The Tax Institute

Tax Update

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

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1. Tax Update Pitstop

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

Tax Update Matter	**Impact Summary**	**Further Detail**
Satterley Property Group	The Federal Court has found that a Top Up Payment made by a project manager to investors in the project entity was on capital account and, therefore, not deductible for the project manager under section 8-1 of the ITAA 1997.	Page 6
Bazzo	Justice Colvin has handed down a decision in the Federal Court concerning default assessments and the nature of the AAT review of the ATO's opinion of fraud or evasion. The decision provides a valuable outline of the approach to disputing default assessments in the AAT or Federal Court.	Page 10
Loan Market Group	The Supreme Court of New South Wales has found arrangements between brokers and loan aggregators to be relevant contracts for the purpose of the *Payroll Tax Act 2007* (NSW). The judgment also considers the application of the exemption for providing services to the public generally.	Page 18
Tax Time Reminders	The ATO has published its tax time reminders for 2024 outlining the 3 areas where taxpayers make common errors.	Page 48
Top 500 – Passive investors	The ATO, as part of the Top 500 program, has developed guidance to help private groups undertaking passive investment with developing tax governance frameworks to manage material tax issues. The guide helps to provide a simplified pathway towards achieving justified trust for Top 500 private groups whose income from regular activities is mainly derived (greater than 90%) from passive investment activity.	Page 50

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2. Cases

2.1 Satterley Property Group – deductibility of outgoings and capital v revenue

Facts

Satterley Property Group has been in the business of property development for over 40 years. Capital is raised for projects from investors and Satterley Property Group Pty Ltd (**SPG**) charges project management fees for the services it provides in conducting the property developments.

In or around 2006, SPG acquired land in South Yunderup, Western Australia. Two entities were established for this purpose, the Bowman Waters Trust, a unit trust, and Yunderup Holdings Pty Ltd to own the land as to 50% each and act as equal joint venturers. The Bowman Waters Trust owned 50% of the shares in Yunderup. The land became known as Austin Cove and the joint venture was called the Austin Cove JV.

The capital for the investment was raised in a number of ways, including by the issue of shares to investors in a company called Satterley Austin Bay Ltd, which owned 50% of the shares indirectly in the Bowman Waters Trust. 50% of the shares in Yunderup were also acquired by investors.

In 2006 SPG also arranged for land near Austin Cove, known as Beacham Road, to be acquired through Crestview Asset Pty Ltd as bare trustee for the Beacham Road JV. There were a number of joint venturers in the Beacham Road JV, including Trendmark Pty Ltd as trustee for the Satterley Beach Road Unit Trust. The sole unitholder of this trust was Satterley Beach Road Ltd, which had raised capital by issuing shares to investors.

By 2016, smaller investors voiced concerns about the performance of their investments. As a result, in 2018 SPG prepared and sent an Information Memorandum (IM) to the investors under which it was proposed that landholdings of the JVs be sold, with capital then returned to the shareholders. Under the IM, SPG agreed to purchase the shares of the investors in Yunderup, Satterley Austin Bay Ltd (**SABL**) and Satterley Beacham Road Ltd (**SBRL**) for the market value of the shares, which in case of Yunderup and Satterley Austin Bay Ltd was considered to be nominal, plus a Top-Up Payment so that the shareholders received back their initial capital.

The IM, in the case of SBRL, described the Top-Up Payment as an ex gratia payment and did not say that the payment was being made "for the shares" of the investors.

The SABL and Yunderup arrangement was described as follows:

> ***SABL and Yunderup Share Purchase Offer and Top-Up Payment***
>
> *The net proceeds from the sale of the ACJV land and other assets will not deliver any return to the SABL Participating Shareholders or the Yunderup Participating Shareholders.*
>
> *Accordingly, subject to the sale of the ACJV's assets and each relevant Participating Shareholder entering into the SABL Share Sale Agreement and or the Yunderup Share Sale Agreement (as the case may be), Satterley offer to pay to the:*
>
> *(a) SABL Participating Shareholders, an aggregate amount equal to the SABL Share Price and the SABL Top-Up Payment; and*

(b) Yunderup's Participating Shareholders, an aggregate amount equal to the Yunderup Share Price and the Yunderup Top-Up Payment.

In June 2018, the small investors approved the disposal proposal.

Subsequently, share sale agreements were entered into between SPG and small investors. The relevant provisions of the share sale agreements, using the agreement for SABL as an example, were as follows:

7. PURCHASE PRICE

The Purchase Price is the SABL Share Price (excluding GST, if any) which the Buyer must pay to the Seller at Completion in the way set out in clause 5.4(a).

…

B. The Buyer has agreed to:

(a) buy and the Seller has agreed to sell to the Buyer the Sales Shares for the Purchase Price; and

(b) pay the Top-Up Payment to the Seller,

on the terms and conditions in this document.

…

Market Value of the SABL Shares *means an amount per share that is equal to their market value of the ACJV Settlement Date, being an amount of $0.001 per SABL Share.*

…

SABL Share Price *means the price the Buyer is offering to pay to the Participating Shareholders for their shares in SABL, being $0.001 per SABL share, which is the Market Value of the SABL Shares.*

…

6. TOP-UP PAYMENT

(a) The Buyer must pay to each of:

SABL's Participating Shareholders, the SABL Top-Up payment in 3 instalments as follows:

(i) the first instalment, being an amount equal to the aggregate of the SABL Share Price and 50% of the SABL Top-Up Payment respectively, on the Completion Date;

(ii) the second instalment, being an amount equal to 25% of the SABL Top-Up Payment, on or before the first anniversary of the ACJV Settlement Date; and

(iii) the third and final instalment, being an amount equal to the full remaining balance of 25% of the SABL Top-Up Payment, on or before the second anniversary of the ACJV Settlement Date.

There were conditions precedent set out in clause 3.2 of the share sale agreement, which included the non-participating shareholders waiving any pre-emptive rights and the sale and the sale of the remaining land of the Austin Cove JV or the Beacham Road JV.

The Commissioner assessed SPG on the basis that the Top-Up Payments were consideration for the purchase of the shares in SABL, SBRL and Yunderup and, therefore, were capital and not deductible for SPG. The Commissioner also denied a deduction under section 40-880 of the ITAA 1997. The Commissioner considered

the amounts were included in the cost base of SPG's shares in SABL, SBRL and Yunderup and, therefore, excluded from deductibility under section 40-880 by section 40-880(5(f), which provides as follows:

> *(f) it could, apart from this section, be taken into account in working out the amount of a capital gain or capital loss from a CGT event;*

SPG objected to the assessment. SPG contended that it made the payments to compensate the investors for their losses to preserve its goodwill and ensure it could attract investors for future investments. SPG argued that, whether a payment is on capital or revenue account depends upon the purpose and effect of the payment from a practical and business standpoint, having regard to the decision in *Hallstroms Pty Ltd v Federal Commissioner of Taxation* [1946] HCA 34. Accordingly, it is necessary to look beyond the share sale agreement and it was clear from the surrounding context that the Top-Up Payments were not for the purchase of the shares from the investors. In relation to section 40-880, SPG argued that the Top-Up Payment was not included in the cost base for the shares as it was not for acquiring the shares and that, in any event, section 40-880(6) applied to permit deductibility. That section provides as follows:

> *(6) The exceptions in paragraphs (5)(d) and (f) do not apply to expenditure you incur to preserve (but not enhance) the value of goodwill if the expenditure you incur is in relation to a legal or equitable right and the value to you of the right is solely attributable to the effect that the right has on goodwill.*

The Commissioner disallowed the objection, following which SPG sought review in the Federal Court of Australia.

In the Federal Court, the Commissioner also contended that the payments did not have a sufficient nexus to the income earning activities of SPG and, therefore, were also not deductible under section 8-1 on that ground.

SPG filed substantial evidence of its officers and senior employees as to the reason for making the payments and particular emphasis was placed on that payments were made to protect the goodwill and reputation of SPG. The evidence suggestion that the value of making the payment was significant in terms of SPG's reputation.

Issues

1. Were the Top-Up Payments on revenue account and, therefore, deductible under section 8-1(1)(b) of the ITAA 1997?
2. Alternatively, can SPG claim a deduction under section 40-880 of the ITAA 1997 over 5 years?

Decision

General deduction

His Honour considered the Top-Up Payments were capital and, therefore, it was not necessary to consider whether they had a sufficient nexus to the income earning capacity of SPG.

The Top-Up Payments were capital as, in accordance with the terms of the share sale agreement, they were for the purchase of the shares. No other consideration passed to SPG under the share sale agreements. Consistent with this was the fact that the sale of shares was conditional on the joint venture land being sold. Such a condition would not be required if the Top-Up Payments were voluntary ex gratia payments to preserve goodwill. His Honour considered it was not permissible to go beyond the terms of the share sale agreement and the question of deductibility should be determined by its terms.

However, Besanko J considered that if he was wrong on this point, even if regard is had to the surrounding circumstances and the subjective purposes of SPG, the Top-Up Payments were still capital. His Honour had regard to the three factors identified by by Dixon J in *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337 to determine whether an expenditure or outgoing is on revenue account or capital account

as follows:

1. *the character of the advantage sought, and in this its lasting qualities, that is, the nature of the asset acquired, or the liability discharged by the making of the expenditure*

   In respect of this factor, Besanko J considered that the purpose of preserving the reputation of SPG indicated that the character of the advantage sought related to the business structure and the profit-yielding subject and its lasting qualities, suggesting the payments were capital in nature.

2. *the manner in which it is to be used, relied upon or enjoyed, and whether the enjoyment recurring; and*

   The payments removed the small investors and got SPG out of an unsuccessful project.

3. *the means adopted to obtain the advantage; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment, or by making a final provision of payment so as to secure future use or enjoyment.*

   The payments were not periodical outlays but were once and for all payments.

Blackhole deduction

His Honour considered the payments were included in the cost base of the shares acquired by SPG, being the first element of cost base, as they were part of the price paid to acquire the shares.

His Honour rejected the argument that the payments were covered by the exception in section 40-880(6) of ITAA 1997. His Honour noted that the section requires that the expenditure incurred to preserve the value of goodwill to be expenditure incurred in relation to a legal or equitable right and the value of the right is solely attributable to the effect that the right has on goodwill, which is not the case for the shares acquired by SPG as the value of the shares is not solely attributable to the effect that the shares have on the goodwill of SPG. In fact, the shares have little or no impact on the goodwill of SPG, even if it the case that the payment had such an effect.

Justice Besanko found in favour of the Commissioner on both issues.

COMMENT – a different outcome may have been arrived at if it could be shown that the payments were compensation for claims that the investors may have had against SPG for its role in managing the projects such that it could be said that the occasion of the expenditure was the income earning activities of SPG. In *Commissioner of Taxation* v *Snowden & Willson Pty Ltd* (1958) 99 CLR 431, expenses were incurred by a taxpayer for legal representation before a Royal Commission to inquire into its business practices. Whilst the High Court accepted that the allegations against which the taxpayer was defending itself would adversely affect its goodwill, this did not make the expenditure capital. It was noted in the High Court that the allegations that led to the royal commission "*were made by persons who stood in an existing legal relationship to the company, either as contractors or as mortgagors"* and that if those persons:

> *had pursued this object in the courts, there could have been no doubt about the position. Expenditure incurred by the company in an action or suit to enforce a contract or a mortgage, or in resisting a claim for relief by a contractor or mortgagor, must have been deductible from the company's assessable income in the year in which it was incurred.*

Citation *Satterley Property Group Pty Ltd v Federal Commissioner of Taxation* [2024] FCA 421 (Besanko J, Western Australia)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/421.html

2.2 Bazzo – default assessments and burden of proof

Facts

Tina Bazzo and her spouse are involved in property developments.

Tina lodged income tax returns for the 2009, 2010 and 2011 income years, disclosing $44,067 of taxable income in the 2009 income year, $37,536 in the 2010 income year and $25,905 in the 2011 income year.

On 4 May 2012 the Commissioner conducted an investigation of Tina's tax affairs based on asset betterment and concluded that Tina had undeclared assessable income. This conclusion was based on the fact that Tina had private expenses from bank accounts and credit cards that, in the Commissioner's view, must have been paid using income from unexplained sources or unidentified business activities.

Tina had 230 properties registered in her name. The Commissioner accepted that all but eight properties were held by Tina as a trustee. The Commissioner contended that Tina beneficially owned eight of the properties and that proceeds from sale should have been included in Tina's assessable income.

In January 2015, the Commissioner issued Tina with default notices of amended assessment under section 167 of the ITAA 1936 for the income years ended 30 June 2009, 2010 and 2011. The amended assessments were partially based on the 'Increase/Decrease' calculation method. The Commissioner purported to calculate the assets of Tina which comprised cash in 7 bank accounts and credit cards in the name of Tina, shares in 12 companies and the proceeds of sale of eight properties. The balances of related party loans were also recorded in the calculation of Tina's total assets. The Commissioner then deducted Tina's total liabilities from the total assets and raised assessments on the basis that the difference represented Tina's assessable income.

Based on the Commissioner's analysis, there were two categories of income assessed:

1. unexplained accumulated wealth as calculated using the 'Increase/Decrease' calculation; and
2. amounts passing through bank accounts and credit cards in Tina's name that may have been non-disclosed income.

The amended assessments increased Tina's income to $3,774,815 in the 2009 income year, $5,420,274 in the 2010 income year and $4,097,663 in the 2011 income year. The Commissioner also issued shortfall interest charges and shortfall penalties for each year.

Tina objected to the assessments.

In April 2016, the Commissioner allowed the objection in part, and issued amended assessments. Tina sought review of the amended assessments in the AAT.

On 30 June 2016, the Commissioner issued Tina with a special assessment under section 168 of the ITAA 1936. The special assessment included income Tina allegedly derived from the sale of a property. Tina objected to the special assessment. The objection was disallowed and Tina sought review of the special assessment in the AAT.

AAT consideration

In the AAT, the case was called *VTBL and Commissioner of Taxation (Taxation)* [2023] AATA 168 (see our March 2023 Tax Training Notes).

The AAT noted that when objecting to a default assessment, section 14ZZK(b)(i) of the TAA imposes a burden on the taxpayer to prove, on the balance of probabilities, both that the assessment is 'excessive' and, also, what the correct assessment should have been.

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The AAT upheld the Commissioner’s objection decision in relation to the special assessment.

However, AAT found that the Commissioner’s objection decision in relation to the default amended assessments should be varied to:

1. allow the objection to the inclusion of eight properties in the assessments for the 2009 and 2010 years, on the basis that those eight properties were in Tina’s name as a trustee, not for her personal benefit;
2. allow the objection to the inclusion in the assessments for the 2009, 2010 and 2011 years of monies passing through a NAB Flexi Account and two Bendigo Bank accounts as the income or property of Tina;
3. allow the objection to a 20% uplift in penalties for the 2010 and 2011 years; and
4. allow the objection by remitting the penalty in respect of an amount for director's fees being returned in the wrong year.

In relation to penalties, section 284-220(1)(c) of Schedule 1 to the TAA provides that a base penalty will be increased by 20% where a base penalty has been worked out under particular items 'previously'. The AAT found that the reference to 'previously' should be interpreted to mean 'on a previous occasion' as distinct from 'in respect of a previous accounting period'. The AAT determined that the 20% uplift had bee incorrectly imposed, as the assessments were all issued on the same day.

The Commissioner appealed to the Federal Court in relation to the default amended assessments. The Commissioner contended that the AAT had incorrectly applied the law either:

1. because the AAT had limited its findings to determining whether Tina had explained the sources of the three main categories of wealth referred to in her objection, meaning that Tina had not discharged her burden to prove the correct amount of assessable income; or
2. if Tina had proven the entirety of her income, because the AAT did not accept some of her arguments, section 14ZZK(b)(i) operated in an 'all or nothing' way so that a taxpayer had to prove affirmatively that the full amount of the assessment was not assessable income.

The Commissioner also contended that the 20% penalty was properly imposed and the AAT was wrong to find to the contrary.

Tina advanced a cross-appeal, contending that the AAT had accepted her evidence as to all items that could potentially be included in her income but did not accept her claim that some of those items were not taxable income. Tina disputed the Commissioner's claim that section 14ZZK(b)(i) operated in an 'all or nothing' way.

The Commissioner had amended the 2009 and 2010 tax returns on the basis that there had been fraud or evasion and that, therefore, the returns could be amended despite otherwise being outside the period of review. Tina contended that the AAT was required to form its own opinion as to whether there was fraud or evasion. Tina argued that the AAT had erred by simply concluding it was satisfied that the Commissioner held the requisite opinion and it was not arrived at capriciously.

The AAT also considered whether there were errors of law in relation to the AAT's findings about a loan amount and several bank account amounts.

Issues

1. Was the AAT legally obliged to conclude that Tina failed to discharge her onus to prove that the amended default assessments were excessive, because she had failed to prove that some of the income items were not assessable?
2. Did the AAT adopt the incorrect approach as a matter of law in determining whether there was fraud or evasion of a kind that justified the amended assessments for the 2009 and 2010 tax years?
3. Did the AAT fail to consider a submission by Tina as to why the penalties should have been remitted?

Decision

Onus of proof

The Court held that the AAT had correctly identified the two matters that must be proved on the balance of probabilities by a taxpayer challenging a default assessment under section 167 of the ITAA 1997. Those two matters are:

1. the taxpayer must positively prove their actual taxable income and that the amount of tax imposed by the default assessment exceeds the taxpayer's actual substantive liability; and
2. in a case where the asset betterment method is used, the taxpayer must account for the unexplained increase in assets by explaining the source of the assets and identifying that those sources are not taxable.

The Court reviewed the approach taken by the AAT in relation to the two separate categories of purported income. The Court held that the AAT had correctly and carefully identified the two aspects it was required to find, being about proof of actual taxable income on the one hand and about the unexplained increase in assets on the other.

In relation to the unexplained accumulated wealth, the Court held that the AAT did not err in finding, on the balance of probabilities, that Tina held the eight properties and certain bank accounts in her capacity as a trustee. As the assets were not beneficially hers, she was under no obligation to prove or explain the accumulation of wealth in respect of those assets.

In relation to the amounts passing through bank accounts and credit card accounts, the Court was satisfied that the AAT did not accept Tina's evidence and that Tina had failed to discharge her onus to prove those amounts were not taxable income.

The Court concluded that the AAT was able to find that the default assessments should be upheld in relation to the amounts passing through bank accounts, but that the default assessments should be amended to remove income relating to assets held by Tina as a trustee.

Fraud and evasion

The Court held that the role of the AAT was to form its own view as to whether there had been fraud or evasion, not merely to satisfy itself that the Commissioner held the requisite opinion. The Court held that the AAT had not adequately considered the evidence to form its own conclusion as to whether there was fraud or evasion. The Court remitted the matter to the AAT for consideration of this issue.

Penalties

The Court held that the AAT had incorrectly interpreted the meaning of 'previously' in section 284-220(1)(c) of Schedule 1 to the TAA. This was conceded by Tina. The Court referred to the decision in *Bosanac v Commissioner of Taxation* [2019] FCAFC 11 at paragraphs [139]-[149] which reached the same conclusion. As the AAT incorrectly interpreted the meaning of 'previously', the AAT did not find it necessary to consider Tina's

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submissions as to whether the penalties merited remission. By failing to consider the merits of the remission submissions, the AAT made an error.

The Court requested that the parties provide submissions about exactly which matters should be remitted to the AAT for reconsideration.

COMMENT – the role of a Court in proceedings such as these is to review whether the AAT has correctly applied the law. The Court is not able to re-evaluate the evidence to determine whether the decision was "correct" on the merits of case.

COMMENT – this decision provides a useful analysis of what is required in order to prove an assessment is excessive in an unexplained deposits or asset betterment case.

Citation *Commissioner of Taxation v Bazzo* [2024] FCA 452 (Colvin J, Western Australia)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/452.html

2.3 Duncan – work travel allowance expenses substantiation

John Duncan was a long-haul road transport driver.

In the income year ended 30 June 2021, John spent 282 days on the road, including 141 nights.

Jon was paid a travelling allowance under the relevant employment Award, but the terms of the Award provided that the allowance was not payable when an employee was provided with suitable accommodation away from the vehicle. The allowance was approximately $45 per night.

John claimed $100 per day in food and drink expenses, being a total of $28,200.

John's actual expenditure was $8,393 at cafes and roadhouses while on the road. When not eating out, John purchased ingredients, stored them in the fridge in the vehicle and prepared meals in the vehicle's kitchenette.

John claimed $28,200 as a work expense deduction in his tax return.

The Commissioner disallowed the deduction.

John objected to the decision. The Commissioner accepted the claim for $8,393 of actual expenditure that was evidenced by John's bank statements, but did not allow the balance of $19,807.

John sought review of the objection decision in the AAT.

John contended that the fact that he did not have receipts for the balance of the expenditure claimed should not prevent him claiming the deduction, as the substantiation exception in relation to work expenses under a travel allowance should apply.

Ordinarily, substantiation is required for expenses to be claimed as deductions, according to section 900-15 of the ITAA 1997. However, there is a 'substantiation exception' under sections 900-30 and 900-50 of the ITAA 1997. A deduction can be claimed for a domestic travel allowance expense without getting written evidence or keeping travel records if the Commissioner considers that the total deductions claimed for travel under the allowance are 'reasonable'.

The parties agreed that the ATO issued Taxation Determination TD 2020/5, which specified the maximum 'reasonable' amounts for drivers for the income year ended 30 June 2021 to be $25.75 for breakfast, $29.35 for lunch, and $50.65 for dinner (total $105.75).

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Issue

Should John's claim for $19,807 be allowed, despite not having substantiation for the expenses?

Decision

The AAT noted that there are four requirements for the deduction to be allowed:

1. John must have received a 'travel allowance', as defined;
2. John must have expended $28,200 on food and drink while on the road. That is, he must have 'incurred' this level of expense;
3. John's expenditure must fall within the limits specified in TD 2020/5; and
4. John's expenses on food and drink must be 'covered by a travel allowance'.

The AAT referred to the definition of 'travel allowance' in section 900-30(3), which requires that the allowance be paid to an employee "to cover losses or outgoings incurred for travel away from home, being losses or outgoings either for accommodation or for food/drink (or for 'incidentals')". As the allowance under the Award was not payable if accommodation was provided away from the vehicle, the AAT found that the allowance was not intended to cover food and drink expenses. The AAT reluctantly accepted that the allowance was intended to contribute towards outgoings incurred for accommodation, but noted that it was unlikely that appropriate overnight accommodation could have been found in the relevant year for $45 per night. The AAT decided to proceed on the basis that the allowance had enough connection to accommodation to fall within the definition of 'travel allowance.

John did not provide sufficient evidence to the ATO or the AAT that the expenditure on food and drink was actually incurred. There is no automatic deduction of up to $105.75 per day for long-haul drivers who include a travel allowance in their assessable income. A driver must have incurred the claimed expense and demonstrate an acceptable methodology for estimating expenses that have been incurred to which the substantiation exception is applied.

The AAT observed that John had the onus to prove what the correct assessment should have been and found that John had not provided evidence to allow the claimed expenses. The objection decision was affirmed.

Citation *Duncan and Commissioner of Taxation (Taxation)* [2024] AATA 974 (Senior Member Dr N A Manetta, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/974.html

2.4 Ionita – deductibility of self-education expenses

Facts

Alice Ionita was a qualified dentist in Romania.

In 2012, Alice moved to Australia to live.

In 2013, Alice commenced working as a dental technician.

She incurred the following expenses during the income years ending 30 June 2015, 30 June 2017, 30 June 2018, and 30 June 2019 (**Relevant Income Years**) to become qualified as a dentist in Australia:

Income year	Expenses claimed

30 June 2015	$610 for an Initial Assessment (General Dentistry) and $1,500 for a Written Examination (General Dentistry), totalling $2,110
30 June 2017	$2,000 for a Written Examination (General Dentistry), and $2,000 for a second Written Examination (General Dentistry), totalling $4,000
30 June 2018	$4,500 for a Practical Examination (General Dentistry)
30 June 2019	$4,500 for a Practical Examination (General Dentistry), $727 for meals and accommodation, and $807 for flights, totalling $6,033
Total	***$16,643***

The Commissioner issued assessments for the Relevant Income Years.

On 28 September 2021, Alice objected the assessments on the basis that the above expenses should have been deductible under section 8-1 of the ITAA 1997.

On 9 December 2021, the Commissioner denied those objections.

Alice applied to the AAT seeking a review of the Commissioner's decision to deny the objections.

Alice argued that the expenses were self-education expenses and therefore deductible under section 8-1 of the ITAA 1997.

The Commissioner argued they were not incurred in gaining or producing Alice's assessable income and therefore not deductible under section 8-1 of the ITAA 1997.

Issue

Were the expenses claimed by Alice deductible under section 8-1 of the ITAA 1997 on the basis that they were self-education expenses?

Decision

The AAT referred to Member D Mitchell's summary of the authorities that dealt with the deductibility of work-related self-education expenses in *Anders and Commissioner of Taxation* [2023] AATA 1471 which found that:

3. self-education expenses may be deductible if they are essential for a taxpayer to maintain their income earning activities, or to improve the taxpayer’s skills or knowledge necessary to perform their current role;
4. alternatively, if the self-education undertaken by the taxpayer leads to an increase in income in their current income earning activities, the expense may be deductible; and
5. however, self-education to obtain new employment or a new income earning activity lacks the sufficient nexus to be deductible.

The AAT also referred to Taxation Ruling 98/9 *Income Tax: deductibility of self-education expenses incurred by an employee or a person in business*, which summarises these principles. Although TR 98/9 is now withdrawn, it was applicable during the Relevant Income Years.

The AAT found that there must be a sufficient nexus between the expenses incurred and Alice's income earning activity as a dental technician. Such a nexus would have been present if the self-education was necessary to maintain her income earning activities as a dental technician, improved her skills or knowledge necessary to perform her role as a dental technician, or led to an increase in income in her role as a dental technician.

However, the AAT found that such nexus did not exist for Alice for the following reasons:

1. the evidence did not support a finding that the expenses for the assessment or the examinations were required to maintain Alice's skills as a dental technician. She was already a qualified dentist overseas. Her employment contract did not require her to undertake any study to maintain her skills, nor did any professional body;
2. the evidence did not suggest a sufficient correlation between the expenses and the improvement of the Alice's role as a dental technician. The AAT found that the roles and qualifications of a dentist and a dental technician were different. It was not clear is not clear what skills and knowledge were gained from sitting the assessment and the examinations and how that correlated with Alice's role as a dental technician;
3. as Alice was not yet employed as a dentist during the Relevant Income Years but sought to become registered as a dentist to work as a dentist in the future, the expenses were incurred at a point too soon to be regarded as incurred in gaining or producing assessable income; and
4. the evidence did not show that her pay increases were due to her completion of the assessment and the examinations. Her salary increase may have been due to several factors, including the experience and confidence she gained over the 10-year period she was working with her employer. Also, the timing of Alice's pay increases did not correlate with the timing of the assessment and examinations.

Based on the above, the AAT affirmed the Commissioner's decision to deny Alice's objections.

TIP – TR 98/9 referred to in this case has been withdrawn and replaced with TR 2024/3 *Income tax: deductibility of self-education expenses incurred by an individual'.*

Citation *Ionita and Commissioner of Taxation (Taxation)* [2024] AATA 808 (Senior Member Dr M Evans-Bonner, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/808.html

2.5 S&H Investments – SGC extended definition of employee

Facts

S&H Investments Pty Ltd (S&H) is a private company that provides technology solutions for corporate and government entities.

In March 2014, S&H engaged TW (a pseudonym), as a full-time employee, to clean S&H's offices. She was paid $23 per hour and was given a desk and a work email address. From 2014, S&H paid superannuation to TW as her employer.

In March 2015, S&H underwent a restructure in order to reduce its expenses.

On 11 May 2015, the Admin and HR representative of S&H emailed TW regarding the restructure. The relevant part of the email is below:

> *We have been extremely happy with the service you have been providing over the last year and would like to keep you to continue with the office cleaning but it would be necessary for us to change the terms of your employment.*
>
> *We would like to propose commencing Monday 25th May (2 weeks) to offer you contract work doing the cleaning at [office address] for 20 hours per week. (4 hours per day x 5 days @$30.00 ph)*
>
> *If you would like to accept the contract cleaning then your full time employment will end on Friday 22nd May.*

Let me know as soon as possible if these changes are acceptable to you [TW] so we can start working towards the changeover and details involved.

On 12 May 2015, TW replied. The relevant part of the email is below:

Yes, this is acceptable. If I could still have some flexibility with my hours (providing of course that I ensure the building is clean for start of business each day) that would make it a lot easier for me to able to find other work so that I can supplement my income and still be able to work for the company.

Some extra hours may be needed here and there to make sure the little extra things are also taking care of and don't build up and get out of hand but we'll see how it goes and we can talk about that if/when the need arises.

On 22 May 2015, the Admin and HR representative emailed TW a list of cleaning duties that a temporary cleaning company undertook when TW was on holidays to *"assist you in the transition from 8 hours per day to 4 hours per day."*

TW was then showed the table below and explained that her hourly rate was higher because it was her responsibility to pay her own superannuation:

Description	***Amount***
Employee Hourly Rate	*$23.03*
Superannuation	*$2.19*
Payroll Tax	*$1.27*
Annual Leave	*$1.77*
Personal Leave	*$0.88*
Public Holidays	*$0.88*
Contractor Hourly Rate	***$30.02***

There was no formal written contract in place. The contract was recorded in the exchange of emails between TW and S&H representatives.

TW was engaged to undertake office cleaning and was given a generic list of tasks and some guidance as to what daily and weekly tasks should be undertaken. There was no change in the work when she was a contracted employee except that she had less time to finish the work.

TW never delegated her work. There was some discussion where she had suggested her friend while she was away, however this never eventuated. When TW was sick or unavailable, S&H would engage a replacement contractor to do the work.

On 21 December 2022, for the quarters ending 30 June 2015 to September 2019, the ATO issued a superannuation guarantee charge assessment to S&H on the basis that TW was S&H's employee within the extended definition of "employee" under s12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGAA**).

Section 12(3) of the SGAA extends the definition of an 'employer' beyond the common law definition. It provides an additional basis for a person to be an employee for the purposes of the SGAA. The provision states:

If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

S&H objected to the assessments. The Commissioner disallowed the objections.

On 9 March 2023, S&H applied to the AAT seeking a review of an objection decisions.

S&H contended that because TW agreed to assume responsibility for her own superannuation contributions from May 2015 and she was paid a higher hourly rate, she was responsible for withholding superannuation contributions on her own behalf.

Issue

Was the contract wholly or principally for the labour of TW, obliging S&H to pay her superannuation contributions?

Decision

The AAT had regard to the decision in *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118 and held that the question is whether the contract is "for" the labour of the person must be approached from the perspective of the putative employer. A contract will not be wholly or principally for the labour of a person where it requires the person to produce a particular result or when there is a right to delegate.

The AAT found that the conduct of the S&H and TW indicated that there was no right to delegate.

The AAT affirmed that employers cannot contract out of their superannuation obligations, nor can employees waive their entitlements under SGAA. It is not for parties to a private contract to determine when the law should apply.

Although the parties may have thought TW was an independent contractor, the parties' subjective intentions are irrelevant, and they cannot contract out of their obligations under SGAA.

The AAT held that TW is an employee under the extended definition in section 12(3) the SGAA and S&H was liable for the SGC assessed.

Citation *S&H Investments Pty Ltd v Commissioner of Taxation* [2024] AATA 893 (Senior Member Dr M Evans-Bonner, Perth)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/893.html

2.6 Loan Market Group – payroll tax relevant contract

Facts

In about 1994, the Ray White Group established Elkbay Pty Ltd. Elkbay carried on a mortgage broking business by entering into agreements with lenders for the purpose of being able to offer the products of lenders to the Ray White Group's real estate clients.

In the late 1990s, lenders began to impose conditions on mortgage brokers to receive accreditation, including minimum value of loans required to be written in a month. In or around 2000, the sharing of accreditations developed into the emergence of aggregators in the industry. In or around July 2002, Elkbay was transformed into an aggregator and changed its name to eMOCA Pty Ltd (**eMOCA**). Aggregators connect lenders to mortgage brokers as lenders do not normally have a direct commercial relationship with brokers.

In June 2003, Reva Broking Pty Limited (**Reva**) was established which, by 2010, approximately 80 brokers were aggregated under Reva with approximately 1-2 brokers within each business. Reva's name was subsequently changed to Loan Market Pty Ltd (**LML**).

eMOCA entered into agreements with various lenders for the payment of commissions by the lender if the borrower, referred to the lender by eMOCA or one of its associates, obtained a loan from the lender (**Lender Agreements**). It was necessary for the brokers to be accredited with a lender before brokering that lender's products. The lenders prescribed criteria for accreditation and had sole discretion regarding whether a broker would receive accreditation.

LML and eMOCA are wholly owned subsidiaries of Loan Market Group Pty Ltd (**LMG**), referred to as the LM Group.

From 1 July 2010, the *National Consumer Credit Protection Act 2009* (Cth) applied to regulate the provision of certain credit activities. Part 2-1 of the Credit Protection Act requires a person to hold an Australian Credit Licence (**ACL**) if they are to engage in credit activities which includes the provision of credit assistance to a consumer. The provision of mortgage broking services constitutes the provision of credit assistance which, in turn, constitutes the provision of credit services.

Ordinarily, a broker would need to obtain a licence to provide mortgage broking services to a consumer. However, an ACL holder may authorise persons to engage in credit activities as an authorised credit representative under its ACL. Section 75 of the Credit Protection Act provides that a licensee is responsible, as between the licensee and the client, for the conduct of the representative, whether the representative's conduct is within the authority of the licensee. Since 27 May 2011, LML and eMOCA have held an ACL.

Prior to about 1 July 2014, LML had three alternative agreements in place with the brokers. On 1 July 2014, LM Group moved to a formal franchise model for its brokers. From that date, brokers were requested to enter into agreements with LML under which LML agreed to provide brokers with services in return for the payment of fees by the brokers (**Broker Agreements**).

Relevantly, the Broker Agreements provided as follows:

1. LML appointed the broker as a credit representative of LML under its ACL to engage in credit activities, although in some cases the broker held their own ACL;
2. the broker was prohibited from being a credit representative of any other ACL holder;
3. the broker was required to respond to all leads in the manner specified in the operations manual;
4. the broker was responsible for seeking new customers;
5. the broker was required to only work as a broker with LML;
6. the broker was required to only offer loan products approved by LML;
7. the broker was required to pay to LML an establishment fee, a system fee, a facilitation fee, and where applicable, a lead generation fee;
8. the broker was required to operate their business strictly in accordance with the LM Group operations manual and any written direction given by LML;
9. the broker was required to conduct their activities to "protect and enhance the good name and reputation of the Loan Market Group…";
10. LML was required to notify to the broker and pay the commission after deducting amounts set out in the Broker Agreement;
11. the broker was required to train its staff to the satisfaction of LML;
12. the broker's commercial premises were required to be fitted out with a LM Group identity;
13. the broker was required to participate in the LM Group marketing and only use the LM Group websites to market its business; and
14. LML was entitled to issue RCTI's on behalf of the broker in respect of supplies made by the broker to LML.

Brokers earned commissions through introducing customers to lenders. The commissions comprised of both upfront and trail commissions. There were claw-back provisions for the repayment of commissions if the borrower defaulted or refinanced with another lender within a certain period of time.

Brokers obtained new customer leads by three main methods:

1. referral from the LM Group which included by customers calling the LM Group call centre, customers filling in an enquiry sent to a generic LM Group email address, and by the “360 Referral Program” the LM Group had in place with the Ray White Group;
2. referral arrangements with entities that operated Ray White real estate offices; and
3. word-of-mouth referrals and other referral networks of the brokers.

The business models of brokers aggregating under LM Group include (but were not limited to) sole traders, private companies, trusts, and partnerships.

The support and services provided by the LM Group to the brokers included the following:

1. onboarding of brokers which takes about 6 weeks;
2. access to LM Group's technology, software, and IT support;
3. use of LM Group's branding;
4. access to a panel of lenders and accreditation assistance;
5. compliance to monitor the loan writing activities of mortgage brokers to ensure compliance with requirements of legislation, lenders, regulators, and LM Group itself;
6. authorisation under LML's ACL;
7. aggregation of the receipt and payment of commissions on behalf of brokers;
8. training and development;
9. lender escalation and complaints handling;
10. recruitment of loan writers, admin staff and brokers;
11. use of offshore processing services, including data entry by Galilee Business Support Services Pty Ltd (**Galilee**);
12. payments to third parties on behalf of the brokers;
13. marketing and support;
14. development and execution of business plans; and
15. lead generation services.

The Chief Commissioner assessed payroll tax to be payable in respect of commissions paid by LML to the brokers under the Broker Agreements during the financial years ended 30 June 2012 to 30 June 2018. LML and LMG applied to the Supreme Court of New South Wales for a review of the payroll tax assessments issued by the Chief Commissioner.

Nine witnesses gave evidence in the proceedings who fell within the following categories:

1. a broker who had an entitlement to trail commissions only each year and who worked less than 90 days in each year;
2. a broker who provided loan origination services to loan applicants/borrowers each year;
3. a broker who obtained services from the LML or LMG under or arising from the Broker Agreement in any given year;
4. a broker who obtained services from Galilee each year;
5. a broker who employed or utilised the services or administrative staff each year; and
6. a broker who utilised their own ACL, in any given year, in the course of conducting their mortgage broking business.

The Chief Commissioner contended that payroll tax is payable on the payments made to the brokers because the Broker Agreements were ‘relevant contracts’ within the meaning of s 32(1)(b) of the PTA. This is in circumstances where the brokers provided services to LML, including by assisting LML to secure new customers for the lenders. Therefore, LML is taken to be the employer of the brokers and the amounts paid to the brokers are taken to be wages for the purposes of the PTA.

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Issues

1. What was the character of the businesses operated by LML and the brokers?
2. Do the Broker Agreements constitute a relevant contract under which LML, in the course of a business carried on by LML, supplied to LML the services of brokers for or in relation to the performance of work to which section 32(1) of the *Payroll Tax Act 2007* (NSW) applies?
3. Are the trail commissions paid by LML to the brokers wages within the meaning of section 35(1) of the PTA?
4. Do any of the exemptions in section 32(2) of the PTA apply?
5. Were the payments made to the brokers “for or in relation to the performance of work relating to a relevant contract” with the meaning of section 35 of the PTA?

Decision

Character of businesses

As a threshold issue, Richmond J made findings about the character of the businesses operated by LML and the brokers.

In respect of the brokers, Richmond J confirmed that the brokers conducted a business of mortgage broking or loan origination which involved the identification for a prospective customer of the appropriate loan product available on the LM Group approved product list and assisting the prospective customer with making a loan application to a lender. Richmond J found that the brokers, including those with their own ACL, conducted this business using the LM Group branding and related intellectual property and in accordance with the requirements of the LM Group operations manual and the Broker Agreements.

In respect of LML, Richmond J found that the business of LML is characterised as entering into and performing the Broker Agreements with the brokers in order to facilitate the generation of commissions payable to eMOCA under the Lender Agreements. This was consistent with the annual reports for the LM Group which were prepared on a consolidated basis and describe the business of the LM Group as “mortgage broking” or “mortgage broking services”. They also identified the main source of revenue as being commissions paid by the lenders, with the payments made to brokers being recognised as expenses of the LM Group.

Relevant contracts

Richmond J confirmed that a Broker Agreement will be a relevant contract within the meaning of section 32(1)(b) of the PTA if it is a contract under which LML, during that financial year and in the course of a business carried on by it, has supplied to it the services of a person, the brokers, for or in relation to the performance of work.

Richmond J had regard to the "suite of promises" the brokers gave to LML under the Broker Agreements as to the manner in which they would conduct their business, with the "key promise" being to conduct that business under the Loan Market brand adopting practices and procedures mandated by LML. Richmond J held that these were valuable promises made by the brokers to LML because:

1. performance of the work in accordance with the Broker Agreements would generate commissions from which LML was expected to benefit; and
2. where the broker was acting as a credit representative on behalf of LML, it was important that the procedures mandated by LML were followed because LML would be responsible to the client for the conduct of the broker as LML’s credit representative.

Therefore, Richmond J confirmed that the performance by the broker of the promises to undertake the work in a particular way is characterised as the performance of a service to LML, being a relevant contract. This is notwithstanding that the brokers also perform a service to the client who obtains the loan. Further, even where

a broker had their own ACL, they were still required to act within the mandates of LML and therefore this was a relevant contract.

The Court accepted that this conclusion could lead to a harsh result for LML. However, the way the legislature approached the implementation of these provisions was to "cast the net of 'relevant contract' very widely and then to give exclusions which were intended to catch the bona fide independent contractor relationships".

Trail commissions

The next issue concerns section 35 of the PTA which provides as follows:

> *(1) For the purposes of this Act, amounts paid or payable by an employer during a financial year for or in relation to the performance of work relating to a relevant contract or the re-supply of goods by an employee under a relevant contract are taken to be wages paid or payable during that financial year.*

In respect of the trail commissions, Richmond J confirmed that section 35 deems amounts paid or payable by LML during a financial year, for or in relation to the performance of work relating to a relevant contract, to be wages paid or payable during that financial year. The expression 'relevant contract' requires the particular contract to be characterised as such in respect of the relevant financial year, and sections 33 and 34 are also tied to the same financial year.

Richmond J concluded that where trail commissions paid to a broker in a financial year after the Brokers Agreement has terminated, there will be no relevant contract between LML and the broker in respect of that financial year. It follows that the broker will not be deemed to be an employee of LML for that year and the trail commissions paid to the broker will not be wages paid under a relevant contact in a financial year. The Court confirmed that there is no provision in the PTA which allows the adjustment of the taxable wages for a financial year by reference to amounts paid or payable in a subsequent financial year.

Accordingly, Richmond J agreed with LML in respect of issue 3.

Relevant contract exemptions

Section 32(2)(b)(iv) – providing services to the public generally

Richmond J next considered whether some of the brokers, who supplied services to LML under the Broker Agreements, ordinarily perform services of that kind to the public generally in the financial year such that the exemption in section 32(2)(b)(iv) of the PTA applied. With the 'public' being the clients serviced by the brokers.

Richmond J accepted that, where the relevant contract between a worker and a principal arises out of services being provided by the worker to a third party, as was the case here, it is possible that the provision of those services may be regarded as providing services of the same kind to the public generally so as to meet the exemption under section 32(2)(b)(iv). It depends on the circumstances.

Richmond J concluded that the services provided to the clients of the brokers were not of the same kind as those provided to LML. In particular, Richmond J had regard to the obligations imposed under the Broker Agreements which were "directed to ensuring that each broker conducts a business which is successful, enhances the Loan Market brand and generates revenue for LML and the LM Group". Richmond J concluded that the performance of these promises was a provision of services different to, and more extensive in nature than, the services provided to the brokers' clients.

Section 32(2)(c)(iii) – work is performed by two or more persons in a business carried on by the contractor

Richmond J also considered whether the exemption in section 32(2)(c)(iii) applied to the relevant contract between LML and Anastasia Theodoropoulos, being the provisions of the mortgage broking services by two or more persons employed by the broker in the course of the business carried on by the broker.

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Richmond J accepted that Anastasia employed Maria Damjanic for approximately nine months from March/April 2017 at $100 per week which includes approximately six months in the 2018 financial year. Maria was employed to assist with administrative tasks, but the main work she performed was data entry for clients for whom Anastasia was working in her mortgage broking business. Richmond J found that Maria had relevant experience for this role and there is an adequate explanation for why the arrangement between Maria and Anastasia was informal, being that Anastasia had a serious illness in 2017.

Therefore, Richmond J accepted that the exemption in section 32(2)(c)(iii) of the PTA applied to the relevant contract between LML and Anastasia for the 2018 financial year on the two persons performed work-related services for that year.

Payments to brokers

Richmond J determined that work performed by the brokers was central to the operation of LML's business, which included assisting eMOCA earn commissions. Richmond J recognised that LML employed no staff to assist it achieve that outcome but instead relied upon the work performed by the brokers that it engaged under the Broker Agreements.

Therefore, there was a direct relationship between the commissions, the performance of work by the brokers and the Broker Agreements such that section 35 of the PTA applied.

The proceedings were stood over for directions to deal with outstanding issues, including penalty tax and costs, and the finalisation of orders.

COMMENT – the outcome in this case is unsurprising, given the nature of the arrangements. The interesting aspect of the decision is Richmond J's acceptance that the exemption in section 32(2)(b)(iv) of the PTA may be satisfied for arrangements of this nature i.e. where a person performing services (in this case, the brokers) for its clients (in this case, the borrowers) is also regarded as performing services for someone else (in this case, LML), on the basis that the services provided to the other person are of a kind that the service provider provides to the public generally because it provides the services to the clients. This opens the potential availability of the section 32(2)(b)(iv) exemption to medical practice arrangements whereby a medical practitioner in providing services to patients is also considered to be providing services to a facilities provider for the purpose of the relevant contract provisions. Such arrangements do not normally involve the medical professional having extensive duties to the facilities provider (as was the case with the brokers here) other than performing the medical services for patients and, accordingly, it may be that the exemption is available, despite it not being so in this case.

Citation *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390 (New South Wales, Richmond J)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/390.html

2.7 Pontiac Trading Co – land tax surcharge and whether a trust is a discretionary trust

Facts

Pontiac Trading Co Pty Ltd is a trustee for the Karina Surjadi Family Trust, which was settled as a discretionary trust on 21 July 1997. Mr Surjadi is the sole director of the trustee company.

On 5 September 1997, the trustee of the Karina Surjadi Family Trust purchased residential land at Kingsford, New South Wales. The property was used as a rental property until February 2022.

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From the 2017 land tax year, surcharge land tax applies to foreign persons who are owners of residential land in New South Wales. Where an interest in a property is acquired directly or indirectly by or held through a discretionary trust, the trustee of the trust may be liable for foreign surcharges if any one of the potential beneficiaries is a foreign person. For a trustee of a discretionary to avoid being a 'foreign person', section 5D of the Duties Act requires that the discretionary must meet both of the following requirements:

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

The “no foreign beneficiary requirement” will usually be satisfied if the terms of the trust prevent any property of the trust from being distributed to or applied for the benefit of the person.

If a trust is a fixed trust, the beneficiaries are assessed based on whether or not they are foreign persons. A fixed trust is where the beneficiaries or unit holders are considered owners of the land as at the taxing date because they’re presently entitled to the income and capital of the trust, and these entitlements cannot be varied by the trustee in any way.

In 2022, Mr Surjadi's accountant informed him that he had received advice from a solicitor that amendments were needed to be made to the trust deed of the Karina Surjadi Family Trust to remove foreign beneficiaries.

The trustee engaged solicitors to amend the trust deed. Mr Surjadi explained to the solicitors that the sole beneficiary of the Karina Surjadi Family Trust had moved into the Property in February 2022 for ‘good’.

On 25 March 2022, the trust deed was amended to:

1. delete all eligible beneficiaries apart from the sole beneficiary;
2. remove the trustee's power to accumulate income of the trust fund; and
3. add to the variation power that "the Trustee may with the consent in writing of the Appointor Eligible Beneficiary from time to time by supplemental deed revoke add to or vary all or any of the provisions of the Trust Deed".

The sole beneficiary is an age pensioner.

On 12 April 2022, the amended trust deed was sent to Revenue NSW.

On 11 May 2023, Revenue NSW responded, determining that despite the amendments, the trust remained a discretionary trust and that foreign beneficiaries were not excluded. The Chief Commissioner of State Revenue issued the trustee with land tax assessments for the 2019 to 2023 land tax years for land tax, surcharge land tax and interest.

The trustee objected to the assessments.

On 10 August 2023, the Chief Commissioner disallowed the objection.

The trustee sought review of the objection decision in the NCAT.

The parties did not dispute that prior to the 25 March 2022 amendments, the trust was a discretionary trust. However, the trustee argued that the amendments had 'converted' the trust into a fixed trust for the purpose of the 2023 land tax year, which commenced at midnight on 31 December 2022. As the sole beneficiary was not a foreign person, the trust should not be subject to surcharge land tax.

The trustee contended that the amendments meant that the trustee had no discretion as to the appointment of income or capital or the discretion to accumulate income. The trustee argued that as the trustee could not override the entitlement of the sole beneficiary without her approval, she was entitled to the property, able to

direct the trustee in relation to the property and the trust could no longer be characterised as a discretionary trust.

The Chief Commissioner argued that the ability of the sole beneficiary to call for the trust to be wound up was not sufficient to establish that the sole beneficiary was entitled to a beneficial interest in the trust property.

The Chief Commissioner also submitted that the amendments did not prevent the deed from being amended in the future in a manner that would result in there being a potential beneficiary of the trust who is a foreign person.

The trustee also requested that interest should be remitted, on the basis that:

1. the unpaid tax arose due to the retrospective application of a new law rather than any act or a mission by the trustee;
2. in every year, land tax has been unilaterally assessed by the Chief Commissioner who has had in his position all relevant information necessary to properly identify the trustee as potentially liable to surcharge land tax;
3. no notice was issued to the trustee advising of the change in law and retrospective application of it; and
4. there was significant delay by the Chief Commissioner in responding to the trustee's April 2022 correspondence regarding the status of the trust for land tax purposes with the position only reached in the 2023 land tax year to the prejudice of the trustee.

The trustee submitted that the surcharge tax should be written off under section 110(1) of the *Taxation Administration Act 1996* (NSW), which allows the Chief Commissioner to 'write off' the whole or any part of any unpaid tax if satisfied that action, or further action, to recover the tax is impracticable or unwarranted.

The Chief Commissioner observed that the power in section 110 of the TAA relates to the accounting practices of Revenue NSW and does not affect he liability of the taxpayer to pay the tax or the power of the Chief Commissioner to recover it.

Issues

1. Was the Karina Surjadi Family Trust a discretionary trust following the making of the amendments?
2. Should interest be remitted?
3. Should the surcharge land tax assessments for the 2019 to 2023 land tax years be 'written off'?

Decision

<u>Is the trust a discretionary trust?</u>

Prior to the amendments in 2022, the trust had two named default beneficiaries and multiple eligible beneficiaries. The NCAT considered sections 3A(3A) and 3A(3B) of the *Land Tax Management Act 1956* (NSW) which defines a fixed trust as one where the trust deed specifically provides that beneficiary is presently entitled to both income and capital of the trust, subject to the trustee's proper expenses in administering the trust. Section 3A(3B) also requires that the present entitlement cannot be removed, restricted or otherwise affected by the exercise of any discretion, or by a failure to exercise any discretion.

The NCAT considered that the amendment power in the trust deed meant that the sole beneficiary's entitlement could be varied in the future and the requirements of section 3A(3B) were not met. The NCAT also accepted the Chief Commissioner's submission that the ability of the sole beneficiary to call for the trust to be wound up was not sufficient to establish that the sole beneficiary was entitled to a beneficial interest in the trust property. There was no clause in the trust deed that required the trustee to transfer the property to a beneficiary upon request or direction, nor was there a clause in the trust deed permitting a beneficiary to instigate winding up the trust.

The NCAT concluded that the amendments in 2022 did not cause the trust to satisfy the requirements to be a fixed trust under the *Land Tax Management Act 1956* (NSW).

The NCAT then noted that the term discretionary trust has no fixed meaning, relying of the decision of the High Court in Chief of *Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4. The NCAT concluded that as the Trustee continued to have interest in the Trust Property and had duties consistent with what a trustee of a discretionary trust has, it remained a discretionary trust.

Should interest be remitted?

The NCAT concluded that it was not appropriate to remit the market or the premium component of the interest prior to 13 April 2022, because the trustee had not provided any information to the Chief Commissioner in relation to the trust's land tax liabilities. Ignorance of the provisions was not considered to be an exceptional circumstance.

Should surcharge land tax be 'written off'?

The NCAT accepted the Chief Commissioner's submission and followed the decision in *Loomes v Chief Commissioner of State Revenue* [2014] NSWCATAD 133, finding that the power to 'write off' tax under section 110 of the TAA is merely an accounting power and does not affect the existence of the liability or the Chief Commissioner's power to recover the debt.

COMMENT – it is hard to accept the NCAT's decision that, as the trustee continued to hold an interest in the property of the trust, the trust remained as discretionary trust. This would arguably mean that every unit trust, which is not a fixed trust for land tax, would be treated as a discretionary trust for land tax surcharge.

Citation *Pontiac Trading Co Pty Ltd as trustee for the Karina Surjadi Family Trust v Chief Commissioner of State Revenue* [2024] NSWCATAD 114 (Senior Member L Andelman)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/114.html

2.8 Hino Group – execution of documents by company director

Facts

In February 2023, Kulwant Sing sought to purchase an apartment in Sydney's Barangaroo from Hino Group Pty Ltd for $7.1 million. On 10 February 2023, the contract of sale was entered into between Hino Group and Kulwant.

Hino Group executed the contract of sale without using a common seal under section 127(1) of the Corporations Act by having Damon Wan, a director and secretary for the company, sign the contract in his capacity as both director and secretary. Ms Huang, being the other director of Hino Group (and mother of Damon), did not sign the contract of sale.

The constitution of Hino Group, at clause 112 relevantly provided that in addition to the powers under section 127(1) of the Corporations Act, Hino Group was able to validly execute a document if signed by '1 director […] or who is both a director and company secretary'. Clause 113 provided that the directors may determine at their discretion that a document may be executed 'in a different manner'.

Kulwant paid a holding deposit of $17,750, leaving the remainder of the contractual deposit of $692,250 to be paid to Hino Group. Hino Group and Kulwant engaged in multiple discussions to arrange for Kulwant to pay the deposit in instalments and with various extensions, all which Kulwant was unable to meet.

On 27 March 2023, Hino Group issued a notice of termination to Kulwant along with a letter of demand for the balance of the deposit. By 11 April 2023, the balance of the deposit had not been paid by Kulwant.

On 18 April 2023, Hino Group commenced proceedings against Kulwant in the New South Wales District Court.

Kulwant argued that he should not have to pay the balance of the deposit as the contract was not validly executed by Hino Group under section 127(1)(b) of the Corporations Act.

Issue

Does section 127(1) of the Corporations Act allow a single director who is also the company secretary of a multi-director company to execute a document without using a common seal?

Decision

The Court had regard to case law which considered section 127(1) of the Corporations Act, including *Zhang v BM Sydney Building Materials Pty Ltd* [2016] NSWCA 166, which ultimately accepted that a director who was also a company secretary of a multi-director company, was able to execute a document for the company without a company seal.

His Honour considered himself bound by the decision in *Zhang*, even if the wording of section 127(1)(b) of the Corporations Act, on plain reading and without authority, would not allow one director who was also a company secretary of a multi-director company to validly execute a document without a company seal.

Additionally, authority on section 127(1) of the Corporations Act, was augmented by clauses 112 and 113 of the constitution of Hino Group. The Court found that the constitution allowed for a director that is also a director and company secretary to sign, under clause 112 of the constitution.

The Court also found that the conversations and agreements around the time of Ms Huang becoming a director of Hino Group Pty Ltd was an agreement under clause 113 of the constitution of Hino Group Pty Ltd, that Ms Huang would be able to execute documents by the company without use of a common seal whilst Damon was travelling or not available, and at other times Damon would be able to continue to execute documents as if he was a sole company director and company secretary.

His Honour also found that the Letter of Demand and the Notice of Termination were valid.

Hino Group was found to have validly executed the contract without a company seal under section 127(1) of the Corporations Act. The Court also found in the alternative, that should it be found that Hino Group did not validly execute the contract of sale, it had been ratified and accepted as if it was validly executed by Hino Group because they had chosen to sue on the contract.

Citation *Hino Group Pty Ltd v Singh and Anor* [2024] NSWDC 124 (New South Wales, Weber SC DJC)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWDC/2024/124.html

2.9 R v Van Eps – ATO compulsory examination

Facts

Julie Van Eps was investigated by the ATO regarding a research and development tax offset claim that she had lodged. Julie was compulsorily examined pursuant to a power conferred to the ATO under section 353-10 of Schedule 1 of the TAA.

Division 353 of Schedule 1 of the TAA gives the Commissioner powers to obtain information and evidence which overrides the common law principle of privilege against self-incrimination. A taxpayer served with a

notice under this provision is required to provide the information or attend a meeting with the ATO where they are required to answer questions posed by the ATO, even if doing so would incriminate the taxpayer.

Division 355 of Scheule 1 of the TAA sets out circumstances in which, and to whom, evidence or information so obtained may be disclosed. The general position is that a taxation officer is prohibited from disclosing information provided by Julie during the compulsory examination unless it is specifically permitted.

One of the exceptions is set out in section 335-50(2) of Schedule 1 of the TAA permits a taxation officer to disclose tax information for the purposes of "for the purpose of administering any taxation law" and "for the purpose of criminal, civil or administrative proceedings (including merits review or judicial review) that are related to a taxation law".

Another exception is contained in section 355-70, which provides the ability for a taxation officer to make disclosure of information to the Commonwealth Director of Public Prosecutions for the purposes of investigating a series offence, or enforcing a law, the contravention of which is a serious offence.

Following the examination, the ATO provided a transcript of the examination to AusIndustry and the Commonwealth Director of Public Prosecutions.

On 4 April 2019, Julie was charged with attempting to dishonestly obtain a financial advantage from a Commonwealth entity on the basis that the claim for the research and development tax offset was false.

On 18 September 2023, the matter was heard in the District Court.

As part of the proceedings in the District Court, Julie applied to stay the prosecution on the basis that the disclosure of the transcript of the compulsory examination by the ATO to AusIndustry and the Commonwealth Director of Public Prosecutions was unlawful. This was on the basis that the ATO was unauthorised to disclose information obtained during the course of a compulsory examination prior to Julie being charged with an offence.

The Commonwealth Director of Public Prosecutions submitted that on a proper construction of section 355-50 and section 355-70, the ATO is authorised to disclose to AusIndustry and the Commonwealth Director of Public Prosecutions for the purpose of a consideration of charges against Julie, formulation of the charges and the preparation of the prosecution case in relation to such charges.

The construction of section 355-50 and section 355-70 has been subject two conflicting appellate court cases, the Queensland Court of Appeal case of *R v Leach* [2018] QCA 131 and New South Wales Court of Appeal case of *R v Kinghorn* (2021) 106 NSWLR 322.

In *Leach*, the ATO had provided a transcript of evidence provided by a taxpayer under a section 353-10 notice to the CDPP and prosecutors resulting in the taxpayer being charged with criminal offense. The Court of Appeal ordered to stay the proceedings on the basis that the evidence obtained in the context of a compulsory examination and its admission as evidence in the prosecution of the taxpayer conflicted with fundamental common law principles, being that the prosecution bears the onus of proof and that the prosecution cannot compel an accused to assist it in discharging its' burden of proof (this is known as the 'accusatorial principle'). A feature of the accusatorial principle is that an accused cannot be required to testify (this is known as the 'companion rule').

In *Kinghorn*, the Court diverged from the decision in *Leach*. The Court determined that the disclosure of information obtained under a compulsory examination was authorised by section 355-70 of Schedule 1 of the TAA, in circumstances where the disclosure occurred before charges were laid. The Court noted that the intent of the statutory provisions was such that disclosure was permitted despite the common law accusatorial principle and the companion rule.

The primary judge in the District Court found that *Leach* applied and the ATO was unauthorised to disclose the information obtained under the section 353-10 notice.

The Commonwealth Director of Public Prosecutions appealed the decision.

Issue

Was the ATO authorised to disclose the transcript obtained in the course of a compulsory examination under section 353-10 to the Commonwealth Director of Public Prosecutions and AusIndustry in circumstances where criminal charges had not been laid?

Decision

The Court of Appeal was required to consider whether the decision in *Leach* should be upheld or whether the decision should be overturned in light of the conflicting decision of the New South Wales Court of Criminal Appeal in *Kinghorn*.

In considering this issue, the Court considered the conflicting decisions of *Kinghorn* and noted the decision in *Kinghorn* was based on the decision of the High Court in *R v Independent Broad-Based Anti-Corruption Commission* [2016] HCA 8. In *IBAC*, the High Court considered that the companion principle was a principle of the criminal justice system and, therefore, only applied once criminal proceedings had commenced.

The Court considered that *Leach* did not consider the objects of the provisions under section 355-70 of Schedule 1 of the TAA. Relevantly, that provision expressly authorises disclosure of information to an authorised law enforcement agency, such as the CDPP, for the purposes of that agency enforcing a law. The Court also noted that the decision in Leach deviated from the High Court in *IBAC* which distinguished between disclosure of a compulsory examination prior to criminal proceedings being initiated and during criminal proceedings. Relevantly, IBAC held that the companion rule only applied in circumstances where a criminal charge had been laid.

Considering section 353-10 in the context of section 355-70, the Court noted that section 355-70 authorises the ATO to disclose information to a law enforcement agency for the purposes of enforcing a law in relation to a serious offence. The Court considered that the statutory provisions were such that a person may be compelled to provide information to the ATO and that the ATO may be provided to another agency for the purposes of enforcing a taxation law.

The Court determined that the disclosure of the transcript by the ATO to the Commonwealth Director of Public Prosecutions was expressly authorised by the TAA. Even if the companion rule could apply to circumstances where a criminal charge had not yet been laid, the relevant provisions of the TAA abrogate the companion rule and permit disclosure for the purposes of enforcing taxation law.

Accordingly, the Court determined that the decision in *Leach* was wrong and should not be followed.

Citation *R v Van Eps; Ex parte Commonwealth Director of Public Prosecutions* [2024] QCA 46 (Bowskill CJ, Morrison JA and Fraser AJA, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2024/46.html

2.10 Krupin – removal of beneficiary and transfer of share without consent

Facts

In 2001, Mr Krupin married Ms Krupin.

In 2003, the Krupin Family Trust was established.

B Pty Ltd was named as the trustee of the Krupin Family Trust. B Pty Ltd was incorporated in 2003 with Mr and Ms Krupin as the directors and holding one ordinary share each.

The beneficiaries of the Krupin Family Trust are defined in the trust deed as the primary beneficiary, the secondary beneficiaries and the tertiary beneficiaries. Mr Krupin was named in the deed as the "primary beneficiary". The deed also provided that:

> *"Primary beneficiaries means;*
>
> *The primary beneficiary; and*
>
> *[Ms Krupin], the spouse of the primary beneficiary."*

Mr Krupin was named in the trust deed as the appointor and the principal of the trust. As the appointor, Mr Krupin had the power to appoint and remove the trustee of the Krupin Family Trust.

In 2007, B Pty Ltd acquired a property, the G Street property, in its capacity as trustee for the Krupin Family Trust. The purchase was funded by cash in the trust, cash from Mr and Ms Krupin personally and an interest only loan in the personal names of Mr and Ms Krupin.

In 2014, the divorce order in respect of Mr and Ms Krupin became effective. Mr and Ms Krupin have not yet reached a property settlement.

In 2015, Mr Krupin married Ms Petrov.

In 2017, without her knowledge or consent, Ms Krupin was removed as a director of B Pty Ltd and her share was transferred to Mr Krupin. Mr Krupin gave the following evidence on this point during the trial:

> *"HIS HONOUR: No, no, no. Please ask; was the wife 50 per cent shareholder in the company that owned [G Street]?*
>
> *[MR KRUPIN]: Until 2017, your Honour.*
>
> *HIS HONOUR: Until – what happened then?*
>
> *[MR KRUPIN]: I moved her out from the board of directors because...*
>
> *HIS HONOUR: What about the shareholding?*
>
> *[MR KRUPIN]: The same. The shares moved to myself.*
>
> *HIS HONOUR: Well, did she transfer her shares to you?*
>
> *[MR KRUPIN]: I transferred. It wasn't her decision."*

Mr Krupin was the sole director of B Pty Ltd from mid-2017 until late 2017, at which point, he unilaterally controlled B Pty Ltd, in its role as the trustee of the Krupin Family Trust. Mr Krupin purported to remove Ms Krupin as a beneficiary of the Krupin Family Trust. Mr Krupin gave the following evidence on this point during the trial:

> *"[Mr Krupin]: ... as it says in trusts documents, she was beneficiary as my wife. As when she ceased being my wife, technically speaking she has no position in the trust anymore, as far as I understand the trust document."*

Under the terms of the trust deed, there is no specific power granted to the trustee to remove a beneficiary. No evidence was provided that the trust deed had been varied.

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In late 2017, Ms Petrov was appointed as a director of B Pty Ltd. Since that time until around mid-2019, Mr Krupin and Ms Petrov were directors of B Pty Ltd.

In mid-2019, Mr Krupin ceased being a director of B Pty Ltd and transferred the two shares then in his name to Ms Petrov. Since that time, Ms Petrov has been the sole director and shareholder of B Pty Ltd.

In mid-2023, the divorce order in respect of Mr Krupin and Ms Petrov became effective.

Since her purported removal as a beneficiary, Ms Krupin has not had the benefit of any distribution from the trust.

Ms Krupin remains jointly liable, with Mr Krupin, to the ANZ Bank in respect of the home loan on the G Street property.

Issues

1. Did Mr Krupin have the power to remove Ms Krupin as a director of B Pty Ltd and transfer her share in B Pty Ltd without her knowledge and consent?
2. Was Ms Krupin removed as a beneficiary of the Krupin Family Trust?

Decision

Removal of Ms Krupin as a director and transfer of her share in B Pty Ltd without her knowledge and consent

Howard J held that Mr Krupin's power as appointor of the Krupin Family Trust did not give him the power to remove Ms Krupin as a director of B Pty Ltd without her knowledge or consent. As appointor, Mr Krupin only had the power to remove B Pty Ltd as the trustee for the Krupin Family Trust.

Howard J described the actions of Mr Krupin of transferring Ms Krupin's share in B Pty Ltd to himself as "a matter of the gravest concern to this Court" and "dishonest conduct of the highest order". His Honour also considered a prima facie argument could be made that the conduct of Mr Krupin amounted to fraud under the Queensland Criminal Code and noted that the matter would be referred to the appropriate authorities to consider whether criminal charges should be laid.

Removal of Ms Krupin as a beneficiary of the Krupin Family Trust

Howard J noted that the deed did not say, merely, that a beneficiary of the trust included "the spouse, from time to time, of the primary beneficiary". Instead, Ms Krupin was specifically named as a primary beneficiary under the trust deed, with a description next to her name of "the spouse of the primary beneficiary", which was accurate at the time the deed was executed. His Honour also noted that, as the terms of the trust deed did not provide a specific power for the trustee to remove a beneficiary, the only way Ms Krupin could be removed legally was through the execution of a deed of variation. As no deed of variation was provided in evidence, Mr Krupin failed to prove his conduct in removing Ms Krupin as a beneficiary was lawful.

Howard J considered that Mr Krupin acted with vindictiveness in purporting to remove Ms Krupin as a beneficiary of the Krupin Family Trust and took this step to advance his own interests at the expense of Ms Krupin. Such actions were a breach of the trustee's fiduciary duty.

His Honour included the G Street property in the matrimonial pool of assets for division between Mr and Ms Krupin.

Citation *Krupin & Krupin (No 2)* [2024] FedCFamC1F 56 (Howard J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FedCFamC1F/2024/56.html

2.11 Other tax and superannuation related cases in period of 8 April 2024 to 9 May 2024

Citation	Date	Headnote	Link
Zhou v Chief Commissioner of State Revenue [2024] NSWCATAD 93	9 April 2024	ADMINISTRATIVE REVIEW - application for an extension of time within which the applicant is to lodge her application for administrative review	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/93.html
Guimaraes v Chief Commissioner of State Revenue [2024] NSWCATAD 95	10 April 2024	TAXES AND DUTIES – Land tax – Surcharge land tax – Foreign person – Liability TAXES AND DUTIES – Land tax – Surcharge land tax – Joint ownership	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/95.html
Oldenburger and Commissioner of Taxation (Taxation) [2024] AATA 635	11 April 2024	TAXATION – superannuation – excess contribution tax – whether concessional contribution can be disregarded or allocated to another financial year – whether special circumstances – decision under review affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/635.html l
Deputy Commissioner of Taxation v Kocic (No 2) [2024] FCA 372	16 April 2024	PRACTICE AND PROCEDURE – where leave sought to file an amended originating application pursuant to r 8.21 of the Federal Court Rules 2011 (Cth) (FCR) – where leave sought to file a statement of claim – where joinder of parties sought pursuant to r 9.05 of the FCR – where amended originating application, accompanying statement of claim and joinder are in aid of the relief sought pursuant to s 37A of the Conveyancing Act 1919 (NSW) (Conveyancing Act) – whether amendment to pleadings is based on the same facts or substantially the same facts as those already pleaded – whether this Court has jurisdiction in respect to the claim sought to be brought pursuant to s 37A of the Conveyancing Act	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/372.html

Citation	Date	Headnote	Link
Deputy Commissioner of Taxation v AGJ Businesses Pty Ltd [2024] FCA 400	18 April 2024	CORPORATIONS — where winding up orders have been made and the director of the company in liquidation purports to apply in the company's name to set aside those orders pursuant to s 482 of the Corporations Act 2001 (Cth), s 35A of the Federal Court of Australia Act 1976 (Cth) and rr 3.11, 39.04 or 39.05 of the Federal Court Rules 2011 (Cth)— where the sole director / shareholder seeks to bring the application in the company's name pursuant to s 198G(3)(b) of the Corporations Act — where it has not been demonstrated that it is arguable that the company is solvent — whether application should be granted — Held: application dismissed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/400.html
Dyirranga Ltd v Deputy Commissioner of Taxation [2024] FCA 411	24 April 2024	PRACTICE AND PROCEDURE – service of application to set aside statutory demand under s 459G(3)(b) of the Corporations Act 2001 (Cth) – where application and supporting affidavit filed via eLodgement – where copies of application and supporting affidavit served before being accepted for filing – where documents served did not include seal of Court, proceeding number or return date – where requirements of s 459G(3)(b) have not been met – application dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/411.html
Wonderful Pty Ltd v Faithful Investment Pty Ltd [2024] NSWSC 472	26 April 2024	EQUITY – trusts and trustees – proceedings between trustees and beneficiaries – whether trustee has mismanaged trust and behaved partially – whether provisional liquidator and receiver should be appointed to the trustee COSTS – party/party – court's discretion – where proceeding has settled without adjudication on the merits of the application – where application to appoint provisional liquidators to trustee company settled following hearing – whether plaintiff would almost certainly have succeeded so as to warrant a costs order notwithstanding the fact that its claim was not adjudicated on – whether second defendant acted unreasonably such as to warrant a costs order against it notwithstanding the fact that the plaintiff's claim was not adjudicated on	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/472.html

Citation	Date	Headnote	Link
SLDL and Commissioner of Taxation (Taxation) [2024] AATA 912	30 April 2024	STATUTORY INTERPRETATION – GOODS AND SERVICES TAX – gambling supplies – gambling events – where there is a calculation of global GST amounts – total amounts wagered – total monetary prizes	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/912.html
Hyder v Commissioner of Taxation [2024] FCA 464	7 May 2024	TAXATION – where application made to Commissioner of Taxation for deferral of due date for payment of tax-related liabilities – where Commissioner had issued alternative assessments and had been paid in relation to one assessment – whether jurisdictional error in refusing deferral – no jurisdictional error TAXATION – application for judicial review of Commissioner's decision to refuse to remit general interest charge – where alternative assessments issued and tax already paid by one taxpayer – where Commissioner failed to consider or address the issue which had been raised – breach of procedural fairness – legal unreasonableness – matter remitted to be determined according to law	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/464.html

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3. Federal Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2024	22/06	09/08	09/08	27/3	08/04
Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2024	13/09	27/11	27/11	27/3	
Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023	16/11	18/3	18/3		
Superannuation (Objective) Bill 2023	16/11	19/3	20/3		
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11				
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11				
Administrative Review Tribunal Bill 2024	07/12	21/3	25/3		
Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2024	07/12	21/3	25/3		
Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) 2024	07/2	21/3	25/3		

There has been no new relevant Commonwealth legislation proposed or introduced this month.

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4. State Legislation

4.1 Victoria – Commercial and industrial property tax reform

On 20 March 2024, the Commercial and Industrial Property Tax Reform Bill was introduced into the Victorian Parliament. The Bill introduces a new tax scheme for commercial and industrial property, by abolishing transfer duty and landholder duty from transactions involving commercial and industrial property in Victoria. Instead, an annual Commercial and Industrial Property Tax (**CIPT**) will be imposed.

The new tax scheme will apply to commercial and industrial properties from the date that the property is sold or is subject to another transaction, including consolidation or subdivision. This is referred to as an 'entry transaction'. CIPT is then imposed on land that:

1. has entered the tax reform scheme; and
2. is no longer within its transition period of 10 years starting from the date of the entry transaction; and
3. has a qualifying use as at midnight on 31 December immediately preceding the tax year; and
4. is taxable land within the meaning of the *Land Tax Act 2005* (Vic).

Land that is exempt land under the *Land Tax Act 2005* (Vic) is not subject to Commercial and Industrial Property Tax.

Generally, a transaction brings land into the scheme if the transaction is not fully exempt from land transfer duty or landholder duty, and the transaction relates to an interest in land that amounts to a qualifying interest, being an interest of at least 50% in the land.

If the entry transaction is a dutiable transaction, duty will be payable on the transaction. Any subsequent transactions involving the land will be exempt from landholder duty and transfer duty, provided it still has a qualifying commercial or industrial use.

Mixed use land will be considered to have a qualifying commercial or industrial use if it is solely or primarily used for that purpose. If the sole or primary use test indicates that the property has a qualifying use, then CIPT will apply to the entire mixed use property.

The CIPT will be imposed at a rate of 1% of the unimproved value of the land. Land that qualifies for a build-to-rent land tax benefit will be entitled to the concessional rate of 0.5%. CIPT will be assessed based on the use of land at 31 December each year, like land tax. If the property has a non-qualifying use at 31 December, CIPT will not apply. If a property has entered the CIPT regime, but ceases to have a qualifying use, subsequent transactions will be subject to existing duty rules.

If the Bill is passed, the amendments will come into effect from 1 July 2024.

w https://www.legislation.vic.gov.au/bills/commercial-and-industrial-property-tax-reform-bill-2024

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5. Rulings

5.1 Minor updates to ATO guidance

The ATO has made minor updates to several Taxation Rulings following the publication of TR 2024/3 *Income tax: deductibility of self-education expenses incurred by an individual'* (see our March 2024 Tax Training Notes).

Taxation Rulings TR 2020/1, TR 2021/1 and TR 2021/4 have been updated to standardise punctuation and replace references to withdrawn rulings and interpretative decisions with a reference to TR 2024/3 and the relevant paragraphs of that ruling.

ATO Reference *TR 2020/1A2*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20201A2/NAT/ATO/00001&PiT=20240424000001
ATO Reference *TR 2021/1A2*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20211A2/NAT/ATO/00001&PiT=20240424000001
ATO Reference *TR 2021/4/A1*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20214A1/NAT/ATO/00001&PiT=20240424000001

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6. Private Binding Rulings

6.1 Satisfying UPE by issuing new units

Facts

A non-resident company holds all of the units in an Australian unit trust.

The unit trust was established for a non-resident investor to invest predominately in ASX listed equities via an Australian investment advisor.

All units on issue in the unit trust comprise one class and each unit has equal value.

The trust deed provides that new units may be issued, provided that they are issued at a price equal to the Unit Value. The Unit Value is defined as:

> *e) the aggregate of the gross values of all the constituent investments as calculated under Australian accounting principles; and*
>
> *f) less the sum of the aggregate of the liabilities of the Trustee as calculated under Australian accounting principles; and*
>
> *g) divided by the number of Units on issue at that time*.

The unitholder company and the unit trust are associates for the purpose of section 318 of the ITAA 1997.

The unit trust has unpaid present entitlements (UPEs) owing to the unitholder company.

The UPEs owed to the unitholder company were not treated as Division 7A loans. The trustee relied on ATO guidance in Taxation Ruling 2010/3 *Income tax: Division 7A loans: trust entitlements* (TR 2010/3), which has now been withdrawn, and ATO Interpretative Decision 2012/74 *Division 7A: unpaid present entitlements between a unit trust and unit holders* (ATO ID 2012/74).

The ATO has published Taxation Determination 2022/*11 Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation*'? (TD 2022/11).

The trustee proposes to satisfy the UPEs by issuing new units to the shareholder company.

Questions

1. Does financial accommodation within the meaning of paragraph 109D(3)(b) of the ITAA 1936 arise where a UPE arising on or after 1 July 2022 becomes a subsisting UPE, and the sole unitholder of the trust is a company?
2. Will the subscription for units in the Trust by the unitholder company at market value, which are intended to be satisfied by offset against a subsisting UPE owed by the Trust to the unitholder company result in a dividend arising under section 109D or section 109C of the ITAA 1936?

Ruling

<u>Application of Division 7A to UPEs</u>

The ATO is of the view that when a UPE arising on or after 1 July 2022 becomes a subsisting UPE and the sole unitholder of the Trust is a private company, the UPE is ‘financial accommodation’, which is considered to be a ‘loan’ under the extended definition in section 109D(3) of the ITAA 1936. This is the view set out in TD 2022/11,

which states that the financial accommodation is provided at the point in time when the private company beneficiary has knowledge of an amount that it can demand immediate payment of from the trustee and does not demand payment of the amount.

The ATO noted that taxpayers can continue to rely on both TR 2010/3 and PS LA 2010/4 in relation to trust entitlements that arose on or before 30 June 2022. Those pieces of guidance expressed the view that financial accommodation did not arise until the trust accounted for the UPE in its accounts as an amount owing to the private company.

Subscription for units

Technically, the issue of units to the unitholder company is a payment under section 109C of the ITAA 1936. However, section 109J provides that such a payment does not give rise to a deemed dividend to the extent that it discharges an obligation of the private company to pay money and does not exceed the arm's length amount required to discharge that obligation.

The ATO noted that the tax risk in unitisation arrangements such as this primarily relates to:

1. whether the arm's length value of the units the private company acquires is equal to the amount paid for those units; or
2. the trust providing a benefit to someone other than the presently entitled beneficiary where the purpose included someone paying no, or less tax.

In this case, the 'Unit Value' defined in the trust deed was calculated based on value of underlying investments and did not take into account other factors that may impact the value of units. The ATO noted that proper valuation of units, including consideration of relevant clauses of the Trust Deed and their impact on Trustee's powers that may affect the rights of beneficiaries and, consequently, the market value of units on issue, is required to ensure that the transaction is at arm's length.

COMMENT – this ruling decision includes a statement that the ATO "currently focuses on arrangements involving private companies acquiring units in a unit trust as these arrangements may involve the application of Division 7A, section 100A or Part IVA of the ITAA 1936". The application of Division 7A to UPEs is uncertain pending the appeal of the decision in *Bendel and Commissioner of Taxation* [2023] AATA 3074 (see our November 2023 Tax Training Notes).

ATO reference *Private Binding Ruling Authorisation No.* 1052226218637
w https://www.ato.gov.au/law/view/document?docid=EV/1052226218637

6.2 Small business CGT concessions and deceased estates

Facts

The deceased acquired a property prior to 1985 (interest A). The property included a main residence and was more than 2 hectares. In 19XX the deceased transferred a 50% interest to their spouse as tenants in common.

Their spouse passed away in 19XX and the deceased acquired the spouse's 50% interest under the terms of the will (interest B).

The deceased lived in a dwelling on the property, and it was their main residence up until they passed away. The property was also used in a farming business operated by the deceased's relative.

The deceased passed away in the 20XX financial year. The will of the deceased included a clause that permitted a relative to use the property for a defined period of time.

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The relative operated a business from the property until it was sold on in the 20XX-XX financial year.

The executors of the estate sold the property and made a capital gain. The assets of the estate and any affiliates or connected entities was less than $X million. The relative was an affiliate of the estate. The turnover of the relative's business was less than $X million. The deceased would have been entitled to the 15-year exemption, in relation to interest B, had they sold the property just prior to their death.

Question

1. Will the Commissioner exercise the discretion under section 152-80 of the ITAA 1997, in relation to interest B, to allow the estate further time to apply the 15-year exemption?
2. Will the Commissioner exercise the discretion under section 118-195 and extend the two-year period in relation to interest A?
3. Does interest A satisfy the basic conditions for the small business CGT concessions?

Ruling

Will the Commissioner exercise the discretion under section 152-80?

The ATO ruled yes.

Section 152-80 of the ITAA 1997 allows either the legal personal representative of an estate or the beneficiary to apply the small business CGT concessions in respect of the sale of the deceased's asset in certain circumstances.

The following conditions must be met:

1. the asset devolves to the legal personal representative or passes to a beneficiary, and
2. the deceased would have been able to apply the small business concessions themselves immediately prior to their death, and
3. a CGT event happens within two years of the deceased's death unless the Commissioner extends the time period in accordance with subsection 152-80(3) of the ITAA 1997.

The property was transferred to the executor of the estate and the deceased would have been able to apply the small business 15-year exemption immediately prior to their death to interest B. The will of the deceased prevented the sale of the property during the period the relative had a right to use the land. The ATO considered this to be beyond the control of the executors. Therefore, the ATO granted an extension of time until the date of the CGT event in relation to interest B.

Will the Commissioner exercise the discretion under section 118-195 and extend the two-year period in relation to interest A?

The ATO ruled yes.

Under section 118-195(1) of the ITAA 1997, a capital gain or capital loss you make from a CGT event that happens in relation to a dwelling (or your ownership interest in it) is disregarded if:

1. you are an individual and the interest passed to you as a beneficiary in a deceased estate, or you owned it as the trustee of a deceased estate; and
2. at least one of the items in column 2 and at least one of the items in column 3 of the table are satisfied.

	Beneficiary or trustee of deceased estate acquiring interest	
	One of these items is satisfied	**And also one of these items**
1	the deceased acquired the ownership interest *on or after* 20 September 1985 and the	your ownership interest ends within 2 years of the deceased's death, or within a longer period

	dwelling was the deceased's main residence just before the deceased's death and was not then being used for the *purpose of producing assessable income	allowed by the Commissioner
2	the deceased acquired the ownership interest *before* 20 September 1985	The dwelling was, from the deceased's death until your ownership interest ends, the main residence of one or more of: (a) the spouse of the deceased immediately before the death (except a spouse who was living permanently separately and apart from the deceased); or (b) an individual who had a right to occupy the dwelling under the deceased's will; or (c) if the CGT event was brought about by the individual to whom the ownership interest passed as a beneficiary — that individual

The deceased acquired interest A before 20 September 1985 and the dwelling on the property was the deceased's main residence just before their death. The ATO accepted that the delay in the sale of the property was outside the control of the executors and due to a clause that allowed a relative to use the property for a set period. Therefore, the ATO granted an extension of time until the date the Estate's ownership interest ended in relation to interest A.

Importantly the ATO noted that as the property was more than 2 hectares the estate will only get a partial exemption.

Does interest A satisfy the basic conditions for the small business capital gains tax (CGT) concessions?

The ATO ruled yes.

To be eligible for the small business CGT concessions, you must first meet the basic eligibility conditions in section 152-10 of the ITAA 1997. If you meet the basic conditions, you can reduce the capital gain by 50%, known as the 50% active asset reduction.

A CGT event must happen in relation to a CGT asset of yours and the event must result in a capital gain.

At least one of the following must apply:

1. you are a CGT small business entity with an aggregated turnover of less than $2 million;
2. you are not running a business, but your asset is used in your affiliate or connected entity's small business;
3. you are a partner in a partnership that is a small business entity;
4. you meet the maximum net asset value test.

Lastly, the asset must satisfy the active asset test in section 152-35 of the ITAA 1997.

Affiliate

A small business affiliate is any individual or company that, in relation to their business affairs, acts or could reasonably be expected to act either:

1. according to your directions or wishes;
2. in concert with you.

Whether a person acts, or could reasonably be expected to act, in accordance with your directions or wishes, or in concert with you, depends on the circumstances of the case. Relevant factors include:

1. the existence of a close family relationship between the parties;
2. the lack of any formal agreement or formal relationship between the parties setting out how the parties are to act in relation to each other;
3. the likelihood that the way the parties act, or could reasonably be expected to act, in relation to each other would be based on the relationship between the parties rather than on formal agreements or legal or fiduciary obligations the actions of the parties.

Active asset

An asset passes the active asset test if it has been an active asset of yours for at least:

1. 7.5 years during the test period (if you've owned it for more than 15 years); or
2. half of the test period (if you've owned it for 15 years or less).

A CGT asset is an active asset if you (or your affiliate or entity connected with you) use it, or hold it ready for use, in running a business (or if it is an intangible asset, it is inherently connected with the business).

The ATO ruled that when the estate sold interest A, a CGT event occurred which resulted in a capital gain. While the estate is not operating a business, the ATO accepted that interest A was used in the course of carrying on a business by an affiliate. The affiliate operated a business as a sole trader and has an aggregated turnover of less than $X million. As interest A has been used by an affiliate from the deceased's date of death up until it was sold it will satisfy the active asset test. Therefore, the estate is entitled to apply the 50% active asset reduction.

ATO reference *Private Binding Ruling Authorisation Number 1052203387740*
w https://www.ato.gov.au/law/view/document?docid=EV/1052203387740

6.3 Temporary full expensing

Facts

In December 20XX, the taxpayer placed an order and paid a $XXXX deposit for a vehicle.

At the time the taxpayer placed the order, the Commonwealth Government had introduced temporary full expensing as part of the COVID-19 economic measures.

Temporary full expensing allows for the immediate write-off of the cost of depreciating assets and relevant additional expenditure in accordance with the rules in:

1. subdivision 40-BB of the *Income Tax (Transitional Provisions) Act 1997* (Cth) (**ITTP Act**), applicable to business entities generally; and
2. section 328-181 of the ITTP Act which modifies the operation of rules in Subdivision 328-D of the ITAA 1997, applicable to small business entities choosing simplified depreciation.

To claim temporary full expensing, an eligible taxpayer would have needed to start holding the depreciating asset and started to use the asset, or have it installed ready for use, for a taxable purpose at or after 7.30pm AEDT on 6 October 2020 and on or before 30 June 2023.

The taxpayer would not have purchased the vehicle had it not been for the temporary full expensing.

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The vehicle arrived in Australia in June 2023 and received Australian compliance in June 2023. The taxpayer paid in full for the vehicle on XX June 2023 but took possession of the vehicle in July 2023.

Question

Can the taxpayer claim a deduction for the vehicle under temporary full expensing for the year ended 30 June 2023?

Ruling

The ATO ruled no.

The ATO considered that the taxpayer could not claim a deduction for the vehicle under temporary full expensing as the taxpayer started holding the depreciating asset and started to use the asset for a taxable purpose after 30 June 2023.

ATO reference *Private Binding Ruling Authorisation No. 1052213265373*
w https://www.ato.gov.au/law/view/document?docid=EV/1052213265373

6.4 Deductions – personal appearance and grooming

Facts

A taxpayer is a performing artist and has a manager.

The taxpayer has developed a grooming style to make them instantly recognisable in a crowd. The taxpayer has incurred expenses for grooming products and grooming appointments to achieve and maintain this look.

The grooming requirements were not included in the taxpayer's original management contract. The taxpayer's manager requested that certain grooming requirements were maintained for marketing purposes.

Question

Can the taxpayer claim the grooming expenses as a deduction for branding purposes under section 8-1 of the ITAA 1997?

Ruling

The ATO ruled no. The taxpayer was not entitled to a deduction for expenses relating to grooming expenses on the basis that the expenses are private in nature.

Section 8-1 of the ITAA 1997 provides that a loss or outgoing will be deductible to the extent that it is incurred in gaining or producing assessable income or necessarily incurred in carrying on a business for the purposes of gaining or producing assessable income. However, a deduction may not be claimed for outgoings of a private or domestic nature.

The ATO referred to taxation ruling TR 96/18 *Income tax: cosmetics and other personal grooming expenses* where the Commissioner confirmed that for an expense to satisfy section 8-1 of the ITAA 1997:

1. the expense must have the essential character of an outgoing incurred in gaining assessable income;
2. there must be a nexus between the outgoing and the assessable income so that the outgoing is incidental and relevant to the gaining of assessable income; and
3. it is necessary to determine the connection between the particular outgoing and the operations or activities by which the taxpayer most directly gains or produces their assessable income.

TR 96/18 provides that the cost of cosmetics and other personal grooming expense are generally regarded as an expense of a private nature. TR 96/18 further explains that an acceptable deduction for a performing artist would include some on-stage makeup and grooming expenses for a particular role of that performing artist.

The ATO referred to Taxation Ruling *TR 95/20 Income tax: employee performing artists – allowances, reimbursements and work-related expenses* which considered deductions for work-related expenses generally claimed by employee performing artists, including singers.

The ATO referred to examples in TR 95/20 of when grooming is private and when it is not. These examples included:

1. the regular hair styling and beauty treatments incurred by "Sophie" an actress on a television series were regarded as private; and
2. Alex, whose costs for cutting his hair shorter than it normally would be to fit a particular role he was playing in a stage play and costs for stage makeup to be used for the role were allowable deductions.

The ATO concluded that the taxpayer was under no contractual requirement to undertake any of the grooming expenses to achieve their look. The ATO acknowledged that the taxpayer's manager asked the taxpayer to modify their grooming but that did not amount to a requirement for the taxpayer to gain assessable income.

The ATO ruled there was not a sufficient nexus between the expenditure in maintaining the grooming styles and the taxpayer's assessable income.

ATO reference *Private Binding Ruling Authorisation No. 1052180842995*
w https://www.ato.gov.au/law/view/document?docid=EV/1052180842995

6.5 Deductions – meal expenses

Facts

The taxpayer lives in Town 1 and is employed by an employer with a work site near Town 2.

The taxpayer's employer provided accommodation for the taxpayer in a hotel in Town 2 for the taxpayer's rostered days.

The taxpayer drove several hours by car to the hotel in Town 2 the day before the taxpayer's rostered shift.

The taxpayer was responsible for the purchase of meals while travelling to and from the hotel and while staying at the hotel.

The taxpayer was paid several allowances by the taxpayer's employer, including a meal allowance. The allowances are displayed on the taxpayer's payslip.

Question

Can the taxpayer claim the cost of meals consumed while travelling to and from the taxpayer's place of work?

Ruling

The ATO ruled no, stating that the meal expenses incurred by the taxpayer while working away from home are essentially living expenses of a private or domestic nature and not deductible.

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In accordance with section 8-1 of the ITAA 1997, deductions are allowed for all losses and outgoings to the extent to which they are incurred in gaining or producing assessable income except where the outgoings are of a capital, private or domestic nature, or relate to the earning of exempt income.

The ATO referred to Taxation Ruling TR 2021/4 *Income tax and fringe benefits tax: employees: accommodation and food and drink expenses, travel allowances, and living-away-from-home allowances*, noting:

1. while living expenses must be incurred before any assessable income can be derived, a loss or outgoing is not incurred in gaining or producing assessable income merely because it is necessary, particularly in relation to living expenses: paragraph [15] of TR 2021/4; and
2. an employee cannot deduct accommodation, food, and drink expenses they have incurred where, due to their personal circumstances, they live far away from where they gain or produce their assessable income. Such expenses are considered living expenses and are not deductible: paragraph [25] of TR 2021/4.

ATO reference *Private Binding Ruling Authorisation No.* 1052220383833
w https://www.ato.gov.au/law/view/document?docid=EV/1052220383833

6.6 Deductions – interest on refinanced loan

Facts

The taxpayer owns 2 properties.

Property 1 is currently the taxpayer's main residence and does not have a mortgage. Property 2 is currently rented out to tenants and has a mortgage.

The taxpayer intends on moving out of Property 1 and moving into Property 2. Property 1 will be rented out and Property 2 will become the taxpayer's main residence.

The taxpayer also intends on renovating Property 2 and will refinance the existing loan from Property 2 to Property 1.

Question

Is the taxpayer able to claim a deduction for the interest incurred on the refinanced loan?

Ruling

The ATO ruled no, meaning the interest the taxpayer incurs on the refinanced loan is not deductible under section 8-1 of the ITAA 1997.

The ATO referred to Taxation Ruling TR 95/25 *Income tax: deductions for interest under section 8-1 of the Income Tax Assessment Act 1997* to confirm the position that there must be sufficient connection between the interest expense and the activities which produce assessable income. TR 95/25 provides that to determine whether the associated interest expenses are deductible, it is necessary to examine the purpose of the borrowing and the use to which the borrowed funds are put.

The ATO consider that:

1. if a loan is used for investment purposes from which income is to be derived, the interest incurred on the loan will be deductible;

2. where a loan relates to private purposes, no deduction is allowed. This is the case even where the security for the loan changes; and
3. the use of the loan is not altered by a refinance. Interest on a new loan will be deductible if the new loan is used to repay an existing loan, which, at the time of the second borrowing, was being used in an assessable income producing activity or used in a business activity which is defined to the production of assessable income.
4. In the taxpayer's circumstances, the new loan funds will be used to repay the existing loan on Property 2. However, Property 2 will be used for private purposes and will no longer be used in an assessable income producing activity. While the new loan may be against Property 1 as the security for the loan, and the property where the taxpayer will be deriving assessable rental income from that property, the interest the taxpayer incurs will not be tax deductible because the new loan funds were not used to buy Property 1.

ATO reference *Private Binding Ruling Authorisation No. 1052228538216*
w https://www.ato.gov.au/law/view/document?docid=EV/1052228538216

6.7 Temporary residency and disposal of cryptocurrency

Facts

The taxpayer has been living in Australia for the past few years on a temporary visa.

While living in Australia, the taxpayer purchased some cryptocurrency.

Within the next couple of years, whilst remaining in Australia on a temporary visa, the taxpayer intends to sell the cryptocurrency.

Questions

1. Is the taxpayer a temporary resident?
2. Will the disposal of cryptocurrency whilst the taxpayer is a temporary resident result in an assessable capital gain or loss?

Ruling

Temporary residency

The ATO ruled yes.

The taxpayer is a temporary resident for taxation purposes as the visa they hold is a temporary visa within the meaning of the *Migration Act 1958* (Cth), the taxpayer does not have a spouse and is also not an Australian resident within the meaning of the *Social Security Act 1991* (Cth).

Will the capital gain on disposal of cryptocurrency be assessable?

The ATO ruled no.

The taxpayer may disregard any capital gain or loss made on the disposal of the cryptocurrency whilst a temporary resident for taxation purposes.

Section 768-915 of the ITAA 1997 provides that a capital gain or capital loss may be disregarded if it is made by a taxpayer that is a temporary resident when, or immediately before, the CGT event happens, provided the capital gain or loss would have been disregarded under Division 855 of the ITAA 1997 if the taxpayer were a foreign resident at that time. Section 855-10(1) of the ITAA 1997 provides that a capital gain or loss, made by a

taxpayer from a CGT event happening in relation to non-taxable Australian property, is disregarded if the taxpayer is a foreign resident just before the CGT event happens.

In this case, the taxpayer is a temporary resident who will dispose of cryptocurrency that is non-taxable Australian property, and any capital gain or loss made on the disposal would be disregarded if the taxpayer were a foreign resident at that time.

ATO reference *Private Binding Ruling Authorisation No.* 1052223970858
w https://www.ato.gov.au/law/view/document?docid=EV/1052223970858

7. ATO and other materials

7.1 Tax Time Reminders

The ATO has announced that it will be focusing on three common errors made by taxpayers this tax time.

Work-related expenses

Taxpayers are reminded that to claim work-related expenses:

1. the taxpayer must have spent the money themselves and must not have been reimbursed;
2. the expense must directly relate to earning the taxpayer's income; and
3. the taxpayer must have a record (usually a receipt) to prove it.

Taxpayers are also reminded that there have been recent changes to substantiation requirements for work-related expenses. ATO has released Practical Compliance Guideline PCG 2023/1 which sets out the ATO's expectations for substantiating claims for running costs when working from home.

Inflated claims for rental properties

The ATO has indicated that 9 out of 10 rental property owners have errors in their tax returns in relation to the rental property. This year, the ATO will be scrutinising claims that may have been inflated to offset increases in rental income. The ATO will also be reviewing the distinction between expenses that are capital in nature (such as improvements or initial repairs) and deductible repairs and maintenance.

Failure to include all income when lodging early

The ATO is warning taxpayers against rushing to lodge returns on 1 July. Information such as interest from banks, dividend income, payments from other government agencies and private health insurers is typically pre-filed by the ATO, but takes some time following the end of year to be populated. By lodging early, many taxpayers forget to include information that has not yet been pre-filled.

COMMENT – the fixed rate method for claiming running expenses when working from home, based on the PCG, requires one document for each category of expense to be retained, even though the number of categories of expenses, or in the amount of the expenses, does not impact upon the amount that can be deducted under the fixed-rate method. This would seem to allow the Commissioner to deny a deduction on review on the basis that a taxpayer cannot produce a document for all categories of additional running expenses.

TRAP – if an objection is lodged that relates to a claim for working from home expenses, the fixed rate method in PCG 2023/1 cannot be relied upon, and actual expenses must be claimed.

w https://www.ato.gov.au/media-centre/ato-flags-3-key-focus-areas-for-this-tax-time

7.2 ATO Decision Impact Statement – BPFN

On 13 March 2024, the Commissioner of Taxation issued a decision impact statement in relation to the case of *BPFN v Commissioner of Taxation* [2023] AATA 2330.

The case concerned whether, under subsection 295-550(5) of the ITAA 1997, the income derived by a self-managed superannuation fund (SMSF) was non-arm's length income (NALI). BPFN, was the trustee of a SMSF

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and the sole unit holder of JJUT, a unit trust. BPFN had fixed entitlements to distributions from the JJUT. JJUT lent funds to ABC, which on-lent funds to DEF and then DEF on-lent to unrelated third parties. BPFN, JJUT, ABC and DEF were related parties and the directing mind of each entity in relation to these dealings was Mr J.

The AAT found that there was a scheme, which was the totality of the arrangement between JJUT, ABC, DEF, and the third-party borrowers, and that JJUT, ABC and DEF were not dealing with each other at arm's length. However, the AAT concluded that BPFN had derived no more income than it would have derived had the parties been dealing with each other at arm's length.

The Commissioner agreed with the AAT's conclusion regarding the identification of a scheme and the fact that the parties to the scheme in question were not dealing at arm's length. The Commissioner questioned whether the AAT's conclusion that JJUT did not derive more income than it would have derived had the parties been dealing with each other at arm's length under this particular scheme could be extrapolated to arrangements involving private lending arrangements.

The Commissioner stated that, when considering the application of ss 295-550(1) or (5) of the ITAA 1997 to a scheme involving private lending arrangements, it would be necessary in each case to consider whether the terms, rates of return and other remuneration of the parties are consistent with that which arm's length parties would expect.

ATO reference *Decision Impact Statement: BPFN v Commissioner of Taxation* [2023] AATA 2330
w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/2021/8256-8258/00001

7.3 Update to fraud and evasion PS LA

On 10 April 2024, the ATO updated Practice Statement Law Administration PS LA 2008/6 to provide more detail around work practices that apply in relation to fraud and evasion.

PS LA 2008/6 provides guidance to ATO staff considering fraud or evasion in the context of unlimited time periods, which allows the Commissioner to amend assessments, or to seek the payment of indirect tax which has been underpaid, due to fraud or evasion.

The update to PS LA 2008/6 is to section 5, with the inclusion of the following:

> *In exceptional cases, the taxpayer may not be informed that fraud or evasion is being considered, for example:*
>
> - *in the case of a covert audit*
> - *where there is a risk of evidence destruction or asset dissipation, or*
> - *where the outcome of an audit might otherwise be compromised.*
>
> *In ordinary circumstances, you should advise the taxpayer of our preliminary view in a position paper and invite their comment before forming any opinion about fraud or evasion. The position paper should include details of the material facts and evidence relied upon.*

PS LA 2008/6 also provides that, in ordinary circumstances, a taxpayer should be made aware that fraud or evasion is being considered prior to consideration of their case by the National Fraud or Evasion Advisory Panel.

ATO reference *Practice Statement Law Administration* PSLA 2008/6
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20086/NAT/ATO/00001

7.4 Liability of legal personal representative tax

On 10 April 2024, the ATO updated *Practical Compliance Guideline* PCG 2018/4: *Income tax – liability of a legal personal representative of a deceased person.*

PCG 2018/4 is intended to enable certain legal personal representatives of less complex estates to finalise those estates before the expiration of the relevant review period without concern that they may have to fund an outstanding tax-related liability of the deceased from their own assets.

The key updates to PCG 2018/4 include:

1. increasing the safe harbour for the market value of the assets of the deceased person's estate from $5 million to $10 million at date of death;
2. expanding the assets included in the estate of the deceased to include cash, cash investments and any other personal assets such as cars, jewellery, and home contents. 'Cash investments' include term deposits, managed funds, bonds, and other such investments that cannot be withdrawn on demand;
3. expanding the safe harbour to deceased estates that pass assets to certain tax-exempt entities; and
4. clarifying that material irregularities in the tax affairs of the deceased person's tax affairs need to be brought to the attention of the ATO in writing using the approved amendment form.

ATO reference *Practical Compliance Guideline* PCG 2018/4
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20184/NAT/ATO/00001&PiT=20240410000001

7.5 RITCs on complex information technology outsourcing agreements

The ATO has published a guidance clarifying the ATO's expectations regarding reduced input tax credit (**RITC**) claims for IT outsourcing agreements under table item 2 of subsection 70-5.02(1) of the *A New Tax System (Goods and Services Tax) Regulations 2019* (**GST Regulations**).

Financial supplies are generally input taxed. However, certain acquisitions connected with making financial supplies may be eligible for reduced input tax credits.

Acquisitions falling within table item 2 of the subsection 70-5.02(1) of the GST Regulations include:

> *Processing services in relation to account information for account providers, including the following:*
> *(a) archives storage, retrieval and destruction services;*
> *(b) statement processing and bulk mailing;*
> *(c) processing and manipulation of information relating to accounts, including information about transactions to which item 7 applies.*

The guidance focuses on correctly identifying reduced credit acquisitions and distinguishing between mixed and composite acquisitions. The guidance is intended to provide practical guidance for taxpayers reviewing their IT outsourcing agreements and determining their entitlements to RITCs in compliance with the GST regulations.

The ATO noted that determining RITC claims for IT outsourcing agreements is highly factual and specific to individual circumstances, and the ATO will aim to understand the framework of the outsourcing arrangement, how services are identified, accounted for, and invoiced, and other relevant circumstances around the agreement.

The ATO noted that it is critical to distinguish between acquisitions of processing services, which are covered by table item 2, and acquisitions of progressing capacity, which are not covered by table item 2. The ATO will

consider whether the outsourced provider had control and responsibility of processing functions in relation to account information for the account provider.

Following identification of acquisitions, the ATO will consider if the acquisitions or parts of the acquisitions fall within the scope of table item 2 or other items in subsection 70-5.02(1) of the GST Regulations. The ATO noted that for an acquisition to fall under table item 2, the processing service must be in relation to account information.

Some applications or services may fall within the scope of table item 2 if they perform operational functions involving processing of account information and if the provider controls the processing functions related to transactions on an account. Other applications that do not directly involve processing in relation to account information and is not integral to applications that process such information, will fall outside of that scope (e.g. Microsoft Word or Outlook, or printing services for bank staff).

Certain acquisitions such as anti-virus software, the incident reporting and help desk functions that relate to handling disruptions in the IT environment may be integral to a table item 2 processing function to an extent. The ATO expects fair and reasonable apportionment of these expenses between reduced credit acquisitions and other acquisitions, supported by detailed evidence and periodic reviews of the apportionment methodology. The ATO noted in some cases, staff surveys may be appropriate for obtaining information on time spent on certain applications or processes.

The ATO also noted in its review, it will examine the calculation of the overall input tax recovery on the IT outsourcing agreement using the formula in Division 70 of the GST Regulations, which would include how a taxpayer had determined its creditable purpose rate under Division 11, and how the taxpayer had used this rate to calculate its overall input tax recovery.

w https://www.ato.gov.au/law/view/document?docid=GFS/gst-ritc-it-agreements

7.6 Top 500 – passive investors

The ATO, as part of the Top 500 program, has developed guidance to help private groups undertaking passive investment with developing tax governance frameworks to manage material tax issues.

The guide is intended to help with recognising tax issues and risks, which is principle 2 of the ATO's 7 principles of effective tax governance. The guide helps to provide a simplified pathway towards achieving justified trust for Top 500 private groups whose income from regular activities is mainly derived (greater than 90%) from passive investment activity.

Groups that have not achieved justified trust will be able to enter 'provisional justified trust' if:

1. all material tax issues arising from the group’s income earning activities have been assured;
2. the tax treatments applied to wealth extraction are sound (if applicable); and
3. the group does not have an effective tax governance framework in place.

The Top 500 group will be required, within 12 months of entering provisional justified trust, to develop an effective tax governance framework, including over material related-party transactions and any wealth extraction activities. During this period, the ATO will not carry out assurance activities.

A draft tax governance framework, across the 4 key principles of tax governance, must be produced within 6 months of the group entering provisional justified trust. The ATO will then review the draft and provide

feedback to the group. The group will have a further 2 months to make any amendments required by the feedback, and then return the framework to the ATO case team for final assessment.

If the group does not develop a framework acceptable to the ATO within 12 months, the group will be removed from provisional justified trust and the ATO will restart assurance activities from the last assured financial year.

If the group's governance framework is accepted, it will achieve justified trust and enter a 3-year 'monitor and maintain period' from the financial year following the year that provisional justified trust was granted. At the end of 3 years, the ATO may ask the group to show that the processes and procedures in the framework have been followed and that the operational effectiveness of the framework has been tested.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-you-should-know/tax-performance-programs-for-private-groups/top-500-private-groups-tax-performance-program/effective-tax-governance-criteria-for-top-500-private-groups/passive-investor-guide-for-top-500-private-groups/our-differentiated-approach-for-passive-investors
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups/what-you-should-know/tax-performance-programs-for-private-groups/top-500-private-groups-tax-performance-program/effective-tax-governance-criteria-for-top-500-private-groups

7.7 Illegal early access to super schemes fact sheet

The ATO has published a fact sheet for superannuation funds to provide to their members to enable members to understand the risks of accessing their superannuation member benefit early.

The ATO is concerned with members being approached by a promoter claiming members can withdraw their superannuation or use an SMSF to pay debts, or for personal enjoyment such as buying cars or holidays. The ATO wants members of superannuation funds to understand the serious consequences illegal early access to super may have, including additional tax, the imposition of penalties and interest, and the potential disqualification from being an SMSF trustee. As the names of disqualified trustees are publicly published, there is also a risk to personal and professional reputation.

Members can report any promoters of illegal access to super schemes using the ATO tip off form.

w https://www.ato.gov.au/tax-and-super-professionals/for-superannuation-professionals/super-funds-newsroom/illegal-early-access-to-super
w https://www.ato.gov.au/api/public/content/9765ca6e-767a-4997-8cb0-beb4fb5d3c72_n75450_Illegal_Early_Release_Super_fact_sheet_pdf

7.8 Revenue NSW updates – surcharge land tax and surcharge duty

Revenue NSW has announced that citizens of New Zealand, Finland, Germany, India, Japan, Norway, South Africa, and Switzerland may be required to pay surcharge purchaser duty or land tax for residential land in NSW, reversing its view on exemptions for individuals of these nations previously announced on 21 February 2023 and 29 May 2023.

This is in response to the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024* which was assented to on 8 April 2024. The Bill amends the *International Tax Agreements Act 1953* to clarify uncertainty associated with the interaction between certain taxes, such as foreign investment fees and state and territory property taxes, and double tax agreements. The amendments contained in the Bill apply retrospectively.

However, the Revenue NSW announcement in relation to surcharge purchaser duty refers to transactions entered into on or after 8 April 2024.

w https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/land-tax/foreign-owner-surcharge
w https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/transfer-duty/surcharge-purchaser-duty

7.9 Foreign CGT withholding clearance certificates

The ATO has provided guidance on how the clearance certificate process is administered for different entities.

CGT withholding of 12.5% applies for a purchaser of property for transactions above $750,000 unless the vendor has obtained a clearance certificate from the ATO. The ATO takes up to 28 days to issue a clearance certificate.

The ATO has identified errors with applications made by different entities.

The ATO has noted that the name on the clearance certificate must match the name on the legal title to the land. If the names do not match, the clearance certificate is not valid and cannot be relied upon by the purchaser. All parties on the certificate of title, whether they are individuals, corporate trustees or partners in a partnership, must apply for the clearance certificate.

Where a vendor is a corporate trustee, the corporate trustee must be listed in associate details on the Australian business register for the ABN for the trust.

COMMENT – the MYEFO update in December announced that the rate will be increased from 12.5% to 15% and the withholding threshold will be reduced from $750,000 to $0, for real property disposals entered into from 1 January 2025.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/clearance-certificates-troubleshooting-different-entities

7.10 Notice of a crypto asset data-matching program

The ATO announced that it will acquire account identification and transaction data from crypto designated service providers for the 2023-24 financial year through to the 2025-26 financial year inclusively.

These data include:

1. client identification details (names, addresses, date of birth, phone numbers, social media account and email addresses); and
2. transaction details (bank account details, wallet addresses, transaction dates, transaction time, transaction type, deposits, withdrawals, transaction quantities and coin type).

The ATO will acquire the data and match it to their systems to identify clients who failed to report a disposal of crypto assets in their income tax return.

w https://www.legislation.gov.au/C2024G00249/latest/text

8. Tax Professionals

8.1 TPB fact sheets on breach reporting

The Tax Practitioners Board has released draft guidance on the additional breach reporting obligations that apply to registered tax practitioners from 1 July 2024.

The draft guidance includes a draft information sheet, summary document and high-level decision tree.

The draft information sheet provides information about:

1. the existing obligations under section 30-35 of the TASA to notify the TPB of a change in circumstances (paragraphs 14 to 23);
2. the additional obligations under sections 30-35 and 30-40 of the TASA to notify the TPB and RPAs of breaches of the Code (paragraphs 24 to 116), including the meaning of key terms and phrases;
3. when you must notify the TPB and RPAs of breaches of the Code (paragraphs 117 to 148);
4. client confidentiality and legal professional privilege (paragraphs 149 to 152);
5. consequences for failing to comply with the breach reporting obligations (paragraphs 153 to 168);
6. TPB's approach to investigating breach notifications (paragraphs 169 to 174); and
7. case studies (paragraph 175).

Significant breach

Breach reporting obligations will apply from 1 July 2024 under sections 30-35 and 30-40 of the *Tax Agent Services Act 2009* (Cth) (**TASA**). These obligations broadly require registered tax practitioners to report significant breaches of the Code of Professional Conduct relating to their own conduct or the conduct of other registered tax practitioners.

Subsection 90-1(1) of the TASA defines a 'significant breach of the Code' as a breach that:

1. constitutes an indictable offence, or an offence involving dishonesty, under an Australian law;
2. results, or is likely to result, in material loss or damage to another entity (including the Commonwealth); or
3. is otherwise significant, including taking into account any one or more of the following:
   (a) the number or frequency of similar breaches by the tax practitioner;
   (b) the impact of the breach on the tax practitioner's ability to provide tax agent services;
   (c) the extent to which the breach indicates that the tax practitioner's arrangements to ensure compliance with the Code are inadequate; or
4. is a breach of a kind prescribed by the Tax Agent Services Regulations 2022.

Indictable offences, or offences involving dishonesty may include, but are not limited to, fraud (including social security and tax fraud), theft/stealing, money laundering, bribery and corruption, embezzlement, dealing with proceeds of crime, dishonest use of position, knowingly making false or misleading statements, cyber-crimes and unlawfully obtaining or disclosing information. "Indictable offence" is not defined and has different meanings in each jurisdiction within Australia.

Confidentiality

Code item 6 (section 30-10(6) of the TASA) requires that registered tax practitioners must not disclose information relating to the affairs of a client or former client, to a third party unless they have obtained the client's permission, or they have a legal duty to do so. As disclosures under the breach reporting obligations are required by the TASA, such breach disclosures will not breach Code item 6.

The TASA, including the breach reporting obligations and the confidentiality obligations in Code item 6, do not override legal professional privilege. Legal professional privilege protects confidential communications between a qualified legal advisor and their client, where the communication was made for the dominant purpose of seeking legal advice, or for use in existing or anticipated litigation.

Comments are invited on the draft guidance by 28 May 2024.

COMMENT – this guidance addresses the confidentiality obligations under the Code of Professional Conduct but does not address contractual obligations. If you have a contractual obligation to keep something confidential, it may be a defence to say that you were compelled under the breach reporting laws to disclose the information. However, it is not clear whether this defence would eliminate your liability for damages for breaching the contract.

w https://www.tpb.gov.au/tpb-invites-comments-draft-guidance-breach-reporting-obligations
w https://www.tpb.gov.au/tpbi-d532024-breach-reporting-under-tax-agent-services-act-2009
w https://www.tpb.gov.au/breach-reporting-obligations
w https://www.tpb.gov.au/sites/default/files/2024-04/Diagram_Breach%20reporting_High%20level%20flowchart%20and%20decision%20tree.pdf

8.2 Targeting tax scheme promotors

The ATO continues to target unlawful tax schemes through the Tax Avoidance Taskforce.

An unlawful tax scheme involves deliberate exploitation of the tax and/or superannuation regimes. The ATO applies promoter penalty laws to take action against promoters of unlawful tax schemes and publishes the outcomes of cases they have pursued on the ATO website.

The ATO suggests the following to advisers to help mitigate any promoter penalty risk:

1. understand the warning signs of unlawful tax schemes. More information is available on the ATO website;
2. report suspected unlawful tax schemes by completing the ATO's confidential tip-off form;
3. advise clients against getting involved in unlawful tax schemes; and
4. encourage clients who might be caught up in an unlawful tax scheme to talk to the ATO so that the ATO can work with them to resolve any problems.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/targeting-tax-scheme-promoters

8.3 Modernising trust administration systems

From 1 July 2024, the ATO is introducing changes to trust administration by digitalising trust income reporting and progressing. These changes aim to streamline the lodgment process, improve reporting accuracy and quality of income tax return information, and improve compliance activities. The change will affect lodgment for the 2023-2024 years and onwards.

The changes include the addition of 4 new capital gains tax labels in the statement of distribution section of the trust's tax return to improve the reporting of beneficiary details. It is recommended that the trustee provides beneficiaries with a copy of the trust statement of distribution to assist the beneficiaries in their own reporting obligations.

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The ATO is also introducing a new trust income schedule which will be required to be lodged by all trust beneficiaries who receive trust income. The schedule will not replace any existing trust income labels in beneficiary income tax returns and is to be lodged as part of the beneficiary's income tax return. The information required to complete trust income schedule can be obtained from the statement of distribution. The schedule should also be completed in respect of distributions received from a managed fund.

New data validations will also be added to the trust tax return form in the practitioner lodgment service.

w https://www.ato.gov.au/businesses-and-organisations/trusts/in-detail/compliance/modernising-trust-administration-systems

8.4 Agent checklist for client-to-agent linking process

On 24 April 2024, the ATO updated its website to include an agent checklist for the client-to-agent linking process. Before tax professionals start the process of adding their clients, tax professionals should ensure that they link at the correct level and use the right identifier to add the client for one account or role.

Link at the correct level

Tax agents should only link at the account level at which they are authorised by the client. For example, if a registered tax agent is representing a client for income tax, only add the income tax account using the TFN. Other accounts or roles do not need to be added.

If you link an account that has an existing agent, the existing agent will be removed. If the client has an existing BAS agent authorised at their activity statement account, linking the activity statement account will remove the BAS agent.

Use the right client identifier

Tax agents representing a client for income tax must add the client to the client list using the TFN identifier. Adding a client using an ABN only will not show the income tax account option to choose.

Before adding the client to the client list

The following steps apply:

1. undertake the normal onboarding process. When the client nominates the agent in Online services for business, the ATO will accept it as an approved agent client verification method;
2. the client needs to nominate the agent in Online services for business before the agent can add the client to the agent's client list. Tax professionals cannot do the nomination for the client;
3. the client should be provided with the agent's registered agent number;
4. the client should be provided with the ATO agent nomination instructions to assist the client to nominate the agent;
5. the client should be advised to let the agent know when the nomination is completed, as tax professionals will not receive a notification when the client has completed the nomination; and
6. the agent should check the client has completed the agent nomination.

After the client has completed the nomination

The following steps should be followed once the client has completed the nomination:

1. the client should provide their business TFN in a secure manner (not via email);

2. the client should be added to the agent's client list in Online services for agents or the practice software for the account or role type the agent is authorised to access. The agent has 28 days from the client nomination to add the client or update the authorisation;
3. if the agent is authorised for the income tax account, the agent must use the business TFN to add the client to the client list. If the agent is authorised for the activity statement account and not income tax, then that account should be added only;
4. the agent needs to link to the activity statement STP reporting level for STP reporting authorisation; and
5. if there is another BAS agent or tax agent authorised to act on behalf of the client, an existing agent link will display against the account. Existing agents should not be removed unless the new agent is authorised to do so by the client.

w https://www.ato.gov.au/tax-and-super-professionals/digital-services/in-detail/agent-checklist-for-client-to-agent-linking-process

8.5 Maintain authorisations

On 24 April 2024, the ATO published guidance on its website on how to view and update the client accounts for which an agent is authorised to act.

The ATO requires tax agents to have an appropriate signed authority from a client to act on their behalf. An authority is required for all accounts listed. If an agent is authorised at the income tax level, they are authorised for all client accounts.

If another agent has authorisation for a listed account, an existing agent link will be displayed. Selecting an account with another agent listed will remove that agent and may result in the taxpayer having to complete another 'Agent nomination' to re-instate the removed agent.

w https://www.ato.gov.au/tax-and-super-professionals/digital-services/in-detail/online-services-for-agents-user-guide/profile/maintain-authorisations

8.6 Illegal early access to super – tax professionals to "bust myths"

The ATO is requesting tax professionals help their clients to “bust myths” around superannuation and assist their clients to understand when they can legitimately access retirement savings from a SMSF.

Where a tax professional notices non-lodgment or financial difficulties for a client, tax professionals are requested to contact their client and remind them of their obligations and rules.

If a tax professional is concerned about the registration of an SMSF, the tax professional should ask their client whether they understand what they are setting up, know when they can legitimately access their super, and whether they are aware of the financial costs associated with doing something illegal.

Tax professionals should use their knowledge to help their client resolve any issues early, including making use of the ATO’s voluntary disclosure services and lodgment deferral services.

Tax professionals can report any promoters of illegal access to super schemes using the ATO tip off form.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/understanding-illegal-early-access-and-how-to-help

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