The Tax Institute

Tax Update

May 2023

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

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1. Tax Update Pitstop

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

Tax Update Matter	**Impact Summary**	**Further Detail**
WZWK	The AAT delivers a judgment concerning, in part, whether a person retires when they cease gainful employment with a company that they control	Page 10
Budget 2023	The 2023 Budget contains a number of measures that affect individual and small businesses, including conferring a power to amend a tax return for small business for 4 years.	Page 28
Small business restructure rollover	There is a private ruling decision on the application of the small business restructure rollover for transfers of active assets between discretionary trusts that have made family trust elections.	Page 32
Use of assets and Division 7A	There are a number of private binding rulings that consider the tax implications where a shareholder or an associate of a shareholder uses the assets a private company.	Page 36
ATO Decision Impact Statement - Guardian	The ATO has issued a Decision Impact Statement concerning the decision of the Full Court in *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3. The Decision Impact Statement confirms that the ATO will update its ruling on 100A (TR 2022/4) to address the *Guardian* decision.	Page 47

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2. Cases

2.1 Leppington Pastoral Company – declaration of trust

Facts

In June 2008 and October 2010, Leppington Pastoral Co Pty Ltd (**LPC**) entered into a range of agreements with Greenfields Development Company Pty Ltd (**GDC**) and the New South Wales Government's development entity Landcom in relation to the development of agricultural land in Oran Park, NSW. One of these agreements was a document titled 'Development Rights Agreement – Oran Park Project' between LPC and GDC.

The Development Rights Agreement granted extensive rights to GDC, including to be the sole and exclusive developer of land, to receive the economic benefit of the project (being the gross proceeds), and to carry out the project at its own cost and for its own sole benefit. LPC was entitled to payment of an 'LPC Lot Amount' calculated according to the value of each parcel of land used by GDC for development.

LPC was not entitled to deal with its interest in the land or to change the nature of LPC's farming, dairy, and grazing business carried out on the land without GDC's prior written consent. GDC could call for land to be transferred to GDC by exercising call options granted to it or by issuing 'Development Notices' under the Development Rights Agreement, which required LPC to vacate the part of the land subject to the development notice. However, LPC had the right to refuse a development notice if there were more than 25 hectares of land under GDC's control upon which development works had not yet commenced.

Clause 16.1 of the Development Rights Agreement provided:

> ***16.1 Estate or interest in Project Land***
>
> *LPC acknowledges and agrees that GDC has a beneficial and equitable interest in the Project Land (and in the Project Land Extension Option parcel) and in the Gross Proceeds of the Project, as those are described in the Transaction Documents.*
>
> *GDC acknowledges and agrees that, as between LPC and GDC, subject to any Securities that may exist from time to time and GDC's beneficial and equitable interest, as described:*
>
> *(1) nothing contained in or implied by this document, operates to transfer to, or vest in, GDC any legal estate or interest in the Project Land; and*
>
> *(2) the legal ownership of the Project Land remains vested in LPC until it is acquired by GDC or a Purchaser.*

In November 2016, LPC lodged the Development Rights Agreement with Revenue NSW after a question was raised in the course of land tax proceedings about whether the Development Rights Agreement effected or evidenced a dutiable transaction.

Section 8(1)(b)(ii) of the *Duties Act 1997* (NSW) imposed duty on a declaration of trust over dutiable property. A 'declaration of trust' was defined in s 8(3) as:

> *any declaration (other than by a will or testamentary instrument) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration*

On 20 February 2017, the Chief Commissioner issued a notice of assessment to LPC for $26,981,990, being duty of $15,596,806, interest of $10,605,345 and penalty tax at a rate of 5%.

On 19 April 2017, LPC objected to the assessment on five grounds:

1. that there was no declaration of trust in the Development Rights Agreement;
2. alternatively, that the Development Rights Agreement did not identify the property that is the subject of any trust declared, with the result that the duty payable is limited to $500 under to section 58(2) of the Duties Act;
3. in the further alternative, that the assessment was based on an inflated valuation of the land and any duty should be reduced to reflect the true value of the land;
4. that the penalty tax should be remitted on the basis that LPC took reasonable care to comply with taxation law; and
5. that the Chief Commissioner should remit the interest, or at least the premium component of the interest.

On 9 November 2021, the Chief Commissioner upheld grounds three and four of the objection, and issued a revised notice of assessment, reducing the duty to $7,685,490, with a corresponding reduction of the interest to $6,518,812, and the waiver of the whole of the penalty tax.

On 14 December 2021, LPC commenced proceedings in the Supreme Court of New South Wales seeking a review of the revised notice of assessment.

Issue

Did the Development Rights Agreement effect or evidence a dutiable declaration of trust, so that LPC held the land on trust for GDC?

Decision

The Court considered that the critical question was whether the Development Rights Agreement demonstrated sufficient intention to create a trust relationship between LPC and GDC.

The Court held that a clause in a contract that expressly disclaims an intention to create a relationship of trustee and beneficiary is not determinative, but is relevant to the question of whether the contract as a whole evidences an intention to create a trust.

LPC was entitled to be paid for so much of the land as GDC chose to utilise for the project, and stood to benefit (or lose) from any increase (or decrease) in the value of the land during the course of the project up until GDC acquired or took exclusive possession of the last parcel of the land. LPC was also entitled to continue its existing farming, dairy, and grazing business on the land for its own benefit and profit, unless and until GDC acquired parts of the land for development. The Court noted that this benefit was strengthened by LPC's right to refuse a development notice issued by GDC, which was intended to ensure that LPC’s express right to continue its farming dairy and grazing business on parts of the land was not undermined by GDC issuing development notices at a pace that outstripped the pace at which GDC was actually undertaking the work required for the project.

The Court held that these rights are fundamentally inconsistent with the fiduciary obligations that LPC would have owed to GDC as a trustee, including the duties:

1. to hold the Project Land for the benefit of GDC;
2. to act for and on behalf of the interests of GDC in dealing with the Project Land; and
3. not to allow its own interests to come into conflict with those of GDC.

GDC’s entitlement as against LPC to the gross proceeds received from the sale of developed lots did not confer on GDC an interest in land itself in the nature of the interest of a beneficiary under a trust.

Citation *Leppington Pastoral Co Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 463 (Williams J)
w https://www.caselaw.nsw.gov.au/decision/187df31a4ce60d2b2497b054

2.2 Messenger Media – input tax credit claim time limit

Facts

Messenger Media and Information Technology Pty Ltd is a corporate entity that was registered for GST on 2 January 2004 and reports GST annually. It accounts for GST on an accruals basis.

Messenger carries on a business of internet marketing, consulting and web design. It also invests in shares and undertakes property development. It has not been disputed that Messenger engaged in a property development enterprise and an IT enterprise during the 2012 and 2013 tax periods (the **Relevant Periods**).

Since 24 February 2003, Anthony Svasek has been the sole director of Messenger.

Prior to the annual tax period ending 30 June 2010, Messenger lodged its annual activity statements each year before the due date. However, Messenger failed to lodge its annual activity statements for the 2011 to 2015 tax periods by the due date.

On 19 January 2017, Messenger was issued with court orders for outstanding income tax returns for the 2011 to 2015 income years.

On 4 February 2019, Messenger lodged annual activity statements for the tax periods of 1 July 2009 to 30 June 2015 to comply with the court orders.

In the activity statements, Messenger claimed $9,043 of ITCs for the 2012 tax period and $7,053 for the 2013 tax period without providing prior written notice of its entitlement to these ITCs.

On 7 February 2019, the Commissioner of Taxation commenced an audit of Messenger's activity statements for the Relevant Periods.

On 15 February 2019, the Commissioner issued Messenger with Notices of Amended Assessment for the annual activity statement periods from 1 July 2009 to 30 June 2012 and for the 2013 tax period (collectively, the **Relevant Assessments**), presumably denying the ITCs in full.

On 17 July 2019, Messenger lodged objections to the Relevant Assessments and on 19 December 2019, the Commissioner disallowed Messenger's objections.

The Commissioner decided that the objection should be disallowed for the 2012 tax period because Messenger did not notify the Commissioner within the 4-year time limit, as stipulated in s 105-55 of Schedule 1 to the *Tax Administration Act 1953* (Cth) (**TAA**), of its entitlement to a refund or credit. Up to 2012 it was possible to extend the period in which claims for ITCs may be made by notifying the Commissioner of the entitlement to claim.

The Commissioner decided that the objection should be disallowed for the 2013 tax period because Messenger did not include its claim for ITCs in its activity statement within the relevant period as stipulated in s 93-5 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**). From 2013 it was not possible to notify the Commissioner to extend the 4-year period in which credits must be claimed.

<u>Application for Review</u>

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On 4 February 2020, Messenger lodged an application for review of the Commissioner's decisions with the AAT.

On 12 December 2022, the matter was heard via video-link before Senior Member Dr Linda Kirk. At the hearing, Anthony gave oral evidence and was subsequently cross-examined.

<u>AAT Hearing</u>

Anthony emphasised at the hearing that Messenger's late lodgement was a result of a 'massive amount of work' that needed to be completed to have the activity statements lodged. The evidence provided by Messenger included the following:

1. Messenger did not lodge activity statements before February 2019 because it was concerned it would incur penalties if it lodged incorrect statements;
2. Messenger was not aware of the 4-year time limit on entitlements to ITCs until February 2019;
3. Anthony called the ATO on several occasions throughout the 2012 and 2013 income tax years regarding difficulties meeting lodgement obligations and assistance with penalties for overdue lodgements, albeit he did not make contemporaneous notes of the conversations; and
4. Anthony's call to the ATO on 20 December 2013, where he expressed his wish to claim a refund of $31,748, constituted a valid oral section 105-55 notification of an entitlement to ITCs for the 2012 period, albeit he could not provide verification of the notification, nor was he aware of the 4-year rule.

Issues

1. Whether Messenger was within time to claim ITC's for each of the Relevant Periods.
2. If the claims were made within time, whether Messenger had established an entitlement to those ITCs as required by section 11-5 and section 29-10 of the GST Act.

Decision

<u>2012 Period</u>

The AAT found that Messenger was not entitled to claim credits or refunds pursuant to Division 93 of the GST Act and section 105-55 of Schedule 1 to the TAA, nor was it entitled to claim those credits or refunds at the time it lodged its activity statements on 4 February 2019 for the following reasons:

1. for the 2012 Period, section 93-5 of the GST Act provided that an entity ceased to be entitled to an ITC for a creditable acquisition 4 years after the day on which it was required to give to the Commissioner a GST return for the period. For the purposes of section 93-5 of the GST Act, the last day of the 4-year period was 3 June 2017. At the relevant time, section 93-10(3) of the GST Act provided that if an entity notified the Commissioner that it was entitled to ITCs that give rise to a refund within 4 years after the end of the tax period, then it remained entitled to the credit or refund attributable to that tax period notwithstanding the 4-year time limit in section 93-5 of the GST Act;
2. the evidence before the AAT was that Messenger did not lodge its activity statement until 4 February 2019. Messenger's entitlement to ITCs for the 2012 Period had therefore ceased, unless it could establish that it had provided a valid section 105-55 Notification of an entitlement to ITCs prior to 30 June 2016;
3. it was not in dispute that Messenger did not make a written section 105-55 Notification. Messenger contended that it made an oral section 105-55 Notification to the Commissioner on 20 December 2013, albeit the Commissioner contends that no oral notification was made. The AAT was ultimately satisfied that Messenger did not provide a valid notification, either in writing or orally, of an entitlement to ITCs within 4 years of the end of the 2012 Period and thus the exception in section 105-55 of the TAA (as it then was) was not available. Moreover, Messenger did not discharge its burden of proving that the

Commissioner's GST assessments for the Relevant Periods were excessive or what they otherwise should be.

2013 Period

The AAT found that Messenger's ability to claim ITCs for the 2013 period ceased on 3 June 2018, as per section 93-5 of the GST Act, for the following reasons:

1. in *Rosebridge Nominees Pty Ltd (in liq) v Commissioner of Taxation*, the AAT held that section 93-5 of the GST Act makes it 'abundantly clear that entitlement to input tax credits is extinguished' when the 4-year period ends; and
2. the definitive operation of section 93-5 of the GST Act was further affirmed by the AAT in its more recent decisions, such as *JHKW and Commissioner of Taxation* and *H & B Auto Repair Centre Pty Ltd and Commissioner of Taxation*, where it was confirmed that neither the Commissioner nor the AAT has discretion to circumvent the operation of section 93-5 of the GST Act.

The AAT was ultimately satisfied that any entitlement Messenger may have had to ITCs ceased to exist well before Messenger's GST return was lodged on 4 February 2019.

TRAP – while claims for input tax credits can go out of time, the requirement to remit GST charged does not.

Citation *Messenger Media and Information Technology Pty Ltd and Commissioner of Taxation (Taxation)* [2023] AATA 752 (SM Dr Kirk, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/752.html

2.3 WZWK – superannuation fund benefits

WZWK is an individual.

Between 1983 and 2021, WZWK worked as an accountant and operated his own firm. WZWK was also a registered tax agent (between 1988 and 2019), a chartered accountant (between 1989 and 2021) and a self-managed superannuation fund (**SMSF**) auditor.

In 2008, WZWK became a director and general manager of Company B. WZWK was the managing director and shareholder of Company B from its incorporation on 17 January 2008 until it was voluntarily deregistered on 28 March 2011.

On 23 February 2010, WZWK established a SMSF (the **Fund**) with WZWK being the sole member of the Fund and Company C being the trustee of the Fund. WZWK was a director of Company C. At the time the Fund was established, WZWK already had a superannuation fund.

In October 2010, WZWK ceased being employed by Company B. A factory used in the business of Company B was destroyed by a fire and WZWK decided to close the business as the business would not be viable even if the factory was rebuilt. Prior to the cessation of WZWK's employment, Company B made superannuation contributions to the Fund.

On 1 October 2010, at the time WZWK was 47 years of age, Company C resolved to commence paying WZWK a 'Non-commutable Lifetime Pension' on the basis that WZWK satisfied a condition of release, being the termination of his employment. WZWK's 'preservation age' is 58.

The contributions made to the Fund and the benefits paid to WZWK between 2011 and 2016 are listed in the table below:

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Year	Contributions made by Company B	Personal Contributions	Closing Account Balance	Benefit paid to WZWK
2011	$17,000	$392,547	$520,421	$4,275
2012	N/A	N/A	$1,263,701	$25,000
2013	N/A	N/A	$2,470,824	$100,000
2014	N/A	N/A	$2,804,291	$108,400
2015	N/A	N/A	$5,005,304	$213,569
2016	N/A	N/A	$2,004,640	$367,892

In 2011, after the Fund had already been making payments to WZWK, WZWK sought advice from SMSF Strategies Pty Ltd about when a member of a SMSF can access their superannuation benefits.

The Notices of Assessment issued to WZWK for the income years ended 30 June 2015 and 2016 provided that no tax was payable by WZWK for those years.

On 19 December 2018, the Fund was wound up. It is not clear how, but the AAT decision says that after the 6 payments above the Fund was depleted of all resources. WZWK said that the fund was depleted of all resources because the assets of the Fund were devalued.

In August 2019, the Commissioner commenced an audit of WZWK's tax affairs for the income years ended 30 June 2015, 2016 and 2017. During the audit, the Commissioner requested that WZWK provide, amongst other things, documents which supported the basis for the payments made by the Fund to him.

During the audit, the Commissioner referred WZWK to ASIC pursuant to section 128P of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SISA**) and in November 2019, ASIC disqualified WZWK from continuing to be a SMSF auditor for the following reasons:

> *… for significant auditor independence breaches and deficiencies in auditing the acquisition of shares, borrowings, valuation of assets, compliance with in-house asset requirements and regarding a non-commutable life pension …*

In May 2020, the Tax Practitioners' Board (**TPB**) terminated WZWK's individual tax agent registration. WZWK was also suspended by the disciplinary panel of Chartered Accountants ANZ (**CA ANZ**).

WZWK did not challenge the decisions of ASIC, the TPB or CA ANZ.

On 2 April 2020, the Commissioner issued a position paper with respect to WZWK's assessable income for the income years ended 30 June 2015 and 2016 wherein the Commissioner formed the view that the payments made by the Fund to WZWK did not meet a condition of release and, as such, the payments should be included in his assessable income pursuant to section 304-10 of ITAA 1997.

Following the position paper, the Commissioner issued an amended assessment for the 2015 financial year, assessing WZWK as owing $226,787 (**2015 Amended Assessment**). In February 2021, the Commissioner also issued the following for the 2015 and 2016 financial years:

1. a shortfall penalty in the amount of $99,040 on the 2015 Amended Assessment on the basis that WZWK made a false and misleading statement;
2. an amended assessment for the 2016 financial year, assessing WZWK as owing $186,622 (**2016 Amended Assessment**); and
3. a shortfall penalty in the amount of $80,621 on the 2016 Amended Assessment on the basis that WZWK made a false and misleading statement.

On 13 May 2021, WZWK objected to the assessments, but the objections were disallowed by the Commissioner on 10 June 2021.

On 26 July 2021, the Commissioner disqualified WZWK from being a trustee of a fund pursuant to section 126A of SISA. WZWK requested a review of the disqualification decision, but the decision was affirmed by the Commissioner on 10 September 2021.

WZWK applied to the AAT for a review of the decision by the Commissioner to disallow the objections to the assessments and the disqualification decision.

Issues

1. Did WZWK breach section 31 of SISA by allowing a member's benefit to be paid out of the Fund?
2. Was the Fund maintained for one of the core purposes?
3. Were the assessments excessive?
4. Was the disqualification of WZWK from being a trustee of a fund justified?

Decision

Did WZWK breach section 31 of SISA by allowing a member's benefit to be paid out of the Fund?

Pursuant to section 31(1) of SISA, the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SISR**) may prescribe standards applicable to the operation of regulated superannuation funds. Regulation 6.17 of SISR is a prescribed operating standard that restricts the payment of superannuation fund benefits to when the fund is required under Part 6 of SISR to pay them.

Regulation 6.18(1), which is under Part 6 of SISR, provides that a member's preserved benefits in a regulated superannuation fund may only be cashed on or after the satisfaction of a 'condition of release'. The conditions of release are set out in Schedule 1 of SISR. In particular, Item 108 of Schedule 1 of SISR provides the following condition of release:

> *Termination of gainful employment with an employer who had, or any of whose associates had, at any time, contributed to the regulated superannuation fund in relation to the member.*

Where this condition is met, a person can cash preserved benefits as a non-commutable life pension or non-commutable life annuity. WZWK argued that he met this condition of release as his employment with Company B was terminated.

The Senior Member was not satisfied that WZWK met a condition of release. As Company B was owned and operated by WZWK, it was WZWK's decision to terminate his own employment. WZWK did not provide evidence concerning the ongoing viability of Company B and the Senior Member queried why the business could not have moved into a new premises and continued performing its contractual obligations. No employment agreement was before the AAT. The Senior Member noted that WZWK needed to provide more persuasive evidence and, as a result, held that the payments from the Fund to WZWK were not made in accordance with relevant standards.

The Senior Member also considered that the payments made to WZWK were not made pursuant to a 'non-commutable life pension' as defined in the SISA And SISR. Of particular note was that the payments could not be a life pension if, after making 6 payments, the fund was depleted of all funds and wound up.

Was the Fund maintained for one of the core purposes?

The sole purpose test is set out in section 62 of SISA. The test provides that a superannuation fund must be maintained solely for one or more of the core purposes, notably, to provide retirement benefits to its members.

WZWK argued that the Fund was established for a core purpose and that he could not have known that the factory used in the business carried on by Company B was going to be destroyed by a fire when the Fund was established. However, the Commissioner argued that the Fund was established to facilitate early access to superannuation benefits. In support of this argument, it was noted that the Fund was established by WZWK despite already having another SMSF and that Company B was not an 'arm's length' employer due to WZWK being its sole director and shareholder. It was also noted that benefits of over $800,000 were distributed to WZWK in only 6 years, despite not yet reaching preservation age and that Company B only contributed $20,000 to the Fund.

The Senior Member drew a negative inference from WZWK seeking advice from SMSF Strategies Pty Ltd after already receiving benefit and was not satisfied that the Fund was established for a core purpose.

Were the assessments excessive?

Section 304-10(1)(b) of the ITAA 1997 relevantly provides that the amount of a superannuation benefit is required to be included in a taxpayer's assessable income if:

(i) *the fund was not (when you received the benefit) maintained as required by section 62 of the Superannuation Industry (Supervision) Act 1993;*
(ii) *you received the benefit otherwise than in accordance with payment standards prescribed under subsection 31(1) of the Superannuation Industry (Supervision) Act 1993 .*

As the Fund was not maintained for one of the core purposes and the benefits received by WZWK were not paid in accordance with SISR, the amount of the benefits received by WZWK should have been included in his assessable income. The Senior Member then considered whether penalties should be imposed. In particular, whether the conduct of WZWK was negligent, a failure to take reasonable care or reckless.

The Commissioner argued that, based on the level and experience of WZWK, his interpretation was incorrect and demonstrated gross indifference to the accuracy of the tax returns. However, WZWK argued that given his background and experience, he took a view of how the legislation is to be interpreted and even if the AAT concludes he was mistaken in that interpretation, it is not enough to find recklessness as something more is needed.

The Senior Member found that the conduct of WZWK was reckless and affirmed the decisions by the Commissioner to impose shortfall penalties on the 2015 Amended Assessment and the 2016 Amended Assessment. The Senior Member considered that due to the significance of WZWK's interpretation, it was careless not to have made reasonable enquiries, obtain a second opinion or obtain a private ruling.

Was the disqualification of WZWK from being a trustee of a fund justified?

Section 126A(1) of the SISA relevantly provides that the Commissioner may disqualify an individual if the Commissioner is satisfied that the *'person has contravened this Act'* and '*the nature or seriousness of the contravention ... provides grounds for disqualifying the individual*'. Section 126A(3) of the SISA further provides that the Commissioner may disqualify a person *'… if satisfied that the individual is otherwise not a fit and proper person'*.

Due to the circumstances of WZWK, namely that WZWK was a chartered accountant, SMSF auditor and registered accountant, the Senior Member found that the breaches of SISA took on an enhanced significance and supported a finding that WZWK is not a fit and proper person to be a trustee of a superannuation fund.

COMMENT – it appears unusual that ceasing being paid by a company you control, where the business of that company ceased, is not seen as being a termination of employment.

Citation *WZWK and Commissioner of Taxation (Taxation)* [2023] AATA 872 (26 April 2023) (Senior Member D K Grigg, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/872.html

2.4 Findlay – Principal place of residence exemption

Facts

In July 2017, Caroline and Richard Findlay purchased a property in Sydney.

In March 2018, an owner builder permit was obtained for the construction of a two-storey home, inground pool and retaining walls on the Property. Due to financial difficulties, the construction of their home on the Property did not initially proceed.

On 5 October 2018, Caroline and Richard lodged a land tax registration return which claimed the principal place of residence (**PPR**) exemption in respect of their Property. Therefore, they were issued with a nil land tax assessment for the 2018 land tax year.

In May 2019, builders were engaged, and a contract was signed in October 2019.

In October 2019, the Hills Shire Council approved a development application. Construction commenced in November 2020.

By 17 December 2021, practical completion was reached and hand over of the Property was on 21 January 2022.

On 2 February 2022, Caroline and Richard moved into their new home.

In May 2022, Caroline and Richard were advised that the Chief Commissioner was reviewing the PPR exemption on the Property. On 1 June 2022, Caroline and Richard applied for the PPR exemption for the period from 29 June 2017 to 2 February 2022 (when they moved in).

On 15 June 2022, the Chef Commissioner determined to revoke the concession on the basis that Caroline and Richard did not commence to use and occupy the Property for a continuous 6 month period prior to 31 December 2021, which is when the PPR concession expired.

Clause 6 of Schedule 1A to the *Land Tax Management Act 1956* (NSW) (**LTMA**) provides a land tax concession of up to 4 land tax years for unoccupied land intended to be the owner's principal place of residence, and where the land is unoccupied because building works or renovations are being undertaken on the land.

Caroline and Richard contended that there were extenuating circumstances, including the lockdowns and other restrictions of the COVID-19 pandemic which caused the delay to construction as a result of shortage of labour and suppliers. This is what prevented them from moving into their home by 31 December 2021.

A notice of assessment was issued to Caroline and Richard for the 2018 to 2022 land tax years for $30,129.30. On 17 June 2022, Caroline and Richard lodged an objection. The objection was disallowed on 29 July 2022.

Caroline and Richard applied to the NCAT for a review of the Chief Commissioner's decision.

Issue

Will the concession in clause 6 of Schedule 1A to the LTMA apply in respect of the Property for the 2018 to 2022 land tax years?

Decision

The NCAT noted, consistent with the case law, that 'use and occupation' requires actual present use and occupation not an intention to use and occupy.

The NCAT concluded that it had no power to exercise a discretion to allow the PPR exemption to apply, and that there is no statutory authority in the LTMA or elsewhere which allows for the exercise of a discretion on the grounds of unfairness or to extend the 4 year period.

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Therefore, as Caroline and Richard did not use and occupy the Property prior to 2 February 2022, the NCAT was not satisfied that the PPR exemption applied for the 2018 to 2021 land tax years and the 2022 land tax year.

The Chief Commissioner's decision was affirmed.

COMMENT – a Bill is currently before NSW Parliament to amend the LTMA to provide the Chief Commissioner with the discretion to extend the time period for construction to be completed to 6 years. See Item 2.8 of these Tax Training Notes.

Citation *Findlay v Chief Commissioner of State Revenue* [2023] NSWCATAD 80
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/80.html

2.5 RFZD – attempting to bring proceedings as a deregistered company

Facts

RFZD was a company that was deregistered by ASIC on 30 January 2022 under section 601AB of the *Corporations Act 201* (Cth). Section 601AD provides that upon deregistration, a company ceases to exist.

Prior to deregistration, RFZD applied to the AAT for review of a decision of the Commissioner of Taxation to allow its objection to amended assessments of superannuation guarantee charge penalties and administrative penalties applied in relation to PAYG withholding.

The AAT decided to affirm the Commissioner's decision after RFZD was deregistered.

On 11 May 2022, RFZD filed a notice of appeal from the AAT in the Federal Court of Australia.

On 25 May 2022, the Commissioner filed a notice of objection to the competency of the appeal on the grounds that RFZD had no capacity to bring the appeal given that it was deregistered.

On 29 June 2022, the Commissioner filed a minute of proposed orders seeking the appeal be dismissed and that the solicitor representing RFZD, Daniel Mezger, pay the Commissioner's costs.

On 6 July 2022, Daniel filed a minute of proposed orders requesting that RFZD be reinstated as a registered company under section 601AH of the Corporations Act.

On 7 July 2022, the Court made orders adjourning the case to 28 September 2022 so that RFZD could have sufficient time to make an application for reinstatement.

However, on 28 September 2022, the Court was informed that no application had been made for reinstatement. Instead, Daniel contended that based on a decision from the Fair Work Commission (*Fan v Integrated Pest Management Systems (Canberra) Pty Ltd* [2020] FWC 2957), there was authority for the concept that a deregistered company could maintain proceedings under section 601AD of the *Corporations Act*.

On 8 February 2023, the Court heard oral arguments on the issue of the competency of the appeal.

On 22 February 2023, Daniel filed written submissions on the question of costs.

Competence of the appeal

At the hearing on 8 February 2023, the Commissioner relied upon an affidavit which had annexed to it an ASIC search extract of RFZD, showing that it was deregistered on 30 January 2022. The Commissioner also

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tendered a further ASIC search extract of RFZD which showed that RFZD remained deregistered as of 8 February 2023.

Requesting costs on an indemnity basis

In support of the Commissioner's objection to the competency of the appeal, the Commissioner made written submissions, filed on 25 January 2023, and oral submissions, heard on 8 February 2023, requesting the Court to award the Commissioner costs on an indemnity basis, should Daniel, on behalf of RFZD, fail to establish competency of the appeal.

At the end of the hearing on 8 February 2023, Feutrill J indicated his intention to make an order in favour of the Commissioner's costs submissions. However, his Honour allowed Daniel to file and serve written submissions and any affidavits in opposition to the Commissioner's costs submissions.

On 22 February 2023, Daniel filed written submissions, asserting:

1. that parties cannot make submissions for costs before proceedings commence; and
2. that the Federal Court does not have discretion as to costs.

Issues

1. Whether RFZD validly make an application for appeal despite being deregistered?
2. Whether costs be awarded against Daniel on an indemnity basis?

Decision

Competency

Feutrill J strongly negated Daniel's assertion that a deregistered company could make an application for appeal or maintain proceedings, citing section 601AD of the Corporations Act which states 'a company ceases to exist on deregistration'. His Honour noted that he was not bound by a decision made by the Fair Work Commission relied upon by Daniel, and that he was bound to follow the interpretation adopted by an intermediate appellate court, unless he considered it was plainly wrong. His honour cited many cases where courts had determined that proceedings brought by or against a deregistered company cannot be maintained.

His Honour ultimately found that neither RFZD nor Daniel were able to discharge the burden of establishing the competency of the appeal as RFZD was 'deregistered, did not exist and was therefore not a legal person.'

His Honour initially considered alternative courses to dismissing the appeal such as staying the proceedings or striking out the notice of appeal, to allow RFZD to be reinstated, thereby eliminating the issue of competency. However, his Honour found it appropriate to dismiss the appeal under rule 33.30(5) of the *Federal Court Rules 2011* (Cth), given that Daniel had been aware of the Commissioner's objection to competency for over 9 months yet had not requested reinstatement.

Costs

In responding to Daniel's submissions regarding costs, Feutrill J affirmed that 'there is nothing unusual, unique or procedurally irregular about parties making submissions on costs on the assumption they are successful.' His Honour further confirmed that the Court has a broad discretion to award costs under section 43 of the *Federal Court of Australia Act 1976* (Cth).

His Honour ultimately held that the appeal was an abuse of process as it was commenced without legal authority. Orders were made against Daniel to pay the Commissioner's costs on an indemnity basis for the period from which it should have been evident to him that there were no real prospects of success available to RFZD.

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Citation *RFZD v Commissioner of Taxation* [2023] FCA 324 (Feutrill J, Western Australia)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/324.html183

2.6 183 Eastwood Pty Ltd – ostensible authority

Facts

On 29 August 2016 the Eastwood Unit Trust was established. 183 Eastwood Pty Ltd was appointed as the trustee of the unit trust. Eric Naijing Lin and John Tak Ching Lau were appointed as the directors of 183 Eastwood Pty Ltd and Steve Zuohong Ju was appointed as the secretary for the company.

183 Eastwood Pty Ltd owned a residential development located in Eastwood. The Trust was established for the purpose of serving as an investment vehicle to enable the unitholders to invest in the development.

One of the investors in the unit trust was a company called LCC Property Development Pty Ltd that was controlled by Scott Chan. This company held a minority interest in the unit trust, owning 46 out of 100 units.

On 23 January 2018 Scott lodged an ASIC 484 form which notified ASIC that Eric, John and Steve were no longer officeholders of 183 Eastwood Pty Ltd. This form also notified ASIC that Scott was the sole director and secretary of the company.

On 24 January 2018 Scott opened a bank account with Westpac Banking Corporation in the name of 183 Eastwood Pty Ltd.

On 25 January 2018 Scott lodged a further ASIC Form 484 which notified ASIC that Scott held all of the shares in 183 Eastwood Pty Ltd.

The effect of these steps was that in January 2018 Scott was recorded as the sole director, secretary and shareholder of 183 Eastwood Pty Ltd on the ASIC register. The real officeholders were unaware that the ASIC register had been changed at this time.

The real officeholders were not made aware of these changes to the ASIC register until February 2018. On 15 February 2018 the accountant for 183 Eastwood Pty Ltd informed the real officeholders that a caveat had been registered in respect of the Eastwood property in favour of a company called Capital Empire Pty Ltd. The real officeholders were not aware of this company or any agreement in relation to the caveat.

Steve subsequently sought advice from a lawyer, Derek Ip, regarding how best to deal with the caveat. Derek recommended writing to the solicitors for Capital Empire Pty Ltd to provide further information regarding the caveat and to withdraw the caveat. The caveat was withdrawn on 2 February 2018. However, another caveat had been lodged by the same company on 1 February 2018 which was subsequently withdrawn on 5 February 2018.

On 22 February 2018 Derek advised the real officeholders that a mortgage had been registered over the Eastwood property on 6 February 2018. This mortgage was in favour of Ippin Textiles Pty Ltd, Jai He Family Investments Pty Ltd and M Wang Family Pty Ltd. A total of $4 million had been raised by way of this mortgage. A further caveat had also been registered in favour of National Commercial Finance Pty Ltd.

Scott had also entered into negotiations with Dragon Property Development & Investment Pty Ltd in respect of investing the Eastwood property development. The sole director of Dragon Property Development & Investment Pty Ltd, Shaolong Feng, requested various documents from Scott, including the ASIC search for 183 Eastwood Pty Ltd.

On 26 February 2018 Derek sent an ASIC search for 183 Eastwood Pty Ltd to the real officeholders which showed that Scott had been recorded as the sole director, secretary and shareholder of the company. The

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officeholders, unitholders of the trust and Scott met in March 2018. The outcome of this meeting was that Scott was to acquire all of the units in the unit trust.

In April 2018 Scott, falsely acting as a director of 183 Eastwood Pty Ltd, entered into a deed with Dragon Property Development & Investment Pty Ltd. Scott was the guarantor under this deed. Under this deed, 19 units in the unit trust were to be transferred to Dragon Property Development & Investment Pty Ltd. Dragon Property Development & Investment Pty Ltd subsequently paid the purchase price for these units to a Westpac bank account that had been established by Scott.

The 19 units were never transferred to Dragon Property Development & Investment Pty Ltd and the deed was subsequently terminated.

In June 2018 the ASIC register for 183 Eastwood Pty Ltd was rectified so that it correctly recorded the officeholders and shareholders of the company.

As the purchase price for the units under the deed was never refunded, Dragon Property Development & Investment Pty Ltd commenced proceedings against Scott and 183 Eastwood Pty Ltd. These proceedings were commenced on the basis that Scott was acting as an agent for 183 Eastwood Pty Ltd. Dragon Property Development & Investment Pty Ltd eventually discontinued the claim against Scott personally as Scott became bankrupt in 2019.

There is a general law principle that a third party is entitled to rely on the 'ostensible authority' of a person to enter into a contract on behalf of a company. A person has ostensible authority where:

1. a representation was made to the contracting party that the person had the company’s authority to enter into a contract of the kind sought to be enforced;
2. the representation was made by a person who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract related; and
3. the contracting party was induced by the representation to enter into the contract, that is, that the contracting party in fact relied upon it.

If a contracting party has relied on ostensible authority, the contracting party is entitled to enforce the contract against the company.

Dragon Property Development & Investment Pty Ltd contended that because the true officeholders of 183 Eastwood Pty Ltd did not rectify the ASIC records, the company had made the misrepresentation that Scott had the ostensible authority to cause the company to enter into contracts and legal arrangements. Ostensible authority will be established by law to prevent a company from repudiating a contractual relationship that was entered into on behalf of the company where there was apparent authority to do so.

183 Eastwood Pty Ltd argued that the deed should be repudiated on the ground that Scott did not have the authority to legally bind the company.

183 Eastwood Pty Ltd argued that it had sought legal advice regarding the incorrect ASIC record prior to June 2018. The officeholders claimed that they had engaged Derek to provide legal advice regarding the ASIC record in February 2018. The officeholders were advised that the unitholders should sell the units in the unit trust to mitigate any loss or detriment.

Dragon Property Development & Investment Pty Ltd argued that even if legal advice regarding the correction of the ASIC register had been sought prior to June 2018, this did not affect the fact that the true officeholders did not act on this advice. Accordingly, such a conclusion would not affect the fact that 183 Eastwood Pty Ltd held Scott out to be an agent of the company.

As to the issue of ostensible authority, 183 Eastwood Pty Ltd argued that silence did not amount to a representation in this context. Therefore, the fact that the officeholders did not take immediate action to rectify the ASIC register did not amount to ostensible authority. The officeholders also argued that there was no duty

to tell the world at large that the ASIC register was incorrect. There was also no duty for the true officeholders to inform Dragon Property Development & Investment Pty Ltd of the incorrect ASIC records. The only duty was to inform ASIC of the errors at the time for review of the ASIC register and the duty to inform the class of persons who were entitled to rely on assumptions under section 129 of the Corporations Act (under section 129 a person may assume from ASIC information that a director, officer or agent has been properly appointed). Therefore, 183 Eastwood Pty Ltd argued that this provision prevailed over the ostensible authority under the common law.

At first instance the primary judge considered the long period of time taken by the real officeholders to rectify the errors in the ASIC record after being notified of this issue. A period of 116 days had passed from Derek providing the officeholders with the ASIC record and the officeholders correcting this. Accordingly, the primary judge determined that 183 Eastwood Pty Ltd had held Scott out as being authorised to act on behalf of the company, including the authority to enter into contracts for the company.

183 Eastwood Pty Ltd appealed the decision of the Supreme Court. On appeal, 183 Eastwood Pty Ltd argued that the primary judge had not sufficiently considered the evidence that it had submitted, particularly in respect of the timing of when the officeholders sought advice on and corrected the ASIC record.

Issues

1. Did the true officeholders seek legal advice about correcting the ASIC register prior to June 2018?
2. Did 183 Eastwood Pty Ltd hold Scott out as having the authority to enter into contracts on behalf of the company by failing to correct the ASIC register for a substantial period of time after becoming aware of the error?
3. Did Dragon Property Development & Investment Pty Ltd suffer loss or detriment as a result of the representation that Scott was an agent of 183 Eastwood Pty Ltd?

Decision

Did the true officeholders seek legal advice about correcting the ASIC register prior to June 2018?

The Court distinguished between the officeholders seeking advice in respect of correcting the ASIC register and seeking advice in respect of false information being kept on the ASIC register. The Court found that there was insufficient evidence to substantiate the conclusion that the officeholders engaged Derek specifically regarding correction of the register rather than what to do about the situation with Scott more generally.

The Court determined that the true officeholders of 183 Eastwood Pty Ltd had failed to obtain legal advice regarding the ASIC register and take action to correct the ASIC register prior to June 2018.

Did 183 Eastwood Pty Ltd hold Scott out as having the authority?

The Court considered that the true officeholders were aware of the incorrect ASIC register and did nothing to correct this for a considerable period of time. The Court considered the case law governing misrepresentation and concluded that silence could amount to a representation.

Failing to correct the ASIC register within a reasonable period of time amounted to 183 Eastwood Pty Ltd representing that Scott had the authority to enter into legal relationships on behalf of the company. Therefore, ostensible authority could be established and the deed could not be repudiated on the ground that Scott was not authorised to act for and on behalf of the company.

Did Dragon Property Development & Investment Pty Ltd suffer loss or detriment as a result?

The Court considered that Dragon Property Development & Investment Pty Ltd had deliberately sought out the ASIC register prior to entering into the Deed in respect of the sale of units in the unit trust. There was reasonable reliance on the incorrect ASIC register by Dragon Property Development & Investment Pty Ltd.

Therefore, the financial detriment suffered by the company could be attributed to conduct of 183 Eastwood Pty Ltd.

Accordingly, the appeal was dismissed.

Citation *183 Eastwood Pty Ltd v Dragon Property Development & Investment Pty Ltd* [2023] NSWCA 72 (Bell CJ, Ward P, Leeming JA)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2023/72.html

2.7 Appeal updates

The taxpayer has appealed against the decision of the Federal Court in *Konebada Pty Ltd ATF William Lewski Family Trust v Federal Commissioner of Taxation* [2023] FCA 257 (see our April 2023 Notes). This case concerned input tax credits for legal costs as part of a litigation funding arrangement.

E Group Security Pty Ltd applied to the High Court of Australia for a grant of special leave to appeal against the orders of the NSW Court of Appeal. The NSW Court of Appeal allowed an appeal against orders of the NSW Supreme Court which concerned liability to pay payroll tax (see our February 2023 tax training notes) where some of the group companies were found to be employment agents.

The High Court of Australia did not grant E Group Security Pty Ltd special leave to appeal against the orders of the NSW Court of Appeal as the application did not raise any issue of public importance or general principle sufficient to warrant a grant of special leave.

Citation *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2023] HCASL 48 (13 April 2023) (Gordon and Jagot JJ)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCASL/2023/48.html

2.8 Other tax and superannuation related cases in period of 4 March 2022 – 9 May 2023

Citation	Date	Headnote	Link
Lakes Oil NL and Innovation And Science Australia (Taxation) [2023] AATA 811	14 April 2023	TAX – R&D Tax Incentive – whether activities undertaken by the applicant are eligible research and development activities under the Industry Research and Development Act 1986 (Cth) and Income Tax Assessment Act 1997 (Cth) – whether activities fall within an exclusion, namely the exclusion for exploring, prospecting or drilling stated in section 355.25(2) – meaning of 'hypothesis' - where expert evidence challenged – where lack of internal records - decision under review affirmed	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/811.html
Elcheikh and Commissioner of Taxation (Taxation) [2023] AATA 859	21 April 2023	TAXATION – income tax – default amended assessments – whether evasion - unexplained bank deposits – onus to prove assessments were excessive and what taxable income should have been – administrative penalty – whether intentional disregard – whether administrative penalty should be remitted – whether shortfall interest charge should be remitted – decision under review affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/752.html

Deputy Commissioner of Taxation v Widdup (No 2) [2023] FCA 377	27 April 2023	PRACTICE AND PROCEDURE – ex parte freezing orders obtained against respondents per rr 7.32 and 7.35 of Federal Court Rules 2011 (Cth) – where respondents paid money into Court to discharge freezing orders – application for repayment of money paid into Court – whether applicant had a good or reasonably arguable case based on a prospective cause of action – whether there was risk of asset dissipation that may defeat prospective judgment – whether balance of convenience favoured the making of the orders TAXATION – freezing orders based on first and second respondents' family trust distribution tax and income tax liabilities – challenge to applicant's reliance on conclusive evidence provision in s 350-10 of sch 1 to Tax Administration Act 1953 (Cth) – argument of conscious maladministration and jurisdictional error as recognised in Commissioner of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146 – whether there was material non-disclosure at the ex parte hearing	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/377.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 (2023 Measures No. 1) Bill 2023	16/2	9/3	9/3		
Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023	22/3	29/3	30/3		

3.2 STP Reporting Exemption for WPN Holders

On 31 March 2023, the ATO released a draft legislative instrument that will exempt an entity from a Single Touch Payroll reporting obligation, being an obligation to notify the Commissioner of an amount under section 389-5 in Schedule 1 of the *Taxation Administration Act 1953* (Cth), where:

1. the obligation arises in the period beginning on 1 July 2023 and ending on 30 June 2026; and
2. at the time the obligation arises, the entity:
   (a) does not have an ABN; and
   (b) has been assigned a Withholding Payer Number by the ATO for the purposes of PAYGW.

Some employers are required to participate in the PAYG withholding system but are not entitled to hold an ABN. For example, individuals who engage staff in a domestic capacity, such as nannies, cleaners or gardeners or individuals who engage support workers under a National Disability Insurance Scheme (NDIS) self-managed care plan.

The exemption provided by this instrument is intended to provide greater flexibility to WPN holders by allowing them to choose whether they adopt Single Touch Payroll by engaging a registered agent to lodge on their behalf, or continue to report PAYG withholding through their existing procedures.

The draft legislative instrument will be repealed on 1 July 2026.

Comments on the draft legislative instrument were due to the ATO by 14 April 2023.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D9/00001

3.3 Amendments to Commissioner's power to remit penalties

On 19 April 2023, the ATO released draft legislative instrument LI 2023/D10 which modifies certain provisions within the *Taxation Administration Act 1953* (Cth) that permit the Commissioner of Taxation to remit general interest charge, shortfall interest charge and administrative penalties including the failure to lodge penalty.

General interest charge, shortfall interest charge and administrative penalties generally apply where entities have failed to meet their taxation obligations or liabilities. The Commissioner has broad discretion to remit these interest and penalty charges when certain criteria is met. The instrument is being made to 'remove doubt' that the Commissioner can exercise his discretion in certain circumstances.

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The modifications to the Taxation Administration Act will ensure that the Commissioner can continue his long-standing practice of providing:

1. remissions as an administrative response to a natural disaster or other serious and external adverse events impacting the community;
2. low value or low risk remissions; and
3. agreement based remissions, where a remission is agreed prior to the relevant liability arising.

These remissions will apply to an entity or one or more entities in a 'relevant class', whether or not the charge or penalty has become due and payable or may become due and payable in the future.

A *relevant class* in this instrument means a class of entities:

1. that the Commissioner is satisfied has been affected by a natural disaster or other serious and external adverse event;
2. with a liability to a penalty that the Commissioner considers is a minor amount, having regard to any relevant matters such as the cost of collecting the liability, costs of compliance for taxpayers, and the need to maintain adequate incentives for the prompt payment of liabilities; or
3. with a liability to a penalty that the Commissioner considers is appropriate to remit to encourage ongoing compliance with taxation laws, having regard to previous compliance history.

Comments on the draft determinations are due to the ATO by 19 May 2023.

ATO reference *Draft Legislative Instrument LI 2023/D10*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D10/00001

3.4 Work test for personal superannuation contributions

On 19 April 2023, the Commissioner released *Draft Legislative Instrument LI 2023/D11* which modifies the operation of subsection 290-165(1A) of the *Income Tax Assessment Act 1997,* to allow all individuals aged 67 to 75 years who are employees under section 15A of the *Superannuation Industry (Supervision) Act 1993* (the expanded meaning of employee) and who would have been eligible to claim a deduction for their personal super contributions under the previous criteria (prior to the 'work test' being moved from the *Superannuation Industry (Supervision) Regulations 1994* and the *Retirement Savings Accounts Regulations 1997* to the ITAA 1997) to continue to be able to claim those deductions.

Until 1 July 2022, the 'work test' was part of the SISR and RSAR. This test operated to limit the personal superannuation contributions that a superannuation fund or a retirement savings account provider could accept from individuals aged 67 to 75 years and relied on a concept of gainful employment. This was changed in 2022 to remove the work test from the criteria concerning whether or not a contribution could be accepted and instead moved the test to the ITAA 1997 to become a criterion that determines whether a contribution is deductible.

In relocating the 'work test' in the ITAA 1997, the definition of employee was effectively altered.

Both SISR and the RSAR contain an extended definition of employee whereas the term employee is not defined in the ITAA 1997. It is therefore the case that a person that is not an employee at common law, or self-employed, would not be able to satisfy the work test for deductibility as the expanded definition of who is an employee is not in the ITAA 1997.

The amendment maintains the same eligibility criteria and definition of employee as it was in the SISR and RSAR.

This instrument applies to personal superannuation contributions made on or after 1 July 2022.

ATO reference *Draft Legislative Instrument* LI 2023/D11
w https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D11/00001

3.5 Superannuation financial reporting and audit

The Treasury is seeking consultation on the *Treasury Laws Amendment (Measures for Consultation) Regulations 2023* which amends the Corporations Regulations 2001 and the Superannuation Industry (Supervision) Regulations 1994 (**SIS Regulations**) to impose financial reporting and auditing requirements consistent with public companies and registered schemes on registrable superannuation entities.

The purpose of the amendments is to enhance transparency and compliance in the superannuation sector. The regulations prescribe requirements for the preparation, lodgement, disclosure, and publication of information and documents. The Regulations commence on the later of registration on the Federal Register of Legislation or the commencement of Schedule 6 to the *Treasury Laws Amendment (2022 Measures No. 4) Act 2023* (the Bill containing the Skills and Technology boosts).

Consultation closed on 5 May 2023.

w https://treasury.gov.au/consultation/c2023-383916

3.6 Disclosure of Information to Fraud Fusion Taskforce

The *Treasury Laws Amendment (Disclosure of Information to Fraud Fusion Taskforce) Regulations 2023* will allow the Commissioner and ASIC to share information with the Fraud Fusion Taskforce to better detect, address and prevent fraud against government programs. This particular taskforce was introduced in the October 2022-23 Budget, as the Government made an election commitment to stop waste in the NDIS.

Prior to this amendment, it was an offence (punishable by two years' imprisonment) if an ATO employee, the Commissioner or the Second Commissioner disclosed personal information (even if the information was fraudulent).

This instrument applies in relation to disclosures of information made on or after the commencement the day this instrument is registered.

w https://www.legislation.gov.au/Details/F2023L00436

3.7 Cents per Kilometre for 2024

On 2 May 2023, the ATO released a draft legislative instrument that:

1. sets the deduction rate for the ‘cents per kilometre’ method for car expenses as 85 cents per kilometre for the income year commencing on 1 July 2023 and to subsequent income years; and
2. repealed the Income Tax Assessment - Cents per Kilometre Deduction Rate for Car Expenses Determination 2022.

Comments on the draft legislative instrument are due to the ATO on 22 May 2023.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D12/00001

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3.8 NSW land tax changes for principal place of residence exemption

On 10 May 2023, the *Revenue Legislation Amendment Bill 2023* (NSW) was introduced to NSW Parliament.

The Bill proposes, amongst other things, amendments to clause 6 of Schedule 1A to the *Land Tax Management Act 1956* (NSW). Currently, clause 6 provides a land tax concession of up to 4 land tax years for unoccupied land intended to be the owner's principal place of residence, and where the land is unoccupied because building works or renovations are being undertaken on the land. If the owner fails to use and occupy the land as a principal place of residence before the end of the period of 4 land tax years, the exemption is revoked, and the land is reassessed for land tax for the whole period.

The Bill proposes to insert a discretion which allows the Chief Commissioner to extend the period of 4 land tax years to a period of up to 6 land tax years if the Chief Commissioner is satisfied that:

1. there has been a delay in the completion of the building or other works necessary to facilitate the owner's intended use and occupation of the land as a principal place of residence;
2. the delay is due primarily to exceptional circumstances beyond the control of the owner; and
3. the delay could not reasonably have been avoided by the owner.

The proposed amendments to clause 6 will enable the Chief Commissioner to extend the 4 year tax period that ended on or after 31 December 2019. This amendment is intended to be a response to owners who faced delays in the construction of their homes due to the COVID-19 pandemic.

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18416

3.9 ACT Landholder Duty amendments

The ACT Government has introduced the *Revenue Legislation Amendment Act 2023* (ACT). The Act amends the *Duties Act 1999* and the *Land Tax Act 2004*.

The Act mainly amends provisions in the Duties Act. These provisions focus on the following areas:

- liability for landholder duty and the calculation of landholder duty payable;
- when duty will be payable in respect of relevant acquisitions;
- refining the definitions for terms used in the Act for clarity and to ensure the meaning of these terms align with the intent of the legislation;
- other minor technical amendments to the Act.

The definition of 'associated person' is amended to reduce the use of interposed entities to reduce the landholdings acquired with the intention of reducing duty that would otherwise be payable. Under the new Act, private companies may be considered to be associated where common minority shareholders would be a majority shareholder if those interests were aggregated and deems two persons to be associated where they have an associated person in common.

The Act also clarifies that a Crown lease will be deemed as an agreement for the sale of land for the purposes of landholder duty.

The liability for payment of landholder duty is extended to the landholder or trustee of a unit trust scheme. This aligns with other jurisdictions where landholders are treated as being jointly and severally liable for landholder duty. The Act also aims to clarify the provisions setting out when landholder duty will be imposed on a relevant acquisition, being where an interest of 50% or more is acquired.

The amendments also set out the information that is required for the purposes of an exemption application and when determining the unencumbered value of landholders. This includes provisions for electronic contact details.

The constructive ownership provisions are amended to extend the definition of 'linked bodies' to include various commercial relationships. This is intended to align with similar amendments in NSW and Victoria. An entity will be deemed to have an interest in land held by a linked body where:

1. the entity would be entitled to receive a distribution of property held by the linked body; and
2. either or both of the following apply:
   (a) any linked body would be entitled to at least 50% of the unencumbered value of all property held by any other linked body; or
   (b) the entity would be entitled to at least 50% of the aggregated unencumbered value of all property held by the linked body.

The amendments to the *Land Tax Act 2004* are only minor technical amendments.

w https://www.legislation.Act.gov.au/a/2023-6/

3.10 Multinational tax transparency – tax changes

Treasury has released for consultation the *Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Multinational tax transparency – tax changes* to amend the TAA. The Bill proposes to impose a new transparency reporting obligation on certain large multinational enterprises.

The amendments will require certain large multinationals to publicly disclose selected tax information on an Australian government website in an approved form. The reporting obligation will apply to country-by-country reporting parents that are certain types of constitutional corporations, partnerships or trusts, and that are members of a country-by-country reporting group.

The changes made by the proposed Bill will apply for income years commencing on or after 1 July 2023.

Consultation on the proposed bill closed on 28 April 2023.

w https://treasury.gov.au/consultation/c2023-383896

4. Budget Summary

The 2023-24 Federal Budget was handed down on 9 May 2023. Some of the key tax and small-business related measures are highlighted below.

4.1 Tax administration

Part IVA

Currently the definition of 'tax benefit' in the general anti-avoidance rules in Part IVA of the ITAA 1936 does not include schemes that are designed to avoid foreign taxes. Under the proposed measure, the definition will be expanded to include:

1. schemes that reduce tax paid in Australia by accessing a lower withholding tax rate on income paid to foreign residents; and
2. schemes that achieve an Australian income tax benefit, even where the dominant purpose was to reduce foreign income tax.

This measure will apply to income years commencing on or after 1 July 2024, regardless of whether the scheme was entered into before that date.

Small business tax administration

There are several measures that are said to be intended to reduce administrative burden for small business taxpayers. These include:

- funding for tax clinics in regional areas to improve access to tax advice;
- expansion of the ATO independent review process to businesses with aggregated turnover between $10 million and $50 million subject to an ATO audit;
- from 1 July 2024, small businesses will be permitted to authorise their tax agent to lodge multiple Single Touch Payroll forms on their behalf, reducing paperwork for small businesses;
- a lodgment penalty amnesty program has been announced for small businesses with an aggregate turnover of less than $10 million to encourage them to re-engage with the tax system. The amnesty will remit failure-to-lodge penalties for outstanding tax statements lodged in the period from 1 June 2023 to 31 December 2023 that were originally due during the period from 1 December 2019 to 29 February 2022; and
- from 1 July 2025, small businesses will be permitted up to 4 years to amend their income tax returns.

COMMENT – when the 2-year amendment period was introduced for small businesses as a result of recommendations in a 2004 report on aspects of income tax self-assessment, it was intended to 'increase certainty' for those taxpayers. While a four-year amendment period for small businesses provides opportunities for businesses to recover unclaimed amounts in earlier years, it may also introduce opportunities for the Commissioner to review and amend assessments for a longer period.

From the ATO guidance available on the lodgement penalty amnesty program it appears an entity merely needs to have an aggregated turnover of less than $10 million at the time of lodgement. The ATO further information is available here https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Small-Business---Lodgment-Penalty-Amnesty-Program/

Register of beneficial ownership

Treasury is to be provided with $1.9 million over 2 years from 2023-24 to establish a ‘public registry of beneficial ownership of companies and other legal vehicles, including trusts.’

4.2 Measures that affect individuals and small businesses

Medicare levy

The Medicare levy low-income thresholds will be increased retrospectively from 1 July 2022 as follows:

	Previous threshold (to 30 June 2022)	**New threshold (from 1 July 2022)**
Singles	$23,365	$24,276
Family	$39,402	$40,939
Singles (seniors and pensioners)	$36,925	$38,365
Family (seniors and pensioners)	$51,401	$53,406
Increase to family income threshold for each dependent child or student	$3,619	$3,760

The Government will also exempt eligible lump sum payments in arrears from the Medicare levy from 1 July 2024. This measure is designed to ensure low-income taxpayers do not pay higher amounts of the Medicare levy as a result of receiving an eligible lump sum payment, for example as compensation for underpaid wages. To qualify, taxpayers must be eligible for a reduction in Medicare levy in the 2 most recent years to which the lump sum accrues. Taxpayers must also satisfy the existing eligibility requirements of the existing lump sum payment in arrears tax offset, including that a lump sum accounts for at least 10 per cent of the taxpayer’s income in the year of receipt.

Asset write-off

The temporary full expensing measures ended on 30 June 2023.

The legislated instant asset write-off threshold for small business entities (aggregated turnover of less than $10 million) of $1,000 will be temporarily increased to $20,000. Small business entities will be able to immediately deduct the total cost of each eligible depreciating asset that costs less than $20,000 and is first used or installed ready for use between 1 July 2023 and 30 June 2024. Assets that cost more than $20,000 can continue to be depreciated in the small business pool (to be depreciated at 15% in the first year and at 30% as part of the opening pool balance in subsequent years).

Small business energy incentive

Small and medium businesses, with aggregated annual turnover of less than $50 million, will be able to deduct an additional 20 per cent of the cost of eligible depreciating assets up to a maximum expenditure of $100,000 (i.e. a deduction of $20,000). The measure will apply to purchases of new assets and upgrades to existing assets that result in more energy efficiency. Certain exclusions will apply such as electric vehicles, renewable electricity generation assets, capital works, and assets that are not connected to the electricity grid and use fossil fuels. The Government will consult with stakeholders on specific eligibility criteria. Eligible assets will need

to be first used or installed ready for use between 1 July 2023 and 30 June 2024. Eligible upgrades will also need to be made in this period.

GST and PAYG instalments

Businesses with up to $10 million annual aggregated turnover will have their 2023-24 uplift factor for GST instalments from 12% (the default rate) to 6%. The 2022-23 uplift factor was 2%.

The same 6% uplift factor will apply to PAYG instalments for businesses with an annual aggregated turnover of up to $50 million.

Electric Car FBT exemption

The Government will sunset the eligibility of plug-in hybrid electric cars from the fringe benefits tax exemption for eligible electric cars. This change will apply from 1 April 2025. Arrangements involving plug-in hybrid electric cars entered into between 1 July 2022 and 31 March 2025 will remain eligible for the FBT exemption.

ATO compliance – personal income tax and rental properties

The ATO is to be provided with extra funds to expand their 'Personal Income Tax Compliance Program' for 2 years from 1 July 2025 and to expand its scope from 1 July 2023 to 'expand the scope of the program to address emerging areas of risk, such as deductions relating to short-term rental properties to ensure they are genuinely available to rent.'

4.3 Superannuation

There are several key superannuation measures announced, including:

- from 1 July 2026, employers will be required to pay their employees' superannuation guarantee (SG) entitlements on the same day that they pay salary and wages;
- previously announced measures regarding individual superannuation balances exceeding $3 million (see our March 2023 and April 2023 notes); and
- amendments to the non-arm's length expenditure (NALE), for SMSFs limiting income that is NALI because of a general expense to twice the level of the expense, and 'exempting expenditure that occurred prior to the 2018-19 year'.

4.4 Property

Build to rent

For eligible build to rent projects where construction commences after budget night, the capital works deduction will be increased from 2.5% to 4%, and the final withholding on eligible payments from Managed Investment Trusts will be reduced from 30% to 15%.

The measure is to apply to build to rent projects where 50 or more apartments are made available to rent to the general public. The dwellings must be retained under single ownership for at least 10 years before being able to be sold and landlords must offer a lease term of at least 3 years for each dwelling.

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4.5 Large business measures

Global Minimum tax rate

Consistent with pillar two of the OECD Base Erosion Profit Shifting (BEPS) measures, the following measures will be introduced to combat tax challenges of the digital economy for large multinational enterprises:

1. 15% global minimum tax for large multinational enterprises with the Income Inclusion Rule applying to income years starting on or after 1 January 2024 and the Undertaxed Profits Rule applying to income years starting on or after 1 January 2025; and
2. 15% domestic minimum tax applying to income years starting on or after 1 January 2024.

More information on this measure is available from the ATO here:

https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/International/Implementation-of-a-global-minimum-tax-and-a-domestic-minimum-tax/

Patent box not proceeding

The Patent Box measures announced in the 2021-22 and 2022-23 measures will not proceed.

Franked distributions funded by capital raisings

The previously announced measure to prevent distributions funded by capital raisings from being franked will have its start date amended from 19 December 2016 to 15 September 2022.

COMMENT – there was no mention in this budget of the previously announced proposed changes to corporate or individual tax residency, nor to the previously proposed changes to Division 7A rules.

COMMENT – there was also no mention of extending the Technology Investment Boost (expiring 30 June 2023) or the Skills and Training Boost (expiring 30 June 2024) which have not yet passed in to law.

w https://budget.gov.au/content/bp2/index.htm

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5. Private binding rulings

5.1 Small business restructure rollover

Facts

A discretionary trust runs a vineyard business.

A family trust election (FTE) has been made for the trust with Person A named as the specified individual.

The trust owns vineyard operational assets which include

- Stock on hand (wine)
- Goodwill
- Plant and equipment; and
- Cash at bank.

The trust has an aggregated turnover of less than $XX million.

A company has completed an interposed entity election, nominating that it be part of the family group of the specified individual of the trust.

The company has an aggregated turnover of less than $XX million

The sole shareholders of the company are Persons A and B as trustees for another discretionary trust. A family trust election has been made for the second trust with Person A named as the specified individual.

The first trust will transfer all the vineyard operation assets to the company, although the trust will retain some assets such as a building, and lease them to the company.

The transfer will be a going concern sale, undertaken in one transaction.

The restructure will facilitate growth of the business by allowing the profits to be retained and reinvested in the business.

The restructure will simplify the business structure and reduce administrative burdens and compliance costs of maintaining Division 7A loans.

To fund the acquisition, the trust will distribute a portion of its 20XX profits to the company, which will use these funds to acquire the assets from the trust at cost.

The trust has 2020 and 2021 UPEs to the company, which were put into Division 7A complying loans; these will be cleared by partially funding the acquisition.

Both the company and the trust are Australian tax residents.

Both the company and the trust will choose to apply the roll-over under Subdivision 328-G of the ITAA 1997.

Question

Will the restructure qualify for roll-over relief under Subdivision 328-G of the ITAA 1997?

Ruling

The ATO ruled yes.

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The ATO noted that section 328-430(1) of the ITAA 1997 provides that a roll-over is available if the following conditions are met:

- the transfer of the asset is, or is part of, a genuine restructure of an ongoing business;
- each party to the transfer is either a small business entity (or affiliate of, or connected with a small business entity), or a partner in a partnership that is a small business entity;
- there is no material change in the ultimate economic ownership of the transferred asset;
- the asset being transferred is a capital gains tax (CGT) asset (other than a depreciating asset) that is an active asset, and for a partnership, is also an interest in an asset of the partnership;
- both the transferor and each transferee are residents of Australia; and
- both the transferor and each transferee choose to apply the roll-over.

Genuine restructure of an ongoing business

The ATO noted that section 328-430(1)(a) of the ITAA 1997 requires that the transaction is, or is part of, a genuine restructure of an ongoing business.

The ATO considered *Law Companion Ruling* LCR 2016/3, which provides guidance on whether a transaction will be part of a 'genuine restructure of an ongoing business'.

The ATO noted that paragraph 6 of LCR 2016/3, in part, explains that a genuine restructure of an ongoing business is one that could be reasonably expected to deliver benefits to small business owners in respect of their efficient conduct of the business and that it can encompass a restructure of the way in which business assets are held where that structure is likely to have been adopted had the business owners obtained appropriate professional advice when setting up the business.

The ATO noted that paragraph 7 of LCR 2016/3 outlines the following features that indicate a transaction is, or is part of, a genuine restructure of an ongoing business:

- it is a bona fide commercial arrangement undertaken to facilitate growth, innovation and diversification, to adapt to changed conditions, or to reduce administrative burdens and compliance costs;
- it is authentically restructuring the way the business is conducted, as opposed to a divestment or a preliminary step to facilitate the economic realisation of assets;
- the economic ownership of the business and its restructured assets is maintained;
- the small business owners continue to operate the business through a different legal structure, and
- it results in a structure likely to have been adopted had the small business owners obtained appropriate professional advice when setting up the business.

However, the restructure of an ongoing business by a business owner is not genuine if it is done in the course of winding down to transfer wealth between generations or realising their ownership interests.

The ATO also noted that a restructure is likely to not be a genuine restructure of an ongoing business if:

- it is a preliminary step to facilitate the economic realisation of assets, or takes place in the course of winding down to transfer wealth between generations
- it effects an extraction of wealth from the assets of the business for personal investment or consumption
- it creates artificial losses or brings forward their recognition
- it effects a permanent non-recognition of gain or creates artificial timing advantages, and/or
- there are other tax outcomes that do not reflect economic reality.

The ATO noted that the reasons for the restructure are:

- to facilitate growth of the business by allowing the profits from the vineyard operations to be retained and reinvested in the business;

- to simplify the business structure where the business operates under a separate legal entity; and
- to reduce administrative burdens and compliance costs of maintaining Division 7A loans

The ATO accepted that a trust structure was considered appropriate for the business due to its small size at the time; each year all beneficiary profits were reinvested into the business. However, due to the growth of the business, a trust is no longer considered appropriate or economical. A company will allow the business greater control over its cash flow as profits can be reinvested.

The ATO noted that succession planning is not considered to be a factor in the restructure.

The ATO accepted that this was a genuine restructure.

There will be no change in the ownership or management of the business.

No change in economic ownership

The ATO noted that section 328-430(1)(c) of the ITAA 1997 requires the transaction to not have the effect of materially changing which individual has, or which individuals have, the ultimate economic ownership of the assets and, where more than one individual holds the ultimate economic ownership of the asset, each individual's share of that ownership must not materially change.

The ATO noted that beneficiaries of a discretionary trust cannot have ultimate economic ownership of the assets of the trust. Under ordinary legal concepts, a beneficiary of a discretionary trust is not entitled to income or capital of the trust until the trustee exercises their discretion to distribute income or to make an appointment of capital.

As a beneficiary of a discretionary trust does not hold an interest in any asset of the trust, it cannot be said that any beneficiary of a discretionary trust will have ultimate economic ownership.

However, section 328-440 provides that, for the purposes of paragraph 328-430(1)(c), a transaction does not have the effect of changing the ultimate economic ownership of an asset, or any individual's share of that ultimate economic ownership, if:

> *(a) either or both of the following applies:*
>
> > *(i) just before the transaction takes effect, the asset is included in the property of a non-fixed trust that is a family trust;*
> >
> > *(ii) just after the transaction takes effect, the asset is included in the property of a non-fixed trust that is a family trust; and*
>
> *(b) every individual who, just before the transfer took effect, had the ultimate economic ownership of the asset was a member of the family group (within the meaning of Schedule 2F to the Income Tax Assessment Act 1936 (ITAA 1936)) relating to the trust or trusts referred to in paragraph (a); and*
>
> *(c) every individual who, just after the transfer takes effect, has the ultimate economic ownership of the asset is a member of that family group.*

The ATO noted that, just before the proposed transaction, the assets will be property of the trust, which is a non-fixed trust with an FTE in place.

In this case, the trust specifies Person A as the test individual. The ATO stated that this means that the individuals who had the ultimate economic ownership of the assets just before the transfer takes effect will be members of the family group.

After the transfer occurs, the ultimate economic ownership of the assets will lie with the shareholders of the company. The only shareholder of the Company is the second trust, which has an FTE in place also specifying Person A as the test individual. Therefore, the ATO stated, the ultimate economic ownership of the assets remains with individuals within the same family group after the transfer takes effect.

Active Asset

The ATO noted that section 328-430(1)(d)(i) of the ITAA 1997 provides that where a party to the transfer is a small business entity under subparagraph 328-430(1)(b)(i), the asset being transferred must be a CGT asset that is an active asset, other than a depreciating asset, at the time of the transfer.

Section 152-40 of the ITAA 1997 provides that a tangible or intangible CGT asset is an active asset if the taxpayer owns the asset and it is used, or held ready for use, in a business carried on by the taxpayer, their affiliate or an entity connected with them.

This business of the trust uses the following assets which will be transferred to the company as part of the restructure:

- Stock on hand (wine)
- Goodwill; and
- Plant and equipment.

Trading stock and goodwill are CGT assets. Therefore, the trading stock and the goodwill used in the Trust's vineyard business are active assets.

The ATO then considered the plant and equipment, which are depreciating assets. The ATO explained that the note to subsection 328-430(1) of the ITAA 1997 states that the roll-over of a depreciating asset transferred in the restructuring of a small business is addressed in item 8 of the table in subsection 40-340(1).

Section 40-340 outlines the circumstances in which roll-over relief is available where specified balancing adjustment events have occurred for a depreciating asset. Roll-over relief is available under section 40-340 if there is a balancing adjustment event because an entity disposes of a depreciating asset to another entity, and the disposal involves a CGT event. Additionally, one of the conditions listed in the table in section 40-340(1) must be satisfied.

Item 8 of the table in subsection 40-340(1) outlines the consequences where there is a transfer of an asset under the small business restructure roll-over. In this situation, roll-over relief is available under section 40-340 if a roll-over under Subdivision 328-G would be available in relation to the asset if the asset were not a depreciating asset.

The ATO also noted that the Commissioner has exercised his remedial power in section 370-5 of Schedule 1 to the TAA to modify the operation of section 40-340. The effect of this modification is to ensure that where the restructure otherwise satisfies the conditions for roll-over under Subdivision 328-G, the transfer of depreciating assets will have no direct income tax consequences.

COMMENT – the ATO here are interpreting the making of a family trust election as determining who has ultimate economic ownership of an asset. If their view is correct, it is possible to restructure in the way set out in this ruling. It is at least possible for the alternative test for underlying ultimate economic ownership to apply here as the assets are coming out of a discretionary trust, in contrast to the PBR included in our April 2023 tax training notes. Presumably the SBRR was used rather than subdivision 122-A of ITAA1997 to obtain asset protection (if the 122-A rollover had been used the business owning trust would have owned the shares in the new company that will carry on the business, exposing the shares to the risks of the former business).

ATO reference *Private Binding Ruling Authorisation No. 1052050343210*
w https://www.ato.gov.au/law/view/document?docid=EV/1052050343210

5.2 Division 7A and use of asset of private company

Facts

A company is considering purchasing an asset that it will make available to it shareholder, which is a trust.

The asset will be used by the primary beneficiaries of the trust. The primary beneficiaries are not employees of the company but they are directors of the company. The company does not pay directors fees.

The primary beneficiaries will pay all funding and operating costs of the asset. The asset is being purchased in the company for asset protection.

The company will not deduct any expenses for the assets or claim any input tax credits.

Question

Will the provision of an asset by the company to the shareholder be a payment that will be taken to be a dividend because of the operation of sections 109CA and 109C of the ITAA 1936?

Ruling

The ATO ruled yes.

The ATO noted that section 109C of the ITAA 1936 provides that 'a private company is taken to pay a dividend to an entity at the end of the private company's year of income if the private company pays an amount to the entity during the year and ... the payment is made when the entity is a shareholder in the private company or an associate of such a shareholder'.

The ATO noted that section 109CA(1) of the ITAA 1936 states that '... payment to an entity includes the provision of an asset for use by the entity' and that section 109CA(2)(a) of the ITAA 1936 provides that the time the payment is made is the time the entity first uses the asset with the permission of the provider of the asset. Where the use continues into another income year of the entity, the provision of the asset for use in the other income year is treated as a separate payment made at the start of that year.

As the Company propose to buy an asset that it will make available to its shareholder, the Trust, which in turn will make the asset available to its beneficiaries, sections 109C and 109CA of the ITAA 1936 will operate to treat the provision of the asset as a payment and a dividend to the shareholder, unless an exception in section 109CA applies.

Section 109CA(5) provides that 'subsection (1) does not apply to the extent that, if the entity had incurred and paid expenditure in respect of the provision of the asset, a once only deduction would have been allowable to the entity in respect of the expenditure...'. The ATO noted that the question here is whether the use of the asset is deductible to the user, not whether the user would be able to deduct the amount had they purchased the asset themselves.

The ATO noted that the trust would not have been able to deduct the hypothetical expenditure here and, accordingly, the exception in section 109CA(5) does not apply and section 109C will operate to treat the company as having paid a dividend to the trust.

The ATO noted that section 109CA(10) of the ITAA 1936 states that the amount of the payment is:

1. the amount that would have been paid for the provision of the asset by the parties dealing at arm's length; less
2. any consideration given for the provision of the asset by the entity.

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TRAP – where a payment is taken to be made the way that the distributable surplus formula in section 109Y(2) of ITAA 1936 is drafted means there will almost always be a distributable surplus, regardless of the accounting net asset position.

ATO reference *Private Binding Ruling Authorisation No. 1052089673616*
w https://www.ato.gov.au/law/view/document?docid=EV/1052089673616

5.3 Division 7A and lease of real property

Facts

The shareholders of a company are amongst the partners in a partnership.

The company owns a property.

The company and the partnership executed a lease agreement for the property. The lease agreement is for a 10-year term.

The annual rent payable is below market value.

Question

Does the lease of the property by the company to the partnership constitute the transfer of property for the purposes of paragraph 109C(3)(c) of the ITAA 1936?

Ruling

The ATO ruled yes.

The ATO noted that under section 109C(3)(c) of the ITAA 1936 a payment includes a transfer of property.

The ATO referred to *Tax Laws Amendment (2010 Measures No. 2) Bill 2010* Explanatory Memorandum which states that a 'transfer of property' to an entity includes a lease of real property to an entity. At paragraph 1.6 the EM states as follows:

> *1.6 For a payment to arise under a 'transfer of property', the ownership of an asset needs to pass from the private company to the shareholder (or their associate), or there must be a lease of real property in existence. As such, Division 7A does not cover the mere use of an asset, or licence or right to use an asset.*

The ATO noted that Example 1.9 of the EM reinforces that a lease of real property is transfer of property and not a use of the property under section 109CA of the ITAA 1936. In the example a shareholder, Audrey, used part of a property, under no lease, to operate a gift-wrapping service. The example states that 'The exception in 109CA(5) would not operate if it was established that Audrey had in fact a lease of real property (that is, a transfer of property to an entity within the meaning of paragraph 109C(3)(c))'.

Accordingly, the ATO considered the lease to be a transfer of property under section 109C(3)(c) and thus a payment under section 109C of the ITAA 1936.

Under section 109C(4) the amount of a payment consisting of a transfer of property is the amount that would have been paid for the transfer by parties dealing at arm's length less any consideration given by the transferee for the transfer.

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TRAP – where a payment is taken to be made under section 109C (not through the operation of section 109CA), there is no 'otherwise deductible' rule. For example, if a private company pays a cost for a shareholder that would have been deductible to the shareholder had they paid it, there will be a deemed dividend notwithstanding the payment would be 'otherwise deductible' had it been a fringe benefit. The effect of this PBR, if it represents the ATO, is that a mere right to use is subject to the otherwise deductible rule, while a lease is not.

ATO reference *Private Binding Ruling Authorisation No. 1052095729929*
w https://www.ato.gov.au/law/view/document?docid=EV/1052095729929

5.4 Fringe benefits tax

Facts

A company is considering purchasing a boat. The shareholder of the company is a trust.

The company intends to make the boat available to the shareholder, to be used by Person A and Person B (who are primary beneficiaries of the trust).

Person A and B are also the trustees of the trust and the directors of the company.

They are not employees of the company. The trust is not an employee of the company. The company does not pay director fees to Person A or Person B.

Person A and Person B will be allowed to use the boat as a result of the trust being a shareholder of the company, not as a result of them being directors of the company.

The company is the relevant entity purchasing the boat for asset protection reasons.

All funding and operating costs for the boat will be paid for by Person A and Person B personally, including loan repayments and all operating costs.

The company will not claim for any expenses relating to the boat.

The company (and any other related entity) will not clam GST or income tax deductions on the purchase, or any future operating cost of the boat.

Question

Will the provision of a boat by the company to its shareholders result in a fringe benefit as defined in subsection 136(1) of the FBT Act.

Decision

No.

In order to be subject to fringe benefits tax, a benefit must be a fringe benefit for the purposes of section 136(1) of the FBT Act.

Relevantly, section 136(1) provides that a fringe benefit:

> *in relation to an employee, in relation to the employer of the employee, in relation to a year of tax, means a benefit:*
> *(a) provided at any time during the year of tax, or*
> *(b) provided in respect of the year of tax,*

being a benefit provided to the employee or to an associate of the employee by:
(c) the employer, or
(d) an associate of the employer, or
(e) a person (in this paragraph referred to as the arranger) other than the employer or an associate of the employer under an arrangement... between:
(i) the employer or an associate of the employer, and
(ii) the arranger or another person, or
(ea) a person other than the employer or an associate of the employer, if the employer or an associate of the employer:
(i) participates in or facilitates the provision or receipt of the benefit, or
(ii) participates in, facilitates or promotes a scheme or plan involving the provision of the benefit,
and the employer or associates knows, or ought reasonably to know, that the employee or associate is doing so,
in respect of the employment of the employee...

Section 136(1) provides that *"employment, in relation to a person, means the holdings of any office or appointment, the performance of any functions or duties, the engaging in of any work, or the doing of any acts or things that result, will result or has resulted in the person being treated as an employee*".

An "employee" includes a current, future or past employee. A current employee is a person who "*receives, or is entitled to receive, salary and wages*". A director may be an employee for the purposes of FBT if they receive director fees.

While Person A and B are also directors of the company they do not receive directors fees and are not otherwise employed by the company. No fringe benefit has been provided to an employee in these circumstances.

ATO reference *Private Binding Ruling Authorisation No. 1052088044137*
w https://www.ato.gov.au/law/view/document?docid=EV/1052088044137

5.5 Life assurance policies and assessable income

Facts

The taxpayer took out an endowment insurance policy.

The Policy provided for the payment of the sum insured and bonus amounts on reaching the specified maturity age or prior death of the life insured.

The Policy matured.

The taxpayer received total annual bonuses and a terminal bonus, which were paid on maturation of the policy.

Question

Is the maturity benefit received from the Policy included in the taxpayer's assessable income?

Ruling

The ATO ruled no.

The ATO considered that the payment received on maturity of the Policy is not income according to ordinary concepts and was not assessable under either section 15-75 of the ITAA 1997 or section 26AH of the ITAA 1936 which are concerned with bonuses received from life insurance policies. Section 15-75 deals with bonuses that are not reversionary bonuses. Section 26AH is concerned with bonuses and other amounts in respect of short term life assurance policies, in general policies that run for less than 10 years.

Further, section 118-300 of the ITAA 1997 provides that any capital gain or loss by the beneficial owner of a life insurance policy is ignored unless the person is not the original owner and they acquired their interest in the policy for consideration.

ATO reference *Private Binding Ruling Authorisation No. 1052093515009*
w https://www.ato.gov.au/law/view/document?docid=EV/1052093515009

5.6 Main residence exemption

Facts

After 20 September 1985 a taxpayer acquired land upon which a house is situated, and adjacent land.

The taxpayer lived in the house as his or her main residence since he or she acquired it.

The taxpayer is a resident of Australia for taxation purposes and has been an Australian resident for taxation purposes for the entire ownership period of the property.

The taxpayer intends to sell a 20% interest in the property to Person A, a person unrelated to the taxpayer. The taxpayer and Person A will hold their interests as tenants in common.

The taxpayer will move out of the property after the sale of the 20% interest to Person A.

Person A will move into the property and will treat the property as his or her main residence for taxation purposes.

Person A will pay rent to the taxpayer based on 80% of the market value rent for the property.

The taxpayer will continue to treat the property as his or her main residence after they move out of the property.

The taxpayer intends to sell his or her remaining ownership interest in the property a few years after the sale to Person A.

Questions

1. Is the taxpayer entitled to the full main residence exemption on the disposal of 20% of their ownership interest in the property pursuant to section 118-110 of the ITAA 1997?
2. If the taxpayer moves out of the property, is he or she eligible to continue to treat the property as his or her main residence and be eligible for the full main residence exemption?
3. If the taxpayer is not eligible for the full main residence exemption, is he or she eligible for a partial main residence exemption and market value substitution of the cost base under section 118-192 of the ITAA 1997 even though he or she is absent from the property?

Ruling

<u>Question 1</u>

The ATO ruled yes.

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The ATO explained that section 118-110 of the ITAA 1997 allows a capital gain or capital loss from a CGT asset that is a dwelling, or your ownership interest in it, to be disregarded if:

- the taxpayer is an individual, and
- the dwelling was the taxpayer's main residence throughout their ownership period, and
- the interest did not pass to the taxpayer as a beneficiary in, or as the trustee of, a deceased estate.

The property consists of a house, which meets the definition of a dwelling in section 118-115 of the ITAA 1997.

The ATO noted that section 118-200 of the ITAA 1997 extends the main residence exemption to adjacent land up to two hectares in area provided that the adjacent land was used primarily for private or domestic purposes in association with the dwelling.

As the taxpayer lived in the property throughout their entire ownership period up until the time of the disposal of the 20% interest, he or she is eligible for the full main residence exemption on the disposal of the 20% interest in the dwelling and the adjacent 2 hectares of land.

Question 2

The ATO ruled yes. The ATO considered Taxation Ruling IT 2485 which considers the application of the main residence exemption where a dwelling is jointly owned. Where there is a disposal of a dwelling that is jointly owned by a taxpayer with another person to whom the taxpayer is not legally married, IT 2485 concluded that the exemption was available to each joint owner who occupied the dwelling as their principal residence in respect of his or her share in the dwelling.

The ATO notes that, in accordance with section 118-145 of the ITAA 1997, if a dwelling that was a person's main ceases to be his or her main residence, he or she may choose to continue to treat it as his or her main residence. Where part of the dwelling is used for the purpose of producing assessable income, the maximum period he or she may choose to continue to treat that dwelling as his or her main residence is 6 years.

The ATO accepted that the taxpayer can choose to continue to treat the property as his or her main residence under the absence rule in section 118-145 for a period of 6 years after moving out.

Question 3

The ATO noted that, section 118-190 of the ITAA 1997, a person only gets a partial exemption if the dwelling is used to produce assessable income and if he or she incurred money borrowed to acquire the dwelling, or his or her ownership interest in it, he or she could have deducted some or all of that interest.

Where a main residence is used to produce income for the first time after 7.30pm pm 20 August 1996 and the person would have got a full exemption if the CGT event happened just before the first time the dwelling was used to produce income, the person is taken to have acquired the dwelling or your ownership interest at the income time for its market value at that time.

In this case, after the 20% interest in the property is sold to Person A, the taxpayer will use the property to produce assessable income by renting the remaining 80% interest in the property to Person A. The conditions for a partial main residence exemption under section 118-190 of the ITAA 1997 are satisfied and the taxpayer would be taken to have acquired the ownership interest in the dwelling at the time it was first used to produce assessable income.

However, these provisions will not apply if the person chooses to continue to treat the property as his or her main residence in accordance with the absence rule in section 118-145 of the ITAA 1997 and dispose of the dwelling within 6 years of ceasing to occupy the property as your main residence.

TRAP – the renting of the property where there is an intention to dispose of the property to the tenant at some future time could trigger CGT event B1. That event occurs where under and agreement the right to use and enjoy an asset passes to another entity and title in the asset will pass or may pass to the other entity at or before the end of the agreement. The event is disregarded if title does not pass.

ATO reference *Private Binding Ruling Authorisation No. 1052093365665*
w https://www.ato.gov.au/law/view/document?docid=EV/1052093365665

5.7 Affiliate relationship

Facts

The taxpayer acquired 50% ownership of a property in 20XX.

A family member acquired 50% ownership in the property in 19XX and carries on a primary production business on the property.

There is no formal agreement between the taxpayer and the family member, and the taxpayer does not receive any rent for the use of the taxpayer's share of the property.

The taxpayer is involved in significant decisions in relation to the farm assets on the property.

The family member's aggregated turnover is less than $X million in the 20XX and 20XX financial years.

The property was sold in the 20XX financial year.

Question

Is the family member considered to be an affiliate of the taxpayer under section 328-130 of the ITAA1997?

Decision

Yes. The family member is an affiliate of the taxpayer.

On the basis that:

1. there is a close family relationship;
2. the business of the family member depends on the use of the property;
3. there is a lack of formal arrangement regarding the use of the property;
4. the family member consults with the taxpayer regarding business decisions,

it is reasonably expected that the family member would act in accordance with the taxpayer's wishes in relation to business affairs.

COMMENT – this ATO decision is in contrast to the PBR 1051961514971 included in our June 2022 notes where on similar facts the ATO said there was no affiliate relationship, citing much of the same criteria.

ATO reference *Private Binding Ruling Authorisation No. 1052087248813*
w https://www.ato.gov.au/law/view/document?docid=EV/1052087248813

5.8 Implications of shareholders deed for corporate trustee

Facts

A discretionary trust was established by trust deed on XXXX with the intention to benefit the family consisting of Mum, Dad and their children.

Mum and Dad are General Beneficiaries of the Trust. General Beneficiaries also include the Primary Beneficiaries of the Trust, who are any children of Mum and Dad.

Child A and Child B are currently the Guardians and Appointers of the Trust.

The Trust's main investments are shares in a company incorporated in Australia, and a successful business run by Child A and Child B.

Under the trust deed, the Trustee has the power to, amongst other powers, to allocate the net income of the Trust in the Trustee's absolute discretion to General Beneficiaries in such proportions as the Trustee determines. In the absence of an allocation by the Trustee, the trust deed provides that the Primary Beneficiaries shall be deemed to be presently entitled to the income of the Trust in equal shares.

The Trustee of the Trust is a company incorporated in Australia pre capital gains tax. The two directors of the Trustee are Child A ad Child B. The shareholders of the Trustee are Mum, Dad, Child A and Child B who hold ordinary shares.

On the passing of Mum and Dad, it is intended that their shares will be split between all of their children equally, including children other than Child A and Child B.

As part of Mum and Dad's estate planning objectives, the shareholders of the Trustee entered into a Shareholders Deed on XXXX.

The intention of the Shareholders Deed is for it to be read together with the Trust Deed. To the extent of any inconsistency, the Shareholders Deed prevails. The Trustee of the Trust exercised its powers under the Trust Deed to vary the Trust Deed with the addition of the Shareholders Deed.

The Shareholders Deed provides for the following (amongst other matters):

1. future distributions of distributable income and capital to be split between the shareholders in the Corporate Trustee in proportion to their shareholdings, unless prior to the last day in the income year the Board of Directors agree to distribute in another manner and the shareholders in the Corporate Trustee unanimously agree;
2. a default position for the allocation of the income and capital of the Trust, where before 30 June of each year, the Board of Directors and the shareholders of the Corporate Trustee do not reach unanimous agreement to distribute otherwise;
3. requires unanimous resolution by the shareholders for the issue of shares in the Corporate Trustee;
4. requires unanimous Board approval for: the issue of shares in the Corporate Trustee, the accumulation of income of the Trust, changes to beneficiaries of the Trust, and the decision to vest the Trust;
5. requires shareholders in the Corporate Trustee to be beneficiaries of the Trust; and
6. requires unanimous shareholder consent for the transfer of shares in the Corporate Trustee, depending on the circumstances.

There are no changes in the Shareholders Deed which provides for a subset of beneficiaries to benefit from certain Trust assets over other beneficiaries.

The Commissioner assumed that the execution of the Shareholders Deed will constitute a proper exercise of the powers of amendment contained in the Trust Deed.

Questions

1. Will CGT event E1 in section 104-55 of the ITAA 1997 happen as a result of executing the Shareholder Deed?
2. Will CGT event E2 in section 104-60 of the ITAA 1997 happen as a result of executing the Shareholder Deed?

Ruling

Question 1

The execution of the Shareholders Deed will not result in CGT event E1 happening.

Taxation Determination TD 2012/21 provides that CGT event E1 and E2 will not happen unless:

1. the change causes the existing trust to terminate and a new trust to arise for trust law purposes; or
2. the effect of the change or court approved variation is such as to lead to a particular asset being subject to a separate charter of rights and obligations such as to give rise to the conclusion that that asset has been settled on terms of a different trust.

Trust termination

The ATO confirmed that, if an amendment to the trust that is made in proper exercise of a power of amendment contained under the deed, it will not have the result of terminating the trust. This is irrespective of the extent of the amendments made so long as the amendments are properly supported by the power in the trust deed.

The ATO considered the three main operational changes, which had the effect of ensuring that all children will benefit from the Trust, proportionately to their shareholdings in the trustee, unless unanimous decision is reached. The ATO reasoned that all beneficiaries will continue to be capable of consideration for allocation of the income or capital of the Trust by the Trustee in its absolute discretion. Further, the ATO stated that:

1. none of the proposed amendments had the effect of changing the continuity of the property of the Trust, including how that property is shared amongst beneficiaries of the Trust; and
2. no particular asset of the Trust could be said to be subject to a charter of rights and obligations that is separate to the rights and obligations of other Trust assets.

Therefore, the ATO concluded that there remained a continuity of membership of the Trust and a continuity of property of the Trust.

Property settled on new trust

The ATO concluded that the amendments contained in the Shareholders Deed did not disturb the continuity of the property of the Trust as none of the amendments have the effect of disturbing the rights or obligations with respect to the assets of the Trust such that they could be said to be now held separately.

The ATO also considered whether the amendments could be considered to be a "trust split". The ATO referred to Taxation Determination TD 2019/14, and paragraph 2 which outlines the features of a trust split.

The ATO found that the amendments contained in the Shareholders Deed were distinguishable from the trust splitting features set out in TD 2019/14 because:

1. there were no express changes to the assets of the Trust such that a subset of beneficiaries could benefit from certain assets to the exclusion of others;
2. there were no expected changes, whether or not express, such that a subset of beneficiaries could benefit from certain assets over others. Trust assets were not intended to be separated. The Trust

property remained available to be deployed for the Trust's original purposes and continued to be governed by the terms of the original Trust Deed, as amended by the Shareholders Deed;

3. the range of potential beneficiaries entitled to benefit from the Trust as a whole did not change;
4. clause X of the Shareholders Deed provided a default clause to allocate income and capital of the Trust by the Trustee, where unanimous decisions cannot be reached by the children. This effectively replaced the existing default clause for the distribution of income in the Trust Deed; and
5. there was no change to the Trustee's indemnity from the Trust assets.

Accordingly, the ATO concluded that the Trust assets were not settled upon a new Trust, and the Shareholders Deed did not result in a trust split.

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Question 2

The execution of the Shareholders Deed will not result in CGT event E2 happening.

The ATO referred to TD 2012/21 and its detailed reasoning to question 1. The ATO concluded that the amendments in the Shareholders Deed did not have the effect of transferring the assets of the Trust to a new or existing trust.

ATO Reference *Private Binding Ruling* Authorisation No. 1052096130037
w https://www.ato.gov.au/law/view/document?docid=EV/1052096130037

6. ATO and other materials

6.1 ATO Decision Impact Statement - *Guardian*

On 24 April 2023, the ATO published a Decision Impact Statement regarding the decision in *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 (see our February 2023 notes).

The ATO acknowledges that the Court concluded in Guardian that the purpose or understanding of the adviser could not be imputed to the client for the purposes of determining whether there is a 'reimbursement agreement' required for the application of section 100A. However, the Commissioner considers that section 100A may still apply where relevant parties have agreed in advance to follow an adviser's plans or recommendations.

The ATO also noted that the Court considered that ordinarily a beneficiary needs to be party to a reimbursement agreement and stated that this was in accordance with their views. Their ruling however states instead that a beneficiary need not 'necessarily' be party to a reimbursement agreement.

The ATO will update *Taxation Ruling TR 2022/4* (see our February 2023 notes) to take into account the Court's observations on the adoption of plans or recommendations from advisers. The ATO will also update *Law Administration Practice Statement PS LA 2005/24* regarding Application of General Anti-Avoidance Rules to reflect the views expressed by the Court with respect to the application of the Part IVA provisions post-amendments in 2013.

The ATO has invited comments on any unidentified consequences of the decision impact statement to be sent to the contact details at the link below by 19 May 2023.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/QUD36of2022/00001

6.2 Ride-sourcing data matching

The ATO will be acquiring ride sourcing data to identify individuals who may be providing ride sourcing services during the 2022-23 financial year.

The ATO will be obtaining records of approximately 200,000 individuals, and the data will be used to identify and inform ride sourcing providers of their tax obligations, as well as to select taxpayers for compliance activities.

The data items include:

- identification details (driver identifier; ABN, driver name; birth date; mobile phone number; email address; address); and
- transaction details (bank account details, aggregated payment details, gross fares, net amount paid to driver, and all other income to which GST may or may not apply to) of all payments received in the relevant period.

The objectives of the ride sourcing data-matching program are said to include:

- promoting voluntary compliance;
- identifying and educating individuals who may be failing to meet their obligations; and
- ensuring compliance with tax and superannuation obligations.

w https://www.legislation.gov.au/Details/C2023G00455

6.3 First Home Super Saver Scheme

On 12 April 2023, the ATO issued an addendum to Law Companion Ruling LCR 2018/5. LCR 2018/5 provides guidance on the operation of the first home super saver (**FHSS**) scheme. The addendum seeks to:

1. incorporate amendments to the law made by the *Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest) Act 2022* (Cth);
2. clarify that an individual may acquire equitable proprietary rights in real property before settlement or completion of a contract (which could affect eligibility for the scheme); and
3. make minor amendments to LCR 2018/5.

The addendum confirms that an individual may withdraw a maximum amount of $15,000 of eligible contributions made in a particular financial year to a total of $30,000 of contributions across all years where a determination is requested on or before 30 June 2022. If a determination is requested from 1 July 2022 or later the total amount is $50,000.

Any amount released by a superannuation fund will be paid to the ATO. The Commissioner will withhold a PAYG amount from the assessable FHSS released amount before releasing the balance amount. This is done to assist the taxpayer in meeting any increased tax burden from having the FHSS released amount included in their assessable income. The balance after PAYG may also be offset against Commonwealth debts.

The Commissioner has confirmed his view that entering into a contract to acquire real property, including vacant land, may mean that the individual acquires an equitable interest in the real property even before settlement of the contract.

ATO reference *Law Companion Ruling LCR 2018/5A2*: *First home super saver scheme*
w https://www.ato.gov.au/law/view/view.htm

6.4 Not proceeding with guidance on E5, E7 and E8

The ATO had been progressing a draft tax determination to answer the question 'Does CGT event E5 or E7 happen if the trustee of a discretionary trust appoints an amount of capital to a beneficiary (for example, by special resolution) and later makes a capital distribution in Australian currency in satisfaction of the appointed interest?'

The ATO were also progressing a ruling addressing what is meant by 'unit trust' in CGT events E5 and E8, and what the interaction is with CGT events E4 and C2.

The ATO website shows that it has been assessed as having insufficient priority to warrant progressing these public advice products at this time.

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

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