

In November 2003, Volovich Partners acquired the practice of Davies French. Volovich Partners held original copies of some of the documents regarding the Fund including the 1989 Deed and 1996 Deed. Since December 2003, Ellasil's registered office has been that of Volovich Partners.

In May 2013, Alan Haintz of Haintz Actuarial Services Pty Ltd prepared an actuarial certificate for the Fund. According to its terms, the certificate was requested by James and Jean as 'trustees' of the Fund.

In 2015, an undated deed of the Fund was made between James and Jean as members and Ellasil as trustee (**2015 Deed**). The 2015 Deed identifies the date of commencement of the Fund and date of execution of the original deed as 25 June 1979. It also records that supplemental deeds were executed on 12 February 1980, 18 May 1982, 16 June 1982, 22 June 1982, 9 October 1989 and the 1999 Deed. The 2015 Deed was signed by James and Jean and witnessed. On the execution page there was a pink heart-shaped post-it note which read: 'Signed & Witnessed 22-6-2015'.

Mr Volovich of Volovich Partners gave evidence that he ordered a trust deed to update the Fund's deed and that the 2015 Deed appears to reflect what would have been sent to Jean.

Two documents signed by James (one was undated and the second was dated 3 December 2006) appeared to reflect death benefit nominations purportedly made by James in respect of the Fund. The undated document was titled '[Fund] Death Benefit Nomination Form' and the second document was addressed to the trustee of the Fund. Both documents nominated Jean as James' sole beneficiary under the Fund.

There were several documents signed by Jean reflecting death benefit nominations purportedly made by her. There was an undated document (similar to James') and was titled '[Fund] Death Benefit Nomination Form' which nominated James as Jean's sole beneficiary under the Fund. There were other documents executed on 3 December 2006 and 7 December 2007 which also nominated James as Jean's sole beneficiary.

In 2017, James died leaving his superannuation benefits to Jean. Jean was the sole director and shareholder of Ellasil in the 18 months prior to her death.

A document titled '[the fund] Death Benefit Nomination Form' and dated 11 August 2017 purports to nominate Janet as the sole beneficiary of Jean's benefits under the Fund (**2017 Nomination**). The 2017 Nomination was signed by Jean and witnessed by two individuals. It was prepared by Volovich Partners. Mr Volovich gave evidence that sometime in 2018, he had at least two discussions with Jean during which she is said to have made clear that she intended for the assets of the Fund to pass to Janet. He did not make file notes of these discussions.

On 13 March 2019, Jean died leaving a will dated 11 August 2017 (**Will**). James and Jean were survived by three children, John, Lynette and Janet.

On 30 May 2019, probate of the Will was granted to a solicitor, Neville Windebank, and Lynette. Under the Will, Janet was to receive any benefits paid to Jean's estate by the trustee of the Fund, Lynette was to receive the residuary of Jean's estate, and John was to receive nothing.

Following Jean's death, Neville and Lynette became Ellasil's directors and shareholders. Lynette has subsequently resigned from her role as director of Ellasil.

Lynette has undertaken searches of the property where Jean resided at the time of her death and has not been able to locate any further documents regarding the Fund. In addition, Neville has made enquiries with banks and former solicitors of James and Jean but was unable to locate any other documents regarding the Fund.

In April 2020, Janet commenced separate proceedings seeking further provision from Jean's estate. Lynette, Neville, Janet and Ellasil entered a deed of settlement which was subject to and conditional upon the Court giving judgment in these proceedings.

As at 30 June 2022, the Fund had net assets of $775,050.

Given the unavailability of the 1979 Deed, issues surrounding the 2015 Deed and death benefit nominations, Ellasil applied for guidance directions and/or orders from the Court under rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) and section 63 of the *Trustee Act 1958* (Vic).

In the proceedings, the Court received submissions from Ellasil and a court appointed contradictor, Richard Boaden of counsel.

Issues

1. Is Ellasil justified in proceeding on the basis that it was validly appointed as trustee of the Fund by the 1996 Deed?
2. Is Ellasil justified in proceeding on the basis that the 2015 Deed is valid?
3. Are any of the death benefit nominations valid and is the trustee bound by any one or more of the death benefit nominations? If the trustee is not bound by any death benefit nomination, does the 2015 Deed apply?

Decision

Issue 1: Was Ellasil validly appointed as trustee of the Fund by the 1996 Deed?

The uncertainties surrounding the validity of Ellasil's appointment as trustee arise because the 1979 Deed could not be located. First, the Court was required to satisfy itself that the 1979 Deed existed but is now not available.

Based on the references to the 1979 Deed in the 1989 Deed, 1996 Deed and 2015 Deed, the Court accepted that on or around 25 June 1979 a deed of trust establishing the Fund was executed. Further, the Court accepted that searches have been made to attempt to locate the 1979 Deed but the 1979 Deed could not be located.

Next, the court considered whether there was satisfactory evidence of the content of the 1979 Deed (as amended) in respect of trustee appointments. In particular, the Court had regard to rule 2 in the 1989 Deed and the 1996 Deed. Rule 2 of the 1989 Deed (extracted above) set out who could be appointed trustee of the Fund and the mechanism for doing so.

In the 1996 Deed, reference is made to clause 8.1.1 of the 1979 Deed being the source of the principal employer's power to appoint a new trustee (which power was actually contained in rule 2 of the 1989 Deed). While the Court accepted that there may be a degree of uncertainty raised by the 1996 Deed in referring to clause 8.1.1 of the 1979 Deed rather than clause 2 of the 1989 Deed, these two clauses are not incompatible as they both grant a power of appointment to the principal employer and aim to ensure compliance with the overarching superannuation regulatory requirements.

The Court also referred to the fact that the appointment of the new trustee was made in writing under the 1996 Deed, this was in accordance with the requirement in rule 2 of the 1989 Deed. The Court also had regard to the consent of Ellasil, resolution of the members and letter from Davies French dated 14 October 1996 to support Ellasil's valid appointment as trustee.

The Court determined that the available documents provided satisfactory evidence as to the terms of the 1979 Deed in relation to the appointment of new trustees, such that Ellasil was validly appointed as trustee of the Fund under the 1996 Deed.

The Court also noted that if Ellasil's appointment under the 1996 Deed was considered invalid, Elasill would be considered as a *trustee de son tort*, accountable on the same basis as an express trustee of the Fund. This is because it has held out to the ATO and members of the Fund that it is the trustee of the Fund and holds benefits of $775,050 as trustee for the members of the Fund. Therefore, if Ellasil were to proceed on the basis that it was not the trustee of the Fund, it would be in breach of the trust.

The Court concluded that Ellasil was justified in proceeding on the basis that it was trustee of the Fund.

Issue 2: Was the 2015 Deed valid?

The Court was required to consider whether the making of the 2015 Deed was a valid exercise of power. This required the Court to assess the various deeds executed, including the 1979 Deed. The Court found that the 2015 Deed relied upon a power in the 1999 Deed. The 1999 Deed cannot be located.

Accordingly, the Court was required to satisfy itself that the 1999 Deed existed but is now not available. The Court accepted that the 1999 Deed existed based on the following:

1. the 1999 Deed was referred to in the 2015 Deed;
2. in 1999 and 2000, regulatory changes concerning SMSFs occurred;
3. Mr Volovich's evidence that the trust deed was amended at some point to become a SMSF without reference to a particular employer, and that James and Jean had retired in 2000 and there was no relevant employer at that time; and
4. the recitals and execution page of the 2015 deed do not refer to any involvement of the 'principal employer'.

The Court also accepted that enquiries have been made to locate the 1999 Deed and that it could not be found.

In respect of the contents of the 1999 Deed, the Court inferred that the 1999 Deed contained a power to amend, exercisable at least by the trustee, subject to similar limits as in the 1989 Deed and the 2015 Deed. Further, the Court inferred that, in order to maximise flexibility of the Fund to comply with the superannuation regulatory scheme and consistent with the 1989 Deed, it was '*more likely than not*' that the power to amend in the 1999 Deed was exercisable 'by resolution in writing' as an alternative to a formal deed or instrument.

The Court accepted that the minutes of the meeting of the members and trustee of the Fund, signed by Jean in or around June 2015 and contemporaneously with the 2015 Deed, was a 'resolution in writing'. Further, the Court noted that there was no suggestion of fraud in respect of the 2015 Deed.

Therefore, the Court concluded that Ellasil was justified in proceeding on the basis that the 2015 Deed was valid and confirmed that this approach is in the best interests of the Fund.

Issue 3: Are the death benefit nominations valid?

The Court had regard to the 2015 Deed which included provisions for members nominating payments to their dependents or legal personal representatives. The term 'dependents' was defined in the 2015 Deed as having the same meaning as in the SIS Act and SIS Regulations. Therefore, it includes the spouse of the person, any child of the person and any person whom the person has an interdependency relationship.

The Court considered the terms of the 2017 Nomination and that it was completed in accordance with the provisions in the 2015 Deed. In addition, the 2017 Nomination accorded with Jean's testamentary intentions in her Will and statements she made to Mr Volovich. Therefore, the Court accepted that the 2017 Nomination should be considered as a current binding nomination.

For completeness, the Court also considered whether the 2017 Nomination needed to be made in accordance with regulation 6.17A of the SIS Regulations. Although this was not necessary, the Court still found that the nomination was binding. Namely:

1. the nomination was to a dependent of Jean's (her daughter);

2. the proportion of benefit was readily ascertainable;
3. the notice was written and signed in the presence of two witnesses with the requisite declaration;
4. to the extent that Ellasil was required to provide Jean with information regarding the nomination, as Jean was the sole director of Ellasil, the Court accepted that she would have been aware of an information and the notice; and
5. the notice remained in effect at the time of Jean's death.

The Court concluded that Ellasil was justified in proceeding on the basis that the 2017 Nomination was binding.

The 1989 Deed did not contain any provisions for binding nominations, and there was no evidence of the nomination power under the 1999 Deed. Therefore, the Court was unable to draw inferences regarding earlier nominations made by James and Jean. The Court concluded that Ellasil would not be justified in acting in accordance with the earlier nominations.

Citation *Application by Ellasil Pty Ltd* [2023] VSC 69 (McMillan J, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/69.html

2.7 Appeal Update – Complete Success Solutions Trust

The Commissioner has successfully appealed against the decision in *STNK and Commissioner of Taxation (Taxation)* [2021] AATA 3399 (see our October 2021 tax training notes). The case involved the application of the GST anti-avoidance provisions in Division 165 of the GST Act.

The Complete Success Solutions Trust was supplier of gold and, under an arrangement it had entered into, prior to the Complete Success Solutions Trust acquiring the gold, there was a taxable supply of gold by another entity (not related to Complete Success Solutions Trust) for which the GST was not remitted to the ATO.

The scheme in more detail was one under which:

1. gold bullion is acquired and then adulterated to longer meet the definition of a precious metal;
2. an entity supplied scrap gold as a taxable supply without remitting GST. This entity is referred to as the 'missing trader' and, in this case, it was an entity called 'Manila Exchange'; and
3. the scrap gold is then refined by a later entity into gold bullion and supplied as a GST-free supply of precious metal. Input tax credits are claimed on the acquisition.

There are often several intermediary entities in the supply chain.

The scheme defrauds the Commonwealth in that the missing trader acquires either GST-free or input taxed precious metal (gold) and then sells adulterated metal as a taxable supply, without remitting the GST. The GST is the amount defrauded from the Commonwealth.

The ATO contended, amongst other things, that the arrangement was subject to the anti-avoidance provisions in Division 165 and, therefore, denied the Complete Success Solutions Trust its input tax credits in acquiring the gold.

Relevantly, section 165-5(1) provides as follows:

(1) This Division operates if:

*(a) an entity (the avoider) gets or got a * GST benefit from a * scheme; and*
*(b) the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the * GST law, the * wine tax law or the * luxury car tax law; an*
(c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:

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(i) *an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so* ***with the sole or dominant purpose of that entity or another entity getting*** *a GST benefit from the scheme; or*

(ii) *the* ***principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly****; and*

(d) *the scheme:*

(i) *is a scheme that has been or is entered into on or after 2 December 1998; or*

(ii) *is a scheme that has been or is carried out or commenced on or after that day (other than a scheme that was entered into before that day).*

At first instance, the AAT held as follows in relation to Division 165:

1. it would not be concluded that any entity had a dominant purpose of securing the Complete Success Solutions Trust's entitlement to input tax credits. The nefarious activities of other entities in the chain should not be imputed to Complete Success Solutions Trust in relation to it obtaining input tax credits; and
2. the principal effect of the scheme was the non-payment of GST by other parties in the chain, not Complete Success Solutions Trust's entitlement to input tax credits.

On appeal, the Full Federal Court noted that when considering the dominant purpose of the scheme, the AAT had erred by only considering the scheme as a whole, rather than 'parts of' the scheme.

Accordingly, the Court allowed the Commissioner's appeal and remitted the matter back to the AAT to re-determine it.

Citation *Commissioner of Taxation v Complete Success Solutions Pty Ltd ATF Complete Success Solutions Trust* [2023] FCAFC 19 (Moshinsky, Thawley and Hespe JJ, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/19.html

2.8 Other tax and superannuation related cases in period of 7 February 2022 – 8 March 2023

Citation	Date	Headnote	Link
Tax Practitioners Board v Williams [2023] FCA 63	8 February 2023	TAXATION – application for civil penalties to be imposed for multiple breaches of s 50-5(1) of the Tax Agent Services Act 2009 (Cth) – respondent conscious of wrongdoing – respondent continuing to breach the Act after becoming aware initial contraventions had been detected – lack of adequate explanation – weight to be given to cooperation in proceedings generally when assessing need for specific deterrence – need for specific and general deterrence in respect of future contraventions of critical provision of the Act – fine imposed commensurate with evidence of respondent's financial means – risk of loss of assets and bankruptcy considered	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/63.html
R v Cordes [2023] QCA 9	10 February 2023	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of 30 counts of obtaining a financial advantage by deception and 13 counts of attempting to do so – where the prosecution case was that each of 43 Business Activity Statements submitted by	https://www.sclqld.org.au/caselaw/QCA/2023/9

		the appellant to the Australian Taxation Office provided false information in order to obtain GST refunds to which there was no entitlement – where the appellant contended that an unidentified person lodged the Statements, intending to obtain a financial benefit for themselves or someone other than the appellant – whether it was open to the jury to be satisfied, beyond reasonable doubt, that it was the appellant who lodged the Statements	
Azam Mohammed & Sarah Azam v Chief Commissioner of State Revenue [2023] NSWCATAD 38	16 February 2023	TAXES AND DUTIES — Surcharge land tax — whether Applicants were foreign persons — whether Applicants were ordinarily resident — Applicants on bridging visas	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/38.html
Ferella v Chief Commissioner of State Revenue [2023] NSWCATAP 50	20 February 2023	REVENUE LAW – Land Tax – exemption for land used for primary production under s 10AA of the Land Tax Management Act – onus of proof under s 100(3) Taxation Administration Act 1956 – whether dominant use was the maintenance of horses for the purpose of selling them or their natural increase – relevance of intention - whether the use of the land has a significant and substantial commercial purpose or character, and is engaged in for the purpose of profit on a continuous or repetitive basis.	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAP/2023/50.html
Lee v Deputy Commissioner of Taxation [2023] FCAFC 22	2 March 2023	PRACTICE AND PROCEDURE – appeal from orders dismissing application for suppression orders under s 37AF of the Federal Court of Australia 1976 (Cth) in relation to the entire court file – where a request for non-party access was made by a journalist under r 2.32 of the Federal Court Rules 2011 (Cth) in relation to affidavits relied upon to obtain freezing orders – where access is opposed by the appellants – whether primary judge should have held that making suppression orders was necessary to prevent prejudice to the proper administration of justice because of asserted commercial and reputational harm being suffered by the appellants – whether the primary judge erred in failing to hold that approval of the non-party access request was inconsistent with the confidentiality regime of the Tax Administration Act 1953 (Cth) – Held: appeal dismissed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/22.html

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3. Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2022 Measures No. 4) Bill 2022	23/11	30/11	1/12		
Treasury Laws Amendment (2022 Measures No. 5) Bill 2022	30/11	1/12	1/12	7/2	16/2
Treasury Laws Amendment (2023 Measures No. 1) Bill 2023	16/02				

3.2 Changes to tax on superannuation balances over $3 million

On 28 February 2023 the Treasurer The Hon Dr Jim Chalmers MP and Assistant Treasurer and Minister for Financial Services The Hon Stephen Jones MP announced that the Government proposes to increase the concessional tax rate for superannuation balances over $3 million.

From 1 July 2025, it is proposed that individuals with total superannuation balances over $3 million will pay an additional 15% tax on earnings attributable to the excess of the balance over $3 million. This tax will be in addition to any tax paid by the superannuation fund on earnings related to balances in accumulation phase.

This means that earnings attributable to balances above $3 million will generally be taxed at a total rate of 30%.

The balances in excess of $3 million will be tested for the first time on 30 June 2026 and the ATO will issue notices of assessment to individuals during the 2026-27 financial year.

Treasury has published a fact sheet that summarises the proposed changes to superannuation concessions and sets out the proposed formulas for calculating the earnings attributable to funds above $3 million and the corresponding tax liability.

Treasury will conduct a consultation process in respect of these measures, but details have not yet been released.

COMMENT – the Treasury factsheet indicates that the extra tax will be payable on 'fund earnings' which appears to be determined by deducting the opening total superannuation balance from the closing total superannuation basis. If the measures are legislated on this basis it will mean that unrealised gains on assets are subject to the extra tax.

w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/superannuation-tax-breaks
w https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2023-03/better-targeted-superannuation-concessions-factsheet.pdf

3.3 Off-market buy-backs and dividends funded by capital raising

The government has introduced *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023* to legislate the following measures:

1. technical amendments to the *Corporations Act 2001* (Cth) in relation to registration of relevant advisers on the Financial Advisers Register;

2. providing the Australian Accounting Standards Board (AASB) with functions to develop and formulate sustainability standards;
3. implementing recommendations from the Tax Practitioners Board (**TPB**) review;
4. integrity measures in relation to off-market share buy-backs by listed companies; and
5. integrity measures in relation to franked distributions funded by capital raising.

We expand on some of these measures below.

Off-market share buybacks

Under this measure, the tax treatment of off-market share buy-backs for listed companies will be aligned to the tax treatment of on-market share buy-backs. The bill proposes to amend Division 16K of the ITAA 1936 so that where a listed public company undertakes an off-market buy-back of a share or non-share equity interest, no part of the purchase price in respect of the buy-back is taken to be a dividend.

Listed public companies that undertake an off-market buy-back will be required to debit their franking account by an amount equal to the part of the buy-back price not debited to the company's share capital account. However, to the extent that a distribution is made to the shareholder in return for cancellation of their share, the distribution will be unfrankable and will be treated as proceeds for the cancellation of the share. This rule is intended to support the integrity of the imputation system by ensuring that shareholders continue to benefit from imputation credits proportionate to their shareholding in the company after the buy-back occurs. This is consistent with the franking debit that currently arises on an on-market buyback by a public company.

As a result, sellers who participate in an off-market buy-back undertaken by a listed public company will not be assessed on any part of the buy-back price as a dividend. Rather, each seller will be assessed on any revenue gain or loss, or capital gain or loss, that results on the sale of the share or non-share equity interest.

These amendments are intended to apply to buy-backs and selective share cancellations undertaken by listed public companies that are first announced to the market after 7:30pm, by legal time in the Australian Capital Territory, on 25 October 2022 (Budget Time). For buy-backs and selective share cancellations undertaken by listed public companies that are not announced to the market, or the announcement is made after the buy-back or the cancellation, the amendments apply to those buybacks that occur after Budget Time.

Franked distributions funded by capital raising

A distribution or non-share dividend by a franking entity (most resident corporate tax entities) is frankable unless the distribution is listed in section 202-45 of the ITAA 1997 as being 'unfrankable'.

Consistent with the Government's exposure draft released on 14 September 2022, this bill proposes to add distributions funded by capital raising to the list of 'unfrankable' distributions.

The amendments provide that a distribution is funded by capital raising if, broadly:

1. the distribution is not consistent with an established practice of the entity of making distributions of that kind on a regular basis;
2. there is an issue of equity interests in the entity; and
3. it is reasonable to conclude, having regard to all relevant circumstances, that:
   (a) the principal effect of the issue of any of the equity interests was to directly or indirectly fund all or part of the distribution; and
   (b) an entity that issued or facilitated the issue of the interests did so for a purpose of funding all or part of the distribution.

The Commissioner previously published Taxpayer Alert TA 2015/2, which raised concerns about arrangements entered into for the purposes of accelerating the release of franking credits to members of entities in circumstances that cannot be explained by existing distribution practices, and which are typically artificial or contrived.

These amendments are intended to apply retrospectively to distributions made on or after 15 September 2022.

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COMMENT – this measure is another where Parliament are being asked to legislate an anti-avoidance rule that requires only that 'a purpose' be to, effectively, provide a tax benefit. This is in contrast to Part IVA that has a dominant purpose test. A purpose test also exists in the franking credit streaming rules of section 177EA of ITAA 1997.

Tax Practitioners Board review measures

The bill also proposes to implement recommendations from the review of the TPB. The proposed changes include:

1. updating and modernising the objects clause of the Tax Agent Services Act;
2. creating financial independence for the TPB from the ATO;
3. requiring tax practitioners not to employ or use a disqualified entity without the TPB's approval, or enter an arrangement with a disqualified entity;
4. converting to an annual registration period; and
5. enabling the Minister to supplement the existing Code of Professional Conduct to ensure that emerging or existing behaviours and practices by tax practitioners are properly addressed.

For the purposes of these measures a disqualified entity will include anyone who has:

- committed a serious offence, as defined in the ITAA 1997;
- been subject to sanctions by the TPB;
- had their registration terminated, suspended, or refused for reasons other than work experience and qualifications; or
- found to have breached the Act by the TPB or Court.

The changes to the TPB and TASA apply from different dates, with the earliest changes coming into effect from the start of a quarter following Royal Assent.

COMMENT – this measure would appear to have the effect that a tax practitioner that is sanctioned or has their registration suspended or terminated by the TPB cannot work for another tax agent, effectively denying them employment in their profession, without the TPBs approval.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6979

3.4 Register of Foreign Ownership of Australian Assets

The *Foreign Acquisitions and Takeovers Act 1975* (Cth) establishes a regime for the notification, review and approval of foreign investment in Australia. Treasury has released an exposure draft Treasury Laws Amendment (Measures for Future Instruments) Instrument 2023, which, when implemented, will establish the Register of Foreign Ownership of Australian Assets. The Register will record foreign interests in land, water, entities, businesses and other assets in Australia in a single resource, incorporating and extending the existing Register of Foreign Ownership of Water Entitlements and Register of Foreign Ownership of Agricultural Land.

Comments on the Exposure Draft are due to Treasury by 31 March 2023.

On 20 February 2023, the ATO released a draft legislative instrument that prescribes the format and accompanying information for submitting a notice of foreign ownership in respect of the Register.

Comments on the draft determination are due to the ATO by 24 March 2023.

COMMENT – based on the current drafting it appears that holdings by Australian citizens not ordinarily resident in Australia will be recorded on the register as a result of the operation of Regulation 15 of the *Foreign Acquisitions and Takeovers Regulation 2015*.

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w https://treasury.gov.au/consultation/c2023-370543
w https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D2/00001
w https://www.ato.gov.au/law/view/document?docid=ESO/ESLI2023D2/00001

3.5 Alternative record keeping for travel-related FBT purposes

On 20 February 2023, the ATO released a series of draft legislative instruments that outline what will constitute 'adequate alternative records' for certain travel-related fringe benefits that employers provide to employees. These 'adequate alternative records' must be written in English and can be used for the following scenarios:

1. overseas employment holiday transport (LI 2023/D3);
2. car travel to employment interview or selections test (LI 2023/D4);
3. remote area holiday transport (LI 2023/D5); and
4. car travel to certain work-related activities (LI 2023/D6).

Additionally, the records must contain, among other things:

1. the name of the employee who received the benefit;
2. the address of the departure location;
3. the address of the arrival location;
4. the dates of travel; and
5. the total number of whole kilometres travelled in the car between the address of the departure location and the address of the arrival location (inclusive of any return trip, and excluding any kilometres travelled whilst at the destination).

Each of the instruments effectively replace the obligation for an employer to be provided with a declaration by an employee.

Comments on the draft determinations are due to the ATO by 17 March 2023.

w https://www.ato.gov.au/law/view/document?DocID=ops/li2023d3/00001
w https://www.ato.gov.au/law/view/document?DocID=ops/li2023d4/00001
w https://www.ato.gov.au/law/view/document?DocID=ops/li2023d5/00001
w https://www.ato.gov.au/law/view/document?DocID=ops/li2023d6/00001

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4. Rulings

4.1 FBT and car parking benefits

The ATO has updated Taxation Ruling TR 2021/2 to provide new examples in relation to car parking benefits provided to airline employees. This update follows on from the decision in *Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd* [2021] FCAFC 209.

An FBT car parking benefit is provided when, among other things, the employee uses a car to travel between their place of residence and primary place of employment on that day and the work car park is located at or 'in the vicinity of'' the primary place of employment.

The new examples are at paragraphs [15A] to [15H] of the ruling and cover how to identify an employee's 'primary place of employment' on days when an employee travels between different business premises during the day. This primary place is identified through a quantitative and qualitative analysis of the duties performed from, or at, the different business premises.

The update to the ruling was previously released as a draft and covered in our November 2022 tax training notes.

ATO reference *TR 2021/2* w https://www.ato.gov.au/law/view/document?docid=TXR/TR20212A1/NAT/ATO/00001

5. Private binding rulings

5.1 Development land and going concern

Facts

A company that is registered for GST and another entity entered into a put and call option in relation to a property. The company held the put option.

In late 20XX, the company acquired development land. Since the completion of the acquisition, the company has undertaken a staged development of the land and has progressively completed several stages of the development.

The company also submitted and pursued an alternative development application for the property.

An approval to undertake a development on the property as part of a greater master plan was granted by council before the company acquired the property (DA Approval).

Development under the DA Approval has commenced and X dwellings have been completed.

The current plan anticipates a further X dwellings being constructed on the property.

The DA Approval remains on foot and is the current approval applicable to the development.

An alternative development application in respect of the property was lodged with council, and approved by council.

Some community organisations subsequently appealed the planning decision. The appeal process has been lengthy and continues at the moment.

No earthworks have been undertaken on the property. No construction contracts have been entered into in respect of the property.

Under the Contract of Sale attached to the option deed the company agrees to sell the property and the Development Enterprise to the purchaser. 'Development Enterprise' is defined as the enterprise of developing the land carried on by the company.

Pursuant to the Contract of Sale, the parties agree that the supply of the property and the Development Enterprise under the Contract of Sale is the supply of a going concern which is GST-free.

The company's interest in certain Consultancy Agreements will either be assigned and transferred to the purchaser at settlement.

At settlement, the company will be a party to the Development Management Agreement (DMA) which applies in respect of the Property and the Development Enterprise. The parties to the DMA have been and continue to operate the Development Enterprise on the terms specified in the DMA and will formalise the existing arrangement between them prior to settlement.

With effect from settlement the company must cause the DMA to be novated to the purchaser on the terms of the DMA Deed of Novation unless the purchaser gives notice that it does not require the novation of the DMA.

The company is also party to the XXX Agreements which apply in respect of the Property. These agreements relate to the design and operation of a hotel on the Property. The company must liaise with XXXX regarding the entry into an Amendment Document in respect of the XXX Agreements and use reasonable endeavours to enter into the Amendment Document with XXXX on or before the Call Option End Date.

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The Amendment Document is an agreement to be entered into between the company and XXXX in respect of the XXX Agreements which will permit the company to sell the property and assign or novate the XXX Agreements to the purchaser...

Question

Will the supply of the property be the supply of a going concern?

Decision

The ATO considered that the supply would not be a supply of a going concern.

In order to supply something as a going concern it is necessary to:

1. make a supply for consideration;
2. make the supply to a purchaser who is registered or required to be registered;
3. agree in writing that the going concern exemption applies;
4. carry on the enterprise up to the date of the supply (settlement); and
5. supply all things necessary for the ongoing conduct of the enterprise.

The ATO set out that in this case, development of the property in accordance with the DA Approval was effectively put on hold when the alternative development application in respect of the property was pursued. Court proceedings in respect of the second DA Approval are still ongoing meaning commencement of the development in accordance with that development application cannot proceed for the time being.

The ATO then note that no earthworks have been undertaken on the property and no construction contracts have been entered into in respect of the property, and that the last dwelling/subdivided block from the earlier stages has been sold.

The ATO considered that the obligations that the company had in respect of the DA Approval and other agreements are obligations that arise under the Option Deed and/or Contract of Sale and are not activities being undertaken as part of operating the development enterprise.

The ATO view that what was being supplied was the property with DA Approval and plans. The DA Approval attaches to the property and runs with the property, noting that upon sale, the DA Approval is automatically transferred to the purchaser as a natural consequence of the sale. The ATO consider that the assignment of the DA Approval does not result in anything being transferred to the purchaser that would not result naturally from the transfer of the Property itself.

The ATO note that the supply of the property with the DA Approval and plans does not, of itself, constitute a GST-free supply of a going concern, and in the absence of ongoing development activity being undertaken all that is being supplied is an asset.

The ATO considered that the fact that the enterprise was not operating did not change the fact that the sale of the property is the sale of an asset of the enterprise, stating:

> *Although you are still carrying on an enterprise, that enterprise will not be operating, in respect of the [property], at the time of settlement.*

As the enterprise was not operating the ATO did not consider the supply of the property would be GST-free.

COMMENT – attempting to supply land as a going concern as part of a property development activity can be problematic, especially with the need to supply 'all things necessary' for the conduct of the enterprise.

ATO reference *PBR Authorisation No 1052059576275*
w https://www.ato.gov.au/law/view/document?docid=EV/1052059576275

5.2 Restructure and sale of business

Facts

A person set up business as a sole practitioner prior to 20 September 1985.

In 19XX, the practice began to be conducted by a company owned and controlled by the individual.

Each year during which the practice was conducted by the company, the income of the practice was paid to the individual on the basis that it was treated as his personal exertion income.

In 19XX, the company received a private ruling from the ATO confirming that no goodwill will be disposed of by the company if the individual were to operate the practice as a sole practitioner again.

The reason for the ruling was that the goodwill of the practice at the time was considered to be personal goodwill and therefore was incapable of being transferred to the company in 19XX when the practice began to be conducted by the company and remained with the individual since it was originally acquired (i.e. pre-CGT).

The individual did not revert to being a sole practitioner and continued to conduct the practice in the company until 20XX.

Since 20XX, and pursuant to the terms of a license agreement, the company granted a license to operate the practice to a trust.

The trust is a discretionary trust established for the benefit of this individual and his family. For each year during which the practice has been conducted by the trust, the income of the practice has been allocated to the individual on the basis that it was his personal exertion income.

The loyalty of the clients to the practice has always been to the individual. The nature and character of the business undertaken has not changed since its creation.

The company has recently entered into a contract for sale in respect of the practice to an unrelated party. The individual will retire as a practitioner upon settlement of the contract.

Questions

1. Will the individual make a capital gain on the sale of the accounting practice?
2. Will the company make a capital gain on the disposal of goodwill in connection with the sale of the practice?

Decision

The ATO set out an analysis of the nature of goodwill and then quoted from TR 1999/16 in relation to personal goodwill (ATO emphasis):

> ***If a sole practitioner disposes of their business, the part of the goodwill of the business that emanates from their personality, reputation, skills or attributes is not transferable.*** *Similarly, if key employees of the sole practitioner are not employed by the purchaser on the disposal of the business, any part of the goodwill that emanates from their personality, reputation, skills or attributes is also not transferable. However, other sources of goodwill continue to draw custom to the business even though the owner or employee has no further connection with the business and, in that respect, the goodwill can be sold.*

The ATO then set out that the personal attributes possessed by the individual and comprising his personal goodwill are inseparable from him, so that his withdrawal from the business will diminish the value of its goodwill. The ATO stated that there would be no change in ownership of the individual's personal goodwill on the sale of the practice, and so CGT event A1 (disposal) would not occur. The ATO considered that CGT event

C2 (cancellation, surrender or similar endings) would occur when the individual retires. They then stated that the individual would not be expected to make a capital gain as there would be no capital proceeds from the event, and that in any event any capital gain would be disregarded as the goodwill was acquired pre-CGT.

The ATO then state:

> *Although the personal skills and attributes of [the individual] that have contributed to goodwill are not transferable, any payment made by the purchaser of the practice under the contract for sale for the goodwill built up from those attributes and other sources will give rise to CGT event A1 for [the company].*

Presumably the ATO accept that the company has sources of goodwill, such as a business name or a location, that are capable of transmitting some portion of goodwill to the purchaser.

TRAP – CGT event C2 is an unusual CGT event in that market value is substituted for capital proceeds where those proceeds are more or less than the market value of the asset, that is, there is always market value substitution.

TRAP – it is not clear that a licence to operate a business does not result in there being a disposal for tax purposes of the licensed asset. There is competing caselaw on this point. The most recent case, *Favotto Family Restaurants Pty Ltd v Chief Commissioner of State Revenue* [2020] NSWSC 120 considered a licence to operate a McDonald's restaurant did not transfer goodwill.

ATO reference *PBR Authorisation No 1052059168962* w https://www.ato.gov.au/law/view/document?docid=EV/1052059168962

5.3 Deduction for portable building

Facts

The taxpayer is a sole trader but is also employed fulltime.

The taxpayer was required by his or her employer to work from home during the first COVID lockdown.

The taxpayer's employer does not have any other offices in Australia for the taxpayer to work from and his or her employment contract states that 'your normal place of work will be at home'.

The taxpayer does not have a spare bedroom in their home to use for work purposes.

The taxpayer purchased a portable building to use as a home office.

The building is installed at a dwelling that the taxpayer rents as the tenant.

The taxpayer uses the building solely for work purposes.

The portable building has electricity connected to run lighting, heating/cooling and houses normal office equipment including a desk, computer, monitor etc.

Clients do not attend the portable building.

Questions

Is the taxpayer entitled to claim a deduction for the depreciation on the portable building used as a home office?

Decision

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The ATO ruled yes.

As the taxpayer is performing 'income-producing activities' from home and use the building at his or her home solely for a taxable purpose, he or she can claim the depreciation to the extent it is not used for private and domestic purposes.

COMMENT – this PBR can be contrasted PBR 1051949982464 covered in our May 2022 tax training notes where an employee renting an office was denied a deduction on the basis that their employer continued to provide them with premises from which they could have worked.

ATO reference *PBR Authorisation No 1052060716198*
w https://www.ato.gov.au/law/view/document?docid=EV/1052060716198

5.4 FDT offset

Facts

The tax agent for a company advised there was a credit balance in the company franking account.

The company then declared a dividend.

A deficit arose due to the timing of an event which was outside the company's control.

Question

Will the Commissioner exercise discretion under subsection 205-70(6) of the ITAA 1997 not to apply the Franking Deficit Tax (FDT) offset penalty?

Decision

Yes.

The ATO accepted that the events and circumstances that led to the franking deficit were outside of the company's control and not readily foreseeable. The events were not due to improper tax planning, bad management, inadvertent errors, or expansion of business.

Accordingly, the Commissioner agreed to exercise the discretion under section 205-70(6) of the ITAA 1997 not to apply FDT.

COMMENT – we included this PBR to contrast PBR 1051965667440 covered in our July 2022 tax training notes where a mistake by an accountant was found not to be an event outside of the company's control. It is not clear in the above PBR what the 'timing of the event' was. The issue in the PBR covered in July 2022 was that the tax agent had erroneously failed to reduce franking credits to take account of refundable R&D tax offsets.

ATO reference *PBR Authorisation No 1052063518129*
w https://www.ato.gov.au/law/view/document?docid=EV/1052063518129

5.5 ATO critique valuation

Facts

A taxpayer is a 50% shareholder in a private company.

The company is a wholesaler and the taxpayer is considering restructuring asset holdings for asset protection and estate planning purposes. The intention is to transfer the shares owned in the company into a family trust.

A valuation report for the company considered the equity value of the company to be below $X million. This figure consisted of the business value (enterprise value) plus net surplus assets.

The net value of the taxpayer's CGT assets, along with the CGT assets of connected entities connected and affiliates or entities connected with affiliates, was less than $6 million. These values included the equity value of the company.

The Report adopted Capitalisation of Future Maintainable Earnings (CFME) as a valuation methodology for the business of the Company.

The capitalisation rate used was 100%.

The ATO stated that 'The adopted business value in the Report was below the normal range of EBITDA of the Company over the previous 4 income years.'

The report set out that the Capital Asset Pricing Model (CAPM) was not used to determine the capitalisation rate due to the difficulty in accurately assessing the beta of private companies.

The report was referred to the Australian Taxation Office's (ATO's) Valuation Services for assessment.

Question

Does the Commissioner consider the method described in valuing the Company appropriate in determining whether the maximum net asset value (MNAV) test in section 152-15 is satisfied?

Decision

No, the Commissioner does not accept the valuation method.

The ATO's Valuation Services reviewed the Report and considered the valuation to be materially understated.

The ATO considered the CFME methodology suitable. However, the major finding of the ATO review, based on revenue size of the wholesale business, consistent profitability and risk and growth factors identified in the report, was that the capitalisation rate of 100% was materially overstated.

In spite of the potential to lose existing customers in the event of the taxpayer leaving the business, the review considered that most customers are likely to remain, as the business has been operated with good reputation.

The 100% capitalisation rate is indicative of an extremely risky business, and the ATO did not consider this to be correct.

The review did not accept the assumption of no goodwill in the business.

The review also found that the failure to apply CAPM when calculating the capitalisation rate resulted in an understatement of the enterprise value. Although accepting of the difficulties in sourcing an appropriate equity beta for private companies, methods are still available, such as estimates based on industry averages, using the debt to equity ratio of comparable companies, or using the beta of company's earnings. Although using CFME as a primary valuation methodology is considered reasonable, the ATO considered using a 12 month period for CFME is not common and the reason provided for using 12 months was not considered sufficient. Based on the calculated CFME and suggested capitalisation rate the enterprise value calculated is understated.

When factoring in net surplus assets to the enterprise value, the review adopted an equity value of the Company above $6 million.

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COMMENT – while the ATO can provide a ruling on market value, they can also charge a taxpayer for their cost in obtaining comments on any valuation.

ATO reference *PBR Authorisation No 1052065031849*
w https://www.ato.gov.au/law/view/document?docid=EV/1052065031849

5.6 Gifted proceeds not income

Facts

The Office Pty Ltd has run as a family office managing investments on behalf of the client and his family.

In 20xx, all shareholdings were sold to an unrelated Company. The client was subject to the Capital Gains Tax (CGT) provisions in respect of the assessable income derived from the disposal of his interests in the company.

Upon sale, amongst all his other considerations, the client wished to gift some of the proceeds from the sale of his interests in the company to some individuals at some later date or upon his death. In the meantime, he wished to invest those funds for future growth to further benefit those persons.

The intended recipients were persons who the client had formed strong personal relationships with and are employees of the employer. The gifts were to be one-off amounts which were to be determined on an arbitrary basis. The gifts were unsolicited, with no consideration, or expectation of consideration, passing from those individuals to the client. The intended recipients were not aware that the client planned to give them a gift. To date, the gifts have not been paid.

Given his advanced age, the client was concerned that if he passed away prior to gifting these monies, they would form part of his estate and may not ultimately be distributed to the intended recipients. Furthermore, he was concerned that if he included a bequest to each of the intended recipients as part of his will, other beneficiaries of his estate might contest the will and attempt to stop the intended recipients from receiving those amounts or reduce the amounts they receive.

In a measure designed solely to protect the funds and ensure they were ultimately distributed in accordance with his wishes, the client set up the Employee Trust which was established with a settled sum of $x paid from the client's personal savings from which tax had already been paid. The client is the trustee of the Trust.

To ensure all intended recipients were included as potential beneficiaries under the Trust, the Trust deed was broadly drafted to include as primary beneficiaries ‘Employees of the Office from time to time’. The funds were never placed in the Trust as a means to remunerate or reward employees of the employer either formally or informally for work they had performed. The use of the name 'The Employee Trust' was merely a simple and convenient way to encapsulate all intended recipients. Without having formed the strong personal relationships with the client they would not have been included as intended recipients and certainly not if the relationship did not extend beyond being an employee.

The client did not attempt to claim any tax deductions or derive any other tax advantages from the contribution to the trust.

The client had formed strong personal relationships with a number of individuals who work, or have worked, for the employer. These relationships have been developed over a number of years and include socialising at sporting and cultural events and being present at significant and deeply personal occasions including birthdays, marriages and funerals of close family members. A recent example was that, of the few people invited to celebrate the client's birthday, a number were employees or former employees of the employer. Some of these individuals have also sat through and supported the client as friends and moral supporters in court hearings

including matrimonial and legal disputes. There was never any requirement in the individuals' employment agreements to attend such events nor be remunerated for attending such events.

Over the years, the client has developed very deep love and affection for these persons and thinks of them as friends and not employees. In doing so, he wants them to benefit from his personal wealth just as he would his direct family and other friends.

Questions

Will the trust distributions to the former employees be treated as fringe benefits, or income from with PAYGW must be withheld?

Decision

The ATO ruled that FBT would not apply and that PAYGW would not apply.

For there to be a fringe benefit there needs to be a benefit provided to a current, past or future employee, by an employer or an associate of an employee, or by a third party under and arrangement with the employer, in respect of the employment of the employee.

The ATO reasoned that the benefit was not being provided by the employer, and that the trust was not an associate of the employer as the company could not benefit under the trust and 'Notwithstanding that the client is the trustee of the trust and an associate of the employer'

The ATO also determined that as the decisions about providing benefits were being made by the client and not the employer, they were not being made under an arrangement between the employer or their associate and a third party.

The ATO then reasoned that as the benefits were being provided because of the strong personal relationship the client had with the employees, they were not being provided in respect of their employment. They also noted that the funds were sourced from after tax proceeds and the client did not claim a deduction or obtain a tax benefit under the arrangement.

That the benefits were not provided in respect of employment was enough to prevent the benefits from being fringe benefits.

After setting out the case law on gifts, the ATO rationalised that the gifts could not be ordinary income as:

- the purpose of the gifts is to recognise strong personal relationships built up over time with persons who are, or were, employees of the employer;
- the proposed gifts are one-off payments with no consideration given, or required to be given, in exchange for the gifts;
- the beneficiaries were unaware that the client is considering giving them a gift and accordingly, it is considered unsolicited; and
- the proposed gift is not a common incident of the income earning activities with the employer.

In relation to whether the amount could be considered to be a gratuity that is assessable under section 15-2 the ATO set out that:

- at issue in this arrangement is whether the gift was granted in relation directly or indirectly to the employee's employment;
- the leading cases in connection with this question of an indirect or direct relation to employment are *Dixon's Case* and *Scott's Case*. In both cases, it was decided that the phrase 'an indirect consequence of employment' was not an open-ended concept. Rather, there must be a connection between the payment and the employment such that the receipt 'is in a relevant sense a product' of the employment.

As they had already determined that the payment was not in respect of employment, they determined that the amount was not statutory income of the employee.

As the amount was not income of the employee, there was no PAYGW obligation.

COMMENT – using a trust in this way to prevent a challenge to a will may not be effective in NSW as a result of the 'notional estate' provisions.

COMMENT – while the ATO analysis here concerning PAYGW focused on whether the amounts received by the employees were income for the employee, the technical test is whether the payments were 'salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity)' under section 12-35 of Schedule 1 to the TAA 1953.

TRAP – the other exposures under this form of arrangement are to superannuation guarantee, payroll tax and workers compensation, where the other relevant bodies may not form the same view as the ATO in this ruling about the connection to employment.

ATO reference *PBR Authorisation No 1052059439228*
w https://www.ato.gov.au/law/view/document?docid=EV/1052059439228

5.7 Affiliates

Facts

The taxpayer acquired a rural farming from his or her parents, jointly with their sibling.

The parents continued to carry on their farming business on the property in partnership.

The taxpayer's sibling is buying out his or her share of the property.

Question

Can the parents (who carry on a business in partnership) be the taxpayer's affiliates individually pursuant to section 328-130 of ITAA 1997?

Decision

The ATO ruled that, no, the taxpayer's cannot be his or her affiliates individually pursuant to section 328-130 of the ITAA 1997 because a partner in a partnership cannot in their capacity as a partner, be a small business entity.

They set out that an affiliate is defined by subsection 328-130(1) of ITAA 1997 as being an individual or company who acts or could reasonably be expected to at in accordance with your directions or wishes, or in concert with you, in relation to the affairs of the individual or company. They then set out that partnerships, trusts and superannuation funds cannot be your affiliates. On this basis the parent's partnership cannot be an affiliate.

The ATO then state:

> *Furthermore, neither of your parents, as individuals, can be your affiliate. An individual is considered an affiliate when they could reasonably be expected to act in accordance with your directions or wishes, or in concert with you, in relation to the affairs of the individual. Your parents cannot be affiliates, as individuals, in relation the affairs of a partnership. This is because a partner in a partnership, in their capacity as a partner, cannot be a small business entity. The small-business entity is the partnership.*

COMMENT – in this ruling, the ATO appear to have conflated the meaning of a 'small business entity' in section 328-110 of the ITAA 1997 with the meaning of an 'affiliate' in section 328-130 of the ITAA 1997. As a matter of law, partners in a partnership are carrying on a business and there is no reason, as a matter of statutory construction, for them not to be able to be affiliates of a person. The ATO's approach in this ruling also appears to be contrary to the example in section 328-130(2) of the ITAA 1997 as follows:

> *Example: A partner in a partnership would not be an affiliate of another partner merely because the first partner acts, or could reasonably be expected to act, in accordance with the directions or wishes of the second partner, or in concert with the second partner, in relation to the affairs of the partnership.*

There would be no need for the example to be included in the law if, as a matter of definition, a partner could not be an affiliate as they could not be a small business entity.

ATO reference *PBR Authorisation No 1052055693800*
w https://www.ato.gov.au/law/view/document?docid=EV/1052055693800

5.8 Capital loss on money

Facts

On M YYYY, a person received a phone call from someone who offered them an opportunity to trade gold options on their trading platform. The person provided you with a link to their website (which appears to be GMP Solutions from the ruling question below), which took the person to the website for a company with an address in Country B.

Before investing the person checked with the Australian Competition and Consumer Commission (ACCC) website, moneysmart.gov.au and the Country B equivalent government websites. They also checked www.iosco.org/investor_protection to confirm it wasn't listed as a suspicious company and did a google search to find any bad reviews of the company.

After finding nothing on all of the searches a decision was made to open a trading account with them. Money was transferred to their account.

Shortly after trading started, the trading advisor changed to another advisor. The advisor would call daily with market information and trade suggestions, which if agreed to, were confirmed by a company investment controller, followed by an email trade confirmation.

All trades were confirmed in writing via email and phone confirmation by the investment controller and from an online trading account, all deposits, trades and their current values were shown.

On DD MM YYYY, the value of the trading account had a balance of USD$X and a request was made for a transfer of USD$X from the trading account into a private bank account. The transfer was confirmed by the company via email and the online account was debited by the same amount, however the funds did not arrive.

The attempts to find out why the transfer was not received led to the company stopping communication and shortly after and blocking access to the trading account.

On DD MM YYYY, the bank advised in a letter that it had done its best to recover your funds, but unfortunately it was not able to do so, and it had 'good reason to believe the people who asked … for money were scammers.'

The scam was reported to Scam Watch on DD MM YYYY, reported to the bank, the police report in Australia, registered on the ACCC website and notified to the XXXX in Country B.

Question

Is there a capital loss for money transferred to GMP Solutions?

Decision

Yes.

The ATO reasoned that as the arrangement entered into is considered a scam, the amount deposited with the company is considered to be a debt or obligation owed by them.

The debt owed is a CGT asset as defined in section 108-5.

The ATO considered the most relevant CGT event to be CGT event C1 (loss or destruction).

Taxation Determination TD 1999/79 relevantly states:

> *2. The word 'lost' in its context in subsection 104-20(1) does not contemplate voluntary actions. The Macquarie Dictionary, 3rd ed, defines 'lost' as '1. past tense and past participle of lose' and defines 'lose' as '1. to come to be without, by some chance, and not know the whereabouts of: to lose a ring'. The word in its context in CGT event C1 suggests an involuntary rather than a voluntary act.*

The ATO stated that loss of an asset includes the happening of an involuntary event which deprives the owner of the asset, for example theft.

As there was no compensation received, the time CGT event C1 happens is when the loss was discovered.

The reduced cost base of the asset was the funds sent to the foreign company. The capital proceeds were nil. The capital loss was the amount of funds not recovered.

COMMENT –contrast this PBR with PBR 1051964156206 covered in our July 2022 tax training notes where the ATO formed the view that money lost through an online scam could result in a blackhole deduction, which could not arise if there is a CGT asset involved, or PBR 1051829318404 from our July 2021 tax training notes where the ATO considered the relevant CGT event was A1. The analysis in this PBR appears the most correct.

ATO reference *PBR Authorisation No 1052037773567*
w https://www.ato.gov.au/law/view/document?docid=EV/1052037773567

6. ATO and other materials

6.1 Claiming a deduction for additional running expenses incurred while working from home

The ATO has released Practical Compliance Guideline PCG 2023/1, which sets out its guidance regarding how to calculate a deduction for expenses incurred from 1 July 2022 as a result of working from home. The PCG was previously released as a draft and covered in our November 2022 tax training notes.

Before 1 July 2022, in order to calculate deductions for expenses incurred as a result of working from home, taxpayers could use the shortcut method (80 cents per hour), the fixed-rate method (52 cents per hour) or calculate actual expenses method.

From 1 July 2022, taxpayers can either calculate deductions for working from home expenses using the new revised fixed-rate method set out in PCG 2023/1, or using the actual expenses method.

In order to use the revised fixed-rate method, you must satisfy the following three criteria:

1. you must be working from home or carrying out employment duties or carrying on a business on or after 1 July 2022; and
2. you must have incurred additional running expenses which are deductible under section 8-1 of the ITAA 1997, as a result of working from home; and
3. you must keep and retain relevant records regarding the time spent working from home and for the additional running expenses that are incurred.

Taxpayers do not need to have a separate home office to rely on PCG 2023/1. Where there is more than one taxpayer in the same household working from home, each taxpayer can only rely on the PCG if both taxpayers meet the three eligibility requirements set out above. Where one taxpayer chooses to calculate their deductions using the actual expenses method, they need to ensure their expenses are appropriately apportioned as between taxpayers.

The revised fixed-rate method apportions the expenses listed below at a rate of 67 cents per hour worked from home during the income year:

1. electricity and gas expenses for lighting, heating, cooling and electronic items used while working from home;
2. internet expenses;
3. mobile and home phone expenses, and;
4. stationery and computer consumables.

By contrast to the former shortcut method depreciation can be claimed in addition to the fixed rate amount.

The rate per hour calculates the total deductible expenses for each expense item. Therefore, you cannot claim an additional separate deduction for any of these expenses, even if the expense is incurred while working from somewhere other than your home. For example, if you use your mobile phone when working from home and when working elsewhere, your total deduction for your mobile phone expenses for the income year will be covered by the hourly rate of 67c per hour.

The PCG sets out the method for calculating the total deduction available for running expenses using the revised fixed-rate method:

1. calculate the number of hours you worked from home during the income year based on your records;
2. multiply the total number of hours you worked from home during the income year by 67c per hour;

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3. calculate the work-related decline in value of any depreciating assets that you used to work from home during the income year and any other running expenses you incurred which are not covered by the rate per hour;
4. add the amounts calculated at points (2) and (3) above – this is the amount you claim as a deduction in your tax return.

If a taxpayer meets the three eligibility criteria and applies the revised fixed-rate method set out in the PCG, the Commissioner will not apply compliance resources to review deductions claimed for working from home expenses.

The PCG states that to apply the fixed rate method, taxpayers must keep:

- records showing the total number of hours you worked from home during the income year
- one document, such as an invoice, bill or credit card statement, for **each of the additional running expenses** which you have incurred during the income year.

COMMENT – the fixed rate method, based on the PCG, requires one document for each category of expense to be retained, even though the number of categories of expenses, or in the amount of the expenses, does not impact upon the amount that can be deducted under the fixed-rate method. This would seem to allow the Commissioner to deny a deduction on review on the basis that a taxpayer cannot produce a document for all categories of additional running expenses.

TRAP – as was the case in the draft document, if an objection is lodged that relates to a working from home claim, the fixed rate method in the guideline cannot be relied upon, and actual expenses must be claimed.

ATO reference *Practical Compliance Guideline PCG 2023/1*
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20231/NAT/ATO/00001

6.2 Verification approaches for electronic device usage expenses

The ATO has updated *Practice Statement Law Administration* PSLA 2001/6, which outlines the principles ATO officers will apply when examining taxpayer claims for expense deductions involved in running a home office and electronic device usage.

Previously, this practice statement covered the approaches for reviewing home office running expenses under the fixed rate method of 52 cents per hour. From 1 July 2022 the fixed rate method of 52 cents per hour will no longer apply.

The Practice Statement was amended on 16 February 2023 to remove references to home office running expenses, and the fixed-rate method that applied up until 30 June 2022.

PCG 2023/1 (discussed above) sets out the ATO's compliance approach to the new fixed rate for home office running expenses for the 2022-23 and later income years.

PS LA 2001/6 remains useful in relation to evidence required for deduction claims for electronic device usage, phone calls and data.

ATO reference *PS LA 2001/6*
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20016/NAT/ATO/00001&PiT=20230216000001

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6.3 Treasury consultation on legislating objective of superannuation

Treasury has released a consultation paper which considers legislating the objective of superannuation in Australia.

The consultation paper discusses Australia's superannuation history, the rationale for preserving the objective of superannuation in law, provides options on the potential framing of superannuation law and how a legislated objective can improve both the accountability and the transparency in policy development of superannuation law in Australia.

The proposed objective set out in the consultation paper is, 'The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way'.

The consultation paper defines most of the specific terms within the proposed objective and provides sentence structure alternatives.

Treasury is seeking stakeholder feedback on the framing of the draft objective proposed in the consultation paper. The closing date for feedback is 31 March 2023.

w https://treasury.gov.au/sites/default/files/2023-02/c2023-361383.pdf

6.4 NSW land tax and duty foreign persons surcharges – exclusion for certain nationalities

The New South Wales Government has determined that the surcharge purchaser duty and surcharge land tax provisions are inconsistent with the tax treaties entered into by Australia with New Zealand, Finland, Germany and South Africa.

Citizens of New Zealand, Finland, Germany and South Africa will no longer be required to pay surcharge purchaser duty and surcharge land tax.

If citizens of New Zealand, Finland, Germany and South Africa have paid surcharge purchaser duty or surcharge land tax on or after 1 July 2021 they will be entitled to apply for a refund from Revenue NSW. Revenue NSW intends to proactively identify customers and transactions that may be eligible for the refund of surcharge purchaser duty.

Similarly, the tax treaties entered into may apply to corporations, trusts or partnerships who have an affiliation with New Zealand, Finland, Germany and South Africa, such that surcharge purchaser duty and surcharge land tax may not be payable by these entities.

Individuals acting as trustees of a trust, individuals as general partners of a limited partnership, and non-individual purchasers/transferees are not subject to surcharge purchaser duty if the entity is a 'foreign person' solely by reason of a substantial interest in the entity (or an aggregate substantial interest) being held by a person from New Zealand, Finland, Germany or South Africa. A 'substantial interest' means:

1. for an entity, the person holds an interest of at least 20% in the entity; or
2. for a trust (including a unit trust), the person, together with any one or more associates, holds a beneficial interest of at least 20% of the income or property of the trust.

Corporations or trusts may be eligible for a refund if they paid surcharge purchaser duty on or after 1 July 2021 and have an affiliation with New Zealand, Finland, Germany or South Africa.

COMMENT – Revenue NSW are limiting refunds of the surcharge to payments made after 1 July 2021 as Revenue NSW considers that taxpayer's rights to recover are limited by the *Recovery of Imposts Act 1963* (NSW). There will likely be arguments over whether such a position is correct, although practically a considerable amount of Revenue NSW's compliance activities for surcharge purchaser duty and surcharge land tax occurred after 1 July 2021.

w https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/transfer-duty/surcharge-purchaser-duty/corporations-trusts
w https://www.revenue.nsw.gov.au/news-media-releases/international-tax-treaties

6.5 ATO Factsheet - electric vehicles FBT exemption

Employers may be entitled to an FBT exemption where they provide or allow employees to use electric vehicles for private use. The ATO has released a fact sheet to assist employers understand their tax obligations in relation to this exemption.

To determine if the exemption applies, the employer will generally need to:

1. determine whether the electric vehicle FBT exemption applies;
2. if the benefit is excluded, determine the taxable value of the benefit which will be included in the employer's FBT liability;
3. determine if an exemption applies to any benefits arise from the associated car expenses or associated items; and
4. calculate the taxable value of the benefit for reporting purposes.

If an exemption does not apply to a benefit, FBT will apply to the benefit and the benefit will need to be included in an employer's FBT liability. The amount of the benefit will not be included in the employee's assessable income. However, it may affect income tests for certain welfare payments.

Whether the exemption applies

An employer first needs to determine whether this FBT exemption applies. The exemption will be available if all of the following requirements are satisfied:

1. the benefit is a car benefit;
2. the care is a zero or ow emissions vehicle, meaning, it is a battery electric vehicle, hydrogen fuel cell electric vehicle, or a plug-in hybrid vehicle;
3. the electric vehicle must be held by the employer, an associate or third party under an arrangement;
4. the electric vehicle must have been used for the first time on or after 1 July 2022;
5. the electric vehicle must be used by a current employee or their associate; and
6. the electric vehicle is not and has never been subject to luxury car tax.

Associated Expenses

Exempt Expenses Associated with Electric Vehicles

Other expenses such as registration, insurance, fuel and repairs that are provided during the same period that the exemption applies will also be subject to the exemption. Fuel includes electricity used to charge the electric vehicles.

Accessories added to the electric vehicle, other than business accessories, will be added to the base value of the vehicle. An accessory will be a non-business accessory unless it is required for the operation of the business such as a GPS for a salesperson.

Non-Exempt Expenses Associated with Electric Vehicles

Certain associated expenses will not be included in the exemption. This includes Global Position System subscriptions and car parking costs.

The purchase of charging stations for the employee's home are also not considered to be a car expense and are not include in the FBT exemption. If an employer gives an employee a charging station, this will be a property fringe benefit and will be subject to FBT.

If an employer installs a charging station on the business premises, this will be a capital asset of the business.

Taxable Value of the Car

There are two methods to determine the taxable value of the car. These are as follows:

1. statutory formula method based on the cost price of the vehicle; and
2. operating cost method based on the operating costs of the vehicle.

It is important that employers are aware of the record keeping requirements for the method they adopt.

Reporting

An employer needs to report the grossed-up value of benefits provided to an employee if those benefits exceed $2,000 in a given FBT year. This does not include the value of any expenses associated with the electric vehicle.

An employer will need to treat the electric vehicles as fringe benefits to work out the taxable value of the car benefit even if the private use component is exempt, as this amount will need to be included in the reportable fringe amount for the employee. This does not affect the FBT liability of the employer.

Where the electric vehicle is considered to be a pooled or shared car, the employer will not be required to report this benefit.

COMMENT – while an exemption has been provided for FBT for the provision of electronic vehicles, there is no similar exemption from the application of Division 7A. Where a private company provides a motor vehicle for us by a shareholder or an associate of shareholder and the person is also an employee of the private company, the question will be whether the provision of the benefit is subject to Division 7A or FBT. This will turn on whether use of the motor vehicle was provided to the person in their capacity as an employee or a shareholder. The Commissioner's views whether benefits are in respect of employment are set out in MT 2019. There are no clear examples concerning cars.

w https://www.ato.gov.au/law/view/document?docid=AFS/EV-FBT/00001

6.6 DGR revocations

The ATO published a document on their website noting that the ATO has recently reviewed non-Government DGRs against the requirements to be a registered charity or operated by one – in particular the requirement to be registered with the ACNC. They stated that they are now beginning to revoke the DGR endorsement for those entities no longer entitled to be DGRs.

If the eligibility criteria are not met there will be a notice provided with the date, reason for revocation and setting out the review rights. An entity that has its DGR status revoked can apply for endorsement if it again meets the eligibility criteria.

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w https://www.ato.gov.au/Non-profit/Newsroom/Fundraising/Deductible-gift-recipient-revocations-are-commencing/

6.7 Serious Financial Crime Taskforce

The ATO have published information on the Serious Financial Crime Taskforce, being an joint-agency taskforce established on 1 July 2015. The material on the website includes an 'identikit' to assist in identifying the warning signs that a person you are involved with is involved in serious financial crime.

w https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Serious-Financial-Crime-Taskforce/

6.8 Douglas decision and military invalidity pensions

The ATO have advised that from late February they will write to those veterans affected by the decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 where the Federal Court found that, from 1 July 2007, certain invalidity pension payments for veterans and their beneficiaries are superannuation lump sum payments and not superannuation income streams.

The ATO note that the vast majority of veterans will be in a better tax position. For veterans that pay more tax Government has proposed a new tax offset (contained in the *Treasury Laws Amendment (2022 Measures No. 4) Bill 2022*).

A person will be affected by the Douglas decision where they are a veteran or their beneficiary and the invalidity pension payment:

- started on or after 20 September 2007, and
- is made by the Commonwealth Superannuation Corporation (CSC) under either
  - the Defence Force Retirement and Death Benefits (DFRDB) scheme
  - the Military Superannuation and Benefits (MSB) scheme.

The ATO webpage sets out further information to determine whether a person is impacted and to determine the tax impact.

w https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Military-invalidity-pensions---Douglas-decision/

6.9 Holiday homes and income tax

The ATO published a document on their website in February setting out three questions they consider can be asked to ensure that claims in relation to holiday homes are valid rental deductions:

- How many days was it rented out and was the rent in line with market values?
- Where do you advertise for rent and were any restrictions placed on tenants?
- Have you, your family or friends used the property?

The ATO views on holiday homes and how to apportion claims when properties are not rented, not genuinely available for rent, or rented at discounted rates was last updated in January and his here https://www.ato.gov.au/Individuals/Investments-and-assets/Holiday-homes/

w https://www.ato.gov.au/Tax-professionals/Newsroom/Your-practice/Do-your-clients-have-a-holiday-home-/

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