Tax Update

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Contents

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

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1. Tax Update Pitstop

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

Tax Update Matter	**Impact Summary**	**Further Detail**
Part IVA – Minerva, Mylan and Grant	A series of cases have been handed down in the Federal Court and the Administrative Appeals Tribunal in relation to Part IVA of the ITAA 1936. Minerva and Mylan are particularly noteworthy decisions as the courts concluded that Part IVA did apply merely because an alternative scheme could be identified that would involve higher tax being payable.	Pages 6 to 18
EFEX Group v Bennet	The Full Federal Court has found that a person engaged by a principal without a written contract was not an 'employee' under ordinary concepts, noting that where there is no written contract it is necessary to discern the terms on which the person is engaged to determine if he or she is a employee within the principles outlined in by the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1. The Court noted that this required distinguishing between arrangements that went to the terms of the contract and the manner in which the contract was performed.	Page 25
Delbake	The Administrative Appeals Tribunal has upheld the Commissioner of Taxation's refusal to remit additional superannuation guarantee charge for periods prior 1 January 2018 on the basis that there no exceptional circumstances for the employer's failure to lodge superannuation guarantee statements. Amongst other reasons, the employer had cited the ill-health and subsequent death of its accountant as part of its exceptional circumstances.	Page 28
Instant Asset Write Off Threshold to be Increased	There is currently a Bill before Commonwealth Parliament under which the instant asset write off threshold will be increased to $30,000 for the year ended 30 June 2024.	Page 39
Bowerman Decision Impact Statement	The Commissioner has issued a Decision Impact Statement concerning the decision of the Administrative Appeals Tribunal in *Commissioner of Taxation v Bowerman* [2023] AATA 3547. The Commissioner is not appealing the decision.	Page 63

2. Cases

2.1 Minerva – Part IVA and trustee's decision not to exercise a discretion

Facts

Minerva Financial Group Pty Ltd (**MFG**) is a member of a group of companies and trusts which carries on the financial services business known as the Liberty group. Liberty obtains capital through a process called ‘securitisation’, which involves the pooling of loan receivables and related securities (typically mortgages) into securitisation trusts, in order to fund loans that it arranges for its customers.

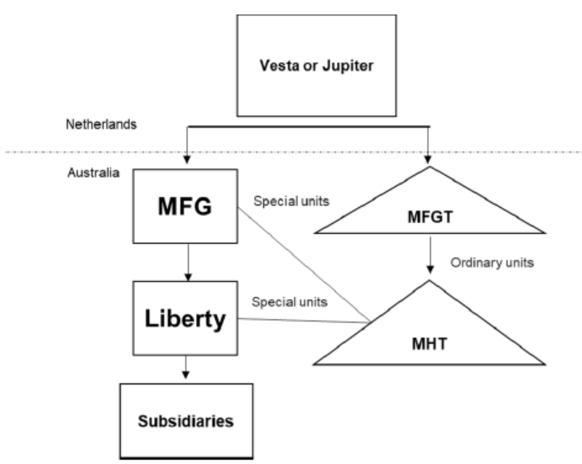
For securitisation trusts established prior to 2008, Liberty Financial Pty Ltd (**Liberty Financial**) was the holder of residual income units (**RIUs**) and residual capital units (**RCUs**). The RIUs entitled Liberty Financial to the balance of the income of the securitisation trusts after payment of interest and fees as well as the recoupment of any losses. The RCUs entitled Liberty Financial to the balance of the capital of the securitisation trust after payment of the principal.

In 2007-2008, Liberty was planning to conduct an initial public offering (**IPO**). In anticipation of the IPO, Liberty restructured so that the Liberty group parent company, Jupiter Holdings NV (incorporated in the Netherlands and later replaced by Vesta Holdings BV), owned interests in two 'silos' of Australian entities as follows:

1. a corporate silo and income tax consolidated group, comprising MFG, its wholly owned subsidiary, Liberty Financial, and Liberty Financial's wholly owned subsidiaries; and
2. a trust silo, comprising Minerva Financial Group Trust, which held all the units in the Minerva Holding Trust.

As part of the restructure, Liberty Financial and Secure Credit Pty Ltd (**Secure Credit**) held ‘special units’ in the Minerva Holding Trust. MFG, as the trustee, had the discretion to distribute the Minerva Holding Trust's distributable income to the special unitholders. However, in each of the income years ended 30 June 2012 to 30 June 2015, the trustee chose not to exercise its discretion to make any (or any substantial) distribution to the special unitholders. The trustee of the Minerva Financial Group Trust, as the holder of the RIUs, was, therefore, entitled to the majority of the distributable income for each year.

The structure is depicted as follows:



The effect of the income flowing through the trust silo to the non-resident owners (Jupiter or Vesta) was that the income was subject to 10% withholding tax, as it was interest income, as opposed to the 30% corporate tax rate that would have applied had it continued to have been derived in the corporate silo. The Minerva Holding Trust lent the funds to Liberty Financial via interest free, undocumented loans. The unpaid present entitlements owing to Minerva Financial Group Trust and Jupiter or Vesta were not settled by cash payment.

The intention was that new securitisation trusts would be established within the trust silo under the Minerva Holding Trust, instead of under the operating company, Liberty Financial, which had been the case in the past.

The anticipated IPO did not proceed.

On 23 November 2016 and 11 January 2017, the Commissioner made determinations under Part IVA to cancel the tax benefits obtained in connection with three alleged schemes by including in MFG's assessable income in the tax years ended 30 June 2012 and 30 June 2015, an amount equal to the omitted income in each year, being:

1. 2012 financial year: $24,836,839 and $806,104;
2. 2013 financial year: $31,761,081 and $3,138,723;
3. 2014 financial year: $46,048,587 and $7,875,741; and
4. 2015 financial year: $53,649,735 and $5,341,506.

Notices of amended assessments were issued by the Commissioner to give effect to the determinations.

On 27 January 2017, MFG objected to the amended assessments, including the Commissioner's decision not to remit the shortfall interest charge in each of the relevant years.

On 14 May 2020, the Commissioner disallowed MFG's objections to the amended assessments and also upheld the decision not to remit the shortfall interest charge for the 2012 financial year. Due to section 280-170 of Schedule 1 to the TAA, MFG did not have the right to object to the decision not to remit the shortfall interest charge for the 2013, 2014 and 2015 financial years. Under that section an objection can only be made against a decision not to remit the shortfall interest charge if the amount not remitted is more than 20% of the additional tax due.

On 6 July 2020, MFG appealed the objection decision made by the Commissioner to the Federal Court of Australia.

The case at first instance considered three alleged schemes put forward by the Commissioner. O'Callaghan J held that Part IVA did not apply to the first scheme, but held that Part IVA did apply to the second and third schemes. These can be summarised as follows:

Second alleged scheme

The second alleged scheme was the following:

1. transferring ownership of the units in Minerva Financial Group Trust from MFG to Jupiter Holdings NV in December 2007;
2. the failure of MFG to distribute greater than nominal amounts of Minerva Holding Trust's distributable income to the special unitholders in Minerva Holding Trust, Liberty Financial and Secure Credit; and
3. the trustee of the Minerva Holding Trust lending money to Liberty Financial.

The Commissioner argued that, had the second alleged scheme not been carried out, MFG acting as the trustee of Minerva Holding Trust would have exercised its discretion to distribute all or substantially all of the distributable income of Minerva Holding Trust to Liberty Financial and Secure Credit as the special unitholders of Minerva Holding Trust, which were the companies in the MFG tax consolidated group, in the years ended 30 June 2012 to 30 June 2015.

Third alleged scheme

The third alleged scheme was the failure of MFG as trustee of Minerva Holding Trust, to distribute greater than nominal amounts of Minerva Holding Trust's distributable income to the corporate silo through the special unitholders, Liberty Financial and Secure Credit, and lending money to Liberty Financial. MFG did not dispute that it obtained a tax benefit in connection with the alleged schemes. However, MFG contended that obtaining a tax benefit was not the dominant purpose of any of the schemes. MFG stated that the decision to separate the newly formed securitisation trusts from the operating assets of the business was to optimise the Liberty group's capital structure and improve access to funding, including by way of an IPO. MFG had received consistent professional advice recommending an IPO of stapled securities, consisting of a unit in a trust holding the passive financial assets and a share in a company holding the operating assets. Whether the dominant purpose of each scheme was to obtain a tax benefit is to be evaluated according to the eight factors set out in section 177D(2)(b) of the ITAA 1936:

- *(i)* *the manner in which the scheme was entered into or carried out;*
- *(ii)* *the form and substance of the scheme;*
- *(iii)* *the time at which the scheme was entered into and the length of the period during which the scheme was carried out;*
- *(iv)* *the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;*
- *(v)* *any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;*
- *(vi)* *any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;*
- *(vii)* *any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and*
- *(viii)* *the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi).*

Primary judgment

In relation to the Second Scheme, O'Callaghan J held that a reasonable person would conclude that MFG entered into or carried out the second scheme for the dominant purpose of enabling it to obtain a tax benefit in connection with the scheme. The basis of his Honour's decision was that MFG was unable to proffer any commercial reasons as to why almost all of the income derived by Minerva Holding Trust was distributed to the non-resident unitholders instead of the resident special unit holders. His Honour stated as follows:

> *The applicant was unable to provide any cogent reason, other than the tax benefit, why the decision was taken in each of the relevant years to direct no more than 2% of MHT's net income to the special unitholders. The applicant submitted that neither LF nor Secure Credit had an 'entitlement' to the income from the RIUs and that the power of the trustee of MHT to distribute income to the special unitholders was discretionary. So much, unsurprisingly, was accepted by the Commissioner. But neither factor goes to the relevant question of dominant purpose, objectively viewed.*

O'Callaghan J concluded that the manner in which the scheme was entered into or carried out and the time at which it was carried out were the key factors that led to the finding that the dominant purpose of the scheme was obtaining the tax benefit.

In relation to the Third Scheme, given the similarities between the Second Scheme and the Third Scheme, his Honour held that a reasonable person would conclude that MFG entered into or carried out the Third Scheme for the dominant purpose of enabling it to obtain a tax benefit in connection with the scheme.

MFG appealed the Federal Court's Decision. The matter was heard in the Full Federal Court on 28 and 29 August 2023.

Full Federal Court

In addition to MFG appealing the decision that Part IVA applied to the Second and Third Schemes, the Commissioner also relied upon a Fourth Scheme ,which consisted only of the non-exercise of the discretion of the trustee of MFG to make distributions to special unitholders.

MFG submitted that the non-exercise by MFG of a discretion to distribute income "did not attract the operation of Part IVA". MFG considered that O'Callaghan J erred in the following ways:

1. neither the first nor third factor (or any other factor) permitted an enquiry into the subjective purpose of any scheme participant. The primary judge therefore erred in searching for the reason why the MFG did not make distributions to the special unitholders;
2. two objective facts were erroneously disregarded by the primary judge:
    (a) the special unitholders had no entitlement to the income of the Minerva Holding Trust; and
    (b) the power of MFG to distribute income to the special unitholders was discretionary;
3. the primary judge failed to take into account the evidence of Mr Pillai, the General Manager of the group, that at the time of establishing the Minerva Holding Trust, he considered that distributing income to the ordinary unitholder allowed income to be distributed to the ultimate unitholders (Jupiter and Vesta) and provided better borrowing flexibility and better capital management for the group. Distributes to the special unitholders would have become encumbered by the charge held by lenders over Liberty Financial's assets;
4. even if it is assumed there was no commercial difference between distributing income to the special unitholders as opposed to the ordinary unitholders, MFG did no more than adopt one of two alternative courses of action. The conclusion as to dominant purpose cannot be drawn if no more appears than a taxpayer adopting one of two possible courses of action (with the chosen course of action providing a tax benefit).

In relation to these grounds of appeal, the Commissioner noted that, even if MFG is correct and O'Callaghan J wrongly disregarded two objective facts, it would still be concluded that a person who entered into any part of the second or third scheme did so for the dominant purpose of obtaining a tax benefit:

1. on the basis that there was a material difference in the ***form*** and substance of the scheme. The form of the second and third schemes was that the income from the Minerva Holding Trust flowed predominantly to the Minerva Financial Group Trust, and from the Minerva Financial Group Trust to Jupiter or Vesta, whereas the ***substance*** of the scheme was that "the funds associated with [Minerva Holdings Trust]'s net income flowed predominantly to [Liberty Financial] in the form of loans";
2. the primary judge erred in finding that the factors relating to a change in financial circumstances (the fifth and sixth factors) was neutral. The factor was indicative of a dominant purpose of deriving a tax benefit because it was reasonably foreseeable that "the third scheme would negatively affect [Liberty Financial]'s financial position… because [Liberty Financial] would have less retained earnings; and
3. the primary judge erred in finding that the eighth factor relating to any connection between Liberty Financial and any person that has a connection to Liberty Financial is neutral. The factor was indicative of a dominant purpose of obtaining a tax benefit because "[MFG] and [the Minerva Financial Group Trust] had the same ultimate owners, 'the only difference between [the Minerva Financial Group Trust] making distributions to its unitholder and the [MFG] distributing dividends to its shareholder was the tax consequence.'" The distribution of the Minera Holding Trust's income could be satisfied by loan offset because the entities were under common control.

It was noted in the Full Federal Court that much of the Commissioner's case relied on an interpretation of the business activities of the MFG and related entities being "static" in their operation. For example, the Commissioner sought to rely on examples of the way in which the finance business had been conducted prior to the restructure, and then adopted them as the lens through which the objective purpose of later year events after the restructure, could be determined.

The Court noted that it cannot be ignored that the change in structure meant that Liberty Financial was in a different position after the restructure, and that the finance business conducted by the group grew considerably between 2007 and 2015. This influenced changes in the business such as how Liberty Financial was remunerated changed.

The Court undertook a detailed consideration of the eight factors in section 177D to determine whether Part IVA should apply.

Decision

The Full Federal Court particularly emphasised the need to consider the "surrounding context" to determine whether a scheme is entered into for a dominant purpose of enabling a taxpayer to obtain a tax benefit.

The Full Federal Court noted, in relation to the application of Part IVA generally, that:

1. for Part IVA to apply, it must be shown that having regard to the eight matters that "it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme, did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme";
2. the inquiry is in respect of the dominant purpose of the parties (not the purpose of a scheme or part of a scheme), and the consideration required by Part IVA is an objective inquiry, not subjective;
3. that a particular transaction is chosen from a number of possible alternative course of action because of tax benefits associated with its adoption does not of itself mean that Part IVA applies, "*the bare fact that a taxpayer pays less tax, if one form of transaction rather than another is made, does not demonstrate that Part IVA applies*";
4. where a taxpayer chooses between two transactions based on taxation considerations, it does not follow that the dominant purpose of the taxpayer was to obtain a tax benefit. "*Part IVA does not apply merely because the Commissioner can identify another means of achieving the commercial outcome which would have resulted in more tax being payable";*
5. Part IVA does not impose a "but for" test – it does not require an injury as to whether the taxpayer would not have entered into the scheme "but for" the tax benefit.

The Full Federal Court's reasons for its decision regarding the non-application of Part IVA to the Second Scheme, Third Scheme and Fourth Scheme, can be summarised as follows:

1. the evidence was that the unpaid present entitlement of Minerva Financial Group Trust from Minerva Holdings Trust, and of Jupiter from the Minerva Financial Group Trust, were satisfied by loan account adjustments in the group. These adjustments enabled Jupiter to repay interest bearing debt owed to Liberty Financial and Jupiter to increase its capital in the Minerva Financial Group Trust. This demonstrated real commercial and financial differences beyond deriving a tax benefit;
2. the special unitholders had **no entitlement** to the income of the Minerva Holdings Trust **without the exercise of MFG's discretion**. A payment of distributions in accordance with their terms of issue "*is not an objective matter that points to a party carrying out a scheme for the dominant purpose of enabling the taxpayer to obtain a benefit*";
3. the failure to exercise the discretion to pay distributions to Liberty Financial did not affect the solvency, profitability or credit rating of Liberty Financial. The nominal distributions to Liberty Financial did not support a conclusion that a party entered into the schemes for the dominant purpose of obtaining a tax benefit;

4. in relation to the Commissioner's argument about the Third Scheme having a detrimental financial impact upon Liberty Financial, the Court held that the failure to exercise the discretion to pay distributions to Liberty Financial as a special unitholder, did not affect the solvency, profitability or credit rating of Liberty Financial. Further it failed to consider that if the distributions had been made to the special unitholders (increasing the retained earnings of Liberty Financial), it would have been at the expense of Jupiter and Vesta. This argument also does not consider that Jupiter and Vesta had its own substantial sources of income, thereby "[failing] to have regard to the **totality of the circumstances**". The nominal distributions to Liberty Financial, or lack of MFG's discretion to make substantial distributions to Liberty Financial does not support a conclusion that a party entered into the schemes for the dominant purpose of obtaining a tax benefit;
5. finally, the Commissioner's case relied upon a comparison of the income flows before and after the restructure that assumed there was no objective reason for the change of income flows other than to obtain a tax benefit. The Court held that argument "failed to engage with the unchallenged finding that the restructure in 2007 was not a scheme to which Part IVA applied" and the evidence which demonstrated that there were in fact, changed business circumstances which required further sources of capital.

The Full Federal Court upheld the appeal, dismissing the Second, Third and Fourth Schemes, and determined that costs be awarded to MFG.

COMMENT – This case ultimately determined that a trustee's failure to exercise its discretion to distribute income to special unitholders, which would attract a higher tax rate, was insufficient in of itself to attract the application of Part IVA. It is a significant win for taxpayers and provides further detailed guidance on the operation of Part IVA. The Court's comprehensive approach in considering the eight factors of section 177D of the ITAA 1936 is a reminder of the need to consider transactions in their full context when considering the possible application of Part IVA.

Citation *Minerva Financial Group Pty Ltd v Commissioner of Taxation* [2024] FCAFC 28 (Besanko, Colvin and Hespe JJ, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/28.html

2.2 Mylan – Part IVA and interest deductions on intra-group borrowing

Facts

Mylan Australia Holding Pty Ltd and its subsidiary Mylan Australia Pty Ltd are part of the Mylan Group. These two entities are the Australian subsidiaries of a larger, international pharmaceutical group. Mylan Australia Holding Pty Ltd was the head of an Australian income tax consolidated group.

Mylan group entered into a share purchase agreement to acquire a number of companies, including Alphapharm, a leading generic pharmaceutical business in Australia. The share purchase agreement permitted Mylan Australia Holding Pty Ltd to substitute an "Affiliate" to acquire the shares in the target entities.

On 2 October 2007, Alphapharm was acquired by Mylan Australia Pty Ltd.

Mylan Australia Holding Pty Ltd and its subsidiary Mylan Australia Pty Ltd used a mixture of equity (25%) and intra-group debt (75%) to finance the purchase of Alphapharm. The intra-group debt arose from a promissory note granted by a Luxembourg subsidiary of the Mylan group at a fixed interest rate of 10.15%. The flexible terms of the promissory note also allowed for capitalisation of interest and permitted early payment of principal without penalty.

In November 2009 the Commissioner commenced a review of Mylan Australia Holding Pty Ltd which progressed to audit in August 2012. During this time the Commissioner issued 18 requests for information and over 1,500 documents were produced.

On 27 April 2021, the Commissioner issued amended assessments for the income years ended 40 June 2009 to 30 June 2019. On 28 February 2022, the Commissioner issued an amended assessment for the income year ended 30 June 2020. The assessments denied deductions for interest costs incurred on the intra-group borrowing arrangement (the promissory note) between the two entities.

Mylan Australia Holding Pty Ltd objected to the amended assessments. The Commissioner ultimately disallowed the objections. The Commissioner's decisions were all made on substantially the same basis, which was that the incorporation of Mylan Australia Holding Pty Ltd and Mylan Australia Pty Ltd was a part of a scheme to derive a tax benefit for the purposes of Part IVA of the ITAA 1936.

Mylan Australia Holding Pty Ltd sought review of the objection decisions in the Federal Court.

The Commissioner argued there were two alternative "schemes" entered into for the dominant purpose of Mylan Australia Holding Pty Ltd obtaining a tax benefit:

1. a wider scheme involving incorporating the Australian holding companies, amending the share purchase agreement to have Mylan Australia Pty Ltd acquire the Alphapharm shares, and issuing of the promissory note. The “counterfactual” was that Mylan Australia Pty Ltd would not have existed and Alphapharm would have been acquired by a Mylan group company with no “debt pushdown” into Australia; or
2. a narrower scheme, assuming the Australian holding companies would still have been incorporated, involving the issue of the promissory note at a high interest rate, capitalisation of interest, and refinancing of the promissory note. The counterfactual involved Mylan Australia Pty Ltd borrowing a lesser amount at a lower variable interest rate and on terms consistent with external borrowing arrangements.

Issue

Was the scheme entered into or carried out for the dominant purpose of obtaining a tax benefit?

Decision

The Court did not accept the wider or narrower scheme counterfactuals put forward by the Commissioner. Rather, the Court held that a sufficiently reliable prediction of the events that would have, or might reasonably be expected to have, taken place in the absence of the schemes was broadly:

1. Mylan Australia Pty Ltd would have borrowed the equivalent of AUD 785,329,802.60 on 7 year terms under at a floating rate consistent with the rates specified in the Mylan group’s external borrowing agreements;
2. Mylan Australia Pty Ltd would otherwise have been equity funded to the extent necessary to fund the initial purchase of Alphapharm and to stay within the thin capitalisation safe harbour ratio from time to time;
3. interest on the borrowing would not have been capitalised;
4. Mylan Australia Pty Ltd would have been required to pay down the principal on a schedule consistent with external borrowing arrangements and would have made voluntary repayments to reduce its debt as necessary to stay within the thin capitalisation safe harbour, from time to time;
5. Mylan Australia Pty Ltd would not have taken out hedges to fix some or all of its interest rate expense;
6. Mylan Australia Pty Ltd would have taken out cross-currency swaps into AUD at an annual cost of 3.81% per annum over AUD 3 month Bank Bill Swap rates; and
7. if Mylan Australia Pty Ltd’s cashflow was insufficient to meet its interest or principal repayment obligations, Mylan group would have had another entity in the Mylan group lend Mylan Australia Pty Ltd the funds necessary to avoid it defaulting on its obligations, resulting in Mylan Australia Pty Ltd owing those funds to that related company lender by way of an intercompany loan, accruing interest at an arm’s length rate.

The Court noted that, as the counterfactual would still give rise to tax deductions, the tax benefit is the differential between the amount claimed and the deductions arising from the counterfactual.

The Court then considered the eight matters in section 177D of the ITAA 1936 to determine whether there was a dominant purpose of obtaining a tax benefit. The Court considered that there was one factor that pointed towards a tax purpose, being the failure to refinance the loan as interest rates fell. The other factors, however, were found to be neutral or pointed to non-tax purposes.

The manner in which the scheme was entered into or carried out

The Court noted that the incorporation of a local holding company structure and choice to form a tax consolidated group was an entirely unremarkable step in the broader context of a multinational acquisition which included an Australian subsidiary.

In respect of the "debt pushdown" identified by the Commissioner as pointing to a dominant purpose of obtaining a tax benefit, the Court noted that there were clear commercial reasons for financing subsidiaries via intercompany loans.

The Commissioner had found that the decision to fix the interest rate, and the flexibility of the borrowing terms were other indications of a dominant purpose of tax avoidance. The Court did not agree, and found that the decision to fix the interest rate between the subsidiaries allowed for better forward planning and mitigated risks of profit and loss volatility and interest rate movements. There was no evidence that fixing the rate was intended to maximise the rate. Rather, a rate of 10.15% was intended to be a fixed equivalent to external funding variable rates. In relation to the flexible terms, the Commissioner had used this to suggest that it allowed the arrangements to stay within the thin capitalisation rules, however, the Court considered that attempting to stay within the thin capitalisation limits is not indicative of a dominant purpose of obtaining a tax benefit.

Form and substance of the scheme

The Court rejected the Commissioner's submission that the substance of the scheme involved only one economic borrowing, but the form of the scheme involved the duplication of debt in Australia while keeping the headline price the same. The Court did not consider that this exposed a divergence between substance and form – the substance and form both involved the distribution of debt internally while also maintaining a streamlined external borrowing arrangement. The promissory note was a real economic obligation.

Result in relation to the operation of ITAA 1936 that, but for Part IVA, would be achieved by the scheme

The Court noted that obtaining tax deductions for interest expenses was an ordinary occurrence of financing structures. The Court emphasised, that a taxpayer pays less tax than it otherwise would have due to choosing a particular form of transaction is not, of itself, indicative of the requisite dominant purpose.

Changes to the financial position of the relevant taxpayer, or any other person

The Court held that obtaining tax deductions for interest expenses was an ordinary incident of the financing structure adopted and that there was no “double deduction” as the intra-group borrowing also generated interest income for another member of the Mylan group.

The nature of any connection between the relevant taxpayer and any person whose financial position is affected by the scheme

The Court noted that the relationship between Mylan Australia Pty Ltd and Mylan Australia Holding Pty Ltd explained the structure of the scheme, however, the Court did not consider that this pointed towards a dominant purpose of obtaining a tax benefit.

Conclusion

The Court held that, while a tax benefit was obtained, the scheme was not entered into for the dominant purpose of obtaining a tax benefit, and Part IVA did not apply.

COMMENT – As was the case in *Minerva*, the Court held that it is not enough for Part IVA to apply to simply rely on the taxpayer having chosen one option over others which resulted in less tax being paid. There must be a holistic consideration of the eight factors in section 177D, having proper regard to the commercial and financial context of the arrangement.

Citation *Mylan Australia Holding Pty Ltd v Commissioner of Taxation (No 2)* [2024] FCA 253 (Button J, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/253.html

2.3 Grant – Part IVA and asset protection scheme

Facts

Steven Grant was one of the partners of a Queensland-based legal practice.

After two of the legal practice's partners were charged for criminal offences, the legal practice experienced financial difficulties in the 1990 to the 1992 income years. The partners sought to restructure the practice as they did not want to earn income or incur debts personally. The firm's practice was overtaken by the Cleary Hoare Practice Trust and various other income earning trusts (**IET**).

Steven was one of the original trustees of the Cleary Hoare Practice Trust. The unitholders of the Cleary Hoare Practice Trust were discretionary trusts controlled by the principals of the legal practice and their affiliated entities.

The Cleary Hoare Practice Trust earned profits by conducting a conventional legal practice, while the IETs primarily generated profits by marketing and advising on tax planning arrangements, which from 1996 included an arrangement named the New Venture Income Scheme (**NVI Scheme**).

Under the NVI Scheme, profits emanating from an entity would be sheltered by utilising losses in associated trusts and tax-exempt entities, so that no tax was payable on those profits.

The principals of the legal practice implemented NVI Schemes in relation to profits arising from Clearly Hoare Practice Trust and the IETs.

Trusts associated with Steven received profits from the Cleary Hoare Practice Trust and IETs that has been processed by the NVI Schemes. They were purported to be loans. The loan arrangements were informal, undocumented, and interest was not charged on those loans.

In 1999, Steven left the legal practice operated by the Cleary Hoare Practice Trust and established his own firm, Grants Lawyers, which later become Merthyr Law. As part of the terms of his exit, loan balances owed by Steven's associated entities to the entities associated with the legal practice were initially required to be repaid, but the parties agreed instead that the loans would be forgiven.

1994-1996 income years

The Commissioner contended that a portion of the income derived by the Cleary Hoare Practice Trust should have been assessable to Steven for the years ended 30 June 1994 to 30 June 1996. These amounts represented distributions from the Cleary Hoare Practice Trust to the Cleary & Hoare Office Unit Trust and other IETs. As a result, the Commissioner recalculated carried forward losses on the basis that those losses were exhausted in the year ended 30 June 1996. Accordingly, Steven was unable to apply those losses to income derived in the 1997 income year and subsequent years.

The Commissioner's basis for which he assessed Steven on those income changed throughout the dispute.

In 2004, the Commissioner's primary basis upon which the adjustment amounts for the 1994 to 1996 income years was that the Cleary Hoare Practice Trust arrangements were invalid or illegal in the legal profession regulatory context, which required the legal practice to be conducted by a partnership, and therefore were assessable as ordinary income under former former section 25(1) of the ITAA 1936. The first alternative position was that the arrangements were a sham leading to the same adjustments under former section 25(1). The second alternative was that Part IVA applied.

By 2013, the Commissioner abandoned the argument that Steven had derived assessable former former section 25(1) amounts but contended that Steven had assessable income by operation of Part IVA.

In 2022, the Commissioner abandoned the Part IVA position in relation to the 1994 to 1996 tax years, but instead contended that amounts were properly included in Steven's assessable income under to former former section 25(1) or as income of a trust to which Steven was presently entitled under section 97 of the ITAA 1936.

The section 97 argument was new for these years and the former section 25(1) argument have not been advanced since 2013.

<u>1997-2001 income years</u>

The Commissioner assessed Steven personally for income of the Cleary Hoare Practice Trust and the other IETs for the years ended 30 June 1997 to 30 June 2001, on two alternative bases:

1. firstly, amounts were ordinary income under former section 25(1) (and subsequently section 6-5 of the ITAA 1997) or trust income under section 97 of the ITAA 1936; or
2. alternatively, Part IVA applied.

The Commissioner argued that even where Steven had not received the income directly, he had indirectly benefited from the income in question. The Commissioner identified various significant asset acquisitions that entities related to Steven had made, suggesting that Steven had indirectly received the benefit of the income used to acquire the relevant assets.

Steven contended that various amounts received from the Clear Hoare Practice Trust and other IETs were loans and should not be treated as assessable income.

As an alternative position, the Commissioner contended that Part IVA should apply in respect of the income derived by the Cleary Hoare Practice Trust and the IETs that should have been assessable to Steven. In this respect, the Commissioner identified two schemes, the Practice Trust NVI Schemes and the IET NVI Schemes.

The Practice Trust NVI Schemes and the IET NVI Schemes comprised a complex series of transactions that involved the distribution of large amounts between the various trusts in the group by way of promissory notes, resolutions and gifts.

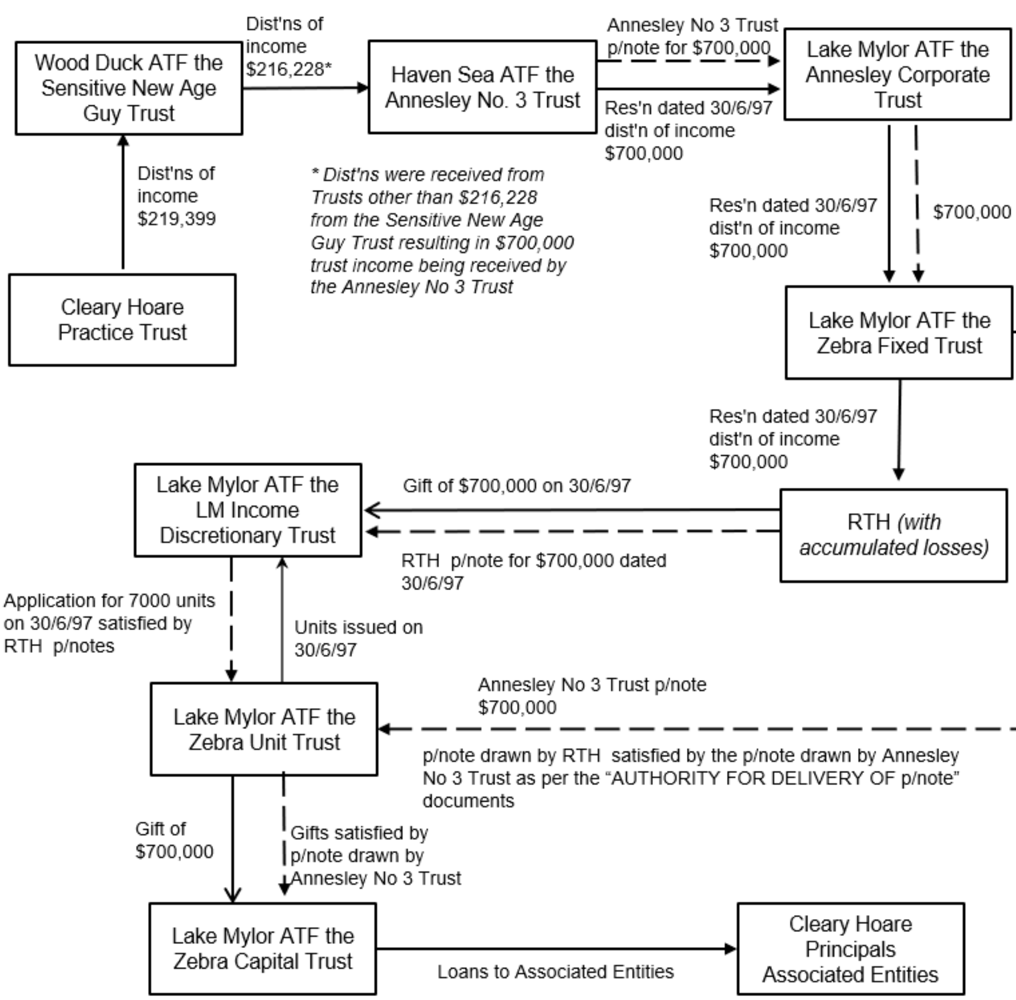
By way of illustration, the 1997 Practice Trust NVI Schemes involved the following steps:

1. the Cleary Hoare Practice Trust distributed income to Sensitive New Age Guy Trust, a discretionary trust controlled by Steven;
2. the principals of the legal practice settled various unit and discretionary trusts, including the Annesley No. 3 Trust, the Annesley Corporate Trust, the Zebra Fixed Trust, the Zebra Unit Trust and the Zebra Capital Trust;

3. Sensitive New Age Guy Trust resolved to distribute income to a chain of trusts by way of a bearer promissory note, with the income ultimately being distributed a tax loss entity;
4. the tax loss entity gifted the bearer promissory note to the LM Income Discretionary Trust, which subscribed for 'B' class units in the Zebra Unit Trust by delivering promissory notes as the application monies;
5. Zebra Unit Trust resolved to make a gift of $700,000 out of capital of the trust to the Zebra Capital Trust.

A diagrammatic form of the 1997 Practice Trust NVI Scheme was prepared by the Commissioner for the proceedings as shown below:

1997 Practice NVI Scheme



The Practice NVI Schemes involved three schemes for the 1997 to 1999 income years.

The IET NVI Schemes similarly filtered or flowed IET income through a sequence of trusts to an entity that had available current or carried forward losses, which was ultimately filtered or flowed back to entities connected with legal practice principals, including Steven, and was available for use by the individuals and their associated entities. The IET NVI Scheme comprised of four schemes in the 1997 to 2000 income years.

The result of the Practice NVI Schemes and the IET NVI Schemes was that the Cleary Hoare Practice Trust Income and the IET Income flowed to the principals of the legal practice without tax being paid.

The Commissioner contended that these arrangements were complex, involving multiple parties and transactions with the sole or dominant purpose of minimising tax on the profits derived from the legal practice through non-arm's length dealings and artificial arrangements.

The Commissioner contended that had the scheme not been entered into, the counterfactual was that the Cleary Hoare Practice Trust and the IETs would have distributed their income to a trust controlled by Steven, which in turn would have distributed income to Steven.

Steven contended that the dominant purpose of entering these arrangements was for asset protection reasons.

Steven contended that, even if the scheme had not been entered, income would be distributed to family members or other entities as part of his asset protection strategy. Therefore, Steven would not have received any income through these arrangements.

The Commissioner disputed this, arguing that Steven would have ultimately received the benefit of the profits of the legal practice, given his expertise and involvement in the business.

As part of the assessments issued to Steven, the Commissioner imposed penalties at the rate of 50%.

Steven sought review of the Commissioner's assessment in the AAT.

Issues

1. Should the amounts identified by the Commissioner be assessable to Steven as ordinary income or should these amounts be accounted for as trust income or loans?
2. Were the losses accrued prior to the income year ended 30 June 1994 available to offset amounts assessable to Steven in the 1997 income year and subsequent years?
3. Should Part IVA apply?

Decision

<u>Should the amounts identified by the Commissioner be assessable to Steven?</u>

For the 1997 to 2001 income years, the AAT considered the nature of loans generally, when determining whether the disputed amounts should be characterised as ordinary income or trust income assessable to Steven. The essence of a loan is an obligation to repay the amount advanced. The AAT noted that loan arrangements can be established through various means, including oral agreements or conduct, without the need for a formal loan agreement.

The AAT noted that the financial statements for the associated entities disclosed inter-entity loan accounts and profit distributions. The AAT considered that this evidence supported Steven's contention that the transactions between the IETs associated with the Cleary Hoare Practice Trust were loans and distributions of income between the trusts.

The AAT also considered that the money management system adopted by the Cleary Hoare Practice Trust reflected the ordinary practice of professional service firms.

The terms of Steven's exit from the practice were also considered. The AAT noted that the terms indicated that all loan balances were to be repaid, which supported the view that the relevant amounts were loans and not distributions of income.

The AAT determined that the disputed amounts were loans rather than income assessable to Steven.

Were the loses accrued prior to the year ended 30 June 1994 available to offset amounts assessable to Steven in the 1997 income and subsequent years?

In relation to the 1994 - 1996 years of income, the AAT held that that the Commissioner was not entitled to contend that the prior year losses had been exhausted before the 1997 tax year under either former section 25(1) or section 97, due to procedural unfairness.

For that reason, the AAT determined that as the practice trust income was not assessable to Steven, the prior year losses were not exhausted by the end of the year ended 30 June 1996.

Should Part IVA should apply?

To determine whether Part IVA should apply to the IET Schemes, the AAT considered that it was necessary to consider whether the income would have been assessable to Steven in the absence of the scheme.

Even if the scheme has commercial aspects, Part IVA will apply if obtaining a tax benefit is the objective dominant purpose of the arrangement. When determining the dominant purpose of the scheme, the AAT considered various factors including the manner of execution, the form and substance of the scheme, change in financial position of the entities and the connection between the entities involved.

The AAT noted the orchestrated nature of the steps in the arrangement, the artificiality of the scheme, and the manner in which it was implemented. Considering these factors, the AAT determined that the dominant purpose of the NVI Schemes was tax avoidance and not asset protection.

The AAT found that the present circumstances did not involve any material difference to those of *Hart* v *Federal Commissioner of Taxation* [2018] HCASL 273, where the High Court upheld the Full Federal Court decision that the NVI Schemes were entered into by Michael Hart, another principal of the Cleary Hoare legal practice, for tax avoidance purposes.

In *Hart*, Michael Hart had also asserted in the Full Court that asset protection motivated the arrangements entered into relating to income which originated from the Cleary Hoare Practice Trust and the IETs. In *Hart*, the Court concluded that there was a tax benefit and that the assertions that other taxpayers would be the logical recipients of those taxable amounts were insufficient to establish that Michael did not enjoy the tax benefit.

The AAT found that there is a reasonable expectation that a principal in an organisation conducting a business would be the recipient of that taxable income apart from the scheme having been entered into or carried out, and that Part IVA applied.

COMMENT – Another case was decided by Deputy President F D O'Loughlin KC this month concerning the substantially similar facts involving another principal of the legal firm (see *Collie v Commissioner of Taxation* [2024] AATA 440 referred to in the table at 1.11 of these notes). *Collie* involved an unsuccessful argument by the taxpayer that the sole or dominant purpose of the scheme was asset protection. The AAT upheld the Commissioner's assessment and penalties based on Part IVA.

Citation *Grant and Commissioner of Taxation (Taxation)* [2024] AATA 427 (Deputy President F D O'Loughlin KC, Melbourne) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/427.html

2.4 Beta Leigh – deductible expenses

Facts

Beta Leigh Pty Ltd is a private company incorporated on 17 May 1991. Beta Leigh Pty Ltd operates a property development business. The directors and shareholders of Beta Leigh Pty Ltd are Dennis Uhrhane and his wife, Nina Uhrhane.

The partnership of Dennis and Nina Uhrhane (**Partnership**) is a licensed builder, registered in Queensland.

From 1996, Beta Leigh Pty Ltd started purchasing large tracts of land, constructing commercial buildings, subdividing and selling the land. Some of the buildings were constructed for client purposes but others were built as trading stock to be sold. All the construction activities for Beta Leigh were carried out by the Partnership.

The Partnership did not keep detailed records or timesheets for the work done for Beta Leigh. There were no costing sheets used when the Partnership would use its equipment to do site preparation, landscaping or maintenance.

The relevant events occurred from August 2001, when Beta Leigh Pty Ltd subdivided a land into 28 lots, and one of those subdivided lots was further subdivided into 5 lots.

The ATO conducted an audit of Beta Leigh Pty Ltd for the 2015 and 2016 financial years and concluded it had returned income and claimed deductions which were not adequately explained by the records provided.

The Commissioner issued amended assessments, including substantial penalties and interest. The total amount payable was $1,043,591.

Beta Leigh Pty Ltd objected to the amended assessments. The objections were disallowed by the Commissioner and Beta Leigh Pty Ltd applied to the AAT for review of the objection decisions.

Beta Leigh Pty Ltd argued that it was entitled to deductions for cost of sales in the income year ended 30 June 2015. It submitted that even if the amount of the deduction claimed $56,000 is overstated, it does not matter because the excess should be ascribed to cost of sales in the previous year and it was merely a timing issue.

Beta Leigh Pty Ltd accepted that the cost of land had been overstated in the income year ended 30 June 2016, as land had been sold in the 2015 year without any adjustments being made for cost of land. This was addressed by a journal entry in 2017. As a result, the profit for the 2016 was understated because the cost of land sold was overstated. Beta Leigh Pty Ltd argued that arithmetically the impact on loss of revenue was neutral, as it would increase the carry forward losses at 1 July 2015.

Issues

1. Was Beta Leigh Pty Ltd entitled to a deduction of $56,000 for cost of sales for the 2015 income year?
2. Was Beta Leigh Pty Ltd entitled to deductions of $416,818 and $680,000 respectively for ‘property maintenance expenses’ paid to the Partnership for the 2015 and 2016 income years?
3. Has Beta Leigh Pty Ltd proved its taxable income calculated under the trading stock provisions was not understated for the 2016 income year?
4. Was Beta Leigh Pty Ltd entitled to a deduction of $350,000 for ‘management fees’ paid to the Partnership for the 2016 income years?
5. Was Beta Leigh Pty Ltd entitled to losses incurred in the 2013 income year which were carried forward to the 2015 and 2016 income years?
6. Did Beta Leigh Pty Ltd prove that the assessments of administrative penalties for recklessness were excessive?
7. Did Beta Leigh Pty Ltd prove that full or partial remission of penalties is appropriate?

Decision

In addressing each issue above, the AAT had found that Beta Leigh Pty Ltd did not produce enough evidence to support its claims. The AAT expected that Beta Leigh Pty Ltd would refer to primary sources of evidence, such as its witness statements, oral evidence and documentary evidence such as financial records. However, despite being given multiple opportunities to find evidence, Beta Leigh Pty Ltd only provided limited evidence and referred mostly to ATO documents, such as audit reports and reasons for the decision, rather than to its own statements and records.

Was Beta Leigh Pty Ltd entitled to a deduction for cost of sales in the amount of $56,000 for some of the lots for the 2015 income year?

The AAT was not directed to any evidence that proved that Beta Leigh Pty Ltd was entitled to a deduction for the cost of sales for some of the lots in the 2015 income year. Beta Leigh Pty Ltd did not provide details of how costs were apportioned to each of the lots, so the AAT could not determine if the $56,000 was the correct cost of sales. Therefore, the AAT was not satisfied that Beta Leigh Pty Ltd was entitled to a deduction for the cost of sales claimed.

Was Beta Leigh entitled to deductions of $416,818 and $680,000 respectively for 'property maintenance services' paid to the Partnership for the 2015 and 2016 income years?

The AAT accepted that the amounts paid by Beta Leigh Pty Ltd were for services provided by the Partnership, not reimbursements of amounts incurred by the Partnership on behalf of Beta Leigh Pty Ltd. Also, the Partnership was not acting as the agent of Beta Leigh Pty Ltd. Although the job cost ledgers of the Partnership were incomplete for the 2015 income year and no evidence was provided for the 2016 year, the AAT still accepted that Beta Leigh Pty Ltd was entitled to these deductions.

Has Beta Leigh Pty Ltd proved its taxable income calculated under the trading stock provisions was not understated for the 2016 income year?

The AAT found that Beta Leigh Pty Ltd has not proved that its taxable income for the 2016 income year was not understated as a consequence of the error of the trading stock calculations.

Was Beta Leigh Pty Ltd entitled to a deduction of $350,000 for 'management fees' paid to the Partnership for the 2016 income years?

The AAT did not receive any information about how the $350,000 of management fees were charged. The AAT did not receive any contemporaneous evidence such as minutes, file notes or working papers. As there was no evidence of how the management fees were calculated or what services they were for, the AAT found that Beta Leigh Pty Ltd did not prove that it was entitled to this deduction.

Was Beta Leigh Pty Ltd entitled to losses incurred in the 2013 income year which was carried forward to the 2015 and 2016 income years?

Beta Leigh Pty Ltd did not provide any evidence of how or why it was claiming $841,000 as a carried forward tax loss from the 2013 income year. Beta Leigh Pty Ltd did not put into evidence its 2014 tax return, which would have shown the losses carried forward from 2013. Therefore, the AAT was not satisfied that Beta Leigh Pty Ltd was entitled to claim a deduction for the asserted carried forward losses.

Did Beta Leigh prove the assessments of administrative penalties for recklessness were excessive?

The AAT found that Beta Leigh did not prove that the assessment of the base penalty amount, calculated at 50% for recklessness, was excessive.

Did Beta Leigh prove that full or partial remission is appropriate?

The AAT found that a remission of the penalty to 25% was appropriate.

Comment – Four months after the AAT hearing, Beta Leigh applied to the AAT for permission to file further evidence. The tax agent representing Beta Leigh stated that summarised information had been supplied to the AAT, but the underlying individual invoices and reconciliations had not been provided. The AAT refused to allow additional evidence to be filed, due to the need for proceedings to be '*fair, just, economical, informal and quick'*. When managing a dispute, whether at ATO review or in the AAT, it is critical that all the relevant information and evidence is provided and the decision maker is directed to how the specific evidence addresses or proves the issues in dispute. It is also critical to prove that each separate year has been correctly accounted for. It is not sufficient to show that overall there has been no loss to revenue, although this may assist with seeking remission of penalties.

Citation *Beta Leigh Pty Ltd and Commissioner of Taxation (Taxation)* [2024] AATA 596 (Senior Member R Olding and Member P Ranson, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/596.html

2.5 Hannover Life – overheads and input tax credits

Facts

Hannover Life Re of Australasia Ltd is a GST registered life insurance company and wholly owned subsidiary of German company, Hannover Rück SE.

Hannover makes supplies of insurance policies in Australia using the services of commission agents, who are responsible for developing and marketing life insurance products, dealing with policyholders and paying claims. Hannover's other revenue generating activities include providing reinsurance of life insurance policies to other Australian life insurers and providing reinsurance to its New Zealand branch for life insurance policies.

Hannover entered into reinsurance arrangements with Hannover Rück. Under those arrangements, Hannover Rück:

1. accepted, by way of automatic reinsurance, 75% of the risk in the policies issued by Hannover through its commission agents, and receives 75% of the premium paid for those policies;
2. was liable to Hannover for 75% of any claim; and
3. was required to pay commission and an "expense allowance" to Hannover. The expense allowance provides for Hannover to be reimbursed to 75% of its overhead expenses incurred in the ongoing management of the insurance policies issued through Hannover's commission agents.

For GST purposes:

1. the underwriting of life insurance policies and supply of life risk reinsurance to Australian policyholders/insurers is an input taxed supply. Entities making input taxed supplies are generally prevented from recovering the GST incurred on associated expenses; and
2. the supply of life reinsurance to Hannover's New Zealand branch is a GST-free supply.

The reinsurance arrangement between Hannover and Hannover Rück was agreed between the parties to be a GST-free acquisition supply by Hannover. Entities making GST-free supplies are generally entitled to recover, in full, any GST incurred on associated expenses. Input tax credits generally cannot be claimed in respect of input taxed supplies.

Hannover lodged monthly Business Activity Statements for the monthly tax periods from 1 October 2014 to 31 August 2018, in which it claimed input tax credits for 75% of the GST it paid on commissions and overheads.

The Commissioner issued notices of assessments denying these input tax credits.

Hannover objected to the assessments. The Commissioner denied the objection in relation to the input tax credits.

Hannover appealed to the Federal Court, arguing that the notices of assessment were excessive because the Commissioner had denied input tax credits to which Hannover claimed it was entitled under the GST Act. The input tax credits related to two types of acquisitions:

1. commissions paid by Hannover to Australian licensed distributors of its insurance policies; and
2. overhead acquisitions such as rent, office supplies and telephone expenses.

The primary judge held that acquisitions in the form of commissions paid to a third-party with respect to a distribution and administration agreement, related wholly to input taxed supplies of life insurance policies in Australia and, as a result, Hannover was not entitled to input tax credits.

In relation to the overhead costs, the primary judge held that the costs related to all enterprise activities and as such, Hannover was entitled to input tax credits to the extent apportioned to GST-free supplies. The primary judge also held that Hannover's method of apportionment, determined by reference to the quotient of the premium on-paid to Hannover Rück and the premiums received by Hannover, was fair and reasonable.

The Commissioner appealed to the Full Federal Court, arguing that Hannover was not entitled to any input tax credits relating to its overheads because those acquisitions arose "by and through" the input taxed supplies made by Hannover rather than through the GST-free acquisition supplies under Hannover's reinsurance arrangements.

Issue

1. Was Hannover entitled to claim input tax credits in relation to its overhead acquisitions?
2. If so, what is a "fair and reasonable" method of apportionment in determining the extent to which the overhead acquisitions were for a creditable purpose?

Decision

The Full Court upheld the finding of the primary judge that Hannover's overhead acquisitions related to both input taxed supplies and the GST-free supplies made by Hannover, including GST-free acquisition supplies arising from its reinsurance arrangement with Hannover Rück. Hannover was, therefore, entitled to claim input tax credits on a proportional basis.

The Full Court held that Hannover's revenue-based apportionment methodology was not unreasonable in the relevant commercial and contractual circumstances of Hannover's enterprise.

The appeal was unanimously dismissed.

Citation *Commissioner of Taxation v Hannover Life Re of Australasia Ltd* [2024] FCAFC 23 (Derrington, Thawley and Hespe JJ, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/23.html

2.6 Konebada – input tax credits

Facts

Konebada Pty Ltd was the trustee of the William Lewski Family Trust. Ari Lewski was a director of Konebada. Ari's father, William Lewski was a director of Konebada from incorporation until 20 December 2014. In August 2016, William was re-appointed as a director of Konebada until October 2019.

William, his wife and sons were all beneficiaries of the Trust.

Ari and William were registered tax agents.

In November 2016, Konebada entered into litigation funding agreements, dated November 2016, with various members and related entities of the Lewski family group. The litigation funding agreements were between the trust as a 'litigation funder' and various members of the Lewski Family Group as 'beneficiaries'. Under these agreements the trust agreed to pay the litigation costs of the beneficiaries. In consideration, those members and affiliated entity would share any litigation proceeds over $5 million with the Trust.

Konebada as trustee accounted for GST arising from the Trust on a cash basis and submitted quarterly BAS statements on behalf of the Trust.

In the business activity statements lodged on behalf of the Trust between the tax periods of 1 January 2015 and 31 December 2017, Konebada claimed input tax credits with respect to invoices that Konebada paid for services provided by lawyers and other professionals to members and affiliated entities of the Lewski family group.

During the same tax periods, the Trust returned GST on sales or income in only 4 of those quarterly returns. The income on which GST was returned primarily related to fees paid by a related trust for the management of properties, and litigation proceeds involving the Trust and/or its associated entities.

The Commissioner denied input tax credits related to the payments of legal and professional fees.

Konebada objected to these amended assessments which was disallowed by the Commissioner. Konebada subsequently appealed to the Federal Court.

In the Federal Court, William's evidence was that Konebada as trustee of the Trust was authorised to 'conduct' the litigation on behalf of those related members or entities who were the parties to that litigation. More importantly, William contended that Konebada did more than simply act as a conduit for advice, but, in effect, took charge of the litigation on behalf of members of the Lewski family. William submitted that he coordinated the legal proceedings, instructed lawyers, and oversaw payments of invoice as a representative of Konebada.

In cross examination, William noted that Konebada's coordination of the litigation involving members of the Lewski Family Group, and entry into the funding agreements, was a form of asset protection to ensure any litigation proceeds would be insulated in the Trust.

The primary judge concluded that while Konebada acquired legal services for the benefit of the Lewski Family Group, for the purposes of section 11-5(a) of the GST Act there was insufficient evidence to establish that these acquisitions were creditable, as they were not made by Konebada in the course of carrying on an enterprise.

Despite assertions from William that he was managing litigation and providing advice on behalf of Konebada, the judge found the evidence was inconsistent and lacked support for the existence of a formal business operation within Konebada. Rather, the primary judge concluded William managed the litigation on behalf of the relevant members of the Lewski Family Group.

The primary judge also cast doubt on the nature of the litigation funding agreements, suggesting they did not reflect a business concern and were not entered into systematically or with clear documentation. The primary judge considered that the carrying on an enterprise required a commercial purpose or a purpose of profit or return, which was lacking in this instance.

Konebada appealed this decision to the Full Federal Court.

Konebada's Notice of Appeal outlined 13 grounds of appeal. These grounds primarily focused on alleged errors in the judge's reasoning and findings regarding the role of William and his status as a registered tax agent, the nature of the arrangements between Konebada and the legal service providers, and the characterisation of Konebada's acquisitions.

Issues

1. Was William's status as a tax agent unfairly used against him in the decision of the primary judge?
2. Was William acting on behalf of Konebada?
3. Was there sufficient evidence to establish that Konebada was carrying on an enterprise?

Decision

<u>Was William's status as a tax agent unfairly used against him in the decision of the primary judge?</u>

Konebada had argued that there was procedural unfairness due to the primary judge considering on William's status as a tax agent and knowledge of GST. However, the Court found that there had been no procedural unfairness as there was no factual dispute about William's status. The primary judge properly assessed William's evidence, and William's status as a tax agent was just one piece of evidence considered. William's evidence was properly assessed considering his understanding and the context of his knowledge and experience as a tax agent.

<u>Was William acting on behalf of Konebada?</u>

The Court held that the absence of supporting documentation was relevant in assessing William's actions and the capacity in which he acted.

The Court also upheld the observation of the primary judge that the arrangements between William and Konebada were artificial. There was insufficient evidence to establish that William had the authority and in practice, did in fact, act on behalf of Konebada.

Ultimately, the Court considered that Konebada's arguments lacked merit, and the primary judge's finding that William did not act on behalf of Konebada was upheld.

<u>Was there sufficient evidence to establish that Konebada was carrying on an enterprise?</u>

The Court considered Konebada's arguments that the primary judge had made an error of fact in refusing to consider that Konebada was carrying on an enterprise. The Court upheld the findings of the primary judge, concluding that Konebada had failed to demonstrate that its litigation activities constituted the conduct of a business or had the potential to generate a positive financial return.

The Court noted that despite the regularity and scale of its activities, Konebada's litigation activities did not constitute a business for the purposes of GST. The court further noted that Konebada's motives, such as asset protection, did not align with the characteristics of a business.

Accordingly, the Court rejected Konebada's appeal on all grounds and upheld the findings of the primary judge. The Court found no errors in the primary judge's assessment and rejected Konebada's arguments that its activities constituted the carrying on of an enterprise or were conducted in the form of a business under the GST Act.

Citation *Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation* [2024] FCAFC 42 w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/42.html

2.7 EFEX Group v Bennett – employee vs contractor where no written agreement

Facts

EFEX Group Pty Ltd (**EFEX**) conducted a services business providing voice, data, printing management and other technology-based services. On 1 February 2018, Gerrard Bennett was engaged by EFEX as a Business Development Manager of the company's South Australian operations.

Gerrard had been friends with the founder and CEO of EFEX, Nick Sheehan, and the Branch Manager of EFEX, Dean Brogan, for some years before Gerrard joined EFEX. Dean and Gerrard had been friends for over 18 years. The CEO told Dean that he was prepared to engage Gerrard on the same basis as Dean's 'contractor arrangement'. Dean said that, although he could not recall the actual words used, he did recall Gerrard telling him that he was happy to be engaged as a contractor.

There was no written employment or engagement agreement between EFEX and Gerrard. Gerrard claimed that he was instructed that EFEX would remunerate him for his work for the company at a flat rate of $120,000 per annum plus GST. The monthly payment of $10,000 was to be invoiced on the 9th or 10th of each month. Gerrard was required to obtain an Australian Business Number (ABN).

On or about 29 January 2018, Gerrard established the Bennett Enterprises Trust and obtained an ABN for the trust.

Between February 2018 and October 2019, the Bennett Enterprises Trust sent a tax invoice on or about the 13th of each month for $10,000 plus GST of $1,000 for what was stated in the invoices to be the supply of the following:

> *Gerrard Bennett — Provision of Sales Contracting Services for the month of [month] [year].*

The invoice sought direct payment to the Bennett Enterprises Trust at a nominated bank account. The bank account was in the name of Gerrard John Bennett as trustee for the Bennett Enterprises Trust. Gerrard was paid the same amount each month regardless of whether he was absent from work.

Gerrard was provided with business cards, a company laptop, a company email and an EFEX polo shirt. Gerrard was not required to wear a uniform, including a polo shirt at any time as part of his role.

Gerrard's role was primarily in generating sales. This involved him creating proposals and putting together deal sheets using EFEX template documents. Gerrard was trained to use, and required to use, the sales processes of EFEX. Gerrard also had sales targets he was required to achieve but he was not directed as to how he should achieve sales targets.

Gerrard was not required to work a standard business week, Monday to Friday 8 am to 5 pm, and no one was keeping track of the hours he worked each week. Gerrard agreed that there was no requirement that he devote the whole of his time and activities during normal working hours to the performance of his duties.

Gerrard did not need permission from EFEX or Dean to attend private appointments during business hours, that is, appointments unrelated to EFEX. Gerrard attended the gym, and classes and tutorials at the university, and private appointments during what would be considered normal business hours.

No records were kept of annual leave or sick leave and that there was no requirement to complete an application or other documentation in respect of taking holidays.

Gerrard reported to, and was accountable to, in the first instance, the local branch manager, being Dean. On two occasions, Nick instructed him that he needed to increase his sales. There was a one-day sales “kick off” conference each year that all EFEX workers were asked to attend. Gerrard was required to attend that conference.

Other relevant matters identified were as follows:

1. there was no requirement that Gerrard wear a corporate uniform;
2. there was no evidence that Gerrard was generating a saleable asset such as goodwill;
3. there was no evidence of any discussion as to whether Gerrard could delegate his work to a third party;
4. Gerrard used his own mobile telephone and motor vehicle. He was not reimbursed for, or given an allowance in respect of, those uses;
5. there were expenses which were paid by Gerrard as trustee of the Bennett Enterprises Trust and not by EFEX, namely: taxes, travel expenses, food and beverages for potential clients;
6. Gerrard was performing work for a former colleague, separate to EFEX, by assisting the former colleague to secure cleaning contracts. Dean was not concerned with Gerrard completing this other work as it did not compete with EFEX; and
7. as trustee, Gerrard could distribute funds to any beneficiaries of the Bennett Enterprises Trust. There was a monthly payment of $7,000 to a private account held by Gerrard which was described as “wages”.

On 1 November 2019, EFEX wrote a letter to Gerrard offering him full-time employment.

On 6 November 2019, Gerrard received a call from the CEO of EFEX to discuss the contract. The CEO said that they had previously discussed the structure. Gerrard denied that they previously discussed changing to a performance-based contract.

On 8 November 2019, Gerrard had a text message exchange with the CEO, and viewed this communication as a dismissal.

On 10 November 2019, Gerrard met with Dean who said:

> *mate I think you should leave, they have had it in for you for a while, and they are going to make it hard for you to stay, and that if you do, they aren’t going to let you do uni anymore, as it is affecting your work.*

Gerrard said he had no other conversation about his dismissal with the CEO or Dean.

Gerrard brought a claim with the Fair Work Commission on the basis of unfair dismissal. EFEX sought to have the claim dismissed on the basis that Gerrard was not an employee and that the Fair Work Commission, therefore, had no jurisdiction to hear an unfair dismissal claim in respect of Gerrard's engagement. The Fair Work Commission held that Gerrard was an employee and that the unfair dismissal proceedings could continue.

EFEX appealed the Fair Work Commission decision to the Federal Court.

Before the Federal Court, EFEX contended that Gerrard was an independent contractor, as there was no direction that Gerrard be in the office at any time, and Gerrard had almost total freedom in how he carried out his sales activities.

The Federal Court concluded that while there were factors which pointed towards a finding of an independent contractor relationship and factors pointing towards the conclusion of an employment relationship, the "overwhelming weight of evidence in terms of control, ability to work for others and the inability to delegate the EFEX work" led to the conclusion of an employment relationship.

EFEX applied to the Full Federal Court to restrain the Fair Work Commission from continuing to hear Gerard's unfair dismissal claim and, in the alternative, seeking an order that the Fair Work Commission hear and determine the application according to law and to dismiss it.

EFEX contended that the Federal Court failed to focus on the contractual legal rights and duties of the parties as required by *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (***Personnel Contracting***). EFEX contended that it had no contractual right to control how Gerrard performed work under the contract, with no required hours of work and no requirement to work from a particular location.

Gerrard submitted that EFEX exercised control over him by requiring him to report to Dean, attend the annual sales conference, training him to use EFEX's processes, expecting that Gerrard not compete with EFEX, and expecting that Gerrard comply with directions given by Nick. Gerrard argued that this indicates the existence of a contractual right to control. Gerrard also submitted that he was presented as an employee by way of a company business card, email address and title and used company documentation and processes and there was no opportunity to profit separately from his work with EFEX.

Issue

Was Gerrard an employee of EFEX?

Decision

The Court referred to the High Court decision in *Personnel Contracting,* which set out the approach for determining the nature of the relationship between a worker and an engaging entity. *Personnel Contracting* provides that where the rights and duties of the parties are "comprehensively committed to a written contract", and the contract is not a sham, varied, waived or the subject of an estoppel, the obligations established by that contract are decisive of the character of the legal relationship.

In the present case, the contract was wholly oral. The Court confirmed that the principles of contract interpretation also apply to the terms of an unwritten contract that are able to be ascertained, inferred or implied. Generally, things said or done after a contract was made are not relevant to determining the terms of the contract at the time it was made.

The Court stated that once the legal relationship is identified, its characterisation as one of employment or independent contractor often hinges on two main considerations:

1. the extent to which the putative employer has the right to control how, when and where the putative employee performs the work; and
2. the extent to which the putative employee can be seen to be working in their own business as distinct from the putative employer's business.

The Court considered the competing factors identified by the primary judge and the submissions of the parties.

The Court held that the primary judge gave too much weight to factors emerging from the way the contract was performed that evidenced only a limited degree of exercise of control, rather than the existence of a contractual right of control, such as the periodic requirement to attend meetings.

Further, the Court held that the primary judge gave insufficient weight to the significance of the freedom that Gerrad had by reason of the contractual arrangements themselves. Gerrard was not required to devote all his time and activities during working hours to the performance of his duties for EFEX, he was not required to keep a record or provide EFEX with a report of the hours he worked, he was not given directions about how to carry out his tasks or how to achieve sales targets.

The Court held that even an independent contractor with the clearest written contract may still present as a representative of the organisation by business cards, uniforms and job titles. Therefore, this says little about the nature of the legal relationship in place.

The Court stated that in a sales job it would be expected that Gerrard made no significant contribution of capital or assets and accrued no saleable rights. Rather, the Court found the fact that Gerrard provided his own vehicle and mobile telephone, being essential tools of trade for any person in a sales role, with the associated expenses being paid out of trust funds and no contractual right to reimbursement from EFEX was relevant.

The final error identified by the Court concerned the remuneration and tax arrangements. The Court held that the tax arrangements were a consequence of the terms of the contract from the outset and were a core term or condition. At the very outset, before Gerrard commenced work for EFEX, he set up a trust for the purpose of the commencing work under the contract with EFEX, so that payment could be made for the services he performed, and that this arrangement was known and agreed to by EFEX.

The Court concluded that the correct characterisation is that the relationship between EFEX and Gerrard was that of principal and an independent contractor, not employer and employee.

The Court made an order prohibiting the Fair Work Commission from hearing Gerrard's unfair dismissal application on the basis that it had no jurisdiction to entertain the unfair dismissal application.

COMMENT – From 26 August 2024, the *Fair Work Act* definitions of 'employee' and 'employer' will be determined based on the real substance, practical reality and true nature of the relationship and will have regard to the whole relationship between the parties, including the terms of the contract and how the contract is performed in practice. These changes were introduced by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2023*.

Citation *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35 (Katzmann, Bromwich and Lee JJ, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/35.html

2.8 Delbake – SGC penalty remission

Facts

Delbake Pty Ltd runs a bakery business and engages employees to work in the business.

In 2019, the Commissioner contacted Delbake about whether it had paid superannuation guarantee for its employees in the periods 1 July 2014 until 30 June 2017. As a result, Delbake lodged superannuation guarantee statements for the quarterly periods between 1 July 2015 and 30 June 2016.

On 3 December 2021, the Commissioner issued to Delbake an ‘early engagement review letter' expressing concerns that Delbake did not comply with its superannuation obligations for the periods between 1 July 2015 and 30 June 2018. Delbake responded by stating that the periods between 1 July 2015 and 30 June 2018 had been subjected an audit in 2019 and SGC statements were prepared and lodged with the ATO.

On 28 February 2022, the Commissioner commenced an audit in relation to Delbake's superannuation compliance for the periods between 1 July 2015 and 30 June 2018 for a number of employees and requested relevant information.

Between 1 April 2022 and 17 May 2022, Delbake provided the Commissioner with documents, including superannuation guarantee statements for the shortfall period.

Between 24 May 2022 and 28 June 2022, the Commissioner issued amended assessments in relation to Delbake's superannuation guarantee charge for the relevant shortfall period and a penalty assessment for $208,611, being equal to 100% of Delbake's superannuation guarantee charge.

The penalty rate is part of the superannuation guarantee scheme under the *Superannuation Guarantee (Administration) Act 1992* (Act) and the *Superannuation Guarantee Charge Act 1992* (Cth).

The scheme provided that an employer who does not make superannuation contributions for employees by the relevant due dates incurs a debt, known as the superannuation guarantee charge which is owed to the Commissioner. SGC can be reduced by employer making superannuation contributions after the date the charge becomes due and before a quarterly assessment is made.

Section 33 of the SGAA also obliges employers to report superannuation guarantee shortfalls in a superannuation guarantee statement on or before the due date in each relevant quarter. Where an employer fails to lodge a superannuation guarantee statement on time, a penalty equal to twice the superannuation guarantee charge amount is imposed.

The Commissioner has a discretion to remit penalties in whole or in part where there are exceptional circumstances that prevented the employer from disclosing the superannuation guarantee information to the Commissioner, before the Commissioner had informed the employer that the Commissioner was examining, or was intending to examine, the employer's superannuation guarantee compliance for a relevant quarter.

Delbake objected to the penalty assessment, stating that the Commissioner should be satisfied that the following exceptional circumstances prevented Delbake from lodging superannuation guarantee statements:

1. Delbake's accountant was diagnosed with brain cancer in August 2018 and died a little less than a year later. The principals of the tax agent firm where the accountant worked provided evidence that they came across a number of issues in respect of the work the former accountant had given which suggested he was in poor health and not operating at full cognitive facility;
2. for the quarterly period from September 2016 to September 2019, Delbake was in fact paying superannuation albeit after the due date, due to the fact that its tax agents were processing the payments, and superannuation charge statements should have been lodged;
3. the pandemic after March 2020 created made it difficult for Delbake's tax agent to service their clients. Due to the pandemic, Delbake also suffered a downturn in business and reduced cash flows which resulted in it having significant amounts outstanding;
4. Delbake already had its superannuation obligations reviewed by the Commissioner in 2019, after which it was entitled to assume that issues surrounding the late payment of the superannuation and the need to lodge SGC statements for the relevant quarters had been considered and adequately addressed;
5. the amnesty period for disclosing unpaid super amounts without penalty was ended by the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill* around the same period as the onset of the pandemic, which added to the exceptional circumstances that prevented the disclosure of the information to the Commissioner.

The Commissioner disallowed the objection. Delbake sought review of the objection decision in the AAT.

Issue

Whether the additional SG penalty should be further remitted?

Decision

In relation to the circumstances of the former accountant, the AAT noted that there was no particular evidence about what information the former accountant had available to him, what instructions he had been given, what information system he had in place, or his cognitive capacity, to satisfy the AAT that the former accountant's illness prevented Delbake from lodging superannuation guarantee statements.

In relation to the fact that the superannuation was paid, the AAT noted that this ground simply reiterates the fact that superannuation guarantee statements were not prepared and lodged for each quarter, which did not assist Delbake. That is, the penalty is not imposed for late payment but because of non-lodgment of the shortfall statements.

In relation to the impact of the COVID-19 pandemic, the AAT was not satisfied that the pandemic prevented Delbake from disclosing its superannuation guarantee shortfall to the Commissioner, in circumstances where its other taxation obligations were met. The AAT also noted the lack of cash flow did not prevent Delbake from disclosing its superannuation guarantee shortfall.

In relation to the assumption made by Delbake after ATO review in 2019, the AAT found that there was no basis for the assumption being made, given that the early engagement letter issued by the ATO on 3 December 2021 specifically requested Delbake to check its records and make sure it had lodged superannuation guarantee statements.

In relation to the amnesty period coinciding with the COVID-10 pandemic, the AAT noted that the amnesty period had run for 18 months by the time of the onset of the pandemic. Further, Delbake could have disclosed its superannuation guarantee shortfall any time before 28 February 2022 to prevent the penalty being imposed.

The AAT affirmed the decision of the Commissioner not to remit the penalty as the AAT was not satisfied that there are exceptional circumstances that prevented Delbake from providing the Commissioner with information about its superannuation guarantee shortfall over the shortfall period before 28 February 2022. In the absence of the Commissioner being satisfied about exceptional circumstances that prevented Delbake from lodging superannuation guarantee statements, the Commissioner and the AAT were unable to remit below 100% of the penalty.

COMMENT – It is important to note that SGC is imposed based on failure to lodge SGC statements, not based on failure to pay.

Citation *Delbake Pty Ltd and Commissioner of Taxation* [2024] AATA 449 (Mr Rob Reitano, Member, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/449.html

2.9 Golden Age – remission of premium interest on duty assessment

Facts

On 1 September 2014, Golden Age and Hannas the Rocks Pty Ltd entered into a contract with Sandhurst Trustees Limited to purchase the leasehold interest in 85 Harrington Street, The Rocks. Sandhurst Trustees held the land under a 99-year lease granted by the New South Wales government in 1989 for $50 million (**Original Lease**). At the time of purchase of the leasehold, there were 74 years remaining, so that the lease was to expire in 2088. On 1 December 2014, stamp duty of $2,735,490 was paid.

On 17 March 2015, a transfer of the leasehold interest in favour of Golden Age was executed and stamped with nominal duty of $10.

After acquiring the Original Lease, Golden Age wished to redevelop the site, which was not permitted under the Original Lease. Golden Age proposed to vary the lease, however the terms of the lease did not allow for a variation in the manner proposed to allow such a development.

In late August 2017, Golden Age and the New South Wales government department Place Management NSW staged discussions, and entered a non-legally binding heads of agreement to, relevantly:

1. negotiate and finalise an agreement for lease between Golden Age and Place Management in good faith;
2. permit Golden Age to develop the land by demolishing the existing building;
3. surrender the Original Lease, to which Golden Age would indemnify Place Management for any stamp duty payable on the surrender of the lease;
4. Place Management would grant Golden Age a licence to develop the land equal to rent payable under the Original Lease;
5. Golden Age would pay Place Management $31 million plus GST before the commencement of the lease;
6. Place Management would grant new leases on completion of the development works; and
7. Golden Age would be liable for all duty implications arising out of the transaction.

Among other things, Section 8 of the Duties Act imposes duty on the surrender of an interest in land in New South Wales and on a lease in respect of which a premium is paid or agreed to be paid.

Section 21(5) of the Duties Act provides that the dutiable value of the leased property transferred by way of lease is taken to be the amount of the premium paid or payable in respect of the lease.

Golden Age raised concerns that it would be paying duty three times on what it believed was the same transaction:

1. on the purchase of the Original Lease;
2. on the surrender of the Original Lease; and
3. on the premium paid to grant the new lease or leases.

In 2017 Golden Age sought tax advice from law firm HWL Ebsworth regarding the New South Wales duties implications of the proposed transactions. On finding the HWL Ebsworth advice difficult to understand, Golden Age sought advice from another law firm, Maddocks, on the question of whether all of the transactions were dutiable transactions.

On 25 May 2018, following advice from Maddocks, Golden Age entered into an Agreement for Lease, which provided that the agreed sum of $39,694,250 for the granting of leases would be due on the completion of the development when the new leases were granted. The Agreement for Lease also provided that the redevelopment would include the division of the development into two strata plans, which would be leased.

On 12 April 2019 Golden Age surrendered the Original Lease. On 18 April 2019, Maddocks arranged for the surrender of lease document to be stamped, and for duty to be paid.

On 7 June 2021, Place Management issued an invoice for the agreed lease premium sum of $39,694,250.

On 28 July 2021, Maddocks sent a letter to the Chief Commissioner with the Agreement for Lease for stamping, without further mention of the strata plans and the leases of the strata plans. Maddocks, however, acknowledged in the letter that the new leases and the strata leases were dutiable transactions.

On 23 August 2021, the Chief Commissioner of State Revenue issued a notice of assessment to Golden Age which assessed for duty the Agreement for Lease in the sum of $2,168,696. The Commissioner's assessment treated the failure to present the Agreement for Lease for stamping by 25 August 2018 as tax default under section 17(1) of the Duties Act, because more than three months had passed since entering the agreement before it was presented for stamping. The assessment included interest of $579,591 due to late payment. The interest comprised $60,539 as the market rate component and **$520,007 as premium interest of 8%**.

On 25 August 2021, Golden Age paid the primary duty amount, but did not pay the premium rate of interest. In the time between the duties notice of assessment and payment, an additional $955 of interest had accrued.

On 27 August 2021, Golden Age objected to the assessment on the basis that:

1. there was no premium paid in respect of the Agreement for Lease, but it was rather the sum paid to Place Management for the grant of the leases that were subsequently entered into; or
2. in the alternative, Golden Age took reasonable care to engage advisors on the dutiable aspects of the transaction, and the premium interest should be remitted on that basis.

On 12 March 2022, the Chief Commissioner disallowed the objection, forming the view that the initial assessment was correct, and that remittance of market interest would only be allowed in exceptional circumstances beyond the control of the taxpayer, such as natural disasters, death of a key person, or electronic faults not caused by the taxpayer. The Chief Commissioner stated that the simply engaging professional advice but that further inquiries needed to be demonstrated.

Golden Age sought review of the objection decision in the Supreme Court of New South Wales.

Issue

Is Golden Age eligible for remission of the premium component of interest?

Decision

Richmond J noted that the premium component of interest serves as a form of penalty to deter taxpayers from delaying payment of duty.

Richmond J discussed the Appeal Panel's decision in C*hief Commissioner of State Revenue v Incise Technologies Pty Ltd* [2004] NSWADTAP 19, which outlined that the criteria to exercise the discretion to remit the premium component of interest are that:

1. all principal tax owing which is not in dispute has been fully paid;
2. the taxpayer has been cooperative in providing information to the Commissioner for the purpose of the Commissioner issuing assessments;
3. the cooperation has occurred prior to an investigation being launched by the Commissioner or, at the very least, within a reasonable time after the request for information had been made; and
4. the taxpayer did not wilfully default on their non-payment of tax by the due date.

Richmond J noted that the first three criteria in *Incise Technologies* were met. The question lay in whether the non-payment of the duty was wilful.

Richmond J held that wilful default involves consciousness of the breach or recklessness indifference as to whether there is a breach. That is, contrary to the submissions of the Chief Commissioner, it does not require the taxpayer to have exercised reasonable care.

In any event, Richmond J held that Golden Age took reasonable care to engage Maddocks and follow the legal advice, especially in a particularly complex set of transactions. It was an oversight from Maddocks that prevented Golden Age from paying the duty on time, as the lawyers failed to consider the potential duty implications of the Agreement for Lease.

Richmond J ordered that the premium component of interest be remitted.

COMMENT – the Supreme Court was only asked to consider remission of premium interest. However, Richmond J noted that there is an argument that, unless the payment of $39,694,250 is properly characterised as a premium for Places Management entering into the Agreement for Lease in favour of Golden Age, the Agreement for Lease would not be a dutiable transaction. If the proper characterisation of the $39,694,250 is that it was a premium for the new leases rather than the Agreement for Lease itself, then the Agreement for Lease would not be a dutiable transaction because, although a lease, no premium would be payable for it.

Citation *Golden Age and Hannas the Rocks Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 249 (Richmond J, Sydney) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/249.html

2.10 Appeal Updates

Bechtel

The Full Federal Court dismissed the appeal against the decision in *Bechtel Australia Pty Ltd v Commissioner of Taxation* [2023] FCA 676 (see our July 2023 Tax Training Notes).

The Full Federal Court held that the primary judge did not err when concluding that expenditure on the travel by FIFO employees between Curtis Island and their point of origin was not incurred in the course of gaining or producing assessable. Each FIFO employee performed their duties on Curtis Island and did not commence performing their employment duties prior to arrival at Curtis Island.

Therefore, it was held that the travel expenditure would not have been deductible for the FIFO employee under s 8-1 of the ITAA 1997 and would not have been otherwise deductible for the taxpayer under s 52(1) of the FBTAA.

Citation *Bechtel Australia Pty Ltd v Commissioner of Taxation* [2024] FCAFC 33 (Derrington, Downes and Hespe JJ, Queensland) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/33.html

Ausnet Services

The taxpayer has appealed to the Full Federal Court against the decision in *AusNet Services Ltd v Commissioner of Taxation* [2024] FCA 90 that the taxpayer, which was the head company of a stapled group, had made a valid election to apply the rollover under Division 615 of ITAA 1997 (see our March 2024 Tax Training Notes).

Quy

Quy, the taxpayer who had worked in Dubai for five years on an international posting, has appealed to the Federal Court against a decision made by the AAT in *Quy and Commissioner of Taxation (Taxation)* [2024] AATA 245 which concluded that he was an Australian tax resident during the relevant years (see our March 2024 Tax Training Notes).

2.11 Other tax and superannuation related cases in period of 8 March 2024 to 11 April 2024

Citation	Date	Headnote	Link
Li v Commissioner for ACT Revenue (Administrative Review) [2024] ACAT 24	8 March 2024	ADMINISTRATIVE REVIEW – liability for duty payable upon a “relevant acquisition” of shares in a property holding company – share transfers within a family and friend group – duty exemptions – ASIC register is not a definitive record of share owners or transfers – onus of proof lies with the applicants – tax penalty	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2024/24.html

Citation	Date	Headnote	Link
		Whether acquisition 1A was an accommodation for the purposes of loan exception under section 95 or trust exemption under section 115H(2)(f) of the Duties Act – shares transferred for “financial accommodation” do not have to be non-beneficially held – insufficient evidence of a loan arrangement – no conclusive evidence on the ‘non beneficial’ nature of the shares transfer for a trust exemption – applicants do not satisfy the onus of proof Whether Acquisition 2 was an accommodation for the purposes of loan exception under section 95 or trust exemption under section 115H(2)(f) of the Duties Act – shares not transferred back within 5 years – insufficient evidence non-beneficial interest transferred – applicants do not satisfy the onus of proof Whether Acquisition 3 is eligible for a trust exemption under section 115H(2)(f) due to being a “manifest” error – mistake – when a constructive trust arises – applicants do not satisfy the onus of proof Penalty tax – amount of penalty tax – delaying the provision of information – providing information that is incomplete – inadequate record keeping – general deterrence – remission of penalty tax due to circumstances of the applicants	
Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation [2024] FCAFC 29	8 March 2024	TAXATION - cross-border transfer pricing and arm's length consideration provisions - whether primary judge erred in formulating the reliable hypothesis required to apply Subdivision 815-A of the Income Tax Assessment Act 1997 (Cth) and Division 13 of the Income Tax Assessment Act 1936 (Cth) - whether primary judge erred in finding that moving to a fixed base interest rate for the last three years of the loan term was not commercially justified - whether primary judge erred in finding that the capitalisation of interest should be on an annual basis - whether primary judge erred in concluding that loan amendment was irrational - whether primary judge erred in his conclusion as to the legal effect of determinations made by the Commissioner - whether primary judge erred in failing to consider losses arising	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/29.html

Citation	Date	Headnote	Link
		before the relevant assessment years - matters raised by notice of contention did not arise - appeal dismissed	
Bushby v Gayle Kristin Bushby as Executor of the Estate of Florence Born [2024] WASC 54	1 March 2024	Family Provision Act 1972 (WA) - Whether plaintiff is eligible person to make an application for further provision under s 6(1) - Whether plaintiff has standing pursuant to s 7(1)(eb) - Stepchildren - Statutory construction - Meaning of 'estate of a parent' - Whether 'estate of a parent' should be confined to 'deceased estate' - Whether 'estate of a parent' should include inter vivos gifts and joint property subject to survivorship	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2024/54.html
Collie v Commissioner of Taxation [2024] AATA 440	12 March 2024	Income Tax (Cth) — Scheme to reduce tax — identification and calculation of tax benefit — Dominant purpose — Penalty.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/440.html
Pratten and Commissioner of Taxation (Taxation) [2024] AATA 439	12 March 2024	PRACTICE AND PROCEDURE – where applicant has applied for the issue of a summons to the respondent to produce documents – where documents not in the respondent's possession or control – whether the Tribunal can compel the respondent to procure documents from another government agency in order to produce documents under summons – where applicant previously applied for relevantly identical summons to be issued to respondent and to the other government agency – application for issue of summons to the respondent refused	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/439.html
GHTZ v Commissioner of Taxation (Taxation) [2024] AATA 453	14 March 2024	TAXATION – LUXURY CAR TAX – whether Applicant entitled to decreasing luxury car tax adjustments – whether refusal to accept a quote is contrary to the statute – whether Applicant was acting as agent for an undisclosed principle – whether Applicant acted as trustee for other entities – whether transactions were shams – whether s 15-30 of the A New Tax System (Luxury Car Tax) Act 1999 should be construed in the light of its heading and other context – whether Division 165 of A New Tax System (Goods and Services Tax) Act 1999 applies	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/453.html
Bechtel Australia Pty Ltd v Commissioner of Taxation [2024] FCAFC 33	15 March 2024	TAXATION – Fringe benefits tax – in relation to travel expenses for 'fly in, fly out' (FIFO) employees – whether 'otherwise deductible' rule applies	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/33.html

Citation	**Date**	**Headnote**	**Link**
Obeid and Commissioner of Taxation (Taxation) [2024] AATA 444	15 March 2024	ADMINISTRATIVE LAW –— Consideration of modification of s 37 Administrative Appeals Tribunal Act 1975 (Cth) by s 14ZZK Tax Administration Act 1953 (Cth) — The discretionary and mandatory powers of s 37 — Summons — Whether summons has the possibility of relevance — Appeals Tribunal to refuses the applicant's application for orders	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/444.html
Deputy Commissioner of Taxation v Wu [2024] FCA 250	18 March 2024	PRACTICE AND PROCEDURE – application for suppression orders under s 37AF of the Federal Court of Australia Act 1976 (Cth) (FCA Act) – where proceeding is for debt recovery in which notices of assessment are conclusive evidence that the assessments were properly made and are correct – where the Commissioner applied for freezing orders ex parte – where the respondents did not have the opportunity to object to the evidence relied upon and will not have any meaningful opportunity in the proceeding to meet the allegations and evidence relied on in the application for freezing orders – whether order necessary to prevent prejudice to the proper administration of justice within the meaning of s 37AG(1)(a) of the FCA Act – limited suppression orders made	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/250.html
Tratter v Aware Super [2024] FCAFC 36	19 March 2024	SUPERANNUATION — appeal under s 1057(1) of the Corporations Act 2001 (Cth) from determination of the Australian Financial Complaints Authority (AFCA) affirming a decision of the trustee of a superannuation fund in relation to the apportionment of a death benefit — where the trustee of the fund apportioned the death benefit 70% to the deceased member's former spouse and 30% to the deceased member's mother — whether AFCA made error of law in determining that the trustee's determination was neither unfair nor unreasonable — no error of law established — appeal dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/36.html
Deputy Commissioner of Taxation v Wu (No 2) [2024] FCA 269	20 March 2024	PRACTICE AND PROCEDURE – application for suppression orders under s 37AF of the Federal Court of Australia Act 1976 (Cth) – where orders made providing opportunity to seek redacted of reasons for judgment –whether order	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/269.html

Citation	Date	Headnote	Link
		necessary to prevent prejudice to the proper administration of justice – application dismissed	
Marchio v Commissioner of State Revenue (Review and Regulation) [2024] VCAT 257	21 March 2024	Review and Regulation List – Review and Regulation List – Duties Act 2000 (Vic), s 3 ('foreign purchaser', 'foreign natural person'), s 28A – Whether purchaser of property, who was permitted to enter and remain in Australia under a temporary partner visa, was a foreign purchaser subject to foreign purchaser additional duty – Whether Tribunal has any discretion as to imposition of foreign purchaser additional duty or as to issue or withdrawal of reassessment – Concession as to remission of interest.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2024/257.html
Gazal v Deputy Commissioner of Taxation (No. 2) [2024] NSWSC 293	22 March 2024	COSTS – specified gross sum costs order instead of assessed costs – Civil Procedure Act 2005, s 98(4)(c) – defendant, the Deputy Commissioner of Taxation, successfully opposes the plaintiff's appeal against a Departure Prohibition Order issued under the Taxation Administration Act 1953 (Cth), s 14S – plaintiff ordered to pay the defendant's costs of the proceedings – plaintiff has few assets in his own name – plaintiff advanced evidence of doubtful provenance in support of his claim – whether the conduct of a costs assessment would be aggravating or oppressive to the defendant in the circumstances – what is the appropriate specified gross sum to be fixed instead of assessed costs – whether a discount should be applied from the costs claimed by the defendant – consideration of the effect of proceedings being brought in vacation reducing the cost efficiencies that might otherwise have been employed by the legal representatives of the defendant.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/293.html
Marchio v Commissioner of State Revenue (Review and Regulation) [2024] VCAT 257	22 March 2024	Review and Regulation List – Review and Regulation List – Duties Act 2000 (Vic), s 3 ('foreign purchaser', 'foreign natural person'), s 28A – Whether purchaser of property, who was permitted to enter and remain in Australia under a temporary partner visa, was a foreign purchaser subject to foreign purchaser additional duty – Whether Tribunal has any discretion as to imposition of foreign purchaser additional duty or as to issue or withdrawal of reassessment –	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2024/257.html

Citation	Date	Headnote	Link
		Concession as to remission of interest.	
Dwayne Taylor FT Pty Limited as trustee for Dwayne Taylor Family Trust and DA and P Taylor v Chief Commissioner of State Revenue [2024] NSWCATAD 80	22 March 2024	Administrative Law – land tax – whether primary production exemption applied – whether land was used for the maintenance of horses for the purpose of selling them, their natural increase or bodily produce	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/80.html
Deputy Commissioner of Taxation v Gerhard Horst Heinrich [2024] QSC 51	3 April 2024	SUMMARY DISPOSAL – GENERALLY – where the Deputy Commissioner of Taxation seeks summary judgment against the defendant in relation to directors' penalties under the Taxation Administration Act 1953 (Cth) – where defendant seeks to defend claim on the basis that he and the Company paid the amount owing by entering into an agreement with the Commissioner or that the Commissioner's claim was compromised by entry into the agreement – where defendant seeks to defend claim on the basis that he took all reasonable steps under s 269-35 of Sch 1 of the Taxation Administration Act 1953 (Cth), or alternatively, there were no reasonable steps he could have taken – whether there is any real prospect of defendant successfully defending all or part of the claim	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2024/51.html

3. Federal Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2024	22/06	09/08	09/08	27/3	
Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2024	13/09	27/11	27/11	27/3	
Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023	16/11	18/3	18/3		
Superannuation (Objective) Bill 2023	16/11	19/3	20/3		
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11				
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11				
Administrative Review Tribunal Bill 2024	07/12	21/3	25/3		
Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024	07/12	21/3	25/3		
Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) 2024	07/2	21/3	25/3		
Treasury Laws Amendment (Foreign Investment) Bill 2024	07/02	14/02	26/02	27/3	08/4
Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024	07/02	14/02	26/02	27/3	08/4

3.2 Increased Instant asset write-off threshold

On 27 March 2024, the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* passed the Senate with amendments proposed by the opposition.

If the Bill is passed, eligible businesses, being businesses with an aggregated turnover of less than $50 million, an increase from the proposed threshold of $10 million, will be able to instantly write-off eligible depreciating assets that cost less than $30,000, an increase from the proposed cap of $20,000, where those assets are first used, or installed ready for use, during the income year ending 30 June 2024.

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

3.3 Deductions for financial advice fees paid out of superannuation fund

The *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024* introduces changes to the *Superannuation Industry (Supervision) Act 1993* (Cth). These changes primarily relate to the use of superannuation to pay the fees of financial advisers engaged on behalf of the superannuation fund.

Section 99FA of the SIS Act prevents a trustee of a superannuation fund from passing on the fees of financial advisers to members without the written consent of members.

The Bill proposes to amend section 99FA of the SIS Act by allowing trustees to use the funds in a member's superannuation account to pay the cost of financial advice regarding the member's personal financial position and their interest in the superannuation fund.

The Bill also proposes to amend the ITAA 1997 to clarify that payments of certain personal financial advice fees by a superannuation trustee from the member’s interest in the fund are deductible from the superannuation fund’s assessable income (to the extent they are not incurred in gaining or producing the fund’s exempt or non-assessable non-exempt income) and are not a superannuation benefit for the relevant members.

If the Bill is passed, the amendments will apply to fees incurred on and after the day after 6 months after the Bill receives royal assent.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7180

3.4 Alternative record keeping options for FBT

The ATO will be introducing additional adequate alternative records to employee declarations in respect of fringe benefits for specific purposes. This will come into effect from FBT years ending 31 March 2025 and onwards.

The alternative record-keeping rules are intended to allow records to be kept by employers, rather than requiring declarations or statements from employees. The Commissioner has made 11 determinations relating to:

1. fly-in fly-out and drive-in drive-out employees;
2. living-away-from-home – maintaining an Australian home;
3. otherwise deductible benefits;
4. private use of vehicles other than cars;
5. temporary accommodation relating to relocation;
6. travel to certain work related activities;
7. remote area holiday transport;
8. travel diaries;
9. relocation transport;
10. overseas employment holiday transport; and
11. car travel to employment interview or selection test.

The requirements for adequate alternative records are different for each determination, however they broadly include keeping records of:

1. the identity of the employee receiving the benefit, including name and address details;
2. the nature and details of the benefit provided;

3. records of the work performed by the employee;
4. dates and durations that benefits were provided; and
5. distances and locations where relevant.

As all of the relevant data must be kept in order to rely on the determination, the specific requirements in each determination should be reviewed.

ATO reference *Legislative Instrument LI 2024/4*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI20244/00001
ATO reference *Legislative Instrument LI 2024/5*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI20245/00001
ATO reference *Legislative Instrument 2024/6*
w https://www.ato.gov.au/law/view/document?docid=ops/li20246/00001
ATO reference *Legislative Instrument LI 2024/7*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI20247/00001
ATO reference *Legislative Instrument LI 2024/8*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI20248/00001
ATO reference *Legislative Instrument LI 2024/9*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI20249/00001
ATO reference *Legislative Instrument LI 2024/10*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI202410/00001
ATO reference *Legislative Instrument 2024/11*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI202411/00001
ATO reference *Legislative Instrument LI 2024/12*
w https://www.ato.gov.au/law/view/document?docid=ops/li202412/00001
ATO reference *Legislative Instrument 2024/13*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI202413/00001
ATO reference *Legislative Instrument LI 2024/14*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI202414/00001

3.5 Build-to-rent tax concessions

Consistent with a 2023-24 budget announcement, Treasury has released exposure draft legislation to promote investment and construction in the build-to-rent sector.

The proposed legislation is intended to apply to build-to-rent developments where construction began after 7:30 pm AEST on 9 May 2023. Qualifying projects must:

1. have at least 50 dwellings that are made available for rent to the public;
2. be owned by a single entity for 15 years;
3. have a minimum of 10% of dwellings with discounted rent at 74.9% or less of the rent payable on a dwelling of an equivalent size and standard located in the same build-to-rent development; and
4. offer three year tenancies, although tenants may request a shorter period.

For qualifying new build-to-rent projects, the exposure draft legislation proposes to:

1. increase the capital works tax deduction rate from 2.5% to 4% annually;
2. decrease the final withholding tax rate on eligible fund payments from managed investment trust investments from 30% to 15%.

Treasury is seeking feedback on the following suggested measures:

1. determining if a minimum portion of dwellings should be designated as affordable tenancies (the exposure draft proposes 10%);
2. establishing the duration that dwellings must be held under single ownership before potential sale (the budget announcement indicated a 10-year period, the exposure draft proposes a 15-year period).

Consultation is open until 22 April 2024.

w https://treasury.gov.au/consultation/c2024-487657

3.6 Draft legislation on global minimum tax released for consultation

As a part of Pillar 2 of the OECD and G20's Two Pillar Solution, Treasury has released draft materials on the implementation of a 15% global minimum tax and domestic minimum tax in Australia.

Treasury has released the following documents for consultation:

1. primary exposure draft legislation;
2. a consultation paper; and
3. subordinate exposure draft legislation.

The proposed legislation will make all 'in-scope' multinational enterprises subject to a minimum 15% effective tax rate in each of the jurisdictions in which they operate. The proposed legislation aims to work in conjunction with legislation currently before Parliament to stop multinational enterprises claiming excessive debt deductions and to increase transparency around this process.

The primary legislation is open for consultation until 16 April 2024. The subordinate legislation is open for consultation until 16 May 2024.

w https://treasury.gov.au/consultation/c2024-503150-primary
w https://treasury.gov.au/consultation/c2024-503150-subordinate
w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/putting-place-minimum-tax-multinationals

3.7 Amendments to First Home Super Saver Scheme

On 15 September 2024, technical changes to the First Home Super Saver (**FHSS**) Scheme contained in the *Treasury Laws Amendment (2023 Measures No 3) Act 2023* (Cth) will commence.

These technical changes are introduced to improve the flexibility of FHSS Scheme, which include:

1. increasing the Commissioner's discretion to amend and revoke FHSS Scheme applications;
2. FHSS Scheme applications will be able to be withdrawn or amended by individuals before receiving a FHSS amount. Those that withdraw will be able to re-apply for FHSS Schemes in the future;
3. the Commissioner will be able to return any FHSS Scheme amounts to superannuation funds, provided that the amount has not been released to the individual yet; and
4. clarifying that FHSS Scheme amounts returned by the Commissioner to superannuation funds are treated as non-assessable non-exempt income of the fund and do not count towards contribution caps of the members.

These changes will generally apply retrospectively to FHSS Scheme applications that have been made from 1 July 2018 onwards.

w https://www.legislation.gov.au/F2024N00276/latest/text

3.8 Exempting lump sums payments in arrears from the Medicare levy

The Commonwealth Government has released for consultation the draft Treasury Laws Amendment Bill 2024: Medicare levy lump sum exemption (**Exposure Draft Bill**).

The Exposure Draft Bill proposes to amend the *Medicare Levy Act 1986* (Cth) to exempt eligible lump sum payments in arrears from the Medicare levy from 1 July 2024.

The Exposure Draft Bill proposes to introduce changes to ensure that low-income taxpayers who receive an eligible lump sum payment (for example, compensation for underpaid wages) are not denied concessional Medicare levy treatment in that income year. The Exposure Draft Bill seeks to place recipients of eligible lump sum payments in arrears back into a similar position had they been paid correctly.

To qualify for relief, taxpayers must:

1. be eligible for a reduction in the Medicare levy in the income year to which the lump sum accrues, or the most recent two years if the accrued amount relates to multiple years; and
2. satisfy the eligibility requirements of the existing lump sum payment in arrears tax offset, including that a lump sum accounts for at least 10 per cent of the taxpayer's income in the year of receipt.

Comments on, and responses to, the consultation can be submitted until 23 April 2024.

w https://treasury.gov.au/consultation/c2024-495310

4. Rulings

4.1 FBT cents per kilometre for vehicles other than cars

The Commissioner has released a Tax Determination for the rates to be applied to the FBT year commencing 1 April 2024, where the cents per kilometre basis is used to calculate the taxable value of a fringe benefit arising from the private use of a motor vehicle, other than a car.

The cents per kilometre rate for a motor vehicle for the FBT year commencing 1 April 2024 has increased to reflect CPI movement, as follows:

1. for vehicles with 0 – 2500 cc engine capacity – 66 cents (previously 62 cents in the prior FBT year);
2. for vehicles with over 2500 cc engine capacity – 77 cents (previously 73 cents in the prior FBT year);
3. for motorcycles – 19 cents (previously 18 cents in the prior FBT year).

ATO reference *Tax Determination TD 2024/1*
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20241/NAT/ATO/00001

4.2 FBT LAFHA reasonable food and drink expenses

The Commissioner has published updated tables for the reasonable food and drink amounts for a Living Away from Home Allowance paid to employees living away from home outside Australia for the FBT year commencing 1 April 2024.

ATO reference *Taxation Determination TD 2024/2*
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20242/NAT/ATO/00001

4.3 GST margin scheme application to separate lots supplied as single parcel

On 20 March 2024, the ATO published a draft consolidation of GSTR 2006/6. The draft consolidation reflects the Full Federal Court's decision in *Commissioner of Taxation v Landcom* [2022] FCAFC 204 (**Landcom**), which held that the margin scheme provisions in the GST Act apply separately to each freehold interest in land, irrespective of whether several freehold interests are supplied as a single parcel of land.

The draft consolidated Ruling revises Example 1 so that it now appears as follows:

47E. Land described in ten certificates of title has been held by a State entity since before 1 July 2000 and has been used as a school site. The land on seven of the titles is cleared, with the school buildings being constructed across five of these titles and the school oval and facilities established on the other two titles. The remaining three titles are in their natural state. The entire school site is marketed for sale as the XYZ School. A single contract for sale is drawn up in which the land is described as XYZ School. The contract specifies a single price for XYZ School.

47F. Although the sale of the entire school site is for a single price, each of the ten titles must be considered separately. The three titles that remain in their natural state are each separate freehold interests in land on which there are no improvements at the time of sale and are GST-free supplies under section 38-445. The other seven titles are land on which there are improvements and would not *be GST-free under section 38-445. The State entity may use any fair and reasonable method of apportionment to ascertain the consideration for each of the ten freehold interests being sold.*

Example 2, titled "supply of land comprising separately titled lots as multiple supplies" is omitted and replaced by the following new example 2, titled "land subdivided from land with improvements on the land at 1 July 2000":

51B. At 1 July 2000, a State entity held a large rural block that was in part cleared and levelled and in part remained in its natural state.

Diagram 1: The rural block as at 1 July 2000

51C. After 1 July 2000, the rural block was subdivided into three lots to be sold separately. The State entity cleared the rest of the original block and constructed new premises on each lot. Each lot is sold under the margin scheme.

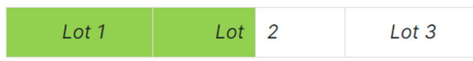


Diagram 2: The rural block as at the time of sale after 1 July 2000

51D. Lots 1 and 2 are land on which there were improvements as at 1 July 2000. Lot 3 is land on which there were no improvements as at 1 July 2000. The State entity may work out the margin for the supply of each of the lots based on obtaining an approved valuation as mentioned in subsection 75-10(3). For the supply of lots 1 and 2, the relevant valuation date is set out in item 3 of the table in subsection 75-10(3).[7] For the supply of lot 3, the relevant valuation date is set out in item 4 of the table in subsection 75-10(3).

51E. The same conclusion applies even if lots 1, 2 and 3 were sold as a single parcel of land, for a single price. However, the State entity would need to use a fair and reasonable method of apportionment to ascertain the consideration for each of the three freehold interests supplied.

Comments on the draft consolidated Ruling are due by 19 April 2024.

ATO reference *Goods and Services Tax Ruling GSTR 2006/6DC2*
w https://www.ato.gov.au/law/view/document?DocID=DGC/GSTR20066DC2/NAT/ATO/00001

4.4 GST supplies of food of a kind marketed as a prepared meal

On 27 March 2024, the Commissioner published its draft GST Determination on when the supply of food is not GST-free under paragraph 38-3(1)(c) of the GST Act because it is a supply of food of a kind 'marketed as a prepared meal, but not including soup'. GSTD 2024/D1 follows the recent Federal Court decision in *Simplot Australia Pty Limited v Commissioner of Taxation* [2023] FCA 1115 (**Simplot**).

In *Simplot*, the Court held that products which contained a mix of vegetables, spices or seasonings, and in some cases, grains, were food of a kind marketed as a prepared meal and therefore not GST-free. Some of the products in question were labelled as 'sides' or provided express or implied serving suggestions, including through pictures displaying the products served with added protein.

The Commissioner adopts the view of the Court in *Simplo*t that food will be food of a kind marketed as a prepared meal if it is the kind of food that is, as a matter of common sense and common experience, marketed as a prepared meal. This is determined objectively by considering the attributes of the food, including quantity, composition and presentation. The relevant test is not whether the product itself is marketed as a prepared meal, but whether the product is a member of a class of foods that are marketed as prepared meals. A product's own marketing is relevant but not determinative.

Quantity of the product

The Court held in *Simplot* that a meal connotes a 'quantity of substance'. The Commissioner considers the following to be relevant regarding quantity:

1. the food need not constitute a substantial meal i.e. a meal can be small;
2. what constitutes a 'quantity of substance' depends on the food in question;
3. food of a kind that is presented as being for consumption by a particular group, such as infants, or that is commonly consumed on a particular occasion, such as breakfast, needs to be considered in that context;
4. food may still be of a kind marketed as a prepared meal despite being supplied in large quantities; and
5. serving suggestions and similar guidance on product packaging have little or no relevance to determining whether a product contains 'quantity of substance'.

The quantity or weight of food will be of little relevance where the food is commonly sold in such a way that the consumer can choose or measure the amount they purchase.

Composition

Where food is made from multiple ingredients or elements, a food's composition will be consistent with it being a prepared meal. This is a question of fact and degree.

Consideration needs to be given to the nature of the ingredients or elements, not simply the amount of ingredients or elements. The composition of a product may also indicate its suitability to be eaten at a particular meal occasion.

Presentation

Food being presented as being complete is indicative of a prepared meal. This is a matter of fact and degree, but will commonly be indicated by seasonings, sauces and flavourings being included.

The following are relevant to determining whether a product is complete:

1. if food is sold fully assembled, the food will not be prevented from being sufficiently prepared even if all or part of it is raw and cooking is required;
2. if cooking or heating is required by the consumer, it should be limited to placing the food in the microwave, oven, frying pan, or saucepan;
3. some foods are ready for consumption even if raw in whole or in part, such as sushi and salad; and
4. the fact that a consumer needs to combine separated components, for example, dressing a salad with a sachet of dressing, does not, of itself, mean that the food is not sufficiently prepared to be complete.

The draft Determination provides several examples of when food is and is not of a kind marketed as a prepared meal.

When the draft Determination is finalised, it is proposed to apply both retrospectively and prospectively. At the time of finalisation, the Commissioner will also update the GST Industry Issue GSTII FL1 *Detailed Food List* for certain identified items and withdraw Goods and Services Tax Industry Issue Food Industry Partnership *Prepared food* (Issue 5 Prepared Food).

Comments on the draft Determination are due by 26 April 2024.

ATO reference *Goods and Services Tax Determination* GSTD 2024/D1
w https://www.ato.gov.au/law/view/document?DocID=DGD/GSTD2024D1/NAT/ATO/00001

4.5 Hybrid mismatch rules – liable entity and hybrid payer

The ATO has issued draft guidance which sets out the Commissioner's preliminary view on the application of the "liable entity" and "hybrid payer" definitions in Div 832 of ITAA 1997.

Division 832 contains the hybrid mismatch rules, which are broadly designed to prevent multinational corporations from exploiting differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions.

The ruling sets out the Commissioner's view on:

1. the identification of a 'liable entity'; and
2. the meaning of 'non-including country' for the purposes of the 'hybrid payer' definition.

Liable entity

The 'liable entity' concept is relevant to identifying whether an entity is a hybrid entity under Division 832, including whether an entity is a hybrid payer. The general test for whether an entity is a liable entity in a country in respect of its own or another entity's income or profits is whether tax is imposed on the entity in respect of all or part of those income or profits for an income year.

The Commissioner considers that, for the purpose of section 832-325, the identification of a 'liable entity' in a country in respect of income or profits can be based wholly on hypothetical income or profits within the tax base of the country. This will be necessary where:

1. an entity has not actually derived any income or profits in a particular period; or
2. an entity has derived income or profits in a particular period, but no part of those income or profits are within the tax base of the country.

Non-including country

For the purpose of section 832-320(3) a "non-including country" in respect of the "hybrid payer" definition can be a jurisdiction other than the country where the payee of the relevant payment is located or resides.

The implication is that the laws of a jurisdiction other than the country where the payee is located or resides may fall for consideration in determining whether there is a hybrid payer within the meaning given by section 832-320.

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

Commends on the draft determination are due by 19 April 2024.

ATO reference *Draft Taxation Determination TD 2024/D1*
w https://www.ato.gov.au/law/view/document?DocID=DXT/TD2024D1/NAT/ATO/00001

5. Private Binding Rulings

5.1 Storage facility and active asset test

Facts

A Partnership acquired vacant land on which it constructed storage sheds and placed shipping containers. The Partnership has operated a 'storage enterprise' from the commencement up unto the present day.

The Partnership engages a real estate agent to facilitate management and collection of storage payments from the 'storer'. The real estate agent advertises the storage facility to the public.

The Partnership also actively advertises the storage facility to the public.

The Partnership employs staff for the storage site to be open 7 days per week from the hours 7am to 6pm and provides 24-hour security surveillance and lock up of entry points each evening via secured access gates.

The Partnership provides general supplies to storers including basic tools, cleaning materials and boxes. No additional fee is charged for the supply of these general supplies to the storers. When a storer exits, the Partnership cleans the storage space for the next customer.

The Partnership performs daily maintenance including the common areas, shared paths, gardens, and gutters.

Among other things, the storage agreement provides as follows:

1. storage spaces are provided for a fee;
2. a cleaning fee may be applied at termination of the agreement;
3. a late payment fee of $20 applies;
4. the owner has the right to refuse access if all fees are not paid promptly;
5. the storage space can only be accessed in set hours;
6. the owner reserves the right to relocate the storer to another space under certain (unspecified) circumstances;
7. the owner has the right to enter in certain circumstances.

Questions

When the storage enterprise is sold as a going concern with the property, are the following 'active assets' for the purposes of the small business CGT concessions:

1. the goodwill that represents the storage enterprise;
2. the property and the storage sheds; and
3. the shipping containers that are not affixed to the property.

Ruling

The ATO ruled no for all three assets. Even if the Partnership can be said to be carrying on a storage enterprise business, the ATO ruled that the exception in paragraph 152-40(4)(e) of the ITAA 1997 will apply to prevent the CGT assets from being active assets for the purposes of subsection 152-40(1) of the ITAA 1997.

Section 152-40(1) provides that a CGT asset is an active asset at a time if, at that time:

1. the Partnership owns the asset (whether the asset is tangible or intangible) and it is used in the course of carrying on a business that is carried on by the Partnership; or

2. if the asset is an intangible asset - the Partnership owns it and it is inherently connected with a business that is carried on by the Partnership.

Carrying on a business

The ATO applied the factors in paragraph [13] of *Taxation Ruling* TR 97/11 to the information provided on the activities carried on by the Partnership to determine whether the Partnership was carrying on a business of providing commercial storage space.

The ATO considered that the Partnership is carrying on a business of providing commercial storage space because:

1. the storage facility has many sheds and shipping containers, an office on site that is staffed during access hours, the partners are available 24/7 to deal with all requests/issues that arise from Storers;
2. the partners have more than an intention to engage in business, by commencing the storage facility with the intention to make a profit, by engaging a real estate agent to advertise, manage and collect storage fees;
3. the activity is not a hobby with the partners on call 24/7 and staffing the onsite office;
4. the activity is planned, organised, and carried on in a businesslike manner directed at making a profit.

Therefore, the ATO was satisfied that the partners were carrying on a business and the assets were being used in that business.

Main use to derive rent

However, an asset will not be an active asset if it falls under one of the exceptions in subsection 152-40(4). The most relevant exception is contained in paragraph 152-40(4)(e) which excludes, among other things, assets whose main use is to derive rent.

Whether an asset's main use is to derive rent will depend on the particular circumstances of each case.

The ATO referred to Example 2 from TD 2006/78 which specifically addresses whether assets used in a commercial storage business were active assets. In this example, the storage agreements indicated that the users of the storage sheds did not have the right to exclusive possession but only the right to enter and use the sheds for certain purposes. Some of the arrangements entered into were short term and a range of services were provided to the users. There was also no intention by the parties to grant a lease. In these circumstances, the ATO considered that a tenant/landlord relationship did not exist between the parties, and therefore the amounts received were not rent. Accordingly, the storage facility in Example 2 from TD 2006/78 was not excluded by paragraph 152-40(4)(e) of the ITAA 1997 and was considered to be an "active asset.

The ATO did not agree that the present circumstances were the same as set out in Example 2 of TD 2006/78.

The ATO stated that a right to exclusive possession is not the sole determinative factor of whether receipts are considered to be rent or not. The ATO considered that it was unclear in this case whether the storer has a right to exclusive possession. One clause in the storage agreement states “the Owner reserves the right to relocate the storer to another space under certain circumstances”, but does not refer to specific clauses. In contrast, another clause in the storage agreement did refer to specific circumstances when the Owner was allowed to take a particular action.

The ATO stated that while the facts of this case were similar to Example 2, regard must be had to *all* the circumstances of the case in deciding whether the storage fees are rent.

The ATO referred to the fact that the main income received by the Partnership, from the storage facility, was the storage fee for the provision of allocated space to storers. The only other income that the Partnership may derive is a cleaning fee and a late payment fee.

The storage agreement did not include a separate fee for the additional goods and services to be provided as part of the storage fee charged. The only income the Partnership received was the storage fee.

The ATO determined that the derivation of the storage fee was passive in nature, as the Partnership did not provide or do anything else to derive that income. That is, the storer's payment to the Partnership was just for the use of the allocated storage space.

The ATO considered that the maintenance activities undertaken by the Partnership were better described as maintaining and preserving the value of the capital asset, being the storage facility, and what would be expected to be carried out by an owner of a property or by a landlord.

In addition to the above, the storage fee derived from the storage facility had been accounted for as rent, and not business income, in the income tax returns for many years.

The ATO concluded that the storage fee was 'rent'. Accordingly, the storage facility was prevented from being an active asset under section 152-40(4)(e) of the ITAA 1997.

COMMENT – "rent" is not defined in the legislation and takes its ordinary meaning. It is difficult to reconcile the finding in this private ruling with the approach taken in LCR 2019/5, which relates to whether income is "rent" for the purposes of determining base rate entity passive income. LCR 2019/5 clarifies that "rent", in its ordinary meaning, "means the consideration payable by a tenant to a landlord for the exclusive possession and use of land or premises". That definition suggests that exclusive possession is an essential factor for a relationship to give rise to rent.

Further, it is difficult to understand how the taxpayer accounted for the receipts as being at all relevant to whether the receipts are "rent".

ATO Reference *Private Binding Ruling Authorisation No. 1052199848992*
w https://www.ato.gov.au/law/view/document?docid=EV/1052199848992

5.2 Capital proceeds of property sold under family court orders

Facts

A taxpayer and the taxpayer's ex-spouse owned a property as tenants in common.

The taxpayer had an ownership interest in the property of XX%.

The taxpayer and the taxpayer's ex-spouse were directed to sell the property by an Order of the Federal Circuit and Family Court of Australia.

The Court Order stated that on settlement of the sale of the property, the proceeds were to be divided and distributed so that YY% of the balance of the proceeds are paid to the taxpayer and ZZ% to the taxpayer's ex-spouse.

The property was sold by the taxpayer and the taxpayer's ex-spouse for a capital gain.

On settlement, the taxpayer received proceeds based on the Court Order.

Question

Are the capital proceeds on the sale of the property apportioned according to the Consent Orders?

Ruling

The ATO ruled that capital proceeds are not apportioned according to Consent Orders but are apportioned according to the legal interests held in the property.

The definition of 'capital proceeds' is set out in section 116-20 of the ITAA 1997. Essentially, a taxpayer's capital proceeds are the total of the money the taxpayer has received or is entitled to receive, and the market value of any other property the taxpayer has received or is entitled to receive.

Section 103-10 of the ITAA 1997 provides that a taxpayer receives money or other property if it has been applied for the taxpayer's benefit, including by discharging all or part of a debt owed by the taxpayer, or as directed by the taxpayer.

In this case, the fact the taxpayer's ex-spouse received a larger portion of the sale proceeds did not alter the calculation of the taxpayer's capital gain as it did not confer on the ex-spouse an additional percentage legal ownership of the property. The ATO considered the money to have been dealt with on the taxpayer's behalf according to the Consent Orders.

ATO reference *Private Binding Ruling* Authorisation *No. 1052185605490*
w https://www.ato.gov.au/law/view/document?docid=EV/1052185605490

5.3 Successful small business restructure roll-over

Facts

The Trust is a discretionary trust which runs a business.

The named beneficiaries of the trust are individuals A, B and C. The beneficiaries of the trust include the named beneficiaries, their children, remoter lineal descendants, and various other specifically defined relatives including spouses and related entities.

At settlement, individuals A and B were the directors and shareholders of the corporate trustee and the appointors of the trust.

Individual A retired as a director of the trustee and an appointor of the trust and individual C was appointed in place of Individual A. Sometime later, Individual B also retired as a director of the trustee and an appointor of the trust.

A family trust election (**FTE**) will be made in the 2023 income tax return which will specify individual C as the specified individual.

The trust owns assets which include stock, plant, equipment and land. The trust has an aggregated turnover of less than $10 million.

The trust is an Australian resident for the purposes of section 328-445 of the ITAA 1997. Individual C is a resident of Australia.

<u>Reasons for restructure</u>

Individual C wishes to grow the business (including by re-investment of profits) and considers it is no longer appropriate to have all of the trust income distributed to individual beneficiaries. Individual C also intends to expand the operations of the business through leasing and purchasing land.

Individual C, via related trusts, has purchased additional land and equipment.

If the business was structured as a company, the profits after company tax would be available to be re-invested in the business. The restructure would also result in entities in the group being either land owners or trading entities but not both.

New Trust

A new discretionary trust (new trust) will be settled in the 20XX financial year. A new company will be incorporated with Individual C as its sole director and shareholder, to be the trustee of the new trust.

The beneficiaries of the new trust will include Individual C, their children, remoter lineal descendants, and various other specifically defined relatives (including spouses) and related entities.

An FTE will be made in the 20XX income tax return with individual C to be named as the specified individual.

The new trust will be an Australian resident.

New Company

A company will be incorporated in Australia in the 20XX financial year with Individual C as the sole director. The sole shareholder of the company will be the new trustee as trustee of the new trust.

The company will be an Australian resident for the purposes of section 328-445 of the ITAA 1997.

The company will pay rent to the trust for use of the land owned by the trust. The rent is likely to be an arm's length/market value amount.

The company will have aggregated turnover of less than $10 million. The trust also owns land which is currently used by the trust and will be used by the company after the restructure.

Question

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

Ruling

The ATO ruled yes.

The ATO noted that the small business restructure roll-over applied as the conditions in subdivision 328-G of the ITAA 1997 were satisfied.

Subsection 328-430(1) of the ITAA 1997 outlines the conditions to be met for the roll-over to apply, as follows:

1. the transfer of the asset is, or is part of, a genuine restructure of an ongoing business;
2. each party to the transfer is either a small business entity, or affiliate of or connected with a small business entity, or a partner in a partnership that is a small business entity;
3. there is no material change in the ultimate economic ownership of the transferred asset;
4. the asset being transferred is an active asset of the relevant small business entity at the time of the transfer;
5. both the transferor and each transferee are residents of Australia; and
6. both the transferor and each transferee choose to apply the roll-over.

Genuine restructure

Whether a transaction is or is part of a genuine restructure of an ongoing is a question of fact that is determined having regard to all of the circumstances surrounding the restructure (LCR 2016/3).

The ATO considered that the current structure limits growth opportunities of the business and that the restructure is not unduly a tax drive. The proposed restructure will simplify the structure meaning entities within the group are either land owners or operating a business but not both, and is not an attempt to wind down or extract wealth from the business.

Therefore, the ATO accepted that the proposed transaction was a genuine restructure of an ongoing business.

Small business entity

The ATO accepted that the small business entity test was satisfied for the transfer of the assets as:

1. the trust is a small business entity; and
2. the new company will be a small business entity in the income year.

Ultimate economic ownership

Section 328-440 of the ITAA 1997 provides that a transaction does not have the effect of changing the ultimate economic ownership of an asset, or any individual's share of that ultimate economic ownership, if:

1. either or both of the following applies:
   (a) just before the transaction took effect, the asset was included in the property of a non-fixed trust that was a family trust;
   (b) just after the transaction takes effect, the asset is included in the property of a non-fixed trust that is a family trust;
2. every individual who, just before the transfer took effect, had the ultimate economic ownership of the asset was a member of the family group relating to the trust or trusts; and
3. every individual who, just after the transfer takes effect, has the ultimate economic ownership of the asset is a member of that family group.

In the circumstances, the trust had a family trust election in place with individual C named as the specified individual. After the proposed transfer the assets will be held in a company and all of the shares will be owned by the new trust, which will also have an FTE in place with individual C named as the specified individual.

After the transaction takes place, every individual who has the ultimate economic ownership of the asset is a member of that family group.

The ATO accepted that the ultimate economic test in paragraph 328-430(1)(c) of the ITAA 1997 is satisfied because of the alternative test in section 328-440 of the ITAA 1997.

Depreciating assets

The Subdivision 328-G roll-over does not directly apply to the transfer of depreciating assets. Roll-over relief is available under section 40-340 of the ITAA 1997 if there is a balancing adjustment event because an entity disposes of a depreciating asset to another entity, and the disposal involves a CGT event. Additionally, one of the conditions listed in the table in subsection 40-340(1) must be satisfied.

The ATO accepted that as a roll-over would apply to the transfer of the depreciating assets if they were not in fact depreciating assets, the roll-over relief in section 40-340 will be available.

Residency

The ATO accepted that both the trust and the company will meet the residency requirements in in section 328-445 of the ITAA 1997 satisfying paragraph 328-430(1)(e) of the ITAA 1997.

All parties choose to apply the roll-over

The ATO accepted that both the trust and the company will make the choice to apply the roll-over under Subdivision 328-G of the ITAA 1997 in relation to the assets transferred under the transaction, satisfying 328-430(1)(f) of the ITAA 1997.

ATO reference *Private Binding Ruling Authorisation No. 1052196298707*
w https://www.ato.gov.au/law/view/document?docid=EV/1052196298707

5.4 Unsuccessful small business restructure roll-over

The taxpayer has been the sole director and shareholder of a company since it was incorporated.

The company is a 'small business entity' as defined by section 328-110 of the ITAA 1997.

Over the past X years, the business carried on by the company steadily grew and now the taxpayer is concerned that the current structure is no longer able to accommodate the growth.

The taxpayer is also concerned about exposure to risk outside of the company and that the taxpayer's shares in the company will be at risk.

The taxpayer plans to transfer the taxpayer's shares in the company to a discretionary family trust. The trust will have a family trust election in place with the taxpayer as the test individual.

The taxpayer and the trust will both choose to apply the roll-over under Subdivision 328-G of the ITAA 1997 in relation to the planned transfer of shares.

The taxpayer and the company are residents of Australia for tax purposes.

Question

Is the roll-over under section 328-430 of the ITAA 1997 available in relation to the transfer of the taxpayer's shares to the family trust?

Ruling

The ATO ruled no.

In order for roll-over relief to be available, the conditions set out in subsection 328-430(1) of the ITAA 1997 must be satisfied. One such condition is that the asset being transferred is an 'active asset' of the relevant small business entity at the time of the transfer. In this case, the ATO found that the shares are not active assets used, or held ready for use, by the company in the course of carrying on its business and are also not inherently connected with that business.

The ATO referred to example 11 from *Law Companion Ruling 2016/3 Small Business Restructure Roll-over: genuine restructure of an ongoing business and related matters*, which relevantly provides as follows:

> *97. Di … operates the business through a company, Fair Dinkum Backpackers Co, of which she is the sole director and shareholder.*
>
> *98. … On 1 August 2016, Di transfers all of her shares to the Trustee of a newly-settled discretionary trust, where she is one of the beneficiaries. The family trust election is made with herself as the primary individual.*

99. *Fair Dinkum Backpackers Co is a 'small business entity' for the 2017 income year. Di is not a small business entity but is connected with Fair Dinkum Backpackers Co.*

Relevant considerations

100. *Fair Dinkum Backpackers Co is not a party to the transfer. The shares are not active assets of a small business entity.*

101. *Di and the Trustee are parties to the transfer and connected with Fair Dinkum Backpackers Co. However, the transferred shares are not active assets used, or held ready for use, by Fair Dinkum Backpackers Co in the course of carrying on its business, nor are they inherently connected with that business.*

Conclusion

102. *Consequently, the SBRR is not available and Di would need to consider the capital gains tax position from the disposal of her shares.*

ATO reference *Private Binding Ruling Authorisation No. 1052204242582*
w https://www.ato.gov.au/law/view/document?docid=EV/1052204242582

5.5 Partial deduction for special levies

Facts

The taxpayer owns two apartments in an apartment complex.

Since acquisition, the taxpayer has used the apartments to derive assessable income.

The apartment complex has damage caused by water ingress through window and door assemblies.

The Body Corporate engaged various consultants to investigate, assess the damage, and make recommendations. Following this, the Body Corporate entered into two contracts, Contract A and Contract B, to undertake works to remedy the damage.

As of 30 June 20XX, the Works were only around X% complete. It is estimated that the Works will be completed by MM/20XX.

The Contractor A progress claim worksheets apportion Contractor A costs into the following categories: deposit, access, windows and doors, balcony refurbishment, internal works, and air conditioning.

The works undertaken in these categories are as follows:

1. access to undertake the works required use of an XYZ system, to provide external vertical access to the apartments and facilitate management of site materials to the corresponding work levels;
2. door and window works were undertaken on all doors and windows in the Apartment Complex and included, removal of the existing doors and windows, removal of waterproofing membrane, pathing and filing and holes or cavities, applying new waterproofing, installing new doors and windows;
3. balcony refurbishment works were undertaken to re-waterproof all the balconies which included, removal of existing tiles, bedding and waterproofing, grinding the floor, remediating damage, and installing new waterproofing and tiles;
4. internal works included rectification of any pre-existing water damage to tiles, mirrors, floor surfaces, cooktops, benchtops, splash backs, cupboard doors and anything else within the work zone caused by water leakage from the doors and windows;

5. air conditioning works included decommissioning and recommissioning air conditioning unit compressors, which needed to be removed and replaced to undertake the works or where the ducting needed to be redirected through the new joinery. Where the apartment owner wanted to replace an old unit with a new unit, they could do so and the apartment owner would pay additional amounts for the new units and additional work items over and above the special levies paid for the principal works contract.

At the Body Corporate extraordinary general meeting, the members resolved that a special sinking fund contribution amounting to $X including GST be raised to fund the Body Corporate's obligations for the works. To date, the taxpayer has received X notices of contribution (notices) from the Body Corporate detailing the amount of special levies in respect of both apartments. Each notice included the words 'Tax invoice', invoice numbers, and due dates.

Expenses were incurred by the Body Corporate for a lawyer to review the works contract, progressive claims for the works, tiles, project management and engineering advice.

Question

Can the taxpayer deduct a partial amount of the special levies paid to the Body Corporate for the works in the income years ended 30 June 2022, 30 June 2023 and ending 30 June 2024 and 30 June 2025, under section 25-10 of the ITAA 1997?

Ruling

The ATO ruled yes.

Under section 25-10 of the ITAA 1997, the taxpayer can deduct expenditure incurred for repairs to premises or a depreciating asset held or used solely for the purpose of producing assessable income. However, the taxpayer cannot deduct capital expenditure.

<u>Were the special levies incurred on receipt or payment of the notices?</u>

The ATO considered that the special levies were not 'incurred' on receipt or payment of the notices as the taxpayer was not definitively committed to debts at that time. There was only an expectation of debts to be paid in the future - when expenses were incurred for the works. Relying on *Taxation Ruling TR 2015/3 Income tax: matters relating to strata title bodies constituted under strata title legislation*, the ATO stated that special levies are an estimate of the contribution in respect of the taxpayer's apartments, to the 'expected' mutual liabilities for the works. Further, as at 30 June 20XX, the works were only around X% complete. As such, no deductions arose at the time of receipt or payment of the notices.

The ATO concluded that the taxpayer will only be entitled to its share of any deductions under section 25-10:

1. in respect of the mutual works expenses paid using the special purpose fund;
2. once the mutual works expenses have been 'incurred';
3. to the extent of the taxpayer's share of the special levies that it has paid and has not previously deducted; and
4. if the requirements in section 25-10 are satisfied.

<u>Are the mutual works expenses incurred to date repairs to the property or of a capital nature?</u>

The ATO considered each category of works undertaken while having regard to *Taxation Ruling TR 97/23 Income tax: deductions for repairs* (**TR 97/23**) which provides the ATO's view regarding circumstances in which expenditure is deductible under section 25-10.

Door, window and balcony works

The ATO concluded that the door, windows and balcony works were not 'initial repairs', as the doors, windows and balconies were in good working order and suitable for use for income producing purposes when they were acquired, and they have been used to produce income for more than XX years since acquisition.

The ATO concluded that the door, windows and balcony works were not renewal or reconstruction of 'entireties' as they are:

1. not separately identifiable as principal items of capital equipment;
2. not capable of providing a useful function without regard to other parts of the apartments;
3. not separate or distinct items of plant;
4. not a 'unit of property' as that expression is used in the depreciation deduction provisions of the income tax law; and
5. physically, commercially, and functionally an inseparable part of the apartments.

The ATO concluded that the door, windows and balcony works were not 'improvements' although new and different materials and technologies were used. This is on the basis that:

1. the new elements replaced old materials and technology that are no longer used or available, and are 'like for like' products to those being removed;
2. at the time of acquisition, the doors, windows, and balconies of the apartments were functioning efficiently. The works were returning them to the previous efficiency of function and any improvement is only minor and incidental,
3. the new elements do not change the character of the doors, windows and balconies, or the apartments as a whole;
4. the door, window and balcony works do not produce a new and different, or additional, function for the apartments;
5. the door, window and balcony works do not bring the apartments into a more valuable form, state or condition; or significantly enhance the apartment's saleability or market value; and
6. any extension of the apartment's life is considered to be minor.

Therefore, the door, window and balcony works were not capital in nature.

Internal works

These works included rectifying damage to tiles, mirrors, floors, benchtops, cupboard doors and other items inside the apartments' work zones caused by the water leakage through the doors and windows. The ATO concluded that the internal works were repairs and were not capital in nature.

Air conditioner units

Predominantly, the existing air conditioner units were being recommissioned and reinstalled. The ATO confirmed that recommissioning of the existing units is maintenance. However, as this maintenance is being done in conjunction with repairs, it does not cause the works to cease being 'for repairs'. The ATO concluded that the works to the air conditioning units were repairs and were not capital in nature.

Deposit and access

The ATO concluded that the deposit, an initial payment for the works, and the access costs, being directly for the purpose of the works, have the same character as the door, window and balcony works and were repairs and were not capital in nature.

In summary, the mutual works expenses incurred to date were 'for repairs' that are not capital in nature. The 'mutual works expenses' do not include any expenses incurred for additional internal works, new air conditioning units, or other parts or works that are not included in the primary works contract, and that are paid for separately by individual apartment owners, in addition to the special levies.

As the mutual works expenses are being incurred progressively, at the time the expenses are incurred, the taxpayer will become entitled to deductions in respect of the expenses in amounts proportionate with the taxpayer's share of the total special levies payable to the special levy fund, and limited by the amount of special levies you have paid, less any amounts previously deducted.

ATO reference *Private Binding Ruling Authorisation No. 1052206846957*
w https://www.ato.gov.au/law/view/document?docid=EV/1052206846957

5.6 Therapy dog not a depreciating asset

Facts

The taxpayer is employed by a primary school and is a certified therapy dog handler.

The taxpayer has a fully certified therapy dog. The dog is under complete supervision of the taxpayer.

The therapy dog attends school with the taxpayer three days a week. When the therapy dog is not at school, the therapy dog resides at the taxpayer's home.

The role and responsibilities of the therapy dog include emotional support, social and behavioural improvement, academic enhancement, reducing absenteeism, and crisis intervention.

The taxpayer incurred all the expenses relating to the therapy dog, including but not limited to:

1. purchasing the dog;
2. assessment and consultation;
3. equipment and supplies;
4. food and nutrition expenses;
5. pet insurance;
6. veterinary care; and
7. medication and supplements.

The taxpayer's employer does not contribute financially to the therapy dog, nor was it a requirement of the taxpayer's employment to have a therapy dog.

Question

Is the taxpayer entitled to claim a deduction for all, or a portion of the expenses related to maintaining the classroom therapy dog under section 8-1 of the ITAA 1997?

Ruling

The Commissioner ruled no.

The Commissioner noted that for expenses to be deductible under section 8-1 of the ITAA 1997 the expenditure must:

1. bear the essential character of an outgoing incurred in gaining assessable income;
2. have a nexus between the outgoing and the assessable income so that the outgoing is incidental and relevant to the gaining of income;
3. not be capital, private or domestic in nature.

Working dogs (including certified therapy dogs used by a qualified therapist) are listed as a depreciating asset in the Commissioner's annual list of depreciating assets. However, the definition of 'working dog' excludes assistance dogs (including support dogs) as they are not considered to be working.

The ATO compared the current matter to when a dog is trained as either a mustering dog, guard dog, sniffer dog or police dog. The ATO confirmed that dogs in those roles are an integral part of the income producing activity of the business and ultimately contribute to the production of income. However, in this case, the therapy dog was not assisting the taxpayer in directly performing their duties and did not have an integral role in the taxpayer's income producing activities.

The ATO confirmed that expenses incurred by the taxpayer for the purchasing, training, and maintaining of a therapy dog have not been incurred in earning assessable income and are therefore not deductible.

TIP – the ATO has specific guidance about costs for guard dogs in *ATO Interpretative Decision 2011/18 Income tax: Deductions: guard dog expenses.* In ATO ID 2011/18, a training cost was a once-off expense calculated to produce a benefit for the business for the working life of the dog, so was not deductible and formed part of the cost.

ATO reference *Private Binding Ruling Authorisation No. 1052217548831*
w https://www.ato.gov.au/law/view/document?docid=EV/1052217548831

5.7 CGT on lease premium

Facts

The taxpayer is the corporate trustee of a Trust.

The taxpayer entered into a contract in May 20xx to acquire a 6.9-acre property with a house located in a regional area.

Before settlement occurred, a utility company who supplies electricity in the metropolitan region approached the taxpayer to take over a portion of land.

In February 20xx settlement occurred.

A 99-year lease was executed by the taxpayer and the utility company in February 20xx, with a commencement date in February 20xx.

The lease contained a clause providing for the subdivision of the property and transfer of the title to the utility company after subdivision at no consideration. Once subdivision of the property takes place, the lease will be extinguished.

A lump sum amount (inclusive of GST) was paid by the utility company to the taxpayer in February 20xx.

As at the time of this ruling application, a subdivision application for this property has not been lodged.

The taxpayer has no further plans or intentions to subdivide the remaining parcel of land which is connected to the 1xxx square metre piece of land which is leased by the utility company. The taxpayer has no immediate plans to sell the remaining parcel of land connected to the 1xxx square metre piece of land leased to the utility company.

Question

Will the granting of a long-term lease and future transfer of the title for no consideration constitute CGT event F2 under section 104-115 of the ITAA 1997?

Ruling

The ATO ruled no.

CGT event F2 happens if:

1. a lessor grants, renews or extends a lease over land (whether or not the lessor owns an estate in fee simple in the land);
2. the lease, renewal or extension is for at least 50 years, and:
   (a) at the time of the grant, renewal or extension, it was reasonable to expect it to continue for at least 50 years; and
   (b) the terms of the lease, renewal or extension as they apply to the lessee are substantially the same as those under which the lessor owned the land or held a lease in the land; and
3. the lessor chooses to apply this event instead of CGT event F1.

<u>Condition 1 – lessor has granted a lease over the land</u>

This condition is satisfied as the taxpayer entered into a lease with the utility company for 99 years.

<u>Condition 2 – the lease is for at least 50 years</u>

This condition is satisfied as the term of the lease is greater than 50 years.

<u>Condition 3 – at the time of the grant it was reasonable to expect that the lease would continue for at least 50 years</u>

The taxpayer advised that the lease will be extinguished once the subdivision has occurred. Therefore, it is not reasonable to expect that the lease will continue for at least 50 years on the following basis:

1. there is nothing to indicate that the taxpayer, the utility company and the Trust are expected to exist for at least 50 years; and
2. when the Trust transfers its interest in the land, certain sections within the lease would cause the lease to be determined (or terminated) upon a disposal of the land.

<u>Condition 4 – the terms of the lease as they apply to the lessee are substantially the same as those under which the lessor owned or leased the land</u>

The ATO reviewed the conditions of the lease and concluded that the terms of the lease are substantially the same as those under which the lessor owns the land.

<u>Condition 5 – the taxpayer chooses to apply section 104-115 instead of section 104-110</u>

The taxpayer would choose to apply section 104-115 prior to lodging its income tax return. Therefore, the fifth condition would be satisfied.

As all the conditions have <u>not</u> been met, CGT event F1 would occur rather than CGT event F2. CGT event F1 happens if a lessor grants, renews or extends a lease and the lease period would be less than 50 years.

The ATO concluded that CGT event F1 will occur at the time the lease contract is entered into and the lease premium will form part of the capital proceeds of the event. The capital gain or loss that occurs following CGT event F1 will be included in the taxpayer's assessable income in the year the event occurs.

Section 115-25(3)(e) of the ITAA 1997 states that the general discount will not apply to capital gains arising from CGT event F1. Accordingly, the taxpayer cannot apply the general discount when calculating any capital gain made from CGT event F1.

ATO reference *Private Binding Ruling Authorisation No. 1052199116155*
w https://www.ato.gov.au/law/view/document?docid=EV/1052199116155

5.8 Person who built a building on land they did not own, does not own the building

Facts

Company 1 purchased land before 20 September 1985.

A dwelling was built on the land after 20 September 1985, which was constructed and paid for by Person A and Person B.

The parties never had a written lease agreement.

In mid-19yy, when construction of the dwelling was completed, Person A and Person B moved into the dwelling. The dwelling was considered the main residence of Person A and Person B from this time.

Person A and Person B provided all of the funds for the construction of the dwelling as Company 1 did not have any means of its own to do so.

Person A and Person B provided other funds directly to the relevant suppliers and service providers and also provided funds to Company 1, recorded in Company 1's books as loans, which were then paid to the relevant suppliers and service providers.

The terms of the loans from Person A and Person B to Company 1 have never been agreed. Person A and Person B have never been paid, nor have they ever charged interest on the loans.

At a later point, Company 1 transferred title of the land to Company 2, as an in-specie distribution to shareholders upon Company 1's voluntary liquidation. The land was transferred without any encumbrances.

Company 2 has remained the sole proprietor of the land since its acquisition of the land.

Person A and Person B continue to live in the dwelling and pay rent to Company 2 for the lease of the land. The rent paid by Person A and Person B is purely for the use of the land, being set at the approximate cost of the outgoings incurred by Company 2.

The dwelling is not, and has not been, used to produce assessable income at any time.

Questions

1. Will Person A and Person B, who incurred expenditure of a capital nature to build and affix a dwelling to the land, be treated as the owners of that dwelling for CGT purposes?
2. Is the dwelling a separate CGT asset to the land?
3. On the disposal of the land, will Person A and Person B be entitled to disregard their capital gain from the disposal of the dwelling as their main residence?
4. On termination of the lease, will Company 2 be deemed to have acquired the dwelling at a cost base of market value of the dwelling as at the date of termination of the lease?

Ruling

Will Person A and Person B be treated as owners of the dwelling for capital gains tax purposes?

The ATO ruled no. The ATO reasoned that the principles in *Taxation Ruling* IT 175, which considers the depreciation provisions of the ITAA 1936 in the context of improvements and fixtures on leasehold property. A dwelling, being a fixture attached to land, is owned by the landowner, and not the tenant, unless another right exists. While Person A and Person B incurred expenses in relation to the construction of the dwelling, as there is no written agreement and the company also paid for some expenses, it could not be said that Person A and Person B have an economic right sufficient to constitute ownership of the dwelling.

Is the dwelling a separate CGT asset to the land?

The ATO ruled no. Subsection 108-55(2) of the ITAA 1997 provides that a building or structure that is constructed on land acquired before 20 September 1985 is taken to be a separate CGT asset from the land if the owner of the land entered into a contract for the construction of the building or structure on or after that day. In this case Company 2 acquired the land after 20 September 1985, when the dwelling had already been constructed on the land. As such, the dwelling and land is a single CGT asset in Company 2's hands.

Will Person A and Person B be entitled to disregard their capital gain?

The ATO ruled no. The ATO considers that a CGT event will not happen to Person A and Person B upon the disposal of the dwelling. Accordingly, Person A and Person B will not make a capital gain or need to give consideration to the main residence exemption.

Will Company 2 be deemed to have acquired the dwelling at a cost base of market value of the dwelling as at the date of termination of the lease?

The ATO ruled no, as Company 2 is already the owner of the dwelling.

TRAP – It appears that Person A and Person B may be subject to deemed dividends under section 109CA in Division 7A of the ITAA 1936. As the dwelling belongs to Company 2, it is a company asset being used by a shareholder or associate of a shareholder. The facts indicate that the 'rent' being paid has been based on the land outgoings and is unlikely to be market rent for the dwelling.

ATO reference *Private Binding Ruling Authorisation No. 1052197978584*
w https://www.ato.gov.au/law/view/document?docid=EV/1052197978584

6. ATO and other materials

6.1 Decision Impact Statement – Bowerman

On 13 March 2024, the Commissioner of Taxation issued an interim decision impact statement in relation to the case of *Commissioner of Taxation v Bowerman* [2023] AATA 3547 (see our November 2023 Tax Training Notes).

The case concerned whether Jenifer Bowerman, a retiree, who had spent her career running successful businesses and investing in property, held an off-the-plan residential apartment, which she purchased with the intention of selling it for a profit but also resided in it for 2 years, on revenue account and thereby able to claim the loss of $265,936 on the sale of the apartment as an allowable deduction.

The AAT member found that Jenifer's primary purpose for acquiring the apartment was to make a profit, with the secondary purpose being to reside in the apartment. The AAT member was satisfied that Jenifer purchased and sold the apartment consistent with a businessperson. The AAT member considered that the loss did not lose its connection to Jenifer's profit-making purpose and as such, was not essentially private or domestic in nature.

The Commissioner noted the facts of the case were "unusual" and as a result, the application of the AAT's decision in future cases would be limited.

The Commissioner does not consider the decision to be a departure from established principles concerning the sale of real property. The Commissioner will continue to apply the CGT rules to gains and losses on the sale of real property, including a person's main residence, in circumstances where the principles in *Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18 do not apply.

The Commissioner agrees with the AAT's analysis that established precedent supports the loss being incurred on completion of the Dune Walk apartment's sale contract and that the loss was realised only upon receiving settlement proceeds. The ATO will review Taxation Ruling 97/7 and consider whether to clarify when a loss (as distinct from an outgoing) has been 'incurred' for the purposes of subsection 8-1(1).

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/2022/3436/00001

6.2 ATO encourages not-for-profits to get ready for new return

The ATO issued a reminder for not-for-profits (NFPs) that have an active ABN and self-assess as income tax exempt that they will need to submit their annual self-review return between July and October 2024 for the 2023-2024 year.

The annual NFP self-review return will confirm the income tax exemption status of those NFPs that are required to submit a self-review return.

The ATO suggests that NFPs start preparing for submitting the self-review return by:

1. conducting an early review of their eligibility;
2. make sure all details are up to date;
3. review their governing documents and purpose to understand their relevant type of NFP.

To assist in the transition for the new self-review requirements, NFPs that are unable to lodge online will be able to do so by using an interactive voice response phone service introduced by the ATO.

Registered tax agents will also be able to lodge on their client's behalf through Online services for agents.

The ATO encourages any NFPs, or their tax agents, that are unsure about their status to contact the ATO.

w https://www.ato.gov.au/media-centre/ato-encourages-nfps-to-get-ready-for-new-return

6.3 Private companies and Division 7A - avoid the common mistakes!

The ATO hosted a webinar on 10 March 2024 to refresh tax practitioners and agents on the consequences of not complying with Division 7A of the ITAA, and the common mistakes that the ATO sees. The webinar was hosted by Assistant Commissioners Kasey Macfarlane and Anthony Marvello. The webinar forms part of a larger campaign by the ATO to educate practitioners and taxpayers on Division 7A. The ATO has planned a range of webinars throughout 2024 to keep both groups on track to comply with Division 7A.

The common mistakes that the ATO sees go to the fundamental principles of Division 7A, including:

1. loans that do not comply with Division 7A;
2. loans agreements that are not made between the right parties;
3. incorrect calculations of minimum yearly repayments or not making the minimum yearly repayments on time;
4. setting the interest rate for the loan at a rate lower than the benchmark interest rate (for the income tax year ending 30 June 2024 it is 8.27%);
5. not making a written loan agreement (noting that a journal entry in the annual accounts is not sufficient evidence of the loan agreement); and
6. re-borrowing from the private company to make repayments on the Division 7A loan.

The ATO advised that these mistakes can be avoided by tax professionals having frank and open discussions with their clients, and making sure that all records are clear and up to date.

The ATO discussed that interest rates must meet the ATO's benchmark interest rate for each year, and therefore the minimum amount payable changes each year.

The ATO also reminded professionals that the Commissioner's discretion exercisable under section 109RB of the ITAA 1997 to disregard the operation of Division 7A or to allow a deemed unfranked dividend to be franked, only applies if certain criteria are met. Those criteria are:

1. where the breach resulted from an honest mistake or inadvertent omission; and
2. and that the circumstances of the breach support the exercise of the discretion.

The ATO emphasised that the Commissioner's discretion is not a get out of gaol free card – the same taxpayer or tax agent should not be using it repeatedly.

The ATO concluded by noting that there are a few things to keep in mind, both for tax professionals and for the taxpayer:

1. companies are separate legal entities and company money is not the money of a private individual;
2. all payments from a private company to its shareholders and their associates can have tax consequences;
3. do not assume you will be able to rely on the Commissioner exercising a discretion;
4. keep accurate and timely records;
5. if a mistake is made, seek an amendment as soon as possible; and
6. the ATO is there to help and will be available at public and professional association events to provide education on Division 7A.

w https://tv.ato.gov.au/ato-tv/media?v=bi9or7orrp1x5m

6.4 ASIC action against directors

A director has been formally charged with one count of contravening section 1272C(1) of the Corporations Act by failing to have a director ID, with the director appearing in the Downing Centre Local Court on 19 March 2024. The director is facing a maximum penalty of $13,320. This is the first prosecution action ASIC has taken against a director for failing to comply with the obligation to have a director ID. The identification of the director is prohibited with the Court granting an interim non-publication order.

The charges have been listed for a further mention before the Downing Centre Local Court on 16 April 2024.

TRAP – Directors appointed before 1 November 2021 had until 30 November 2022 to apply for a director ID. New directors appointed for the first time between 1 November 2021 and 4 April 2022 had 28 days from their appointment to apply. From 5 April 2022, intending new directors must apply before being appointed.

w https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-058mr-asic-brings-first-action-against-a-director-for-failing-to-have-a-director-identification-number

6.5 Valuing fund assets correctly for the SMSF annual return

The ATO has updated its website to remind SMSF trustees of the requirement to lodge an annual return that reports the assets of the fund at market value. The trustee of the SMSF is required to determine the market value of the assets for the relevant income year on an appropriate basis.

The trustee must maintain supporting evidence of the method used to determine the market value of the SMSF assets. This evidence will need to be provided to the SMSF auditor during the annual audit of the fund.

Where the trustee does not meet this obligation, additional tax and administrative penalties may be imposed on the trustee.

The ATO noted that it is using data to assess whether trustees are appropriately reporting the value of assets in SMSF returns each financial year. The ATO has identified 16,500 funds, which the ATO has classified as 'high-risk' on the basis that these funds have reported the same value for the fund assets for three or more consecutive income years.

The ATO aims to address the risk of SMSF trustees misreporting the market value of assets by sending correspondence to trustees regarding this requirement and monitoring funds deemed as 'high-risk'.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/valuing-fund-assets-correctly-for-the-smsf-annual-return

6.6 Update to ATO approach for The Top 1,000 Combined Assurance Program

The ATO has advised that it will be updating its approach to the Top 1,000 combined assurance program as follows:

1. recalibrate the metrics used to determine whether an economic group is in scope of the Top 1,000 assurance program to ensure they focus on the largest 1,000 taxpayers from the largest economic groups;
2. differentiate the assurance approach and tailor engagement regarding the understanding of taxpayers from prior engagements and the assurance already attained.

At the time the Top 1,000 was introduced in 2016, the threshold for the Total Business Income (**TBI**) was over $250 million. As a result of high growth of businesses in Australia, the threshold for the Top 1,000 is now over $350 million.

The ATO has confirmed that it will continue to monitor the growth of businesses to ensure that the Top 1,000 is targeted at the largest 1,000 taxpayers.

The ATO will divide the Top 1,000 into two categories, namely, significant taxpayers and general pool taxpayers.

Significant taxpayers are defined as taxpayers who have a TBI over $1 billion. The remainder of the Top 1,000 will fall into the general pool category.

For significant taxpayers, the review system will continue with the ATO's current approach. However, for the general pool taxpayers, the ATO will review the economic activity in the last year of the review period, as well as any significant or new transactions or tax risks that arise in the 4-year review period.

The ATO has advised that it will adopt a differentiated approach for GST where they have a level of assurance for a taxpayer through an earlier review. For taxpayers that have attained stage 2 or 3 governance rating and have a medium or high overall assurance rating, the ATO's review will predominantly focus on:

1. any GST governance improvements made by the taxpayer since the earlier review;
2. understanding any variances between accounting and GST reporting through the use of the GST Analytical Tool or similar process (other than for taxpayers making predominantly input taxed supplies, where the ATO will continue to e-audit);
3. what the taxpayer has done to address the concerns that were raised in the earlier review; and
4. as a profit-making scheme.

This media release should be read in conjunction with the ATO governance and management review guide which is available on the ATO website and linked below.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/differentiating-our-approach-with-top-1000
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/in-detail/key-products-and-resources/tax-risk-management-and-governance-review-guide

6.7 ATO ramps up warnings on $50b in tax debts

The Commissioner of Taxation delivered the opening address at the Council of Small Business Australia National Small Business Summit held on 4 April 2024.

In his address, the Commissioner acknowledged the significant amount of collectable debt, which is now over $50 billion, following the resumption of normal debt collection processes at the end of last year.

The Commissioner noted that 65% of the collectable debt is owed by small businesses, and 75% of the debt is owed by small business relates to activity statements.

The collectable debt largely comprises unpaid GST, PAYG withholding amounts and superannuation. The ATO is observing that many businesses are falling behind on these payments and are struggling to get back on top of their obligations and remain viable.

w https://www.ato.gov.au/media-centre/council-of-small-business-organisations-australia-national-small-business-summit-2024

6.8 ATO warning on false invoicing

The ATO's Serious Crimes Task Force has issued a warning that it is using sophisticated data matching and analysis to target business engaging in false invoicing schemes.

False invoicing involves a scheme promoter issuing invoices to a legitimate business for goods or services that are either overstated or not provided at all. The business pays the invoice and the promoter returns most of the amount paid in cash. The business illegally claims deductions and input tax credits in relation to the false invoice.

Businesses involved are invited to make a voluntary disclosure to the ATO. There is also a tip-off phone number and online form for community members to report false invoicing activities.

w https://www.ato.gov.au/about-ato/tax-avoidance/the-fight-against-tax-crime/our-focus/serious-financial-crime-taskforce/taskforce-action-on-false-invoicing-arrangements

7. Tax Professionals

7.1 Lodgment deferral function in Online services for agents

On 15 March 2024, the ATO updated its information on requests for lodgment deferral by tax agents experiencing exceptional or unforeseen circumstances that affect their ability to lodge by the due date.

The only way tax agents may request a lodgement deferral is to use the lodgement deferral function available under the "reports and forms" menu in Online services agents. The old spreadsheet forms are no longer available and will not be processed.

If the request for lodgment deferral meets deferral guidelines, the ATO will respond within 48 hours.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/requesting-a-lodgment-deferral

7.2 Illegal early SMSF withdrawals – keep your clients between the flags

On 27 March 2024 Assistant Commissioner of Taxation Justin Micale delivered a speech at the Tax Institute Superannuation Intensive, reminding professionals of the perils of withdrawing money early from self-managed super funds (**SMSFs**).

The Assistant Commissioner reminded tax professionals that accessing super funds early places significant reliance on taxpayer-funded pensions and it can have a major impact on the member's retirement savings.

The ATO has published resources online directed at providing information to trustees of SMSFs on how to run an SMSF, including the circumstances in which a trustee is authorised to withdraw money from a SMSF. The Assistant Commissioner advised that the ATO is making significant progress on the development of a SMSF trustee education course, centred around the lifecycle of an SMSF.

The Assistant Commissioner also reminded trustees that all loans from an SMSF to a member, regardless of whether they are paid back or not, are a type of illegal withdrawal.

The Assistant Commissioner further reminded trustees and tax professionals that withdrawing funds illegally from an SMSF, and failing to meet lodgment obligations can include:

1. the trustee being disqualified from being able to be a trustee of any SMSF;
2. criminal penalties;
3. loss of professional licences; and
4. substantial additional tax.

w https://www.ato.gov.au/media-centre/keep-your-clients-between-the-flags-tax-institute-superannuation-intensive

7.3 ASIC acts against 15 SMSF auditors performing in-house audits

On 14 March 2024, ASIC published a media release stating that it had imposed conditions on the registration of 13 self-managed superannuation fund auditors and accepted voluntary cancellations of two SMSF auditors after independence concerns were raised.

The 15 SMSF auditors were referred to ASIC by the ATO following a review of firms that were conducting both accounting and audit work for SMSF clients.

The ASIC Deputy Chair stated that ASIC will always act when appropriate to reinforce the importance of the independence requirements and that auditors should consider their structure and services, that they provide to their SMSF clients to ensure that independence requirements are being met.

w https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-043mr-asic-acts-against-15-smsf-auditors-performing-in-house-audits/