The Tax Institute

Tax Update

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1. Tax Update Pitstop

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

Tax Update Matter	Impact Summary	Further Detail
Tawfik	The Administrative Appeals Tribunal has found in favour of the Commissioner of Taxation concerning the timing of derivation of a bonus payment for an employee.	Page 6
Makrylos	The Federal Court has found against a taxpayer's contention that he acquired land not for the purpose of sale. The case examines the nature of the taxpayer's onus and the factors that will damage a taxpayer's credibility.	Page 10
Williams	The Supreme Court of Queensland has held that a binding death benefit nomination was not validly made as it was only given to one of the two trustees of the fund.	Page 17
Payroll tax and health care practices	Revenue NSW and the Victorian State Revenue Offices have issued rulings concerning the application of payroll tax to health care practice arrangements. The NSW Parliament has also passed legislation providing for a pause on collection of payroll tax in relation health care practice arrangements for 12 months.	Pages 29 and 34
Employees guide for work expenses	The ATO has updated its employees guide for work expenses to incorporate recent developments.	Page 52

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2. Cases

2.1 Tawfik – deriving income from bonus payments

Facts

Magued Tawfik was employed in Kuwait. At the time of Magued's employment, he was receiving a monthly salary and was not an Australian resident.

In the first week of February 2017, Magued became entitled to a 'milestone bonus', in that it fell due for payment. The bonus was in addition to his salary.

Magued's employer was unable to pay the bonus when it became due. Instead, Magued's employer paid his bonus by way of three instalments as follows:

1. $41,274 on 23 January 2018;
2. $43,730 on 2 July 2018; and
3. $44,377 on 3 July 2018.

Magued was an Australian resident by the time the instalments of the bonus were paid to him.

Section 6-5(2) of the ITAA 1997 provides that the assessable income of an Australian resident:

> *… includes the *ordinary income you *derived directly or indirectly from all sources, whether in or out of Australia, during the income year.*

Section 6-5(4) of the ITAA 1997 states that:

> *In working out whether you have derived an amount of *ordinary income, and (if so) when you derived it, you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf.*

Magued did not include the bonus payments in his income for the income years ended 30 June 2018 and 30 June 2019 on the basis that he was legally entitled to receive the bonus payments prior to becoming an Australian tax resident.

The Commissioner considered that the payments were derived by Magued when he received them. Magued argued that the bonus should be brought to account either when he performed the work to which the bonus related or when he became legally entitled to receive the bonus.

The Commissioner issued Magued with notices of amended assessment which brought the first instalment to account as assessable income in the income year ended 30 June 2018 and brought the second and third instalments as assessable income in the income year ended 30 June 2019.

Magued objected to the notices of amended assessment. Magued argued he:

1. was a non-resident when the income was earned and it was not his fault that the bonus was not paid to him when it became due and payable. To that end, Magued complained he was being 'punished';
2. did not hide the source of the bonus payments. Magued noted he could have directed the payments to an account he maintained in Kuwait and then transferred it to his Australian bank account as 'savings'; and

3. provided all information relevant to the circumstances surrounding the payments to the Commissioner so it was not right for the Commissioner to make submissions to the effect that he had not discharged the burden of proving the assessments were excessive.

The Commissioner disallowed the objections. Magued applied to the AAT for review of the objection decision.

Issue

Did Magued derive the bonus payments when they were earned or upon receipt?

Decision

The AAT referred to the High Court in *Commissioner of Taxes (SA) v Executor Trustee and Agency Co. of South Australia* (1938) 63 CLR 108 (**Carden's Case**), which established the following principles:

1. the determination of whether a method of accounting for derivation of income is appropriate requires inquiry into whether, in the circumstances of the case, it is calculated to give a substantially correct reflex of the taxpayer's true income; and
2. the object is to discover what gains during the accounting period have come home to the taxpayer in a realised or immediately realisable form.

The above principles result in employee remuneration, and other income which is in substance a reward for professional skill or personal work, being treated as derived upon receipt. This is distinguishable from a trading or manufacturing business where the accruals or earnings basis is appropriate to reflect of the income derived in a period.

In keeping with the principles in *Carden's Case,* Senior Member Olding found that the bonus payments were derived upon receipt. Senior Member Olding also noted that neither party was able to identify a single case in which any form of employee remuneration was brought to account on an earnings basis rather than receipts basis.

The objection decision was affirmed.

COMMENT – the taxpayer was self-represented in this case. The fact that the work that led to the payments was done outside of Australia should lead to the income being foreign sourced employment income, but the provision that exempts foreign employment income, section 23AG of ITAA 1936, is extremely limited in scope. Accordingly, this was just a case where a resident derived income at a time when the taxpayer was assessable on their worldwide income in Australia.

The outcome would be different if the taxpayer was a temporary resident, as, although foreign employment income is still assessable to a temporary resident, this is only the case where the income relates to employment undertaken, or services rendered, while the person is a temporary resident.

TIP – the outcome may have been different in this case if the taxpayer had agreed to leave the amounts owed to him in February 2017 with his employer, as this would arguably have resulted in him constructively receiving the amount for the purposes of section 6-5(4) of ITAA 1997.

COMMENT – the taxpayer in this case pointed out to the Tribunal that, had the amount been a termination payment, section 82-235 of the ITAA 1997 would have exempted the receipt, and so the 'spirit' of the law was that the amount should not be taxed. The Tribunal did not consider whether the payment could have also been considered to be a termination payment.

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Citation *Tawfik and Commissioner of Taxation (Taxation)* [2023] AATA 2541 (Senior Member R Olding, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2541.html

2.2 Bains – income according to ordinary concepts

Facts

In 2001, Jaswinder Bains and his wife acquired a 'perpetual' taxi licence (**First Licence**) for $280,000, funded by way of bank loan secured against their family home.

Jaswinder did not drive a taxi under the First Licence but, instead, provided a vehicle to third party drivers to operate under the First Licence.

In 2006, Jaswinder and his wife acquired a second licence (**Second Licence**) for $385,000 funded by a further bank loan secured against their family home. The Second Licence was also operated by third party drivers until 2013. From 2013, Jaswinder commenced operating under the Second Licence.

In 2010, Jaswinder acquired a third licence (**Third Licence**), being a 10-year fixed term licence for $180,000, funded by a further bank loan. Jaswinder also operated this licence.

In 2016, Jaswinder received a payment of $62,500 from the Victorian Taxi Reform Hardship Fund.

In about 2017, Jaswinder also received three Transitional Assistance Payments from the Victorian Government, totalling $183,750.

By letter dated 25 February 2018, Jaswinder received notification of approval by the Department of Economic Development, Jobs, Transport and Resources of a further payment of $250,000 from the Victorian Taxi Reform Hardship Fund (the **Payment**). No reasons were provided for how the relevant eligibility criteria were satisfied by Jaswinder.

An information notice regarding the Victorian Taxi Reform Hardship Fund sets out the eligibility criteria as follows:

> ***Who will be eligible?***
>
> *People who had an ownership interest in a taxi or hire car licence at any time in the period 1 January 2016 to 23 August 2016 and who are facing significant financial hardship as a result of the proposed reforms may qualify for an assistance payment where any or all of the following can be demonstrated:*
>
> - *A lack of current income or the loss of a future income stream that is significantly impacting on household spending capacity*
> - *Significant difficulty in meeting ongoing debt obligations related to the licence(s) held*
> - *A lack of available funds to meet financial commitments…*

On 6 March 2018, Jaswinder received the Payment. It appears that the criteria used to determine whether Jaswinder was eligible to receive the Payment took into account an ‘asset test’ comparing the difference between annual income, an income test threshold plus 50% of net debt, an ‘indebtedness test’ looking at 50% of net debt and a ‘mortgage test’. The Payment was calculated under the asset test.

Jaswinder exited the taxi industry in about June 2018.

The Commissioner assessed the Payment as assessable income according to ordinary concepts.

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Jaswinder appealed to the AAT.

The Commissioner submitted that the Payment was received in the ordinary course of Jaswinder's taxi business as he remained in business at the time the payment was received. The Commissioner cited *Berghofer v Commission of Taxation* [2008] AATA 1138, a case where the Queensland Government had passed legislation restricting the clearing of land. Berghofer had applied for a grant from a fund created to provide assistance to farmers affected by the restrictions, and received a grant to construct a dam. The grant was made on the condition that he incur expenditure on the dam prior to receiving the grant. The Commissioner noted a comment in the Berghofer decision concerning the grant: '*It represented a profit or gain made by Mr Berghofer in the course of his business. The occasion for the payments was unusual, but that does not mean that it was not received in the ordinary course.'*

Issue

Is the Payment income according to ordinary concepts?

Decision

The AAT considered that in the case of voluntary payments such as the Payment, it is necessary to determine what the payment is for: *Federal Commissioner of Taxation v Rowe* [1997] HCA 16.

The AAT considered in determining what the payment was for relevant considerations included:

1. whether or not a particular receipt is income depends upon its quality in the hands of the recipient;
2. the motives of the donor may be relevant but are seldom decisive;
3. the regularity and periodicity of payments will be relevant though not generally decisive considerations;
4. a generally decisive consideration is whether the receipt is the product in a real sense of employment of, or services rendered by, the recipient, or any business or revenue-producing activity carried on by the recipient; and
5. a payment in substitution for income acquires the character of that for which it is substituted.

The AAT found that the Payment was not income according to ordinary concepts. Rather, the Payment was a one-off discretionary payment paid as a matter of public policy for the relief of unfair financial hardship, and not a substitute for or an estimate of forgone income.

In coming to its decision, the AAT noted that:

1. not all payments received by a person in business are income, especially so when the recipient is an individual natural person rather than a company or partnership;
2. the relevant question to be considered is not whether the recipient is carrying on a business but whether the receipt was a product of carrying on the business; and
3. in respect of the eligibility criteria of the Victorian Taxi Reform Hardship Fund, it did not require the applicants to be in business. There was also no requirement that at the time of an application the applicant held a taxi licence, provided they held an ownership interest in a licence at any time in the period 1 January 2016 to 23 August 2016.

Citation *Bains v Commissioner of Taxation (Taxation)* [2023] AATA 2477 (Senior Member Olding, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2477.html

2.3 Makrylos – starting to hold land as trading stock

Facts

On 30 June 2006 Michael Makrylos entered into a contract to purchase a property located at 125 Dick Ward Drive in Coconut Grove in Darwin for a price of $825,000, with the purchasing completing on 17 August 2006.

On 27 June 2006 a report had been written to a company related to Michael concerning a subdivision which could occur on the land.

On 4 July 2006 Michael met with a surveying firm who provided a plan dividing the land into 8 lots.

At the time of purchasing the land, there were two demountable buildings on the land.

From December 2006 to 26 April 2007 Michael lived at the Coconut Grove property with his spouse and their. dog with their home facilities across the two demountable buildings.

In February 2007 a letter was written to Michael and his spouse by a consulting town planner thanking them for requesting her services, and confirming that they wanted to develop the property into a residential estate.

In April 2007 Michael had an interior designer prepare a floor plan sketch for 10 dwellings to be built on the land.

Michael claimed that he and his spouse moved away from the land in April 2007 due to Michael's spouse not feeling safe living on the land given the temporary buildings and that the land had become infested with toads.

There were, overall, various plans prepared for the development of the land. Some plans provided for a single dwelling that was apparently to be a new home for Michael and his spouse. However, other plans provided for a multi-dwelling residential subdivision.

On 12 June 2007 a planning application was lodged to enable the rezoning of the land. The application indicated that a development was to be undertaken on the land to construct 10 residential dwellings.

Michael claimed that up until 2009 he and his spouse still intended to build a new home on the land. This intention ceased in 2009 due to the cost and stress involved and that at the same time she was undergoing an IVF program.

On 29 April 2010 second rezoning application was lodged and it was to allow the land to be developed as an integrated residential estate containing 16 dwellings.

In or around April 2010 Michael entered into a joint venture agreement with Kalhmera Pty Ltd as trustee for the Makrylos Family Trust in relation to the land. Michael has at all relevant times been the sole director of Kahlmera. Kahlmera has had a long history of engaging in property development ventures. Michael claimed that the joint venture agreement was conditional until the second rezoning application was approved.

The second rezoning application was approved on 18 May 2011.

The land was rezoned, subdivided, developed and sold pursuant to the joint venture agreement between Michael and Kalhmera.

In the income years ended 30 June 2013 and 30 June 2014, 15 of the 16 developed parcels were sold for a total of $11,995,999.

Michael lodged tax returns for the income years ended 30 June 2013 and 30 June 2014 claiming his assessable income to be $93,473 and $59,775 respectively. The tax returns treated the property as his main

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residence for a period of time after its acquisition, and from 18 May 2011 as trading stock held in the course of a business. Michael considered that the land only became trading stock when the joint venture agreement became unconditional on 18 May 2011.

'Trading stock' is relevantly defined in section 70-10(1) of the ITAA 1997 to include 'anything produced, manufactured or acquired that is held for ***purposes*** of manufacture, sale or exchange in the ordinary course of a business'.

The Commissioner, after an audit of Michael's tax affairs, concluded that Michael held the property as trading stock from the date of acquisition on 17 August 2006. The Commissioner issued amended assessments for the respective income years. Michael objected to the amended assessments, on the basis that he did not start to hold the property as trading stock until 18 May 2011.

The Commissioner allowed the objection in relation to the year ended 30 June 2013 only, in part. Michael appealed the Commissioner's decision to the Federal Court of Australia.

During the hearing, Michael made an alternative argument that if he did not start holding the property as trading stock on 18 May 2011, it was 'sometime in 2010'. Evidence of valuations of the property for both dates was provided at the hearing. Michael contended that, if he had any intention to subdivide the land at the time of purchase, he would have done things differently. For example, he would have purchased the land subject to obtaining the relevant rezoning grants, and he would not have purchased it in his personal name.

In his evidence, Michael also understated the property development history of him and his entities. In particular, he initially stated that his group had developed about 10 units on average each year. However, it was later revealed that his group had undertaken the development of hundreds of residential dwellings.

Issue

Whether Michael commenced holding the property as trading stock on 18 May 2011, rather than on acquisition of the property?

Decision

Charlesworth J considered that there were serious credit problems for Michael. Charlesworth J specifically referred to Michael's understatement of his group's property development activities, commenting as follows:

> *The size of the business enterprise might be regarded as a peripheral issue. However, Mr Makrylos' disinhibition in giving evidence that was plainly false is a matter that reflects poorly on his credit. The initial false response typifies his attempt to present as a naïve family business operator, a theme he returned to over and again in the course of his evidence.*

Charlesworth J also noted that Michael's claims about intending to develop the land as a home were inconsistent with the contents of the rezoning applications that were lodged at the same time.

Charlesworth J considered the chronology of events, and the examination and cross examination of Michael during the hearing, noting there were clear inconsistencies in the evidence given in examination, cross examination and re-examination. Charlesworth J described Michael's evidence as 'argumentative, selectively evasive, vague and unresponsive'. Charlesworth J was not satisfied with Michael's supposedly 'critical' state of mind, and, therefore, could not be satisfied that the earliest date upon which Michael held the property as trading stock is April 2010. Michael failed to discharge his burden of proof.

The Court dismissed the appeal and confirmed the Commissioner's decision.

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Citation *Makrylos v Commissioner of Taxation* [2023] FCA 971 (Charlesworth J, Northern Territory)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/971.html

2.4 TKYY – interest deduction

Facts

TKYY was a partner in a large accounting firm for at least 18 years and a qualified lawyer.

In 2005, TKYY left the accounting firm and commenced working full time for his family's agribusiness that was operated by his family trust.

This family trust also had an interest in a payday lending business operated by an entity called ABC. The business was managed by TKYY's girlfriend, Ms KK.

Separately, in or around 2004, Ms KK presented TKYY with an opportunity to be involved in a casino junket business. Ms KK pitched to TKYY that the business operation required gamblers to make deposits to the operator or enter into a loan agreement with the operator to provide funds to the casino. The operator would then deposit these funds with the casino. The funds would be used to acquire chips for the gamblers who would use the chips throughout the casino. Any unused chips would be returned at the end of the junket.

Ms KK presented to TKYY that, with the assistance of a friend, she would procure the gamblers to participate in the operation. TKYY's role in the operation was to procure funding to be deposited in the casinos. TKYY did so by mainly obtaining loans from family members and associates. Because these loans were generally unsecured, the interest rate on these loans were approximately 30%. TKYY obtained loans from 2004 through to 2008.

Most of these loans from family and associates were paid into an account in the name of ABC. Some of these loans were paid to Star Casino, or into account in the name of TKYY or Ms KK. A few loans were made to TKYY in cash.

Ms KK would pay monthly instalments to TKYY to repay the lenders. Ms KK paid these instalments periodically until early 2008. By April 2008 these payments ceased altogether. TKYY subsequently stopped making interest payments to the lenders.

It became apparent that TKYY and the lenders had been scammed by Ms KK.

Between 20 June 2008 and 30 June 2016, TKYY received approximately $6 million for work performed in the family business. TKYY did not report the amounts received from the family business in respect of the personal services he rendered through his family trust.

In 2008, TKYY lodged an income tax return but did not declare any taxable income. In 2009 TKYY lodged an income tax return that reported a small amount of taxable income but claimed deductions in respect of the interest owing on the loans, resulting in nil assessments. TKYY's income tax returns lodged for the income years ended 30 June 2010 and 30 June 2011 reported taxable income but excluded the personal services income received by TKYY.

The 2008-2011 income tax returns did not claim deductions in respect of interest accruing from the loans in relation to the junket business operations. The claim with respect to interest deductions only surfaced during the audit process and following the issue of the amended assessments.

Following an audit in 2017, the Commissioner issued amended assessments in respect of the 2008 to 2011 financial years under section 170 of the ITAA 1936. These amended assessments included income derived

from personal services income for work performed by TKYY in his family's agribusiness. The Commissioner claimed that he was entitled to issue amended assessments for these years because there was evidence of fraud or evasion.

The Commissioner also issued default assessments for the 2012 to 2014 income years and amended assessments for the 2015 to 2016 financial years for underreported personal services income.

The Commissioner also issued penalty assessments for the 2008 to 2016 income years.

On 2 November 2017, TKYY lodged objections to the notices of assessment and the amended assessments, and claimed that he was entitled to deductions relating to interest incurred on loan advances made to him by friends and associates in connection with the junket business. The Commissioner disallowed the objections.

In relation the deductions claimed in respect of the interest on the loans as part of the junket operation, the Commissioner contended that TKYY had failed to establish that these amounts were a loss or outgoing incurred in gaining or producing assessable income. There were instances where the borrowed funds were used to pay personal expenses or to repay other lenders.

TKYY claimed that, although he himself was not conducting the junket operation, he was obtaining funding for a profit-seeking venture to derive a return for himself and lenders. One lender gave evidence in the hearing that he made advances. However, those advances were not specifically referrable to the casino junket business, but for another property transaction.

TKYY also argued that it did not matter that the interest on the loans was not actually paid after 2008. The obligation to pay remained and the presence of an existing obligation to pay meant that he incurred the loss or outgoing each year. In this respect, the Commissioner contended that the interest would be incurred in a specific year only if there is a presently existing obligation to pay even if the payment had not occurred. If the lender does not press for payment, or the liability to pay is contingent, or the debt has been forgiven or abandoned, the outgoing is not incurred. The taxpayer must be definitively committed to the obligation and completely subject to it.

In respect of whether the Commissioner was entitled to issue amended assessments for the 2008 to 2011 income years, TKYY claimed that the Commissioner should not have determined that there had been fraud or evasion.

The issue of whether TKYY should be assessed in respect of personal services income was not in dispute.

In closing submissions TKYY argued that his subjective intention was relevant in determining whether his outgoings were deductible, especially as they exceeded his income. He relied on *Fletcher v Federal Commissioner of Taxation* [1991] HCA 42; (1991) 173 CLR 1 in marking this argument. In that case, the subjective intention of the taxpayer was used against them in determining that they did not incur expenditure to gain or produce assessable income, instead they incurred it to obtain a tax benefit.

Issue

1. Whether deductions can be claimed in respect of interest incurred in respect of loans used for an income-producing business operation where that operation never came into existence?
2. Should the Commissioner have determined that there was fraud or evasion?

Decision

Interest deductions?

The AAT acknowledged that the lenders had provided funds on the basis that the loans were being used for commercial purposes and that they would receive a return on the investments. The loan arrangements were in place before TKYY became aware of the fact that no junket operation was in existence.

In considering the circumstances of the loans in question, the AAT held the interest on the loans was not necessarily incurred in the carrying on a business for the purpose of gaining or producing assessable income, as there was no actual junket business (or money-lending business other than payday lending), and as TKYY did not actually conduct such business, TKYY could not claim a deduction in respect of the loans acquire as part of the junket venture. The AAT commented that the arrangement between TKYY and Ms KK appeared more in the nature of a partnership business but that the case did not proceed on that basis.

The AAT then considered whether the interest arising from the loans could be claimed as a loss or outgoing incurred in gaining or producing TKYY's assessable income. In this respect, the AAT assumed that the outgoings were incurred in each of the financial years following the year 30 June 2008.

The AAT considered that there was no need to inquire into a taxpayer's purpose or motivation to characterise an outgoing if the final use of the expenditure is evident. However, subjective intention might be relevant. In this case, the AAT considered that it did not matter that TKYY genuinely believed that he was providing money to Ms KK with the expectation of generating assessable income. This is because the AAT considered that there was no necessary income-producing structure in place such as agreements with the casinos and gamblers. In such circumstances, it cannot be considered that TKYY was incurring expenses in gaining or producing assessable income when there was no possibility of such income materialising.

Accordingly, the AAT considered that the interest on the loans could not be claimed as a loss or outgoing incurred in gaining or producing assessable income.

Fraud or evasion?

The AAT considered that it was evident that TKYY withheld information from the Commissioner during the relevant years. TKYY did not report fee income generated from personal services provided to the family business. The AAT noted that TKYY explained that he expected this income to be included in the tax returns for the trust, but since he was the trustee and the trust did not file income tax returns, this income was not reported. Rather, the TKYY had submitted that the income was distributed to another family trust, which he also controlled, and was eventually reported when that trust went into liquidation in 2014.

The AAT determined that TKYY's non-disclosure was a deliberate rather than a coincidental result of his unconventional financial approach. Accordingly, TKYY had failed to discharge the burden of proving that the finding of fraud or evasion should not have been formed.

Accordingly, the AAT affirmed the decision of the Commissioner to disallow TKYY's objections.

Citation *TKYY and Commissioner of Taxation (Taxation)* [2023] AATA 2497 (Deputy President McCabe, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2497.html

2.5 FSX – principal place of residence

Facts

In December 2020, FSX purchased a parcel of land from a company controlled by her and her husband. The land was subject to an existing development consent for the 'demolition of existing buildings and construction of a new three to four storey building shop top housing development' (the **Development Consent**).

As at the date of Development Consent in 2015, under the relevant Local Environment Plan, the land was zoned B1 Neighbourhood Centre. This prohibited Council from granting development consent for residential accommodation on the land without a commercial space on the ground floor. The Local Environment Plan permitted Council to grant development consent for 'shop top housing'.

Condition 3 of the Development Consent required specific development applications to be lodged for approval in connection with the initial usage of any retail or commercial area within the development prior to occupation of the premises. If this was satisfied, the areas on the ground floor plan marked red were able to be lawfully used and occupied exclusively for non-residential commercial purposes. They could not be used for residential purposes.

In accordance with the Development Consent, FSX has been building a four-storey residence on the land, with spaces on the ground floor separately designated either for commercial use or residential use, or both residential and commercial use. An application was not lodged for the initial usage of any retail or commercial area, and so the areas marked red on the ground floor plan were required to remain vacant.

The Chief Commissioner assessed FSX for land tax for the land for the 2021 and 2022 land tax years.

FSX objected to the Chief Commissioner's decisions on the basis that, at all relevant times, she intended to use and occupy the land solely as her principal place of residence. She relied on clause 6 of Schedule 1A to the *Land Tax Management Act 1956* (NSW). Clause 6(1) and (2) provide the following:

> *(1) An owner of unoccupied land is entitled to claim the land as his or her principal place of residence if the owner intends to use and occupy the land solely as his or her principal place of residence. In such a case, the owner is taken, for the purpose of the principal place of residence exemption, to use and occupy the unoccupied land as his or her principal place of residence.*
>
> *(2) This clause does not apply unless--*
>
>> *(a) the land is unoccupied because the owner intends to carry out, or is carrying out, building or other works necessary to facilitate his or her intended use and occupation of the land as a principal place of residence, and*
>>
>> *(b) 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 that commencement, and*
>>
>> *(c) the intended use and occupation of the land is not unlawful.*

FSX's objection was disallowed by the Chief Commissioner. FSX applied to NCAT for review of the Chief Commissioner's decision.

The Chief Commissioner argued that:

1. FSX's intention was not to occupy the land solely her principal place of residence, but to use and occupy the land partly as her principal place of residence and partly as a commercial premises; and
2. the use and occupation of the land solely as a principal place of residence is unlawful, because it contravened the terms of the development consent, which was for both residential and commercial use, and it contravened the Local Environment Plan.

Issues

1. Whether FSX intended to use and occupy land 'solely' as a principal place of residence?
2. Whether the intended use and occupation unlawful?

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Decision

Did FSX intend to use and occupy land 'solely' as a principal place of residence?

The NCAT was satisfied that at all relevant times, FSX intended to use and occupy the land solely as her principal place of residence.

The NCAT stated that a person's intention is to be gauged not subjectively, but objectively having regard to all the circumstances of the case.

The NCAT found the evidence provided by FSX and her husband to be 'unequivocal':

1. at all relevant times their intention was to use and occupy the land solely as their home;
2. they had no intention to use and occupy the site for any other purpose, notwithstanding the designation of areas on the ground floor exclusively for commercial purposes and other areas on the ground floor for commercial and residential purposes;
3. the sole purpose for identifying these areas on the plans was to satisfy the requirement of the Local Environment Plan for 'shop top housing', which in turn would empower the Council to grant the development consent; and
4. they have been, and remain, content to leave the exclusively designated commercial use areas vacant.

The NCAT further found that despite the ground floor plans showing areas designated for commercial use, the spaces designated for exclusive commercial use were required to be left vacant and the appearance of the façade with set-back living areas at the top and commercial style design below, such evidence was not inconsistent with the intention to use and occupy solely as a residence:

Therefore, the NCAT held that FSX intended to use and occupy the land solely as her principal place of residence.

Was the intended use and occupation unlawful?

The NCAT found that the use was unlawful.

Drawing on the meaning of 'use' and 'occupation' adopted in the *Commissioner of Land Tax v Christie* [1973] 2 NSWLR 526 and *Metricon Qld Limited v Chief Commissioner of State Revenue (No 2) [2016] NSWSC 332* cases, the NCAT accepted SFX's submission that SFX always intended to use the commercial areas as her principal place of residence.

However, the parties had agreed that the areas marked red on the ground floor plan were to be exclusively designated for commercial use, and may not lawfully be used for residential purposes. FSX's intention to leave them vacant amounted to an intention to use them for residential purposes. That use was unlawful.

On the basis of the above, the NCAT held that requirement (c) of clause 6(2) was not satisfied and the principal place of residence exemption did not apply.

Citation *FSX v Chief Commissioner of State Revenue* [2023] NSWCATAD 219 (Senior Member Perrignon, Sydney)
w https://www.caselaw.nsw.gov.au/decision/18a020d5f17e7122293485f4

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2.6 Williams – validity of BDBN only served on one trustee

Facts

On 28 December 2021, Anthony Vincent Williams died.

Anthony was survived by his wife, Gayle Dianne Williams, whom he married in 2019, and his adult sons, Paul Francis Williams and Mark Anthony Williams.

Anthony appointed Mark as his executor in the will that he executed in 2020. Both Paul and Mark are residuary beneficiaries under the will.

Boosey Doherty Superannuation Fund (the **Fund**)

Anthony was a member of the Fund, a SMSF.

The original members and trustees of the Fund were Anthony and his late first wife, Margaret Williams. Margaret died in December 2014.

In the absence of a corporate trustee, the SIS Act requires, among other things, that in the case of a single member fund, there be at least two trustees. Anthony's son, Paul, was appointed as a trustee of the Fund in 2016. From 2016 until Anthony's death, the trustees of the Fund were Anthony and Paul.

Binding death benefit nominations

Anthony executed two Binding death benefit nominations (**BDBNs**). The first BDBN was executed on 1 February 2018 and the second BDBN was executed on 26 March 2018. The second BDBN provided for Anthony's death benefits to be paid to Gayle as to 50% and his legal personal representative as to 50%. It is not apparent who was to benefit from the first BDBN.

Clause 24.6A of the deed for the Fund provides as follows:

> ***If the Trustees are given a written notice by Member*** *requesting that benefits be paid following the death of that Member to a person or persons or other permitted payees* ***then the Trustees must****:*
>
> *(a) by written resolution, accept the terms of the Member's notice; or*
> *(b) give written notice to the Member of a proposed rule in respect of the death benefit specifying the terms thereof in accordance with the Member's request.*
>
> *AND on the date of that resolution referred to in (a) or the date of the written acceptance by the Member of the death benefit referred to in (b), the Trustees are bound by those terms unless and until that member and the Trustees otherwise in writing agree or until a later binding nomination in accordance with the SIS Act is given to the Trustees or a later non-lapsing nomination is given effect under (a) or (b). [Emphasis Added]*

A dispute arose as to the validity of the second BDBN.

Paul and Mark argued that Paul, as a joint trustee of the Fund with Anthony, was not given written notice by Anthony of the second BDBN.

Gayle argued that the term 'Trustees' need not be interpreted as meaning all of the trustees for the Fund and that, consequently, the second BDBN was valid as Anthony, as a trustee of the Fund, had notice of the BDBN because he had executed the document. Gayle relied on clause 2.1 of the Fund deed and the definition of the term 'Trustees'.

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Clause 2.1 of the deed provides that, *‘In this Deed unless the context otherwise requires words importing gender include any gender and* ***words importing number include the singular number and the plural number****. ...’* [Emphasis added]

The word ‘Trustees’ is relevantly defined in the Deed to mean *‘... the Trustees or the Trustee for the time being of the Fund and ‘Trustee’ has the same meaning’*.

Paul and Mark argued that the context otherwise requires the word ‘trustees’ in clause 24.6A of the deed for the Fund to be read as more than one trustee, as clause 24.6A requires the trustees, upon receiving the notice from the member, to take certain actions, such as, creating a written resolution either accepting the terms of the notice or giving notice to the member of a proposed rule.

Office of trustee of the Fund

On 25 March 2022, by deed of removal and appointment of trustee, Anthony was removed as a trustee of the Fund and Mark was purportedly appointed as a trustee of the Fund alongside Paul (**Deed of Appointment**). The Deed of Appointment was unusual for two reasons, namely:

1. the parties to Deed of Appointment were said to be Anthony, Paul and Mark, despite Anthony having died prior to its execution; and
2. the provisions of clause 9.8 of the Deed already rendered Anthony's position as trustee vacant due to his death.

Clause 9.8(b) of the Deed provided as follows:

> *Pending any appointment of a Trustee where a Member has died* ***the deceased Member’s legal personal representative may with the consent of any other Members, act as Trustee in place of the deceased Member/Trustee*** *... in any period commencing on the Member’s death and ending on the date the Member’s benefits become payable. [Emphasis Added]*

Clause 9.9 of the deed provides that in the event of a vacancy, the position of trustee may be filled by resolution of a two-thirds majority of the members of the Fund. The Deed of Appointment purported to remove Anthony as trustee by a resolution of Anthony and Paul.

The only member of the Fund was Anthony. While a person ceases to be a member on death, rule 2.5(a) to the Deed, provides that the deceased member’s legal personal representative is deemed to be a member on that death. ‘Legal personal representative’ is relevantly defined in clause 2.1 of Deed as follows:

> *... in relation to a Member a person who satisfies the Trustees that such person is entitled to represent the Member and to give valid receipts and discharges on the Member’s behalf and in relation to a deceased Member* ***the person who has been granted probate of the will*** *or letters of administration of an estate of that Member. [Emphasis Added]*

Probate of Anthony's Will has not yet been obtained.

Behaviour of Paul

Until required by a court order, Paul did not provide relevant trust documentation when requested to do so. Paul also decided to exercise the powers of the trustee under clause 27.1 of the Deed to resolve that Gayle and Anthony were not entitled to any benefit from the Fund on the basis that Anthony had, as a member of the Fund, been dishonest within the meaning of clause 27.1 of the deed of the Fund by not giving any purported BDBN to him as trustee of the Fund.

Gayle argued that Paul and Mark should be removed as trustees of the Fund and replaced with independent professional trustees. The principles relevant to an application to remove a trustee are set out by Dixon J in *Miller v Cameron* (1936) 54 CLR 572 at 580-581 as follows:

> *The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised.*

Issues

1. Was the second BDBN given to the trustees in accordance with the rules of the Fund?
2. Should the current trustees of the Fund be removed?

Decision

Was the second BDBN given to the trustees in accordance with the rules of the Fund?

Martin SJA held that the practical provisions of the Deed envisage the giving of notice to all of the trustees of the Fund. Further, his Honour considered that it would be contrary to the intention of the Deed to allow one beneficiary, who also happens to be a trustee, to make a binding nomination which creates a binding obligation upon the other trustees and the Fund itself without the other trustees having knowledge of the transaction. Accordingly, the second BDBN was invalid.

Should the current trustees of the Fund be removed?

Martin SJA noted that the Deed of Appointment did not appear to satisfy the conditions in the Deed as the only member of the Fund was Anthony and Probate of the Will had not been obtained, meaning that there is no person who fell within the definition of 'legal personal representative' of Anthony.

Martin SJA held that it was appropriate in the circumstances to replace the current trustees of the Fund with independent trustees for the following reasons:

1. conflicts exist for both Paul and Mark as they are both dependents for the purpose of the exercise of a discretion as to the payment of any death benefit and as residuary beneficiaries of the Will, they have an interest in the death benefit being paid to the estate of Anthony; and
2. the behaviour of Paul was 'concerning' and not rational.

COMMENT – the parties did not address the requirements of the SIS Act when making this application. The SIS Act requires, among other things, that (in the absence of a corporate trustee) there be at least two trustees, and that at least one of those be a member. There is a question as to whether the SIS Act requirements have any impact on the Court's ability to appoint a new trustee. Martin SJA invited the parties to make further submissions on that point.

Citation *Williams v Williams & Anor* [2023] QSC 90 (Martin SJA, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2023/90.html

2.7 Bankrupt Estate of Tarrant – payments of money under the Bankruptcy Act

Facts

On 14 September 1994 Tarrant Enterprises Pty Ltd was incorporated, with Mervyn Ross Tarrant as its sole director.

On 23 March 1999, Tarrant Enterprises executed a deed under which it was appointed the trustee of the MRT Family Trust. The trust deed of MRT Family Trust specified Mervyn’s children, Lara Tarrant and Mervyn Steven Tarrant as the “Specified Beneficiaries”. Mervyn fell within the definition of “General Beneficiary”.

On 20 December 2007, Tarrant Enterprises settled on the purchase of a penthouse in Market Street, Wollongong. Tarrant Enterprises funded the purchase entirely by drawing down $2,151,951 from a loan facility of $2.16 million which NAB granted to Tarrant Enterprises. The amount of the drawdown was debited to a loan account held by Tarrant Enterprises with the NAB. The terms of the NAB loan included that Tarrant Enterprises would make 359 monthly repayments of $16,736, and a final payment of $12,476. Mervyn provided a guarantee for the NAB loan.

Mervyn was conducting a business as a sole trader under the name “Tarrant Accountants and Business Advisors”, and held an account personally with NAB with account name “Tarrant Accountants and Business Advisors”.

For some years up to July 2015, Mervyn caused monthly payments to be made from his personal NAB account to the NAB company loan account.

At some time after the purchase of the penthouse, Mervyn encountered financial difficulties.

On 1 May 2013, Lara and Steven were appointed as co-directors of Tarrant Enterprises.

On 29 July 2014, NAB issued a default notice addressed to Tarrant Enterprises, copied to Mervyn as guarantor, demanding payment from Tarrant Enterprises for amounts in arrears of $265,175. Tarrant Enterprises did not comply with that notice.

On 3 October 2014, NAB sent Mervyn a demand that he pay NAB the amount of $1,902,679.

On 12 January 2015, Mervyn resigned as a director.

Between 21 July 2015 and 29 August 2016, Mervyn effected 27 electronic funds transfers, totalling $194,290, from his personal NAB account to the NAB loan account of Tarrant Enterprises. The description of each of the payments in each of the two bank accounts was, or was similar to, “Internet Transfer Mrt Penthouse Tarrants”.

On 8 September 2016, a sequestration order was made against the estate of Mervyn. Mark Roufeil was appointed as trustee in bankruptcy of Mervyn's estate.

In administering Mervyn’s estate, the trustee become aware of the electronic funds transfers totalling $194,290.

The trustee claimed that the electronic funds transfers constituted payments of money by Mervyn to Tarrant Enterprises in the circumstances set out in section 120, 121 and 121A of the *Bankruptcy Act 1966* (Cth), and accordingly were void as against the trustee.

Section 120(1) of the Bankruptcy Act provides as follows:

"A transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferor's bankruptcy if:

(a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and
(b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property."

Section 120(7) of the Bankruptcy Act provides relevantly as follows:

"For the purposes of this section:
(a) transfer of property includes a payment of money.... "

The primary judge in the Federal Circuit and Family Court of Australia held that payments into the loan account were not "payments of money" for the purposes of sections 120 and 121 of the Bankruptcy Act.

In making that finding, the primary judge noted that a credit balance recorded in a current bank account signifies a debt owed by the bank, but the cash becomes the property of the bank (referring to the English case of *Foley v Hill* [1848] EngR 837). On the meaning of 'payment', the primary judge said that payment by bank money manifests itself as a chain of debit and credit entries and, in particular, that the crediting of the payee's account does not necessarily mean the 'payment' has been completed, or that the transaction can properly be characterised as a 'payment'.

The primary judge further noted, in respect of bank transfers, that the expression "payment of money" in section 120(7)(a) of the Bankruptcy Act at the very least includes "person A (payer/transferor) instructing his or her bank to debit an amount to A's current account and [causing] the same amount to be credited in a current account B holds with his or her bank."

The primary judge found that the 27 payments were made from Mervyn's current account, but that there was nothing to suggest that the company loan account was a current account in the hands of Tarrant Enterprises. This was because Tarrant Enterprises had an arrangement with NAB in relation to its company loan account under which it could not direct NAB to pay amounts on demand and debit those amounts to the company loan account. Any amount credited to the company loan account was not a credit available to Tarrant Enterprises on which Tarrant Enterprises was entitled to draw, in the normal course of business or banking practice, in the form of cash.

Accordingly, the primary judge held that the trustee's claims against Tarrant Enterprises under section 120(1) of the Bankruptcy Act failed, because there was no payment of money or transfer of property from Mervyn to Tarrant Enterprises that was capable of being rendered void.

The trustee in bankruptcy brought an appeal to the Full Court of the Federal Court. The trustee submitted that the primary judge should have recognised that credit entries in a loan account, such as the company loan account, were just as much payments of money as credit entries in a current account.

Issue

Were the payments into the company loan account "payments of money" for the purposes of sections 120 and 121 of the Bankruptcy Act?

Decision

The Full Court of the Federal Court allowed the appeal, finding that the statutory phrase "payment of money" bears its ordinary meaning and the mere fact of receipt of value is sufficient to constitute a payment of money.

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In particular, the concept of "payment" or "payment of money" is an ordinary English expression. The Full Court considered it entirely appropriate to refer to a banking transaction in which value is transferred from one bank account to another as being a payment of money between the two account holders, irrespective of whether the bank account receiving the money is a current account or a loan account or some other kind of account.

When Mervyn effected the 27 transactions, his personal account with NAB was debited and Tarrant Enterprises' account with NAB was credited with corresponding amounts, with NAB accepting those payments on behalf of its customer, Tarrant Enterprises. It would be incorrect to conclude that in a multi-party payment system, the initiating payer did not pay the money to the recipient account holder.

Tarrant Enterprises had also asserted a right of set-off pursuant to section 86 of the Bankruptcy Act, claiming that Mervyn owed Tarrant Enterprises the amount of $159,804, which should be set off against the claim by the trustee for $194,290, leaving a balance of $34,486 owing by Tarrant Enterprises to the trustee.

The Full Court rejected the argument, affirming well-established authority that a debt or liability of the bankrupt cannot be set off against that creditor's liability pursuant to section 120 or section 121 of the Bankruptcy Act to refund the impugned payments, given that a liability arising under those provisions is payable to the trustee in bankruptcy, not as a debt due to the bankrupt, but as the proceeds of the avoidance by the trustee of a preference. Accordingly, there was no mutuality in the debts sought to be set off.

Citation *Roufeil as Trustee of the Bankrupt Estate of Tarrant v Tarrant Enterprises Pty Ltd as Trustee for the MRT Family Trust* [2023] FCAFC 142 (Derrington, Abraham and Jackman JJ, Sydney)
w https://austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/142.html

2.8 NBT Trust – Application for judicial advice regarding trust matters

Facts

The NBT Trust (**Trust**) was established on 8 January 1980 between Shane Oxenham, as settlor, and Nicholas Taylor and Julia Taylor, as trustees.

The original trust deed was amended on several occasions, but the original deed was lost, misplaced, or accidentally destroyed:

1. 27 May 1996;
2. 28 June 2022;
3. 3 May 2004; and
4. 13 December 2021.

Nicholas and Julia were removed as trustees on 30 September 1981, and NBT Pty Ltd was appointed as a new trustee.

On 13 December 2021, Breakfast Creek Station Pty Ltd was appointed as trustee in respect of a specific asset held by the trust.

Both NBT Pty Ltd and Breakfast Creek Station Pty Ltd were trustees of the trust, although they held different trust property (collectively, the **Trustees**).

The Trustees sought several orders relating to the management and administration of the Trust.

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Issues

The orders sought by the Trustees were:

1. whether the Trustees are justified in managing and administering the Trust pursuant to the terms of the trust deed and supplemental deeds;
2. whether NBT Pty Ltd was validly appointed as trustee;
3. whether Nicholas and Julia were validly removed as trustees;
4. whether the Burton Taylor Foundation was validly appointed as a beneficiary of the Trust;
5. whether the Trustees are justified in managing and administering the Trust such that Nicholas and Julia or any corporation in which Nicholas and Julia have any actual or contingent beneficial interest are not excluded as beneficiaries of the Trust;
6. whether the Trustees have the power to vary the Vesting Day; and
7. whether as a consequence of Breakfast Creek Station being appointed as trustee in respect of the property located at Breakfast Creek Station the perpetuity period in respect of the Breakfast Creek Station is reckoned from the date on which Breakfast Creek Station Pty Ltd became the registered legal owner of Breakfast Creek Station.

Decision

Question 1

Nicholas provided evidence to the Court that he had made several inquiries and had conducted searches in an attempt to locate the original deed.

The Court concluded that the copy of the deed being relied upon could be confirmed to be a true copy of the original trust deed. The reason being that the copy had proof that it had been stamped and duty was paid in the sum of $1.50.

Questions 2 and 3

The first issue was whether the deed to appoint NBT Pty Ltd as trustee and to remove Nicholas and Julia as trustees had been validly executed (**Deed of Appointment**).

The execution page of the Deed of Appointment did not contain the signatures of Nicholas, Julia or the directors of NBT Pty Ltd. The Deed of Appointment did however contain the typed words 'Signed'.

At the end of the Deed of Appointment, preceding the execution clause, was a page that contained a certification from a clerk of a chartered accountant firm, confirming that the Deed of Appointment was a true copy of the original.

The Court concluded that the Deed of Appointment was properly executed.

The second issue was whether Nicholas signed in his capacity as trustee of the Trust or as both Trustee and principal. In this case, the principal had the same powers as that of an appointor.

The Court relied on the principles set out in *Alonso v SRS Investments (WA) Pty Ltd* [2012] WASC 168 where one of the defendants claimed that a guarantee was not enforceable against her personally as she had only signed in her capacity as director of the principal debtor.

In reaching its decision the Court held that the intention to be legally bound is not one to be answered by reference to subjective thoughts or intentions, but rather objectively manifested intentions. The court in *Alonso* explained that 'the intention is manifested in light of the subject matter of the agreement, the status of the parties to it, their relationship to one another and other surrounding circumstances'.

Clause 22 of the trust deed, provided that the principal may at any time, by notice in writing to the trustee, remove from office all or any of the trustees of the Trust and may appoint a new trustee in their place.

The Deed of Appointment was between Nicholas, Julia and NBT Pty Ltd and did not make reference to Nicholas as the principal of the trust. However, a recital in the Deed of Appointment contained a reference to the power of the principal in clause 22. The Court concluded that, while the Deed of Appointment could have been prepared in a better form, the reference to clause 22 of the trust deed suggests that the Deed of Appointment should be construed on the basis that the parties, including Nicholas, signed in all relevant capacities. The Deed of Appointment was considered effective.

Question 4

The Burton Taylor Foundation is a charity.

Clause 19 of the trust deed provides:

> *The Trustee may with consent of the person who has the power to appoint a new Trustee hereof in accordance with Clause 22 at any time and from time to time in its absolute discretion by Deed or Memorandum in writing or oral declaration recorded in the Minutes of the Trustee:*
>
> *(i) vary all or any of the powers or provisions herein declared concerning the Trust Fund with the exception of the Vesting Day;*
> *(ii) add any beneficiaries, corporations, Trustees of trusts or classes of persons as beneficiaries;*
> *(iii) exclude any persons, corporations, trustees of trusts or classes of persons as beneficiaries, but so that this power shall not be capable of being exercised so as to derogate from any interest to which any beneficiary has previously become indefeasibly entitled either in possession or in reversion or otherwise.*

On 28 June 2022, by way of deed, Nicholas, as principal and NBT Pty Ltd as trustee, added the Burton Taylor Foundation as a beneficiary.

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Clause 1(d) of the new trust deed defined the term 'primary beneficiaries' which included '*any additional persons, corporations and Trustees of trusts as are nominated by the trustee at any time and from time to time by Deed or Memorandum in writing or oral declaration recorded in the Minutes of Trustees and did not include any person being the Settlor or Trustee hereof.'*

The Court concluded that the wording of clause 1(d)(iv) meant that the Burton Taylor Foundation had been validly appointed as a beneficiary of the Trust.

Question 5

The question the Court was required to consider was whether the fact that Nicholas and Julia had been previously trustees of the trust had they been automatically excluded as beneficiaries of the Trust.

Clause 1(a) defines Trustee as *the company, person or persons named as such in the Schedule or any other Trustee or Trustees for the time being of the Trust.*

Clause 24 of the trust deed relevantly provides that:

> *It is hereby declared that the Settlor or any person from time to time being the Trustee hereof or any corporation in or under which any Trustee has any actual or contingent beneficial interest are specifically excluded from all or any benefits whatsoever under this Trust Deed other than in respect of remuneration for the Trustee hereunder.*

The Court concluded that on proper construction of clause 1(a) is that the term 'trustee' only applies to the trustee or trustees of the trust fund at that time and did not apply to the trustees named in the schedule as they were no longer the true trustee of the Trust.

The Court concluded that Nicholas and Julia are not excluded from benefiting from the Trust.

Question 6

Clause 19 of the trust deed provides for the power to vary, which specifically excludes the power to vary the vesting day.

The Court concluded that clause 19 of the trust deed does not give power to delete the provisions relating to the vesting day.

Question 7

The trust deed was established prior to the introduction of the *Perpetuities Act 1984* (NSW).

The Court discussed the operation of the Perpetuities Act and concluded that there was no resetting of the perpetuities period, as the vesting day may arrive, notwithstanding who the trustee or trustees may be at that time or earlier.

In determining whether the trust deed ought to be rectified by deleting the vesting date of 31 December 2074 from the schedule, the court discussed several cases, all of which, concluded that when deciding to rectify a trust deed, the court needs to identify the party or parties whose intention is relevant.

In this case, Nicholas asked Shane to settle the Trust. At the time, Shane was practicing as a lawyer and Nicholas was practicing as a chartered accountant. Shane told the Court that Nicholas had produced the trust deed and he agreed to sign as settlor.

The evidence produced to the Court by both Nicholas and Julia did not identify how the vesting date came to be in the schedule, and that there was never an intention for the trust have a set date for termination.

The Court confirmed the rectification of the vesting date by removing a reference to the trust vesting in 2074 and instead leaving a 'King George VI' vesting date.

Citation *Application of NBT Pty Ltd* [2023] NSWSC 919 (Meek J, New South Wales)
w https://www.caselaw.nsw.gov.au/decision/189cd6baa5146e0a099f0d6a

2.9 Appeal Update – Automotive Invest

The Full Federal Court dismissed the appeal against the decision of the Federal Court of Australia in *Automotive Invest Pty Limited v Commissioner of Taxation (Gosford Classic Car Museum)* [2022] FCA 281.

In that case, Automotive Invest operated the Gosford Classic Car Museum, marketed it as such, charged an entry fee and hired its venue for functions. It also sold cars that were on display in the museum. Automotive Invest quoted its ABN when acquiring and importing its cars, and contended that it is not subject to an increasing luxury car tax adjustment, on the basis that the cars were only use for a quotable purpose and the museum was solely 'an enterprising strategy intended to increase the price of the car'.

The Full Federal Court rejected that contention and held that the scale and nature of the appellant's activities resulted in each of the cars being held as more than trading stock.

Citation *Automotive Invest Pty Limited v Commissioner of Taxation* [2023] FCAFC 129 (Logan, Wheelahan and Hespe JJ, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/129.html

2.10 Other tax and superannuation related cases in period of 12 August 2023 to 8 September 2023

Citation	Date	Headnote	Link
Edge Developments Pty Ltd & Ors v Commissioner of State Taxation [2023] SASCA 88	17 August 2023	TAXES AND DUTIES - STAMP DUTIES – EXEMPTIONS – Appeal dismissed	https://austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCA/2023/88.html
McEwan v Office of the Australian Information Commissioner [2023] FCAFC 137	18 August 2023	TAXATION – power of taxation officer to disclose protected information under Ch5, Pt 5.1 Subdiv 355-B of Sch 1 to the Taxation Administration Act 1953 (Cth) – where disclosure alleged to amount to breach of Australian Privacy Principles – where disclosure made in the context of an investigation by the Australian Taxation Office to a third party – whether officers performing duties 'as a taxation officer' – whether those duties restricted to 'collection and recovery of income tax and other liabilities' – whether disclosure otherwise authorised by law	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/137.html
Ross and Commissioner of Taxation (Taxation) [2023] AATA 2495	11 August 2023	Asset betterment – assessable income – shortfall interest – taxable income – tax related liability – penalty assessment – base penalty amount – administrative penalty	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA//2023/2495.html
Buzadzic v Commissioner of Taxation [2023] FCA 954	16 August 2023	TAXATION – appeal on question of law from the Administrative Appeals Tribunal – assessment under s 167 of the Income Tax Assessment Act 1936 (Cth) – whether the	

		Tribunal applied the wrong test for burden of proof – whether the Tribunal made findings of fact or reached conclusions that were unreasonable – whether the Tribunal misconstrued or misapplied s 6-5 of the Income Tax Assessment Act 1997 (Cth) – whether the Tribunal misconstrued or misapplied the "fraud or evasion" provision – whether the Tribunal failed to afford the applicant procedural fairness	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA//2023/954.html#_Ref143006283
Campana v Censori [2023] VSC 502	25 August 2023	Express trust/resulting trust/constructive trust over property Outcome was real property in question was held on trust TRUSTS — Express trust — Certainty of subject matter — Trust deed provided for defendant to hold property for the benefit of the plaintiff — Whether defendant held a mere expectancy — Plaintiff's claim to enforce express trust fails because defendant was not the owner of property the subject of the trust when the trust deed was executed. TRUSTS — Resulting trust — No interest under a resulting trust from failure of express trust because plaintiff did not hold any beneficial interest in property which could revert to him on failure of express trust — No presumption of resulting trust from plaintiff's contribution to purchase of property in circumstances where trust deed evidenced the intention of the plaintiff and defendant to create a trust. TRUSTS — Constructive trust — Common intention of plaintiff and defendant that plaintiff would be beneficial owner of the property — Plaintiff detrimentally relied upon common intention by paying purchase price of property — Defendant engaged in equitable fraud by failing to honour common intention. ESTOPPEL — Deed estoppel — Instrument of transfer of land operated as deed between parties — Whether plaintiff estopped from leading evidence that he purchased the property the subject of the transfer of land — Transfer of land instrument did not constitute an unambiguous statement that the defendant had paid the full purchase price of the property — Plaintiff not estopped from leading evidence that he paid purchase price of property.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/502.html
Sean Butler and Australian Small Business and Family Enterprise Ombudsman (Freedom of information) [2023] AICmr 71	25 August 2023	Freedom of Information — Whether documents subject to legal professional privilege — Whether material obtained in confidence — Whether disclosure of personal information unreasonable — Whether disclosure would unreasonably affect a person adversely in respect of his or her lawful business or professional affairs — Whether contrary to the public interest to release conditionally exempt	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2023/71.html

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		documents (CTH) Freedom of Information Act 1982 ss 42, 45, 11A(5), 47F and 47G	

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		
Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023	14/06	01/08	02/08		
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023	22/06	09/08	09/08		
Revenue, Fines and Other Legislation Amendment Bill 2023 [NSW]	01/08	23/08	23/08	24/08	

3.2 Various amendments to Revenue Fines and Other Legislation Amendment Bill

In our August Tax Training Notes, we summarised the amendments contained in the *Revenue, Fines and Other Legislation Amendment Bill 2023* which were proposed to be introduced.

On 24 August 2023, the Bill passed Parliament and is now legislation. The Bill introduced various amendments to the revenue legislation in New South Wales, including amendments to the *Duties Act 1997* (NSW), the *Land Tax Management Act 1956* (NSW), the *Payroll Tax Act 2007* (NSW) and *Taxation Administration Act 1996* (NSW).

Notably, the amendments included the following:

1. the introduction of a new form of payroll tax grouping to address the perceived 'phoenixing' of entities that have payroll tax liabilities. A new section 74A has been inserted to the Payroll Tax Act to provide that an entity (the successor) and a former entity, including a corporation that is in administration, being wound up or deregistered constitute a group if the successor, often known as a phoenix operator or corporation, and the entity are or were **sufficiently influenced** by the same third party. The amendment will enable payroll tax to be recovered from these groups arising from former entities; and
2. the limitation of taxpayer's objection rights by amending the Chief Commissioner's discretion to permit a person to lodge an objection after the standard 60-day period so that the Chief Commissioner may only provide such permission for up to 5 years from the assessment or decision.

In addition to the amendments summarised in our August Tax Training Notes, and in response to the Revenue NSW ruling on the payroll tax rules affecting health care practitioners (PTA 041), the NSW Government moved to pause payroll tax audits for general practitioners and their practices for 12 months to allow ongoing consultation with the Royal Australian College of General Practitioners.

A new section 61A of the Taxation Administration Act operates as follows:

1. during the period starting on the day on which the *Revenue, Fines and Other Legislation Amendment Act 2023* (NSW) commences (24 August 2023) and ending on the day that is 12 months after the day that Act commences, the Chief Commissioner may not conduct an audit of the payroll tax compliance of a general practitioner or an entity's arrangement with a general practitioner;
2. no interest can be imposed on any tax shortfalls during the period mentioned in paragraph 1; and
3. no penalty tax will be imposed on any tax shortfalls for periods before and during the period mentioned in paragraph 1.

The new section 61A will only provide an amnesty for general practitioners and not other health care practitioners.

The new section 61A also provides that the amnesty will not result in an entitlement to a refund of interest or penalty already paid.

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18471

3.3 Reporting exemptions for Electronic Distribution Platform operators

An Electronic Distribution Platform (EDP) is relevantly defined in section 84-70 the GST Act as a service (including a website, internet portal, gateway, store or marketplace) that allows entities to electronically deliver supplies to end-users.

The definition excludes carriage services (e.g. telecommunications services) and certain payment platforms.

Under the sharing economy reporting regime that is given effect by table item 15 in section 396-55 in Schedule 1 to the TAA, operators of electronic distribution platforms (EDPs) are required to report information about certain supplies made through their platforms to the Commissioner of Taxation.

The ATO has published draft Legislative Instrument 2023/D15, which provides transitional support to operators of EDPs preparing to comply with reporting obligations under this regime in its first year of operation. It provides relevant operators with a choice of either a reporting exemption, or a deferral of the time by which their reports must be lodged, based on their relative circumstances.

The ATO has also published draft Legislative Instrument 2023/D16, which exempts operators of EDPs from having to include specified classes of transactions in reports prepared and lodged in relation to table item 15 in section 396-55. This exemption applies to the provision of certain accommodation and taxi travel if:

1. the supplier was a listed entity or a wholly-owned subsidiary of a listed entity; or
2. the transaction involved the provision of consideration relating to a property in respect of which there were 2000 transactions in the 12 months ending on the last day of the reporting period (or a pro-rated equivalent if it was listed for the first time part-way through the period); or
3. the following conditions are met:
   (a) the supplier has provided the operator with one or more addresses, and none of those addresses are within Australia;
   (b) for a reportable transaction involving a supply of taxi travel, the taxi travel did not occur within Australia;
   (c) the consideration provided to the supplier was not paid to an account held with a financial institution in Australia; and
   (d) there is no other information available to the operator that indicates that the supplier is a resident of Australia.

Both legislative instruments are transitional only and will be repealed on 31 December 2024.

The ATO has invited comments on the draft instruments to be provided on or before 12 September 2023.

ATO references *LI 2023/D15, LI 2023/D16*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D15/00001
w https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D16/00001

3.4 ACT Duties amendments

On 4 August 2023, the Australian Capital Territory Executive made the *Duties Regulation 2023* under the *Duties Act 1999*.

The regulation prescribes that a person is not required to prepare an acquisition statement for a relevant acquisition in relation to landholder if the rate of duty for the relevant acquisition is nil. The rate of duty for landholder duty is determined under a disallowable instrument authorised under section 139 of the *Taxation Administration Act 1999* (ACT).

The *Taxation Administration (Amounts Payable—Duty) Determination 2023, DI2023-162* in section 7 identifies that nil duty is payable on a relevant acquisition under section 90 of the Duties Act if the dutiable amount of the transaction is less than or equal to $1,800,000.

An acquisition statement is still required to be lodged if a person is claiming an exemption from landholder duty under another provision of the Duties Act. This is because an exemption under the Duties Act usually only applies if the Commissioner is satisfied that the exemption criteria have been met.

The regulation commences on the commencement of section 20 of the *Revenue Legislation Amendment Act 2023*.

w https://www.legislation.act.gov.au/sl/2023-18/

3.5 Luxury Car Tax Determination

The ATO has published a determination to explain how to determine the principal purpose of a car for the purpose of the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) (**LCT Act**).

Ascertaining the principal purpose of a car is necessary in order to determine whether a car is considered a luxury car which may be subject to luxury car tax under the LCT Act. The LCT Act is not applicable to cars primarily intended for the carriage of goods rather than passengers.

A car will be a ‘luxury car’, subject to certain exceptions, where the car has an LCT value exceeding the LCT threshold. One of these exceptions is where the car is a commercial vehicle that is not primarily designed for carrying passengers.

The term ‘commercial vehicle’ is given its ordinary meaning and includes vehicles designed for business use, such as panel vans. Whether the principal purpose of a car is to carry passengers is objective and based on the car’s design rather than its intended use in practice. Even if a car has multiple design purposes, as long as carrying passengers is not its principal purpose it may be excluded from being a luxury car.

The exception does not require a specific percentage of the principal purpose but relies on an objective assessment.

Principal Purpose Test for all Vehicles

The principal purpose test requires an objective consideration of the factors that include the following:

1. the appearance and presentation of the vehicle;
2. any relevant promotional literature;
3. the emphasis evident in marketing the vehicle;
4. compliance with Australian Design Rules applicable to the vehicle;
5. the load carrying capacity of the vehicle; and
6. the passenger carrying capacity of the vehicle.

These factors are to be considered equally without giving more weight to any particular factor. If these factors indicate that the primary purpose of a vehicle is to carry passengers, the exception for commercial vehicles will not be available where the car meets the LCT threshold and the car will be subject to luxury car tax.

Modifications

When assessing a vehicle's principal purpose and considering modifications to a vehicle, several factors should be taken into account, including:

- the significance and extent of modifications that are incapable of being readily reversed, which may differ from the vehicle's original design features;
- the details of any process to effect or reverse a modification, including tools, parts, process, and time taken; and
- whether modification plans are required by law, approved by a regulator, or developed for custom or commercial modifications

Permanent alterations to a vehicle may change its original design after manufacture, while modifications that can be readily reversed, allowing the vehicle to be used for its original purpose, do not alter its design.

Determining whether modifications effect a permanent alteration is based on the nature of the modification, not how it relates to the intended use. Whether modifications are actually reversed or intended to be reversed is not relevant. The focus is on whether they are capable of being readily reversed.

Consideration is given to the totality of modifications completed, and minor improvements or modifications that replace existing parts with similar ones are generally considered minor. Significant modifications involve alterations, additions, or removal of parts that are not readily accommodated by the original vehicle design.

The legal form and consequences of modifications, such as changes in warranty, are indicative but not conclusive of the significance and extent of modifications.

Even with significant modifications, if the primary purpose of carrying passengers remains prominent in the vehicles design, it will be classified as a passenger-carrying vehicle. Modifications made to a luxury car after its initial supply or importation will not change the character of the original taxable supply or importation on which luxury car tax is payable.

Examples

The ATO provides 4 examples that consider the principal purpose test and the impact of modifications on this test. These examples demonstrate that the extent and permanency of the modifications are key factors in determining whether a car remains classified as a luxury car. We have included 2 of the examples here.

Example 1 - principal purpose - vehicles with minor modifications

Derek sells luxury cars and is modifying a 4x4 off-road wagon with seating capacity for 7 people, including the driver. The car is classified as an MC category passenger vehicle at the time it is manufactured.

Derek modifies the car by:

- *repainting the car to include reflective stripes and the customer's business logo*

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- *reducing the car's seating capacity from 7 passengers to 5 passengers by removing 2 of the passenger seats and their anchorage points and mounting plate*
- *increasing the car's GVM by upgrading the car's suspension and differentials.*

The modifications will result in the majority of the car's load capacity being available to carry goods. The car will be reclassified from an MC category passenger vehicle to an NB1 category goods vehicle.

On review of each of the modifications, and having regard to each of the factors listed in paragraph 13 of this Determination, it is considered that:

- *The GVM upgrade will have minimal effect on the design of the car, as the upgrade merely involves the replacement of existing parts with improved parts.*
- *While a paint job may be considered permanent and changes the appearance of the car, it will not alter the design of the car or impact passenger capacity.*
- *Although the seating capacity of the car has been reduced, the carriage of passengers continues to be the most important and prominent of the car's design features.*
- *The combined effect of the modifications will allow the car to carry a slightly heavier load and will free up a small amount of additional space to carry goods.*

The principal purpose of the car has not changed from that of carrying passengers. Accordingly, the car is still considered to be a luxury car. When Derek sells the modified car, he makes a taxable supply of a luxury car and is liable to pay any LCT.

Example 2 - principal purpose - vehicles with significant modifications

Assume the same facts in Example 1 of this Determination, except that Derek modifies the car by:

- *removing 5 of the seats and their respective anchorage points and mounting plates, converting the car into a 2-seater wagon*
- *installing a goods carrying tray behind the driver's seat, which extends throughout the rear cabin to the end of the car*
- *installing a cargo barrier behind the driver's and front passenger seat*
- *installing shelving and additional cargo restraints from behind the passenger seats, which extend throughout the rear cabin to the end of the car*
- *increasing the car's GVM by reinforcing the car's structure, and upgrading the suspension and differentials*
- *increasing the car's ground clearance.*

The combined effect of the modifications will allow the car to carry a significantly heavier load and make substantially more space available to carry goods. At the same time, the modifications will significantly alter the appearance of the car, and significantly diminish the passenger carrying capacity of the car.

Having regard to the factors in paragraph 13 of this Determination, the design of the car has sufficiently changed such that it is not designed principally for the carriage of passengers for the purposes of the LCT Act. Accordingly, the modified car is not considered to be a luxury car. When Derek sells the modified car, he will make a taxable supply of the modified car but will not be liable to pay any LCT.

ATO reference *LCTD 2023/1*
w https://www.ato.gov.au/law/view/document?docid=LCD/LCTD20231/NAT/ATO/00001

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4. Rulings

4.1 New South Wales and Victoria: Relevant Contracts - Medical Centres

On 11 August 2023, Revenue NSW and State Revenue Office Victoria issued revenue rulings to provide guidance on their position regarding the application of the relevant contract provisions to medical centre businesses (PTA 041). The revenue rulings are substantively the same.

The revenue rulings affect entities that conduct 'medical centre businesses'. These include dental clinics, physiotherapy practices, radiology centres and other healthcare providers who contract with medical, dental and other health practitioners or their entities to provide patients with access to the services of practitioners.

A contract between a facilities provider and practitioner will be a relevant contract under section 32 of the relevant Payroll Tax Act if all of 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 exclusion under section 32(2) of the Payroll Tax Act does not apply.

It is the view of the Revenue offices that the medical centre and each practitioner engaged by the medical centre conducts separate but related businesses. The Revenue Rulings refer to the case of *Commissioner of Taxation v Healius Ltd* [2020] FCAFC 173 at 32 to support this position. That is, the medical centre provides:

1. patients with access to medical services provided by practitioners; and
2. facilities to the practitioners and patients by attracting patients, advertising the services offered by practitioners, managing the services provided to patients including arranging appointments and billing patients either directly or by bulk billing Medicare, and maintaining patient records.

Where the medical centre exercises control over the practitioners, this is suggestive of the medical centre providing the public with access to medical-related services and the practitioner serving patients on the medical centre's behalf. This control includes influencing matters such as who practices at the centre, the hours and days when the practitioners practice, the space within the centre where that occurs, and requiring the practitioners to hold out that they are practitioners of the medical centre.

The three most relevant exclusions are as follows:

1. that the health care practitioner provides the services for periods that, in aggregate, do not exceed 90 days in the year;
2. that the services under the contract with the health care practitioner are performed by 2 or more persons in a business carried on by the health care practitioner;
3. that the health care practitioner provides services of the kind to the public generally.

Under section 35(1) of the Payroll Tax Act, amounts paid or payable under a relevant contract by a medical centre are wages for payroll tax purposes if the payments are in relation to the performance of work relating to the relevant contract by the practitioner.

The revenue rulings confirm the Revenue's view that it does not matter that payments to a practitioner are paid from money received by the medical centre on behalf of practitioners, whether from patient fees or Medicare

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payments, even if the practitioner is beneficially entitled to that money. When the practitioner's entitlement is recognised and the money is paid or becomes payable, it constitutes wages for payroll tax purposes.

Further, the revenue rulings confirm that, under section 46 of the Payroll Tax Act, 'third party payments' under a relevant contract that would be wages if paid by an employer to an employee may be taken to be wages. The application of section 46 extends to medical centre businesses.

A third-party payment may consist of:

1. a payment by a person other than a deemed employer to a deemed employee;
2. a payment by a deemed employer to a person other than a deemed employee;
3. a payment by a person other than a deemed employer to a person other than a deemed employee.

The revenue rulings also consider the following other issues:

1. *Grouping*: an entity that provides administration services only to practitioners may be grouped with practitioners or the practitioners' entity. Ordinarily, a service entity employs administrative and nursing staff. These staff provide services to the practitioner's entity. The service entity and operating entity are usually grouped because of common control, and the service entity will be grouped with the practitioner entity due to the use of common employees, being the administrative staff. Revenue Ruling PTA 017 sets out when the discretion not to group these entities will be exercised, including where none of the persons who own or operate the professional practices has a proprietary interest, whether directly or indirectly, in any of the other professional practices; and
2. *Tenancy contract that is not a relevant contract*: the Revenue Rulings state that a tenancy contract by lease or licence that provides a practitioner with use of a suite or space in a building from which the practitioner conducts their own independent medical practice will not be a relevant contract. Generally, the tenancy contract will reference the specific space being leased or licensed and generally includes provisions for fit-out and alterations to accommodate the practitioner's requirements and services such as building maintenance and signage for the practitioner's operating hours.

COMMENT – In response to the Revenue NSW ruling PTA 041, the NSW Government moved to pause payroll tax audits for general practitioners and their practices for 12 months to allow ongoing consultation with the Royal Australian College of General Practitioners. See Item 2.2 of these Tax Training Notes for a summary of the legislative amendments enacted to give effect to this pause.

w https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/payroll/pta-041
w https://www.sro.vic.gov.au/legislation/relevant-contracts-medical-centres

1.1 Updated Ruling for objections lodged out of time in Victoria

The State Revenue Office of Victoria has issued an updated revenue ruling on objections lodged out of time (TAA-004v5).

Section 96 of the *Taxation Administration Act 1997* (Vic) allows a taxpayer who is dissatisfied with an assessment to lodge a written objection with the Commissioner. The objection must be lodged with the Commissioner within 60 days after the date of service of the notice of assessment or decision on the taxpayer, except as provided by section 100 (section 99). Section 100 allows the Commissioner to permit a person to lodge an objection after the 60-day period if it is lodged within 5 years after the date of service of the notice of assessment or decision on the taxpayer.

TAA-004v5 explains how the Commissioner applies section 100 of the TAA. It updates and replaces Ruling TAA-004v4 to reflect the time frame in which an out of time objection must be lodged and extends the application of the ruling to the *Gambling Taxation Act 2023* (Vic).

A few things to note from the ruling are as follows:

1. an objection is taken to have been lodged out of time if it is received by the Commissioner after the expiry of the prescribed 60-day period;
2. it is necessary to make an application under section 100 whenever an objection (other than an objection to a valuation used by the Commissioner in an assessment of land tax) is lodged out of time;
3. such an objection must be lodged within 5 years after the date of service of the assessment or decision, otherwise it will be considered invalid;
4. the application must be made by the taxpayer in writing. Oral applications will not be accepted;
5. the onus is on the taxpayer to establish why the Commissioner should exercise the discretion to permit an objection to be lodged after the expiration of the 60-day period. Accordingly, the taxpayer should provide any evidence that is relevant to the application and substantiate all the reasons provided in the application;
6. the Commissioner will consider the following factors when determining an application under section 100:
    (a) whether the taxpayer has an arguable case;
    (b) reason for lateness;
    (c) extent of lateness;
    (d) complexity of issues;
    (e) lack of awareness of the 60-day limit; and
    (f) any other reason or circumstance;
7. the Commissioner may decide to:
    (a) grant permission to lodge an objection out of time unconditionally;
    (b) grant permission to lodge an objection out of time subject to conditions; or
    (c) refuse permission to lodge an objection out of time; and
8. if the Commissioner refuses permission or imposes conditions on permission, that decision is a non-reviewable decision.

State Revenue Office Victoria *Revenue Ruling TAA-004v5 Objections lodged out of time*
w https://www.sro.vic.gov.au/legislation/objections-lodged-out-time-3

5. Private binding rulings

5.1 Division 7A debt forgiveness

Facts

A taxpayer is a director and shareholder of a company.

The company owned property which was purchased using funds lent by the taxpayer and funds borrowed from a financial institution.

In accordance with agreements, at a specified date the property was transferred to the taxpayer and the taxpayer moved into the property. Prior to the transfer, another entity was renting the property from the company.

The mortgages over the property were refinanced into the taxpayer's name.

The property transfer combined with other transactions on the same date as the transfer resulted in a debt owed by the taxpayer to the company. A Division 7A loan agreement was executed between the company and the taxpayer.

The property was sold at a specified date and the taxpayer used the proceeds from the sale to pay out other debt.

The company wishes to forgive the debt subject to the Commissioner exercising his discretion under section 109G(4) of the ITAA 1936. Under that subsection a forgiveness does not result in a deemed dividend if the Commissioner is satisfied that:

1. the debt was forgiven because payment of the debt would have caused the entity undue hardship; and
2. when the entity incurred the debt, the entity had the capacity to pay the debt; and
3. the entity lost the ability to pay the debt in the foreseeable future as a result of circumstances beyond the entity's control.

The reason that the company considers the Commissioner should exercise the discretion is because the company had assessed that it would result in undue hardship for the taxpayer if the debt were to be repaid and the taxpayer is unable to service the debt to the company in addition to a bank loan.

The taxpayer provided various material to the Commissioner to show the taxpayer's servicing ability.

In relation to the capacity to repay the debt at the time that the debt was incurred the ruling request included material disclosing the rental income and the negative gearing deductions available.

Question

Will section 109G(4) of the ITAA 1936 apply so that any forgiveness of a debt owed by an entity to the company will not be deemed a dividend under Division 7A of the ITAA 1936?

Ruling

The ATO ruled No.

The payment of the debt would have caused the entity undue hardship

The ATO stated that hardship would “necessarily involve” a financial detriment resulting from the payment of the debt.

The phrase “undue hardship” is not defined in the ITAA 1936, but Practice Statement Law Administration PSLA 2011/17: *Debt relief, waiver and non-pursuit* (PSLA 2011/17) contains a definition of serious hardship. Also, the phrase "serious financial hardship" is explained in Practice Statement Law Administration PSLA 2011/4: *Collection and recovery of disputed debts* (PSLA 2011/4).

Namely, the Commissioner considers serious hardship for a person to be the deprivation of the basic necessities of everyday life, such as food, clothing, shelter or reasonable education.

Although no evidence of expenses and income were provided in the application, the ATO still considered the following as relevant to its conclusion:

1. no Deed of Forgiveness had yet been executed and the wording in the application suggest the action had not yet been taken, it is merely proposed subject to approval. If this were to be the case, then the forgiveness would not occur in the specified income year and the sale of the property would be taken into account;
2. taking into account the sale of the property and allowing for outgoings and other costs, it was estimated there may have been over $XXX in sale proceeds remaining. The ATO considered that this amount would allow for the repayment of the debt owed to the company without causing undue hardship and still allow for the repayment of other debts and the purchase of a new affordable property; and
3. the property could have been sold at an earlier date and downsizing commenced from an earlier date.

Therefore, the ATO did not accept that the repayment of the debt would have caused undue hardship.

When the entity incurred the debt, the entity had the capacity to pay the debt

The ATO did not consider that the material submitted concerning rental property income and negative gearing deductions was relevant to showing the taxpayer could repay the debt. Therefore, it was not accepted that the taxpayer had the capacity to repay the debt when it was incurred and as such this requirement was not met.

The entity lost the ability to pay the debt in the foreseeable future as a result of circumstances beyond its control

The taxpayer stated that various factors greatly diminished the taxpayer’s financial resources and income earning capabilities, including that the taxpayer could no longer receive rental income from the property and the taxpayer no longer had the specified income earning capacity.

The ATO stated that as the taxpayer did not have the capacity to pay the debt when it was first incurred it would “naturally flow” that the taxpayer cannot lose what the taxpayer did not first have. Therefore, this final requirement was not considered.

ATO reference *Private Binding Ruling Authorisation No. 1052136159090*
w https://www.ato.gov.au/law/view/document?docid=EV/1052136159090

5.2 Dividend streaming and dividend stripping

Facts

Company A carries on a business and has assets including land, buildings and plant and equipment.

All the shares in Company A are owned equally by Company B and by a Unit Trust. Family Trust A is now the sole unit holder of the Unit Trust.

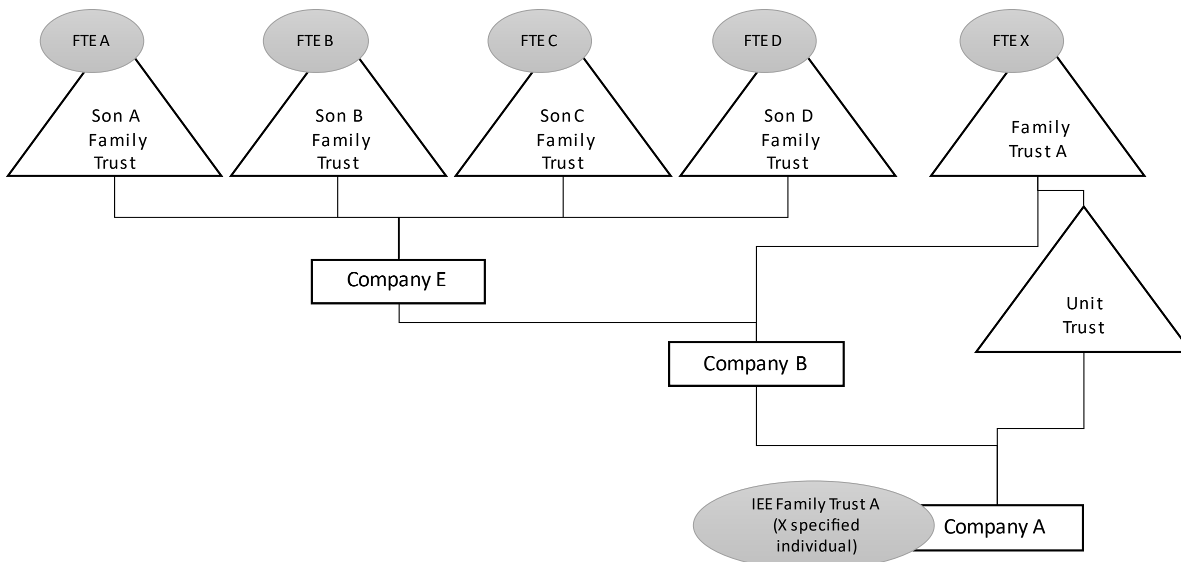
Company A made an interposed entity election (**IEE**) in respect of Family Trust A. The specified individual in Family Trust A's family trust election (**FTE)** has died.

The Unit Trust has not made an IEE or FTE.

Company B is owned by Family Trust A and Company E.

Family Trust A made a family trust election with a specified individual, who was also the appointer of the trust.

The specified individual had four sons. A family trust was established for each son and each trust made an FTE for the named son. Those four trusts own all the shares in Company E.



In addition to the entities in the diagram, each of the sons has incorporated a company with the shares held equally by a son and their spouse. As a consequence of all the ordinary shares being owned by family members of the deceased specified individual, these companies are within the family group of Family Trust A.

Company A sold a parcel of land and has significant capital proceeds to distribute.

As a result of the IEE, Company A is restricted to making distributions to members of Specified Individual's family group (the **Family Group**) if it is not to be liable to pay FTDT.

The Family Trust has fixed interests in X% of the income and capital of Company B. However, the remaining X% interest is held by Company E, which is owned by the sons' family trusts, which are not members of the Family Group because they each have made an FTE with other specified individuals.

Consequently, Company B is not a member of the Family Group. Any future distributions by Company A to Company B would be a distribution to a member outside the Family Group, and therefore the distribution would be subject to Family Trust Distribution Tax (**FTDT**) at a rate of 47%.

Proposed Transaction

To avoid triggering FTDT, Company A proposes to restructure its share capital as detailed below.

Step 1: Create two new classes of shares, A and B class. The rights attaching to the A Class Shares and the B Class Shares will be identical, as follows:

- voting rights, and the rights to be paid a dividend to the exclusion of other classes of shares subject to the discretion of the directors;
- no rights to capital on winding-up; and
- the rights to be paid dividends will be extinguished by the effluxion of 47 months for the date of the share issue.

Step 2: Company A will issue one A Class Share to the Unit Trust and one B Class Share to Company B for consideration of $X per share.

Step 3: Once Steps 1 and 2 have been completed, Company A will pay fully franked dividends out of profits to the Unit Trust on the A Class Share. The Unit Trust will distribute the fully franked dividend to the Family Trust, which will distribute the fully franked dividend to the sons' companies in equal proportions.

Step 4: The right to receive a dividend on the A Class Share and the B Class Share will be extinguished after 47 months from the date of the share issue.

Company A expects to pay several fully franked dividends to its A Class shareholder (the Unit Trust) prior to the cancellation of the A Class Share's dividend rights. It is estimated that the initial fully franked dividend will be approximately $X, paid out of the profits on the sale of the land.

Immediately after the payment of the anticipated dividend, Company A expects to have remaining assets of approximately $X. In the years following the initial distribution and prior to the cancellation of the A Class Share and the B Class Share dividend rights under the Proposed Transaction, Company A expects to liquidate its assets and be wound up.

The purpose of issuing the B Class Share to Company B is to maintain the same ownership share rights for both shareholders, in proportion to the existing ordinary shares.

Company A does not intend to declare or pay any dividends on the B Class Share, because any distributions by Company A to Company B would trigger FTDT.

The Unit Trust and Company B will be a qualified person in respect of the distributions made by Company A under the Proposed Transaction for the purposes of Division 1A of former Part IIIAA of the ITAA 1936, on the basis that they both have held the relevant shares in Company A for a continuous period of at least 45 days (for shares which are not preference shares) pursuant to former section 160APHO(2) of the ITAA 1936.

Questions

1. Is the Unit Trust a fixed trust within the meaning of section 272-65 of Schedule 2F to the ITAA 1936?
2. If the Unit Trust is not a fixed trust for the purposes of section 272-65 of Schedule 2F to the ITAA 1936, will the Commissioner exercise the discretion under subsection 272-5(3) of Schedule 2F to the ITAA 1936 to treat the Unit Holders of the Unit Trust as having fixed entitlements to all of the income and capital of the Unit Trust for purposes of the Proposed Transaction?
3. Will FTDT apply to a dividend declared by Company A under Step 3 of the Proposed Transaction?
4. Will the A Class and B Class shares issued by Company A under the Proposed Transaction to Company B and the Unit Trust be equity interests in a company under subsection 974-70(1) of the ITAA 1997?
5. Will subsection 725-90(1) of the ITAA 1997 (the reversal rules) apply to Step 2 of the Proposed Transaction such that the value shifting consequences (if any) will be disregarded under Division 725?

6. Will the Proposed Transaction be considered a dividend stripping scheme within the meaning of subsection 177E(1) of the ITAA 1936?
7. Will the Commissioner make a determination to deny the Unit Trust a tax offset in relation to a franked distribution paid to the A Class shareholder in Step 3 of the Proposed Transaction pursuant to subsection 204-30(3) of the ITAA 1997?
8. Will paragraph 207-145(1)(f) of the ITAA 1997 operate to deny a tax offset in relation to a franked distribution paid to the A Class shareholder in Step 3 of the Proposed Transaction?
9. Will the Commissioner make a determination that a franking debit arises or that no imputation benefit arises on a franked distribution paid to the A Class shareholder in Step 3 of the Proposed Transaction pursuant to section 177EA of the ITAA 1936?
10. Will the Proposed Transaction result in 'the obtaining by a taxpayer of a tax benefit in connection with a scheme' for the purposes of subsection 177C(1) or 177C(2) of the ITAA 1936 with respect to the avoidance or non-incidence of FTDT, as provided for in Division 271 of Schedule 2F to the ITAA 1936?
11. Will Part IVA apply to the Proposed Transaction in relation to a taxpayer obtaining a tax benefit in connection with a scheme in respect of:
    (a) the non-inclusion of an amount in assessable income by way of non-inclusion of a dividend by Company B (Scheme One); or
    (b) avoiding the consequences of a value shift resulting in non-inclusion of an amount such as a net capital gain in the assessable income of a taxpayer (Scheme Two)?

Ruling

Question 1: Is the Unit Trust a fixed trust?

The ATO ruled no.

It is an essential element of subsection 272-5(1) of Schedule 2F to the ITAA 1936 that in order to have a fixed entitlement to a share of income or capital there must be a vested or indefeasible interest 'under a trust instrument'.

Determining whether a beneficiary has a 'vested and indefeasible' interest in a trust requires an examination of the terms of the trust upon which the relevant trust property is held, including individual clauses, and whether a beneficiary's interest in a share of the income or capital is defeasible by virtue of any of the powers contained in the trust instrument (see *CPT Custodian Pty Ltd v Commissioner of State Revenue; Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd* [2005] HCA 53).

While the unit holders had vested interests under the trust deed, there were various clauses that made their interests defeasible, including the trustee's powers to:

- issue new units on such terms and to such persons as it thinks fit and to classify or to reclassify units which are already issued in such a manner as the Trustee thinks fit;
- classify receipts and outgoings as capital and income;
- redeem units at fair value as determined by the trustee; and
- transfer assets to another trust.

Question 2: Will the Commissioner exercise the discretion to treat the Unit Trust as a fixed trust?

The ATO ruled yes.

The Commissioner had regard to all the relevant circumstances and the factors set out in paragraph 272-5(3)(b) of Schedule 2F to the ITAA 1936 and was satisfied that the Unit Trust has the following attributes:

- it has a trust instrument;
- the Unit Trust is a unitised trust however it is not subject to any specific industry regulation, licensing or registration requirements which are legally enforceable;
- all of the beneficial interests in the income and capital of the trust are vested;
- there is only one type of unit currently on issue and therefore all beneficial interests have the same rights to receive the income and capital of the Trust;
- all the beneficial interests in the income and capital of the trust can be expressed as a percentage of the total income and capital of the trust; and
- the trust does not have a default clause for either income or capital and currently the trust has no discretionary powers to appoint income or capital of the Trust.

Question 3: Will FTDT apply to a dividend declared by Company A to the Unit Trust?

The ATO ruled no.

Per the answer to the previous question, the Commissioner has exercised the discretion pursuant to subsection 272-5(3) of Schedule 2F to deem the Unit Holders of the Unit Trust as having fixed entitlement to the income and capital of the Unit Trust.

The sole unit holder of The Unit Trust is Family Trust A. Accordingly, the Unit Trust will be a member of the Family Group pursuant to subsection 272-90(5) of Schedule 2F to ITAA 1936. As a result, there will not be a liability to pay FTDT when Company A pays a dividend to the Unit Trust under the Proposed Transaction.

Question 4: Will the A and B class shares be equity interests?

The ATO ruled yes.

The A and B Class Shares would fail the debt interest test in Subdivision 974-B of the ITAA 1997, as there is no effectively non-contingent obligation as required by paragraph 974-20(1)(c), because the shareholder entitlement to dividends under both the A and B Class Shares is contingent on Company A having the ability to pay dividend and the discretion of the directors to declare a dividend on the shares.

Accordingly, the A and B Class Shares that Company A would issue if the Proposed Transaction were to proceed would be equity interests under Subdivision 974-C of the ITAA 1997.

Question 5: Will the value shifting consequences (if any) be disregarded under Division 725?

The ATO ruled yes.

Section 725-145 of the ITAA 1997 provides that there is a direct value shift (**DVS**) under the scheme involving equity interests in a company if:

1. there is a decrease in the market value of one or more equity interests in Company A; and
2. the decrease is reasonably attributable to one or more things done under the scheme and occurs at a time or after when that thing or the first of those things is done; and
3. either or both of subsections 725-145(2) or (3) of the ITAA 1997 are satisfied.

However, section 725-50 of the ITAA 1997 relevantly provides that a DVS will only have consequences under Division 725 if section 725-90 does not apply.

Section 725-90 of the ITAA 1997 applies if:

- the one or more things referred to in paragraph 725-145(1)(b) of the ITAA 1997 brought about a state of affairs, but for which the direct value shift would not have happened; and

- as at the time referred to in that paragraph, it is more likely than not that, because of the scheme, that state of affairs will cease to exist within 4 years after that time.

The Proposed Transaction involves issuing the A and B Class shares, then removing the rights to dividends 47 months after the shares are issued. Accordingly, as the state of affairs that brings about any potential value shift will be reversed within four years, there will be no consequences under Division 725 of the ITAA 1997 in relation to any potential value shift.

Question 6: Will the Proposed Transaction be considered a dividend stripping scheme?

The ATO ruled no.

Section 177E of the ITAA 1936 applies to schemes entered into after 27 May 1981 where:

- property of a company is disposed of as a result of paragraph (177E(1)(a)):
  - a scheme by way of or in the nature of dividend stripping; or
  - a scheme having substantially the effect of a scheme by way of or in the nature of a dividend stripping; and
- in the Commissioner's opinion, the disposal of property represents, in whole or in part, a distribution of profits of Company A (paragraph 177E(1)(b)); and
- if, immediately before the scheme was entered into, Company A had paid a dividend equal to the amount of the disposal of property, an amount (referred to as the notional amount) would have been included in the assessable income of a taxpayer of a year of income (paragraph 177E(1)(c)).

For section 177E of the ITAA 1936 to apply, paragraph 177E(1)(c) must be satisfied. That is if, immediately before the scheme was entered into, Company A had paid a dividend equal to the amount of the disposal of property, an amount (referred to as the notional amount) would have been included in the assessable income of a taxpayer of a year of income.

Company A would be liable to pay FTDT on any dividend paid to Company B under section 271-30 of Schedule 2F to the ITAA 1936) as it is not a member of the Family Group.

Consequently, pursuant to section 271-105 of Schedule 2F to ITAA 1936, the dividend would be non-assessable non-exempt income in the hands of Company B. Therefore, there is no notional amount identified under paragraph 177E(1)(c) of the ITAA 1936 in connection with the scheme.

Question 7: Will the Commissioner determine to deny a tax offset for the franked distribution to the Unit Trust?

The ATO ruled yes.

Under section 204-30 of the ITAA 1997, the Commissioner may cancel franking credits or create franking debits if an entity streams distributions to entities that would benefit more from imputation benefits. The ATO took the view that the Unit Trust would otherwise be able to take advantage of imputation credits. However, because of the application of FTDT, Company B would receive non-assessable non-exempt income and would not have the benefit of franking credits. The ATO noted that section 204-30 does not have a 'purpose' test and that the distribution was being 'streamed' to the A Class Shareholder (the Unit Trust) and not to Company B which could not enjoy the imputation benefit.

Question 8: Will a tax offset be denied under section 207-145(1)(f) for the franked distribution to the Unit Trust?

The ATO ruled that it was not necessary to consider this question, as the Commissioner would determine to deny the offset under section 204-30 of the ITAA 1997.

Question 9: Will the Commissioner determine a franking debit arises under section 177EA of the ITAA 1936?

The ATO ruled that it was not necessary to consider this question, as the Commissioner would determine to deny the offset under section 204-30 of the ITAA 1997. Section 177EA is a general anti-avoidance provision. Where a specific provision applies, it is not necessary to consider the general provision.

Questions 10 and 11: Will Part IVA apply?

The ATO ruled no.

The taxpayer's stated purpose in undertaking the Proposed Transaction to restructure Company A's share capital is to avoid triggering FTDT when a dividend is paid by Company A.

Part IVA cannot apply unless a taxpayer has obtained, or would, but for section 177F of the ITAA 1936 obtain, a tax benefit in connection with a scheme. The non-application of FTDT is not a tax benefit as defined by subsections 177C(1) and (2).

ATO reference *Private Binding Ruling Authorisation No. 1052121485678*
w https://www.ato.gov.au/law/view/document?docid=EV/1052121485678

5.3 Capital loss for payment made under a guarantee

Facts

The Company carried on a primary production business. Loans financed the purchase in the company name. As part of the financing arrangement, the taxpayer was required to give a personal guarantee to the bank to honour the debt in the event of the Company defaulting. The taxpayer was an employee of the company in receipt of wages and also a shareholder in the company.

During the operation of the business after approximately X years of trading, a disease was identified in the growing rooms. The disease decreased productivity and the business was operating at a loss. The efforts to eradicate the disease were not successful and it was decided to have the Company placed into liquidation and a liquidator was appointed.

The liquidator operated the business for a period of time, but it was decided they could not turn the business around or sell it as a going concern. Consequently, it was decided to cease business operations.

All of the assets of the business were sold and proceeds were used to partly pay down the loan with the bank. After the liquidator disposed of all the Company assets, there was still a sizeable loan outstanding. It is this loan that the taxpayer was called upon to pay, under the personal guarantee.

The taxpayer took out a personal loan to extinguish the Company loan.

The Company was subsequently deregistered.

Questions

1. Can the taxpayer claim a capital loss for an amount paid under a personal guarantee on a business loan for a Company that went into liquidation and has since been deregistered?
2. Do the annual interest payments on the loan the taxpayer took out to honour the personal guarantee and repay the Company debt form part of the capital loss against which the taxpayer can offset future capital profits, or is the interest deductible against the taxpayer's assessable income in each year it is incurred?

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Ruling

Question 1

The ATO ruled yes. The taxpayer can claim a capital loss for an amount paid under a personal guarantee on a business loan for a company that went into liquidation and has since been deregistered.

Generally, when an indemnifier repays a debt under a deed of indemnity to a primary creditor, the indemnifier acquires a CGT asset within section 108-5 of the ITAA 1997, which is a right to be indemnified by the principal debtor. The indemnifier is taken to have acquired this right for a cost base equal to the amount the indemnifier pays, or is required to pay, under the contract of indemnity.

When a creditor's debt is paid in full, the indemnifier's right of subrogation is created, that is, the right to stand in place of the creditor and be subrogated to the creditor's remedies against the principal debtor. This means that the indemnifier has an enforceable debt against the principal debtor. The amount paid under the deed or contract remains the relevant cost base of the asset and the asset will be disposed of when either the debt is extinguished by payment or by release.

If the debtor cannot repay the debt, the indemnifier will make a capital loss under section 104-25 of the ITAA 1997 (CGT event C2).

In this case, when payment in full was made under the deed of indemnity with the bank, the taxpayer's right of indemnity became an enforceable debt against the Company. This enforceable debt was a CGT asset within section 108-5 of the ITAA 1997 and the amount paid by the taxpayer under the deed became the first element of the cost base of this asset for the purposes of subsection 110-25(2) of the ITAA 1997.

When the Company was deregistered, it ceased to exist and the Company's debt to the taxpayer was "released, discharged, or satisfied" for the purposes of paragraph 104-25(1)(d) of the ITAA 1997. At this time CGT event C2 in section 104-25 of the ITAA 1997 happened. The taxpayer received no capital proceeds when this happened and so the taxpayer incurred a capital loss for the amount the taxpayer paid in full satisfaction of the indemnity to the bank.

Question 2

The ATO consider that the annual interest payments on the loan the taxpayer took out to honour the personal guarantee formed part of the cost base of their asset, but not its reduced cost base, so that the interest would not increase the capital loss.

Section 8-1 of the ITAA 1997 allows a deduction for a loss or an outgoing to the extent to which it is incurred in gaining or producing your assessable income, except where the loss or outgoing is of a capital, private or domestic nature.

Here the ATO considered the purpose of the taxpayer's action was not to directly produce any assessable income, but to fulfil a commitment under the guarantee. The taxpayer was not in the business of entering into contracts as a guarantor. The provision of the guarantee was not undertaken by the taxpayer as a regular and normal incident of the taxpayer's income earning activities. As such, the expenses did not sufficiently relate to the taxpayer's income earning activities and a deduction for interest incurred on loans to pay the Company's debt would not be allowable under section 8-1 of the ITAA 1997.

Instead, the interest expense would be considered capital in nature and be included under the third element of the cost base. However, as capital loss under a CGT event C2 is calculated using a reduced cost base and the reduced cost base does not include the third element, this interest expense is not included in the taxpayer's reduced cost base to increase the overall capital loss. Any loss claimed under CGT event C2 is limited to the amount paid in full satisfaction of the indemnity to the bank at the time of final payment.

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COMMENT – the ATO analysis about the capital loss in this PBR ignores the requirement to determine whether the debt is a personal use asset – there is a need for a connection between the giving of the personal guarantee and the production of assessable income. The issue is discussed in detail in TR 96/23.

ATO reference *Private Binding Ruling Authorisation No.* 1052092514804
w https://www.ato.gov.au/law/view/document?docid=EV/1052092514804

5.4 Sale of real property and GST-free supply of going concern

Facts

Entity 1 entered into contracts to acquire two properties, Property 1 and Property 2 from Entity 2.

Entity 2 was registered for GST.

Property 1 was a commercial property subject to a lease. A council rates notice stated that Property 1 was owned by Entity 2. However, a tax invoice in respect to costs incurred by the tenant of Property 1 listed a third entity, Entity 3, as the owner of Property 1.

The contract of sale in respect of Property 1, included a licence agreement between the existing tenant and Entity 3 (as the landlord).

Property 2 was a residential premise. The contract for sale did not include a lease. Property 2 had not been actively marketed for lease.

Prior to the date of settlement, Entity 1 and Entity 2 entered into a written agreement that the sale of the properties would be a sale of going concern.

Questions

1. Did the sale of Property 1 by Entity 2 satisfy the conditions of a GST-free sale of a going concern under section 38-325 of the GST Act?
2. Did the sale of Property 2 by Entity satisfy the conditions of a GST-free sale of a going concern under section 38-325 of the GST Act?

Ruling

Question 1 – Sale of Property 1

The ATO ruled no.

For a supply to be a GST-free supply of going concern, section 38-325(1) provides:

1. the supply must be for consideration;
2. the recipient of the supply must be registered for GST, or must be required to be registered for GST; and
3. the supplier and the recipient have agreed in writing that the supply is of a going concern.

A supply will also need to satisfy the following requirements in section 328-25(2) to be considered a supply of going concern:

1. the supplier must provide the recipient with all things necessary for the continued operation of an enterprise; and

2. the supplier must carry on or will carry on the enterprise until the day of the supply.

The sale of Property 1 satisfied section 38-325(1) but failed to meet the conditions in 328-25(2).

The ATO noted that Goods and Services Taxation Ruling GSTR 2002/5 provides guidance on what constitutes a going concern for GST-free purposes. GST 2002/5 states that an enterprise must be identified and continued by the supplier until the day of the supply.

The term "enterprise" encompasses a broader scope than just a "business" and can include leasing activities. The necessary components for a going concern depend on the nature of the enterprise.

In respect of Property 1, the enterprise in question is leasing. The ATO considered the critical element for the continued operation of this leasing enterprise, is an agreement or lease between the property owner and the tenant. However, it appears that the agreement in place is with a third-party entity, being Entity 3, rather than the vendor, Entity 2.

The evidence provided did not demonstrate that there was a leasing enterprise carried on by Entity 2.

<u>Question 2 – Property 2</u>

The ATO ruled no.

The ATO considered all of the requirements for a supply to be a GST-free supply of going concern set out above.

As with the sale of Property 1, the sale was for consideration, Entity 2 as the recipient was registered for GST, Entity 1 and Entity 2 had a written agreement that the sale was to be a supply of going concern.

Accordingly, it was necessary to consider whether Entity 1 had provided Entity 2 will all things necessary for the continued operation of an enterprise. In these circumstances, the relevant enterprise was a leasing enterprise.

The ATO considered that Entity 1 had not provided all things necessary for the continued operation of a leasing enterprise in respect of Property 2 for the following reasons.

1. Property 2 was vacant when it was acquired by Entity 1;
2. there was no current lease in place; and
3. the property was not being marketed for lease.

Therefore, the sale of Property 2 does not qualify as a GST-free sale of a going concern.

As Property 2 did not meet the requirements as a GST-free supply of going concern, the sale of Property 2 falls under section 40-65 of the GST Act. That provision states that a sale of real property is input taxed if it is residential premises to be used predominantly for residential accommodation. Property 2 meets these characteristics as it is a residential premises over 5 years old and was vacant at the settlement date. Therefore, the sale of property 2 is classified as an input taxed supply of residential premises under section 40-65.

Therefore, the sale of Property 2 did not qualify as a GST-free supply of going concern and was an input taxed supply of residential premises.

COMMENT – the ATO reference to Property 2 being input taxed as it is over 5 years old is an incomplete analysis. If the property was in fact potentially new residential premises when supplied (having not been previously supplied as new residential premises, subject to a long term lease, or having been substantially renovated), it would only cease to be new residential premises if it had been continuously used for 5 years to make input taxed supplies of residential premises.

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If the purchase of Property 2 had been a going concern, and then Property 2 was used to derive input taxed rent, there would have been an increasing adjustment of 10% of the purchase price to be accounted for.

ATO reference *Private Binding Ruling Authorisation No 1052139439844*
w https://www.ato.gov.au/law/view/document?docid=EV/1052139439844

5.5 Trust Distribution – application of section 99B

Facts

The taxpayer was a resident of Australia for tax purposes.

The late parent of the taxpayer was a resident of New Zealand (the **Parent**).

The Parent left a Last Will and Testament in which created, at clause 5, a testamentary trust (the **Trust**).

An individual and a corporate trustee were the original trustees of the Trust. The individual was the Parent's spouse (the **Spouse**). The Spouse did not remarry after the Parent's death.

The Spouse also died.

The Parent and the Spouse had three children: the taxpayer, Sibling 1 and Sibling 2.

Under clause 5(a) of the Trust, the Spouse was entitled during their lifetime (provided they remained a widow) to the net annual income of the Testamentary Trust.

Under clause 5(b) of the Testamentary Trust, following the Spouse's death, the taxpayer, Sibling 1 and Sibling 2 were entitled to share equally as tenants in common in the assets and income of the Trust.

The corporate trustee did not maintain digital records of the financial information in relation to the Trust.

Certain shares, along with other assets, formed part of the corpus of the Trust. The trustee of the Trust had already, or intend to, sell all the shares (and other non-cash assets) held in the Trust and convert same into cash.

Additionally, as at the date of their death, the Parent held Government Stock worth approximately $XXX,XXX. Financial statements indicated that some of the bonds were rolled over and one redeemed.

The corporate trustee proposed to make a distribution to the taxpayer of his or her one third share of the remainder of the Trust, made up entirely of the original corpus of the Trust.

Relevantly, subsection 99B(1) of the ITAA 1936 provides that where a beneficiary who was an Australian resident at any time during an income year, is paid an amount from a trust, or has an amount of trust property applied for their benefit, that amount is to be included in the assessable income of the beneficiary in the income year it is paid.

However, subsection 99B(2) of the ITAA 1936 reduces the amount to be included in the beneficiary's assessable income under subsection 99B(1) by so much of that amount as represents, relevantly:

> *a) corpus of the trust, (but not to the extent that it is attributable to income derived by the trust which would have been subject to tax had it been derived by a taxpayer being a resident)...*

Questions

1. Will section 99B of the ITAA 1936 apply to the distribution made to a taxpayer from the Trust?
2. Will the exception in subsection 99B(2)(a) of the ITAA 1936 apply to all the distributions made to the taxpayer from the Trust?
3. Will the exception in subsection 99B(2)(a) of the ITAA 1936 apply to part of the distribution made to taxpayer from the Trust?

Ruling

The ATO ruled:

1. in respect of Question 1, yes;
2. in respect of Question 2, no;
3. in respect of Question 3, yes.

The ATO noted that the proposed distribution to the taxpayer was not attributable solely to the value of the original corpus of the Trust, such as the gains on the disposal of the shares and Government Stocks. The amount of distribution made to the taxpayer, which is attributable to these gains (or any other income or capital gain amount) will be assessable.

The ATO further explained that, to the extent that the distribution represented proceeds from the disposal of shares and Government Stocks originally contributed to the Trust:

1. that portion of the proceeds which is not attributable to a capital gain is corpus and excluded under paragraph 99B(2)(a) of the ITAA 1936, and
2. that portion of the proceeds which is attributable to a capital gain is not excluded by paragraph 99B(2)(a) and is assessable under subsection 99B(1) of the ITAA 1936.

ATO reference *Private Binding Ruling Authorisation No. 5010085708350*
w https://www.ato.gov.au/law/view/document?docid=EV/5010085708350

5.6 CGT – Absolute entitlement

Facts

The Deceased passed away on XX XX XX leaving a valid will.

The Trustee is the sole trustee.

In accordance with the Will, the estate of the Deceased was divided into the following trusts:

1. to sell call in and convert the same into money with the power at his discretion to postpone the sale calling in and conversion of any part thereof during such time as the Trustee shall think fit and out of the proceeds pay the Deceased's debts and funeral and testamentary expenses;
2. to invest the residue of the Deceased estate.

The daughter of the Deceased was to be paid the net income of the residuary estate during her lifetime.

The Trustee had the absolute discretion to apply out of the capital of the residuary estate such part or parts as required to relieve any hardship encountered by the Deceased's daughter.

On the death of the Deceased's daughter, the capital of the residuary estate was to be divided into three equal parts on trust:

1. one part for the sole use and benefit of Person B;
2. the balance for Persons C and D as tenants in common in equal shares.

The Trustee had converted all assets into cash and had invested the proceeds in shares in publicly listed companies, managed funds and other assets. All capital gains and losses were taken into account when calculating the net taxable income for the trust.

The Deceased's daughter passed away on XX XX XX.

During the period XX XX XX to XX XX XX amounts were paid to the Deceased's daughter by the Trustee.

The Deceased's daughter was survived by Persons B, C and D (**Residuary Beneficiaries**).

The Residuary Beneficiaries are all Australian residents for tax purposes, none are under a legal disability and the Will did not allocate specific assets to any particular person.

As at the date of death of the Deceased's daughter, the trust fund comprised of the following assets:

1. shares in listed companies;
2. units in listed trusts.

The assets were all acquired following the death of the Deceased.

The shares and the units could not be divided equally between the Residuary Beneficiaries.

Persons B, C and D advised the trustee that their preference was to sell the shares in two tranches, in financial year A and financial year B.

The Trustee confirmed that the shares and units would be sold.

On XX XX XX the trustee arranged for the sale of one half of the share portfolio to be sold. The sale of the shares gave rise to net capital gains.

The proceeds of sale of the shares were deposited into the Trustee's solicitors trust account.

On XX XX XX, the Trustee determined that the trust fund comprised of:

1. shares in listed companies;
2. units in listed trusts;
3. cash management accounts;
4. cash in solicitors trust account.

The Trustee resolved to make a capital distribution to each of the Residuary Beneficiaries.

The Trustee did not make a choice to be specifically entitled to any of the capital gains under section 115-230 of the ITAA97.

Income was calculated according to ordinary concepts, and as such capital gains were not included when calculating the income of the trust estate.

The testamentary trust derived income during the financial year and there was income of the trust. The net income for that financial year comprised of franked dividends, capital gains and other income (interest and trust distributions).

On XX XX XX most of the remaining shares were sold resulting in a capital gain.

The proceeds of sale, minus the brokerage were deposited into the Trustee's solicitors trust account.

Person B died on XX XX XX.

The term deposit and cash management accounts were closed, and the balance thereof was transferred to the Trustee's solicitors trust account.

In XX XX, the Trustee paid a distribution to each of the Residuary Beneficiaries.

The expenses in that financial year exceeded the income derived by the Trust.

The Trust received franked distributions but there were no expenses incurred that were directly relevant to the franked distributions.

The Trust had a net income under section 95 of the ITAA36 in respect of that financial year.

The Trustee will not make a decision to be specifically entitled to any of the capital gains under section 115-230 of the ITAA 97 for that year.

The Trustee did not keep a written record of the assets allocated to the beneficiaries.

The Trustee prepared a written resolution to advance capital to the Residuary Beneficiaries.

Questions

1. Does CGT event E5 in section 104-75 of the ITAA 1997 happen on the death of a life tenant?
2. Will the Trustee be assessable on any share of the capital gain from a CGT event happening in the XX income year from the sale of securities in XX XX under sections 99 or 99A of the ITAA 1936?
3. Will the Trustee be assessable on any share of the capital gain from any CGT event on the sale of securities arising in the 20XX year under sections 99 or 99A of the ITAA 1936 if the trustee resolves prior to XX XX XX to distribute the proceeds from the sale of those securities to the three Residuary Beneficiaries?
4. Will the Trustee of the Testamentary Trust be assessed and pay tax under sections 99 or 99A of the ITAA 1936 on the net income of the trust estate calculated pursuant to subsection 95(1) of the ITAA 1936 for the year ended XX XX XX?

Ruling

Question 1

The ATO ruled no.

A CGT E5 event occurs if a beneficiary becomes absolutely entitled to a CGT asset of a trust. A trustee will make a capital gain if the market value of the asset is more than its cost base or a capital loss if the market value is less than the assets reduce cost base.

The ATO referred to PS LA 2003/12 which explains the ATO's practice is not to recognise any taxing point in relation to assets owned by a deceased person until they cease to be owned by the beneficiaries named in the will.

The ATO concluded that it is not necessary to consider whether CGT event E5 happens on the death of a life tenants as a testamentary trust is treated in the same way as a legal personal representative is, and CGT Event E5 does not happen as a testamentary trust is a trust to which Division 128 applies.

The ATO referred to *TR 2004/D25 Income Tax: capital gains: meaning of the words absolutely entitled to a CGT asset as against the trustee of a trust* which explains the core principles of when beneficiaries become absolutely entitled to an asset.

The question is whether the beneficiary has the ability to call for the asset to be transferred to them or to be transferred at their direction. In this case, there is more than one beneficiary with interests in the trust asset and as such is not possible for any one of the beneficiaries to call for the asset to be transferred to them or at their direction.

Circumstances where a beneficiary can be absolutely entitled to an assert of a trust for CGT purposes include:

1. the assets are fungible;
2. the beneficiary is entitled against the trustee to have their interest in those assets satisfied by a distribution or allocation in their favour of a specific number of them; and
3. there is a very clear understanding on the part of all the relevant parties that the beneficiary is entitled, to the exclusion of the other beneficiaries, to that specific number of assets in the trust.

Assets are fungible if each asset matches the same description such that one asset can be replaced with another. For example, shares in a company.

On the death of the Deceased's daughter, the assets comprised of shares in listed companies and units in listed trusts. These assets are fungible.

However, the number of shares and unit holdings on the date of death, was not divisible by three and the will of the Deceased did not indicate whether specific assets were to be allocated to a specific beneficiary.

On this basis, the ATO held it was not clear how the assets would be allocated so that CGT event E5 could not occur.

Question 2

The ATO ruled no.

Subdivision 115-C sets out the rules for dealing with the taxable income that related to capital gains of a trust, broadly:

1. assess beneficiaries on capital gains to which they are specifically entitled;
2. where there is an amount of capital gain to which no one is specifically entitled, beneficiaries are allocated a proportionate share of that part of the gain based on their share of the income of the trust;
3. trustees are similarly allocated a proportionate share of an amount of a capital gain to which no one is specifically entitled, but only to the extent that there is an adjusted share of the income of the trust to which no beneficiary is presently entitled.

Under section 115-228 a beneficiary is specifically entitled to capital gain if the following two conditions are satisfied:

1. entitlement condition – the beneficiary must have received, or reasonably expect to receive, financial benefits that are referable to the capital gain;
2. recording condition – the beneficiary's entitlement to the amount must be recorded in its character as an amount referable to the capital gain in the accounts or records of the trust.

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A CGT event occurred on the sale of the shares and gave rise to net capital gains.

The Trustee did not make a choice to be specifically entitled to any of the capital gains.

The ATO concluded that the distributions received by the Residuary Beneficiaries was paid out of the capital proceeds from the sale of the shares, and they had received the financial benefits that are referable to the capital gain realised on the shares.

The distribution of capital was consistent with the terms of the trust and the terms of the Deceased's will.

The ATO was satisfied that the two conditions under section 115-228 of the ITAA 1997 were satisfied, and the beneficiaries were specifically entitled to all of the capital gains from the disposal of the shares.

Question 3

The ATO ruled no and gave the same reasoning as outlined in Question 2.

Question 4

The ATO ruled no.

Any trust income to which no beneficiary is presently entitled is assessed to the trustee under section 99A of the ITAA 1936 unless the Commissioner is satisfied that that it would be unreasonable that section 99A of the ITAA 1936 applies.

It was estimated that the expenses in the income year ending 30 June 2023 would exceed the income derived. The income of the trust was calculated to be nil.

The ATO concluded that that Trustee would not be assessed under section 99 or 99A of the ITAA 1936, as there was no income of the trust estate and the beneficiaries had become specifically entitled to the capital gains from the disposal of the shares.

ATO reference *Private Binding Ruling Authorisation No. 1052135122268*
w https://www.ato.gov.au/law/view/document?docid=EV/1052135122268

5.7 Supply of digital content to recipients through a non-resident platform operator

Facts

The taxpayer is an Australian resident.

The taxpayer carries on an enterprise of creating and providing digital content to subscribers/fans and is registered for GST. The subscribers are from all over the world, including Australia.

The content that the taxpayer creates includes videos and photographs of the taxpayer. The taxpayer is also engaged in online chatting with subscribers.

While all of the content is created by the taxpayer in Australia, it is supplied through a non-resident electronic distribution platform operator.

The taxpayer interacts with the platform directly to sell the content and the subscribers purchase the content via the platform. The platform:

1. collects payments from subscribers for their purchase of the taxpayer's content on behalf of taxpayer;
2. transfers the payments that it collects to the taxpayer after deducting its fees of XX% for the use of the platform and storing the content;
3. does not collect GST on behalf of the taxpayer and does not charge GST on the fees charged to the taxpayer;
4. collects the details of the purchasers based on their geolocation; and
5. provides the taxpayer with information in relation to the taxpayer earnings, tips received, and the fees charged by them on a monthly basis.

The taxpayer did not enter into a specific agreement with the platform. However, the standard terms of use for content creators provides that those terms form part of the agreement with the platform. The standard terms of use includes the following:

1. all transactions are contracts between fans and creators on the terms of the standard contract between fan and creator;
2. content is not confidential. Creators authorise fans to access and view content on the platform in accordance with any licenses that creators grant to their fans; and
3. creators are responsible for their own tax affairs.

Questions

1. Is the supply of digital content by the taxpayer to recipients through the platform GST-free under subsection 38-190(1) GST Act?
2. Is the taxpayer required to report GST on the total earnings from Australian subscribers or the net earnings credited to the taxpayers nominated account?
3. Is the taxpayer liable to pay GST on the tips received from the taxpayer's subscribers via the platform?
4. Is the taxpayer entitled to claim a credit for the GST paid on the fees charged by the platform?

Ruling

<u>Question 1</u>

The ATO noted that the taxpayer supplies content to subscribers based in Australia and outside Australia.

Pursuant to the standard terms of use, every transaction that the taxpayer enters into with subscribers is a contract between the taxpayer and the subscribers. The taxpayer did not enter into a contract with the platform. Accordingly, the ATO formed the view that the taxpayer does not make a supply of content to the platform but instead makes a supply directly to the taxpayer's subscribers using the platform.

The ATO ruled that the supplies made to subscribers in Australia will satisfy all of the requirements of section 9-5 of the GST Act (taxable supply) and therefore will be subject to GST. The ATO also ruled that the supply of content to non-resident subscribers will satisfy the requirements of item 2(a) in the table in subsection 38-190(1) of the GST Act and therefore will be GST- free.

<u>Question 2</u>

The ATO ruled that the taxpayer is required to report GST on the total earnings from Australian subscribers irrespective of the fact that the platform collects the consideration from the taxpayer's subscribers in Australia and credits the amount to the taxpayer's nominated account after the platform deducts its fees.

Question 3

The ATO ruled yes. The ATO considered that the tips the taxpayer receives from subscribers via the platform form part of the consideration for the taxpayer's supply of content. Accordingly, the ATO concluded that the taxpayer is liable to pay GST on the tips received from the taxpayer's subscribers via the platform.

Question 4

The ATO ruled no, as the fees charged by the platform do not include GST.

ATO reference *Private Binding Ruling Authorisation No. 1052123215647*
w https://www.ato.gov.au/law/view/document?docid=EV/1052123215647

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6. ATO and other materials

6.1 Employees guide for work expenses

The ATO has updated its Employees Guide for Work Expenses. The guide was first published on 1 July 2018 and has been updated several times. Each year the Guide is updated to include a "What's new" section for the relevant income year.

The Guide is intended to help employees decide whether expenses are deductible and what records need to be kept to substantiate them. This Guide explains:

- how to determine if an expense is deductible against employment income;
- how to apportion expenses if they are only partly deductible;
- how to work out whether to claim a deduction in the year the expense was incurred or whether to claim a deduction for a decline in value over a number of years; and
- what records to keep.

The key updates to the Guide reflect the changes in the law in relation to work-related deductions. In particular:

1. from 1 July 2022, only the revised fixed-rate method or the actual cost method may be used for calculating the additional running expenses incurred as a result of working from home. The temporary shortcut method of 80c is no longer available; and
2. the $250 reduction for self-education expenses in section 82A of the ITAA 1936 has been repealed. Employees claiming a deduction for self-education expenses in the 2022–23 or later income years do not need to reduce allowable expenses by $250.

The Guide also provides examples of many commonly claimed expenses and includes a section with 'Myths' and their corresponding facts.

TIP – For more information about the ATO's compliance approach to claiming expenses relating to working from home see PCG 2023/1.

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

6.2 Tips to help sole trader clients

The ATO published a document on their website that indicates that sole traders are continuing to make mistakes in respect of:

1. omitting income such as salary or wages earned outside of their business. Including non-monetary payments or payments in kind;
2. incorrectly claiming expenses, for example, claiming for the portion of an expense related to personal use or overstating the cost of goods sold and other business expenses;
3. incorrectly calculating business losses;
4. incorrectly applying non-commercial loss rules to offset the loss against other income;
5. incorrectly claiming PAYG withholding refunds;
6. incorrectly reporting or failing to report personal services income (PSI).

The ATO reminds sole traders of the 'small business tax time toolkit' which can assist them in avoiding making these mistakes.

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w https://www.ato.gov.au/Tax-professionals/Newsroom/Activity-statements/Tips-to-help-your-sole-trader-clients/

6.3 Checking for charges over property assets

The ATO has published a document on their website reminding auditors of self-managed superannuation funds to ensure there are no charges over fund assets as part of completing the annual fund audit.

Evidence should be obtained annually that the trustee has not given a charge over a fund asset by seeking confirmation in writing from the trustee and reviewing the property title and PPSR.

The ATO has identified in audit cases over the last 12 months that a number of auditors have not been gathering appropriate audit evidence to confirm assets held by a fund are not subject to charges.

w https://www.ato.gov.au/Super/SMSF-newsroom/Auditors/Checking-for-charges-over-property-assets/

6.4 PAYG instalments variation issue

The ATO has published that it is aware of an issue that has affected PAYG instalment variations and is fixing this issue.

The ATO suggests that if a variation to an activity statement was lodged from 16 June, then the activity statement should be checked prior to the next lodgment to ensure it is correct. The taxpayer may need to re-input the variation if the taxpayer is a quarterly or monthly lodger with an activity statement period ending 31 July.

w https://www.ato.gov.au/Business/Small-business-newsroom/Lodging-and-paying/Pay-as-you-go-instalments-variation-issue/

6.5 Getting rental right

The ATO has published a page reminding rental property owners and their tax agents to take care when lodging tax returns.

Namely, the ATO is reminding rental property owners that:

1. income and deductions must be in line with a rental property owner's ownership interest;
2. rental income must be reported in the year the tenant pays and as the gross amount received (before property manager fees and other expenses are taken out);
3. initial repairs to rectify damage, defects or deterioration that existed at the time of purchasing a property cannot be claimed as an immediate deduction but may be claimed over a number of years as capital works deductions;
4. immediate deductions can be claimed for general repairs like replacing a broken light globe or window;
5. where the property is not being used to produce rental income (e.g. a holiday home), deductions for rental expenses will need to be apportioned. For example, if a taxpayer has charged 'mates rates' on a holiday home, the taxpayer can only claim for expenses up to the amount of income received.

The ATO is focused on interest expenses and ensuring rental property owners understand how to correctly apportion loan interest expenses where part of the loan was used for private purposes. An interest deduction can only be claimed for the portion relating to producing rental income.

The ATO has data matching capabilities which include rental property-related data and has recently implemented new residential investment property loans and landlord insurance data matching programs.

w https://www.ato.gov.au/Media-centre/Media-releases/Get-your-rental-right-this-tax-time/

6.6 Changes to fuel tax credit rates

The ATO has published a web page noting that fuel tax credit rates have changed.

From 1 July 2023, the fuel tax credit rate for heavy vehicles for traveling on public decreased.

From 1 August 2023, fuel tax credit rates increased in line with the fuel excise indexation.

The ATO notes that, for taxpayers that claim less then $10,000 in an income year, they are able to use the rate that applies at the end of their BAS period to work out their claim.

w https://www.ato.gov.au/Business/Small-business-newsroom/GST-and-excise/Changes-to-fuel-tax-credit-rates/

6.7 Scam Alerts

The ATO has published the latest spam alert in relation to ATO impersonation SMS and email scams.

These scams try to trick recipients to click on a link that directs them to a fake myGov sign in page designed to steal their username and password.

The ATO confirms that, while it may use SMS or email to ask a recipient to contact them, it would not send recipient a link to log onto online services.

The linked webpage also summarises earlier scam alerts.

w https://www.ato.gov.au/General/Online-services/Identity-security-and-scams/Scam-alerts/#August2023taxtimeSMSandemailscams

6.8 ATO ramps up compliance activities

The ATO has noted on its website that it has ramped up compliance activities on self-managed superannuation funds in the 2023 income year.

It noted that it identified an increasing number of funds who did not comply with their compliance obligations, including obligations to preserve their superannuation benefits until they met a condition of release, to ensure the fund is audited, or to lodge their annual return.

In the 2023 income year, the ATO issued an additional $29 million in income tax liabilities, administrative and tax shortfall penalties, and interest on SMSF trustees and/or members. It also disqualified a total of 753 trustees who have now been added to their public register. This is double the amount of tax and penalties, and triple the amount of disqualifications compared to the 2022 income year.

The ATO notes it will continue to focus on superannuation compliance in the 2024 income year, and urged SMSF trustees to comply with their superannuation laws, and to rectify any breaches as soon as possible.

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w https://www.ato.gov.au/Super/SMSF-newsroom/Compliance/ATO-ramps-up-compliance-activity/

6.9 Transfer balance cap indexation

The ATO has published a reminder that on 1 July 2023, the general transfer balance cap was indexed. Personal transfer balance caps will now range from $1.6 million to $1.9 million.

Members who previously reached or exceeded their personal TBC are not entitled to this indexation.

w https://www.ato.gov.au/Super/Super-funds-newsroom/General/Transfer-balance-cap-indexation/

6.10 Update to ATO Market Valuation Guidance

The ATO has updated its guidance on market valuation to remove specific references to institutes that provide certification and standards for valuers. Instead, the updated market valuation guidance now has a general statement to note that, when considering who can determine market value, valuers need to have the appropriate certification and registration or licensing.

w https://www.ato.gov.au/law/view/view.htm?docid=%22SGM%2Fmarket_val%22

6.11 ATO Lodge and Pay speech at Tax Summit 2023

Vivek Chaudhary, Deputy Commissioner of Taxation, made a speech at The Tax Institute Tax Summit 2023 on 7 September.

The Deputy Commissioner emphasised the importance of paying tax on time. The Deputy Commissioner noted that the ATO had shifted its focus during the pandemic, offering support and concessions to taxpayers but now aims to re-establish a culture of timely tax payments.

The speech highlighted concerning trends, including an 89% increase in collectable debt from businesses over the past four years, with small businesses accounting for a significant portion. The ATO expressed its commitment to returning to normal debt collection operations and encouraged early engagement from taxpayers facing difficulties.

The following specific areas of focus were outlined:

1. unpaid superannuation guarantee charges;
2. debt arising from ATO audit adjustments;
3. refund fraud;
4. aged high-value debts; and
5. debts from employers with new self-assessed debts.

The Deputy Commissioner emphasised the ATO's determination to shift payment behaviours and take firmer actions against non-compliant taxpayers.

The speech also mentioned the role of tax professionals as trusted advisors and urged them to help clients understand the importance of paying tax on time. It discussed various support options for taxpayers in financial difficulties and highlighted efforts to make interactions with tax professionals more efficient.

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w https://www.ato.gov.au/Media-centre/Speeches/Other/Addressing-collectable-tax-debt---Tax-Institute-s-Tax-Summit-2023/

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