The Tax Institute

Tax Update

October 2023

Written by:
Brown Wright Stein Lawyers
Level 6, 179 Elizabeth Street
Sydney NSW 2000
P 02 9394 1010

Brown Wright Stein tax partners:

Amanda Comelli	E: akc@bwslawyers.com.au	P: 02 9394 1044
Andrew Noolan	E: ajn@bwslawyers.com.au	P: 02 9394 1087
Geoff Stein	E: gds@bwslawyers.com.au	P: 02 9394 1021
Matthew McKee	E: mpm@bwslawyers.com.au	P: 02 9394 1032
Michael Malanos	E: mlm@bwslawyers.com.au	P: 02 9394 1024
Rachel Vijayaraj	E: rlv@bwslawyers.com.au	P: 02 9394 1049
Suzie Boulous	E: sjm@bwslawyers.com.au	P: 02 9394 1083

www.bwslawyers.com.au

© Brown Wright Stein Lawyers 2023
The Tax Institute disclaimer: The material and opinions in this paper are those of the author and not those of The Tax Institute. The Tax Institute did not review the contents of this paper and does not have any view as to its accuracy. The material and opinions in the paper should not be used or treated as professional advice and readers should rely on their own enquiries in making any decisions concerning their own interests. Liability limited by a scheme approved under professional standards legislation.

About Brown Wright Stein

Brown Wright Stein is a medium-sized commercial law firm based in Sydney. We provide legal advice in the following areas:

- Tax
- Dispute Resolution
- Corporate & Commercial
- Franchising
- Property
- Employment
- Estate Planning
- Elder Law
- Intellectual Property
- Corporate Governance
- Insolvency & Bankruptcy

Our lawyers specialise in working with business owners and their business advisors, such as accountants, financial consultants, property consultants and IT consultants – what we see as our clients' 'business family'. We develop long-term relationships which give our lawyers a deep understanding of our clients' business and personal needs. Over the years we have gained a unique insight into the nature of operating owner-managed businesses and the outcome is that we provide practical commercial solutions to business issues.

At Brown Wright Stein, we believe in excellence in everything we do for our clients. It's this commitment that enables us to develop creative, innovative solutions that lead to positive outcomes.

This paper has been prepared for the purposes of general training and information only. It should not be taken to be specific advice purposes or be used in decision-making. All readers are advised to undertake their own research or to seek professional advice to keep abreast of any reforms and developments in the law. Brown Wright Stein Lawyers excludes all liability relating to relying on the information and ideas contained within.

All rights reserved. No part of these notes may be reproduced or utilised in any form or by any means, electronic or mechanical, including photocopying, recording, or by information storage or retrieval system, without prior written permission from Brown Wright Stein Lawyers.

These materials represent the law as it stood on 12 October 2023.
Copyright © Brown Wright Stein Lawyers 2023.

Liability limited by a scheme approved under professional standards legislation

Contents

1. **Tax Update Pitstop** 5

2. **Cases** 6

2.1 Bendel – are UPEs loans for Division 7A? 6

2.2 MJH Trading Trust – dividend stripping 12

2.3 Kitchen Unit Trust – SGC employee v contractor 16

2.4 Colaciello – illegal loans from SMSF 18

2.5 Frontlink Pty Ltd – Victorian land tax 21

2.6 Hildard Pty Ltd – fixed trust and principal place of residence exemption 24

2.7 The Five Oaks Trust – land tax surcharge 27

2.8 Halkett v APG – accounting for JobKeeper 28

2.9 Appeal Updates 30

2.10 Other tax and super related cases for 9 September 2023 to 12 October 2023 31

3. **Legislation** 33

3.1 Progress of legislation 33

3.2 Better Targeted Superannuation Concessions 33

3.3 NSW State taxes changes 35

3.4 Significant amendments to Fair Work Act 36

3.5 Response to PwC – promoter penalty laws consultation 38

3.6 Response to PwC – new whistleblower protections consultation 38

3.7 Federal tax amendments – small business and charities 39

3.8 NSW land tax – unoccupied land as principal place of residence 40

3.9 Changes to Victorian land tax, duties and windfall gains tax 42

3.10 Finalisation of GST and fuel tax errors legislative instruments 43

3.11 SA Budget Bill 43

3.12 ACNC secrecy provisions reform 44

3.13 Payday Super consultation 44

4. **Rulings** 45

4.1 Updates to section 100A tax ruling 45

4.2 Deductibility of self-education expenses 47

© Brown Wright Stein Lawyers 2023

4.3 Vacant land deductions 49

4.4 Successor superannuation fund transfers 50

4.5 Medical practices and payroll tax in Queensland 51

4.6 Exempt foreign employment income 53

4.7 Aggregated turnover and connected entities – 'control' 54

4.8 ACT Revenue updates circular on principal place of residence 55

5. Private binding rulings 56

5.1 Self-education 56

5.2 Self education 57

5.3 15-year retirement exemption 59

6. ATO and other materials 61

6.1 Communication protocol for ATO objections 61

6.2 Excise return lodgements 62

6.3 Deceased estate tax liabilities 62

6.4 Queensland extension to payroll tax amnesty 63

6.5 Requesting lodgment deferrals 64

6.6 Charging GST correctly on food and breakfast products 64

6.7 ATO to issue unclaimed super notices 65

6.8 ATO CGT reminder 65

6.9 ATO Decision Impact Statement - Dals Property Trust and Commissioner of Taxation 66

6.10 Taskforce action on electronic sales suppression tools 67

6.11 Where to access depreciation effective life information 67

6.12 Appointing a person as a trustee, or a director of a trustee, of a SMSF 68

6.13 ATO response to superannuation non-compliance 68

6.14 Revenue NSW gig economy payroll tax 68

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

Eleanor Arthurson	Phoebe Mayson	Hayden Rudd
Aritree Barua	Rayaan Mubayyid	
Indeya Canvin	Anna Ritchie	

© Brown Wright Stein Lawyers 2023

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
Bendel	Th AAT has held that an unpaid present entitlement is not a loan for the purposes of section 109D(3) of the ITAA 1836 and, therefore, a UPE in favour of a company does not give rise to a deemed dividend under Division 7A	Page 6
MJH Trading Trust	The AAT has held that an arrangement under which dividends from private company were paid to 4 public trading trusts was not a dividend stripping operation as there was no tax avoidance purposes due to the arrangement being entered into for asset protection.	Page 12
JMC Appeal Update	The High Court has refused the Commissioner of Taxation's application for special leave to the decision in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 In that decision, Full Court held that a person will not be an employee under the extended meaning of employee in section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) where the person has a contractual right to subcontract or delegate, even if the contractual right requires the consent of the principal.	Page 30
State taxes changes	Both New South Wales and Victoria have proposed substantial amendments to various aspects of their State tax regimes. Importantly, New South Wales is reducing the landholder relevant acquisition threshold for unit trusts to 20%.	Pages 35 and 42
Medical practices and payroll tax in Queensland	Revenue Queensland has published a new ruling concerning payroll tax for medical practices. Importantly, the ruling states that were payments are made directly from the patient to the medical practitioners, the payments will no the taxable wages.	Page 51

© Brown Wright Stein Lawyers 2023

2. Cases

2.1 Bendel – are UPEs loans for Division 7A?

Facts

Steven Bendel was the sole director and shareholder of Gleewin Pty Ltd. Gleewin Pty Ltd was the trustee of The Steven Bendel 2005 Discretionary Trust (the **2005 Trust**). Steven was a beneficiary of the 2005 Trust, and was also the sole director and shareholder of Gleewin Investments Pty Ltd, a corporate beneficiary.

In the years ended 30 June 2014 to 30 June 2017, the 2005 Trust made Steven presently entitled to a share of its income and, from 2013 until 2017, the 2005 Trust made Gleewin Investments Pty Ltd presently entitled to a share of its income.

The trust deed for the 2005 Trust contained terms which allowed the trustee to determine to set aside, pay or apply any part of, or all of the income of the trust in each year for any of the beneficiaries of the trust. In relation to amounts set aside for a beneficiary, the trust deed provided that "[a]ny amount set aside for any beneficiary ...shall cease to form part of the Trust Fund and upon such setting aside ... shall thenceforth be held by the Trustee on a separate trust for such person absolutely …".

The trust deed then provided the trustee with the power to invest amounts held on separate trusts for beneficiaries, in such manner as the trustee thinks fit.

During each of the 2013 to 2017 years, the financial affairs of the 2005 Trust were managed as follows:

1. Steven caused the 2005 Trust to advance money from its resources to him or for his benefit from time to time;
2. the advances to Steven were recorded with the description 'Drawings' by way of journals posted to a beneficiary account, 'Bendel Current Account';
3. distributions of (or creation of entitlements to) the 2005 Trust's income or capital were made from time to time;
4. when the amounts of the distributions (entitlements) were ascertained, journals were posted to the Bendel Current Account; and
5. for each year, Steven's entitlement to income from the 2005 Trust was less than the then balance owed by him to the 2005 Trust so that his entitlement to the 2005 Trust's income was always fully discharged or paid (i.e. the current account was always in debit).

For each of the years under review, the 2005 Trust reported Steven's entitlement as discharged and paid (due to the set off against amounts owed by Steven to the 2005 Trust).

The financial affairs of Gleewin Investments Pty Ltd were similarly managed. During each of the 2013 to 2017 years:

1. Steven caused the 2005 Trust to meet the tax liabilities and other expenses of Gleewin Investments Pty Ltd from time to time;
2. when the expenses of Gleewin Investments Pty Ltd were met by the 2005 Trust, entries were made to both entities' accounts – in the 2005 Trust accounts, expenses were recorded in the Gleewin Investments Current Account, and in the accounts of Gleewin Investments Pty Ltd, the expenses were recorded in the account named 'Steven Bendel 2005 Discretionary Trust';
3. from time to time amounts belonging to Gleewin Investments Pty Ltd (PAYG tax refunds) were received by the 2005 Trust and not passed on. These amounts also were posted to the same accounts by or on

behalf of each of the 2005 Trust and Gleewin Investments Pty Ltd and reflected an increase in the obligations of the 2005 Trust to Gleewin Investments Pty Ltd; and

4. for each year the entitlement of Gleewin Investment Pty Ltd to income from the 2005 Trust was also posted to the Gleewin Investments Current Account, and for each of the 2013 to 2017 years that income entitlement was greater than the taxation and other expenses paid on behalf of Gleewin Investments Pty Ltd by the 2005 Trust from its resources so that its entitlement to the income of the 2005 Trust was always recorded as at least partly outstanding (i.e. the loan account was always in credit in the 2005 Trust).

The entitlements of Gleewin Investments Pty Ltd were reported in the 'Gleewin Investments Current Account' showing a running balance of unpaid present entitlements (**UPEs**).

Despite the requirements under the trust deed, Gleenwin Pty Ltd did not report any asset held separately, did not purport to alienate or create any interest in any identified asset to meet or correspond with the UPEs and did not report or account for any separate trust.

ATO audit

The ATO conducted an audit of Steven's tax affairs, during which the UPEs of Gleewin Investments Pty Ltd were discovered.

On 4 September 2019 the Commissioner issued amended assessments contending that:

1. the UPEs of Gleewin Investments Pty Ltd to prior year trust income comprised loans within the meaning of section 109D(3) of the ITAA 1936 made by Gleewin Investments Pty Ltd in the current year to the 2005 Trust;
2. those loans were taken to be dividends paid within the meaning of section 109D(1) of the ITAA 1936;
3. those dividends were taken to be paid out of the profits of Gleewin Investments Pty Ltd by operation of section 109Z of the ITAA 1936;
4. the dividends taken to be paid out of profits were assessable income by operation of section 44(1) of the ITAA 1936 and included in the section 95 net income of the 2005 Trust; and
5. the beneficiaries who were entitled to the income of the 2005 Trust were liable to be assessed under section 97 for a proportion of each such dividend determined by reference to their proportionate shares of the income of the 2005 Trust.

In determining the quantum of the deemed dividends the ATO treated the tax payments made by the 2005 Trust for Gleewin Investments Pty Ltd up to the lodgement day for the relevant year's trust tax return, and any tax refunds received, as being netted off against the UPE balance. This had the effect of treating tax refunds, which were in effect a loan from the company to the 2005 Trust, as forming part of the UPE. The Tribunal, as part of its findings, separated these amounts out.

Objections were lodged on 1 November 2019. On 23 March 2021 the objections were disallowed for the 2014 to 2016 years, and allowed in part for the 2017 year. The Commissioner also issued penalty assessments.

Is there a loan for the purposes of section 109D(3)?

At the AAT hearing, the first issue raised was whether there was a "loan" for the purposes of section 109D(3). Section 109D(3) provides as follows:

What is a loan?

(3) In this Division, loan includes:

(a) an advance of money; and

(b) a provision of credit or any other form of financial accommodation; and

© Brown Wright Stein Lawyers 2023

(c) a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and
(d) a transaction (whatever its terms or form) which in substance effects a loan of money.

Steven relied on two arguments to assert there was not a loan: one based on statutory interpretation and other based on the UPEs being held on separate trusts.

Steven submitted that the statutory context and purpose of section 109D of the ITAA 1936 indicates that the definition of "loan" does not extend to amounts of trust income, which are either set aside for a beneficiary on a separate trust, or to which a beneficiary is presently entitled. Steven further submitted that a construction of section 109D(3) of the ITAA 1936 that includes UPEs to companies as loans would lead to absurd and unintended results, namely double taxation of the same amount, from the dual operation of section 109D and Subdivision EA (subdivision EA concerns the position where there is a UPE owing to a private company, and then a loan, payment or forgiveness occurs between the trustee and a shareholder or associate of a shareholder in the private company).

Steven's second contention was that a beneficiary does not make a loan to a trust where an amount of trust income is set aside and held on a separate trust for the beneficiary. In the present case, the entitlement to income was a function of a trust relationship and not a debtor and creditor relationship. Steven submitted:

1. the trustee had no obligation to pay money to Gleewin Investments Pty Ltd in the relevant sense. Credit or financial accommodation requires allowing time to pay, or forbearing, a monetary obligation. The trustee's obligation, as trustee of each separate trust, was not to pay the relevant amounts to Gleewin Investments Pty Ltd, but rather to hold them for Gleewin Investments Pty Ltd absolutely. In contrast to having an obligation to pay those amounts to Gleewin Investments Pty Ltd, the trustee was permitted to invest them on behalf of Gleewin Investments Pty Ltd; and
2. there is a fundamental distinction between a trust relationship and a debtor/creditor relationship as is implied by a loan or credit or other financial accommodation. Where the recipient of money is required to hold the money for the benefit of the other party (or a third party), there is a trust but not a debt. Where the recipient is only required to repay the same amount of money at a future time and is free to use the money as his or hers in the meantime, there is a debt but not a trust. This is, as is made explicit by the trust deed, a case of the former; the relevant amounts were required to be 'held by the Trustee on a separate trust for [Gleewin Investments Pty Ltd] absolutely'.

Steven argued that it could not be suggested that if a company gave money to a trustee to hold on trust for the benefit of the company (or some third party), that a loan arises, however that is what was occurring in this instance. Part of the income of the 2005 Trust was set aside on a separate trust for the benefit of Gleewin Investments Pty Ltd, and the mere fact that Gleewin Investments Pty Ltd could have called for payment of those amounts but did not, does not change the transaction from a trust relationship into a loan.

The Commissioner's submissions in relation to this first issue relied on two arguments, firstly that Gleewin Investments Pty Ltd made a loan as defined in the legislation to the 2005 Trust, and secondly that Subdivision EA does not inform the construction to be given to definition of a loan in section 109D(3) of the ITAA 1936.

The Commissioner's first argument was that Gleewin Investments Pty Ltd made a loan to the 2005 Trust because Gleewin Investments Pty Ltd provided a form of financial accommodation, in that the phrase 'any other form of financial accommodation' in section 109D(3)(b) covers a consensual arrangement where a beneficiary does not require the amount of a distribution to be paid, or does not exercise a power to bring a trust to an end, and in consequence, the trustee retains the use of funds, but remains obligated to pay the amount of the distribution in the future.

The Commissioner also noted that the relevant UPEs were recognised in the financial statements of the 2005 Trust where they were relating the 'Beneficiaries' Current Account' in respect of Gleewin Investments Pty Ltd,

© Brown Wright Stein Lawyers 2023

which the 2005 Trust recorded as a liability. There is no reference in the balance sheets to a sub-trust. Further to this point, the funds supposedly held on a sub-trust were intermingled with all other funds of the 2005 Trust. However, the Commissioner did not deny the existence of a sub-trust, due to the operation of the trust deed. If Gleewin Investments Pty Ltd were to call for its entitlement, it would be paid from the intermingled funds.

Regarding the statutory interpretation argument, the Commissioner noted that the existence of Subdivision EA and legislative history did not indicate that the definition of a “loan” in section 109D(3) excludes 'a consensual arrangement where a beneficiary does not require the amount of a distribution to be paid, or does not exercise a power to bring a trust to an end, and as a consequence a trustee retains the use of the funds but remains obligated to pay the amount of the distributional in the future'.

The Commissioner further noted that there is no dual application of Subdivision EA and 109D, because in order for section 109XA to be enlivened, it must be the case that the company in question (Gleewin Investments Pty Ltd) is or becomes presently entitled to an amount from the net income of the trust estate (the 2005 Trust) which is not paid to it. That condition is not satisfied here because clause 3(5) of the trust deed provided for any amount set aside for Gleewin Investments Pty Ltd to cease to form part of the ‘Trust Fund’ and to commence to be held on a separate trust. Accordingly, only section 109D of the ITAA 1936 applies.

As an additional argument, Steven contended that, if the amount of the UPE was a loan, section 6-25 of the ITAA 1997 prevented it from being income for him.

Section 6-25 in part provides as follows:

> *(1) Sometimes more than one rule includes an amount in your assessable income:*
> ** the same amount may be * ordinary income and may also be included in your assessable income by one or more provisions about assessable income; or*
> ** the same amount may be included in your assessable income by more than one provision about assessable income.*
>
> …
>
> *However, the amount is included only once in your assessable income for an income year, and is then not included in your assessable income for any other income year.*

Steven contended that the amount taken to be a deemed dividend paid by Gleewin Investments Pty Ltd to the 2005 Trust is the same amount determined to be assessable income by operation of sections 95 and 97 for Gleewin Investments Pty Ltd.

Issues

1. Whether Gleewin Investments Pty Ltd made a loan within the meaning of section 109D(3) of the ITAA 1936 arising from the unpaid present entitlements owed by the 2005 Trust to Gleewin Investments Pty Ltd over the 2014 to 2017 years?
2. Whether section 6-25 of the ITAA 1997 prevents the amount that is taken to be a dividend paid by Gleewin Investments Pty Ltd from being included in the 2005 Trust's assessable income, or alternatively, Steven's assessable income, on the basis that the same amount has already been included in assessable income?

Decision

<u>Accounting issue</u>

The AAT noted that the manner in which the Commissioner had accounted for the UPE balances was generous, and apart from accounting separately for the tax refunds as separate loans, it would not disturb the Commissioner’s treatment. If the tax payments which reduced the UPE balances had instead been accounted

for on a FIFO (first in first out) basis, there would have been no reduction in the UPE balances for the years in question. For instance, the 2013 year distribution to Gleewin Investments Pty Ltd was $236,251, but because the Commissioner accepted tax payments could reduce that balance the UPE that was treated as a loan was ultimately reduced to $181,601.

Is there a loan for the purposes of section 109D(3)?

The AAT noted that both parties presented an argument based on the existence of a sub trust. However, the AAT did not consider that creating a right to income gave rise to a sub-trust. Ordinarily you would expect that there is sufficient identity of the subject matter of the trust for there to be a trust, which was not the case here. Rather, based on case law, it is 'the exercise of the power by way of unconditional and irrevocable allocation of trust property' which results in 'absolute beneficial entitlement in respect of property which, before and after the resolution of the trustee, remained property which the trustee held on trust under the terms of the existing settlement' which could constitute a sub-trust.

The AAT noted that here the 2005 Trust did not make any appropriation of any asset, nor any investment decision regarding the trust funds referrable to any income entitlements and has not identified any asset or property held on account of entitlements to income. At the end of each year there was no identifiable property that was held absolutely for Gleewin Investments Pty Ltd. The AAT therefore did not accept that a separate trust arose that had the effect of discharging the obligation to pay entitlements to income.

In relation to the statutory interpretation argument, the AAT did not accept a number of the Commissioner's contentions. The AAT noted that the purpose of Division 7A is to ensure that shareholders of private companies are not able to enjoy distributions of company profits tax-free. The AAT also considered in detail various media releases and the explanatory memoranda for the former section 109UB and then the later addition of Subdivision EA.

The AAT accepted Steven's argument that the statutory context is relevant, noting that an issue that arises between section 109D and Subdivision EA is that separate entities may be taxed on the same 'deemed dividend' resulting in double taxation, as suggested by Steven. Section 6-25 of the ITAA 1997 does not assist in this situation, as it is not the same taxpayer that is subject to double tax, but rather it is two separate entities who are both being assessed on a deemed dividend arising from the same underlying circumstances. Further, the AAT noted that there is no 'tiebreaker' provision in Division 7A, noting that section 109RB of the ITAA 1936 only applies to 'honest mistakes or inadvertent omissions'.

Ultimately, the AAT concluded that there was no “loan” under section 109D(3) of the ITAA 1936 as a loan for this purpose 'does not go so far as to embrace the rights in equity created when entitlements to trust income are created but not paid, and remain unpaid'. The AAT found that 'the balance of an outstanding or unpaid present entitlement of a corporate beneficiary of a trust, whether held on a separate trust or otherwise, is not a loan to the trust'.

This conclusion was reached having regard to the following reasons:

1. the policy of Division 7A to tax those who enjoy the benefit of corporate profits without paying the tax that would arise had the company paid dividends in the usual way;
2. statutory construction principles call for:
   (a) regard to statutory context and legislative history; and
   (b) potentially competing provisions to be construed in a manner which ‘gives effect to harmonious goals’;
3. that there is no tiebreaker provision which mandates which of two competing assessing provisions would apply if an unpaid present entitlement constitutes a loan within the meaning of section 109D(3);

© Brown Wright Stein Lawyers 2023

4. that the section 109RB discretion is not designed to allow relieving discretions to be exercised outside the section 109RB(1)(b) gateways of honest mistakes and inadvertent omissions and thus not a discretion that would relieve inappropriate double taxing;
5. Subdivision EA being a specific, and therefore a lead, provision containing an express set of rules that can be regarded as a particular path that has been chosen to deal with the taxation effect of UPEs in favour of corporate beneficiaries in prescribed circumstances;
6. the lack of clarity as to the nature of a UPE and the separate trust concept;
7. the expressed explanation accompanying the former section 109UB of the ITAA 1936 to the effect:
   (a) that an unpaid present entitlement in favour of a corporate beneficiary and a contemporaneous loan by the trustee to a shareholder in the corporate beneficiary (or associate) is in substance a loan by the company to the shareholder; and
   (b) that an amount to which a company is entitled 'held on a secondary trust for the benefit of the company' is regarded as unpaid and within the ambit of section 109UB of the ITAA 1936;
8. the operation of Subdivision EA which taxes the shareholder in the foregoing circumstances as if the company had lent money directly to that shareholder which falls squarely within the Division 7A policy framework;
9. there being no provision in either of the tax acts that expressly allows assessment of two people arising out of the same circumstance with one of those people potentially not enjoying any benefit of the corporate profits that are the underlying cause of the assessment.

Will section 6-25 of the ITAA 1997 apply?

The AAT noted that section 6-25 of the ITAA 1997 uses the compound term 'same amount' which required the relevant amount to be the same in its identity, for example a particular dividend that is assessable under both section 6-5 of the ITAA 1997 and section 44 of the ITAA 1936. The compound term does not embrace amounts of a different identity that might have historical connections.

The amounts in question here are two separate amounts:

1. an amount assessed as a share of section 95 net income having its origins in entitlements to distributable income of a trust estate;
2. then a disputed amount assessable because, by reference to further events, the ITAA 1936 required a further calculation of a separately identified amount to be included in assessable income.

The AAT confirmed that the amount taken to be a dividend paid by Gleewin Investments Pty Ltd to the 2005 Trust was not the same as the amount determined to be assessable income by operation of sections 95 and 97 for Gleewin Investments Pty Ltd.

The AAT set aside the Commissioner's objection decisions.

COMMENT – the 'double tax' argument made by the taxpayer is in fact raised in the now withdrawn TR 2010/3, where the Commissioner implicitly acknowledged the potential for an amount to both be treated as a UPE, triggering subdivision EA, and a loan, triggering section 109D. In the final paragraph of that ruling the Commissioner stated that he would not treat a UPE that he considered to be a 109D loan as a UPE, effectively to prevent double taxation.

COMMENT – this case will have major importance if it is ultimately upheld on appeal, and presumably the Commissioner will appeal, given his public position is that a UPE can become a loan as a result of being a financial accommodation. The Commissioner is unlikely to change his position unless he receives an unfavourable decision in the Full Federal Court or High Court.

Citation *Bendel and Commissioner of Taxation (Taxation)* [2023] AATA 3074 (DP F O'Loughlin KC, SM K James, Melbourne)

w http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3074.html

2.2 MJH Trading Trust – dividend stripping

Facts

The Hayes family comprised Cecil (now deceased) and Shirley and their four sons Michael, John, Bryan and Paul. The family operated businesses in the transport, fuel storage and distribution and primary production industries through various entities, including four operating companies:

1. Malacorp, whose shareholders were John, Bryan, Paul and Shirley;
2. Fuentes, whose shareholders were Michael, John and Bryan;
3. MJB&P, whose shareholders were Michael, John, Bryan and Paul; and
4. Hayes Investments, whose shareholders were Michael John Hayes Family Pty Ltd, John Hayes Pty Ltd, Bryan Hayes Pty Ltd and Paul Hayes Pty Ltd.
   (the **Operating Companies**).

In late 2007, the Hayes family engaged Raymond Miller of PMW to provide accounting services. Raymond reviewed the affairs of the family and made the following recommendations:

1. each Hayes brother should have a discrete family trust for which a new corporate trustee would be established (Family Trusts) 'to eliminate the possibility of personal liability to each family should any part of the family operation be attacked by outside creditors or other persons who may wish to sue the family operation';
2. each family member's salary and wage income from the business operations should be held at $35,000 each (which was less than 10% of total income for each family member) to allow for further superannuation deductions;
3. a separate superannuation fund should be set up for contributions made on behalf of each family members' spouse; and
4. further discussions should be held regarding distributions to family members' children.

Raymond stated that the objectives of these recommendations were to 'spread the wealth within the families, develop conduits to enable the funds owing to, or by, each family to be traced, while protecting the risk aspect and limiting the impact of Division 7A.' Raymond remained concerned about the business risks and quantum of retained earnings within the group.

After attending a conference session on asset protection presented by a solicitor from Cleary Hoare, Raymond suggested that the Hayes family should meet with Cleary Hoare to discuss the business risks and retained earnings. In early 2010, the Hayes family engaged Cleary Hoare solicitors to review these risks and advise on asset protection and simplifying intragroup debt and entitlements.

<u>Asset protection and risk management for Operating Companies</u>

Broadly, in relation to asset protection and risk management, Cleary Hoare recommended:

1. creating new entities;
2. creating a new class of shares (Z Class) in the Operating Companies and issuing those Z Class shares to the new entities;
3. the Operating Companies declaring and paying discretionary dividends on the Z Class shares; and
4. the Z Class shareholder lending amounts back to the Operating Companies.

In February 2010, members of the Hayes family acquired four companies to be trustees of newly formed public trading trusts as follows:

1. Michael John Hayes Trading Pty Ltd as trustee of the MJH Trading Trust;
2. John Hayes Trading Pty Ltd as trustee of the JPH Trading Trust;
3. Bryan Hayes Trading Pty Ltd as trustee of the BGH Trading Trust; and
4. Paul Hayes Trading Pty Ltd as trustee of the PAH Trading Trust.
(the **Trading Trusts**).

Shortly after the Trading Trusts were established, in different proportions, the Trading Trusts acquired 10 Z Class shares (shares with special rights to dividends only) for $1 per share in each of the Operating Companies. Later on the same day that the Trading Trusts acquired the Z Class shares, the Operating Companies declared and paid fully franked dividends totalling $8,008,460 to the holders of the Z Class shares.

Each of the Trading Trusts included the fully franked dividend income in its income tax return for the income year ended 30 June 2010 and had no further tax to pay due to the tax offset for franking credits. Under the public trading trust provisions, the Trading Trusts are taxed as companies at the company tax rate.

These dividends were not paid by cash. Rather, the Operating Company issued Bonded Promissory Notes, which were either:

1. returned to the Operating Company as a loan from the Trading Trust; or
2. provided to an individual as a loan from the Trading Trust, then returned by the individual to the Operating Company as repayment of an existing Division 7A loan owed by the individual to the Operating Company.

<u>Simplifying intragroup debt</u>

To simplify intragroup debt, Cleary Hoare recommended:

1. the trusts in the group pay the total amount of unpaid present entitlements to corporate beneficiaries ($4.6 million), which would be funded via entering into loan agreements and repaying the loans over seven years using dividends declared;
2. utilising the Trading Trusts that are taxed at the same rate as a company but still regarded as a trust eligible for discount capital gains; and
3. having the Trading Trusts lend funds to the borrowers so they could use the funds to repay their loans.

These steps were implemented and greatly reduced the quantum and complexity of debts between entities in the Hayes group.

<u>Personal asset protection for individuals</u>

Around the same time as these arrangements, the Hayes family also implemented Cleary Hoare's recommendations regarding managing intragroup debt by:

1. estimating each Hayes brother’s equity in his real property assets;
2. each Hayes brother executing a Bonded Promissory Note for the estimated equity amount;
3. each Hayes brother gifting the Bonded Promissory Note to his related/connected family trust;
4. each family trust lending the funds represented by the gift back to the Hayes brother donor; and
5. cancelling the Bonded Promissory Note because it was in the possession of the issuer.

The purpose of the arrangement was for each family trust to be an unsecured creditor who would stand equally with any other unsecured creditors to whom each Hayes brother owed money. It was acknowledged that the degree of asset protection created by these steps could be affected by the quantum of the amounts that the individual owed to other unsecured creditors.

© Brown Wright Stein Lawyers 2023

The Commissioner issued a notice of amended assessment to each Trading Trust denying the franking offsets under section 207-145 of the ITAA 1997 on the basis that the dividends were part of a dividend stripping operation. Section 207-155 defines a dividend stripping operation as a scheme that:

1. was by way of, or in the nature of, dividend stripping; or
2. had substantially the effect of a scheme by way of, or in the nature of, dividend stripping.

The trustees of the Trading Trusts objected to the amended assessments. The Commissioner disallowed the objections. The trustees of the Trading Trusts appealed to the AAT.

The Commissioner contended that the Trading Trusts were involved in schemes, the dominant purpose of which was to extract the accumulated, retained earnings in each of the Operating Companies in a manner that would cause the brothers, being the ordinary shareholders to receive the benefit of those profits but to avoid tax on that distribution.

In particular, the Commissioner contended:

1. that the Operating Companies' existing shareholders and their associates:
   (a) avoided tax by receiving amounts which were not income (the amounts advanced by way of loan represented by the Bonded Promissory Notes) that were used to discharge loans that were subject to Division 7A conditions; and
   (b) received 'a capital sum for the shares in an amount the same as or very close to the dividends paid to the purchasers'; and
2. the scheme was carefully planned, with all the parties acting in concert, for the predominant if not the sole purpose of the ordinary shareholders avoiding tax on dividends from the Operating Companies.

The trustees of the Trading Trusts argued that:

1. the schemes were implemented to achieve improved asset protection and better and diversified asset ownership arrangements;
2. the Trading Trusts received taxable dividends and the entitlement to tax offsets on account of franking credits does not change that assessment; and
3. the latent tax liability in the pre-existing retained profits (that were moved from the Operating Companies to the Trading Trusts) remains or continues to be a latent tax liability that will come home when the Trading Trusts' profits are distributed beyond the corporate environment.

The Commissioner did not apply Part IVA to the arrangements.

Issue

Were the dividends paid pursuant to a scheme that was by way of, or in the nature of, dividend stripping, or that had substantially the effect of a scheme by way of, or in the nature of, dividend stripping?

Decision

The AAT referred to the case law, including the decision in *Commissioner of Taxation v Consolidated Press Holdings Ltd (No 1)* [1999] FCA 1199 (endorsed by the High Court decision on the same matter), which sets out six key characteristics of a dividend stripping scheme:

(a) 'a target company, which had substantial undistributed profits creating a potential tax liability either for the company or its shareholders;'
(b) 'the sale or allotment of shares in the target company to another party ...;'
(c) 'the payment of a dividend to the purchaser or allottee of the shares out of the target company's profits;'

© Brown Wright Stein Lawyers 2023

(d) 'the purchaser escaping Australian income tax on the dividend so declared (whether by reason of a s 46 rebate, an offsetting loss on the sale of the shares, or the fact that the shareholders were resident outside Australia);'
(e) 'the vendor shareholders receiving a capital sum for their shares in an amount the same as or very close to the dividends paid to the purchasers (there being no capital gains tax at the relevant times).' and
(f) careful planning 'with all the parties acting in concert, for the predominant if not the sole purpose of the vendor shareholders, in particular, avoiding tax on a distribution of dividends by the target company.'

Only three of these elements were disputed in this case, being whether:

1. the dividends received by the Trading Trusts were taxed;
2. the original shareholders (as represented by the Hayes brothers) received any, and if so what, capital sum as a substitute for taxable dividends; and
3. the schemes had the requisite tax avoidance purpose.

Were the dividends received by the Trading Trusts taxed?

The AAT did not accept that because the Trading Trusts had a tax liability (which was reduced to nil by the franking credit offsets), the dividends could be said to have been 'taxed'. The AAT referred to the case law authorities in relation to dividend stripping operations, and found that the relevant test is to look to whether the dividend received, after associated credits or deductions or rebates, including tax offsets, bears taxation liability in a net sense. Therefore, the dividends were not 'taxed', because the Trading Trusts had no tax liability on the dividends after the application of the franking credit offsets.

Was there a relevant capital sum?

The AAT found that the proportion of the dividends that made their way back to the Hayes brothers in the form of loans was 30.46% of the total amount. The AAT found that this was well short of the extent of the substitute required for this amount to be a capital sum required for a dividend stripping operation.

Was there a relevant tax avoidance purpose?

The AAT noted that the availability of franking credit tax offsets was not determinative when considering whether the Trading Trusts intended to avoid tax. Subject to meeting applicable at-risk rules, franking credit tax offsets would be available in the same amount to an original shareholder and a new shareholder in a company.

In relation to the arguments that the purpose of the transactions was asset protection, the AAT found as follows:

1. upon a change of accountant the situation of the group was identified, and steps were taken before Cleary Hoare was engaged to begin distributing money to discretionary trusts and superannuation funds rather than the Hayes brothers individually;
2. the Hayes brothers and at least some of their entities were involved in businesses where it was possible for exposures to arise that would give rise to a need for asset protection, and at least one of those entities had previously been sued;
3. Cleary Hoare was engaged as a result of the new accountant attending a conference session specifically about asset protection;
4. the transactions recommended by Cleary Hoare extended to broader asset protection within the family;
5. the relevant profits were not transformed to become non-taxable amounts, or moved beyond the Hayes family; and
6. the amount of loan capital available to the family members associated with the dividend stripping operations was substantially all of the profit stripped from the Operating Companies.

The AAT held that the predominant purpose of the scheme was not tax avoidance and that the dividends paid to the Trading Trusts were not taken to have been made as part of a dividend stripping operation. The AAT allowed the objections in full.

COMMENT – in this case it was critical that (a) there were real commercial risks giving rise to the need for asset protection, and (b) there was substantial contemporaneous evidence about the intentions of the parties and consistent actions taken to implement asset protection measures beyond the dividends.

Presumably, some of the other issues posed by the arrangements, such as whether a value shift occurred on the issue of the Z class shares, and whether the Z class shares were debt instruments, did not arise in this case.

Citation *Michael John Hayes Trading Pty Ltd as trustee of the MJH Trading Trust and Commissioner of Taxation (Taxation)* [2023] AATA 3005 (DP F D O'Loughlin KC, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3005.html

2.3 Kitchen Unit Trust – SGC employee v contractor

Facts

The Trustee for the Kitchen Unit Trust was in the business of the supply and renovation of kitchens and bathrooms.

From on or about 1999 to the end of June 2017, Mathew Novak entered into a working relationship with the Trustee. There was no written agreement of the working relationship. The working relationship had the following features:

1. Mathew was to supply any tools and equipment including a car, measuring tapes and drawing equipment;
2. the Trustee was to provide graph paper and stationery to present designs and quotes to customers;
3. Mathew was not provided with a uniform;
4. Mathew was free to use the Trustee's stationery and business cards. The business cards had Mathew's name on them with the identifying logo of the Trustee;
5. Mathew would decide on his own designs, but was required to use the Trustee's cabinetry and benchtops to be paid commission by the Trustee;
6. potential customers would be allocated to Mathew by the Trustee;
7. there were disputes between the Mathew and the Trustee regarding working hours, but it is noted that Mathew had an identifiable and consistent spread of hours or work;
8. Mathew used the Trustee's price list;
9. Mathew was at times required to undertake training by the Trustee in computer design/software programmes;
10. Mathew was not permitted to sub-contract his work or delegate;
11. Mathew was required to be given permission by the Trustee to take time off and was required to notify of his intention to take time off; and
12. Mathew was provided with an office at the Trustee's premises.

The Trustee and Mathew each contended a different version of how remuneration was provided.

The Trustee submitted that Mathew's pay was commission-based, that Mathew would be paid 10% of the retail price of cabinets and benchtops sold, being those manufactured by the Trustee, and between 2% and 5% of the amount charged to customers for trades and electrical appliances.

© Brown Wright Stein Lawyers 2023

Mathew said he was paid each week an amount of salary determined by the Trustee.

On 12 and 13 May 2020, the Commissioner issued 22 superannuation guarantee charge assessments assessing the Trustee's superannuation guarantee shortfall, and the superannuation guarantee charge payable on that shortfall, arising from payments to Mathew between 1 July 2007 to 31 December 2012.

The SGAA provides that superannuation guarantees shortfalls and superannuation guarantee charges arise where 'employers' as defined in the SGAA have not made the required superannuation contributions to 'employees' as defined in the SGAA.

Sections 12(1) and (3) of the SGAA provide:

> *'(1) Subject to this section, in this Act, employee and employer have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):*
>
> > *(a) expand the meaning of those terms; and*
> >
> > *(b) make particular provision to avoid doubt as to the status of certain persons.*
> >
> > *...*
>
> *(3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.'*

The definitions of 'employer' and 'employee' in the SGAA are, therefore, wider than their ordinary meaning.

On 9 July 2020 the Trustee objected to all of the assessments. On 17 August 2021 the Commissioner decided to disallow the objection. On 24 August 2022 the Trustee applied to the Administrative Appeals Tribunal for a review of the Commissioner's decision.

The Trustee led evidence that, rather than being paid all the commission at once, there was an accounting exercise that was undertaken which allowed Mathew to be paid a regular amount each week with credits and debits applied against the commission payable to him. The Trustee tendered some commission statements, which did not reflect what the Trustee said about the calculation of the commission.

Mathew was unable to recall any conversation about rates of commission, or the system concerning the payment of a regular amount each week. Mathew stated that he had never seen the commission statements the Trustee produced.

Some pay slips concerning part of the employment period were produced. The description of the rate of payment on the payslips referred to '*Annual salary: $52,000*' and '*Hourly rate: $26.3158*'. Under the heading '*Type*' on each payslip the word '*Wages*' appears. Those pay slip broadly showed that Matthew was paid $1,000 less pay-as-you-go amounts that were withheld each week.

Mathew also produced bank statements in evidence showing the consistent pattern of regular weekly payments and a consistent amount, mirroring the amounts shown on the payslips.

Issues

1. Whether the 'ordinary meaning' of 'employer' and 'employee' was satisfied under section 12(1) of the SGAA?
2. Whether the extended meaning of 'employee' under section 12(3) of the SGAA was satisfied?

Decision

<u>The 'ordinary meaning' of 'employer' and 'employee' under section 12(1)</u>

The AAT was required to ascertain the terms of the agreement by considering the objective matters known to the parties when they formed their agreement and any subsequent conduct. This is because there was no

written agreement between the parties. Having regard to the totality of the relationship between the Trustee and Mathew, the AAT found that the following factors led to the conclusion that the relationship was one of an employer and employee:

1. the Trustee controlled the customers whom Mathew would see, the way he would quote (by reference to pricing) and the products he would use for his quotes, designs and sales;
2. Mathew was required to use the Trustee's graph paper in presenting designs;
3. Mathew was required to perform the work personally;
4. Mathew needed permission to take time off and to notify any absence;
5. Mathew worked regular hours over set days of the week;
6. Mathew worked at the Trustee's place of business (in its show room and offices) and where the Trustee's customers were to be found (in their homes);
7. Mathew was required to represent himself as part of the Trustee's business;
8. Mathew was to be paid a fixed amount each week.

Therefore, the AAT held that the Commissioner was correct to decide that the Trustee was an employer and Mathew was an employee within the ordinary meaning of those words.

The extended meaning under section 12(3)

Having already decided that the Trustee was an employer and Mathew was an employee within the ordinary meaning of those words, the AAT held that section 12(3) was not relevant. Nevertheless, for completeness, the AAT decided that the Commissioner was correct to decide that Mathew was an employee under the definition in section 12(3) of the SGAA for the following reasons:

1. Mathew performed work under an oral contract for the Trustee;
2. the contract was wholly or principally for the provision of Mathew's labour, that is, Mathew's design, quoting and selling work; and
3. Mathew did in fact work under the contract over the assessment period.

Therefore, the AAT affirmed the Commissioner's decision to disallow the objection.

Citation *Trustee for the Kitchen Unit Trust and Commissioner of Taxation (Taxation)* [2023] AATA 2831 (Member Rob Reitano, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2831.html

2.4 Colaciello – illegal loans from SMSF

Facts

Antonio Colaciello and his wife, Cathy Colaciello, were neighbours and close friends of Russell Christensen and his wife, Michelle Christensen.

In 2006, Russell was introduced to William Vlahos and joined a punting club that William had formed.

In or around 2009, Russell became a syndicate leader in the punting club. As a syndicate leader, Russell received money from, and paid out money to, members in the syndicate, which included his family and friends. Each quarter, after netting out the deposits and withdrawals, Russell would either pay the balance to William, or be repaid by William.

In 2011, Antonio joined Russell's syndicate. On 20 July 2011, Antonio made a payment of $65,320 to Russell for the punting club. Antonio made another contribution to the club of $10,000 on 19 October 2011.

© Brown Wright Stein Lawyers 2023

In early 2013, Antonio made further payments to Russell for the punting club and was repaid some money. The payments that Antonio made were as follows:

1. on 23 January 2013, deposits of $67,933 and $5,485;
2. on 24 January 2013, a deposit of $218,515; and
3. on 25 February 2013, a deposit of $250,000.

In about March 2013, Antonio said to Russell that he did not have any more money to invest except for his superannuation. Antonio asked Russell if he knew of a way to get money out of superannuation, to which Russell replied that he had heard this could be done by setting up a self-managed fund.

Russell drove Antonio to Russell's accountant, who arranged for Antonio to establish a self-managed superannuation fund, known as the 'Colaciello Superannuation Fund' (**Fund**). Colaciello Super Pty Ltd (**Colaciello Super**) is the trustee the Fund.

Once a bank account was opened for the Fund, the following arrangements were made:

1. the Fund would advance the amount of $290,000 to Michelle (Russell's wife) for a period of two years, commencing on 1 April 2013 (**first loan agreement**). The first loan agreement provided for an interest rate of 8% per annum and was to be secured by way of a mortgage over Michelle's home. The mortgage was signed by Michelle, but not ultimately registered; and
2. Michelle would advance the amount of $290,000 to Antonio (**second loan agreement**). The second loan agreement also provided for an interest rate of 8% per annum and a term of two years.

The recitals to the second loan agreement noted that the loan arose as a result of the first loan agreement and that the parties intended that the second loan agreement would be offset against the first loan agreement. Further, clause 9 of the second loan agreement stated:

> *The parties agree that the Lender will not be required to repay any principal and interest on the loan for $290,000 made by Colaciello Super Pty Ltd to Michelle Maree Christensen unless principal and interest due under the loan made is in accordance with this agreement is paid to Michelle Maree Christensen.*

Antonio and Russell verbally agreed to increase the amount of both loans to $320,000.

Money was transferred from the Colaciello Super bank account to Russell and Michelle's joint account. On the same day of each transfer, the money was transferred from Russell and Michelle's joint account to Antonio's account.

On 26 April 2013, Antonio made a payment of $230,000 into the punting club, and on 15 July 2013, made a payment of $200,028 directly to William.

In June 2013 Antonio lent $1.5 million to William, to help keep the punting club afloat.

William turned out to be a fraudster. In late 2013, the punting club collapsed, and all contributions made to the punting club were lost. William had operated a Ponzi scheme with punting club funds and was declared bankrupt on 16 December 2013. No amounts were repaid by William.

In these proceedings, Colaciello Super sought damages from Michelle for breach of the first loan agreement by failing to repay the amount of $320,000 and interest. Colaciello Super also sought a declaration that it is entitled to possession of the property that was to be mortgaged in favour of the Fund.

Section 62 of the SIS Act requires trustees of a regulated superannuation fund to maintain the fund solely to provide benefits to each member of the fund after retirement, or after reaching the specified age.

Section 65(1) of the SIS Act provides that lending money to, or giving financial assistance to, a member or relative of a member of a regulated superannuation fund is prohibited.

At common law, a contract is void and unenforceable if:

© Brown Wright Stein Lawyers 2023

1. the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;
2. the making of the agreement is impliedly prohibited by statute. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute;
3. the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a 'contract associated with or in the furtherance of illegal purposes'.

However, a contract does not become unenforceable merely because something illegal is done in the course of its performance.

Michelle argued that the proceedings should be dismissed on the following grounds:

1. she was simply an intermediary or a conduit to effect the flow of funds from the Fund to Antonio, as the first loan agreement and the second loan agreement are interconnected; and
2. the first loan agreement and the second loan agreement are unenforceable as they are in breach of the SIS Act.

Issue

Are the first loan agreement and second loan agreement unenforceable for illegality, being contracts expressly or impliedly prohibited by sections 62 and 65 of the SIS Act?

Decision

In the case of *St Johns Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, the Court found the following two principles in relation to a contract being unenforceable, which were adopted by the Victorian Court of Appeal in *Civil and Allied Technical Construction Pty Ltd v A1 Quality Concrete Tanks Pty Ltd* [2018] VSCA 157 at [88] and [114]:

(a) a contract entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of intent at the time the contract was made to break the law; and

(b) the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break law or not.

Garde J held that the principal object of the two loan agreements was to lend money to Antonio, being a member of the Fund, and to provide financial assistance to him using the resources of the fund.

His Honour held that the first loan agreement and the second loan agreement, taken together, constituted a scheme to defeat the operation of section 65 of the SIS Act, as it would have been simpler to draft one agreement, whereby the Fund lent money directly to Antonio (obviously not done as it would have been a direct contravention of section 65(1) of the SIS Act).

Garde J also noted that it would be an affront to the public conscience to uphold the loan agreement.

Garde J dismissed the proceedings, holding that the first loan agreement and the second loan agreement are unenforceable, being contracts expressly or impliedly prohibited by sections 62 and 65 of the SIS Act.

COMMENT – presumably, as a publicly reported decision, the ATO will now look to review the activities of the superannuation fund.

Citation *Colaciello v Christensen & Anor; Colaciello Super Pty Ltd v Christensen & Anor* [2023] VSC 568 (Garde J, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/568.html

2.5 Frontlink Pty Ltd – Victorian land tax

Facts

On 30 January 2015, the Commissioner of State Revenue issued a notice of assessment under the *Land Tax Act 2005* (Vic) (**LTA**) assessing Frontlink Pty Ltd for land tax of $1,002,328 in respect of 45 properties of which it was the registered proprietor as at 31 December 2014 (**Assessment**).

On 18 February 2021, Frontlink objected to the Assessment insofar as it related to the following 8 properties:

1. Clyde North Properties: 4 lots in a residential land subdivision in Clyde North were sold by Frontlink to third-party purchasers before 31 December 2014. However, the subsequent transfer of title of those properties did not take place until between January to March 2015; and
2. Rural Properties: 4 properties located outside greater Melbourne, in Elliminyt, Sunbury and Lyndhurst.

Clyde North Properties

Ordinarily, the 'owner' of land is the registered proprietor. Section 16 of the LTA provides however that where land has been sold, but not transferred, before 31 December of a given year, the vendor of that land is deemed to be the owner of the land until the purchaser has taken possession of the land and:

1. either ‘at least 15% of the purchase money has been paid’; or
2. the Commissioner exercises the discretion in section 16(3) of the LTA to deem the vendor not to be the owner, despite less than 15% of the purchase money having been paid, if the Commissioner is satisfied the contract was made in good faith, was not made for the purpose of evading the payment of land tax and the contract of sale is still in force.

The contracts for sale of the North Clyde Properties (**Contracts**) included a special condition dealing with possession, namely:

> *The Vendor must provide possession of the Land to the Purchaser on the date on which the Plan is registered by the Registrar of Titles ('Registration Date'), and the Purchaser agrees that the Purchaser must take possession of the Land on the Registration Date.*

Frontlink contended that the purchasers had taken possession of the properties before 31 December 2014 and, as such, should not be deemed the owner of the land or subject to land tax. Specifically, that the entry by the respective purchasers into an obligation to take possession was sufficient to meet the requirement of section 16(1) of the LTA.

In support of its argument, Frontlink relied on propositions of Ginnane J in *Commissioner of State Revenue v Oakbee Pty Ltd* [2013] VSC 672, as follows:

1. for de facto possession to pass from a vendor and taken by a purchaser, although something more is required than the granting of a right to possession under a contract, it may be something less than the taking of physical possession; and
2. the circumstances which will satisfy the requirements of section 16(1) of the LTA are not closed.

The Commissioner submitted that a general condition providing for a vendor to provide the purchaser with vacant possession at settlement is inconsistent with the suggestion made by Frontlink that de facto possession was taken by the purchasers at the time of entering into the Contracts.

The Commissioner further submitted that a right of the purchasers to inspect a property in a 7-day period before settlement is inconsistent with the purchasers having taken possession upon entering into the Contracts.

Rural Properties

© Brown Wright Stein Lawyers 2023

Frontlink contended that each of the properties were used for 'primary production' and exempt from land tax.

Elliminyt property

In a witness statement of Peter Murrihy, it was explained that Frontlink provided a lease to Peter's late wife, Nancy Murrihy to enable them to operate their cattle farming business on the Elliminyt property. The Elliminyt property was parallel to the Murrihy's property and a gate between the properties enabled the cattle to be moved from one to the other approximately every 6 weeks to enable to pastures to re-grow.

Frontlink relied upon the decision of the Court of Appeal in *Rainn Pty Ltd v Commissioner of State Revenue* [2016] VSCA 338, where it was determined that land can still be used for primary production where it lies fallow between crops.

The Commissioner contended that the evidence was insufficient to establish that the land was being used primarily for primary production on the grounds that:

1. there was a discrepancy in rent between the two properties which reflected that the Frontlink lot was of a lesser quality; and
2. the cattle movement documents provided by Peter were ‘of limited assistance’ given that they were dated after the relevant period.

Lyndhurst property

A copy of a Share Farming Agreement between Frontlink and the tenant, GR and SM Willmott dated 1 December 2012 was filed with VCAT. It evidenced that the tenant would be entitled to conduct agriculture or grazing management of cattle livestock from 1 December 2012 to 1 December 2014 in return for a fee of not less than $14,000 per annum.

Frontlink was unable to obtain a witness statement from the tenant.

Sunbury properties

In a witness statement of Jeff Steeper, it was explained that his father had sold the property to Frontlink. Jeff's father retained ownership of adjoining land. In late 2014, Jeff observed that he was aware that the Frontlink property had been leased to Paul Atwell which was used by him to farm wheat. Jeff also observed that Paul was also allowing large amounts of rubbish to be dumped on the land.

Sometime after the wheat was harvested, Jeff also observed that a large number of sheep were introduced to the land, owned by Douglass Curnow. In April of 2015, Jeff entered into an agreement with Frontlink to run his own sheep on the land.

In a witness statement of Douglass Curnow, it was explained that in 2014, he came to an agreement with Paul to pay 60 cents per week per head of sheep to run on the land but, as there was a crop growing in December 2014, he waited until January 2015 before bringing approximately 1000 sheep to the property.

Frontlink submitted that the evidence suggested primary production took place in the form of harvesting wheat and/or grazing cattle at 31 December 2014. In respect of the rubbish dumped, Frontlink contended that it was confined to a small area of approximately 1 hectare and did not affect the conclusion that the entirety of the land was being used for primary production.

The Commissioner contended that:

1. while a licence permitted Paul to use the properties for agricultural purposes, it was also used by him as a rubbish dump;
2. the rubbish dump may have been a business of Paul's;

© Brown Wright Stein Lawyers 2023

3. the use of the property as a dump continued even after Douglass moved his sheep onto the land;
4. there are no purchase or sale records to provide an understanding of the intensity of the wheat farming or sheep grazing activity.

Issues

1. Did the possession clause in the Contracts pass de facto possession to the respective purchasers of the Clyde North Properties for the purposes of section 16 of the LTA?
2. Were each of the rural properties primarily used for primary production and exempt from land tax?

Decision

Issue 1: Clyde North Properties

The VCAT held that some action by the purchaser in relation to the land is required to support a finding that the purchaser has taken possession of it. The VCAT confirmed that where the contractual right or obligation to take possession only crystallises if, and when, a plan of subdivision is registered, it is 'impossible' for the purchaser to take any action in relation to the land prior to that time as the exact identity of the land is uncertain.

Therefore, the VCAT determined that the purchasers had not taken possession of the properties as at 31 December 2014. Consequently, as the owner of the Clyde North Properties, Frontlink remained liable for the land tax.

Issue 2: Rural Properties

In respect of the Elliminyt property, the VCAT referred to evidence from the Murrihy's in respect of the use of the land. While no evidence of sale of cattle could be produced for the relevant period, the VCAT nonetheless accepted that the evidence provided was truthful. The Commissioner also conceded that the property was used for primary production. The VCAT held that the Elliminyt property was used by Frontlink for primary production and exempt land for the purpose of land tax.

In respect of the Sunbury properties, the VCAT was not satisfied that the primary production use represented a sufficiently chief use at the relevant time so as to impart a primary production character to the whole of the land. This was because the land was also being use as a rubbish dump during the relevant period.

In respect of the Lyndhurst property, the VCAT stated that no evidence was adduced from the tenant who was the person who is said to have farmed the property. There was only one witness statement provided in respect of the Lyndhurst property. Therefore, Frontlink had not discharged its onus of proof to establish that the land was used primarily for primary production.

The VCAT remitted the Assessment to the Commissioner for reassessment.

COMMENT – there is a similar provision in NSW that can treat the purchaser of land as being the owner for land tax purposes where they are entitled to exclusive possession and have taken possession, but there is no requirement that they have paid anything for the land.

Citation *Frontlink Pty Ltd v Commissioner of State Revenue* (Review and Regulation) [2023] VCAT 54 (Member R. Tang AM, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2023/54.html

2.6 Hildard Pty Ltd – fixed trust and principal place of residence exemption

Facts

Graham Catt is the sole director and shareholder of Hildard Pty Ltd.

Graham first purchased a property in Baulkham Hills in 1985 which was his family home from 1986 to 2007.

Graham sold the Baulkham Hills property in 2007 as he required alternative accommodation to care for his ill wife. The Baulkham Hills property was sold to an acquaintance with an agreement that if the acquaintance was to sell the Baulkham Hills property, Graham would have the first option to buy it back. Graham's stepson continued to live in the Baulkham Hills property after Graham and his wife moved out.

Graham's wife died in 2016, at which time he was made an offer to buy back the Baulkham Hills property.

Graham was unable to obtain a loan in his personal name, due to his age (79 years of age). Graham however was able to take out a loan with a company which would lend to businesses and corporate trustees.

It was decided that the Baulkham Hills property would be purchased in a trust with Graham's stepson as the beneficiary. The purpose of this was to ensure that Graham's son would inherit the Baulkham Hills property.

Hildard Pty Ltd was registered on 7 September 2016.

On 15 September 2016, the deed of settlement establishing the Hildard Trust was prepared with Hildard Pty Ltd as trustee. The document was signed, but not stamped.

On 17 September 2023, Hildard Pty Ltd made a declaration of trust over the Baulkham Hills property. The document was signed. The document provided that the trustee was to acquire the trust asset (here the Baulkham Hills property) as bare trustee for the sole benefit of the beneficiary (being Graham's stepson).

On 21 September 2016, a minute of meeting recorded that it was resolved that the bare trust 'be adopted' and is to be forwarded to their lawyers for settlement of the Baulkham Hills property on behalf of Graham's stepson.

On 30 September 2016, Hildard Pty Ltd entered into a contract to purchase the Baulkham Hills property as trustee of the Hildard Trust. Duty was paid on 11 October 2016 and the transfer was registered on 14 October 2016.

The Chief Commissioner issued land tax notices for the 2017 and 2018 land tax years for the Baulkham Hills property to Hildard Pty Ltd. Graham telephoned the Chief Commissioner and advised that the Baulkham Hills property had been taxed incorrectly, as it was purchased under a trust arrangement.

Graham provided the Chief Commissioner with a copy of the 15 September 2016 trust deed. After review of the trust deed, the Chief Commissioner advised Graham that the Hildard Trust was a discretionary trust and as such, was taxable as a special trust, and as such, the principal place of residence exemption could not apply.

In response to the decision of the Chief Commissioner, Graham advised that he had provided the wrong document, and in fact, he should have lodged the declaration of trust dated 17 September 2016.

In March 2019, the Chief Commissioner advised Graham that he had provided conflicting deeds, both of which were not stamped, and Revenue NSW would not be accepting the 17 September 2016 declaration of trust.

In April 2019, Graham lodged the 17 September 2016 declaration of trust for stamping and sought concession from duty under section 55 of the *Duties Act 1997* (the apparent purchaser provisions). The concession was not granted and notices of assessment were issued Hildard Pty Ltd. Hildard Pty Ltd objected to the notices of

assessment. The objections were disallowed. Hildard Pty Ltd then sought a review of assessments in the NCAT. The NCAT previously confirmed the Chief Commissioner's decision in relation to the duties assessment.

Hildard Pty Ltd also objected to the land tax assessments. These objections were disallowed. Hildard Pty Ltd, represented by Graham, sought a review in NCAT of the land tax assessments issued to Hildard Pty Ltd.

Section 3A of the LTMA provides that a trust is a special trust if:

1. the trust property includes land;
2. the trustee of the trust is the owner of the legal estate in the land;
3. the trust is not a fixed trust; and
4. none of subparagraph (a)-(f) of section 3(4) apply.

It was not in dispute that property of the Hildard Trust included land and that none of subparagraphs (a)-(f) of section 3(4) applied.

Section 3A(2) of the LTMA defines a trust as a fixed trust if the equitable estate in all of the land that is the subject of the trust is owned by a person or persons who are owners of the land for tax purposes.

Section 304(1) of the Duties Act provides that an unstamped instrument may not be presented into evidence. However, section 304(2) of the Duties Act provides that an unstamped instrument may be admitted into evidence if, after its admission, it is transmitted to the Chief Commissioner of State Revenue in accordance with arrangements approved by the court or tribunal.

Graham argued that:

1. the land tax assessment should have been issued to the Hildard Trust, not Hildard Pty Ltd on the basis that it is the Trust, and not the company, which owned the Baulkham Hills property;
2. the Hildard Trust should not have been characterised as a special trust (which does not receive the benefit of the land tax threshold) as, it was a fixed trust (which does receive the benefit of the land tax threshold);
3. that the principal place of residence exemption should have applied to the Baulkham Hills property; and
4. the Baulkham Hills property was and is the principal place of residence of Graham and his stepson and that it is unfair to be denied the principal place of residence exemption in the circumstances, as he was not in a financial position to pay the land tax.

The Chief Commissioner contended that:

1. the land tax assessment was issued to the correct entity;
2. Graham did not establish that the Hildard Trust is a fixed trust; and
3. the principal place of residence exemption cannot apply, as the Baulkham Hills property is owned by a company.

Issue

1. Was the land tax assessment issued to the correct entity?
2. Is the Hildard Trust is a fixed trust and not a special trust?
3. Should the principal place of residence exemption apply in respect of the Baulkham Hills property?
4. Was the assessment unfair?

Decision

Were the land tax assessments were issued to the correct entity?

© Brown Wright Stein Lawyers 2023

The NCAT found that it is clear that Hildard Pty Ltd as trustee for the Hildard Trust entered into the contract to purchase the Baulkham Hills property, and that Hildard Pty Ltd was the registered owner of the property. While the company may hold the property on trust, it remains the legal owner of the Baulkham Hills property, as a trust is not a separate legal entity. NCAT confirmed the assessments were issued correctly to Hildard Pty Ltd.

Is the Hildard Trust a fixed trust?

In relation to whether the Hildard Trust was a fixed trust, the onus was on Graham to prove that the Hildard Trust was not a special trust (as determined by the Chief Commissioner). This was relevant because for the principal place of residence exemption to apply, the trust must be a fixed trust, not a special trust.

In relation to the fixed trust issue, the declaration of trust dated 17 September 2016 was admitted into evidence, however, the NCAT found that Graham was not entitled to the benefit of its legal effect unless and until it is stamped. As the 17 September 2016 declaration of trust has no effect at law or equity until that time, NCAT noted that Graham could not rely upon it to demonstrate that the Hildard Trust was a fixed trust.

In the absence of any other evidence as to the precise terms of the Hildard Trust, the NCAT concluded that it could not be satisfied that the Hildard Trust was a fixed trust. Graham failed to discharge his onus to prove that the Hildard Trust was a fixed trust. The NCAT was satisfied that the Hildard Trust was a special trust.

Should the principal place of residence exemption apply?

On his argument that the Hildard Trust was a fixed trust, Graham further submitted that the property had been his, and his stepson's principal place of residence at all times and, as such, should be subject to the principal place of residence exemption.

The NCAT referred to clause 11(1)(a) of Schedule 1A of the LTMA. This section provides that the principal place of residence exemption does not apply to land that is owned by a company, even if the land is used and occupied as a residence of a director and shareholder of the company and their families. The exceptions to this are when the company that owns the land is acting in its representative capacity, or is acting as trustee of a concessional trust. This requires the company to be a licensed trustee company within the meaning of Chapter 5D of the *Corporations Act 2001* (Cth), or that the trust is a concessional trust (e.g. a trust for the benefit of a minor or the principal beneficiary of a special disability trust).

As Hildard Pty Ltd had been the owner of the Baulkham Hills Property since 14 October 2016, and it was not a licensed trustee company nor was it acting as a trustee of a concessional trust, the principal place of residence exemption did not apply.

Was the Assessment unfair?

Regarding unfairness and the inability of Hildard Pty Ltd to pay the tax, the NCAT confirmed that the inability of a taxpayer to pay tax is not a consideration that can be taken into account when determining the validity of an assessment, nor is there any general discretion for the Chief Commissioner to take into account special circumstances of a landowner, that are not already exceptions under the LTMA.

The NCAT stated that there is well-recognised authority that a taxation assessment cannot legally be challenged because it would result in an unjust result for the taxpayer.

The NCAT confirmed the notice of Assessment issued by the Chief Commissioner.

Citation *Hildard Pty Ltd ATF Hildard Trust v Chief Commissioner of State Revenue* [2023] NSWCATAD 247 (Senior Member S Dunn, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/247.html

© Brown Wright Stein Lawyers 2023

2.7 The Five Oaks Trust – land tax surcharge

Facts

The Five Oaks Trust was established in South Australia by deed dated 30 June 1986.

The initial trustee and appointor of the Five Oaks Trust was Stephen Gilbert. The named 'primary beneficiaries' were Stephen and his wife, Sandra Gilbert. The other primary beneficiaries included their children, grandchildren and former spouses. The 'general beneficiaries' under the Trust were the primary beneficiaries and the spouses of the primary beneficiaries.

The beneficiaries of the Trust included foreign persons, namely relatives of Sandra, who resided in the United Kingdom.

On 30 March 1988, Waverley Investments Pty Ltd was appointed as trustee of the trust.

In 2014, Waverley in its capacity as trustee of the Trust purchased a residential property in Potts Point.

Section 5D(1) of the *Land Tax Act 1956* (NSW) takes the trustee of a discretionary trust to be a foreign person 'if the trust does not prevent a foreign person from being a beneficiary of the trust'. To prevent a foreign person from being a beneficiary of the trust, two requirements must be met under section 5D(3) of the LTA. Namely:

1. no potential beneficiary of the trust is a foreign person; and
2. the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (the 'no amendment requirement').

On 22 December 2020, the trust deed for the Five Oaks Trust was amended (**First Amending Deed**) to insert a new clause 1.14 that read as follows:

> *1.14 Notwithstanding any other provision of this Deed,*
>
> *1.14.1 a foreign person shall not be a beneficiary of the Trust; and*
>
> *1.14.2 any foreign person who is or may be a Primary Beneficiary or a General Beneficiary is expressly excluded and disentitled from being a beneficiary of the Trust.*
>
> *1.14.3 any foreign person who is or may be entitled to be a Primary Beneficiary or a General Beneficiary is expressly excluded and disentitled from being a beneficiary of the Trust.*
>
> *and the Trustee and the Appointor* ***shall not amend or vary this clause 1.14 of this Deed for at any time when and for so long as the assets of the Trust include residential land in New South Wales.*** (emphasis added)

The First Amending Deed also defined a 'foreign person' in the same way as defined in section 2A of the LTA.

The Chief Commissioner assessed Waverly for surcharge land tax for the 2017 to 2021 land tax years on the basis that the 'no amendment requirement' was not met by the Trust.

Waverley objected to the Chief Commissioner's assessment. The objection was disallowed and Waverley applied to the NCAT for review of the assessment.

Waverley contended that the Chief Commissioner was incorrect to require the terms of the trust deed to irrevocably exclude foreign persons from being a beneficiary as the word 'irrevocable' does not appear in section 5D(3)(b) of the LTA. It is not clear from the decision, but it appears to have been part of the objection decision that the exclusion of foreign persons amendment needed to be expressed to be irrevocable.

© Brown Wright Stein Lawyers 2023

The Chief Commissioner contended that the requirements of section 5D(3)(b) of the LTA were not met in the relevant land tax year on the basis that it was within Waverley's power to take steps which would result in the future being a potential beneficiary of the trust who is a foreign person.

In respect of the use of the word 'irrevocable', the Chief Commissioner submitted that the word is a 'simply convenient shorthand' to describe the effect of section 5D(3)(b) of the LTA. The Chief Commissioner explained that section 5D(3)(b) has no temporal limitation, it requires that as at the taxing date, the terms of the trust must not be capable of being amended, at any subsequent time, to add a foreign beneficiary.

Separately, on 20 December 2021, the trust deed was amended further (**Second Amending Deed**) to 'irrevocably declare' that a foreign person shall not be entitled to be a beneficiary of the Trust.

The Chief Commissioner accepted that the Second Amending Deed sufficiently met the 'no amendment requirement' for the 2022 and subsequent land tax years.

Issues

Did the First Amending Deed meet the 'no amendment requirement' in section 5D(3)(b) of the LTA?

Decision

The NCAT accepted the Chief Commissioner's submissions that section 5D(3)(b) of the LTA looks to what is capable of being done, namely, are the terms of the Trust capable of amendment at some point in the future. That an amendment might occur after the Trust had ceased to own NSW land was not relevant.

The NCAT held that to satisfy the no amendment requirement, the question to ask at midnight on 31 December is whether the terms of the trust can ever be amended to include foreign persons as potential beneficiaries. That is, the no amendment requirement looks to future possibilities.

The NCAT found that for each of the 2017 to 2020 land tax years, the 'no amendment requirement' in section 5D(3)(b) was not met and did not prevent foreign persons from being a beneficiary of the Trust.

The assessment was confirmed.

Citation *Waverley Investments Pty Ltd atf The Five Oaks Trust v Chief Commissioner of State Revenue* [2023] NSWCATAD 255 (Senior Member SE Frost, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/255.html

2.8 Halkett v APG – accounting for JobKeeper

Facts

APG & Co Pty Ltd (**APG**), operates 200 retail stores across Australia, selling fashion under brands including Sportscraft, Saba and Jag. Peter Halkett, was the chief executive officer and executive chairman and held 5% of shares and units (**Securities**) in APG under the terms of an Equityholders Agreement.

In early 2020 APG stores were closed due to COVID-19 and APG began to receive JobKeeper payments.

In June 2020 Peter resigned. APG was entitled to buy back Peter's Securities for 'Fair Market Value' calculated in accordance with a formula set out in the Equityholders Agreement.

The formula relevantly required:

Fair Market Value = (VM x Relevant EBIT) – Net Debt

Where

EBIT *means Earnings before Interest and Taxation as determined using generally accepted accounting principles and consistent with how these principles have been applied in prior years for APG* ***and after accounting for all abnormal or extraordinary items****. (emphasis added)*

VM *= the Valuation Multiple, which equals 5.2*

Relevant EBIT *= the average earnings before interest and taxes of the Trust and Company over the following periods as applicable:*
…
(b) otherwise, the applicable period shall be the 3 preceding financial years (and if the date triggering the calculation of EBIT is more than 6 months through a financial year, the year to date EBIT will be pro-rated to make a full year and will be included in the calculation)
…
Net Debt *means all financial indebtedness of the Company and the Trust (including any subsidiaries) (excluding trade debtors), less cash on hand.*

Peter contended that the Fair Market Value was $3,579,465, while APG contended that the Fair Market Value was $1,395,299.

The difference between the valuations of the parties related to the way that the JobKeeper payments were accounted for.

APG's calculation was based on the audited financial results for the 2019, 2020 and 2021 years and cash and debt balances as at 10 November 2021, that is, gathering the earning periods described in sub-paragraph (b) of the definition of Relevant EBIT.

The 2019 figures were used as reported. The 2020 and 2021 figures had substantial adjustments in order 'to apply accounting principles consistently'. Some adjustments were made due to retrospective adoption of AASB 16 concerning leasing. This change was in Peter's favour and he did not contest the adjustments.

In the Supreme Court of New South Wales, Peter disputed the following adjustments:

1. 'effect from sale of FX Hedge Book' - in the 2020 year, EBIT was reduced by $7,956,812 and increased by $2,095,477 in 2021; and
2. 'Job Keeper Contribution from Govt' - reducing EBIT in both 2020 and 2021 by $4,537,200 and $9,702,320 respectively, being, effectively, the 'windfall' received by APG from JobKeeper in each year.

The adjusted figures were the same as the figures disclosed in APG's financial statements.

Evidence was given by accountants of different ways that the JobKeeper amounts should be adjusted for, with one considering that it was Covid-19 that was the extraordinary event, and not the JobKeeper amounts, while another considered that the JobKeeper amounts were themselves extraordinary amounts for which adjustments could be made.

Issue

Should the calculation of 'Fair Market Value' in the Equityholders Agreement include the adjustments for 'effect from sale of FX Hedge Book' and 'Job Keeper Contribution from Govt'?

Decision

The Court held that the issue was a matter of contractual interpretation and the proper construction of the definition of 'EBIT' in the Equityholders Agreement.

The Court held that the definition required two steps. The first step relates to the words 'as determined using generally accepted accounting principles and consistent with how these principles have been applied in prior years for APG'.

The first step calls for an examination of the APG's financial statements for the relevant years, including the notes to those financial statements, to ascertain how generally accepted accounting principles have been applied by APG.

The definition then calls for a second step – indicated by the word 'and' – being to take EBIT as identified by the first step and then, '*after* accounting for all abnormal or extraordinary items' arrive at EBIT as defined. The definition requires the parties to do something in order to account for such items, because it is only 'after' having taken this second step that EBIT is revealed for each reporting period, of which an average is taken and to which a multiple is applied and from which Net Debt is deducted.

The Court did not accept Peter's contention that the words 'accounting for' meant that abnormal or extraordinary items must necessarily be included in the calculation. Instead, the Court held that 'accounting for' meant that such items must be considered and, if appropriate, allowance made which may result in the item being included, excluded, or an adjustment made.

The Court held that there did not appear to be one correct way to account for abnormal or extraordinary items and it was not the place of the Court to determine the 'correct' accounting treatment for JobKeeper payments.

The Court dismissed Peter's case.

COMMENT – there is a deemed market value substitution rule for off-market share buy backs under section 159GZZZQ of the ITAA 1936. The Fair Market Value of the shares under the Equityholders Agreement would not necessarily be the market value of the shares for the purposes of section 159GZZZQ.

Citation *Halkett v APG & Co Pty Ltd* [2023] NSWSC 1058 (Rees J)
w https://www.caselaw.nsw.gov.au/decision/18a4e355d6847b06a37310af

2.9 Appeal Updates

JMC

The High Court has refused the Commissioner of Taxation’s appeal against the decision of the Full Federal Court in JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76 (see our June 2023 Tax Training Notes). In that decision, Full Court held that a person will not be an employee under the extended meaning of employee in section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) where the person has a contractual right to subcontract or delegate, even if the contractual requires the consent of the principal.

Citation *Commissioner of Taxation v JMC Pty Ltd ACN 003 572 012* [2023] HCASL 155
w https://www.hcourt.gov.au/assets/registry/special-leave-results/2023/12-10-23_Results.pdf

Edge Developments

The taxpayer has sought leave to appeal to the High Court against the decision of the South Australian Court of Appeal in *Edge Developments Pty Ltd & Ors v Commissioner of State Taxation* [2023] SASCA 88 (see our July 2022 tax training notes for an earlier decision). The case concerned duty on the redemption of units.

Automotive Invest

The operator of the Gosford Classic Car Museum has sought leave to appeal to the High Court against the decision of the Full Federal Court of Australia in *Automotive Invest Pty Ltd v Commissioner of Taxation* [2023] FCAFC 129 (see our September 2023 tax training notes). The case concerned luxury car tax and whether cars displayed in a museum were trading stock.

Buzadzic

The Federal Court has dismissed an appeal against the decision of the AAT in *Buzadzic and Commissioner of Taxation (Taxation)* [2021] AATA 4820 (see our February 2022 tax training notes) with costs. The case concerned undisclosed income and Division 7A.

Citation *Buzadzic v Commissioner of Taxation* [2023] FCA 954 (Moshinksy J, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/954.html

2.10 Other tax and super related cases for 9 September 2023 to 12 October 2023

Citation	Date	Headnote	Link
Smith and Commissioner of Taxation (Taxation) [2023] AATA 3090	12 September 2023	TAXATION – Income tax deductions – whether applicant substantiated expenses claimed– where applicant sought to claim work-related expenses that included travel, accommodation and meal expenses – whether applicant has satisfied the onus of proof in establishing that Commissioner's assessment was excessive or otherwise incorrect – where applicant had failed to retain receipts for expenses and otherwise did not sufficiently substantiate expenses – statutory requirements to discharge onus of proof not satisfied – decision affirmed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/3090.html
Woodsman Properties Pty Ltd v Commissioner of State Revenue (Review and Regulation) [2023] VCAT 1044	13 September 2023	Review and Regulation List – Duties Act 2000 (Vic), ss 42, 78, 89D and Taxation Administration Act 1997 (Vic), ss 25, 30(3)(a), 35 – Applicant assessed for duty on acquisition of 37% interest in landholder company on the basis that it was to be aggregated with acquisition of the remaining shares in that company by two other entities controlled by siblings of applicant's sole director – Whether acquisition was a 'relevant acquisition' for duty purposes – Whether applicant entitled to exemption from landholder duty having regard to exemption for a transfer of land in relation to a deceased estate – Whether applicant took reasonable care and whether 'exceptional circumstances' required for penalty tax or interest to be remitted – Assessment of duty confirmed, but no penalty tax payable and interest remitted in full.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2023/1044.html
Wang and Commissioner of Taxation (Taxation) [2023] AATA 2962	15 September 2023	TAXATION – income tax default assessments – whether the taxpayer could satisfy the onus of proof by establishing errors in assets betterment methodology adopted by the Commissioner – no agreement to confine the issues in dispute – failure to adduce sufficiently reliable evidence –whether administrative penalties correctly imposed for failure to lodge tax returns– objection decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2962.html

McGrath and Secretary, Department of Social Services (Social services second review) [2023] AATA 2990	19 September 2023	SOCIAL SECURITY – family tax benefit – claim for lump sum payment for past period – late lodgement of claim – late lodgement of taxation returns – whether an extension of time should be granted – whether special circumstances prevented lodgement by due date - decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2990.html
Simplot Australia Pty Limited v Commissioner of Taxation [2023] FCA 1115	22 September 2023	TAXATION – goods and services tax – exemption – whether certain frozen food supplied and imported by the applicant was “of a kind” “marketed as a prepared meal”	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1115.html
Axiom88 Pty Ltd ATF Axiom88 Trust v Chief Commissioner of State Revenue [2023] NSWCATAD 252	26 September 2023	TAXES AND DUTIES -Land tax – Surcharge land tax – applicant holds land on trust – discretionary trust – whether, during the relevant land tax years, foreign persons were excluded as a beneficiary under the terms of the trust deed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/252.html

3. Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2023 Measures No. 1) Bill 2023	16/02	09/03	09/03		
Treasury Laws Amendment (2023 Measures No. 3) Bill 2023	14/06	01/08	02/08	06/09	20/09
Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023	14/06	01/08	02/08	07/09	20/09
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023	22/06	09/08	09/08		
Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023	13/09				

3.2 Better Targeted Superannuation Concessions

On 3 October 2023, Treasury released exposure draft Bills: *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023* and the *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023* for consultation.

The draft Bills seek to enact the changes to superannuation tax concessions that were first announced by the government on 28 February 2023 in the 2023-24 federal budget.

The *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023* inserts a new Division 296 in the ITAA 1997, which once enacted, will impose tax from 1 July 2025 onwards on individuals with a total superannuation balance (**TSB**) in excess of $3 million.

Who is liable?

Individuals with a TSB at the end of an income year that exceeds that 'large superannuation balance threshold' of $3 million and superannuation earnings of greater than nil will be subjected to the Division 296 tax at a rate of 15% on the amount of their 'taxable superannuation earnings' for the year.

The following individuals are exempt from the Division 296 tax:

1. child recipients of superannuation income streams at the end of the income year;
2. individuals who have a structured settlement contribution made to them as a payment for a personal injury at the end of the income year or any prior years; and
3. individuals who died before the last day of the income year.

Division 296 tax

The total amount of the 'taxable superannuation earnings' for an income year is worked out by:

1. first, determining the percentage of the TSB at the end of the year that is above $3 million according to the following formula, rounded up to two decimal places:

$$\frac{\text{Your *total superannuation balance at the end of the year} - \text{The *large superannuation balance threshold}}{\text{Your *total superannuation balance at the end of the year}} \times 100$$

2. secondly, the TSB percentage is multiplied by the amount of superannuation earnings for the income year to derive the taxable superannuation earnings:

$$\text{The percentage worked out under subsections (2) and (3)} \times \text{The amount of your *superannuation earnings for the year}$$

TSB

The definition of TSB has been modified extensively to remove the link to transfer balance account. It is to be based on the 'total superannuation balance value' of all Australian superannuation interests. The TSB value will be determined by a method or value prescribed in the regulations, or otherwise the total amount of the 'withdrawal benefit' in the superannuation fund.

Notably, the TSB does not include superannuation interests in a foreign superannuation fund. For Division 296 purposes, the individual's share of an LRBA amount under section 307-231 is also to be disregarded in working out that individual's TSB. Interests in a non-complying fund are however included in the TSB.

Superannuation earnings

An individual's basic superannuation earnings for an income year is worked out by subtracting their previous TSB immediately before the start of the year, from their adjusted TSB at the end of the year, shown in the following formula:

$$\text{Current adjusted balance} - \text{Previous balance}$$

An individual's current adjusted balance is determined by the following formula:

$$\text{Your *total superannuation balance at the end of the year} + \text{Your withdrawals total for the year} - \text{Your contributions total for the year}$$

The adjusted TSB considers the effect of withdrawals and contributions which would otherwise misrepresent the investment earnings generated within the fund. The Bill further provides a regulation-making power to modify the mechanisms for calculating contributions total and withdrawals total.

Where an individual's current adjusted balance or their previous balance is less than $3 million, $3 million will be used as a substitution instead.

The following superannuation earnings are excluded from Division 296 tax:

1. where you are an individual excluded by regulations, earnings in a constitutionally protected fund; or
2. earning in the superannuation fund established under the *Judges Pension Act* 1968 held by a judge, where that person was appointed prior to 1 July 2025 and whilst they remain employed; or
3. in a superannuation plan that is a non-complying fund at the end of the year.

If an individual’s basic superannuation earnings are positive, and they hold an excluded interest, there are additional steps calculations to work out their basic superannuation earnings.

Negative superannuation earnings to be carried forward

Any negative superannuation earnings are to be carried forward to offset against a future Division 296 tax liability.

Assessments

The Commissioner will calculate the Division 296 tax liability and notify individuals of their tax liability for a given income year.

Payment of a Division 296 tax is generally due 84 days after the Commissioner gives the individual a notice of assessment.

Individuals liable to pay a Division 296 tax will have the option of paying their tax liability by releasing amounts from their superannuation funds, by paying from resources outside of their superannuation funds or a combination of the two. This is irrespective of whether they have met a condition of release.

Other amendments

The Bill also amends several other Acts to include provisions relating to the calculation of earnings, withdrawals and contributions, modifications for earnings of certain constitutionally protected interests, debt deferral provisions for defined benefit interests in the pre-end benefit phase, and changes to the definition of TSB.

The Imposition Bill amends income tax, superannuation law, and the TAA 1953, which contain the rules to assess and calculate an amount that is subject of the tax and how that liability is paid.

The consultation is open until 18 October 2023.

w https://treasury.gov.au/consultation/c2023-443986

3.3 NSW State taxes changes

On 27 September 2023, the *Treasury and Revenue Legislation Amendment Act 2023* was assented to by the NSW Government. The Act introduces various new amendments to the *Duties Act 1997* (NSW), *Land Tax Management Act 1956* (NSW) and the *Taxation Administration Act 1996* (NSW).

Duties Act 1997

The following amendments have been made to the Duties Act:

1. the fixed and nominal duty payable on certain transactions will increase for transactions occurring on or after 1 February 2024 as follows:
    (a) where duty of $10 was previously payable it has increased to $20. For example, the assessment of duplicates is $20;
    (b) where duty of $50 was previously payable it has increased to $100. For example, a declaration of a bare trust under section 55(1) of the Duties Act is assessable for duty of $100;
    (c) transfers and instruments relating to management investment schemes are now assessable for duty of $500 (increased from $50);
    (d) where duty of $500 was previously payable it has increased to $750. For example, the declaration of trusts over unidentified or non-dutiable property is assessable for duty of $750, i.e. the stamping of discretionary or unit trust deeds.
2. amendments to the landholder duty provisions. Currently, a person has a significant interest in a landholder for the purposes of the Duties Act if the person is entitled to 50% or more of the property distributed in a private landholder and 90% or more of the property distributed in a public landholder. From 1 February 2024, there will be a new category specifying that for a private landholder that is a

private unit trust scheme, a person has a significant interest if the person is entitled to 20% or more of the property distributed;

3. introduces new provisions regarding wholesale unit trusts where investors will be able to register as a wholesale unit trust, and, if registered, the relevant acquisition threshold for landholder duty is 50%. A wholesale unit trust scheme is where:
   (a) the scheme was not established for a particular investor;
   (b) not less than 80% of the units in the scheme are held by qualified investors;
   (c) no qualified investor, either alone or together with associated persons, holds 50% or more of the units in the scheme; and
   (d) the scheme satisfies additional requirements that are specified by the Chief Commissioner.
4. from 1 February 2024, the meaning of a 'linked entity' in section 158 of the Duties Act is amended such that an entity may be a linked entity to a principal entity where in the event of the distribution of the property of the other entity, the principal entity is entitled to receive not less than 20% of the value of that property. Previously, the percentage threshold was 50%;
5. from 1 February 2024, the exemption from duty for corporate reconstruction and corporate consolidation transactions is removed and replaced with a 90% reduction in duty otherwise chargeable under the transaction;
6. from 1 February 2024, duty exemptions for electrical vehicles under $78,000 will cease. Instead, the new road user charges will be payable for electric vehicles, including plug-in hybrids, from 1 January 2024.

Land Tax Management Act 1956

Currently, a person with an interest in residential land may claim the principal place of residence exemption in respect of that land where they use and occupy the property as their principal place of residence.

From 31 December 2025, a property will not be entitled to a principal place of residence exemption unless all the persons who use and occupy the land as a principal place of residence together own at least a 25% interest in the land.

Further amendments are provided for the indexing of the land tax thresholds and premium thresholds. For 2023, the land tax threshold is $969,000 and for premium rate threshold is $5,925,000.

Taxation Administration Act 1996

Previously, section 25 of the TAA provided that the Chief Commissioner may, in such circumstances considered appropriate, remit the market or premium component of interest, or both.

Section 25 has been amended to provide that:

1. the Chief Commissioner may issue guidelines setting out how interest must be remitted;
2. if guidelines are issued, interest must be remitted only in accordance with the guidelines; and
3. the imposition or remission of penalty tax is not relevant to the imposition or remission of interest.

The amendments also confirm that the imposition or remission of interest is not relevant to the imposition or remission of penalty tax.

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18498

3.4 Significant amendments to Fair Work Act

The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* proposes to amend the *Fair Work Act 2009* and related legislation to improve the workplace relations framework.

© Brown Wright Stein Lawyers 2023

The proposed changes include (from the Explanatory Memorandum):

1. improving job security by amending the definition of 'casual employee' to reflect a fair and objective definition, and by creating a new employee choice pathway for eligible employees to elect if they wish to change to permanent employment;
2. addressing the consequences of the small business redundancy exemption in insolvency contexts by providing an exception to its operation when a lager business downsizes to become a smaller business employer;
3. making targeted amendments to the bargaining framework;
4. protecting bargained wages in enterprise agreements from being undercut by labour hire workers being paid less;
5. supporting workplace delegates by providing a framework for delegates' rights, including protecting those delegates when they seek to exercise those rights;
6. establishing a new protected attributed in the Fair Work act to improve workplace protections against discrimination for employees subject to family and domestic violence;
7. changing the defence to sham contracting from a test of 'recklessness' to one of 'reasonableness';
8. enabling registered organisations to obtain an exemption certificate from the Fair Work Commissioner to waive the 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid;
9. empowering the Fair Work Commission to take action in relation to the future issue of exemption certificates (by imposing conditions or banning their issue) if those rights are misused;
10. increasing maximum penalties for underpayments, and amending the civil penalties and serious civil contravention frameworks, amending the threshold for serious contraventions;
11. clarifying that Fair Work Ombudsman compliance notices can required an employer to calculate the amount of an underpayment owed to an employee;
12. repealing certain amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020;*
13. introducing a new criminal offence for wage theft;
14. inserting an interpretative principle for determining the ordinary meanings of 'employee' and 'employer' under the Fair Work Act. The purpose of this interpretative provision is to require that the ordinary meanings of ‘employee’ and ‘employer’ be determined by reference to the real substance, practical reality and true nature of the relationship between the parties. This would require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor. This interpretative provision is in response to the decisions of the High Court in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2;
15. allowing the Fair Work Commissioner to set fair minimum standards:
    (a) for 'employee like' workers including in the gig economy;
    (b) to ensure the Road Transport Industry is safe;
16. repealing a sunsetted clause regarding applications to vary modern awards;
17. extending the functions of the Asbestos Safety and Eradication Agency to address silica related diseases;
18. introducing a presumption so that first responders who sustain post-traumatic stress disorder will not have to provide their employment contributed to their PTSF for the purpose of their workers compensation claim;
19. introducing a new offence of industrial manslaughter in the *Work Health and Safety Act 2011*; and
20. aligning the WHS Act offence framework with recent changes to the Model WHS Law.

w
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr7072%22

3.5 Response to PwC – promoter penalty laws consultation

On 20 September 2023, exposure draft legislation that proposes to amend the *Taxation Administration Act 1953* (Cth) was released for consultation with respect to the promoter penalty laws, which introduces the following:

1. the Commissioner of Taxation may apply to the Federal Court of Australia for an order that an entity has contravened the promoter penalty laws within six years from the time of the alleged conduct. Currently, the Commissioner only has four years to make an application to the Federal Court;
2. maximum civil penalties on bodies corporate for breach of the promoter penalty laws are increased from 25,000 penalty units to 50,000 penalty units;
3. maximum civil penalties that can be applied to bodies corporate now extend to significant global entities (which can include large partnerships and trusts);
4. maximum civil penalties that can be imposed is increased from twice to three times the benefit received or receivable, directly or indirectly, by an entity or its associates in respect of the scheme;
5. a new alternative maximum civil penalty for bodies corporate and SGEs can be imposed being an amount equivalent to 10% of the aggregated turnover for the most recent income year ending before the relevant breach occurred or began occurring, capped at 2.5 million penalty units;
6. the meaning of 'promoter' is broadened to include entities that have received a benefit, rather than 'consideration' in respect of the marketing or growth of interest in a scheme;
7. the definition of tax exploitation scheme is expanded to include schemes that are subject to the Multinational Anti Avoidance Law (MAAL) or the diverted profits tax (DPT) due to the operation of section 177DA or section 177J of the ITAA 1936, or that would reasonably be expected to be subject to either the MAAL or DPT if the scheme were implemented; and
8. the promoter penalty laws prohibit an entity from promoting a scheme on the basis of conformity with a public ruling, private ruling or oral ruling where the scheme is materially different from the scheme described in the ruling.

The changes are expected to commence by 1 July 2024. The draft was open for comments until 4 October 2023.

w https://treasury.gov.au/consultation/c2023-444281-ppl

3.6 Response to PwC – new whistleblower protections consultation

On 20 September 2023, exposure draft legislation that proposed to amend the TAA and the *Taxation Administration Regulations 2017* (Cth) was released for consultation with respect to whistleblower protections, which introduces the following:

1. a discloser qualifies for protection if made to the Commissioner of Taxation or to the Tax Practitioners Board to assist the TPB to perform its functions or duties under the *Tax Agent Services Act 2009* (Cth).
2. A discloser is further protected if they make disclosures to several entities for the purposes of obtaining assistance in relation to a disclosure, or to a medical practitioner or psychologist.
3. The burden of proof is reversed for claims for protection from liabilities by a discloser, such that the discloser bears the onus of substantiating their claim for protection.

The justification given for reversing the onus of proof is:

> *The Guide to Framing Commonwealth Offences states that it may be appropriate for the evidentiary burden of proof to be placed on a defendant where the facts in relation to the defence are peculiarly within the knowledge of the defendant. Where a whistleblower is making a claim that they have made a*

disclosure that qualifies for protection under Part IVD of the Act, it will be uniquely within their knowledge as to the circumstances of the information they disclosed and the motivations for doing so.

The changes are expected to commence by 1 July 2024. The draft was open for comments until 4 October 2023.

w https://treasury.gov.au/consultation/c2023-444750

3.7 Federal tax amendments – small business and charities

On 13 September 2023, the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* was introduced. The Bill includes measures to:

1. increase the instant asset write off for certain entities to $20,000 from 1 July 2023.
2. introduce the bonus deduction for certain entities in relation to assets that support electrification or more efficient energy use from 1 July 2023;
3. introduces a new class of community charities as DGRs; and
4. change the operation of the non-arm's length income (NALI) provisions.

Instant asset write off

The Bill amends the *Income Tax (Transitional Provisions) Act 1997* to increase the instant asset write-off threshold under the simplified depreciation rules from $1,000 to $20,000. This will allow small businesses (with an aggregated annual turnover of less than $10 million) to immediately deduct the full cost of eligible depreciating assets costing less than $20,000 that are first used or installed ready for use for a taxable purpose between 1 July 2023 and 30 June 2024. The Bill also extends the deferral of the 'lock-out' rule for small businesses that previously opted out of the simplified depreciation rules to 30 June 2024. The legislation commences on the first 1 January, 1 April, 1 July or 1 October after the day the Bill receives Royal Assent.

Bonus deduction for electrification and efficient energy use

The Bill also amends the IT(TP)A to provide small and medium businesses (with an aggregated annual turnover of less than $50 million) with access to a bonus deduction equal to 20 per cent of the cost of eligible assets, or improvements to existing assets, that support electrification or more efficient energy use. The bonus deduction is a temporary measure which applies from 1 July 2023 until 30 June 2024, to the cost of eligible assets and improvements up to a maximum amount of $100,000, with the maximum bonus deduction being $20,000.

To be eligible for the bonus deduction:

1. the expenditure must be eligible for a deduction under another provision of the tax law; and
2. the asset must be first used or installed ready for use, or the improvement cost incurred, between 1 July 2023 and 30 June 2024.

A depreciating asset is eligible for the bonus deduction if it uses electricity and:

1. there is a new reasonably comparable asset that uses a fossil fuel available in the market; or
2. is more energy efficient than the asset it is replacing; or
3. if it is not a replacement, it is more energy efficient than a new reasonably comparable asset available in the market.

A depreciating asset is also eligible for the bonus deduction if it is an energy storage, time-shifting or monitoring asset, or an asset that improves the energy efficiency of another asset.

© Brown Wright Stein Lawyers 2023

An improvement to a depreciating asset is eligible if it:

1. enables the asset to only use electricity, or energy that is generated from a renewable source, instead of a fossil fuel;
2. enables the asset to be more energy efficient, provided that asset only uses electricity, or energy generated from a renewable source; or
3. facilitates the storage, time-shifting or usage monitoring of electricity, or energy generated from a renewable source.

Certain kinds of assets and improvements are not eligible for the bonus deduction, including where the asset or improvement uses a fossil fuel, where the asset has the sole or predominant purpose of generating electricity, capital works and motor vehicles.

New class of DGR

The Bill enables a new class of community charities to obtain DGR status, in recognition of their valuable contribution to their communities and Australian society. The legislation is in response to the 2024 Budget, in which the Government reaffirmed its decision to facilitate DGR status for up to 28 entities affiliated with the peak body Community Foundations Australia. The entities are, or will be, structured as either trusts or incorporated entities.

The amendments will create a hybrid framework for DGR endorsement for community charities, in which two new items are included in Division 30 of the ITAA 1997, and defined in Division 426 Schedule 1 to the TAA, and will be specified by name in a ministerial declaration made under that Division. The TAA will also set out certain requirements of community charities, modelled on those relating to ancillary funds, and a ministerial obligation to make legislative guidelines.

NALI changes

The Bill limits the amount of non-arm's length income that arises relating to a general non-arm's length expenditure.

For general expenses, the amount of income that is taxed as non-arm's length income is twice the difference between the amount of the expense that might have been expected to be incurred had the parties been dealing at arm's length, and the amount the entity did incur, with no deductions applying against that amount. Where the entity did not incur any expense, the amount of income that is taxed as non-arm's length income is twice the amount that might have been expected to be incurred had the parties been dealing at arm's length. However, the total amount of a fund's non-arm's length component is capped at an entity's taxable income for the year not including any assessable contributions or any deductions against assessable contributions. This is to apply from 1 July 2018.

The measure also narrows the application of the non-arm's length expense provisions so that they no longer apply to expenses incurred before 1 July 2018 (before the provisions were enacted). Large APRA-regulated funds, exempt public sector superannuation funds, pooled superannuation trusts and approved deposit funds are also exempt from the non-arm's length expense provisions.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7081

3.8 NSW land tax – unoccupied land as principal place of residence

On 10 September 2023, Revenue NSW published practice note *CPN031: Clause 6 - Concession for unoccupied land intended to be owner's principal place of residence,* relating to the *Revenue Legislation Amendment Act 2023* which amended the Land Tax Assessment Act to allow the Chief Commissioner to

© Brown Wright Stein Lawyers 2023

extend the availability of the land tax concession on unoccupied land from four tax years to up to six tax years in certain circumstances.

An owner of unoccupied land may claim the land as their PPR if the owner intends to use and occupy the land solely as their principal place of residence once any building works are completed, and they meet the timing requirements. The following criteria need to be met

1. the land is unoccupied because the owner intends to carry out, or is carrying out, building or other works necessary to facilitate their intended use and occupation of the land as a principal place of residence; and
2. if those building or other works have physically commenced on the land, no income has been derived from the use and occupation of the land since the commencement; and
3. the intended use and occupation of the land is not unlawful.

The timing requirement is that the owner needs to use and occupy the land before the end of a four-year period. If they fail to use and occupy the property within that period, the PPR exemption is retrospectively revoked.

The four-year period can be extended by the Chief Commissioner to six years where:

- 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;
- the delay is due to exceptional circumstances beyond the control of the owner; and
- the delay could not reasonably have been avoided by the owner.

The amendment commenced from 1 July 2023. The Chief Commissioner however has the power to apply the extension to an exemption that ended on or after 31 December 2019.

CPN 031 provides examples of circumstances the Chief Commissioner may consider as exceptional circumstances beyond the owner's control and what could not reasonably be avoided by the owner. These includes:

1. unforeseen delays in obtaining approval from Council;
2. unforeseen works necessary to stabilise the land for building;
3. shortage of skilled tradespersons;
4. shortage of basic building materials;
5. extraordinary events such as fires, floods, earthquakes, and pandemics;
6. defective building works requiring remediation that delays occupation of the dwelling; or
7. builders becoming insolvent or ceasing business.

The Chief Commissioner noted that he will generally not classify the followings as exceptional circumstances beyond the owner's control:

1. conflict with the builder;
2. variations to designs or scope of the project by the owner;
3. disputes with adjacent owners or residents;
4. delays in obtaining building materials which are unusual, bespoke or normally require significant production or delivery lead-times;
5. delays by the owner in lodging plans with council or changing the plans; or
6. delays in obtaining finance.

In order to apply for an extension, an applicant must lodge a detailed written submission explaining:

1. the reason or reasons for the delay

© Brown Wright Stein Lawyers 2023

2. why the circumstance is exceptional; and
3. why the delay is beyond the owner's control.

In order to apply for an exemption, the Chief Commissioner noted that evidence in support of the exemption application might include:

1. medical certificates;
2. correspondence from the council;
3. correspondence from the builder;
4. correspondence from liquidators/administrators;
5. insurance claims relating to a natural disaster such as bushfires and floods;
6. Home Building warranty claims; and
7. any other evidence to support the request for the extension.

w https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/cpn-031-clause-6-concession-for-unoccupied-land-intended-to-be-owners-principal-place-of-residence

3.9 Changes to Victorian land tax, duties and windfall gains tax

On 4 October 2023, the *State Taxation Acts and Other Acts Amendment Bill 2023* was introduced into the Victorian Parliament. The bill proposes to introduce a number of reforms to Victorian State Taxes. Some of the key changes are outlined below.

Duties Act

The amendments to the *Duties Act 2000* (Vic) include:

1. allowing the corporate reconstruction and consolidation concession and exemption to apply to certain sub sale arrangements; and
2. clarify the operation of the duty reduction, the public landholder concession and the corporate reconstruction and consolidation concession for pensioners and concession cardholders by setting out who is an eligible cardholder.

Windfall Gains Tax

The Bill amends the *Windfall Gains Tax Act 2021* (Vic) and *Valuation of Land Act 1960* (Vic) to:

1. broaden the windfall gains tax exemption for rezoning errors;
2. clarify the definition of excluded rezoning as it applies to land in the contribution area within the meaning of section 201RC of the *Planning and Environment Act 1987* (Vic);
3. clarify that the capital improved value of any land includes the value of the fixtures (with a new definition of fixtures, being anything that constitutes a fixture at law and any other item fixed to the land); and
4. clarify the operation of the windfall gains tax waiver of for charitable land.

The Bill will also amend the *Sale of Land Act 1962* (Vic) to prohibit windfall gains tax being apportioned between a vendor and purchaser under a contract of sale of land or an option, if at the time it is entered into, a notice of assessment has been served in respect of the windfall gains tax liability.

Land Tax

The amendments to the *Land Tax Act 2005* (Vic) include:

1. apply vacant residential land tax to all vacant residential land in Victoria on and after 1 January 2025 (it previously only applied within certain council areas in greater Melbourne);
2. extend the definition of vacant residential land tax to include certain unimproved land in metropolitan Melbourne effective from 1 January 2026;
3. introduce two new exemptions from vacant residential land tax for land contiguous to principal place of residence land and for land that cannot be used or developed for residential purposes;
4. alter the imposition of a single COVID-19 debt temporary surcharge to aggregated land which is otherwise assessed on a single holding basis, to ensure that the concession operates as intended;
5. adjust the formula for calculating the amount of Build-to-Rent special land tax payable by owners of land to reflect new rates of land tax that were introduced by the *State Taxation Acts Amendment Act 2023* (Vic).

w https://www.legislation.vic.gov.au/bills/state-taxation-acts-and-other-acts-amendment-bill-2023

3.10 Finalisation of GST and fuel tax errors legislative instruments

The ATO has finalised Legislative Instrument 2023/32 *A New Tax System (Goods and Services Tax) (Correcting GST Errors) Determination 2023* and Legislative Instrument 2023/33 *Fuel Tax (Correcting Fuel Tax Errors) Determination 2023.* The Determinations outlines when an error from an earlier tax period may be corrected in a later tax period.

The Legislative Instruments were outlined in our August 2023 tax training notes. There were no material changes on finalisation.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI202332/00001
w https://www.ato.gov.au/law/view/document?docid=OPS/LI202333/00001

3.11 SA Budget Bill

On 15 June 2023, the South Australian Government introduced the *Statutes Amendment (Budget Measures) Bill 2023.* The Bill amends the following:

1. the Emergency Services Funding Act – amending the definitions of emergency services, owners and shack leases;
2. the First Home and Housing Constructions Grants Act – amending the entitlement of a grant for any eligible transaction which commences on or after 15 June 2023 to $650,000;
3. the Land Tax Act – amending the reduction in taxable value for certain build-to-rent properties. The amendments set out what is required for a building to be categorised as a build-to-rent property and ultimately receive a 50% reduction in land tax; and
4. the Stamp Duties Act – inserts new sections 71DD and 71DE. These sections provide guidance as to what evidence and requirements are involved for a new home and new landowner to be entitled to relief from duty. The amendment also provides a formula for how the duty will be calculated.

w
https://www.legislation.sa.gov.au/lz?path=/b/current/statutes%20amendment%20(budget%20measures)%20bill%202023

3.12 ACNC secrecy provisions reform

The Australian Government has released exposure draft legislation that amends the secrecy provisions in the *Australian Charities and Not-for-profits Commission Act 2012* to allow the ACNC to make increased disclosures on new and ongoing investigations.

The draft legislation is open for consultation until 16 October 2023.

w https://treasury.gov.au/consultation/c2023-448980

3.13 Payday Super consultation

Treasury has released a consultation paper on the proposed Payday Superannuation measure that was part of the Federal Budget 2023/24. The measure is proposed to commence on 1 July 2026.

The consultation is open to 3 November 2023.

w https://treasury.gov.au/consultation/c2023-436950

© Brown Wright Stein Lawyers 2023

4. Rulings

4.1 Updates to section 100A tax ruling

The ATO has updated Taxation Ruling TR 2022/4 to reflect the Full Federal Court decisions in *B&F Investments Pty Ltd as trustee for the Illuka Park Trust v Commissioner of Taxation* [2023] FCAFC 89 (**BBlood**) (see our July 2023 tax training notes) and *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 (see our February 2023 tax training notes).

Parties to reimbursement agreements

A new paragraph [11] has been inserted regarding who must be party to a relevant agreement (footnotes omitted):

> *The relevant agreement is one that provides for a benefit to a person or persons other than the presently entitled beneficiary. An agreement requires 2 or more parties that assent to the agreement, expressly or impliedly including (where relevant) through their authorised representatives. The parties can include advisers who formulate the documentation and implement the agreement with the knowledge and assent of one or more parties to the transactions (or the party's controllers, where relevant). Whether the beneficiary (or their representative or controller) needs to be a party to the agreement will depend on the particular circumstances of a case. An exact understanding of the nature and extent of the agreement (or of the benefits to be provided under it) is not required between all of its parties.*

Paragraph [68] has been reworded to state (footnotes omitted):

> *For the purposes of section 100A, the relevant agreement is one that provides for a benefit to be provided to a person or persons other than the presently entitled beneficiary, or to the beneficiary and another person or persons. The relevant agreement must be between 2 or more parties that assent to it, expressly or impliedly. An exact understanding of the parties to the nature and extent of the agreement and benefits to be provided is not required. Section 100A does not require the presently entitled beneficiary or the relevant trust to even be in existence when the agreement is made.*

Four new paragraphs have been inserted after paragraph [70] as follows:

> *70A. The parties to the agreement may include advisers who formulate the documentation and implement the agreement with the knowledge and assent of one or more parties to the transactions (or the party's controllers, where relevant).*
>
> *70B. A person can be made a party to an agreement without knowing its terms where another person is authorised to act on their behalf or where they have agreed to follow the decisions of another person in relation to the management of certain affairs. Whether these conclusions can be reached in a specific case is a question of fact, which may turn on the documentary and other evidence relevant to determining whether an agreement, arrangement or understanding exists. The Courts have not prescribed what being authorised to act means, but have observed that authorisation would not be established simply by showing a general practice of following advice.*
>
> *70C. Section 100A applies according to its terms, which do not require a presently entitled beneficiary to be a party to the agreement. However the Courts have recognised in some cases that it cannot be concluded that there is an agreement that meets the conditions of being a reimbursement agreement unless the presently entitled beneficiary, or at least their controller or representative, is a party to that agreement. For example, where an alleged reimbursement agreement requires a presently entitled corporate beneficiary to declare and pay a franked dividend in favour of the trustee to achieve the intended taxation outcome of that*

© Brown Wright Stein Lawyers 2023

dividend being appointed to another beneficiary, the beneficiary or their controller would ordinarily have to be a party to that agreement. For other cases, whether a beneficiary will be required to be a party to the agreement for it to be a reimbursement agreement will depend on the particular circumstances and documentation.

70D. Consistent with the approaches of the Courts where the meaning of the words 'agreement', 'arrangement' or 'understanding' have been otherwise considered:

- *Where, as provided by subsection 100A(13), an agreement can be implied, it is open to infer that an agreement exists from the surrounding circumstances or the conduct of the parties.[68J] In the particular context of section 100A, examples of where it is possible that this inference may be drawn include*
  - *where the conduct of the trustee and others is inconsistent with the rights and duties imposed by the trust deed and the general law*
  - *where parties act in accordance with the advice of a professional adviser (or rely on the professional adviser) in undertaking a series of steps or taking concerted action, and it is open to infer that the parties had knowledge of, and had assented to a relevant plan formulated by the adviser.*
- *While an 'arrangement or understanding' must have been entered into consensually, the parties' acceptance or adoption may be tacit and it is not essential that they be committed or bound to support it. The arrangement may be both informal and unenforceable, and the parties may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it. An arrangement or understanding may lack formality and precision.*

The ATO notes in a new footnote that the Courts have not prescribed what is a representative or controller for these purposes and the terms take their ordinary meaning. The ATO has taken the view that a representative or controller would have the ability to influence the actions of the presently entitled beneficiary, whether or not they are in a position to legally bind the presently entitled beneficiary.

<u>Tax reduction or deferral purpose</u>

A new paragraph [21] has also been inserted in relation to the relevant tax reduction or deferral purpose (footnotes omitted):

The reference to purpose is to an actual purpose of entering into the agreement at the time of entry into the agreement. It may be determined by reference to the parties' own evidence as to their purposes for entering into the agreement and to the objective facts and circumstances including the financial, taxation and other consequences of the transaction entered into.

In relation to purpose, the ATO further clarifies at the end of paragraph [22]:

A party's understanding of the effect to be achieved is relevant, regardless of whether that understanding is objectively correct.

The ATO has also updated the ruling to incorporate the comments of Moshinsky, Colvin and Hespe JJ in *BBlood* regarding the relevance of an adviser's purpose to a reimbursement agreement. Paragraph 24 has been updated to include the following statements:

The purpose of the adviser may be imputed to a party to the relevant agreement where the adviser is authorised to act on behalf of that party. Additionally, communication by an adviser of the intended tax effects of an arrangement to another entity can be relevant in determining that other entity's purpose.

The ATO has also confirmed that, unlike in Part IVA proceedings, there is no need to establish what the parties would have done if the agreement had not been entered into, when considering whether there is a tax reduction purpose.

© Brown Wright Stein Lawyers 2023

Timing of reimbursement agreement

Consistent with the case law, the ATO has updated paragraph [74] to include a statement that:

> *An expectation that some arrangement will be entered into after the creation of the present entitlement is not sufficient for the purposes of section 100A.*

ATO reference *Taxation Ruling TR 2022/4A1 - Addendum*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20224A1/NAT/ATO/00001

4.2 Deductibility of self-education expenses

On 27 September 2023, the ATO released draft ruling *Draft Taxation Ruling TR 2023/D1* which sets out the principles on the deductibility of self-education expenses under section 8-1 of the TAA.

For the purposes of the Ruling, self-education includes:

1. courses undertaken at an educational institution (whether leading to a formal qualification or not);
2. courses provided by a professional or industry organisation;
3. attendance at work-related conferences or seminars;
4. self-paced learning and study tours (whether within Australia or overseas).

The ATO notes that the ruling should be read in conjunction with the *Taxation Ruling TR 2020/1 Income Tax: employees: deductions for work expenses under section 8-1 of the Income Tax Act 1997*. TR 2020/1 considers the general deductibility principles for work expenses.

Self-education expenses are deductible under section 8-1 to the extent they:

1. are incurred in gaining or producing assessable income; and
2. are not capital or private in nature, incurred in gaining or producing exempt or non-assessable income or non-exempt income or prevented from being deductible by a specific provision in the tax law.

Self-education expenses which have been reimbursed are not deductible.

In gaining or producing assessable income

For expenses to be classified as incurred in gaining or producing assessable income, there must be a relationship or close connection between the expenditure and what the taxpayer does to produce their assessable income, or if there is no assessable income produced, what the taxpayer would be expected to produce as assessable income.

The ruling explains that it is not enough to show only a perceived connection or general link between the expenditure and production of the income.

The ruling clearly provides that having the support or encouragement of your employer to undertake the self-education is not, by itself, determinative as to whether the expense is deductible. Further to that point, incurring an expense on a voluntary basis does not necessarily preclude a deduction.

The ATO confirmed that if either or both of the following apply, the Commissioner would be satisfied that the self-education expenses have been incurred in gaining or producing income:

1. income-earning activities are based on the exercise of a skill or some specific knowledge and the self-education enable the taxpayer to maintain or improve that skill or knowledge (**Principle 1**)

© Brown Wright Stein Lawyers 2023

2. the self-education objectively leads to, or is likely to lead to, an increase in income for the taxpayer (**Principle 2**).

Principle 1 and Principle 2 are not mutually exclusive and should not be considered in isolation.

Principle 1

Whether the self-education expenses were incurred to maintain or improve skills and knowledge is a question of fact, and courts have relied on the following when considering Principle 1:

1. if the self-education is too general in terms of current income-earning activities, the necessary connection between the self-education expense and the income-earning activity does not exist;
2. self-education that results in the taxpayer being better equipped to perform at their current income earning activity is deductible where the requisite connection to income-earning activities is present;
3. obtaining a higher degree of qualification within the taxpayer's profession or industry is deductible;
4. expenditure on an overseas study or trip has been found to be deductible in limited circumstances, such as:
   (a) the taxpayer devoting all their time whilst overseas to their advancement of knowledge relevant to their work;
   (b) the tour or trip is undertaken whilst employed in the relevant role;
   (c) the tour or trip was not recreational or general in nature;
   (d) the tour or trip was supported by the taxpayer's employer.

The ruling sets out various examples of Principle 1.

Principle 2

Expenses for self-education that objectively leads to, or is likely to lead to, an increase in your income from your current income-earning activities are deductible

The following factors have been confirmed by courts to be relevant when determining whether the self-education expenses would increase the taxpayer's income:

1. the increase in income from current income earning activities is clear and closely related to the self-education;
2. there is a real opportunity for promotion as a result of the self-education;
3. the self-education leads to or is likely to lead to a promotion with a higher pay grade;
4. the self-education leads to or is likely to lead to a bonus or a higher pay grade;
5. the self-education leads to or is likely to lead to a promotion to a position that is not materially different from the taxpayers current position;
6. the overall motive or purpose of the self-education of the taxpayer is to advance their employment grade and salary and must form a substantial element in the taxpayers motive for undertaking the self-education.

The ruling sets out various examples of Principle 2.

Exclusions

New employment or new income-earning activity

Self-education expenses are not deductable, if the education was undertaken to enable the taxpayer to:

1. to get employment;
2. obtain new employment; and
3. open up a new income earning activity, whether in business or in current employment.

What is deemed to be new employment or new income earning activity is a question of fact and the court will consider all factors such as whether conversations with a new employer had been made prior to the commencement of the self-education.

Not currently undertaking income-earning activities to derive income

A deduction is not available if at the time the expense was incurred, the taxpayer was not undertaking income-earning activities to derive assessable income.

Specifically not deductible

A taxpayer cannot claim a deduction for expenses incurred to get government assistance that are rebatable benefits, such as Youth Allowance.

The phrase 'to the extent' means that circumstances may arise in which the self-education expenses may only be deductible in part. In such circumstances it is appropriate to apportion the expenses.

The process for apportioning self-education expenses is as follows:

1. where the self-education expense has distinct and severable parts, where some are for an income-producing purpose and others are for some other purpose, the taxpayer would apportion the expense according to the particular purposes; and
2. where the self-education expense is a single outlay that serves both as an income-producing purpose and another purpose, the taxpayer would apportion on a fair and reasonable basis.

The ruling includes examples of types of self-education expenses that are deductible and those that are not.

1. course fees that have been paid for by the taxpayer, and have not been paid for by third parties, such as the Commonwealth;
2. interest that is incurred on borrowing monies to pay for deductible self-education expenses (such as books and course fees), however, repayments of the principal amount borrowed is not deductible;
3. books, digital subscriptions and stationery can be deductible expenses;
4. airfares incurred to participate in self-education are deductible, on the condition that the taxpayer is not living at the location of the self-education activity;
5. accommodation and meals are deductible if incurred during the participation of the self-education activity away from the taxpayer's home and are not domestic in nature;
6. transport expenses incurred by the taxpayer to get to and from the place of education is deductible; and
7. a taxpayer can deduct an amount for a decline in value of a depreciation asset which was held by the taxpayer during an income year and used, or has ready for use, for a taxable purpose.

When the final ruling is issued, it is to apply both before and after the date of issue.

The Commissioner is open to comments before 27 October 2023.

ATO reference *Draft Taxation Ruling* TR 2023/D1
w https://www.ato.gov.au/law/view/document?docid=DTR/TR2023D1/NAT/ATO/00001

4.3 Vacant land deductions

On 27 September 2023, the ATO released Taxation Ruling *TR 2023/3 Income tax: expenses associated with holding vacant land*, which outlines the Commissioner's views with respect to the limitation of deductions for holding vacant land under section 26-102 of the ITAA 1997. This Ruling applies to costs incurred on or after 1 July 2019, even for land held prior to that date.

© Brown Wright Stein Lawyers 2023

Subsection 26-102(1) of the ITAA 1997 denies a deduction for losses or outgoings relating to holding land on which there is no substantial and permanent structure in use or available for use. In certain circumstances, the taxpayer may be excluded from the operation of this section, including where the land is used in carrying on a business, is leased an entity carrying on a business, or is held by primary producers.

The ruling finalises draft *Taxation Ruling* TR 2021/D5.

The Ruling clarifies a number of aspects of the operation of section 26-102 of the ITAA 1997 from the perspective of the ATO, including the following:

1. whether there is a substantial and permanent structure on the land?
2. where there is a structure, is it in use or available for use?
3. if there is a structure available for use, is it independent of and not incidental to the purpose of any other structure, or proposed structure on the land?

The finalised Ruling provides further guidance on mixed use premises, where premises are across multiple titles of land, interest and borrowing costs relating to repairing and renovating structures on the land, and land held for property development.

ATO reference *Taxation Ruling* TR 2023/3
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20233/NAT/ATO/00001

4.4 Successor superannuation fund transfers

On 27 September 2023, the ATO published draft *Taxation Ruling* TR 2013/5DC1, which is a draft compendium to *Taxation Ruling* TR 2013/5. The draft Ruling clarifies how the general principles in TR 2013/5 about when a superannuation income stream commences and ceases, apply in the context of successor fund transfers. The draft Ruling also reflects amendments to legislation and removes practical compliance approaches that are no longer current.

Generally speaking, a successor fund transfer involves the transfer of all the assets and liabilities of a superannuation fund (the 'original fund'), including assets and liabilities relating to superannuation income streams, from the trustee of the original fund to the trustee of the successor fund.

The draft Ruling notes that a superannuation income stream ceases:

1. for income tax purposes, when the liability to pay superannuation income stream benefits is transferred without the consent of the member to another superannuation fund under a successor fund transfer; and
2. from the original fund, at the time of the transfer to the successor fund.

A superannuation income stream commences, in the case of a successor fund that is required to pay superannuation income stream benefits as a result of a successor fund transfer, from a new superannuation interest in the successor fund.

The draft Ruling includes the following new example:

> *Example 7: successor fund transfer – cessation of a superannuation income stream*
>
> *44A. ABC Super and DEF Super funds have agreed to enter a successor fund transfer under which the benefits of members of ABC Super will be transferred to DEF Super.*
>
> *44B. A Deed is prepared by the parties setting out the obligations of both parties under the successor fund transfer. This includes DEF Super providing equivalent superannuation income streams to those*

currently payable to members of ABC Super. The Deed specifies the transfer will occur on 1 August 2023.

44C. On 1 August 2023:

- *the assets supporting superannuation income streams payable to the members of ABC Super, and corresponding obligations, are transferred to DEF Super;*
- *the superannuation income streams cease for income tax purposes for each of the members of ABC Super;*
- *the transfer results in an involuntary roll-over superannuation benefit to DEF Super in respect of each member;*
- *new superannuation income streams commence for income tax purposes from DEF Super to its new members.*

TR 2013/5DC1 applies from 1 July 2007. Comments on the draft Ruling, including in relation to the proposed date of effect, are due by 10 November 2023.

ATO reference *Draft Taxation Ruling* TR 2013/5DC1
w https://www.ato.gov.au/law/view/document?docid=DTC/TR20135DC1/NAT/ATO/00001

4.5 Medical practices and payroll tax in Queensland

On 19 September 2023, Queensland Revenue Office (**QRO**) issued a Public Ruling PTAQ000.6.2 to explain the application of the relevant contract provisions in the *Payroll Tax Act 1971* (Qld) to an entity that conducts a 'medical centre business'. This includes healthcare providers who engage medical, dental and other health practitioners or their entities (**practitioner**) to provide patients with access to the services of Practitioners.

Application of relevant contract provisions to a medical centre business

The Ruling provides that a contract between an entity that conducts a medical centre business and a practitioner is a relevant contract if all the following apply:

1. the practitioner carries on a business or practice of providing medical-related services to patients;
2. in the course of conducting its business, the medical centre:
   (a) provides members of the public with access to medical-related services
   (b) engages a practitioner to supply services to the medical centre by serving patients on its behalf; and
3. an exemption under section13B(2) of the PTA does not apply.

The Ruling confirms that, if a medical centre engages a practitioner to practise from its medical centre, or holds out to the public that it provides patients with access to medical services of a practitioner, it is likely the relevant contract provisions will apply to the contract with the practitioner unless an exception applies.

The Ruling refers to the case of *Commissioner of Taxation v Healius Ltd* [2020] FCAFC 173 to support the position that the medical centre and each practitioner engaged by the medical centre conducts separate but related businesses, with the medical centre providing services and facilities to the practitioners and patients by attracting patients.

Where the contract provides, either expressly or by implication, that a practitioner is engaged to supply work-related services to the medical centre by serving patients for or on behalf of the medical centre, the contract is a relevant contract.

Exemptions from relevant contract provisions

The three exemptions more likely to apply to a contract between a medical centre and a practitioner are:

1. the practitioner provides services to the public generally—s.13B(2)(b)(iv): For this exemption to apply, the practitioner must provide services of the same kind to other principals, such as other medical centres or hospitals. The Ruling confirms that the provision of services to patients for or on behalf of a single medical centre may not satisfy the requirement that services are provided to the public generally. Public Ruling PTA021 sets out in detail when this exemption will apply and the safe harbour method;
2. the practitioner performs work for no more than 90 days in a financial year—13B(2)(b)(iii): If a practitioner performs work under a contract for no more than 90 days during a financial year, the contract is exempt for that financial year. Each calendar day counts as 1 day, regardless of whether the practitioner worked for part of a day. Public Rulings PTA035 and PTA 014 provide further detail on the application of this exemption;
3. services are performed by two or more persons—13B(2)(c)(i): This exemption applies if a medical centre contracts with a practitioner, and the practitioner and at least one other person employed by or who provides services for the practitioner perform the work required under the contract. The work performed by the second person must be work required to be performed under the contract between the medical centre and the practitioner. The exemption does not apply where the second person is engaged by the medical centre or provides general business-related services.

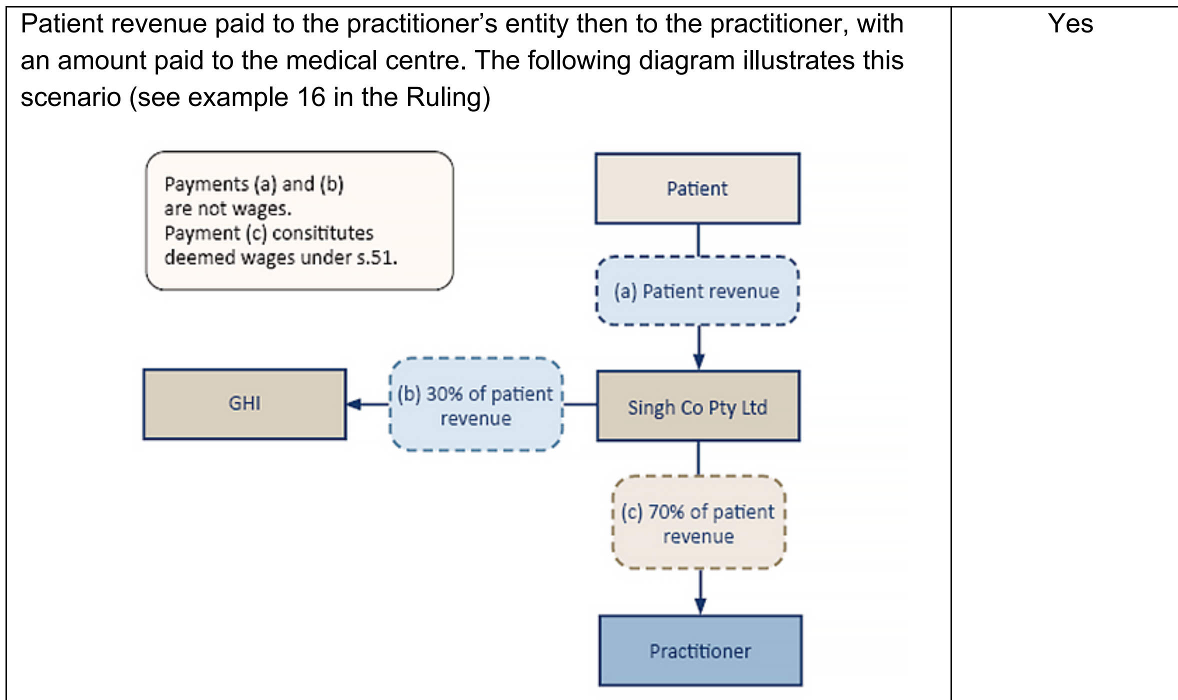
The medical centre business must keep records for up to 5 years which support the claim of the exemption.

Deemed wages – common payment arrangements

The Ruling lists common payment arrangements and identifies whether these common payments to the practitioner are deemed wages under the PTA. The common payment arrangements are as follows:

Payment arrangement	Deemed wages
Medicare benefit assigned by the patient to the practitioner, and any additional out-of-pocket patient fees (‘patient revenue’) paid to the medical centre on behalf of or directed by the practitioner, then payment from the medical centre to the practitioner (net of any administration fee)	Yes
Patient revenue paid to the medical centre on behalf of or directed by the practitioner, then payment from the medical centre to the practitioner’s entity (net of any administration fee)	Yes
Medicare benefit assigned by the patient to the practitioner and paid directly to the practitioner from Medicare	No
Out-of-pocket patient fees paid directly to the practitioner from the patient	No
Patient revenue paid to a third-party entity, then paid from the third-party entity to the practitioner	Yes

© Brown Wright Stein Lawyers 2023

Patient revenue paid to the practitioner's entity then to the practitioner, with an amount paid to the medical centre. The following diagram illustrates this scenario (see example 16 in the Ruling) 	Yes

Other matters

The Ruling confirms that a tenancy contract is not a relevant contract if the practitioner does not supply work-related services to patients for or on behalf of the landlord. In these circumstances, the practitioner must operate their own independent medical practice responsible for such matters as advertising and attracting patients, providing medical services to their own patients, managing patient appointments and records and directly submitting claims for medical benefits to Medicare with Medicare paying those benefits to the practitioner (or the practitioner's entity).

A contract with the administration entity may be a relevant contract depending on the terms and conditions of each contract. Each contract will be considered on a case-by-case basis.

An entity that provides administration services only to practitioners may be grouped with practitioners or the practitioners' entity. This is further explained in Public Ruling PTA017.

Medical centres must keep records that enable their tax liability under the PTA to be properly assessed for a minimum of 5 years after the end of the financial year in which wages were paid or became payable.

Queensland Revenue Office reference, Public Ruling PTAQ000.6.2, *Relevant contracts – medical centres* w https://qro.qld.gov.au/resource/ptaq000-6/

4.6 Exempt foreign employment income

The ATO has made changes to *Taxation Ruling* TR 2013/7 to confirm that a member of the Australian Border Force is not a member of a disciplined force for the purposes of paragraph 23AG(1AA)(d) of the ITAA 1936, as set out in *Willard and Commissioner of Taxation* [2022] AATA 3723.

ATO reference *Taxation Ruling* TR 2013/7 w https://www.ato.gov.au/law/view/document?docid=TXR/TR20137/NAT/ATO/00001

4.7 Aggregated turnover and connected entities – 'control'

The ATO has finalised Taxation Determination TD 2023/5 (which was originally released as draft TD 2023/D2). There are no material changes from the draft version.

TD 2023/5 provides guidance on the following specific issues relating to the concept of 'control' which the Commissioner has to consider in administering the Commissioner's discretion:

1. requests for the exercise of the Commissioner's discretion where a third entity has sole or primary responsibility for day-to-day management of the affairs of the test entity, but holds relatively insignificant or no interests in the income or capital of the test entity, or in shares carrying voting rights (if the test entity is a company); and
2. applications that control percentage interests of between 40% and 50% should be disregarded because the remaining holders of interests in the test entity will together necessarily control the entity, irrespective of their number or relationship to each other.

Sections 328-125(2) and 328-125 (4) of the ITAA 1997 set out the primary tests of control for the purposes of section 328-125, being the calculation of a 'control percentage'. Where an entity (the first entity) holds a percentage of at least 40% of the relevant interests in another entity (the test entity), the first entity is considered to control the test entity for the purposes of section 328-125.

Where the first entity has a control percentage of at least 40% but less than 50%, subsection 328-125(6) provides the Commissioner with a discretion to determine that it does not control the test entity. To make that determination, the Commissioner must consider whether the test entity is controlled by an entity or entities that is not, or does not include, the first entity or any of its affiliates. The language of section 328-125(6) requires the Commissioner to form a view on actual control by reference to all relevant circumstances. It is not sufficient to merely show that the first entity is not a controller.

Relevance of who has responsibility for managing the day-to-day business

The ATO considers that sole or primary responsibility for the day-to-day management of the affairs of the test entity, while not irrelevant, does not of itself constitute control for the purposes of subsection 328-125(6).

Concept of 'control'

The nature of control relevant for the Commissioner's discretion is control over those matters associated with ownership of a business entity. Namely, entitlements to income and capital of the entity, and participation in decision making on key matters affecting the entity's constitution, funding, structure and management.

Control exercised by managers with responsibility for the day-to-day conduct of the business of the entity, in the ATO view, do not of themselves constitute control of the entity. It is necessary to distinguish control of an entity from powers in respect of the conduct of an entity's business.However, the holding of interests carrying rights to more than 50% of the income, capital and voting power in a company is consistent with control of the company for the purposes of section 328-125(6) of the ITAA 1997.

Third entity can hold less than 40% interest

The Commissioner will not accept that an entity's control percentage interest of between 40% and 50% should be disregarded on the basis that the remaining interest holders together necessarily control the test entity, irrespective of their number or relationship to each other. Evidence must show that the group has agreed to operate and operates as a single controlling mind in respect of decision making generally of the test entity.

ATO reference *Taxation Determination* TD 2023/5
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20235/NAT/ATO/00001

© Brown Wright Stein Lawyers 2023

4.8 ACT Revenue updates circular on principal place of residence

On 11 September 2023, the ACT updated its circular on principal place of residence by replacing Gen011.1 with Gen011.2.

The key changes included in the updated circular include:

1. when determining occupancy factors for a principal place of residence, additional factors that will be considered by ACT Revenue Office include the location of employment, where (if relevant) children are schooled, and where the person's relevant social activities are located;
2. in determining the principal place of residence:
   (a) adjacent properties with separate legal titles might be considered as one principal place of residence if they are collectively used as a single dwelling. This could happen, for instance, when the properties are expanded to augment the garden space (excluding separate farmlands) or if two adjacent, independently titled buildings or units have been significantly and legally altered to function as a single dwelling. The mere removal of fences between two individually titled properties or cases where distinct owners possess separate titles does not count as significant modifications;
   (b) possible exemptions could include separate units that have undergone major changes to operate as a single dwelling (that is, not just a mere doorway addition), and continuous land featuring a pool or garden (on the condition there is no separate dwelling on it);
3. the circular considers the various concession schemes that apply in ACT, including first home owners grant, duty and land tax concessions; and
4. the circular adds guidance on the Commissioner's powers to review the residence period. The circular provides that the Commissioner will only review the residence period if specifically requested in writing to do so. The Commissioner will determine whether circumstances put forth are unforeseen – for example, events that render the property uninhabitable (like fire or flood), health related matters of a family member that requires them to live elsewhere, involuntary job transfers, divorce or separation. The ACT Revenue office will not consider the following scenarios as unforeseen: financial difficulties from purchasing the property, or the property not being suitable for the needs of a person (such as property size or family growth).

ACT Revenue Office, *Revenue Circular GEN011.2 'Principal Place of Residence'*
w https://www.revenue.act.gov.au/__data/assets/pdf_file/0003/2278470/GEN011.2-Principal-Place-of-Residence.pdf

© Brown Wright Stein Lawyers 2023

5. Private binding rulings

5.1 Self-education

Facts

On XXXX a person commenced a Master of XX course with a university, consisting of 16 subjects.

On XXXX, the person commenced employment with XXX in role A.

On XXXX, the person started a new secondment role with the same employer (Role B).

The Role B secondment will cease on XXXX, unless extended by mutual agreement. At the cessation of the secondment the person will revert to their substantive position.

The employer supports the employee’s aim to complete the course. They provide study leave to complete exams, flexibility to switch between part time and full-time hours depending on the university schedule.

The employer provided a letter which states: *"This letter is to confirm that the course undertaken by XX will improve the specific skills and knowledge required in her current role B and is likely to result in an increase in income from employment activities."*

The cost of each subject module is $XX. The total course cost will be approximately $XX.

The course fees are being paid using the Higher Education Loan Program (HELP).

Questions

1. Is there an entitlement to claim a deduction for all of the university fees incurred in undertaking a Master of XX course?
2. Is there an entitlement to claim a deduction for a portion of the university fees incurred in undertaking a Master of XX course?

Ruling

The ATO ruled that the fees would not be deductible in full, but that the fees for certain subjects would be deductible.

The ATO noted that if a taxpayer's current income-earning activities are based on the exercise of a skill or some specific knowledge and the self-education enables the taxpayer to maintain or improve that skill or knowledge, the self-education expenses are allowable as a deduction.

In addition, if the study of a subject of self-education objectively leads to, or is likely to lead to, an increase in a taxpayer's income from his or her current income-earning activities in the future, the self-education expenses are allowable as a deduction.

The ATO then further set out that, no deduction is allowable for self-education expenses if the study is designed to enable a taxpayer to open up a new income-earning activity, whether in business or in the taxpayer's current employment.

The ATO considered that the Master of XX course will maintain or enhance the skills that are required in the performance of the current Role B. Therefore, a deduction is allowed for course fees incurred for self-education whilst in this particular role.

© Brown Wright Stein Lawyers 2023

The ATO considered the person had demonstrated that there is a sufficient connection between some of the subjects of study and your current income earning activities in Role B. The ATO noted that if the person ceases to be employed in Role B, the subjects may not be deductible.

The ATO stated that they had identified ten subjects as being not deductible as they were not satisfied these subjects have the necessary nexus to employment. These are strategic subjects are more suitable for managers and leaders. These subject expenses are incurred at point too soon as the person was not being employed in a management or leadership role.

The ATO then further noted that they were not able to establish the necessary nexus in relation to Role A. They accepted that the course may lead to being generally 'better' at Role A and that it may broaden the person's knowledge of the principal areas of their work. However, the ATO considered that the person had not objectively shown that there is a sufficient connection between any subjects of the course and Role A. Whilst a general link can be made, the ATO do not consider that the course, in its entirety, forms an integral part of the core responsibilities in Role A.

ATO reference *Private Binding Ruling Authorisation No. 1052153770015*
w https://www.ato.gov.au/law/view/document?docid=EV/1052153770015

5.2 Self education

Facts

A person discussed working and studying an MBA with Employer B when they were interviewed on XX X 20XX, after this they appear to have enrolled in the MBA course.

They obtained employment with Employer A as a Study Manager on a temporary basis in X 20XX and then changed employment on XX X 20XX with a position obtained via XX Labour Agency with Employer B.

The duties of the past position and the present position are the same.

The duties are as follows:

- Project management, operational improvement methodologies related to large scale operations.
- Organisational Behaviour, organising and reorganising structure of your company and dealing with Personnel management issues, personal motivation the structure and restructuring to deal with problems.
- Strategic level decision making
- Dealing with strategic level work and decisions and setting and developing business cases on projects you lead.
- Project Financial analysis
- Corporate reporting and decision making at a corporate level
- Corporate level analysis.

Employer B supported the MBA by allowing the person to work remotely and flexibly so that the person could study.

The role as a study manager aligns very closely to all the units of study being undertaken at The University.

All units of study are closely linked to the current duties as a study manager where the person requires leadership skills and people management skills along with skills to initiate large projects and teams that require the use of diverse stakeholder engagement.

© Brown Wright Stein Lawyers 2023

Included with the private ruling application was additional information regarding the units of study and how each of them related to income earning activity as a Study Manager.

The following costs will be incurred to complete the MBA:

- Tuition
- Accommodation while in the Country A
- Cost of flights to and from the Country A
- Meal costs
- iPad case pen and ear plugs

On completion of the studies, the person hopes to have a role in a similar field to what they currently have but at a more Senior level with an increased salary to match these skills.

Questions

1. Is a deduction available for course fees expenses incurred in association with completing a MBA at The University?
2. Is a deduction available for airfares incurred in association with completing a MBA?
3. Is a deduction available for accommodation expenses incurred in association with completing an MBA?
4. Is a deduction available for meals expenses incurred in association with completing an MBA?
5. Is a deduction available for in country sim card., vaccinations and health insurance incurred in association with completing an MBA?
6. Is a deduction available for iPad, case, pen, stationery and earplugs for lectures incurred in association with completing an MBA?

Ruling

The ATO ruled 'YES' in relation to all of the items excepting question 5 concerning the sim card, etc.

The ATO accepted that the course will maintain or enhance the skills that the person requires to perform their duties as a lead knowledge analyst. Consequently, the self-education expenses incurred while the person was employed by employer B, a mining company, have the necessary and relevant connection to derivation of assessable income.

In relation to the course the ATO considered that MBA will provide support for the person to undertake projects management, operational improvement methodologies related to large scale operations.

The Organisational Behaviour unit of study provides information on personal motivation and how organisations can structure and restructure to deal with problems.

The unit Strategic Advantage focuses on strategic level decision making which the person is currently dealing with, strategic level work and decisions and the unit of study provides a framework for setting and developing business cases on projects the person leads.

The MBA also provide financial analysis fundamentals which the person uses extensively in their role as Study Manager. The unit Corporate Reporting and Decision Making enhances the level of understanding of corporate level analysis as distinct from project level analysis

All units of study are closely linked to the person's current duties as a study manager where they require leaderships skills and people management skills along with skills to initiate large projects and teams that require the use of diverse stakeholder engagement.

The reason that the ATO denied the cost of vaccinations and health insurance is that they considered the expenses private in nature. It is not clear why the sim card cost was denied.

© Brown Wright Stein Lawyers 2023

TIP – both PBRs highlight the need, in the ATO view, to focus on each individual course taken as part of a larger course of study to determine deductibility. They also show that the ATO will take into account employer support for a field of study favourably.

ATO reference *Private Binding Ruling Authorisation No. 1052155613202*
w https://www.ato.gov.au/law/view/document?docid=EV/1052155613202

5.3 15-year retirement exemption

Facts

D MM YY the Taxpayer entered into a franchise agreement, which granted the Taxpayer the right to develop and promote "DD" trademark and service mark in the geographical area in which it carried on business.

The franchise agreement was then renewed continuously for the period to DD MM YY.

The business known as "EE" traded uninterrupted at all times from the commencement of the business on DD MM YY through to the completion of the deed of surrender on DD MM YY (the Trading period).

For the Trading period, the Business operated as EE and did not use any other marks or intellectual property not related to the trademark and service mark.

The outlet licence is a part of the franchise agreement.

At clause D, for consideration, the franchisee wishes to surrender the agreements (meaning the franchise agreement and the outlet licence) prior to the end of the term.

Question

Has the taxpayer continuously owned the right to operate the franchise business for a 15 year period so that the 15-year retirement exemption might be available?

Ruling

The ATO considered the right had been owned for the required 15-year period.

The ATO noted that for the 15-year retirement exemption to be available, the taxpayer must have continuously owned the business asset for the 15-year period ending just before the franchise agreement was surrendered.

The ATO accepted that that the rights, obligations and other terms of the franchise agreement have remained substantively consistent over the 15 year period and that no new obligations or rights of any substance have been conferred or withdrawn. Consequently, it was the Commissioner's view, based on a holistic view of the facts, that in this particular instance the right to operate the franchise business has been continuous for the 15 year period - relevantly in these circumstances Franchise Agreement A and later franchise agreements are merely extensions of the original, noting:

- The terms of the franchise agreement have remained effectively unchanged since 17 March 1983, which supports the view that both parties intended for the franchise agreement to simply be extended. The taxpayer's rights under the franchise were acquired and have been continuously extended since DD MM YY on effectively the same terms and conditions.
- The Franchise Agreements at 'Part O: End of Agreement' provide that when the agreement ends, amongst other things, the franchisee must cease using the know how etc. return materials relating to know how etc. In that case, at the end of each agreement the taxpayer should have ceased using and returned know how

etc. Other than under the Deed, the Trustee has never acted on or been required to act on this clause of the franchise agreements.

- The nature of the correspondence between the parties suggests that there is an expectation the franchise agreement will remain in place unless the taxpayer is informed that the franchiser has decided not to continue with the agreement.
- This intention to extend the original franchise agreement rather than create an entirely new agreement is also reflected in the taxpayer's actions and the fact that the taxpayer has never reported a CGT event C2 in previous years, which would be expect if the trustee saw the agreement renewal as a new asset at the commencement of the next franchise period.

ATO reference *Private Binding Ruling Authorisation No. 1052144948812*
w https://www.ato.gov.au/law/view/document?docid=EV/1052144948812

6. ATO and other materials

6.1 Communication protocol for ATO objections

On 13 September 2023, the ATO released *Practice Statement Law Administration* PS LA 2023/2 Communication protocols governing ATO objections, which that sets out the framework for communications between ATO objection officers and officers involved in the original decision.

In PS LA 2023/2, the ATO states that the overarching principles are to focus on ensuring fairness and improving the taxpayer's experience during the objection process. Objection officers should aim to be open and transparent, and to provide a fair and impartial review of the relevant decision, independent from the original decision maker.

PS LA 2023/2 notes that the objection officer should ensure consistency and coherence in applying tax and superannuation laws, and are expected to take steps to be as informed as possible on the relevant facts, circumstances and supporting evidence.

When reviewing an earlier ATO decision, PS LA 2023/2 states that the objection officer should act in accordance with the following obligations:

1. the officer should not have been involved in the original decision making process;
2. the officer should maintain independence and can discuss the original decision with the decision-maker, but the original decision-maker should not interfere in the objection determination;
3. the officer may consult within the ATO to gather expertise and ensure alignment with the Commissioner's view; and
4. the officer should manage communication and engagement with other ATO officers involved in the original decision while upholding independence.

PS LA 2023/2 also states that, prior to the objection process, the evidence and reasons behind the original decision should have been provided to the taxpayer. This information is part of the case records and accessible to the objection officer. Generally, these documents should be sufficient for understanding the original decision. However, the objection officer may contact the original decision-maker for more information.

If new information arises during the objection process, the objection officer should try and understand why the information was not presented earlier. This new information can be shared with the original decision-maker. Discussions between the objection officer and the original decision-maker should revolve around how the new information would have affected the original decision.

The objection officer may seek advice within the ATO, including from relevant panels or external advisors.

During the objection process, the original decision-maker and other officers involved in the original decision should engage with the objection officer as needed but should refrain from influencing the objection decision. The taxpayer should be informed about discussions with the original decision-maker.

The original decision-maker should discuss the basis and context of the original decision when requested by the objection officer. The original decision-maker should ensure information shared with the objection officer is fair, objective, evidence-supported and complete. Generally, the original decision-maker should avoid unsolicited contact with the objection officer.

The original decision-maker should also keep case records updated and provide any additional relevant documentation or evidence.

© Brown Wright Stein Lawyers 2023

There are limited circumstances in which a modified approach to communication between objection officers and those involved in the original decision may be justified. These circumstances include:

1. cases where there was no earlier ATO decision (self-objection);
2. when time constraints, complexity, and legal requirements necessitate the original decision-maker's involvement;
3. if the taxpayer requests the continued involvement of original decision-makers to expedite the objection process; or
4. when a new audit on the same issue arises during the objection process, requiring collaboration between objection officers and those involved in the new audit.

ATO reference *Practice Statement Law Administration* PS LA 2023/2
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20232/NAT/ATO/00001#H2

6.2 Excise return lodgements

The ATO has made minor updates to Practice Statement Law Administration PS LA 2011/15 as result of changes to the *Excise Act 1901* which came into effect on 1 July 2023.

A periodic settlement permission (**PSP**) allows an entity to deliver excisable goods for a specified period (**settlement period**) and to defer lodging an excise return and paying excise duty until the due date specified in the PSP.

Previously, a PSP could specify a settlement period as being either a recurring 7-day period or as a calendar month. Now, a PSP may specify a settlement period as a quarter, provided that:

1. the goods are classified to items 1, 2, 3, 10, 15, 20 or 21 of the Schedule to the *Excise Tariff Act 1921* (Cth); and
2. the person is an eligible business entity.

The due dates for lodgement of the excise return and payment of excise duty are, if the entity is an eligible business entity and the PSP applies in respect of a quarter:

1. for a quarter ending on 31 March, 30 June or 30 September - the 28th day after the end of the quarter; and
2. for a quarter ending on 31 December - the 28th day of the February after the end of the quarter.

ATO reference *Practice Statement Law Administration* PS LA 2011/15
w https://www.ato.gov.au/law/view/document?docid=PSR/PS201115/NAT/ATO/00001&PiT=20230920000001

6.3 Deceased estate tax liabilities

On 27 September 2023, the ATO released draft Practical Compliance Guideline PCG 2018/4DC1 (**Guideline**) to make changes to the original PCG. This is a draft consolidation outlining proposed changes to PCG 2018/4 to uplift the threshold for the market value of estate assets to $10 million and to include additional examples to provide greater certainty to legal personal representatives of the deceased in distributing estate assets.

The purpose of the Guideline is to enable certain legal personal representatives (LPRs) of less complex estates to finalise the estate before the expiration of the relevant period of review without concern that they may have to fund an outstanding tax liability of a deceased person from their own assets.

The Guideline also sets out when an LPR will be treated as having notice of a claim by the ATO.

© Brown Wright Stein Lawyers 2023

An LPR may have to meet a deceased's liabilities personally where the LPR is considered to have notice of any such amounts that the deceased owed to the ATO at the date of their death. Such liability may relate to either an assessment or an amended assessment that is made after the death of the deceased person.

A deceased person's estate is considered less complex if:

1. in the 4 years before the deceased person's death, they:
   (a) did not carry on a business;
   (b) were not assessable on a share of the net income of a discretionary trust;
   (c) were not a member of a self-managed superannuation fund,
2. the assets of the deceased estate consist only of:
   (a) public company shares or other interests in widely-held entities;
   (b) death benefit superannuation;
   (c) Australian real property;
   (d) cash and personal assets such as cars and jewellery,
3. the total market value of the assets of the deceased estate at the date of the deceased person's death was less than $10 million; and
4. none of the assets of the deceased estate are intended to pass to a foreign resident, a tax-exempt entity or a complying superannuation entity.

It is a question of fact whether the LPR has notice of a claim by the ATO.

The ATO considers that because an LPR 'stands in the shoes of the deceased person', the LPR has notice of any amount that the deceased owed to the ATO at the date of their death.

Similarly, the ATO considers that an LPR has notice of any outstanding tax-related liabilities arising from the assessment of income tax on returns that the deceased person had lodged, but that had not been issued at the time of the deceased person's death.

Where the ATO has decided to review or examine the affairs of a deceased estate, it will notify the LPR. The LPR will have notice of liabilities that may arise from the review.

The ATO will treat an LPR as not having notice if:

1. the LPR acted reasonably in lodging all of the deceased person's outstanding returns; and
2. the ATO has not given the LPR notice that it intends to examine the deceased person's taxation affairs within 6 months from the lodgment (or advice of non-lodgment) of the last of the outstanding returns by the LPR.

ATO reference, *Practical Compliance Guideline PCG 2018/4DC1*
w https://www.ato.gov.au/law/view/document?docid=DPA/PCG20184DC1/NAT/ATO/00001

6.4 Queensland extension to payroll tax amnesty

The Queensland Government is providing a payroll tax amnesty on payments made to contracted general practitioners (GP's) until 30 June 2025.

Medical practices that successfully apply for the amnesty will not be required to pay payroll tax on payments made to contracted GPs up to 30 June 2025 and for the previous 5 years.

The amnesty is not available for:

1. contracted GP's where an exemption applies;
2. GP's who are common law employees;

3. other medical doctors or allied health professionals; and
4. other types of contractors.

To be eligible, the medical centre business needs to complete an expression of interest form by 10 November 2023. This is the extended date, the original deadline was 29 September 2023.

Medical centre businesses have until 30 June 2025 to make a voluntary disclosure and register for payroll tax. The voluntary disclosure must contain information for the Commissioner to assess the eligibility for the amnesty and payroll tax obligations.

Medical centre businesses must continue to meet their payroll tax obligations, for example by lodging returns.

w https://qro.qld.gov.au/payroll-tax/liability/contractor-payments/amnesty/

6.5 Requesting lodgment deferrals

The lodgment deferral function in Online services for agents was launched on 21 April 2023 and is now the only way to request lodgment deferral forms. The deferral function can be accessed under the 'Reports and forms' menu.

The ATO state that if a request meets agent-assessed or new or re-engaged client guidelines then a response should be received within 48 hours.

The ATO has removed phone deferrals and is now taking the final step to decommission the old process. The ATO will remove ATO-assessed, agent-assessed, and new or re-engaged lodgment deferral mail subjects from Practice mail in Online services for agents. From 1 October 2023, the option to submit spreadsheet application forms for processing will no longer be available.

The ATO has provided information and instructional videos which can be accessed here:

1. applying for a lodgment deferral - https://www.ato.gov.au/Tax-professionals/Prepare-and-lodge/Lodgment-program-deferrals/Applying-for-a-lodgment-deferral/?anchor=Howtoapply#Howtoapply
2. online services for agents user guide - https://www.ato.gov.au/Tax-professionals/digital-services/In-detail/Online-services-for-agents-user-guide/?page=11#Lodgment_deferrals

w https://www.ato.gov.au/Tax-professionals/Newsroom/Lodgment-and-payment/The-only-way-to-request-lodgment-deferrals/

6.6 Charging GST correctly on food and breakfast products

The ATO updated its website on 12 September 2023 in relation to GST on food and breakfast products.

The ATO reminds taxpayers that GST applies to food products that consist principally of seeds or nuts that have been processed or treated by salting, spicing, smoking or roasting, or a similar process. These are a taxable supply and specifically excluded from being GST-free.

While breakfast cereals are GST-free, products that mainly consist of roasted nuts or seeds are not. This means GST applies to breakfast products that consist of more than 50% of roasted nuts, even if the product is called a breakfast cereal.

© Brown Wright Stein Lawyers 2023

The ATO encourages taxpayers to regularly check that they are charging GST correctly on these products. If taxpayers haven't charged GST previously, they should make a voluntary disclosure or speak with a registered tax professional.

The ATO will not apply penalties or unfavourable adjustments where taxpayers follow the ATO approved classification guidance on the National Product Catalogue (formerly GS1net).

w https://www.ato.gov.au/Business/Small-business-newsroom/GST-and-excise/Are-you-charging-GST-correctly-on-food-and-breakfast-products-/

6.7 ATO to issue unclaimed super notices

From 1 September 2023, the ATO will be issuing Section 20C notices for the period 1 January to 30 June 2023, with a due date of 31 October 2023.

The Commissioner must issue notices under section 20C of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* to superannuation providers if the Commissioner is satisfied that there are reasonable grounds for believing that a particular person has a superannuation interest in the fund and the person is a former temporary resident. The super benefit of a former resident becomes unclaimed when the person has departed Australia but has not claimed their benefit from their super provider within a specified period of time.

Requests for lodgement and payment deferrals for any component (i.e. small lost members or former temporary residents) are required before lodging any other unclaimed superannuation money statements for that period.

Where a superannuation provider believes an individual was incorrectly identified as a former temporary resident, a revocation request should be lodged as soon as possible.

w https://www.ato.gov.au/Super/Super-funds-newsroom/CRT-Alerts/CRT-Alert-004-23/

6.8 ATO CGT reminder

ATO Assistant Commissioner Tim Loh said the ATO is seeing mistakes made where people are incorrectly claiming the full main residence exemption when selling their home. A main residence will not be fully exempt from CGT if the main residence has been used to:

1. produce income (such as renting out all or part of the main residence through the sharing economy or through Airbnb or Stayz); or
2. run a business from the main residence.

The ATO warns taxpayers against avoiding CGT as the ATO has access to a range of data from external sources, with more than 600 million transactions reported annually. Further, the ATO receives data from State and Territory property titles offices and revenue agencies, crypto asset exchanges and share registries.

w https://www.ato.gov.au/Media-centre/Media-releases/Capital-gains-don-t-need-to-cause-strains/

© Brown Wright Stein Lawyers 2023

6.9 ATO Decision Impact Statement - Dals Property Trust and Commissioner of Taxation

On 27 September 2023, the Commissioner of Taxation issued a decision impact statement in relation to the case of *Domestic Property Developments Pty Ltd and Commissioner of Taxation* [2022] AATA 4436.

The case concerned a property developer, Domestic Property Developments Pty Ltd as trustee for the DALS Property Trust who rented 2 units (Units 1 and 3) in a newly-constructed development to tenants for a period of approximately 5 years before the units were sold. Unit 1 advised for sale during the 5 year period. It appeared that Unit 3 was rented continuously for 5 years prior to the sale.

In 2017, DALS remitted amounts of GST, calculated under the margin scheme, on the sale of Unit 1 and Unit 3. On 12 October 2021, DALS considered that it made an error and lodged an objection against assessments of the net GST amounts on the basis that the sales of the 2 units were input taxed, and the matter proceeded to the AAT after the objection was disallowed.

Having considered the ordinary meaning of the term 'used', the AAT found that actively marketing Unit 1 for sale in the course of a developer's enterprise was a 'use' for the purposes of paragraph 40-75(2)(a). As such, the AAT held Unit 1 was not an input taxed supply.

The AAT also held that the 5 years requirement must be a continuous period of 5 years, due to the reference to '***the*** period of at least 5 years…' (emphasis added).

The AAT made a comment that, for Unit 1 to be an input taxed supply, Unit 1 would have to be only used to make input taxed supplies since the issue of the certificate of occupancy. No reasoning was provided as to why the 5-year period is to commence from the date of the certificate of occupancy.

The AAT also considered the judgment of *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29 which held that where taxpayers have priced a produce to ensure they make a profit, it will be difficult for the taxpayer to prove that they have borne the GST burden. Given DALS sold Unit 1 and Unit 3 on arm's length terms and for profit, the AAT found that DALS did not prove that excess GST was not recovered in the selling prices of those units.

The Commissioner considers that the AAT's decision is consistent with the Commissioner's views in GST Ruling *GSTR 2009/4 Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose*, which provides that actively marketing a property for sale would be a use for the purposes of section 40-75(2)(a). The Commissioner accepts that the term 'used' is to be interpreted by reference to its ordinary meaning within the statutory context of the GST Act and will considering changes required to GSTR 2009/4 to clarify this position.

The Commissioner further notes that actively marketing a property for sale would also be an application for GST adjustment purposes.

The Commissioner also considers that the AAT's decision is consistent with the Commissioner's views that section 40-75(2)(a) requires a continuous period of 5 years.

Regarding AAT's comment on when the 5-year period commences, the Commissioner considers that the 5-year period can be any continuous period of 5 years, and does not have to commence from the date from which the premises first become residential premises.

On the passing on issue, the Commissioner considers that the AAT's decision is consistent with his views set out in GST Ruling *GSTR 2015/1 Goods and services tax: the meaning of the terms 'passed on' and 'reimburse' for the purposes of Division 142 of the A New Tax System (Goods and Services Tax) Act 1999*.

© Brown Wright Stein Lawyers 2023

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/2021/3014/00001

6.10 Taskforce action on electronic sales suppression tools

The Serious Financial Crime Taskforce has become aware of businesses using electronic sales suppression tools (ESSTs) to under report taxable income.

The Serious Financial Crime Taskforce has observed:

1. businesses supplying and using ESSTs or software to avoid paying tax;
2. businesses connecting ESSTs to point-of-sale systems to:
   (a) permanently delete, re-sequence or misrepresent transactions;
   (b) reduce sales values;
   (c) produce fake tax records;
3. ESSTs taking the form of cloud-based software and linking to domestic offshore payment options.

It has been illegal to produce, supply, possess, use or promote ESSTs in Australian since October 2018. The Serious Financial Crime Taskforce is warning businesses against ESSTs. The Serious Financial Crime Taskforce has warned that operators may market ESSTs to small business owners as an 'all-in-one complete business solution' with low commissions, website presence and an online ordering tool. Any business caught using ESSTs will be dealt with the full force of the law.

The Serious Financial Crime Taskforce will identify these businesses using:

1. intelligence and data on lifestyle indicators;
2. bank information;
3. small business benchmarks; and
4. tip-offs from the community.

Any businesses currently using ESSTs are encouraged to make a voluntary disclosure to attract potentially reduced penalties rather than wait for the Serious Financial Crime Taskforce to contact the business.

Any person or businesses involved in producing, supplying, possessing, using or promoting ESSTs or software can be reported by completing an ATO tip-off form online or by phoning the hotline on 1800 060 062.

w https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Serious-Financial-Crime-Taskforce/Taskforce-action-on-electronic-sales-suppression-tools/

6.11 Where to access depreciation effective life information

As a result of recent consultation, the ATO will now publish on the ATO website the content of the rulings explaining the facts to be considered when making determination of the effective lives for certain depreciating assets.

Determinations will still be published in the legal database.

Taxpayers can still rely upon the determination in T*R 2022/1 Income tax: effective life of depreciating assets* for income year ending 30 June 2023 tax returns.

w https://www.ato.gov.au/Business/Business-bulletins-newsroom/General/Where-to-access-effective-life-information/

© Brown Wright Stein Lawyers 2023

6.12 Appointing a person as a trustee, or a director of a trustee, of a SMSF

The ATO has published a document on their website confirming that any person who becomes a trustee of a SMSF, or becomes a director of a trustee of a SMSF, must:

1. be eligible to be a trustee or a director; and
2. understand the responsibilities of being a trustee or a director.

To be eligible to be a trustee of a SMSF or a director, a person must be at least 18 years old, not under a legal disability (such as mental incapacity) and not be a disqualified person.

The document includes a simple checklist to determine if a person is a disqualified person.

If a person is disqualified from being a trustee of a SMSF or a director, provided the disqualification was not an offence involving serious dishonest conduct, the person may apply to the ATO for a waiver of disqualified status.

w https://www.ato.gov.au/Super/Self-managed-super-funds/Setting-up/Appoint-your-trustees-or-directors/

6.13 ATO response to superannuation non-compliance

The ATO has published a document on their website which sets out the responses that trustees of SMSFs can expect from the ATO if they do not comply with superannuation laws.

The document:

1. includes advice around what should be included in an enforceable undertaking and what will be considered when deciding whether or not to accept the undertaking;
2. includes information about rectification directions;
3. sets out the administrative penalties that individual trustees and directors of corporate trustees are personally liable to pay if they contravene provisions of the SIS Act;
4. confirms that members who illegally access their super without meeting a condition of release will have the accessed amount included in their assessable income, irrespective of whether they repay the accessed amount to the fund later;
5. confirms, depending on the severity of the contravention, the ATO may:
    (a) disqualify an individual from acting as a trustee or director of a corporate trustee;
    (b) apply through the courts for civil or criminal penalties to be imposed;
    (c) wind up the SMSF and roll over any remaining benefits to an APRA regulated fund;
    (d) issue the SMSF with a notice of non-compliance;
    (e) give a trustee or investment manager a notice to freeze an SMSF's assets.

w https://www.ato.gov.au/Super/Self-managed-super-funds/Administering-and-reporting/How-we-help-and-regulate-SMSFs/How-we-deal-with-non-compliance/

6.14 Revenue NSW gig economy payroll tax

Revenue NSW has released information in relation to the payroll tax implications for gig economy businesses on its website.

Revenue NSW notes that the 'gig economy' is a business model where individual workers provide services to customers for a fee via digital platforms. This model generally involves three parties:

© Brown Wright Stein Lawyers 2023

1. the Platform Operator, which provides and operates the digital platform;
2. the Gig Worker, who provides personal services to Customers through the digital platform; and
3. the Customer, who receives the services of the Gig Worker via the digital platform.

Revenue NSW considers three ways this model may give rise to a payroll tax liability:

1. a Gig Worker can be an independent contractor as they provide services to both the Customer and the Platform Operator. The relevant contract provisions may apply to these arrangements, with the effect that, unless an exemption applies, any amounts paid or payable by the Platform Operator to the Gig Worker for the performance of work relating to a relevant contract are taken to be wages for payroll tax purposes;
2. a Gig Worker can be a common law employee, in which case payments made by the Platform Operator to the Gig Worker would be subject to payroll tax;
3. a Platform Operator can be an employment agent that procures the services of a Gig Worker for a Customer. Where the employment agency provisions applies, payments made by the Platform Operator to the Gig Worker may be taken to be wages and subject to payroll tax.

w https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/payroll-tax/your-industry/gig-economy-businesses