The Tax Institute

Tax Update

June 2024

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

Brown Wright Stein tax partners:

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

www.bwslawyers.com.au

© Brown Wright Stein Lawyers 2024
The Tax Institute disclaimer: The material and opinions in this paper are those of the author and not those of The Tax Institute. The Tax Institute did not review the contents of this paper and does not have any view as to its accuracy. The material and opinions in the paper should not be used or treated as professional advice and readers should rely on their own enquiries in making any decisions concerning their own interests. Liability limited by a scheme approved under professional standards legislation.

About Brown Wright Stein

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

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

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

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

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

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

These materials represent the law as it stood on 13 June 2024
Copyright © Brown Wright Stein Lawyers 2024.

Liability limited by a scheme approved under professional standards legislation

Contents

1. **Tax Update Pitstop** 6

2. **Cases** 7

2.1 Ierna – Part IVA and section 45B 7

2.2 Merchant – Wash sale, Part IVA and dividend stripping 12

2.3 Merchant – disqualification of SMSF trustee 17

2.4 Moloney – small business CGT concessions and market value substitution rule 21

2.5 WCVB – attribution of income 24

2.6 Godolphin – dominant use of land for primary production 27

2.7 Baxter – NSW duty on fixing of trust 29

2.8 Cohen – NSW duty and transfers from deceased estate 32

2.9 Conexa – NSW landholder duty 33

2.10 Appeal update - Liang 36

2.11 Appeal update – Buzadzic 37

2.12 Other tax and superannuation related cases in period of 8 May 2024 to 13 June 2024 37

3. **Federal Legislation** 40

3.1 Progress of legislation 40

3.2 Waiver of requirement for a recipient of a supply of a motor vehicle to hold tax invoice 40

3.3 PAYG withholding for US resident entertainers and sportspersons 41

3.4 Administrative Review Tribunal Bills 41

3.5 2024 Federal Budget Measures 41

3.6 Requirement to lodge tax returns 43

3.7 Requirement to lodge return for child support 44

4. **State Legislation** 45

4.1 Victorian state tax amendments 45

4.2 Tasmanian stamp duty exemption 45

4.3 Queensland budget 2024-25 45

4.4 Payroll tax (SA) – exemption for general practitioner wages for bulk-billed services 46

4.5 Payroll tax (Vic) – exemptions for certain general practitioners 46

© Brown Wright Stein Lawyers 2024

4.6 Payroll tax (Vic) – annual reconciliations and threshold increases 47

5. Rulings 48

5.1 Exempt income of international organisations and persons connected with them............. 48

6. Private Binding Rulings 49

6.1 Main residence exemption and active asset.. 49

6.2 Depreciating assets 50

6.3 Residency of trusts 51

6.4 Class shares and SBCGT concessions.. 52

6.5 GST and return of goods 55

6.6 GST and registration requirement when selling commercial property 58

7. ATO and other materials 60

7.1 Jamsek – Decision Impact Statement 60

7.2 JMC – Decision Impact Statement 60

7.3 Minerva – Decision Impact Statement 61

7.4 Hannover Life re Australasia – Decision Impact Statement 63

7.5 SMSF trust beneficiaries.. 63

7.6 Update NFP associate and authorised contacts 64

7.7 Payments to non-residents 64

7.8 Income and deductions for renting out your home 65

7.9 Luxury Car Tax threshold 65

7.10 Car Limit.. 65

7.11 FBT car parking threshold for 2024–25 66

7.12 Payroll tax (NSW) – annual return lodgment process improved 66

7.13 SMSF notice of intent to claim a deduction for contributions 67

7.14 Fees for foreign investors investing in Australian residential property 67

7.15 New or near-new dwelling exemption certificates 68

8. Tax Professionals.. 69

8.1 High-certainty prefill data expanding 69

8.2 Incapacity of a tax practitioner.. 69

8.3 Decoding Division 7A – minimum yearly repayments 70

© Brown Wright Stein Lawyers 2024

BROWN WRIGHT STEIN LAWYERS

8.4 Family trust elections and interposed entity elections 70

8.5 Small business restructure roll-over eligibility 71

8.6 Scams are on the rise 71

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

Aritree Barua	Indeya Canvin	Phoebe Mayson
Amy Burriss	Imogen Delangre	

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
Item 2.1 City Beach	Justice Logan in the Federal Court has found that Part IVA and section 45B did not apply in relation to a restructure that enable taxpayers, in effect, to access unrealised capital profits in order to repay Division 7A loans	Page 7
Item 2.2 Merchant	Justice Thawley has found that an arrangement to utilise losses by selling high cost shares to a related entity self-managed superannuation fund was a scheme to which Part IVA applied and was also a scheme that was a dividend stripping operation or in the nature of a dividend stripping operation.	Page 12
Item 2.3 Merchant	Justice Thawley found that the arrangement under which the SMSF acquired the shares as mentioned in Item 1.2 breached various provisions of the *Superannuation Industry (Supervision) Act 1993* (Cth) but ultimately held that the director of the SMSF should be disqualified from acting as a director or trustee of self-managed superannuation funds.	Page 17
Item 2.6 Goldolphin	The High Court has disallowed the taxpayers appeal against the decision of the Court of Appeal of the Supreme Court of New South Wales refusing the taxpayer the land tax exemption on the basis that the dominant use of land was primary production in circumstances where the land was used both for breeding and sale of horses and also horse racing.	Page 27
Items 7.1 to 7.4 Decision Impact Statements	The ATO has issued four Decision Impact Statements concerning recent decisions in which the ATO was unsuccessful, being *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48, *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76, *Minerva Financial Group Pty Ltd v Commissioner of Taxation* [2024] FCAFC 28 and *Commissioner of Taxation v Hannover Life Re of Australasia Ltd* [2024] FCAFC 23	Pages 60 to 63

© Brown Wright Stein Lawyers 2024

2. Cases

2.1 Ierna – Part IVA and section 45B

Facts

On 1 February 1985 a trust known as the Frendzmenz Indooroopilly Trust was established, with Fewstone Pty Ltd as the initial trustee. The trust later became known as the City Beach Trust (**CBT**). The trust deed for the CBT appeared to provide the trustee with discretion as to the distribution of the income of the CBT as between the unitholders.

The directors of Fewstone were Carmela Ierna and Melville Hicks.

The initial unitholders in the trust were Carmelo as to 15 units and Yorkdon Pty Ltd as trustee of the William Hicks Family Trust (**WHFT**) as to 15 units.

The CBT carried on a business known as City Beach.

On 26 June 1991 Carmelo transferred one of his units to the Ierna Family Trust (**IFT**).

On 16 August 2001 Corkdon Pty Ltd replaced Yorkdon as trustee of WHFT.

On 2 July 2012 Oxlade Pty Ltd became trustee of the IFT.

The net accounting profit of the City Beach business in the income years ended 30 June 2007 to 30 June 2016 was as follows:

Income Year	Net Accounting Profit
2007	$25,080,465
2008	$24,870, 632
2009	$29,251,151
2010	$12,645,700
2011	$11,390,093
2012	$18,021,479
2013	$10,212,725
2014	$5,471,439
2015	$4,743,147
2016	$4,642,780

As at 16 May 2016, the units in the CBT remained Carmelo as to 14 units (all pre-CGT), the WHFT as to 15 units (all pre-CGT) and the IFT as to 1 unit (post-CGT).

Over the years the net income of the CBT was distributed equally between WHFT and IFT.

In the years ended 30 June 2011 to 30 June 2016, the distributions were as follows:

Year ended 30 June	Net Profit available for 'distribution'	Total distribution to beneficiaries	Distribution to WHFT	Distribution to IFT

2011	$11,774,354	$11,390,354	$5,695,046	$5,695,047
2012	$18,024,479	$18,024,479	$9,010,739	$9,010,740
2013	$10,212,725	$10,212,725	$5,106,363	$5,106,362
2014	$5,471,439	$5,471,439	$2,735,719	$2,735,720
2015	$4,743,147	$4,743,147	$2,371,574	$2,371,573

In a practice that had developed prior to 2011, the trustees of the WHFT and the IPT then distributed their share of the income to Mastergrove Pty Ltd, a company commonly controlled by Carmelo and Melville.

On and from the 2012 income year and until the 2016 income, the trust income distribution practice changed slightly so that distributions of income went to corporate beneficiaries (Ierna Beneficiary Pty Ltd and Hicks Beneficiary Pty Ltd) separately controlled by Carmelo and Melville and not Mastergrove.

Mastergrove lent money to Carmelo, Melville, the Hicks Property Trust (HPT) and the Ierna Property Trust IPT under Division 7A compliant terms. Similarly, loans were made by Ierna Beneficiary and Hicks Beneficiary Pty Ltd once the distribution practice changed.

As at 29 June 2016 the outstanding balances of the loans were as follows:

1. loans from Mastergrove to the IPT: $10,131,875.56;
2. loans from Mastergrove to Carmelo: $4,154,805.80;
3. loans from Ierna Beneficiary Pty Ltd to IPT: $1,097,170.95
4. loans from Ierna Beneficiary Pty Ltd to Carmelo: $10,588,236.13;
5. loans from Mastergrove to the Melville: $3,987,705.93;
6. loans from Mastergrove to HPT: $10,131,640.48;
7. loans from Hicks Beneficiary Pty Ltd to Melville: $1,224,031.19; and
8. loans from Hicks Beneficiary Pty Ltd to HPT: $10,557,682.31.

In the income years ended 30 June 2005 to 30 June 2013 Mastergrove paid the following dividends to Carmelo and Melville:

Year of income	Dividend paid	Dividend paid per A ORD Share
2005	$2,224,000	$1,112,000
2006	$3,054,000	$1,527,000
2007	$3,682,000	$1,841,000
2008	$4,740,000	$2,370,000
2009	$5,200,000	$2,600,000
2010	$7,000,000	$3,500,000
2011	$8,068,000	$4,034,000
2012	$9,200,000	$4,600,000
2013	$8,620,000	$4,310,000

In 2009 a concern arose because of the ATO's new position with effect from 1 July 2009, that Division 7A of the ITAA 1936 applied to unpaid present entitlements to companies, as set out in *Taxation Ruling* 2010/3. This new position, coupled with the changing financial conditions of the business and the general disadvantages of

© Brown Wright Stein Lawyers 2024

operating a business through a trust, caused the Carmelo and Melville, in consultation with their advisors, to consider a change of the operating structure for the business.

In 2011 a proposal to have the City Beach business operated through a company was first raised. One concern was that a trust structure, in which profits could not be retained without considerable tax disadvantage, meant that personal guarantees and securities needed to be offered by unitholders in order to obtain the necessary finance to operate the business.

In October 2014 Carmelo and Melville's tax advisor recommended the following proposal under which the business would commence to be operated out of a company in manner that would enable the Division 7A loans to be repaid to the corporate beneficiaries.

The 2014 proposed restructure involved a transfer, at market value, of either:

1. the City Beach business from the trustee of the CBT to a new holding company; or
2. the units in CBT to a new holding company.

The proposal envisaged that the new holding company would primarily use debt payable to the unit holders to acquire the business or units. This debt would be sufficient to repay the outstanding Division 7A loans by assigning the debt to the creditor companies. Additionally, the new holding company would elect to form a consolidated group.

The 2014 proposal did not proceed.

In 2016 a new restructure was proposed, utilising the rollover in Division 615 of the ITAA 1997, and which would involve the following steps:

1. Step 1 – a transfer of the units in CBT to a new company in consideration for new shares in the company;
2. Step 2 – the undertaking of a selective share buy-back to allow, in substance, a realisation of pre-CGT capital gains to the shareholders in new company;
3. Step 3 – the assignment of the debt (loan) interests arising from the share buy-back as repayment of the Division 7A loans; and
4. Step 4 – an election by the new company to form a consolidated group with the CBT.

On 18 April 2016 a new company, Methuselah Holdings Pty Ltd, was incorporated, with shares held by Carmelo, the IFT and the WHFT, matching the ownership of units in the CBT. The directors of Methuselah were Carmelo and Melville.

Each of the shareholders in Methuselah chose to obtain a roll-over under Subdivision 615-A of the ITAA 1997 in respect of their disposal of their units in the CBT.

on 20 May 2016 unit sale agreements were entered into between the unitholders of the CBT and Methuselah to undertake Step 1 of the restructure. Methuselah issued 30,000 additional shares valued at $2.50 per share, to Carmelo, IFT and the WHFT in accordance with their relevant proportions.

On 14 June 2016 the shareholders approved a selective capital reduction was resolved, cancelling shares of Carmelo and WHFT and paying $2.50 per share, with the effect that Methuselah owed amounts to Carmelo and WHFT as follows:

Shareholder	Shares cancelled	Cancellation amount payable
Carmelo	10,400,000	$26,000,000
Oxlade as trustee of the IFT	Nil	Nil
Corkdon as trustee of the WHFT	10,400,000	$26,000,00
Total cancellation amount payable by Methuselah		$52,000,000

Deeds of Assignment were executed to assign the debts to the companies to which the Division 7A loans were owed.

On 6 March 2018, Methuselah elected to form an income tax consolidated group under section 703-50 of the ITAA 1997, effective from 1 July 2016. Methuselah served as the head company of the consolidated group, with the CBT as a subsidiary member.

On 8 February 2018, the Commissioner commenced an audit the City Beach group, focusing on the 2016 restructuring of the CBT and the extinguishment of complying Division 7A loans.

On 19 July 2021 the Commissioner made the following determinations:

1. determinations for the purpose of section 45B(3)(b) of the ITAA 1936 that section 45C applied to:
    - (a) the capital benefit of $26,000,000 derived by Carmelo on the capital reduction such that the amount was an unfranked dividend for him;
    - (b) the capital benefit of $26,000,000 received by WHFT on the capital reduction such that the amount was an unfranked dividend for it;
2. that Part IVA applied to the tax benefit under the restructure as it was undertaken for the dominant purpose of obtaining a tax benefit.

In determining whether a person has received a capital benefit under section 45B, regard must be to the relevant circumstances in section 45B(8). The relevant circumstances include the extent to which the capital benefit is attributable to capital or the extent to which the capital benefit is attributable to profits (realised and unrealised) of the company or of an associate (within the meaning in section 318) of the company.

The Commissioner contended that the capital benefit received by Carmelo and WHFT was attributable to the profits of CBT. Fewstone, as the trustee of CBT, was an “associate” of Methuselah under s 318 of the ITAA 1936. Under section 318, the role of “associate” attaches to the trustee of the trust in its capacity as such and, accordingly, the profit of a trust was regarded as the profit of its trustee.

Carmelo and Melville objected to the assessments of the Commissioner and, upon the Commissioner largely disallowing the objections appealed to the Federal Court of Australia.

The Commissioner had also assessed Carmelo and Hicks entities on a deemed dividends under Division 7A on the assignment of the loans, although that issue was dealt with separately and ultimately resolved in favour of the taxpayers.

Issues

1. Whether the 2016 restructure involved a scheme under which a demerger benefit or a capital benefit was provided for the purpose (dominant or otherwise, but not incidental) of enabling a taxpayer to obtain a tax

benefit such that the Commissioner could treat the capital benefits as unfranked dividends under section 45C of the ITAA 1936.

2. Whether the 2016 restructure involved a scheme was entered into for the dominant purpose of obtaining a tax benefit under Part IVA of the ITAA 1936.

Decision

Logan J in the Federal Court found for the taxpayers on both issues and set aside the objection decisions.

Section 45B determination

Logan J doubted that the CBT could be an 'associate' of Methuselah under section 318 of the ITAA 1936 as section 318 makes a trustee an associate but not the trust. Any profits of the CBT were not profits of Fewstone and Fewstone was the associate. However, Logan J did not consider it necessary to resolve this issue.

Logan J noted that the question to be answered under section 45B of the ITAA 1936 is whether, objectively, the capital benefit was attributable to Methuselah's share capital account and, in this case, the company's only account was its genuine share capital account. Further, Methuselah had no pattern of distributions of dividends or returns of capital and, accordingly, it could not be said the capital reduction was a substitute for dividends. Logan J concluded that, on no objective view, could the capital reduction be regarded as a substitute dividend. Instead, the capital return was aimed at taking advantage of the Division 615 rollover.

Accordingly, section 45B did not apply to the scheme and there was no basis for a determination under section 45C.

<u>Part IVA</u>

Logan J noted that the Commissioner identified the applicable scheme as:

1. the recommendation and implementation of the selective capital reduction of shares in Methuselah;
2. the entry into the Loan Agreements; and
3. the entry into the Deeds of Assignment.

Further, the tax benefit identified by the Commissioner was the non-inclusion of the dividend and franking offset in the assessable income of Carmelo and Melville for the 2016 income year. The Commissioner proposed that Mastergrove would have paid a fully franked dividend to Carmelo and Melville sufficient to discharge the Division 7A loans.

Logan J held that the alternative postulate identified by the Commissioner was a theoretical possibility rather than a practical one, unsupported by objective evidence. No evidence suggested Mastergrove ever paid dividends of the magnitude proposed. Furthermore, the only dividends paid by Mastergrove between 2010 and 2013 were to service the minimum interest on Division 7A loans, with no dividends paid in 2014 and 2015. The Commissioner's postulate failed to consider the business environment and financial constraints of the City Beach business, making it unreasonable.

Further, the actual scheme resulted in real commercial changes that were not part of the Commissioner's postulate, being that Carmelo's shareholding in Methuselah reducing from 46.67% to 39.13% and all Division 7A loans were fully repaid.

By contrast, the taxpayers' realistic alternative postulate involved the unit holders in CBT transferring their units to Methuselah for market value, receiving shares worth $23 million and $52 million in cash, with the loan

receivable assigned to creditor companies to repay Division 7A loans. As the units were pre-CGT, no tax would have been paid. This was the more appropriate alternative.

Accordingly, Logan J considered there was no tax benefit.

Logan J noted that, even if tax benefit considerations were unnecessary, the application of s 177D of the ITAA 1936 reinforced that the scheme's dominant purpose was not to avoid including a $26 million dividend in assessable income. The scheme's dominant purpose was to use pre-CGT assets to repay Division 7A loans.

As such, Part IVA did not apply.

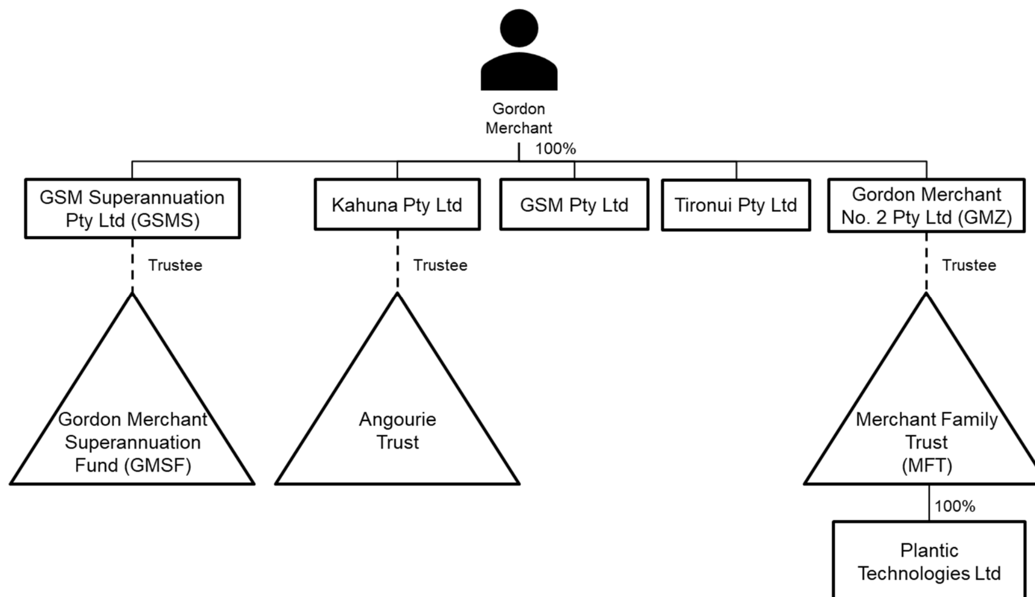
Citation *Ierna v Commissioner of Taxation* [2024] FCA 592 (Logan J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/592.html

2.2 Merchant – Wash sale, Part IVA and dividend stripping

Facts

Gordon Merchant co-founded Billabong Limited (**BBG**). Through related entities, Gordon remained a shareholder of BBG.

Gordon was also the director and the controlling mind of a number of entities in the Merchant Group. The main entities which were relevant to this case are depicted below (which has been extracted from the case at paragraph 3):



Gordon was also the sole shareholder and director of GSM Superannuation Pty Ltd (**GSMS**) the trustee of the Gordon Merchant Superannuation Fund (**GMSF**).

In 2010, the Merchant Family Trust (**MFT**) acquired all the shares in a start-up company, Plantic Technologies Ltd (**Plantic**). From 2011 to 2015, other Merchant Group entities, including GSM, Tironui and Kahuna as trustee of the Angourie Trust loaned Plantic approximately $55 million.

Gordon was dissatisfied with the level of funding Plantic required and began considering selling the Plantic business.

In about May 2014, advisers at EY advised that the preferable structure of a future sale of Plantic from Merchant's perspective was for:

1. MFT to sell its shares in Plantic to a third party rather than for Plantic to sell its assets;
2. the relevant Merchant Group entities to forgive the Plantic loans of about $55 million; and
3. for the GMSF to acquire from the MFT a substantial number of the MFT's high-cost shares in BBG with the result that the MFT would crystallise a significant capital loss.

In around June 2014, a US company expressed interest in acquiring Plantic, but the sale did not proceed.

On 3 September 2014, an adviser from EY sent an email to Gordon which attached a paper outlining the options to manage the tax costs for a sale of Plantic's assets rather than a share sale.

The "summary" in respect of the share sale and debt forgiveness was as follows:

> *Debt forgiveness gives a higher capital gain (and therefore use of more capital losses) but a reduction in top-up tax payable i.e. reduce current tax but potentially increase future taxes if would otherwise be able to use capital losses.*
>
> *Risk of anti-avoidance provisions applying to this tax benefit mitigated because occurs as normal part of commercial sale process with an arm's length party.*

On 4 September 2014, the MFT sold 10,344,828 shares in BBG to the GMSF for $5,844,828 (**BBG Share Sale**). The result was that the MFT crystallised a capital loss of $56,561,940.

On 15 October 2014, negotiations commenced with Kuraray Co Ltd (**Kuraray**), a Japanese company which had earlier expressed an interest in Plantic.

On 31 March 2015, a share sale agreement was exchanged between the MFT and Kuraray for the sale of all of the MFT's shares in Plantic. The MFT's capital gain on the sale of its shares in Plantic to Kuraray was around $85 million. A condition precedent of completion of the share sale agreement was that the Plantic loans of $55 million be forgiven by the relevant Merchant Group entities.

On 2 April 2015, completion of the sale occurred and a Deed of Forgiveness between GSM, Tironui, Angourie and Plantic was executed.

As a result of the MFT's sale of its shares in BBG to GSMS, the MFT had capital losses sufficient to absorb the whole capital gain arising from the sale of the shares in Plantic.

On 27 April 2015, before the Merchant Group tax returns for the 2015 income year were lodged, the adviser from EY emailed a draft letter of advice which addressed the question of whether the Commissioner would consider that Part IVA applied to the BBG Share Sale, including whether or not it would be regarded to be a “wash sale”, and also addressed the forgiveness of loans.

The Commissioner audited the affairs of Gordon and the Merchant Group. On 20 July 2020, the Commissioner finalised its audit.

The Commissioner considered that Part IVA applied to the BBG Share Sale and made a determination that the amount of $56,561,940, referable to a capital loss incurred by the MFT in the year ended 30 June 2015, was

© Brown Wright Stein Lawyers 2024

not incurred by the MFT in relation to that financial year. This resulted in amended assessments increasing GSM's tax payable by $12,877,001 (because GSM was the beneficiary with a 100% present entitlement to the income of the MFT in the 2015 year) and applying penalties at a base rate of 50% on the basis of recklessness.

The Commissioner also considered that the forgiveness of debts by two of the three lenders, GSM and Tironui, were schemes having substantially the effect of schemes by way of or in the nature of dividend stripping within the meaning of section 177E(1)(a)(ii) in Part IVA. Accordingly, the Commissioner made a determination that debts forgiven by GSM and Tironui be included in Gordon's assessable income in the 2015 income year as dividends. On 27 July 2020, the Commissioner issued an amended assessment to Gordon which increased his tax liability to $30,570,438.

On 22 September 2020, Gordon, the MFT and GSM lodged a joint objection objecting to the assessments issued by the Commissioner. On 27 July 2021, the objections were disallowed.

Gordon appealed the objection decisions to the Federal Court. There were three proceedings in the Federal Court brought under Part IVC of the TAA, and three proceedings in the AAT. The AAT proceedings concerned the review shortfall penalties imposed by the Commissioner and a review of the Commissioner's decision to disqualify Gordon as a trustee of a self-managed superannuation fund (see case summary at 2.3 in these notes).

Part IVA

The Commissioner identified the BBG Share Sale Scheme as including all of the actions and decisions that resulted in the transfer of 10,344,828 BBG shares from MFT to GMSF.

There was no dispute that the BBG Share Sale Scheme was a scheme as defined in section 1777A(1) of the ITAA 1936, the scheme resulted in a tax benefit, and Division 6 of the ITAA 1936 operated such that GSM was properly assessed to 100% of the net income of the MFT. The only issue was whether a person who entered into or carried out the BBG Share Sale Scheme did so for the dominant purpose of obtaining the tax benefit.

During the hearing, Gordon gave evidence that he decided to transfer the BBG shares from MFT to GMSF "to free up some cash that [he] could use to fund Plantic". Further, Gordon gave evidence that he had no recollection of his advisers at EY suggesting that he should transfer the BBG Shares from the MFT to the GMSF whether or not Plantic was to be sold under an asset sale or a share sale.

Gordon stated that he believed the BBG shares were a "good investment" and he was "confident" the BBG share price would increase over time.

In relation to Part IVA, Gordon argued that:

1. the forgiveness served a commercial objective, being to facilitate the sale of the MFT shares in Plantic to an arm's length purchaser who wanted Plantic free from related party debt;
2. there was nothing uncommercial about one entity engaging in a transaction that has a benefit for a related group entity – here the forgiveness facilitated the sale of Plantic shares free of related-party debt, and GSM and Tironui benefited because they were owed substantial amounts of unpaid present entitlements; and
3. Kuraray is a key party to the arrangement and an arm's length party. It could not be said that all the parties were acting in concert to enable Gordon to obtain a tax benefit.

Dividend stripping

The Commissioner identified the Debt Forgiveness Schemes as schemes "having substantially the effect of a scheme by way of or in the nature of dividend stripping" for the purposes of section 177E(1)(a)(ii) of the ITAA 1936.

In relation to dividend stripping, Gordon contended that an "essential characteristic of dividend stripping is that something becomes tax free" which is missing here because "the sum which but for the debt forgiveness might have been paid out to Gordon as dividends remains in fact taxed or as potentially liable to be distributed to Gordon and taxed in the same way".

Issue

1. Was the BBG Share Sale Scheme entered into for the dominant purpose of obtaining a tax benefit in accordance with section 177D(1) of the ITAA 1936?
2. Was the Debt Forgiveness Scheme a dividend stripping scheme, or substantially had the effect of a dividend stripping scheme in accordance with section 177E of the ITAA 1936?

Decision

Part IVA

The Federal Court confirmed the following principles in respect of section 177D of the ITAA 1936:

1. section 177D(1) provides an objective test used to determine actual purpose. It requires a conclusion about the intention of a person who entered into or carried out the scheme or a part of it to be determined objectively by reference to the eight matters in s 177D(2);
2. it is necessary to have regard to each of the eight matters set out in s 177D(2), which are "posited as objective facts ;
3. the drawing of a conclusion about purpose from the eight matters identified in s 177D(2) may require consideration of what other possibilities existed to achieve the same commercial end; and
4. the fact that a course of action might be a rational commercial decision, whilst relevant, does not necessarily supply the answer to whether a person entered into or carried out the scheme for the dominant purpose of enabling the taxpayer to obtain a tax benefit.

First, the Federal Court addressed the commercial reasons advanced by Gordon during the hearing as to the reason for the BBG Share Sale. The Federal Court then considered the eight matters under section 177D(2) and applied each factor to the BBG Share Sale Scheme. The Federal Court's findings are outlined below.

The Federal Court determined that Gordon's frequent acquisition of BBG shares aimed to ensure the Merchant Group's substantial holding in BBG and to maintain his position on the BBG board. Contrary to Gordon's assertion, the Court found that the BBG Share Sale was not for funding Plantic or the MFT in general but was recommended by Gordon's advisers as a strategic move for the anticipated Plantic share sale. The transaction aimed to crystallise a capital loss to offset against the capital gain from the proposed forgiveness of the Plantic Loans. Documents from May to September 2014 confirmed that the BBG Share Sale related to the anticipated Plantic sale, not its funding needs or those of the MFT.

The Court did not accept Gordon's claim of ignorance regarding the large capital loss resulting from the BBG Share Sale, as this was inconsistent with EY's advice. There was also no evidence that BBG shares were a good investment for GMSF or that future dividends would be paid on these shares.

© Brown Wright Stein Lawyers 2024

Manner of scheme entry

The Court held that the BBG Share Sale was not an independent transaction but was entered into in anticipation of the Plantic sale to crystallise a capital loss, indicating it was carried out to obtain a tax benefit.

Form and substance of the scheme

The Court held that the form of the BBG Share Sale matched its substance. The transaction involved an off-market transfer of shares at market value, wherein Gordon retained economic ownership of the BBG shares but crystallised a capital loss to offset anticipated significant capital gains in the MFT. This indicated that the dominant purpose of the BBG Share Sale was to obtain a tax benefit for the MFT.

Timing and duration of the scheme

The Court noted that the timing of the BBG Share Sale aligned with EY's advice on the benefits in the context of an anticipated Plantic sale. This timing suggested that the sale aimed to crystallise a capital loss in MFT and secure a tax benefit.

Result but for Part IVA

The Court found that, without the scheme, the MFT would not have crystallised the $56.5 million capital loss and would have realised a net capital gain. The scheme created a tax benefit that would be realised if not for the application of Part IVA.

Financial position changes

The BBG Share Sale converted BBG shares into cash and significantly improved MFT's financial position by allowing it to crystallise $56.5 million in capital losses to offset the expected gain from the Plantic sale. Without the scheme, MFT would have faced a substantial capital gain for the year, taxable in its hands or in the hands of the beneficiary, GSM.

Financial position of others

The Commissioner's submissions identified three other parties affected by the BBG Share Sale Scheme:

1. **GSM** - avoided tax on a capital gain, preserving its assets;
2. **GMSF** - converted cash assets to a non-current asset, requiring Gordon's pension to be commuted, returning the fund to the accumulation phase; and
3. **Gordon** – was prejudiced by the loss of GMSF's ability to pay his pension but benefitted from the accrued advantages to MFT and GSM as the ultimate owner or beneficiary.

The Federal Court found these changes indicated the dominant purpose was to obtain a tax benefit.

Other consequences

The scheme transferred BBG shares within the Merchant Group, causing GMSF's assets to be heavily weighted towards non-dividend-paying BBG shares, inconsistent with its documented investment strategy. The Court concluded this supported the dominant purpose of obtaining a tax benefit.

© Brown Wright Stein Lawyers 2024

Connection between relevant parties

Gordon was the sole member of GMSF, a special beneficiary of MFT, and the sole shareholder of the corporate trustees of MFT and GMSF. This connection further supported the conclusion that the dominant purpose was to obtain a tax benefit.

After considering the factors of section 177D(2), the Federal Court concluded that the dominant purpose of the BBG Share Sale scheme was to obtain a tax benefit, and Gordon did not prove that the general anti-avoidance provisions in Part IVA did not apply.

<u>Dividend stripping</u>

The Federal Court referred to *CPH Property Pty Ltd v Commissioner of Taxation* [2008] FCA 1276, which described dividend stripping as involving a company likely to declare dividends from accumulated or anticipated profits. It emphasised examining the scheme's substantial effect and comparing it to dividend stripping to determine similarity. A scheme under section 177E must always have a dominant tax avoidance purpose.

In assessing the scheme's purpose, the Court examined:

1. the purpose behind specific steps within the scheme; and
2. the commercial or other objectives sought by the scheme's steps and context.

Debt forgiveness scheme's dividend stripping effect

The Court held that the Commissioner's broader identified scheme fell within section 177E(1)(a)(ii) as having a dividend stripping effect. Section 177E can apply even without complete tax avoidance, such as where a lower tax rate is achieved. The objective purpose of loan forgiveness was to reduce the tax liability significantly.

Dominant Purpose of the Scheme

The Court noted that a commercial purpose does not negate a dominant tax avoidance purpose. A third-party purchaser would have either paid more for Plantic shares without the loans or less if refinancing was needed. In this case, Kuraray, the purchaser, could have repaid the Plantic Loans directly. Kuraray's upfront cash payment to MFT exceeded the loan amounts, showing no commercial interest in forgiving the loans. Thus, forgiving substantial debts had no sensible commercial objective for GSM or Tironui.

The primary purpose of the Debt Forgiveness Scheme was to avoid top-up tax on undistributed profits by Gordon. Without forgiveness, GSM's undistributed profits would have created a tax liability for Gordon, taxed at marginal rates.

The Court concluded that the scheme effectively transferred undistributed profits in GSM and Tironui to the MFT, allowing utilisation of losses and distribution at lower tax rates. Gordon failed to prove that the Debt Forgiveness Scheme did not substantially resemble a scheme by way of dividend stripping.

Citation *Merchant v Commissioner of Taxation* [2024] FCA 498 (Thawley J, New South Wales) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/498.html

2.3 Merchant – disqualification of SMSF trustee

Facts

The facts of this case are summarised at 1.2 of this month's notes. Additional facts relevant to this decision are below. Acronyms in this summary take their meaning from the summary at 1.2.

At the relevant time, Gordon was over 65 and received a pension of at least $450,000 from the GMSF for the financial years ended 30 June 2010, 30 June 2011, 30 June 2012, 30 June 2013, 30 June 2014 and 30 June 2015.

On 19 September 2013, BBG entered into financing agreements with third parties that included issuing equity to the finance providers. As a result, this would dilute Gordon's shareholding in BBG. Gordon wanted to make sure other persons "did not get a seat on the board" and, therefore, he "felt that [he] needed to keep acquiring BBG shares".

Consideration was given to the GMSF acquiring shares in BBG through the entitlements of other Merchant Group entities, but this ultimately did not proceed because the tax adviser considered that such a course raised tax issues. Ultimately, on 31 March 2014, the MFT, GSM and GMSF acquired further shares in BBG.

On 4 September 2014, the MSFG acquired 10,344,828 shares in BBG from MFT for $5,844,828.

On 30 April 2015, discussions occurred at a meeting of the Merchant Group concerning cash flow issues in the GMSF. On 25 June 2015, it was resolved that the trustee of the GMSF commute Gordon's existing account-based income stream with effect from 1 July 2015 and roll his account balance into accumulation phase.

The Commissioner's audit letter concluded that GSMS, as trustee of the GSMF, had contravened the SIS Act as follows:

1. investment strategy: under section 34(1) of the SIS Act, the trustee “must ensure that the prescribed standards applicable to the operation of the entity are complied with at all times”. Regulation 4.09(2) of the SISR contained a prescribed standard which required that the “trustee of the entity must formulate, review regularly and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including” the matters set out in paragraphs 4.09(2)(a) to (e);
2. sole purpose test: section 62 of the SIS Act requires that acquisition of the BBG shares from the MFT was made for the purposes of the fund providing retirement benefits to Gordon; and
3. financial assistance: section 65 of the SIS Act prevents the use of financial resources of a fund as a means of providing financial support to the members and their relatives for purposes other than for the provision of retirement benefits under the fund's rules.

Accordingly, the Commissioner disqualified Gordon under both sections 126A(2) and 126A(3) of the SIS Act on the basis that:

1. section 126A(2): as a corporate trustee of a superannuation entity he has contravened the SIS Act on one or more occasions, and at the time of the contraventions he was a responsible officer of the corporate trustee and the seriousness of the contraventions provides grounds for disqualifying Gordon; and
2. section 126A(3): Gordon was not a fit and proper person to be a trustee or a responsible officer of a body corporate that is a trustee, of a superannuation entity for the purposes of the SIS Act.

On 7 August 2020, Gordon requested that the Commissioner revoke the disqualification decisions. On 9 October 2020, a decision was made on the review request and the Commissioner:

© Brown Wright Stein Lawyers 2024

1. was satisfied that, while Gordon was a director of GSMS, GSMS contravened the SIS Act and the nature and seriousness as well as the number of the contraventions provided grounds for his disqualification under section 126A(2) of the SIS Act; and
2. set aside the decision to disqualify Gordon on the basis that Gordon was a not fit and proper person to be a responsible officer of a body corporate that is a trustee under section 126A(3) of the SIS Act. Generally, the reasons provided to set aside this decision were as follows:
   (a) Gordon did not possess tax, law or accounting qualifications, and sought professional advice from a reputable accounting firm EY who were engaged as his tax advisor since 2006;
   (b) Gordon appropriately delegated his affairs to a trusted tax advisor given his lack of background in tax and/or accounting;
   (c) Gordon's positions at audit were in part able to be supported by legal precedence as well as documentation, demonstrating a degree of soundness of judgment on his part;
   (d) Gordon fully cooperated with the ATO throughout the audit and review processes;
   (e) Gordon's compliance history showed that he willingly rectified any errors and contraventions made;
   (f) Gordon and the other entities in the Merchant Group have never been subject to disciplinary action or sanctions by relevant professional or regulatory bodies such as ASIC and ASX;
   (g) Gordon had never been subject to any ATO-related litigation or prosecution activity and have never filed for bankruptcy; and
   (h) there was only one transaction that led to disqualification under section 126A(3), and the status of that transaction was in dispute.

On 6 November 2020, Gordon applied for a review of the Commissioner's decision in the AAT. The application for review was heard together with three proceedings in the Federal Court and two other proceedings in the AAT.

During the AAT proceedings, Gordon gave an undertaking to the AAT that he will not act as sole director of GSMS and will appoint an independent director. Further, Gordon undertook to engage a financial planner to provide advice to the GSMS at least once a year in respect of the GMSF's investment strategy and to review this investment strategy.

Section 126A(2) of the SIS Act provides:

> *(2) The Regulator may disqualify an individual who is, or was, a responsible officer of a trustee, investment manager or custodian (the body corporate) if satisfied that:*
>
> *(a) the body corporate has contravened this Act or the Financial Sector (Collection of Data) Act 2001 on one or more occasions; and*
>
> *(b) at the time of one or more of the contraventions, the individual was a responsible officer of the body corporate; and*
>
> *(c) in respect of the contravention or contraventions that occurred while the individual was a responsible officer of the body corporate—the nature or seriousness of it or them, or the number of them, provides grounds for the disqualification of the individual.*

Issue

Should Gordon have been disqualified from acting as a director of the trustee for the GMSF pursuant to section 126A(2) of the SIS Act?

Decision

Investment strategy

The AAT confirmed that the SIS Act and SISR do not impose a direct requirement that, in making a particular investment decision, the trustee must consider or reconsider each of the matters in paragraphs 4.09(2)(a) to (e). Rather, in making an investment decision, the trustee must “give effect” to the investment strategy which has been formulated having regard to the circumstances of the entity including the matters in paragraphs 4.09(2)(a) to (e) and review that strategy regularly.

The AAT concluded that there was only one investment strategy at the time of the BBG Share Sale, being the investment strategy prepared in 2012. GSMS investment decision did not constitute it adopting a new investment strategy. GSMS did not "give effect to" this investment strategy at the time of the BBG Share Sale for the following reasons:

1. the predominant reason Gordon effected the BBG Share Sale was to crystallise a capital loss in the MFT which was expected to make significant capital gains from selling the Plantic shares and to ensure he retained significant shareholding in BBG;
2. there was no contemporaneous documentary evidence or material suggesting consideration if the matters in the 2012 investment strategy including anticipated liquidity requirements; and
3. the purchase led to the GMSF holding 74.4% of its assets in the class “shares in listed companies” when the 2012 investment strategy stated that 0 to 40% of its assets were to be held in that class.

The AAT was satisfied that GSMS beached section 34(1) of the SIS Act.

Sole purpose test

The AAT held that the predominant reason Gordon agreed to enter into the BBG Share Sale was to crystallise a capital loss in the MFT which was expected to make significant capital gains from selling the Plantic shares. The AAT also accepted that a substantial purpose of GSMS was to keep ultimate beneficial or economic ownership of BBG within the Merchant Group.

The AAT confirmed that neither of these purposes was a core purpose within the meaning of section 62(1) of the SIS Act. Therefore, the GSMS breached section 62(1) of the SIS Act.

Financial assistance

The AAT was satisfied that, under the BBG Share Sale, financial assistance was provided to Gordon who was a discretionary object of the MFT. Namely, that GSMS purchased the shares with cash in the GMSF for the purpose of increasing the financial resources of the MFT for the benefit of the discretionary objects of the MFT, including Gordon.

The AAT rejected Gordon's argument that the cancellation of the capital loss meant that no financial assistance was provided. The AAT stated that the later cancellation of the tax benefit does not undo the earlier breach.

The AAT was satisfied that GSMS breached section 65(1) of the SIS Act.

Disqualification under section 126A of the SIS Act

Although the AAT found that GSMS had breached sections 34(1), 62(1) and 65(1) of the SIS Act, it did not agree with the Commissioner's decision to disqualify Gordon on the basis that it considered the risk of future non-compliance would be unlikely. The AAT relied on the following to support its conclusion:

1. it agreed with the reasons of the decision-maker on review that Gordon was a fit and proper person. Further, there was no evidence before the AAT that Gordon was advised by EY in respect of the risk that the BBG Share Sale would breach the provisions of the SIS Act. In particular, it was an EY adviser who suggested that the MFT should sell BBG shares to the SMSF;
2. Gordon gave an undertaking to the AAT in respect of the GMSF;
3. although the breaches of the SIS Act were serious ones, they all arose from one course of conduct. This was not the case of multiple breaches on multiple occasions;
4. having regard to his personal circumstances, Gordon was only ever likely to be a director of the trustee of his own superannuation fund, and therefore does not need protection from himself; and
5. a significant mitigating factor was that although the breaches were serious, the BBG Share Sale was put forward by EY without raising an issue from a superannuation compliance perspective.

Accordingly, the AAT allowed the appeal and set aside the disqualification decision.

COMMENT – while the Court ultimately concluded that the disqualification of Gordon should be revoked, the conclusion that the acquisition of shares for market value could be 'financial assistance' to Gordon or his relatives suggest that 'financial assistance' is to be broadly construed.

Citation *Merchant and Commissioner of Taxation* [2024] AATA 1102 (DP Justice T Thawley, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1102.html

2.4 Moloney – small business CGT concessions and market value substitution rule

Facts

Between 1996 and 2015, JG Moloney & Co (Noorat) Pty Ltd (**JGM**) in its capacity as trustee of the JG Moloney Family Trust (**Moloney Trust**) ran a bulk haulage business called Mt Noorat Freighters, specialising in agricultural products in western Victoria. Raymond and Anthony Moloney were the directors of JGM.

The beneficiaries of the Moloney Trust, a discretionary trust, included Raymond, Kathryn, Anthony, and Jacqueline Moloney.

In 2014, in accordance with advice provided by Crowe Horwath, a restructuring of the business commenced to be undertaken. in 2014, as part of the restructure, a valuation was obtained from a valuer at Crowe Horwath, which valued the business at $3,500,000. Raymond and Anthony were happy to proceed with the sale as it was at market value and the advice that they received was that there would be no tax implications.

On 12 June 2014 Mt Noorat Freighters Holdings Pty Ltd was incorporated with Raymond and Anthony as directors.

On 25 March 2015, JGM, in its capacity as trustee of the Moloney Trust, sold the Mt Noorat Freighters business to itself, in its personal capacity, for $3,500,000, assuming all business liabilities.

The same day, JGM, in its capacity as trustee of the Moloney Trust, sold the trust's shares in itself to Mt Noorat Freighters Holdings Pty Ltd for $3,500,000.

On 31 March 2015 JGM was replaced as trustee by Raymond and Anthony.

On 19 June 2015, the income of the Moloney Trust for the income year ended 30 June 2015 was distributed equally among Raymond, Kathryn, Anthony, and Jacqueline.

The Moloney Trust's 2015 tax return reported the capital gain as follows:

Net income from business: **Interest**	$1,284,745 $3,210
NET INCOME	$1,287,955
Capital Gain from CGT event (sale of shares in JGM to Mt Noorat Freighters Pty Ltd)	$3,500,000
Less: • 50% discount on capital gain – Division 115 • 50% active asset discount on capital gain – Division 152-C • 2 Year deferral on balance of capital gain – Division 152-E	 $1,750,000 $875,000 $875,000
CAPITAL GAIN	NIL

The Commissioner commenced an audit of the treatment of the sale transaction by the Moloney Trust.

During the audit, the Moloney family obtained valuations of the business which all valued the business lower than the $3,500,000.

On 29 April 2021, the Commissioner concluded that the market value substitution rule applied to deem the capital proceeds from the CGT event to be $10,640,000, relying on a valuation that it obtained from KordaMentha, and, further, that the Moloney Trust was not eligible for small business concessions as it did not satisfy the maximum net asset value (**MNAV**) test just before the CGT event.

Section 116-30(2) of the ITAA 1997 provides that the capital proceeds from a CGT event will be replaced with the market value of the CGT asset if parties did not deal at arm's length in connection with the CGT event and the Commissioner considered that JGM and Mt Noorat Freighters Holdings Pty Ltd did not deal at arm's length.

The audit decision resulted in a net capital gain of $3,488,740.50 for the Moloney Trust, increasing each beneficiary's taxable income from $321,989 to $1,194,174. In April and May 2021 notices of amended assessments were issued to Raymond, Kathryn, Anthony and Jacqueline to give effect to the decision.

On 27 June 2021 Raymond, Kathryn, Anthony and Jacqueline objected to the amended assessments and, on 27 October 2021, the Commissioner disallowed the objections.

On 8 December 2021 Raymond, Kathryn, Anthony and Jacqueline applied to the AAT for a review of the objection decisions.

Raymond, Kathryn, Anthony and Jacqueline argued that the Moloney Trust and Mt Noorat Freighters Holdings Pty Ltd dealt at arm's length regarding the CGT event, despite their connection, as the transaction involved real bargaining, being that the parties engaged in the transaction with their own interests in mind, without any collusion, and the $3.5 million sale price resulted from genuine, independent bargaining based on an independent valuation. It was noted that parties that are related can deal at arm's length: *Federal Commissioner of Taxation v AXA Asia Pacific Holdings Ltd* [2010] FCAFC 134.

The Commissioner contended that no real bargaining occurred as the valuation was not challenged or queried. The lack of bargaining and reliance on the valuation indicated the parties did not deal at arm's length.

In relation to the valuation issue, Raymond, Kathryn, Anthony and Jacqueline relied on valuation from PKF that provided a midpoint valuation of $3,000,000. By contrast, the valuation of KordaMentha relied on by the Commissioner provided a midpoint of $7,000,000.

Both valuation experts agreed that the capitalisation of future maintainable earnings method of valuation was the most appropriate approach.

The PKF valuation was lower primarily because it relied on a lower capitalisation multiple (3.75 to 4.25) compared to that adopted by KordaMentha (5.5 to 6.0), although there was also a difference of opinion of the maintainable EBITDA for the year ended 30 June 2015 ($1,920,561 for PKF and $2,008,421 for KordaMentha) as KordaMentha assumed that the recent trend in the growth of the revenue of the business would continue whereas PKF did not considerable that a prudent purchaser would make such an assumption.

The key reason for the difference in the capitalisation multiple was that PKF considered that a 25% marketability discount should be applied, to reflect the multiples appropriate for an unlisted entity. PKF also relied upon the following factors to support the discount:

1. customer concentration – 65% of the business was with one customer;
2. the contractual arrangement with the major customer did not guarantee any amount of work; and
3. the profitability of the MNF business, although relatively high, carried the risk that it could not be sustained.

Issues

1. Did the market value substitution rule apply in relation to the capital proceeds for the Moloney Trust from the sale of its shares in JGM?
2. Was the MNAV test satisfied just before the CGT event?

Decision

<u>Dealing at arm's length</u>

The AAT found that, despite the valuation process being independent, there was no real bargaining between the parties and, therefore, the parties did not deal at arm’s length.

The AAT accepted that related parties can deal at arm’s length in certain transactions, but this was not such a case. The indicative valuation by Crowe Howarth was accepted without challenge, and there was no real bargaining between the parties. The tax advisory team simply proceeded based on the valuation, with no negotiation typical of arm’s length dealings. The same individuals controlled both sides of the transaction.

Accordingly, the market value substitution rule applied to deem the Moloney Trust to have received market value for its shares.

<u>MNAV test</u>

The satisfaction of the MNAV test depended upon which of the valuation reports were preferred.

The AAT held that the PKF valuation was to be preferred. The AAT considered that PKF's approach was conservative and realistic, taking into account business-specific risks and the lack of marketability of unlisted shares. By contrast, the AAT considered that KordaMentha relied too heavily on broader market conditions and assumptions that were not specific to the business.

The AAT concluded that the maintainable EBITDA falls within PKF's estimated range of $1.6 to $1.7 million, approximately $1,650,000 and that the appropriate capitalisation multiple is at the high end of PKF's range, specifically 4.25. This resulted in a business valuation of around $7,012,500 ($1,650,000 x 4.25). Subtracting the agreed long-term financial liabilities of $3,660,000, the net value was $3,352,500. When combined with the market value of the CGT assets of the connected entities, being $803,901, the total net value was $4,156,401. Accordingly, the net value of the CGT assets did not exceed $6,000,000 and the objections should have been allowed.

The AAT set aside the objection decisions.

COMMENT – There is a question whether the original structure, where the trustee company held shares in itself, would have complied with sections 259A and 259C of the *Corporations Act 2001* (Cth). Broadly, sections 259A and 259C prohibit a company from acquiring shares (including redeemable preference shares) in itself or in a company that controls it.

Citation *Moloney and Commissioner of Taxation (Taxation)* [2024] AATA 1483 (DP Molloy, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1483.html

2.5 WCVB – attribution of income

Facts

WCVB is a member of a corporate group which is involved in the business of buying, developing and selling real estate. One entity within the group would acquire and hold land, while other entities within the group would supply corporate services to landowning companies and each other, in connection with various development projects.

The group was controlled by Mr Smith.

WCVB was established in 2001 and together with the holding company of the group, acquired three adjourning blocks of land in Astoria in February 2002. The land was mortgaged to Suncorp as part of a refinancing arrangement. Suncorp's consent was necessary for any sale.

One of the group entities, Zenith was responsible to carry out the planning processes from conception to approval stages of the development applications for landowners. In December 2002, Zenith applied for development approvals on the Astoria properties which were obtained in 2006.

ABC, another company in the group controlled by a group employee, and ultimately Mr Smith, acquired an option to purchase property located in Banksia. Zenith obtained planning approvals in respect of the Banksia Property.

Zenith also undertook development planning services for another group company, Delta, in relation to a property in Corinthia.

In 2010, discussions arose between Mr. Smith and individuals from another property development business, Mr Black and Mr Blue, regarding a joint venture to develop properties. Mr Black and Mr Blue were interested in acquiring the Astoria properties *and* taking over the contract for the purchase of the Banksia property held by ABC. Eventually, the joint venture arrangement was abandoned, and it was agreed that Mr Black and Mr Blue

would take control of ABC and Delta, and ABC would purchase the Astoria properties from WCVB for $5 million net of GST.

On 12 March 2010, Mr Black and Mr Blue were appointed directors of ABC and acquired two thirds of the issued shares in ABC. The share transfer was for nominal value. The group employee remained on the board until July 2010.

On 12 March 2010, Mr Black and Mr Blue were appointed directors of Delta and acquired two thirds of the issued shares in Delta, the share transfer was for nominal value. On the same day, Mr Smith resigned as director of Delta and the same group employee that was a director of ABC was also appointed as director of Delta.

In April 2010, Mr. Smith sought Suncorp's consent for the sale of the Astoria properties. Suncorp consented on the condition that the proceeds would all be applied to reduce the group's debt.

Between May and June 2010, three separate contracts were entered into between WCVB and ABC for the purchase of the Astoria properties. The contracts settled on 12 August 2010 and the net proceeds, after GST, adjustments and legal fees were deducted, were deposited into the Suncorp loan account.

A fourth contract dated 7 June 2010 was entered into between Zenith, and ABC, where Zenith sold its 'beneficial ownership' of documents related to property development for the Astoria properties, the Banksia property and the Corinthia property to ABC for $3.85 million net of GST.

There was no evidence WCVB received the proceeds from the fourth contract.

Under this arrangement, apart from the $3.85 million payment from ABC to Zenith under the fourth contract, there was a $1.9 million payment into Delta by Mr Black and Blue which covered a debt owed by Delta to Zenith. The purpose and nature of these payments were scrutinised, with questions raised about the debt owed by Delta to Zenith and the reasons behind it.

The Commissioner amended the assessment, attributing a portion of the fourth contract proceeds to WCVB, increasing its taxable income from $5,000,000 to $5,946,000 and imposing penalties. The Commissioner contended that, having regard to all four contracts, WCVB or entities associated with WCVB derived more from the sale of the Astoria properties than WCVB reported in its tax return, and it was appropriate to treat a portion of the proceeds of sale under the fourth contract as the balance of the purchase price for the Astoria properties.

The Commissioner also disallowed certain claims for deduction of interest expenses and construction costs, on the basis that those expenditures were not allowable deductions under section 8-1 of the ITAA 1997.

WCVB appealed the Commissioner's decision in the AAT, on the basis that no sale proceeds from the fourth contract should be attributed to WCVB and that it was entitled to the deductions.

In the hearing, WCVB argued that the sale prices under the three contracts were fair, supported by a valuation report estimating the properties' market value at nearly the same amount as the sale prices. In the valuation report, the value generated by the approvals was incorporated into the value of the land subject to the approvals.

Mr Smith contended that the fourth contract was entered into recover Zenith’s costs and participate in some of the gains accruing to the landowners as a result of the development approval processes that Zenith had overseen, and no part of the sale proceeds from that transaction could be attributed to the sale of the property by WCVB.

© Brown Wright Stein Lawyers 2024

The Commissioner did not contest the valuation report. The Commissioner did not allege that the fourth contract was a sham.

The Commissioner tendered evidence of a letter from the lawyers for ABC at the time of the settlement of the contracts over the Astoria properties, enquiring about a charge over the Corinthia property which would need to be released prior to settlement of the Astoria properties. The Commissioner contended that reference to the Corinthia property was clearly suggestive of a link between the transactions. There was a suggestion by the Commissioner that the fourth contract was designed to defeat Suncorp entitlement to some of the sales proceeds from the Astoria properties.

Given evidence that the parties to the various dealings appeared to link the transactions, the Commissioner submitted the sales of the Astoria properties must be seen in a wider context which includes the fourth contract and the related corporate control transactions and payments.

On the deduction issue, WCVB argued that the interest it owed on an intragroup loan became payable only upon the sale of the Astoria properties, and therefore interest incurred should have been an allowable deduction in the 2011 income year. The Commissioner contended the WCVB had not discharged its onus of proof and pointed to inconsistencies in WCVB's financial records and the lack of documentation of the intragroup loans.

WCVB claimed deductions for work done on the Astoria properties between July 2008 and December 2009. The Commissioner contended the WCVB had not discharged its onus of proof and pointed to discrepancies in the invoicing and timing of the work.

Issues

1. Were the proceeds from the fourth contract assessable to WCVB?
2. Were the interest expenses and construction costs deductible?

Decision

The AAT varied the objection decision to allow the interest deduction but affirmed it in all other aspects.

The AAT noted there were inconsistencies in Mr. Smith's explanations and unresolved questions regarding the nature and purpose of various transactions and agreements, and also whether the parties were dealing with each other at arms' length. The AAT noted there were elements of noncommercially and ambiguity surrounding the entire situation, including that ABC was acquiring from Zenith for $3.85 million.

Noting that a development consent flows with the land once it is obtained, the Deputy President observed that development approval in respect of the Astoria properties and the Corinthia property, which have been obtained and were publicly available, had no intrinsic value.

The AAT accepted the Commissioner's submission that it can be inferred that the fourth contract was an implied direction from WCVB to ABC to pay to Zenith that portion of the proceeds of sale under the fourth contract which related to the Astoria properties.

The AAT noted the inconsistencies with the financial of WCVB but ultimately accepted WCVB's account of the terms of the loan, acknowledging that the interest liability arose only upon the sale of the properties.

The AAT found that WCVB failed to sufficiently establish that the construction costs were incurred during the 2011 income year, and thus, the deduction for construction costs was disallowed.

© Brown Wright Stein Lawyers 2024

COMMENT – the AAT relied on the taxpayer's onus in coming to the conclusion in this case. It is questionable whether the onus should operate in this way when there were clear legal documents for which a payment was made and there was no allegation of sham.

Citation *WCVB and Commissioner of Taxation (Taxation)* [2024] AATA 1259 (DP B McCabe, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1259.html

2.6 Godolphin – dominant use of land for primary production

Facts

Two properties, "Kelvinside" and "Woodlands," owned by Godolphin Australia Pty Ltd, were used in a business involving the breeding and sale of horses, as well as horse racing.

Kelvinside featured extensive facilities for stallion operations, including 20 stallion boxes and a covering area. During the breeding season, 10 to 14 stallions, which had completed their racing careers, were stationed there. Stallion-related activities occupied about 10% of one of Kelvinside's four land parcels. Additionally, Kelvinside had areas and facilities for educating and preliminary training of yearlings, including a practice racecourse. Paddocks were also used for "spelling" racehorses, which involved resting them between races. The revenue from breeding operations, including horse sales and covering services, was significant, with the training and racing activities demanding substantial labour and resources.

Woodlands, a larger property of about 2,420 hectares, was primarily used for keeping breeding mares and foals. Foals were born and raised on Woodlands before some were transferred to Kelvinside as yearlings. Horses bred on Woodlands were mostly sold when they reached three or four years old, with around 70% of the bred horses being sold. The primary sources of income from Woodlands were from these sales and the nomination fees from covering mares. Like Kelvinside, Woodlands had facilities for early training and development of foals and yearlings, and parts of the property were used for spelling and resting racehorses.

Godolphin's business model, reflected in the slogan "breed to race, race to breed," highlighted the integrated nature of their breeding and racing operations. The business involved two primary operations: breeding thoroughbred horses, selling them, and covering mares for nomination fees, and racing horses for prize money, which involved intensive training and significant resource allocation. Financially, the breeding operations, including stallion services, were profitable, while racing operations incurred significant losses but were crucial for enhancing the value of the breeding stock. The ultimate goal was to enhance the residual value of their bloodstock holdings by achieving success on the racetrack, thereby creating a self-sustainable operation.

Section 10AA(3) of the *Land Tax Management Act 1956* (NSW) (**LTMA**) defines "land used for primary production" and lists specific uses that qualify, being:

1. cultivation, for the purpose of selling the produce of the cultivation, or
2. the maintenance of animals (including birds), whether wild or domesticated, for the purpose of selling them or their natural increase or bodily produce, or
3. commercial fishing (including preparation for that fishing and the storage or preparation of fish or fishing gear) or the commercial farming of fish, molluscs, crustaceans or other aquatic animals, or
4. the keeping of bees, for the purpose of selling their honey, or
5. a commercial plant nursery, but not a nursery at which the principal cultivation is the maintenance of plants pending their sale to the general public, or
6. the propagation for sale of mushrooms, orchids or flowers.

Section 10A of the LTMA states that where land is used for more than one purpose and each of those purposes is an exempt purpose, the land is exempt from land tax.

The Chief Commissioner of State Revenue assessed Godolphin as liable for land tax, contending that the dominant use of the land was not for the exempt purpose of selling horses or their natural increase or bodily produce.

Godolphin objected to the assessment. The objection was disallowed. Godolphin appealed the objection decision in the Supreme Court of NSW.

Godolphin claimed that certain parcels of each property were exempt from land tax under section 10AA(3)(b) of the LTMA, arguing that the "dominant use" of these parcels was for primary production, specifically for "the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce."

The primary judge concluded that, given the integrated nature of Godolphin's business, it could not be said that there were two distinct purposes (breeding for sale and racing) for the activities on the properties. The Court held that the overall objective was to increase the value of the stud operations, primarily through the sale of stallions' semen and broodmares' progeny, and thus exempted the land from tax.

The Chief Commissioner of State Revenue appealed the decision. The Court of Appeal, by majority, held that the dominant use of the properties was for racing, not for the exempt purpose of primary production. The Court of Appeal emphasised that the word "dominant" in section 10AA(3) qualifies the composite phrase "use-for-a-purpose," and the dominant use must be both for maintaining animals and for the purpose of selling them.

Issue

Did parcels of land used for breeding and racing horses qualify for the exemption from land tax for land used for the dominant purpose of primary production under the LTMA?

Decision

The High Court upheld the "use-for-a-purpose" construction, stating that the dominant use must encompass both the maintenance of animals and the purpose of selling them. The lead judgment of the High Court noted as follows:

> 34. *Whether land is being used for the dominant purpose of maintaining animals for their sale or the sale of their natural increase or bodily produce is a question of characterisation of the use or uses to which the land is put.[53] The proper approach is to consider the amount of land used for any purpose, the nature and extent and intensity of the various uses which are taking place, and the time and labour and resources spent in using the land.[54] In some cases, the financial gain from a given activity may be an indicator of predominance.[55] And in all cases one should not ignore the conclusion reached by an objective observer who is viewing the land as a whole.[56]*
>
> 35. ***Where land has more than one use, for a given use to be dominant it must exhibit such predominance as to impart to the whole of the land the necessary exempting character.*** *Thus, in Abbott v Commissioner of Land Tax, 83 out of 209 acres of land were leased to a golf club; the balance of the land was used for grazing and raising animals for sale.[57] Section 3 of the Land Tax Act 1958 (Vic) relevantly defined, at that time, lands used for primary production as meaning lands "used primarily for ... the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce". Lush J observed that in construing the word "primarily" in its application to land which is used partly for an exempt purpose and partly for other purposes it was to be remembered "that the question is whether*

the whole of the parcel is primarily used for the exempt purpose".[58] In that respect, it was not sufficient merely to inquire into whether some difference could be discerned between the different uses in order to justify classifying one as the main or predominant use; the "predominance must be of such a degree as to impart a character to the parcel as a whole".[59] In the case before Lush J there were two substantial activities conducted "side by side".[60] It followed that it could not be said that the land was being used "primarily" for farming.[61]

The High Court dismissed the appeal, holding that while significant portion of the land was used for maintaining animals for the purpose of selling them and their produce and progeny, such use was not so predominant so as to impart an exempting character to the land as a whole.

Consequently, the properties did not qualify for the land tax exemption under section 10AA(3)(b) of the LTMA.

COMMENT - this case reinforces the interpretation that for land to be exempt from land tax under section 10AA(3)(b) of the LTMA, the dominant use must include both the maintenance of animals and the purpose of selling them or their natural increase or bodily produce. The decision highlights the importance of the integrated nature of land use and the need for the dominant purpose to be clearly linked to the exempt activity.

Citation *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] HCA 20 (Gageler CJ, Gordon, Edelman, Steward, Jagot JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2024/20.html

2.7 Baxter – NSW duty on fixing of trust

Facts

On 10 January 2021, Parkdaill Pty Ltd as trustee established the Windsmere Family Trust with Cynthia Gana Baxter, her spouse John Charles Baxter, and her son Antonio Stuart Baxter as named beneficiaries.

In 2021, the Trust acquired two properties in Surry Hills, New South Wales.

In November 2022, an agreement was reached for the transfer one of the properties (the Ridge Street Property) to Antonio for $2,815,000, funded by a loan from the trustee.

On 21 November 2022, the transfer agreement was formalised through signed documents, including a paper transfer form and a client authorisation form for electronic registration via the PEXA system.

On 22 November 2022, the Trust Deed was varied to change the Trust into a fixed trust, making Cynthia the sole beneficiary with a present entitlement to all income and capital of the Trust.

On 28 November 2022, the property transfer was registered.

Among other things, section 8 of the *Duties Act 1997* (NSW) (**Duties Act**) relevantly imposes duty on the following transactions:

1. transfer of dutiable property;
2. an agreement for the sale or transfer of dutiable property; and
3. another transaction that results in a change in beneficial ownership of dutiable property, other than an excluded transaction.

On 31 March 2023, the Chief Commissioner of State Revenue issued two assessments for duty totalling $228,888 for both properties. Cynthia objected to the assessments. The objection was partly allowed and the Chief Commissioner issued a reassessment for a single dutiable transaction with duty chargeable on the total unencumbered value of the two properties. The duty reassessed was $242,150.

Cynthia objected to the reassessment. The Chief Commissioner partly allowed this objection by reducing the interest component. On 5 October 2023, the Chief Commissioner issued another reassessment.

Cynthia sought review of the objection decisions in the NCAT.

The Chief Commissioner contended that the deed of variation made Cynthia the sole beneficiary of a new fixed trust and that the previous discretionary trust had ceased to exist.

Cynthia argued that she did not obtain any interest in the assets of the trust as a result of the deed of variation, as she did not have absolute, vested or indefeasible interests.

A trustee has a right of indemnity that allows a trustee to recoup from the trust's assets any expenses and liabilities properly incurred in the administration of the trust. Cynthia argued that the statutory provisions dealing with the trustee's right of indemnity confirmed that the trustee's rights took priority over any interest of a beneficiary. Cynthia referred to the High Court's reasoning in *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53, which stated that the beneficiaries of the unit trust in that case were not the owners of the trust property. She argued that similar reasoning should apply to "fixed trusts," where the beneficiaries' interests are not absolute due to the trustee's rights. Based on these reasons, Cynthia argued that the deed of variation could not have caused a change in beneficial ownership.

The Chief Commissioner referred to section 8(3) of the Duties Act, which defines "beneficial ownership" and includes a list of excluded transactions. One of these exclusions is a change in a trustee's right of indemnity. The Chief Commissioner argued that this exclusion means that any change in the trustee's right of indemnity should be disregarded when assessing whether there has been a change in beneficial ownership of dutiable property.

The Chief Commissioner also submitted that exchange of the relevant documents dealing with the Ridge Street Property did not occur on 21 November 2022 but occurred on 28 November 2022 when the documents were dated and/or exchanged on PEXA.

Cynthia submitted that there was a signed agreement for transfer of the Ridge Street Property to Antonio on 21 November 2021 and that Antonio had a right to specific performance of that agreement from that date. Therefore, Cynthia contended, Antonio had an equitable interest in the Ridge Street Property from that time.

Issues

1. Did the variation of trust to create a fixed trust result in a change of beneficial ownership?
2. Does the trustee's right of indemnity have any bearing on whether there has been a change of beneficial ownership?
3. When did the transfer of beneficial ownership of the Ridge Street Property occur?

© Brown Wright Stein Lawyers 2024

Decision

Creation of fixed trust

The NCAT concluded that the deed of variation caused a change in beneficial ownership of the trust property by converting the Windsmere Family Trust from a discretionary trust to a fixed trust with Cynthia as the sole beneficiary. Before the variation, the trust was a discretionary trust, where the beneficiaries' interests were subject to the trustee's discretion. After the variation, the trust became a fixed trust with Cynthia Gana Baxter as the sole beneficiary, having a present entitlement to all income and capital of the trust. This change in the nature of the beneficiaries' interests was substantial enough to attract duty.

Trustee's right of indemnity

The NCAT found that the trustee's right of indemnity, while a beneficial interest, did not affect the conclusion that there was a change in beneficial ownership due to the variation. The NCAT concluded that the exclusion of changes in the trustee's right of indemnity from the scope of dutiable transactions under section 8(1)(b)(ix) implies that this right should be disregarded when determining the extent of the beneficial interests of the beneficiaries for duty purposes.

The NCAT observed that Cynthia had not provided sufficient evidence to demonstrate how the trustee's right of indemnity would impact the beneficial ownership of the trust assets. Without clear evidence of the trust's liabilities or the extent of the trustee's right of indemnity, the NCAT could not conclude that this right materially affected the beneficial ownership determination.

Timing of transfer

There were discrepancies in the dates on various documents related to the transfer. For example, the loan agreement funding the purchase price was dated 28 November 2022, while the accompanying mortgage was dated 21 November 2022 but referred to the loan agreement bearing the later date. The NCAT considered the Transfer and the Purchaser's Declaration that were submitted to Revenue NSW. The Purchaser's Declaration referred to a transaction date of 21 November 2022. The NCAT concluded that there had been a dutiable transaction as of 21 November 2022, evidenced by the executed transfer and the documentation submitted to Revenue NSW. Therefore, the NCAT recognised that Antonio acquired an equitable interest in the Ridge Street Property as of 21 November 2022, given that the transfer was executed, and he had secured the necessary funding to complete the purchase.

Consequently, the Ridge Street Property was not subject to the change in beneficial ownership that resulted from the trust variation.

COMMENT – The Chief Commissioner here argued that the discretionary trust known as the "Windsmere Family Trust" ceased to exist and a new fixed trust came into existence. This is contrary to the approach the Chief Commissioner took in *Pontiac Trading Co Pty Ltd as trustee for the Karina Surjadi Family Trust v Chief Commissioner of State Revenue* [2024] NSWCATAD 114 (see our May 2024 Tax Training Notes).

Citation *Baxter v Chief Commissioner of State Revenue* [2024] NSWCATAD 153 (Senior Member E A MacIntyre)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/153.html

2.8 Cohen – NSW duty and transfers from deceased estate

Facts

In April 2016, Harry Cohen died, leaving a property in Goulburn to his three children, Stephen Cohen, Peter Cohen and Wendy Kent in equal shares, which was to be subject to Stephen's right to occupy the Property for 5 years rent-free.

At the time of Harry's death, an automotive business run by a third party not related to Harry or his children, Auto One, was permitted to use part of the property to run their business. Harry and his wife also operated a business that serviced and repaired caravans.

Harry's Will specifically provided that any rent received from tenants other than Stephen, was to be divided equally between Stephen, Wendy and Peter.

Stephen, Wendy and Peter came to an agreement that Stephen would buy Wendy and Peter's interests in the property. The executors of the will had the property valued at the date of Harry's death for $1,300,000, which all three children accepted.

Stephen offered $433,333.33 to each of Wendy and Peter for their shares of the property. Wendy and Peter refused this amount on the basis that it may not be reflective of the future income that they may receive from Auto One. Stephen offered each of Wendy and Peter an additional $100,000, which was accepted.

The contract for sale specified that the property was $1,599,000 and included special condition 45, which in summary, laid out the following points:

1. the property was being sold by the vendors in their capacity as executors of Harry's estate;
2. the vendors would only be entitled to a sum of $1,066,000.00 on the basis that Stephen, as purchaser is entitled to a one-third share as beneficiary of Harry's estate.

On 10 May 2017 the contract for sale was then sent by Stephen's solicitor to the Office of State Revenue NSW with a comment noting that the special condition 45, and that they estimated the duty payable as $44,140.00. The Office of State Revenue NSW confirmed the following day that they assessed the contract liable for duty on the reduced dutiable value of $1,066,000, being $44,140.00.

On 20 July 2017, a transfer of the property was executed.

On 21 March 2022, the Chief Commissioner issued a Notice of Investigation to Stephen in respect of a potential additional duty liability for the contract, for which the investigation concluded that duty had been underpaid.

The Chief Commissioner then wrote to Stephen on 2 May 2022 explaining that the dutiable value was the full price in the contract, not the reduced value, and issued a Duties Notice of Assessment indicating a further duty liability of $29,315 and additional interest. The interest was later remitted.

Stephen argued that the circumstances of the transaction were covered by section 63(2) of the *Duties Act* NSW which accounts for a reduction in the dutiable value where:

1. a transfer of dutiable property has been made by a legal personal representative of a deceased person to a beneficiary; and
2. the transfer is made pursuant to an agreement between the beneficiaries to vary the trusts contained in the will of the deceased or arising on intestacy.

© Brown Wright Stein Lawyers 2024

The Chief Commissioner relied on *Revenue Rulings – Deceased Estates* (DUT 046, 12 February 2020) (Revenue Ruling DUT 046) which outlines that a reduction in the dutiable value of a property in accordance with section 63(2) does not apply where there is an agreement for sale. Stephen argued that the Chief Commissioner's position in the ruling should not be taken into account as it was published three years following the sale of the property.

Issue

Is Stephen liable for the further duty liability of $29,315?

Decision

Member Frost noted that the Chief Commissioner's position on whether an agreement for sale came under the purview of section 63(2) published in the ruling had not changed, and that a contract could not be taken to be a transfer of dutiable property.

Member Frost discussed the legislative framework of the *Duties Act*, noting that in section 8 the legislation differentiates between a transfer, and an agreement for the sale or transfer of dutiable property and imposes duty on those transactions as a dutiable transaction.

Section 9 provides that duty is charged on an agreement for sale as if it were the case that it was a transfer of dutiable property, and that the transfer is taken to have occurred when the agreement is entered into.

Member Frost concluded that as the entering into of the agreement is not a transfer of property itself, section 63(2) of the *Duties Act* does not apply to Stephen, and he was liable to pay duty on the entire price of the contract.

Citation *Cohen v Chief Commissioner of State Revenue* [2024] NSWCATAD 136 (Senior Member S E Frost, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/136.html

2.9 Conexa – NSW landholder duty

Facts

The Rosehill Water Recycling Scheme was established in 2009 under the under the *Environmental Planning and Assessment Act 1979* (NSW) to deliver recycled water in south-west Sydney. The scheme involved SGSP Rosehill Network Pty Ltd constructing a 19-kilometre pipeline to facilitate the supply of recycled water.

The pipeline would have the following features:

1. the pipeline would be approximately 19 kilometres in length and buried in the ground;
2. there would be three reservoirs and two pumping stations along the pipeline;
3. in order to construct the pipeline, SGSP Rosehill Network Pty Ltd had to lay it in an open trench, over which the displaced soil would be replaced, or directional boring used through abandoned gas mains pipes;
4. the pipeline would originate at 2 East Parade, Fairfield and would be connected to a recycled water plant in Fairfield.

The Rosehill Water Recycling Scheme and the pipeline were governed by the *Water Industry Competition Act 2006* (NSW) (**WIC Act**).

On 30 September 2019, Conexa Sydney Holdings Pty Ltd acquired 100% of the shares in SGSP Rosehill Network Pty Ltd under a share sale agreement.

On 21 March 2022, the Chief Commissioner assessed the plaintiff to landholder duty under the *Duties Act 1997* (NSW) in the amount of $3,326,497, plus interest, on the basis that the total unencumbered value of the land holdings and goods of SGSP Rosehill Network Pty Ltd at the time of the acquisition was $60,749,000 comprising $4,110,000 for the Fairfield property, $46,390,000 for the pipeline (as goods) and $10,249,000 for the other plant and equipment of SGSP Rosehill Network Pty Ltd.

Conexa objected to this assessment and the Chief Commissioner disallowed this objection.

Conexa filed an amended summons at the Supreme Court of New South Wales for review of this decision under section 97(1)(a) of the TAA.

Conexa argued that the pipeline could not be classified as "goods" for the purposes of section 155 of the Duties Act as:

1. the pipeline as a whole was not moveable in its present condition, nor did the parties to the SSA purport to treat the pipeline as a moveable good;
2. while the WIC Act distinguished between ownership of water industry infrastructure and land, that does not mean that it determined the proper characterisation of the infrastructure itself;
3. *First North Shore Gas* is authority for the proposition that a pipeline cannot be classified as 'goods' once installed in land.

The Commissioner argued that the pipeline was a part of "land" for the purposes of section 155 of the Duties Act. A pipeline underneath land fell within the ordinary legal conception of land. The Commissioner argued that even if the pipeline was not an interest in land, it was an interest in goods for the purposes of calculating the unencumbered value of SGSP Rosehill Network Pty Ltd as a landholder.

Issue

1. Was the pipeline "land" under section 155 of the Duties Act?
2. Was the pipeline "goods" for the purposes of s 155 of the Duties Act?

Decision

<u>Was the pipeline an interest in land?</u>

Section 155 of the Duties Act provides:

> *155 How duty is charged on relevant acquisitions – private landholders*
>
> *(1) If an acquisition statement that discloses a relevant acquisition in a private landholder does not disclose any other acquisitions during the statement period, duty is chargeable, at the general rate, on the amount calculated by multiplying the* ***unencumbered value of all land holdings and goods of the landholder*** *in New South Wales (calculated at the date of acquisition of the interest acquired) by the proportion of that value represented by the interest acquired in the relevant acquisition.* ***[emphasis added]***

The term "land holding" is defined in section 147 of the Duties Act as "an interest in land other than the estate or interest of a mortgagee, chargee or other secured creditor".

Generally, where a chattel is affixed to land so that it cannot be removed without damaging it, the chattel ceases to be goods and will only regain the status of a chattel if it is severed from the land. However, section 64 of the WIC Act provides that:

> *64 Ownership of water industry infrastructure*
>
> *(1) Except where another Act expressly provides otherwise, water industry infrastructure is owned by the person that constructs or installs it, or on whose behalf it is constructed or installed, or any person that subsequently acquires title to it, whether or not the land in, on, under or over which it is situated is owned by that person.*

The Court held that the proper construction of section 64 had the effect of causing the things comprising of the water industry infrastructure to retain their character as chattels despite their affixation to the land. This is because:

1. firstly, there is a general principle that a statutory provision which vests ownership of items in a person that would otherwise be fixtures does not merely confer an interest in the land itself. It would be necessary to find in the statute some indication of an intention to take that further step of conferring an interest in the land. There was no such indication in the WIC Act;
2. secondly, there are a number of court decisions which have concerned statutory severance provisions of a similar kind to section 64 where the relevant items were treated as retaining their character as chattels;
3. thirdly, the decision of the Court of Appeal in *Chief Commissioner of State Revenue v Shell Energy Operations No 2 Pty Ltd* (2023) 116 ATR 337 was closely analogous to the present case as it concerned vesting orders made under statute which had the effect of legally severing the assets concerned from the land.

While the severance in the present case occurred by section 64 of the WIC Act itself, the Court held that there is no reason in principle why the present case should be different to *Shell Energy (No 1)*. Therefore, the Court held that the pipeline remained a chattel despite its installation in land.

Was the pipeline "goods" for the purposes of section 155?

The Court referred to the decision in *Shell Energy (No 1)* that the items constituting the power stations, having been legally severed from the land, were "goods" for the purposes of Chapter 4 of the Duties Act. In that case, the items fell within that notion of "goods" because the ordinary understanding of that notion at general law included former chattels legally severed from the land.

The Court considered itself bound by the reasoning in *Shell Energy (No 1)* and, therefore, held that the pipeline were "goods".

Therefore, the Court affirmed the assessment by the Commissioner and dismissed the amended summons.

Citation *Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 628 (Richmond J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/628.html

© Brown Wright Stein Lawyers 2024

2.10 Appeal update - Liang

Zhi Dong Liang and Lai Chu Yeung have been successful in their appeal to the Federal Court of Australia against the decision of the AAT in *CVMW and Commissioner of Taxation (Taxation)* [2023] AATA 4039 (see our February 2024 Tax Training Notes). In that decision, the AAT concluded that Zhi Dong and Lai Chu had not satisfied their onus that cash deposits to a trust they controlled were not their income as beneficiaries of the trust.

An important factor was that, during the AAT hearing, the Commissioner agreed to narrow the issues in dispute solely to whether the deposits made into the bank accounts of the trust were income. The Commissioner accepted that the trust was only engaged in property investment and did not provide services to anyone. The Commissioner also accepted that the deposits did not constitute an opportunistic gain made with a profit-making purpose in the course of the carrying on of a business such that the gain could form part of the ordinary income of the trust.

In the Federal Court, Logan J held that a rejection of Zhi Dong and Lai Chu's evidence did not lead to a conclusion that the objection decision must be affirmed. Rather, the AAT was required to review, on the merits and on the material before it, the objection decision in light of the issues as refined and with the concessions made.

Logan J stated that, given the way the issues in dispute were confined to whether the deposits had the character of income, if the deposits were found not to be ordinary income, the AAT was obliged to set aside the Commissioner's decision. The onus was on Zhi Dong and Lai Chu to prove that the character of the deposits was not income under ordinary concepts. Logan J distinguished between the situation where the Commissioner raises assessments on a default basis under section 167 of the ITAA 1937 and makes an estimate of taxable income. Where an estimate of income has been made of taxable income by the Commissioner, it is necessary for the taxpayer to show what their income was for the year. But this was not a case where the Commissioner had made an estimate of the taxpayer’s income.

Based on the evidence before it and concessions from the Commissioner, the Logan J determined that given concessions that the deposits were not income from services, were not interest, were not dividends, were not opportunistic profit-making gains, the AAT ought to have concluded that whatever the deposits might be, they were not, in the hands of the trustee of the trust, income.

The appeal was allowed and the objections of Zhi Dong and Lai Chu were allowed in full.

Citation *Liang v Commissioner of Taxation* [2024] FCA 535 (Logan J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/535.html

© Brown Wright Stein Lawyers 2024

2.11 Appeal update – Buzadzic

The taxpayer in *Buzadzic v Federal Commissioner of Taxation* [2024] FCAFC 50 has applied to the High Court for special leave to appeal against the Full Federal Court's decision regarding default assessments for unreported income (and associated penalties) issued on the basis there had been fraud or evasion.

2.12 Other tax and superannuation related cases in period of 8 May 2024 to 13 June 2024

Citation	Date	Headnote	Link
Waller and Comptroller-General of Customs (Taxation) [2024] AATA 1097	16 May 2024	TAXATION – luxury car tax (LCT) – whether importation of a car liable to LCT – whether exemption for LCT applicable to taxable supply of car relevant to taxable importation of car – where LCT imposed on an importation of a car is a duty of customs – where car more than 30 years old – whether customs duty exemptions apply to LCT – refund application rejected – reviewable decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1097.html
Keddas Pty Ltd ATF Kaluarachchi Family Discretionary Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 138	22 May 2024	TAXES AND DUTIES - Surcharge land tax – Applicant holds residential land on trust – discretionary trust – whether, during the relevant land tax years, foreign persons were excluded as a beneficiary under the terms of the trust deed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/138.html
Clifford v Tax Practitioners Board (No 2) [2024] FCA 557	24 May 2024	ADMINISTRATIVE LAW – registered tax agents – appeal from decision of the Administrative Appeals Tribunal affirming decision of Tax Practitioners Board to terminate the applicant's registration as registered tax agent – termination of registration under s 40-5(1) of the Tax Agent Services Act 2009 (Cth) for ceasing to meet tax practitioner registration requirements – where Board and Tribunal found that the applicant had breached the Code of Professional Conduct and was not a "fit and proper person" – where applicant prohibited from reapplying for registration as a tax agent for 18 months – whether Tribunal was legally required to consider alternative lesser sanctions under Subdiv 30-B when exercising discretion to terminate registration under s 40-5(1)	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/557.html

© Brown Wright Stein Lawyers 2024

Citation	Date	Headnote	Link
Waters and Commissioner of Taxation (Taxation) [2024] AATA 1211	27 May 2024	TAXATION – onus case – whether the applicants have satisfied the burden of proof under s 14ZZK(b) of the *Taxation Administration Act 1953* (Cth) – whether the evidence could establish taxpayers' true taxable income – whether it is necessary and appropriate to remit penalties and shortfall interest charge – decisions affirmed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1211.html
Mitri and Commissioner of Taxation (Taxation) [2024] AATA 1268	28 May 2024	TAXATION – INCOME TAX – decisions giving effect to tribunal's conclusions in earlier reasons TAXATION – ADMINISTRATIVE PENALTIES – whether applicants discharged burden of proving assessments of administrative penalties are excessive – whether shortfalls due to intentional disregard of the law or recklessness – whether taxpayer exercised reasonable care – whether remission appropriate – decisions set aside – decisions partly allowing objections substituted TAXATION – SHORTFALL INTEREST CHARGE – whether further remission appropriate – decisions affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1268.html
GSXZ and Tax Practitioners Board [2024] AATA 1303	30 May 2024	TAX AGENT REGISTRATION – termination of registration as a tax agent – preclusion from registration for 12 months – failure to act honestly and with integrity – failure to comply with taxation laws – failure to respond to requests and directions of Tax Practitioners Board – fit and proper person to be a registered taxation agent – decision varied by consent as to date of effect of termination but otherwise affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1303.html

© Brown Wright Stein Lawyers 2024

Citation	Date	Headnote	Link
Wang v Commissioner of Taxation [2024] FCA 585	4 June 2024	TAXATION – where the Administrative Appeals Tribunal affirmed the Commissioner of Taxation's decision not to allow the applicant's objection to a default assessment issued pursuant to s 167 of the *Income Tax Assessment Act 1936* (Cth) – where the default assessment was made applying the asset betterment methodology – whether the applicant could satisfy the burden of proof in s 14ZZK(b)(I) of the *Taxation Administration Act 1953* (Cth) by establishing errors in the default assessment – whether Tribunal erred in applying the "all or nothing" approach – no error in the Tribunal's approach	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/585.html
Feng v Chief Commissioner of State Revenue [2024] NSWCATAD 155	5 June 2024	TAXES AND DUTIES — Land tax — Joint owners — liability to surcharge purchaser duty — deferral of duty — interest and penalties — costs	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/155.html
Doery and Commissioner of Taxation (Taxation) [2024] AATA 1493	7 June 2024	TAXATION - application for review of an objection decision – application for release from taxation liability – eligible and non-eligible taxation liabilities – whether taxpayer would suffer serious hardship if he were required to satisfy his taxation liabilities – meaning of phrase 'serious hardship' – income/outgoing test – assets/liabilities test – other relevant factors in deciding whether to exercise discretion to grant release from taxation liabilities – serious financial hardship found – other relevant factors weigh against exercising discretion – reviewable decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/1493.html

© Brown Wright Stein Lawyers 2024

3. Federal Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023	16/11	18/3	18/3	16/5	31/5
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	16/5	3/6
Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024	07/12	21/3	25/3	16/5	31/5
Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) 2024	07/2	21/3	25/3	16/5	31/5

3.2 Waiver of requirement for a recipient of a supply of a motor vehicle to hold tax invoice

On 9 May 2024, the Commissioner released draft Legislative Instrument LI 2024/D6. Generally, when an input tax credit is not attributable to a tax period and cannot be claimed until the recipient holds a tax invoice.

Sometimes a motor vehicle dealer will receive a 'motor vehicle incentive payment', for example fleet rebates and run-out model support, which are third-party consideration provided by the manufacturer to the motor vehicle dealer for the supply of the motor vehicle to the recipient.

The invoice from the motor vehicle dealer generally only shows the amounts paid by the recipient for the vehicle. The recipient would not know whether third-party consideration has been provided by the manufacturer to the motor vehicle dealer. Therefore, the recipient generally will not know that the document they hold does not meet the requirements in subparagraphs 29-70(1)(c)(iii) and 29-70(1)(c)(vi) of the GST Act and that the document is not a valid tax invoice.

The instrument, once commenced, will waive the requirement for a recipient of a supply of a motor vehicle in certain circumstances to hold a tax invoice before the relevant input tax credit will be attributable to a tax period.

ATO reference *Legislative Instrument LI 2024/D6*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI2024D6/00001

© Brown Wright Stein Lawyers 2024

3.3 PAYG withholding for US resident entertainers and sportspersons

On 9 May 2024, the Commissioner released draft Legislative Instrument LI 2024/D7 for consultation. The instrument, once commenced, will replace the instrument titled "*Taxation Administration Act 1953 – Pay as you go withholding – Variation to remove the requirement to withhold from payments for certain US resident entertainers and sport persons (F2014L00379)*".

Since 1 July 2004, withholding has applied to payments related to entertainment and sports activities conducted in Australia by foreign residents. Under Article 17 of the Australia-US double taxation agreement, a US resident is not subject to Australian income tax unless their earnings from those activities exceed US $10,000 (or its equivalent in Australian dollars) for that income year.

The instrument will vary the amount a payer must withhold, to nil, from withholding payments covered by paragraph 1 of Article 17 of the Australia and US international tax agreement, where:

1. the payee is a US resident entertainer, including a theatrical, motion picture, radio or television artiste, musician, and athlete;
2. the payment is for activities the payee undertakes in Australia as an entertainer; and
3. the sum of all such payments does not exceed $US10,000, or the equivalent amount in Australian dollars for the relevant income year.

Without a withholding variation, the US resident would be required to apply to the ATO to obtain a formal variation to nil. This instrument will allow a payer to determine whether the conditions for withholding variation specified in the instrument are met, without the need to refer the issue to the ATO.

ATO reference *Legislative Instrument LI 2024/D7*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI2024D7/00001

3.4 Administrative Review Tribunal Bills

The Administrative Review Tribunal Bill 2024 was passed in Federal Parliament on 28 May 2024 and was given Royal Assent on 3 June 2024. The *Administrative Review Tribunal Bill 2024* (Cth) established the new Administrative Review Tribunal to replace the Administrative Appeals Tribunal.

The new Tribunal is to commence as soon as practicable before the end of 2024.

w
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr7117%22

3.5 2024 Federal Budget Measures

Reforming treatment of transfer balance cap for successor fund transfers

On 26 October 2023, the Assistant Treasurer and Minister for Financial Services announced a measure to reform the treatment of the transfer balance cap provisions for successor fund transfers. The measure was re-announced on 13 December 2023 as part of the 2023-24 Mid-Year Economic and Fiscal Outlook.

© Brown Wright Stein Lawyers 2024

The measure will ensure individuals with a capped defined benefit income stream are not adversely impacted in the event of a successor fund transfer between superannuation funds.

Currently, for recipients of capped defined benefit income streams, the balance of their transfer balance account can be unintentionally affected as a result of the original income stream being treated as ceasing and a new stream beginning.

The measure is intended to be retrospectively applied from 1 July 2017.

w https://www.ato.gov.au/about-ato/new-legislation/in-detail/superannuation/reforming-treatment-of-transfer-balance-cap-for-sfts

Strengthening the foreign resident CGT regime

On 14 May 2024, the Commonwealth Government announced it will strengthen the integrity of the foreign resident CGT regime. The amendments will apply to CGT events starting on or after 1 July 2025 and will:

1. clarify and broaden the types of assets that foreign residents are subject to CGT;
2. amend the point-in-time principal asset test to a 365-day testing period; and
3. require foreign residents disposing of shares and other membership interests exceeding $20 million in value to notify the ATO, prior to the transaction being executed.

The amendments are intended to ensure that foreign residents are taxed in Australia on direct and indirect sales of assets with a close economic connection to Australian land. The notification process is intended to improve oversight and compliance with the foreign resident CGT withholding rules, where a vendor self-assesses their sale is not taxable real property.

These reforms are intended to align Australia's tax law for foreign resident capital gains with OECD standards and international best practice.

The Commonwealth Government will consult on the implementation details of the measure.

w https://www.ato.gov.au/about-ato/new-legislation/in-detail/businesses/strengthening-the-foreign-resident-cgt-regime

Hydrogen Production and Critical Minerals Tax Incentives

On 14 May 2024, the Commonwealth Government announced it will establish the following:

1. a temporary Hydrogen Production Tax Incentive to incentivise renewable hydrogen production for eligible Australian resident corporations with a time-limited and uncapped refundable tax offset. The incentive will provide a $2 incentive per kilogram of renewable hydrogen produced. The incentive will be available for up to ten years, between 1 July 2027 and 30 June 2040, for projects that reach final investment decisions by 2030; and
2. a temporary Critical Minerals Production Tax Incentive from 1 July 2027. The incentive will provide eligible recipients with a refundable tax offset of 10% for the costs of processing the 31 critical minerals currently listed in Australia. The credit will be available for a maximum of 10 years, between 1 July 2027 and 30 June 2040.

w https://www.ato.gov.au/about-ato/new-legislation/in-detail/businesses/hydrogen-production-and-critical-minerals-tax-incentives

© Brown Wright Stein Lawyers 2024

New royalty penalty and withdrawal of intangibles measures

On 14 May 2024, the Commonwealth Government announced from 1 July 2026 it will introduce a new penalty provision for taxpayers with more than $1 billion in global turnover annually, who have mischaracterised or undervalued royalty payments to which withholding tax would normally apply.

The Commonwealth Government is no longer proceeding with the 2022–23 October Budget measure *Multinational Tax Integrity Package – denying deductions for payments relating to intangibles held in low - or no-tax jurisdictions*.

w https://www.ato.gov.au/about-ato/new-legislation/in-detail/businesses/new-royalty-penalty-and-withdrawal-of-intangibles-measure

Extension of the $20,000 instant asset write-off

On 14 May 2024, the Commonwealth Government announced it will extend the $20,000 instant asset-write off by a further 12 months until June 2025.

Under this measure, small businesses, with an aggregated turnover of less than $10 million, can immediately deduct the full costs of an eligible asset costing less than $20,000 that are first used, or installed ready for use, between 1 July 2023 and 30 June 2025.

The $20,000 threshold will apply on a per asset basis, meaning small businesses can instantly write off multiple assets.

Assets valued at $20,000 or more can continue to be placed into the small business simplified depreciation pool. In this pool, assets can be depreciated at 15% in the first income year and 30% each income year after that.

w https://www.ato.gov.au/about-ato/new-legislation/in-detail/businesses/small-business-support-20000-dollar-instant-asset-write-off

3.6 Requirement to lodge tax returns

On 15 May 2024, the Acting Commissioner of Taxation made a legislative instrument setting out who is required to lodge an income tax return, a franking return, a venture capital deficit tax return and an ancillary fund return for the 2024 income year.

The legislative instrument introduces the new requirement for certain entities whose income is exempt under Division 50 of ITAA 1997 to lodge an 'NFP self-review return'.

The legislative instrument lists who must lodge an income tax returns and the exceptions to the lodgment of an income tax return.

w https://www.legislation.gov.au/F2024L00550/asmade/text

© Brown Wright Stein Lawyers 2024

3.7 Requirement to lodge return for child support

On 15 May 2024, the Acting Commissioner of Taxation made a legislative instrument setting out the requirements to lodge income tax returns for the 2024 income year for carers entitled to child support (other than a non-parent carer) or a liable parent as defined in the *Child Support (Assessment) Act 1989* (Cth).

Liable and recipient parents under a child support assessment are required to lodge an income tax return for the 2024 year. Exceptions for lodging a return are:

1. a person's taxable income was less than $28,464; and
2. the person was in receipt of one or more Australian Government pensions, allowances or payments (listed in 5(2)(b) of the instrument) for the whole of the 2024 year.

The income tax return must be lodged by 31 October 2024, unless they have a substituted accounting period. For a substituted accounting period, the person must lodge the return no later than 4 months after the end of their substituted accounting period.

w https://www.legislation.gov.au/F2024L00551/latest/text

4. State Legislation

4.1 Victorian state tax amendments

On 4 June 2024, the *State Taxation Amendment Bill 2024* (Vic) was given royal assent.

Among the numerous amendments, the Bill proposes to amend:

1. the *Duties Act 2000* in relation to duty chargeable on premiums paid in relation to contracts of business insurance;
2. the *Land Tax Act 2005* in relation to the assessment of joint owners of land and certain trusts for land tax, a new land tax exemption for social housing from 1 January 2025, and exemptions from vacant residential land tax for land used as a holiday home;
3. the *Payroll Tax Act 2007* in relation to exemptions for non-Government schools and not-for-profit organisations providing educational services to those schools;
4. the *Taxation Administration Act 1997* to make further provision for criminal liability of officers of casino operators.

w https://www.legislation.vic.gov.au/bills/state-taxation-amendment-bill-2024

4.2 Tasmanian stamp duty exemption

On 21 May 2024, the Tasmanian government published measures stating that:

1. land tax free threshold will rise from $99,999.99 to $124,999,999 and will take effect on and from 1 July 2024;
2. the existing three-year land tax exemption for new builds that are built for the purpose of being long term rentals has been extended to 30 June 2026;
3. the existing one-year land tax exemption for short term visitor accommodation that is being converted to a long-term rental has been extended to 30 June 2026;
4. the property transfer duty concession for established home will rise to 100% for eligible first home buyers of established homes valued up to $750,000 (previously, was $600,000) and will apply from 18 February 2024 to 30 June 2026, inclusive.
5. property transfer duty for eligible pensioners selling their existing home to downsize to a new home or unit (up to a value of $600,000) has been extended to 30 June 2025.

w https://www.sro.tas.gov.au/Documents/2024-election-measures-factsheet.pdf

4.3 Queensland budget 2024-25

On 11 June 2024, the Queensland Government released its budget for 2024-25. The following key budget measures relate to revenue measures the Queensland government intends to undertake:

1. allocating resources to the revenue and penalty debt administration. The measure is expected to support revenue benefits of $970.1 million over 4 years;

© Brown Wright Stein Lawyers 2024

2. increasing the surcharge rate of land tax for foreign companies and trustees of foreign trusts, and absentees, from 2 per cent to 3 per cent. Ex gratia relief will continue to be offered for Australian-based foreign entities whose commercial activities make a significant contribution to the Queensland economy and community (subject to eligibility criteria). It is estimated that this measure will result in additional taxation revenue of approximately $330 million over the 4 years ending 2027-28;
3. increasing the rate of additional foreign acquirer duty (AFAD) from 7 per cent to 8 per cent. AFAD is levied on foreign buyers of residential property in Queensland, with ex gratia relief offered to Australian-based foreign entities whose commercial activities involve significant development by adding to the supply of housing stock in Queensland (subject to eligibility criteria). It is estimated this measure will result in additional taxation revenue of approximately $90 million over the 4 years ending 2027-28;
4. adjusting the eligibility criteria for the regional payroll tax discount to exclude extremely large businesses. From 2024-25, businesses with Queensland taxable wages of more than $350 million on an annual basis will not be eligible for the discount. It is estimated this measure will result in additional taxation revenue of approximately $20 million over 4 years;
5. extending the 50 per cent payroll tax rebate on the exempt wages of apprentices and trainees until 30 June 2025; and
6. increasing the eligibility thresholds for the first home concession and first home vacant land concession. Eligibility for the first home concession will be extended to properties valued up to $800,000, with no duty payable on homes valued up to $700,000 and a partial concession for homes between $700,000 and $800,000. Eligibility for the first home vacant land concession will be extended to $500,000, with no duty payable on land valued up to $350,000 and a partial concession for land valued between $350,000 and $500,000.

w https://budget.qld.gov.au/at-a-glance/w https://budget.qld.gov.au/files/Budget_2024-25_BP4_Revenue_measures.pdf

4.4 Payroll tax (SA) – exemption for general practitioner wages for bulk-billed services

On 22 May 2024, the South Australian Government announced that it will exempt the wages earned by GPs from payroll tax for bulk-billed services provided to patients. The exemption will apply from 1 July 2024 to all GP practices liable for payroll tax, whether their GPs are engaged as employees or deemed as contractors. This exemption will apply to practices which successfully applied for the State Government's existing payroll tax amnesty, set to expire 30 June 2024, as well as practices which fully met their existing payroll tax exemptions.

The relevant amendments to the *Payroll Tax Act 2009* (SA) will be included in the South Australian Budget bill, set to be tabled on 6 June 2024.

w https://www.premier.sa.gov.au/media-releases/news-items/sa-government-delivers-tax-cut-to-protect-bulk-billing-by-gps

4.5 Payroll tax (Vic) – exemptions for certain general practitioners

On 22 May 2024, the Victorian Government announced that all Victorian general practice businesses will be exempt from any outstanding or future assessment issued for payroll tax on payments to contractor GPs for the period up to 30 June 2024. A further 12-month exemption from payroll tax, provided through the Treasurer's

existing 'ex gratia' powers, will be available for any general practice business that has not already received advice and begun paying payroll tax on payments to their contractor GPs.

From 1 July 2025, the Victorian Government will provide an exemption from payroll tax for payments to contractor GPs and to employee GPs for providing bulk-billed consultations.

w https://www.premier.vic.gov.au/supporting-more-bulk-billed-consults-victorians

4.6 Payroll tax (Vic) – annual reconciliations and threshold increases

The payroll tax thresholds in Victoria will increase as follows

1. the threshold for annual returns will increase from $700,000 to $900,000 from 1 July 2024, then to $1 million from 1 July 2025, and
2. the threshold for monthly returns will increase from $58,333 to $75,000 from 1 July 2024, then to $83,333 from 1 July 2025.

There will also be a phasing of the threshold for every dollar of wages above $3,000,000 and up to $5,000,000. Businesses with Australian wages above $5,000,000 will not receive any payroll-tax free threshold.

w https://www.sro.vic.gov.au/changes-payroll-tax-threshold

© Brown Wright Stein Lawyers 2024

5. Rulings

5.1 Exempt income of international organisations and persons connected with them

The Commissioner has released draft Taxation Ruling *TR 2024/D2 – income tax: exempt income of international organisations and persons connected with them* for comment.

The ruling considers exempt income of international organisations and persons connected with them. Relevantly, income is made exempt by section 6-20 of the ITAA 1997 because of the *International Organisations (Privileges and Immunities) Act 1963* (the **IOPI Act**). The IOPI Act provides for the conferral of privileges and immunities, including tax exemptions, for international organisations.

The ruling expands on previously released draft ruling, *Taxation Ruling* TR 2019/D1.

The ruling considers when an international organisation is covered by the IOPI Act, and when a person is connected with an international organisation.

The IOPI Act will apply to an organisation if regulations declare it to be an international organisation for the purposes of the IOPI Act. The extent to which a particular organisation will be exempt from tax is stipulated in the relevant regulation.

The ruling suggests applying for a private binding ruling if there is uncertainty.

ATO reference *Draft Taxation Ruling TR 2024/D2*
w https://www.ato.gov.au/law/view/document?docid=DTR/TR2024D2/NAT/ATO/00001

© Brown Wright Stein Lawyers 2024

6. Private Binding Rulings

6.1 Main residence exemption and active asset

Facts

X is an Australian resident for tax purposes.

X purchased a property in February 20XX which contains a dwelling and 5 small commercial shop outlets on a single lot of land. The property is less than 2 hectares in size.

Since acquisition, X has been residing in the dwelling as their main residence. X has not used the dwelling to produce income. The dwelling comprises 80% of the land and the shop outlets comprise under 20% of the land.

From the financial years ended 20XX-20XX, X used one of the shop outlets to run their business. The business was carried on through a discretionary trust entity, which X's spouse was the trustee and X a beneficiary. During the years that the business operated, X actively worked in the business on a full-time equivalent basis. The other shop outlets were leased to unrelated entities.

During this time, more of the land was used to conduct X's business than was used to derive rent. This meant that more of the commercial area was used for business purposes. However, on average, X's business derived more rent than business income.

In 20XX, X's business changed and no longer required a physical premises. The shop outlets were all leased to unrelated entities.

X is now preparing to sell the property.

Questions

1. Does the main residence exemption apply in accordance with section 118-100 of the ITAA 1997 where the land comprises of both main residence and commercial premises (shops)?
2. Can the land be deemed to be an active asset in accordance with section 152-35 of the ITAA 1997 where the land has mixed use?

Ruling

The ATO ruled yes for both questions.

<u>Main Residence</u>

The ATO confirmed that X used the dwelling as their main residence during your ownership period and did not use it to produce income at any point during their ownership period. Therefore, X is entitled to the full main residence exemption on the disposal of the main residence, and will need to calculate the proportion of the main residence's floor area.

<u>Active Asset</u>

The active asset test in section 152-35 of the ITAA 1997 is satisfied where an asset is owned for more than 15 years, and the asset was an active asset for a total of at least 7.5 years in the test period. The test period begins when the asset was acquired and ends at the CGT event. A CGT asset is an active asset if it is owned

and used, or held ready for use, by the taxpayer, the taxpayer's affiliate or another entity that is connected with the taxpayer in the course of carrying on a business that is carried on, whether alone or in partnership. Where an asset's main use is to derive rent, it cannot be an active asset.

The ATO accepted that X's business was operated for over 7.5 years during the financial years ended 20XX-20XX. The Property therefore meets the active asset test as X owned the property for more than 15 years and it was an active asset for more than 7.5 years during this time.

The business was operated by the discretionary trust. The ATO concluded that the discretionary trust was connected to X because it could be reasonably expected that X's spouse in their capacity as trustee would act in accordance with X's directions or wishes.

Ignoring personal use of the Property, the ATO formed the view that X used more of the non-residential land by area for business purposes than to derive rent. Therefore, as the majority of the non-residential land by area was used for business purposes, the ATO considered that the main use of the land is not to derive rent. Therefore, the property was not excluded from being an active asset.

The ATO concluded that the property is an active asset as it meets the active asset test and was used by the trust connected with X in the course of carrying on a business. The ATO did not consider X's eligibility for the small business concessions in the ruling.

ATO reference *Private Binding Ruling Authorisation No. 1052231077344*
w https://www.ato.gov.au/law/view/document?docid=EV/1052231077344

6.2 Depreciating assets

Facts

The trust acquired a property, which it held on capital account.

The property is a manufacturing and distribution facility, which is leased to an unrelated tenant.

On X September 20XX, the trust entered into a contract for sale to dispose of the property, with settlement occurring on X September 20XX.

The contract included clauses that defined the 'Inclusions' for the sale, which included plant and equipment, fittings, fixtures and chattels at the property on the contract date owned by the vendor.

The contract allocated a 'nil' value to the plant and equipment, fittings, fixtures and chattels owned by the vendor, being the Division 40 depreciating assets and which gives rise to a balancing adjustment. For the purposes of this ruling, the inclusions did not include any Division 43 capital works.

The trust and the purchaser are not related parties and were dealing on an arm's length basis in respect of this transaction.

Questions

1. Was the trust the holder of Division 40 assets under item 10 in section 40-40 of the ITAA 1997?
2. Did a balancing adjustment event occur at the time of the property settlement under section 40-295 of the ITAA 1997 in respect of the Division 40 assets that were sold by the trust?

© Brown Wright Stein Lawyers 2024

3. Where a balancing adjustment event occurs, is the termination value of the Division 40 assets in respect of the sale of the property equal to 'nil'?

Ruling

Did the trust hold the Division 40 assets?

The ATO ruled yes. The table in section 40-40 of the ITAA 1997 is used to determine who holds an asset. Items 1 to 9 of the table do not apply to the inclusions because, broadly, they are not leased luxury cars (item 1), assets on leased land (items 2-3), other leased assets (item 4), assets subject to a right to purchase (items 5-6), partnership assets (item 7), or mining, quarrying or prospecting information (items 8-9).

Accordingly, item 10 of the table applies and a depreciating asset is held by the owner of the asset, or the legal owner if there is both a legal and equitable owner.

Did a balancing adjustment event occur at the time of the property settlement?

The ATO ruled yes. Under paragraph 40-295(1)(a) of the ITAA 1997, a balancing adjustment event occurs for a depreciating asset if the taxpayer stops holding the asset. In accordance with section 40-40 of the ITAA 1997, the trust ceased to hold the Division 40 depreciating assets as the legal owner on the settlement date.

Is the termination value of the Division 40 assets in respect of the sale of the property equal to 'nil'?

The ATO ruled yes. The meaning of 'termination value' of a depreciating asset is set out in section 40-300 of the ITAA 1997. Generally, the termination value is the 'amount' the taxpayer received, or is entitled to receive, for the balancing adjustment event. In accordance with subsection 2-15(3) and subsection 995-1(1) of the ITAA 1997, the term 'amount' is defined to include a nil amount.

While the contract allocated a 'nil' value to the Division 40 depreciating assets, item 6 in the table in subsection 40-300(2) of the ITAA 1997 can apply to deem the termination value of the depreciating asset to be its market value where a taxpayer stops holding a depreciating asset under a non-arm's length dealing and the consideration, or termination value, the taxpayer received is less than its market value.

As the parties were dealing at arm's length in relation to the sale of the property, the Commissioner accepted the allocation of a 'nil' value to the inclusions as set out in the contract.

TIP – when allocating sales proceeds in a contract it is common to allocate proceeds equal to the written down value to each depreciating asset and otherwise provide no allocation of proceeds, allowing the parties to allocate on a reasonable basis at a later date.

ATO reference *Private Binding Ruling* Authorisation No. 1052206528369
w https://www.ato.gov.au/law/view/document?docid=EV/1052206528369

6.3 Residency of trusts

Facts

Trust A is an Australian discretionary trust. Company A is an Australian incorporated company and has always acted as the trustee for Trust A.

The Appointor of Trust A proposes to appoint Company B, which is a foreign resident company, as a co-trustee of Trust A.

Question

Does CGT Event I2 in section 104-170 happen on the appointment of a foreign resident company as co-trustee for Trust A?

Ruling

The ATO ruled no.

CGT event I2 happens if a trust stops being a 'resident trust for CGT purposes'. 'Resident trust for CGT purposes' is defined in section 995-1(1) of the ITAA 1997 as follows:

> *resident trust for CGT purposes: a trust is a resident trust for CGT purposes for an income year if, at any time during the income year:*
>
> *(a) for a trust that is not a unit trust, a trustee is an Australian resident or the central management and control of the trust is in Australia; or*
>
> *(b) ...*

Section 6(1)(b) of the ITAA 1936 defines which companies are residents of Australia as follows:

> *a company which is incorporated in Australia or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia.*

Section 995-1(1)(a) states that the trust will be an Australian resident where at least one trustee is an Australian resident. As Company A is incorporated in Australia and will remain as a co-trustee, Trust A will continue to be an Australian resident for CGT purposes.

Therefore, CGT event I2 will not occur on the appointment of Company B as a co-trustee of Trust A.

ATO reference *Private Binding Ruling Authorisation No. 1052239966562*
w https://www.ato.gov.au/law/view/document?docid=EV/1052239966562

6.4 Class shares and SBCGT concessions

Facts

A discretionary trust was established for the benefit of A, their wife B, and their family. The Trust carried on a primary production business in partnership.

In a number of income years before 20XX, the Trust incurred losses or had no "net income" (as a result of carry-forward tax losses). In other years, the Trust's net income was small and was distributed to Individual A and Individual B, their son and in some cases X Pty Ltd. In 20XX A's distribution was 20% and B's distribution was 80%.

X Pty Ltd was incorporated in 19XX by A's parents and carried on an agricultural business for many years. A and B have been connected with X Pty Ltd since the early 19XXs when they were married. In the 20XX income

year X Pty Ltd sold some Water licences and sought to apply the small business CGT concessions to the capital gain that resulted.

At that time, the issued share capital of X Pty Ltd was held and remains held as follows:

1. 3,000 A class shares to B;
2. 1 A class share to A;
3. 3,000 B class shares to the Trust;
4. 3,000 D class shares to the Trust; and
5. 3,000 IM shares to the Trust.

X Pty Ltd's shares confer equal rights to participate in surplus assets on a winding up and all shares carry an equal vote. X Pty Ltd's directors have the power to pay dividends to the holders of one or more classes of its shares, to the exclusion of the holders of the other classes.

Before the introduction of capital gains tax, X Pty Ltd purchased farmland and water licences for the benefit of the farmland.

In 20XX, Individual A transferred their 3,000 A class shares in X Pty Ltd to Individual B, resulting in a change in the majority underlying interest in X Pty Ltd. The farmland and Water Licences therefore stopped being pre-CGT assets and were treated as being acquired by X Pty Ltd in 20XX, at their market value, at that time. A pre-CGT reserve of $X,XXX,XXX was established in X Pty Ltd's financial accounts attributable to the resetting of the Farmland and Water Licence assets under Division 149.

The Water Licences were sold in the 20XX income year. X Pty Ltd derived a taxable capital gain of $X,XXX,XXX on the disposal of the Licences, which was reduced to nil by applying the 50% active asset reduction and using carry forward losses. The farmland was sold a few years ago.

Individual A has dementia and moved into a nursing home in mid-20XX. The taxpayer recently realised that the capital gain could have been disregarded entirely if X Pty Ltd had chosen the 15-year exemption instead of the 50% reduction. In addition, the 15-year exemption would have allowed the disregarded amount to be paid directly to a CGT concession stakeholder, tax free.

The ATO assumed that in 20XX X Pty Ltd satisfied the basic conditions in Subdivision 152-A**.**

Questions

1. Did X Pty Ltd have a significant individual for a total of at least 15 years (even if the 15 years was not continuous and it was not always the same significant individual) during which X Pty Ltd owned the Water Licences, for the purposes of paragraph 152-110(1)(c) of the ITAA 1997?
2. Can the capital gain that accrued before the resetting in 20XX of the pre-CGT asset (the Water Licences), under Division 149 of the ITAA 1997, be distributed by X Pty Ltd to Individual A and Individual B as X Pty Ltd's CGT concession stakeholders, under Subdivision 152-B of the ITAA 1997?
3. Will the Commissioner accept that if X Pty Ltd.'s Directors resolve to distribute the exempt amount to Individual B and Individual A, the requirement in paragraph 152-125(1)(b) of the ITAA 1997 has been satisfied?
4. Did Individual A have a small business participation percentage in X Pty Ltd just before the relevant CGT event (the sale of the Water Licences in 20XX), and thus a stakeholder's participation percentage in X Pty Ltd, of 15% for the purposes of subsection 152-125(2) of the ITAA 1997?

© Brown Wright Stein Lawyers 2024

5. Did Individual B have a small business participation percentage in X Pty Ltd just before the relevant CGT event (the sale of the Water Licences in 20XX), and thus a stakeholder's participation percentage in X Pty Ltd, of 85% for the purposes of subsection 152-125(2) of the ITAA 1997?
6. Will the Commissioner exercise the discretion under paragraph 103-25(1)(b) of the ITAA 1997 to allow X Pty Ltd an extension of time in which to make a choice to apply the CGT 15-year exemption in Subdivision 152-B of the ITAA 1997?
7. Will the Commissioner exercise the discretion under subsection 152-125(4) of the ITAA 1997 to extend the time in paragraph 152-125(1)(b) of the ITAA 1997 for X Pty Ltd to make payments of the CGT exempt amount to X Pty Ltd.'s CGT concession stakeholders, Individual A and Individual B?

Ruling

The ATO ruled no in respect of question 1.

Therefore, the remaining questions were not applicable.

Subdivision 152-B contains the small business 15-year exemption that allows a small business to disregard a capital gain arising from a CGT asset that it has owned for at least 15 years. One of the requirements is that the entity had a significant individual for a total of at least 15 years (even if the 15 years was not continuous and it was not always the same significant individual) during which the CGT asset was owned.

Section 152-50 provides that an entity satisfies the significant individual test if the entity had at least one significant individual just before the CGT event. Under section 152-55 an individual is a significant individual in a company or trust if they have a small business participation percentage in the company or trust of at least 20%. Section 152-65 provides that this 20% is made up of the total of direct and indirect small business participation percentage in the other entity.

Item 1 of the table in section 152-70(1) provides an entity's direct small business participation percentage in a company is the smallest of the percentage of voting power, the percentage of any dividend the company may pay or the percentage of any distribution of capital the company may make that the entity has because of holding the legal and equitable interests in shares in the company. Where a company has more than one class of shares all classes (other than redeemable shares) must be taken into account in determining if the company has a significant individual.

Taxation Determination TD 2006/77 provides that a shareholder that holds more than 20% of one class of shares in a company will not be a significant individual if their right to any distribution of income or capital from the company is dependent on a discretion to make distributions of income or capital to one class of shareholders to the exclusion of another.

The indirect small business participation percentage considers an entity's interest in a company that is held through an interposed entity.

To determine if X Pty Ltd has a significant individual for the purposes of section 152-55 either A or B will need to have a small business participation percentage in the company of at least 20% in the relevant income years. The 20% small business participation percentage is the sum of their individual direct and indirect small business participation percentages.

In respect of B's direct and indirect small business participation percentage:

1. direct: the ATO stated that B only holds the legal and equitable title to A class shares where there are also class B, D and IM shares in X Pty Ltd of which B does not hold legal and equitable title. Any interest

© Brown Wright Stein Lawyers 2024

in these shares are not included in B's calculation of their direct small business participation percentage. Further, B 's right to a distribution of income from the company is dependent on how the directors' exercise their discretion to pay dividends. Therefore, B is not capable of receiving a distribution and their direct small business participation percentage is 0%. The ATO confirmed that a shareholder must be capable of receiving at least 20% of any distribution regardless of how a director's discretion is exercised to be a significant individual.

2. indirect: B's indirect small business participation percentage in the company is calculated by multiplying together their direct small business participation percentage in the Trust as an interposed entity, and the Trust's total small business participation percentage (both direct and indirect) in the company. These are as follows:
    (a) as B received a distribution from the trust of 80% in 2008, B had a direct small business participation percentage of 80% in the Trust;
    (b) the Trust had a direct small business participation percentage in the company of 0%, as the Trust's right to a distribution of income from the company was dependent on how the directors exercised their discretion.

    Therefore, B's indirect small business participation percentage in the company via the interposed Trust was 0% (80% × 0% = 0%).

In respect of A's direct and indirect small business participation percentage:

1. direct: similar to B, A only holds the legal and equitable title to Class A shares and therefore also has a direct small business participation percentage of 0%. Depending on how the directors' discretion is exercised, Individual A might receive 0.008% of any distribution of the company or they might not receive anything at all. Therefore, A has a direct small business participation percentage of 0%;
2. indirect: A received a distribution from the trust of 20% in 2008, B had a direct small business participation percentage of 20% in the Trust. However, as stated above, the Trust had a direct small business participation percentage in the company of 0%. Therefore, A's indirect small business participation percentage in the company via the interposed Trust was 0% (20% × 0% = 0%).

The ATO concluded that the small business participation percentage of each shareholder in X Pty Ltd is 0%. There is no significant individual in X Pty Ltd as no shareholder had a small business participation percentage in the company of at least 20% as required under section 152-55. Therefore, the condition in paragraph 152-110(1)(c) has not been satisfied and so the 15-year exemption does not apply to disregard any capital gain arising from a CGT event.

ATO reference *Private Binding Ruling Authorisation No. 1052230500324*
w https://www.ato.gov.au/law/view/document?docid=EV/1052230500324

6.5 GST and return of goods

The taxpayer was registered for GST.

The taxpayer purchased a motor vehicle from a motor vehicle dealer. The purchase price for the vehicle was $XXXX

A GST amount of $XXXX was included in the purchase price. A LCT amount of $XXXX was also included in the purchase price.

Following the purchase of the vehicle, the taxpayer identified both mechanical and cosmetic issues with the vehicle.

The vehicle was sent into the dealer for repair of paint defects and electrical faults.

After picking up the vehicle following repairs, the taxpayer notified the dealer of additional electrical faults and stalling of the vehicle. The vehicle was dropped off to the dealer for an assessment.

On DD MM YYYY, the taxpayer notified the dealer of the same persistent issues.

The dealer agreed to purchase the vehicle back from the taxpayer. In an email, a representative of the dealer requested the taxpayer complete two forms - a Purchase Agreement and a request for the refund of monies. The dealer requested that the taxpayer return the completed forms together with a 'tax invoice on the taxpayer's letterhead'.

The taxpayer replied on the same day attaching the completed forms noting that they would 'get an invoice sorted shortly ...'.

The completed Purchase Agreement contained the following statement:

> *'As the registered owner(s) of the subject vehicle I/We hereby agree to Sell of the subject vehicle to the Dealer for the allowance of $XXXX.*

The Purchase Agreement also provided a statement commencing 'My sale of the vehicle through you is...' and provided three options to complete the statement with instruction to strike out options as applicable. None of the options were struck out as instructed. The options available included the following:

> *'Made in the course of the furtherance of my business enterprise and I/We hereby quote its ABN, which is... and is registered for GST and I/We have provided a Tax invoice for the purchase...'*

The taxpayer accepted the refund and proceeded to finalise the transaction, forgiving any further claims made against the dealer.

To date, the taxpayer has not claimed any expenses related to the vehicle.

The taxpayer has also not claimed input tax credits for the purchase of the vehicle from the dealer as the taxpayer reports annually.

Question

Is the taxpayer making a taxable supply pursuant to section 9-5 of the GST Act when the taxpayer returns the motor vehicle they purchased from a motor vehicle dealer, and subsequently obtains a full refund?

Ruling

The ATO ruled yes, the taxpayer would be making a taxable supply. The ATO noted that the issue is the classification of the transaction whereby the dealer has agreed to take back possession and ownership of the vehicle and pay the taxpayer an amount. That is, whether the act of the dealer taking possession and ownership results in the taxpayer making a supply. Alternatively, is the act considered to be the cancellation of the original supply.

Prior to determining whether the taxpayer has made a 'taxable supply', it is first necessary to determine whether the taxpayer has made a 'supply'. The meaning of the word 'supply' is contained in section 9-10 as

© Brown Wright Stein Lawyers 2024

'any form of supply whatsoever'. The meaning of 'supply' is further discussed in Goods and Services Tax Ruling GSTR 2006/9 *Goods and services tax: supplies* (GSTR 2006/9).

The ATO referred to paragraphs 22 and 23 of GSTR 2006/9 which outlines the sixteen propositions which may be relevant to characterising and analysing supplies.

The relevant propositions on these facts include:

1. Proposition 5: An entity will make a supply if it provides something to another entity;
2. Proposition 6: 'Supply' usually, but not necessarily, requires something to be passed from one entity to another; and
3. Proposition 11: The agreement is the logical starting point when working out the entity making the supply and the recipient of that supply.

Paragraph 71 of GSTR 2006/9 discusses that an entity will make a supply whenever that entity (the supplier) provides something of value to another entity (the recipient) (Proposition 5). This is consistent with the ordinary meaning of 'supply', being to furnish or provide.

Proposition 6 is discussed at paragraphs 92 to 94 of GSTR 2006/9 whereby a supply usually, but not necessarily, requires something to be passed from one entity to another. This proposition is largely self-evident in a transaction-based tax such as the GST.

Proposition 11 (at paragraphs 119 to 122 of GSTR 2006/9) considers that the agreement is the logical starting point when working out the entity making the supply and the recipient of that supply.

The ATO ruled that in this case, with reference to the above propositions, the taxpayer is providing something of value (being the vehicle) to the dealer. Title to the vehicle is passed to the dealer via the relevant State vehicle transfer process and the Purchase Agreement that the taxpayer provided to the dealer acknowledges that the taxpayer agreed to sell the vehicle to the dealer and that the dealer would provide the taxpayer with an allowance of $XXXX.

Furthermore, the taxpayer's correspondence with the dealer discusses that you provide a tax invoice to the dealer as provided for in the Purchase Agreement. Section 29-70(1)(a) of the GST Act provides that a tax invoice is a document that is issued by the supplier of the supply to which the document relates.

Therefore, the ATO ruled that the taxpayer made a separate and distinct to the initial supply made by the dealer to the taxpayer at the outset.

The ATO then considered whether the supply was a taxable supply.

The taxpayer expressed the view that the supply of the vehicle back to the dealer is a return of goods and not a second sale. However, the content of the Purchase Agreement provided did not support this contention.

The taxpayer received an amount of $XXXX as consideration from the dealer and the supply of the vehicle is connected to the indirect tax zone (Australia), therefore satisfying paragraphs 9-5(a) and 9-5(c) of the GST Act.

The ATO also considered that the supply of the vehicle to the dealer was made in the course or furtherance of the enterprise that the taxpayer carries on and the taxpayer is registered for GST, therefore satisfying paragraphs 9-5(b) and 9-5(d) of the GST Act.

As such, paragraphs 9-5(a) to (d) are satisfied. The supply of the vehicle does not fall within the scope of being GST-free or input taxed. Therefore, the taxpayer will be making a taxable supply.

© Brown Wright Stein Lawyers 2024

ATO reference *Private Binding Ruling Authorisation No. 1052240190810*
w https://www.ato.gov.au/law/view/document?docid=EV/1052240190810

6.6 GST and registration requirement when selling commercial property

Facts

Person A and her spouse, Person B, acquired a property for $X.

The property is a commercial property and is zoned for industrial use.

Person A and Person B operated a leasing enterprise wherein they leased the property to two related entities, Entity A and Entity B.

Person B passed away and his beneficial ownership share of the property passed to Person A.

Person A is not registered or required to be registered for GST.

Person A leased the property to Entity A (the lessee) until the property was vacated. Person A did not enter a formal lease arrangement with the lessee.

Person A was not receiving monetary rental income from Entity A. However, under an informal lease agreement, the lessee was responsible for paying for expenses in relation to the management and upkeep of the property such as council rates, water rates, land tax and building insurance.

At all times, Person A's income, attributable to the leasing enterprise, was beneath the GST registration turnover threshold.

On [date], Person A ceased the informal leasing arrangement with Entity A when the property was vacated, and Entity A moved to new business premises.

On [date], Person A entered a contract of sale to sell the commercial property to Person C and/or nominee.

Person A did not make any improvements or develop the commercial property prior its sale.

Person A currently resides at another property in Australia, Property B, and owns a holiday house located at Property C. Person A uses both properties for private purposes.

Person A does not currently carry on any other enterprise.

Question

Is the sale of the property a taxable supply under section 9-5 of the GST Act when Person A sells the property?

Ruling

The ATO ruled no.

Section 9-5 of the GST Act sets out the definition of a taxable supply.

In this case, the supply satisfies the first three requirements of section 9-5 of the GST Act as the supply is for consideration, is made in the course of an enterprise that Person A carries on (the supply is part of ceasing Person A's leasing enterprise), and is connected with the indirect tax zone. Additionally, as the property is a

commercial property, its sale will not constitute an input taxed supply and no provisions of the GST Act apply to make the supply GST-free.

The remaining requirement is whether Person A is required to be registered for GST. Section 23-5 of the GST Act explains that you are required to be registered for GST if you are carrying on an enterprise and your GST turnover meets the registration turnover threshold. In this case, Person A is carrying on an enterprise of leasing commercial property and, as such, the first element is satisfied.

The meaning of GST turnover is contained in Division 188 of the GST Act. Subsection 188-10(1) of the GST Act provides that your GST turnover will meet the registration turnover threshold if:

1. your current GST turnover is at or above $75,000 and the Commissioner is not satisfied that your projected GST turnover is less than $75,000; or
2. your projected GST turnover is at or above $75,000.

Person A's current GST turnover did not exceed the current GST turnover threshold of $75,000.

In calculating your projected GST turnover, section 188-25 of the GST Act provides that you disregard any supply made, or likely to be made, by way of transfer of ownership of a capital asset. Taking into account the facts, the ATO considered the proposed sale of the commercial property would constitute the transfer of a capital asset and is therefore disregarded when calculating projected GST turnover.

As Person A is not registered or required to be registered for GST, not all elements of section 9-5 are satisfied, and the sale of the property is not a taxable supply.

ATO reference *Private Binding Ruling* Authorisation No. 1052237766571
w https://www.ato.gov.au/law/view/document?docid=EV/1052237766571

7. ATO and other materials

7.1 Jamsek – Decision Impact Statement

On 15 May 2024, the Commissioner of Taxation issued a decision impact statement in relation to the case of *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48 (see our April 2023 tax training notes).

The case concerned whether truck drivers, Mr Jamsek and Mr Whitby, who agreed with ZG Operations Australia Pty Ltd and its predecessors to purchase their own trucks and set up partnerships with their respective wives, which then entered into written contracts with ZG for the provision of delivery services, were employees of ZG, pursuant to subsection 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (**SGAA**), being employees under a contract that was wholly or principally for their labour.

The Full Federal Court held that Mr Jamsek and Mr Whitby were not employees under subsection 12(3) of the SGAA, as that section only applies where the party providing the services is a natural person who was a party to the contract in his or her individual capacity. In this case, the partnerships were the relevant parties to the contracts, not Mr Jamsek and Mr Whitby. The Full Federal Court also held that Mr Jamsek and Mr Whitby did not discharge their onus of proving that the contracts were wholly or principally for their labour.

The Commissioner considers that the decision of the Full Federal Court clarified various aspects of the application of subsection 12(3) of the SGAA, particularly:

1. applying subsection 12(3) of the SGAA requires analysing the content of a bilateral exchange of promises, irrespective of the number of parties on each side of the contract;
2. the superannuation regime cannot be circumvented by the simple device of forming a contract which names more than two parties;
3. only a natural person who enters into a contract in that capacity can be deemed to be an employee for the purposes of subsection 12(3) of the SGAA; and
4. assessing whether a contract is for labour involves an evaluation of the terms of the relevant contract or contracts. The assessment is by reference to the benefit that the engaging entity receives out of the bargain.

Despite Perram and Anderson JJ's conclusion that a quantitative analysis of the components of delivery services would have been the most appropriate valuation methodology in the circumstances of the case, the Commissioner considers that there may be some scenarios where a qualitative analysis may also be relevant in determining whether a contract is principally for labour under subsection 12(3) of the SGAA.

The Commissioner will review SGR 2005/1, SGR 2005/2, SGR 2009/1, ATO ID 2014/28 and other relevant guidance products, and update them as necessary.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/S332of2022/00001

7.2 JMC – Decision Impact Statement

On 15 May 2024, the Commissioner of Taxation issued a decision impact statement in relation to the case of *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 (see our June 2023 tax training notes).

In this case, the Full Federal Court considered whether a contract lecturer for a higher education provider was an employee or an independent contractor under the *Superannuation Guarantee (Administration) Act 1992*. The contracts documenting the arrangement between JMC and Nicholas broadly provided that:

1. JMC would pay Nicholas an hourly rate for delivering lectures and marking;
2. Nicholas was required to submit invoices to JMC, accompanied by time sheets and signed weekly lesson plans;
3. Nicholas was also required to provide his Australian business number;
4. Any intellectual property brought into existence by Nicholas while providing the teaching services vested in JMC;
5. Nicholas would carry out the teaching services personally;
6. Nicholas had a right of delegation but only with JMC's written consent.

The Full Court overturned the primary Judge's decision and found that Nicholas Harrison, engaged by JMC to provide teaching services, was an independent contractor and not an employee under both section 12(1) of the SGAA or the extended definition of employee under section 12(3) of the SGAA.

In relation to the section 12(1) issue, the Full Court applied the High Court decision of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and held that the contractual terms, rather than the performance of those terms, were relevant in determining the nature of the relationship between parties. Factors in the contracts such as the right to delegate work, the absence of evidence supporting JMC's control over Harrison's work, the payment structure and the handling of intellectual property collectively indicated an independent contractor relationship rather than employment.

In relation to the section 12(3) issue, the Full Court noted that the focus should be on contractual rights rather than actual performance. They concluded the right to delegate work indicated that the contracts were for the provision of teaching services, and not wholly or principally for the labour of Nicholas.

On 12 October 2023, the High Court dismissed a special leave application by the Commissioner regarding subsection 12(3) of the SGAA.

The ATO has set out in TR 2023/4 its view on the ordinary meaning of the term 'employee' which is relevant for the purposes of section 12(1) of the SGAA. The ATO also confirms that where a contract includes a provision allowing a worker to delegate, subcontract, or assign their work to another party, in the absence of sham, enforceability and contract variation, the contract will not be considered wholly or principally for the worker's labour for the purposes of section 12(3) of the SGAA .

The ATO plans to review and update other relevant guidance, including Taxation Rulings and Superannuation Guarantee Rulings, in line with the Full Federal Court decision.

The decision impact statement is open for comments until 14 June 2024.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/S69of2023/00001

7.3 Minerva – Decision Impact Statement

The ATO has released a decision impact statement in relation to *Minerva Financial Group Pty Ltd v Commissioner of Taxation* [2024] FCAFC 28 (see our April 2024 tax training notes). The case concerned the application of Part IVA.

Minerva is a member of a group of companies and trusts known as the Liberty Group that carries on business as a non-bank lender. The Liberty Group raised funds for its lending business through a process called securitisation, which involved the establishment of special purpose 'securitisation trusts'.

Prior to 2007, Liberty Financial Pty Ltd, the main operating entity of the Liberty Group, was the holder of the special class units in the securitisation trusts and was entitled to receive the 'residual income' of each securitisation trust. This was the income left after interest was paid to noteholders and other expenses were paid.

In 2007, in anticipation of conducting an initial public offering of 'stapled securities', the Liberty Group restructured itself into what the primary judge referred to as a 'trust silo' and a 'corporate silo'. Relevantly, the trustee issued special class units in one of the unit trusts to a Liberty Group company (Liberty Financial), on which the trustee could pay distributions at its discretion.

Although the IPO did not proceed at the time, the Liberty Group implemented the restructure broadly consistent with its plan for an IPO. From 15 April 2008, the 'residual income' units were issued to a newly settled holding trust, Minerva Holding Trust. As a result, if the discretion was not exercised to distribute to the company holding the special class units, residual income was distributed to Minerva Holding Trust.

The unitholders of Minerva Holding Trust, in turn, were presently entitled to the income. The ultimate holder of all units was the parent of the Liberty Group, being Jupiter Holdings BV (Jupiter) up to 12 April 2013 and, thereafter, Vesta Funding BV (Vesta), both incorporated in, and tax residents of, the Netherlands.

The taxation consequence of the distributions from the trust silo going to the non-resident unitholder, rather than to the discretionary corporate beneficiary, was that the distributions were subject to a withholding tax of 10% rather than the corporate tax rate of 30%.

The Commissioner made Part IVA determinations to include in Minerva's assessable income, income that would have been included in Minerva's assessable income if the income had been distributed to Liberty Financial, a subsidiary member of the tax consolidated group of which Minerva was the head company.

The Full Court found that the same commercial outcome for the parties would not have been achieved had distributions been made instead to Liberty Financial. The distribution of income to Jupiter and Vesta had real economic and financial consequences to them that would not have flowed had the income been distributed to Liberty Financial. The Full Court relied upon these facts when considering the eight factors to ultimately conclude that there was no requisite dominant purpose, and therefore, Part IVA should not apply.

The ATO has commented that while the Full Court found that Part IVA did not apply, it did so on the basis of a conclusion of the particular facts in this case of a non-bank lender with an 'IPO ready' business structure. Accordingly, the ATO does not consider this decision as having any impact on the Commissioner's current advice and guidance.

The decision does not disturb the Commissioner's long-held view that schemes which include a trustee's exercise of discretion to distribute income can attract the operation of Part IVA. Further, whether Part IVA will apply to such a scheme will not be answered by the trustee's evidence of their purpose. It will depend on a consideration of the eight factors in section 177D of the ITAA 1936 collectively applied to the objective facts, to ascertain whether a party to the scheme had the requisite objective purpose that the taxpayer would obtain a tax benefit.

The decision impact statement is open for comments until 28 June 2024.

© Brown Wright Stein Lawyers 2024

w https://www.ato.gov.au/law/view/document?DocID=LIT/ICD/VID662of2022/00001

7.4 Hannover Life re Australasia – Decision Impact Statement

The ATO has released a decision impact statement in relation to *Commissioner of Taxation v Hannover Life Re of Australasia Ltd* [2024] FCAFC 23 (see our April 2024 tax training notes). The case is in relation to the extent to which Hannover Life, a life insurer, was entitled to GST input tax credits for its acquisitions, when it made input taxed supplies of life insurance, as well as GST-free supplies of acquiring reinsurance.

An entity is only entitled to input tax credits to the extent it acquires things for a creditable purpose under section 11-15 of the GST Act. Acquisitions are not acquired for a creditable purpose to the extent that they relate to making input taxed supplies – paragraph 11-15(2)(a) of the GST Act. If an acquisition is partly creditable the amount of the input tax credit is calculated under section 11-30 of the GST Act.

The Commissioner contended that the acquisitions related to input taxed supplies. Hannover contended that they partly related to the GST-free reinsurance supplies. Hannover's proposed revenue-based apportionment method for the purposes of section 11-30 for the overhead acquisitions meant that those acquisitions were acquired for a creditable purpose, to the extent that risk was ceded to Hannover Rück under the GST-free reinsurance supplies.

The Full Court concluded that the overhead acquisitions related to both input taxed and GST-free supplies, as the Commissioner had not identified any error in the primary judge's findings, that the acquisitions were undifferentiated, or related indifferently to all supplies made by the enterprise. In relation to the apportionment method under section 11-30 of the GST Act, the Full Court did not consider it relevant to assess if the method was fair and reasonable based on a hypothetical scenario where 100% of the risk was reinsured. The Full Court confirmed the primary judge's conclusion that the apportionment method was only to apply to this specific known case, where there was 75% of the risk reinsured.

The Commissioner noted that the primary judge's observations in relation to the impacts where a life insurer can be seen as a 'mere conduit' for its reinsurer, in a hypothetical example where 100% of the risk is reinsured, are *obiter*. The Commissioner emphasised that these observations were not necessary to decide the matter, and the

The Commissioner accepted that there may be more than one methodology that is fair and reasonable under section 11-30 of the GST Act, however the Commissioner does not consider that the fact a specific apportionment method was allowed in this case represents an endorsement of the method as fair and reasonable in other circumstances.

The decision impact statement is open for comments until 14 June 2024

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/NSD816of2023/00001

7.5 SMSF trust beneficiaries

On 10 May 2024 the ATO issued a reminder that income tax reporting changes under the Modernisation of Trust Administration System will come into effect on 1 July 2024 for 2023-2024 self-managed superannuation fund annual returns.

These changes will require that where a SMSF has received a distribution from a trust, that a new trust income schedule is completed and lodged with the superannuation fund annual return.

Distributions of trust income received from a managed fund should be included in the new trust income schedule.

The ATO recommends asking the trustee for a copy of the trust statement of distribution.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/is-your-smsf-a-trust-beneficiary

7.6 Update NFP associate and authorised contacts

The ATO issued a reminder for non-charitable not-for-profit (NFP) organisations with an ABN to prepare to lodge their first NFP self-review return by 31 October 2024.

Crucial to this, the ATO warns, is updating any new associates and authorised contacts appointed to NFPs to make it easier for authorised contacts to access the NFP's tax account information and receive important information from the ATO, and to set up access to *Online services for business* to lodge the return.

The ATO reminded NFPs that it is a legal requirement for NFPs that hold an ABN to notify the Australian Business Register within 28 days of changes to their registration details.

The ATO has published a handy checklist on how to update an NFP's ABN registration details, how to access key documents and what information an NFP needs to provide about their governing structure and reporting obligations.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/update-your-nfps-associates-and-authorised-contacts-now

7.7 Payments to non-residents

The ATO issued a reminder to taxpayers who have paid interest, dividends or royalties that are subject to withholding tax to a non-resident, that they have an obligation to:

1. lodge a ' Pay as you go (PAYG) withholding from interest, dividend and royalty payments to non-residents – annual report' by 31 October each year, and/or
2. if you're an investment body making interest payments to non-resident investors, lodge an annual investment income report by 31 October each year, and
3. pay withholding tax to the ATO, unless a withholding exemption or tax treaty relief applies.

The ATO noted that its main focus will be on taxpayers that are a part of the medium public and multinational business engagement program and have made overseas payments to non-residents, and that appropriate preparations should be made by reviewing records.

Ensure that accounts and records are up to date, and that any overdue annual reports have been lodged.

The ATO will focus on arrangements where entities defer their interest to avoid or defer withholding tax while continuing to claim income tax deductions on an accrual basis, and offshore related entities which are used to

facilitate avoiding the payment of withholding tax in relation to interest expenses deducted against Australian-sourced income and paid to non-residents.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/have-you-made-payments-to-non-residents

7.8 Income and deductions for renting out your home

On 23 May 2024, the ATO issued guidance outlining the tax implications of renting out a home or part of it, emphasising the need to report the income as rental income, and only claim proportional associated expenses.

Deductions can include council rates, loan interest, utilities, insurance, cleaning and maintenance costs.

Where only part of a home is rented out, expenses must be apportioned based on space and usage. Similarly, where the entire home is rented out occasionally via platforms like Airbnb, expenses should be apportioned based on rental duration.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/sharing-economy-and-tax/renting-out-all-or-part-of-your-home/income-and-deductions-for-renting-out-your-home

7.9 Luxury Car Tax threshold

The ATO has updated its website guidance on the Luxury Car Tax (LCT) rates and thresholds.

If you import or sell a car with a GST-inclusive value above these LCT thresholds, you must pay LCT except in certain circumstances. In general, the LCT value of a car includes the value of any parts, accessories or attachments you supplied, or imported, at the same time as the car.

The LCT thresholds for the income year ending 30 June 2025 are $91,387 for fuel efficient vehicles and $80,567 for other vehicles.

A fuel-efficient car has a fuel consumption that does not exceed 7 litres per 100 kilometres as a combined rating under the vehicle standards in force under section 12 of the *Road Vehicle Standards Act 2018*.

w https://www.ato.gov.au/tax-rates-and-codes/luxury-car-tax-rate-and-thresholds

7.10 Car Limit

The car limit for the 2025 income year has increased to $69,674 (from $68,108 for the 2024 income year).

The car limit refers to the maximum value that can be used to calculate the depreciation of a car for income tax purposes. This limit is set annually by the Australian Taxation Office (ATO) and applies to both the cost of the car and the value used for depreciation calculations under the capital allowances provisions. The key applications of the car limit are as follows:

1. **Depreciation calculation** – if you purchase a car for business purposes, you can claim a deduction for the car's depreciation. However, if the cost of the car exceeds the car limit, you can only claim depreciation up to the car limit;

2. **Luxury Car Tax (LCT)** – the car limit is also relevant to the Luxury Car Tax, which applies to vehicles above a certain threshold. If the car's value exceeds this threshold, the purchaser may be liable for LCT.
3. **Logbook Method** – when using the logbook method for car expenses, the business use percentage is applied to the car's depreciation value, which is capped by the car limit.
4. **GST** – when claiming input tax credits on a car purchase, the GST is only claimable on the car's value up to the car limit.
5. **Immediate deductions for small and medium businesses** – under the instant asset write-off rules for small businesses, the cost of the car that can be immediately deducted is also capped at the car limit. This was relevant for the previous temporary full expensing measures and during periods when the instant asset write-off threshold exceeded the car limit.

The ATO website provides detailed information on the current car limit and its application.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/depreciation-and-capital-expenses-and-allowances/simpler-depreciation-for-small-business/assets-and-exclusions#ato-Cars

7.11 FBT car parking threshold for 2024–25

The ATO revealed on its website that the car parking threshold for the fringe benefits tax year commencing on 1 April 2024 is $10.77 (up from $10.40 for the previous year that commenced on 1 April 2023).

w https://iknowconnect.cch.com/AUS/document/ausUwknewsPartP29026/fbt-car-parking-threshold-for-2024-25

7.12 Payroll tax (NSW) – annual return lodgment process improved

Revenue NSW has simplified the annual return in Payroll Tax Online to assist businesses in calculating payroll tax more accurately and to help businesses understand which payments are taxable so they can be reported accurately.

The changes to the annual return include:

1. the annual return will prefill business details;
2. the form will have pop up prompts to guide businesses when, for example, wage components like allowances and commissions were reported for the prior year but are entered as ‘0’ for the current year, and superannuation amounts entered are low in comparison to salaries and wages;
3. a 'workforce details' section which is aimed to help businesses who use contractors, staff from employment agencies or labour hire to correctly calculate their payroll tax; and
4. streamlined payroll tax cancellation.

Business will still need to lodge their annual return on Payroll Tax Online and pay the payroll tax by 28 June 2024, or the next business day of 28 July is on a weekend or public holiday.

w https://www.revenue.nsw.gov.au/news-media-releases/we-have-improved-the-payroll-tax-annual-return

7.13 SMSF notice of intent to claim a deduction for contributions

SMSF members wanting to claim a tax deduction for personal superannuation contributions must complete a *Notice of intent to claim or vary a deduction for personal super contributions*. Once the fund trustee receives a valid notice from the member, the trustee must send written acknowledgment to the member. SMSF members must receive acknowledgment from the trustee before they can claim the deduction on their tax return.

SMSF members considering rolling over or withdrawing their superannuation interest should, before initiating a rollover or closing their account, ensure they have an acknowledged notice of intent for any deduction. If a member gives a notice of intent after they have rolled over their superannuation interest to another fund or withdrawn their superannuation interest, the notice will not be valid and the member will not be able to claim a deduction for the contributions they made before the rollover or withdrawal.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/claiming-a-deduction-for-personal-super-contributions

7.14 Fees for foreign investors investing in Australian residential property

On 28 May 2024, the ATO published guidance to assist foreign investors on working out the fees it must pay when investing in residential property in Australia.
The ATO noted that a foreign investor must pay a fee when submitting an application for foreign investment approval, including for an:

1. approval to purchase a specific residential property (no objection applications);
2. application for an exemption certificate to purchase a non-specified residential property (exemption applications);
3. application to vary an existing foreign investment approval;
4. residential property applications.

The ATO noted that the same fee applies to a no objection notice or an exemption certificate.
The fees for residential property applications vary depending on whether the property is an established dwelling or a new/near-new dwelling or vacant residential land, the value of the property the foreign investor is seeking to purchase.
The fees for a variation application depends on whether the variation is simple or complex.
Where a property remains unoccupied or not rented out for 183 days or more in a vacancy year, a foreign investor may need to pay a vacancy fee. From 9 April 2024, the vacancy fee will be double of the foreign investment application fee paid by the foreign investor.
If the foreign investor is a property developer applying for a new or near new dwelling exemption certificate, there are specific initial application fees and ongoing reporting fees.

w https://www.ato.gov.au/individuals-and-families/investments-and-assets/foreign-investment-in-australia/fees-for-foreign-residential-investors

© Brown Wright Stein Lawyers 2024

7.15 New or near-new dwelling exemption certificates

Australian or foreign property developers, and other vendors, can apply for a *New or near-new dwelling exemption certificate* to sell new or near-new dwellings in a development to foreign persons.

The certificate means that foreign buyers will not need to seek their own foreign investment approvals for the Australian properties covered by the certificate. The certificate provides approval for a foreign buyer to purchase a single or multiple dwellings within the development, up to the value of $3 million. Foreign investors must apply for their own foreign investment approval for purchases over $3 million.

Property developers can apply for a certificate if the development has all the following:

1. 50 or more dwellings;
2. development approval from the relevant government authority; and
3. if applicable, foreign investment approval for purchase of the land the development is on, and any conditions of that approval are being met.

Applications for the certificate can be made using Online services for foreign investors. Applications will be considered on a case-by-case basis to ensure the application is in Australia's national interest.

If the exemption is granted, property developers will need to report their sales and pay a separate fee per sale for each dwelling sold to a foreign person under the certificate.

Property developers who do not comply with the conditions on the certificate may be subject to civil and criminal penalties and revocation of their exemption certificate.

w https://www.ato.gov.au/individuals-and-families/investments-and-assets/foreign-investment-in-australia/new-or-near-new-dwelling-exemption-certificates

© Brown Wright Stein Lawyers 2024

8. Tax Professionals

8.1 High-certainty prefill data expanding

Starting 1 July 2024, pre-filling reports will include a 'certainty indicator' for:

1. interest income, including bank interest for joint account holders; and
2. Australian Government benefits, such as Newstart, Youth Allowance, JobSeeker, Austudy, taxable Age Pension, and Disability Support Pension.

These indicators reflect high confidence in data from financial institutions and government agencies. To change data with a 'high certainty' indicator, select a reason or specify under 'Other'. No supporting documents are required to be submitted at the time of making the change, but the ATO may contact you to seek additional information.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/high-certainty-pre-fill-data-expanding-to-cover-more-fields

8.2 Incapacity of a tax practitioner

The Tax Practitioner's Board considers that tax practitioners should implement a plan to deal with long term and short-term periods of incapacity, especially where such incapacity may impact the practitioner's ability to comply with their obligations under the TASA.

Tax practitioners should consider the following when developing their plan, including:

1. the structure of their business;
2. how their business would continue to operate should the practitioner or other key individuals (such as supervising registered tax practitioners) within the business become incapacitated in the short or long term
3. identify an authorised contact with the TPB and ATO;
4. engage with a caretaker registered tax practitioner to ensure they are willing to step in under certain circumstances
5. obtain legal advice and assistance to ensure the caretaker registered tax practitioner has the appropriate legal authority to make business decisions;
6. ensure that the caretaker registered tax practitioner is covered by professional indemnity insurance that meets the TPB's requirements
7. regularly review your plan or arrangements to ensure it remains up to date.

Tax practitioners should also consider the maintenance of their client files in the event of incapacity.

Written communications with clients (i.e. letters of engagement or other written communication) will be beneficial in outlining the practitioner's caretaker plan or arrangements to minimise any disruption to their clients and practice.

The TPB recommends that each tax practitioner:

1. inform their clients clearly that, in the event of your incapacity, information relating to their affairs may be disclosed to another registered tax practitioner who will act as a caretaker; and
2. seek the client's permission in relation to such disclosures to ensure that, if necessary, the caretaker registered tax practitioner can perform work for the client.

w https://www.tpb.gov.au/incapacity-tax-practitioner

8.3 Decoding Division 7A – minimum yearly repayments

The ATO published a reminder on 20 May 2024 to people who are subject to Division 7A loans to make sure that the Division 7A loan complies with the legislative requirements.

The ATO emphasised the importance of calculating the correct minimum yearly repayment by using the correct benchmark interest rate, to pay by the due date (being the end of the income year) and to start repayments in the income year after the complying loan was made.

Not meeting the minimum yearly repayments may cause an unfranked dividend to be assessed to the borrower.

The benchmark interest rate for the current income year ending 30 June 2024 is 8.27%, and changes annually. Minimum yearly repayments must pay back the interest and the principal each year.

The ATO concluded by highlighting that the reminder is a part of a larger push to make sure that Division 7A loans are complied with and included links to useful ATO resources of Division 7A loans.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/decoding-division-7a-minimum-yearly-repayments

8.4 Family trust elections and interposed entity elections

The ATO has published a reminder for tax professionals regarding Family Trust Distribution Tax (**FTDT**).

FTDT is a 47% tax applicable when a trust, having made a Family Trust Election (**FTE**) or an entity having made an Interposed Entity Election (**IEE**), distributes income outside the family group of the specified individual in the election.

When a trustee or another entity makes an FTE or IEE, it is crucial to retain the original FTE and IEE in the approved form. These elections can be lodged with the ATO.

The ATO emphasises that FTEs and IEEs should not be 'set and forget' decisions for trustees or their tax professionals. They should be actively considered when managing a client's tax affairs, particularly regarding distribution decisions that may result in FTDT liabilities.

The ATO encourages tax professionals and their clients to consider the following every year:

1. if the election is still needed and if it can or should be revoked;
2. if the specified individual remains the most suitable person, and if not, whether this individual can or should be varied;

3. the limited timeframes for varying or revoking elections, as changes outside these periods are not permitted.

It is essential to identify the members of the specified individual's family group when making annual trustee resolutions, as distributions outside this family group will trigger FTDT. Each FTDT payment must be accompanied by the family trust distribution tax payment advice.

TRAP – for the purposes of FTDT 'distribution' is very widely defined and can include any payment, loan, transfer of property, application of money or property for the benefit of a person or forgiveness of a debt. In 2017 the Commissioner finalised TD 2017/20 which sets out the view that you do not need to be a beneficiary to receive a 'distribution' for the purposes of Schedule 2F. This view only applies to 'distribution transactions' that began to be carried out after 7 June 2017. It also sets out that certain 'commercial benefits' will not be considered to be distributions for FTDT purposes.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/know-your-stuff---family-trust-elections-and-interposed-entity-elections

8.5 Small business restructure roll-over eligibility

The ATO is concerned that some wealthy groups are using the small business restructure roll-over for purposes other than a genuine restructure of an ongoing business. The ATO is engaging with engaging with some tax professionals and their clients to ensure the required conditions have been met, including whether a genuine restructure has occurred.

The ATO notes that some indicators of a genuine restructure are:

1. a bona fide commercial arrangement;
2. maintaining economic ownership of the business;
3. continued use of the transferred assets in the business;
4. a new structure that may have been adopted when establishing the business if appropriate professional advice was obtained;
5. changes that facilitate growth rather than divestment; and
6. changes that aren't artificial or unduly tax driven.

The small business restructure roll-over also includes a safe harbour rule as an alternative way of ensuring a restructure is genuine.

TIP – *Law Companion Ruling LCR 2016/3* explains the meaning of the term 'genuine restructure of an ongoing business' for the small business restructure roll-over and provides examples of what the ATO considers will and will not qualify.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/eligibility-for-the-small-business-restructure-rollover

8.6 Scams are on the rise

On 13 May 2024, the ATO published guidance for tax professionals to help their clients protect their personally identifiable information, such as myGov log-in credentials, which is the doorway to ATO accounts and financial

© Brown Wright Stein Lawyers 2024

information, from scammers. The ATO encourages all tax professionals to have a conversation with their clients about protecting their personally identifiable information and to remind clients to 'stop, think and protect' their information, by:

1. stop – do not share any personally identifiable information unless you trust the person you are communicating with, and the person has a genuine requirement for the details;
2. think – consider if the message or call could be fake and never click on hyperlinks to an online login portal; and
3. protect – make sure you contact the ATO as soon as possible if you have noticed suspicious activity on your ATO accounts.

The ATO advises anyone that encounters a scammer, to not engage with the scammer, but instead to report the incident to reportscams@ato.gov.au or use the online form at ato.gov.au/scams.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/scams-are-on-the-rise-protect-client-information

© Brown Wright Stein Lawyers 2024