Tax Update

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About Brown Wright Stein

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

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

Contents

Our tax training notes are prepared by Matthew McKee, Marianne Dakhoul, Jane Harris, Gillian Tam, Hayden Rudd, Aritree Barua, Emily Halloran, Amy Burriss, Luke Hermez, Samiksha Vaidya and Aaditya Kadam.

1. Tax Update Pitstop

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

Tax Update Matter	**Impact Summary**	**Further Detail**
Item 2.1 Abotomey	The Administrative Review Tribunal has considered a large array of issues for a taxpayer who worked in Shanghai for a period of time, including: 1. whether the period to amend the taxpayer's assessments was 2 years or 4 years; 2. whether the taxpayer was a resident of Australia; 3. what was the taxpayer's cost base in shares he received as part of the work arrangements; 4. whether loans made by a Hong Kong company to taxpayer were assessable to taxpayer under section 47A of the ITAA 1936, being a distribution benefit from a controlled foreign company; 5. whether the taxpayer was assessable on the profits of the Hong Kong company under the controlled foreign company provisions. The case demonstrates the complexity that can arise for taxpayers with cross-border affairs.	Page 7
Item 2.3 CBRX	The ART considered a case concerning the deductibility of travel expenses for a fly-in, fly-out worker. The case demonstrates the importance of understanding, in the context of travel expenses, when a worker has commenced work.	Page 15
Item 2.4 Staley	The Supreme Court of Queensland has held that trust deed could be amended to allow a trustee to change an appointer without the consent of the appointor. The case demonstrates the importance to understanding who has capacity to ultimately control a discretionary trust.	Page 17
Item 3.1 and 3.2 Slowey and Jayasinghe	Two cases have been determined in the Victorian County Court concerning director penalty notices where directors have sought to rely defences to the penalty being imposed on them. The cases demonstrate the difficulty for a director in making out a defence to a director penalty notice.	Page 25
Item 6.5 Guidelines on emission of interest for NSW States taxes	Revenue NSW has issued guidelines as to when interest can be remitted for NSW State taxes. The Guidelines significantly reduce the circumstances in which remission of interest will be permitted and make no distinction between the market rate of interest and the premium rate of interest.	Page 42

2. Detailed case summaries

2.1 Abotomey – individual residency and assessable income

Facts

Peter Abotomey was born in Australia and has at all times been an Australian citizen.

From 1987 to 2009 Peter and his family maintained a family home in South Yarra, Melbourne.

In 1993 Peter incorporated Jensid Pty Ltd to be the trustee of the Abotomey Family Trust, a discretionary trust of which Peter and his family were beneficiaries.

In the 1990s Peter spent extended periods of time in New Zealand and Thailand for work. During this time, Peter obtained tax residency advice from a tax partner at a large international firm about his work in New Zealand.

From 2002 Peter began holding various leadership roles with an ASX listed company known as OnCard International Limited, including as a director, Chair of the Board and CEO.

On 1 July 2007 Peter, Jensid and OnCard entered into a Consultancy Agreement under which:

1. Jensid agreed to provide Peter's services as CEO and Chairman; and
2. OnCard agreed to issue cumulative redeemable preference shares (CRPS) worth AUD500,000 to Peter and pay Jensid fees in Australian dollars.

In 2009 Peter relocated to Shanghai, China, to oversee OnCard's growing operations. OnCard leased him a furnished two-bedroom apartment in Shanghai.

In around September 2009, it was decided that Peter's services to OnCard will be provided through a new entity, Giant Forever, instead of Jensid.

In November 2009 Peter incorporated Giant Forever Ltd in Hong Kong, becoming its sole director and shareholder.

Between 2007 and 2009 Peter spent more time in Australia than overseas.

In February 2010 the Board of OnCard ratified a verbal agreement to amend the 2007 Consultancy Agreement so that Giant Forever now provided Peter's services.

On 5 January 2010 the CRPSs that were issued to Peter under the 2007 agreement were converted to 1,439,264 ordinary shares in OnCard without any additional payment by Peter.

In November 2010 Peter resigned as Chairman of OnCard, but continued as CEO and continued to provide services as a consultant via Giant Forever.

Between 2011 and 2015 Giant Forever transferred funds into the Australian bank accounts of Peter and his late wife. These amounts were recorded in Giant Forever's accounts as loans.

Between 2011 and 2013 OnCard started exploring the sale of its Chinese operations, in particular one part of the business known as SmartPASS. Discussions occurred about whether Peter would stay involved under new ownership.

In 2013 OnCard decided to sell SmartPASS, but Peter indicated an intention to continue residing in China ‘indefinitely’ despite the sale.

Between 2010 and 2013 Peter spent more than half of his time outside Australia.

On 28 April 2014 Peter, Jensid, Giant Forever and OnCard signed a Termination Agreement, ending the 2007 Consultancy Agreement effective 29 May 2014.

On the same day, a new Consultancy Agreement was signed. Under it:

1. Giant Forever agreed to provide Peter’s services to help sell SmartPASS and assist OnCard generally.
2. OnCard agrees to pay Giant Forever monthly fees and possibly a bonus.

In May 2014 Peter formally retired as CEO and director of OnCard.

In the 2014 income year, Peter travelled to Australia on 10 occasions, spending 113 days in Australia.

In late 2014 Peter decided to leave Shanghai. In late November 2014 Peter began moving or disposing of his belongings in Shanghai from late November 2014 after being verbally told by OnCard’s new CEO that the consultancy would end in January 2015.

On 6 February 2015 Peter transferred 1,439,264 of his OnCard shares to his wife for $417,386.56 (reflecting the share price of $0.29 each).

In early February 2015 Peter vacated his Shanghai apartment and returned permanently to Australia.

In 2014 and 2015 Peter sought further residency and tax advice from Melbourne tax adviser, Peter Jess, regarding his situation in China. Peter lodges his 2014 Australian tax return as a non-resident and his 2015 return on the basis that we was a non-resident until the end of February 2015 but that he resumed residency at that time.

In 2015 Peter travelled to Australia 9 occasions, spending 212 days in Australia, of which 123 days were after he said he resumed Australian residency in February 2015.

<u>Visits and residence</u>

In 2014 and early 2015, Peter claimed that his visits to Australia were primarily to attend OnCard business events and, conveniently, to see family. During these visits he stayed at the South Yarra property but said he retained no possessions there.

<u>Shanghai living</u>

While in Shanghai, Peter lived in a furnished apartment leased by OnCard. He purchased additional household items to equip the apartment, including kitchenware and electronics. In late November 2014, Peter began clearing out or disposing of these belongings, vacating the apartment by early February 2015.

<u>Family</u>

Peter’s immediate family was his wife and children, with whom he maintained close contact, though he had minimal engagement with extended family. From 2009, he worked in China alone to avoid disrupting his children’s secondary education in Australia, with occasional visits by his family to Shanghai.

<u>Other ties to Australia</u>

Peter maintained Australian private health insurance for himself and his family, though it was unclear which claims related to him personally. He held both Chinese and Victorian driver’s licences but did not own a car in either jurisdiction. He also retained long-standing memberships with Australian clubs including the RACV, Rotary, MCC and the Australian Club, and maintained a Melbourne GPO Box for secure mail handling. He was removed from the Australian electoral roll in 2009 and reinstated in 2015.

Tax compliance

Peter lodged Australian tax returns as a non-resident from 2010 to 2014 and as a resident for the 2015 income year. He did not lodge tax returns in China or Hong Kong for the 2014 or 2015 income years.

Peter claimed he became a non-resident of Australia and a resident of China from 25 September 2009. Between 2009 and 2015, he spent substantial time in China, maintained a Shanghai address, registered for temporary residence, and obtained a Chinese driver's licence. He also expressed an intention to remain in China indefinitely, even after OnCard decided in 2013 to sell its Chinese business, SmartPASS. However, this intention was at times contradicted by passenger cards and other documents in which he declared himself to be a resident of either Hong Kong or Australia.

In 2016 the ATO commenced a review of Peter's tax affairs for the 2012 to 2015 income years, later expanding to include the 2010 and 2011 income years.

In December 2018 the Commissioner issued amended assessments and penalties for 2010 to 2015, alleging that Peter had made false statements and misleading statements in preparing his taxation returns and, to enable the assessments to be amended, that there was fraud or evasion.

Peter objected to the amended assessments. In October 2021 the Commissioner disallowed Peter's objection, finding:

1. Peter was a tax resident from 2010 to 2015 under the ordinary concepts and domicile tests;
2. Peter's income from OnCard was Australian-sourced and, therefore, assessable to him, irrespective of whether Peter was an Australian resident;
3. there was an unlimited period to amend the assessments due to fraud or evasion; and
4. a capital gain should have been declared in 2015 on the disposal of the CRPS.

In November 2021 Peter applied to the AAT for a review of the objection decision. Amongst other things, Peter claimed he was not a resident for the whole of the income year ended 30 June 2014 and only resumed residency in February 2015.

In around 2023 the ATO withdrew its fraud/evasion claims, limiting the dispute to the 2014 and 2015 income years (**Relevant Years**). The ATO also changed its positions multiple times, raising new arguments such as controlled foreign company (CFC) provisions in relation to Giant Forever, tax on the Jensid dividends, loans as deemed dividends under Division 7A, and revisiting the capital gain on the OnCard shares.

In relation to the OnCard shares, the ATO argued that, on the basis that there was no consideration paid, there was a capital gain in the 2015 income year of $417,387. Peter argued that the cost base in the shares was $500,000 on the basis that they were provided in consideration for services under the 2007 Consultancy Agreement, and that he had therefore made a capital loss of $82,614.

Issues

1. Were the amended assessments for the Relevant Years made within time?
2. Did a capital gain arise in relation to the transfer of shares in OnCard?
3. Was Peter a resident of Australia in the Relevant Years?
4. Was the franked dividend paid by Jensid to Peter liable to withholding tax?
5. Did Peter derive income attributed from Giant Forever under the controlled foreign company rules?
6. Were the loans from Giant Forever assessable to Peter as dividends?

7. Were the administrative penalties validly imposed?
8. Were the shortfall interest charges validly imposed?

Decision

Were the amended assessments for the 2014 and 2015 income years within time?

Under Item 1 of the Table in subsection 170(1) of the ITAA 1936, the ATO may amend the assessment of an individual for a year of income within 2 years after the day on which ATO gives notice of the assessment to the individual. However, a 4-year time limit may apply if any of the qualifications in the second column of that Table are met.

The ATO relied upon the two qualifications to support its amendment of the 2014 and 2015 assessments after the 2 years period:

1. Item 1(f) of the Table – where an individual has not identified income from one or more foreign transactions for the purposes of, or in the course of, an assessment, and the income has not been received from a resident investment vehicle; and
2. Item 1(d) of the Table – where an individual is a beneficiary of a trust estate at any time in the relevant income year, unless the trust is a small business entity or medium business entity for that year or the trustee of the trust (in that capacity) is a full self-assessment taxpayer for that year.

On the basis that Peter was a beneficiary of the Abotomey Family Trust in each of the 2014 and 2015 income years, and the ART did not determine it was a small business entity or medium business entity, the ART determined that the qualification in Item 1(d) of the Table in subsection 170(1) operated in each year, and the ATO was able to issue amended assessments in December 2018.

It was not necessary for the ART to consider the application of Item 1(f) of the Table, although the ART noted on the basis of the subsequent finding that Peter was an Australian resident in 2015 and should have included assessable income under sections 44, 47A and 456 of the ITAA 1936, being income arising from transactions outside Australia, providing the ATO with a further basis for issuing the amended assessments in 2018 for the 2015 income year.

Did a capital gain arise in relation to shares in OnCard?

The ART examined whether the provision of services could constitute a cost base under section 110-25 of the ITAA 1997, which requires money or property to have been given. As services do not constitute 'property' under this definition, the ART concluded that no cost base arose under that section. Additionally, the market value substitution rule in section 112-20 of the ITAA 1997 did not apply, as the shares were issued directly by the company and no consideration was given, which excluded them under specific exemptions.

Further, the ART considered section 130-60 of the ITAA 1997, relating to shares obtained by converting a convertible interest like the CRPS. While the CRPS did qualify as convertible interests, there was no evidence that Peter paid any amount for their conversion. Nor was there any documentation, such as valuations required under section 139FB of the ITAA 1936, to establish a cost base. Peter's argument that the shares should be treated similarly to prior performance rights under former Division 13A was also rejected, as those provisions were not applicable to the CRPS in this case.

Therefore, the capital gain for the transfer of the shares in OnCard in the 2015 income year was $417,386.56.

Was Peter a resident of Australia in the Relevant Years?

2014 Year

Based on the ordinary concepts test, the ART determined that Peter was not a resident of Australia during the 2014 income year. The ART determined that the actions taken by Peter to sever his connection with Australia in removing his personal belongings from the South Yarra property to Shanghai, disposing of his real estate interests in Australia to his wife, and removing his name from the electoral roll in September 2009, carried weight in determining his residency. Some connections remained, but these were largely for family convenience (e.g. shared bank accounts) or practical reasons. The ART noted that there may be circumstances, albeit 'unusual' or 'exceptional' where the location of family in Australia is not determinative.

Having regard to the domicile test, the ART was satisfied that Peter had a permanent place of abode outside Australia. He lived in a Shanghai in an apartment leased exclusively for him, which was maintained over several years. His senior executive role with OnCard and subsidiaries showed ongoing professional ties to China. The ART accepted that Peter's living arrangements in Shanghai were not temporary or transitory in the 2014 income year.

2015 Year

The ART noted that Peter's circumstances changed significantly in the 2015 income year. His 2007 Consultancy Agreement ended in April 2014 and was replaced by a limited 2014 Consultancy Agreement focused solely on transitioning the sale of the SmartPASS business. By 29 May 2014, his executive roles had ended.

Despite his claim that he had only resumed Australian residence on 1 February 2015, when he left Shanghai, objective facts showed his ties and intention to return to Australia were established earlier, following the end of his executive roles and the sale transition. By mid-2014, he was aware he would not continue working in China and started moving personal belongings to Australia.

The ART held that, against this background of changed circumstances affecting his intention in relation to where he wished to live, the factors identified by the ATO as indicating ongoing connections to Australia were maintained and became more significant. That is, his family were in Australia, his Australian bank accounts, his Victorian driver's license, his membership of clubs in Australia, and his family's private health insurance policy. On this basis, the ART determined that Peter was a resident of Australia in the 2015 year for the purposes of the ordinary concepts test.

The ART did not need to assess the application of the domicile test, but the ART noted Peter's domicile remained in Australia and his stay in China was temporary and transitory given his employment situation and legal status.

The 183-day test was also not necessary to consider but ,if applied, would have confirmed his residency in Australia because he spent more than half the year in Australia and lacked a permanent place of abode overseas.

Was the dividend paid by Jensid to Peter in the 2014 income year assessable income?

In the 2014 income year, Jensid paid Peter a dividend of $10,000 to which franking credits of $4,286 attached, and Peter did not return any amount of assessable income in relation to this dividend. Jensid is an Australian established and resident company. There was no evidence that Jensid derived profits from outside Australia.

As the ART found that Peter was not a resident of Australia in the 2014 income year, it was determined that the dividend would have been liable to withholding tax under subsection 128B(1) of the ITAA 1936, subject to any of the exceptions in subsection 128B(3) of the ITAA 1936. As the dividend was fully franked, paragraph 128B(3)(ga) of the ITAA 1936 applied to make the dividend and the franking credits non-assessable under by operation of section 128D of the ITAA 1936.

Did Peter derive income attributed from Giant Forever under the CFC rules?

Subsection 456(1) of the ITAA 1936 provides that where a ‘CFC’ has ‘attributable income’ for a ‘statutory accounting period’ in respect of an ‘attributable taxpayer’, that attributable taxpayer must include in their assessable income their ‘attribution percentage’ of the attributable income. A company will be deemed a CFC if it is a resident of a listed country or an unlisted country and if it meets the control conditions under section 340 of the ITAA 1936.

Giant Forever was a company incorporated in Hong Kong, an unlisted country. Peter was the sole shareholder in, and director of, Giant Forever. OnCard was a resident of Australia for Australian income tax law purposes in the Relevant Years. Giant Forever's income included bank interest income and service fees from OnCard in the Relevant Years.

As Peter was found to not be an Australian resident in the 2014 income year, Giant Forever did not satisfy the CFC control tests under section 340 of the ITAA 1936 and was not a CFC for that year, and the income earned by Giant Forever in that year was not attributable to Peter.

However, in the 2015 income year, as Peter was an Australian resident, and he owned 100% of the shares in Giant Forever, he satisfied the control conditions under section 340 of the ITAA 1936 and Giant Forever was designated a CFC. Peter was, therefore, assessable for the income attributable to Giant Forever for 2015 income year.

Were the loans from Giant Forever assessable to Peter as dividends?

Amounts totalling $1,070,000 in the 2014 income year and $148,500 in the 2015 income year were transferred by Giant Forever to the Australian bank accounts of Peter and his wife. These were described in the Giant Forever financial statements as loans due from the director which were 'unsecured, interest free and repayable on demand'. There was no separate documentation setting out the terms of these loans.

Subsection 47A of the ITAA 1936 operates to treat a 'distribution benefit' or 'eligible benefit' made by a CFC which is a resident in an unlisted country that is not already treated as a dividend, and does not exceed the company's profits, as a dividend. Subsection 47A(7) provides than an 'eligible benefit' arises where an entity makes a loan to another entity and the parties to the loan are not at arm’s length with each other in relation to the loan.

In respect of the 2014 income year, as the ART held that Giant Forever was not a CFC in the 2014 income year, section 47A of the ITAA 1936 did not apply to advances or loans made by Giant Forever to Peter in the 2014 income year and such amounts were not dividends assessable to Peter in that year.

In respect of the 2015 income year, as the ART held that Giant Forever was a CFC in the 2015 income year and a resident of an unlisted country in that year, the ART determined that each advance or loan made by Giant Forever to Peter in the 2015 income year was an 'eligible benefit', being an interest-free loan, repayable on demand, without documentation or security, for the purpose of section 47A of the ITAA 1936. Given the non-commercial terms of the arrangement, the ART concluded that the parties were unlikely to be acting on arm's length terms. As sole shareholder and director of Giant Forever, Peter was an associated entity under section 47A of the ITAA 1936, and Giant Forever had sufficient profits immediately before each distribution time. Therefore, the loans issued in the 2015 income year were deemed dividends assessable to Peter.

Administrative Penalties

The ATO issued penalties for each of the Relevant Years on the basis that Peter had made false or misleading statements in his tax returns, in circumstances where he did not take reasonable care in making those statements and the resulting shortfall of tax arose from recklessness on his part.

The ART held for the 2014 income year that Peter was not an Australian resident and, therefore, could not have been said to have made a false or misleading statement to the ATO through his tax return for that year.

The ART was not satisfied that Peter took 'reasonable care' in connection with the preparation of his tax return for the 2015 income year. His tax return failed to declare income under the CFC rules and section 47A, and omitted the capital gain from the transfer of shares. He had failed to seek tax advice despite major changes to his financial and life circumstances. The ART held that his actions met the threshold for recklessness as he had extensive business and financial experience and understood the relevant tax laws to be complex. Despite this, Peter had not sought appropriate tax advice.

On this basis, the ATO's penalty decision for the 2015 income year was upheld and remission was not deemed appropriate.

Shortfall interest charges

On the basis that Peter was not a resident of Australia in the 2014 income year, the ART held that shortfall interest was not validly imposed in the 2014 income year.

In respect of the 2015 income year, as the ART held that Peter was a resident of Australia and was required to include additional amounts in his assessable income, shortfall interest was validly imposed. On the basis that the amount of shortfall interest charge not remitted by the ATO was not more than 20% of the additional income tax, Peter was unable to object against the remission decision of the ATO, and the ART had no jurisdiction to review that decision.

TIP – when a person commences to become a resident of Australia, their CGT assets (other than taxable Australian property and pre-CGT assets) are taken to have a first element of cost equal to the market value of the asset at just before the time the person became a resident: see 855-45 of the ITAA 1997. In this case, no consideration appears to be given to whether the shares in OnCard had a cost base by operation of section 855-45 of the ITAA 1997. It is noted that Peter was self-represented in the proceedings.

TRAP – this Tribunal does not appear to have considered the operation of Division 7A of the ITAA 1936 in relation to the loans from Giant Forever but, instead, focused on section 47A of the ITAA 1936, which deems a 'distribution benefit' from a CFC to be a deemed dividend. Division 7A can apply to loans, payments and a forgiveness from foreign companies, although where it deems a dividend to a foreign resident, a question will be whether the deemed dividend has an Australian source. The Commissioner did raise Division 7A as an alternative to section 47A of the ITAA 1936.

COMMENT – the Tribunal does not appear to have considered whether Giant Forever commenced to be resident of Australia from February 2015 when Peter resumed living in Australia on the basis that the location of its central management and control was in Australia from that time. If Giant Forever was a resident of Australia from February 2015, section 47A of the ITAA 1936 would have had no application to the loans made to Peter by Giant Forever from February 2015.

Citation *Abotomey v Commissioner of Taxation* [2025] ARTA 719 (General Member C Willis, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/719.html

2.2 Evans – FIFO and individual residency

Facts

Wayne Evans, an Australian citizen, worked as a FIFO (fly-in fly-out) employee since 2012. From 25 June 2020 to 20 June 2023, he was employed as a jumbo operator by Barminco Mining Services Botswana. Under his employment contract, his point of hire was Perth, with Barminco paying for flights between Australia and Botswana and providing on-site accommodation and meals. His roster was generally 4 weeks on, 4 weeks off.

Wayne departed Australia on 23 June 2020 but, due to COVID-19 international travel restrictions, he was unable to return to Australia on his usual roster cycle. During the 2021 income year, Wayne spent approximately ten months in Botswana, returning only twice to Australia, each time staying at his family home in Western Australia with his partner and three children. His absences were entirely due to border closures and quarantine requirements. Once travel restrictions eased, he resumed FIFO travel on his usual roster and permanently returned to Australia in May 2023 (upon cessation of his employment with Barminco).

While in Botswana, Wayne rented a room from Mr Adams (a colleague) via an informal verbal arrangement, obtained a local mobile phone, a PO box, and opened a local bank account. He also socialised modestly, watching a few soccer games and befriended a local dance instructor.

Wayne maintained his Australian bank accounts, private health insurance, driver's licence, and mobile phone. Wayne's partner and children remained in Australia living in the jointly owned family home, which continued to house his personal effects. Wayne continued to financially support his family throughout the 2021 income year. He also owned an investment property in Australia. Wayne did not take any steps to sell the investment property or dispose of any of his Australian interests.

In his 2021 income tax return lodged in December 2021, Wayne declared he was an Australian resident. The Commissioner assessed Wayne for $70,370, which was based on a taxable income of $510,972.

In April 2023, Wayne objected to the notice of assessment. Wayne argued that he should not be treated as an Australian resident for tax purposes for the 2021 income year because he spent almost ten months of that year physically in Botswana, only returning to Australia twice for short periods. Wayne argued he was *"forced into non-residency"* due to Australia's strict COVID-19 border restrictions, which prevented him from following his usual FIFO roster and spending his off-shift time in Australia. Wayne believed it was unfair to be taxed as a resident on his foreign earnings under such circumstances.

The Commissioner argued that Wayne remained an Australian resident for tax purposes throughout the 2021 income year under both the ordinary concepts and domicile tests. Despite Wayne's extended physical absence, the Commissioner considered this was solely due to temporary COVID-19 travel restrictions, not a decision to abandon Australia as his home. Wayne continued to maintain strong connections to Australia. The Commissioner also highlighted that Wayne's presence in Botswana was entirely tied to his employment, under a work permit that was time-limited, and upon its conclusion he immediately returned to Australia, demonstrating he never established a permanent place of abode overseas nor acquired a domicile of choice in Botswana.

On 30 August 2023, the Commissioner disallowed the objection. Wayne then appealed to the Administrative Appeals Tribunal (as it was then known).

Issue

Was Wayne an Australian resident for tax purposes in the 2021 income year?

Decision

The ART dismissed Wayne's application, finding that he remained an Australian resident under both the ordinary concepts test and the domicile test.

<u>Ordinary concepts test</u>

The ART found that, despite spending most of the 2021 income year in Botswana, Wayne continued to reside in Australia under ordinary concepts. His absence was due solely to Australia's COVID-19 travel restrictions, not by personal choice. Wayne intended to keep returning to Australia on his off-shifts and treated Australia as his home. His family remained in Australia, living in the family home which contained all his personal effects. Wayne financially supported his family throughout the 2021 income year, retained all substantial assets in

Australia, and maintained Australian phone, health insurance, driver's licence, and bank accounts. When travel restrictions eased, he resumed spending off-shift periods in Australia. Upon termination of his employment, he immediately returned to live in Australia.

The ART accepted that Wayne took steps to set up life in Botswana to make enforced stays there more comfortable, but found these were minimal responses to the unique COVID situation. The steps did not reflect a change of intention to abandon Australia as his home. Wayne's time in Botswana was *"inextricably linked to his employment"*, and there was no evidence he took steps to permanently relocate or wrap up his Australian affairs.

Domicile test

The ART found that Wayne's domicile remained Australia. His Botswana work permit was tied to his employment and there was no evidence of an intention to make Botswana his indefinite home. Wayne consistently intended to return to Australia as soon as practical and did so. The ART noted that acquiring a domicile of choice requires clear evidence of indefinite intention to reside overseas, which was absent.

The ART also found that Wayne had not established a permanent place of abode outside Australia. His living arrangements in Botswana were temporary and driven by pandemic constraints. Wayne's situation was distinguishable from cases where individuals relocate their family and set up long-term households overseas.

COMMENT – this case demonstrates that, while the period of absence from Australia, is important to ascertaining whether a person has remained a resident under ordinary concepts, it is not determinative. It is necessary to consider the reasons for the physical absence and the extent of the remaining connections to Australia.

Citation *Evans and Commissioner of Taxation (Taxation)* [2025] ARTA 824 (General Member R Smith, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/824.html

2.3 CBRX – deductibility of work-related travel expenses

Facts

CBRX, a qualified engineer, was employed by a large oil and gas producer in a highly specialised, safety-critical role primarily based at an offshore facility off the coast of Western Australia.

CBRX lived in Queensland with his family. Under his employment contract, the offshore facility was his permanent work location, and he worked a rotating cycle of 3 weeks on the facility and 4-5 weeks off, with some training and additional work days.

CBRX's remuneration included an 'Offshore Allowance', covering the challenges of working remotely, including family separation, standby duties and time travelling, a 'Commuting Allowance', covering travel from his home in Brisbane to the designated Australian airport, and a 'Secondment Allowance', which was paid during COVID-related quarantine.

On 26 September 2022, CBRX lodged his tax return claiming nearly $31,000 in work-related travel expenses, which covered stays in Perth, Darwin and Broome outside his rostered 'on-duty' periods, as well as deductions for home office expenses and depreciation on an Omega watch and a tool chest.

CBRX argued that the travel expenses were deductible under section 8-1 of the ITAA 1997 because they were incurred in the course of producing his income. CBRX maintained that during the COVID-19 period, he was effectively required by his employer to remain in Western Australia between rostered periods, instead of returning home to Queensland, to avoid quarantine complications and to ensure he could be quickly deployed back to the offshore facility. CBRX also argued that he undertook supporting activities, such as training, assessments and remote software tasks, from his hotel in Perth, meaning the travel and accommodation expenses were closely connected to his employment duties. In relation to the Darwin quarantine period, he argued this was a direct consequence of COVID travel restrictions that he had to comply with to continue working.

In respect of the home office, CBRX argued that it was used exclusively for work and continuing professional development (in the 2022 income year, he was also studying a Master of Engineering), while the Omega watch and tool chest were both necessary for safely performing or preparing for his technical duties.

On 5 October 2022, the Commissioner commenced an audit, and on 9 January 2023, after finalising the audit, the Commissioner disallowed the expenses as deductions.

The Commissioner argued that under the employment contract and the 'Offshore Personnel Policy Manual' (**OPPM**), CBRX's work only commenced when he physically arrived at the offshore facility. Travel between his home and the offshore site was, therefore, preliminary to the earning of income and private in nature. The Commissioner also argued that the allowances CBRX received were not *"travel allowances"* under section 900-30(3) of the ITAA 1997, so he could not rely on the substantiation exception for travel claims.

With respect to the home office expenses, the Commissioner argued that the evidence was insufficient to show it was used solely for income-producing purposes, warranting apportionment.

The Commissioner also argued that the Omega watch was not a specialist item acquired for his employment, having been purchased over a decade earlier, and that the tool chest did not have a sufficient connection to producing assessable income.

Issue

Is CBRX entitled to a deduction for his travel expenses, home office expenses, and decline in value expenses?

Decision

<u>Are the travel expenses deductible?</u>

The ART found CBRX's primary place of employment was the offshore facility. Under his employment contract and the OPPM, his 'on-duty' period only commenced when he began work at the facility, and ended when he left. Travel to Perth, Broome or Darwin between shifts occurred while CBRX was off-duty and, therefore, on his own personal time. Under well-established principles, expenses incurred travelling to commence duty or returning home are private and not deductible under section 8-1 of the ITAA 1997.

The allowances CBRX received, namely the Offshore, Commuting and Secondment Allowances, were not *"travel allowances"* as defined in section 900-30(3) of the ITAA 1997 because they were paid to compensate generally for working offshore or to cover private travel, not travel in the course of performing duties. Consequently, CBRX could not rely on the substantiation exception under section 900-15 of the ITAA 1997.

For periods spent in Perth during COVID restrictions, the ART accepted that CBRX performed some work remotely but found this could have been done from anywhere, and there was no written direction from his employer requiring him to stay in Perth. Similarly, for time spent quarantining in Darwin before a shift, these expenses were treated as preparatory to earning income. As such, the expenses did not lose their private character simply because they were a necessary pre-condition to work.

Only $208.53 was allowed as work-related travel expenses, reflecting an overnight stay conceded by the Commissioner.

Are the home office expenses deductible?

The ART accepted CBRX maintained a home office used exclusively for work, including sensitive continuing professional development and training required by his role, and for a Master of Engineering, although CBRX later withdrew from the course due to work. The ART considered that the Commissioner's concerns about apportionment were not supported by evidence.

The ART allowed the claimed home office expenses in full, being $579.

Are the decline in value expenses deductible?

CBRX's claim for an Omega watch was disallowed. The watch had been purchased over 12 years before he commenced work with his current employer, and was not shown to be a specialist item, like a stopwatch or fob watch) with a direct functional link to his income-earning activities.

Similarly, CBRX's claim for a tool chest was rejected. While it was said to store tools accumulated over his career for studies, these tools were not used in his employment duties, and there was insufficient evidence linking the expense to producing assessable income.

COMMENT - merely performing some supporting tasks while off-duty, such as online training or incidental remote work, will not transform fundamentally private travel or accommodation costs into deductible outgoings.

Citation *CBRX and Commissioner of Taxation (Taxation and business)* [2025] ARTA 768 (General Member R Smith, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/768.html

2.4 Staley – replacement of trust appointor

Facts

On 19 February 2002, the Hill Family Trust was established. Under this deed, Sydenham James Hill was named as both the Appointor and the Primary Beneficiary, while Hill Family Holdings Pty Ltd, a company in which Sydenham and his wife, Shirley, were the original directors and shareholders, was named as Trustee. The Secondary Beneficiaries included Sydenham's spouse, children, and grandchildren.

On 18 December 2009, Sydenham died. Under his will, he appointed his daughters, Paula Maree Porter and Kerin Anne Staley, as his executors. Paula and Kerin proceeded on the basis that they also became Appointors under the Trust Deed.

On 30 October 2013, Shirley, now the sole director and shareholder of Hill Family Holdings, exercised the Trustee's power to remove Kerin, Kerin's husband, and their descendants as beneficiaries by making an oral declaration. On the same day, she appointed Paula as a director of Hill Family Holdings.

On 18 November 2015, Hill Family Holdings executed a Deed Poll purportedly removing Kerin as Appointor and appointing Paula as Substitute Appointor. This deed was later accepted by all parties to be invalid, as the Trustee lacked such power under the Trust Deed.

On 22 July 2019, Paula appointed her daughter, Brodie Maree Mitchelmore, as a director of Hill Family Holdings. When Paula died on 31 December 2019, Kerin became the sole Appointor of the Hill Family Trust. Subsequently, Shirley died on 29 September 2022.

Clause 14.01 of the trust deed conferred on the Trustee a broad power to *"revoke, add to, release, delete or vary all or any of the trusts, powers or provisions declared or included in this Deed,"* without limiting it merely to beneficiaries, and this breadth was reinforced by clause 12.05, which expressly provided that *“[a]ll powers set out in this Deed shall be construed as widely as possible.”* In contrast, clause 22.01 governed the exercise of powers by the Appointor, specifying that these powers would be exercised jointly by multiple Appointors and then by survivors or their personal representatives upon death, reflecting the intended succession for control of the Trust.

On 28 March 2024, Brodie, acting as the sole director and secretary of Hill Family Holdings, caused the company to execute a Deed of Variation as Trustee. This deed inserted a new clause 22.04 that targeted Kerin specifically, allowing the Trustee to *“in its absolute discretion remove Kerin Anne Staley as the Appointor”*. Exercising this newly inserted power immediately, Hill Family Holdings removed Kerin as Appointor and appointed Paula’s husband, William Porter, in her place. Kerin was not informed of this Deed of Variation at the time.

Kerin had not been informed of the oral declaration removing her and her family as beneficiaries when it was made. She became aware of it shortly after a statutory declaration to that effect was provided to her solicitors on 8 March 2024. On 19 June 2024, Kerin executed a Deed of Removal and Appointment of Trustee, removing Hill Family Holdings as Trustee and appointing Staley Management Pty Ltd.

On 27 June 2024, Hill Family Holdings’ solicitors informed Kerin’s solicitors of the Deed of Variation executed three months earlier that had removed Kerin as Appointor. They also revealed an intention to vest the trust on 30 June 2024, a step that was deferred pending resolution of the proceedings. On the following day, 28 June 2024, Kerin and Staley Management applied to the Supreme Court of Queensland seeking declarations to uphold Kerin’s position as Appointor and to challenge the validity of the Deed of Variation.

Kerin argued that the Deed of Variation executed by Hill Family Holdings on 28 March 2024 was invalid. Kerin contended that the Trustee’s power of amendment under Clause 14.01 of the Trust Deed did not extend to inserting a new clause that allowed the Trustee to remove and replace the Appointor. According to Kerin, this power was implicitly limited by other provisions of the Trust Deed, particularly Clauses 21 and 22, which she said established a comprehensive regime governing the appointment, removal, and resignation of Appointors. Kerin argued that these clauses demonstrated that the role of Appointor was intended to stand above that of the Trustee, especially given that the Appointor was expressly empowered to remove and appoint Trustees under Clause 21. The Trust Deed contained no provision authorising the Trustee to remove or replace the Appointor, which Kerin claimed meant that any such amendment would invert the fundamental relationship set out in the trust structure.

Hill Family Holdings argued that the Deed of Variation executed on 28 March 2024 was a valid exercise of its powers under the Trust Deed. The company contended that Clause 14.01 conferred a broad and express power on the Trustee to revoke, add to, or vary any of the trusts, powers, or provisions in the Trust Deed, including by inserting new provisions such as Clause 22.04, which allowed the Trustee to remove and replace the Appointor. They emphasised that this clause was not limited by the headings or by other provisions concerning the role of the Appointor, and pointed to Clause 12.05, which directed that all powers in the Trust Deed be construed as widely as possible.

Hill Family Holdings rejected the suggestion that inserting a clause to permit the removal and replacement of the Appointor undermined the substratum of the trust. Hill Family Holdings argued that the substratum of the Hill Family Trust was not tied to the identity of the Appointor but rather to the purpose of conferring benefits on the beneficiaries from time to time, at the Trustee’s discretion. Hill Family Holdings also submitted that there was no implied restriction in the Trust Deed preventing the Trustee from amending provisions relating to the Appointor, and that concerns about potential misuse of power or “circularity” were adequately addressed by the Trustee’s obligations under general principles of equity, which ensured powers had to be exercised properly and in good faith.

Justice Muir in the Supreme Court of Queensland determined that the Deed of Variation executed by Hill Family Holdings on 28 March 2024 was a valid exercise of the Trustee's power under the Trust Deed. Justice Muir found that Clause 14.01 of the Trust Deed, properly construed, conferred a very broad power on the Trustee to amend the Trust Deed, which included the power to insert a new clause (Clause 22.04) allowing the Trustee to remove and replace the Appointor. Her Honour rejected the argument that this power was impliedly limited by other provisions regulating the role of the Appointor or by any principle preserving the substratum of the trust.

Justice Muir concluded that inserting Clause 22.04 and then using it to remove Kerin as Appointor and appoint William in her place did not impermissibly alter the substratum of the trust. The judgment also rejected contentions that the Deed of Variation was contrary to the structure or scheme of the Trust Deed. As a result, her Honour held that Kerin ceased to be Appointor on 28 March 2024, which meant she did not have the power on 19 June 2024 to remove Hill Family Holdings as Trustee and appoint Staley Management in its place. Accordingly, Justice Muir dismissed the application by Kerin and Staley Management for declaratory relief and ordered them to pay Hill Family Holdings' costs.

Kerin and Staley Management appealed to the Court of Appeal.

Issues

1. Did the Trust Deed, properly construed, authorise the Trustee to amend the Trust Deed to insert a clause allowing the Trustee to remove and replace the Appointor, or was this power constrained by other provisions or by the substratum of the trust?
2. Was the Deed of Variation executed by Hill Family Holdings on 28 March 2024, which removed Kerin Staley as Appointor and appointed William Porter in her place, valid?

Decision

The Court found that clause 14.01 of the Trust Deed conferred a broad power on the Trustee to amend the Trust Deed, including the power to insert a clause allowing the Trustee to remove and replace the Appointor. It rejected the argument that this power was implicitly limited by other provisions of the Deed relating to the Appointor, or by any principle that would protect the substratum of the trust.

The Court of Appeal agreed that the substratum of the Hill Family Trust was not tied to who held the office of Appointor, but rather to the overarching purpose of conferring benefits on beneficiaries as determined by the Trustee. It accepted that the insertion of clause 22.04 and the subsequent removal of Kerin as Appointor did not destroy the substratum of the trust. The Court also found there was no implied restriction in the Trust Deed preventing the Trustee from amending provisions related to the Appointor, particularly given that clause 12.05 expressly stated that all powers in the Trust Deed should be construed as widely as possible.

Ultimately, the Court concluded that the Deed of Variation executed on 28 March 2024 was a valid exercise of the Trustee's powers. As a result, Kerin had ceased to be Appointor on that date and, therefore, lacked authority to remove Hill Family Holdings as Trustee and appoint Staley Management in its place on 19 June 2024. The appeal was dismissed, and Kerin and Staley Management were ordered to pay Hill Family Holdings' costs.

COMMENT - This decision is a reminder that in family trusts, the person who appears to be the "ultimate controller", often the Appointor, may not actually hold that position if the trust deed confers wide variation powers on the Trustee. The Court of Appeal's ruling highlights the real possibility that a Trustee, equipped with broadly drafted powers of amendment, can change the trust's governance in ways that override the Appointor's role. It also underscores the importance of careful estate planning, particularly where foreign estate tax considerations can make the question of who truly controls a trust even more significant.

Citation *Staley v Hill Family Holdings Pty Ltd* [2025] QCA 95 (Bond JA, Gotterson AJA and Bradley J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCA/2025/95.html

2.5 N & G Grima Family Trust – surcharge land tax

Facts

On 8 November 2024, the N & G Grima Family Trust was established under a trust deed. The trustee of the Trust, N & G Grima Family Trust Pty Ltd, owned land in New South Wales. The trust was a discretionary trust.

Clause 1.1 of the trust deed provided that an 'Excluded Person' was not a beneficiary of the trust, and the definition of 'Excluded Person' included any 'Foreign Person' which was relevantly defined as follows.

> *"Foreign Person means:*
>
> *...*
>
> *(l) any potential Beneficiary of this Trust who would or might cause this Trust to be or become a foreign person or a foreign trust for the purposes of any other statute,*
>
> *and who, by being a Beneficiary, would or might cause this Trust to be assessed to additional or increased duty or land tax (in excess of any amount which the Trust would be required to pay had the person, corporation or trust not being so classified) in respect of the acquisition or holding of any direct or indirect interest in real property to which any of the provisions above apply, but only while:*
>
> *(m) the foreign person, corporation or trust continues to be so classified under the relevant provision; and*
>
> *(n)* ***the Trust acquires or holds, any direct or indirect interest in real property*** *to which any of the provisions above apply;".*

Clause 3 of the trust deed stated as follows:

> *3 EXCLUSION FROM BENFITS*
>
> *3.1 Excluded Persons*
>
> *Every Excluded Person is specifically excluded from all or any benefits under this Trust. The Trustee must not:*
>
> *(a) make any determination in favour of or any distribution of Income or capital in favour of any Excluded Person;*
> *(b) pay, distribute, apply or Set Aside any Property of the Trust (including money) to or for the benefit of any Excluded Person.*
>
> *3.2 Provision not Effective*
>
> *Any provision of this Deed which does or might have the effect of conferring a benefit on any person contrary to clause 3.1 will be ineffective to confer that benefit and must be read down to the extent necessary to give effect to clause 3.1.*
>
> *3.3 Irrevocable*
>
> *This clause 3 is irrevocable and is not capable of being amended.*

Surcharge land tax applies to a trust that holds residential land in NSW, unless foreign persons are prevented from benefitting under the trust. A ‘foreign person’ is prevented from benefiting under a discretionary trust where the following requirements in section 5D(3) of the *Land Tax Act 1956* (NSW) are satisfied:

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

On 8 August 2024, the Chief Commissioner issued a surcharge land tax assessment to the trustee for the 2024 land tax year on the basis that the trust deed did not satisfy the ‘no amendment requirement’. The Chief Commissioner contended that the trust deed was capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a ‘foreign person’. The Chief Commissioner accepted that the trust deed satisfied the ‘no foreign beneficiary requirement’.

The Chief Commissioner contended that clause 3.3 of the trust deed will prevent the trustee from changing the words contained within clause 3 only and not clause 1.1. The consequence of this is that the definition of ‘Excluded Beneficiaries’ can change in clause 1.1 despite clause 3 not being capable of amendment. Therefore, the trust deed could be amended to enable ‘Foreign Persons’ to benefit under the trust.

On 18 November 2024, the trustee lodged an objection to the surcharge land tax assessment.

On 29 November 2024, the trustee amended the trust deed to irrevocably exclude “foreign persons” as beneficiaries. However, these amendments were not in effect as at 31 December 2023.

On 29 January 2025, the trustee commenced proceedings in the NCAT seeking a review of the Chief Commissioner's decision.

Issue

By stating that clause 3 of the trust deed is “irrevocable and is not capable of being amended”, does clause 3.3 only prohibit changes being made to the actual words within clause 3 or does it prevent changes to clause 1.1 of the trust deed?

Decision

The NCAT considered that the term ‘amend’ ordinarily means to alter a legal instrument through formal procedure. Therefore, the NCAT found that clause 3.3 not only prohibited direct textual changes but also any alterations that affected the function or legal effect of clause 3.

The NCAT explained that the legal effect of a clause is tied to both the wording and the defined terms within the trust deed. For example, definitions in clause 1.1, such as “Excluded Person” and “Foreign Person” directly influence the operation of clause 3. Altering these definitions, such as by removing foreign persons from the definition of Excluded Persons, would effectively change how clause 3 functions. The NCAT found that such changes are prohibited by clause 3.3, even if not made directly to clause 3 itself.

However, the NCAT also addressed a temporal qualification in the definition of “Foreign Person,” which limited its application to periods during which the trust holds relevant real property. Once such property is no longer held, persons who were previously considered “foreign persons” may no longer be excluded under clause 3.

The NCAT found that clause 3.3 failed to meet the strict requirement of being unamendable, because the deed allowed the exclusion of foreign persons to lapse based on future circumstances. This capability of change, even if self-executing, meant the clause was not truly “irrevocable” or “not capable of amendment” as required.

Citation *N & G Grima Family Trust Pty Ltd v Chief Commissioner of State Revenue* [2025] NSWCATAD 149 (Senior Member EA MacIntyre, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/149.html

2.6 Camwall – duty exemption for intergenerational transfer of farmland

Facts

On 26 October 2023, Camwall Pty Ltd, as trustee for the Antap Trust, entered into an agreement to purchase farmland from Patricia Anne Wallace. The land was part of the Wallace family's primary production business. John Wallace, Paricia's son, is the sole director of Camwall and has been responsible for managing the family business.

The Antap Trust is a discretionary family trust. John is named as the principal in the trust deed and a beneficiary. John's children were to be the default beneficiaries if no other appointment was made.

On 15 November 2023, a Deed Poll was executed to amend the trust deed. These changes included a new clause stating that the trust fund would be held solely for John, and the previous clauses (about equal shares for children or their descendants) were pushed down and modified so that John's children would only be takers in default if John were no longer alive. Importantly, the Deed Poll specified that these amendments would not take effect unless the exemption under section 274 of the *Duties Act 1997* (NSW) was approved. Section 274 of the Duties Act provides an exemption from transfer duty for transfers Primary Production Property between family members.

Section 274(4) of the Duties Act provides as follows:

(4) Thirdly, the Chief Commissioner must be satisfied that the business will continue to be carried on, whether alone or with others, by—

(a) the transferee, or

(b) the person directing the transferee.

(4A) For the purposes of this section, the person directing a transferor or transferee is—

…

(b) for a transferor or transferee acting in the capacity of trustee of a discretionary trust—a person or persons who are entitled, as takers in default of appointment, to not less than a 25% interest in the capital of the trust, being an entitlement—

…

(ii) for a transferee—that exists for at least 3 years after the date of the transfer,..

On 16 November 2023, John's solicitor lodged an application for exemption under section 274 of the Duties Act, listing John as the 'person directing the transferee'. On 15 January 2024, after seeking further information, the Chief Commissioner advised that the exemption was not available because section 274(4A)(b)(ii) had not been satisfied. The transaction was instead assessed for ad valorem duty, and a notice of assessment was issued the same day.

Also on 15 January 2024, John, as sole director of Camwall, formally adopted the Deed Poll amendments. On 24 January 2024, Camwall paid the assessed duty and proceeded to execute and lodge the transfer of the property.

In February 2024, Camwall sought clarification as to why the exemption had been denied. The Chief Commissioner responded on 28 February, explaining that because the Deed Poll amendments were made after the liability date (26 October 2023), the exemption requirements were not met at the relevant time.

On 14 March 2024, Camwall lodged an objection to the assessment on the basis that the exemption should be assessed at the date of the transfer, not the date of the contract. However, on 5 June 2024, the Commissioner disallowed the objection, asserting that the word "transfer" should carry the same meaning as in Chapter 2 of the Duties Act, and the relevant exemption conditions must be satisfied as at the date duty liability arose, that is, the contract date of 26 October 2023.

Camwall lodged an application with NCAT on 2 August 2024, arguing that the transaction qualified as an intergenerational transfer of primary production land under sections 274(2) to 274(4) of the Duties Act.

The Chief Commissioner accepted that the exemption under section 274 of the Duties Act applied as at 26 October 2023. However, the Chief Commissioner argued that when the trust deed was amended on 24 January 2024, John became the sole default beneficiary, and his children would only be takers in default if he were deceased. This change, the Chief Commissioner contended, breached the three-year requirement in section 274(4A)(b)(ii), thus disqualifying Camwall from the exemption, which should be revoked.

Issues

1. What is the correct date on which the Chief Commissioner must be satisfied of the exemption criteria under section 274 of the Duties Act must be satisfied?
2. Does the subsequent amendment to the Antap trust deed revoke Camwall's entitlement to the exemption due to the three-year requirement under section 274(4A)(b)(ii) of the Duties Act?

Decision

The NCAT confirmed that liability for duty arises at the time of the transaction, not at the time of transfer instrument execution. Specifically, section 12(1) of the Duties Act states that duty liability is triggered by the transfer of dutiable property, and section 12(2) provides that where a transfer is executed by a written instrument, liability arises upon first execution. In this case, since the contract was executed on 26 October 2023, that is when liability arose. Camwall accepted that, without an exemption, duty would be payable as of that date.

The NCAT agreed that, as at 26 October 2023, the requirements in section 274(2) to (4) of the Duties Act were satisfied. First, Patricia was clearly a family member of the persons directing Camwall, being her grandchildren (John's children). Second, the property was being used for primary production by John, who was a family member of the persons directing the transferee. Third, the business was to be carried on by John and his children, satisfying the requirement for continuity. Therefore, the exemption applied at the time duty liability arose.

The question then turned to whether the amendment made to clause 3.4(c) of the Antap Trust Deed in November 2023 disqualified Camwall from relying on the exemption due to the three-year requirement. That amendment removed John's children as takers-in-default and named John instead.

The NCAT found that section 274 of the Duties Act does not expressly require the person directing the transferee at the time of transfer to be the same individual throughout the three-year period. Rather, it defines control based on entitlement to at least 25% of the trust capital as a taker-in-default. The NCAT observed that such a rigid interpretation would unfairly penalise legitimate intergenerational changes, such as the death of a family member or estate planning updates. John had always been a beneficiary and is clearly a family member of Patricia. The amendment simply reflected a restructuring of entitlements within the family.

Ultimately, the NCAT concluded that even with the amendment, the transfer remained a genuine intergenerational family farm transfer intended to fall within the object and purpose of section 274. The NCAT found that the Chief Commissioner's decision of 15 January 2024 was not the correct or preferable decision and should be set aside. However, due to the remaining issue of whether the amendment rendered Camwall ineligible under section 274(4A)(b)(ii), this matter was remitted to the Chief Commissioner for reconsideration in line with the NCAT's interpretation.

Citation *Camwall Pty Ltd atf Antap Trust v Chief Commissioner of State Revenue* [2025] NSWCATAD 136 (Senior Member S Higgins, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/136.html

3. Cases in brief

3.1 Slowey – director penalty notice defences

Between 2016 and 2019, three companies of which Michael Slowey was a director, Custom Clad Pty Ltd, Custom Clad Services Pty Ltd, and Custom Clad Projects Pty Ltd, failed to remit Pay-As-You-Go Withholding (PAYGW) amounts to the ATO. As a result, the Deputy Commissioner of Taxation issued three director penalty notices (DPNs) to Michael in 2018 and 2019, seeking to recover a total of $604,046 in director penalties.

The Deputy Commissioner commenced proceedings in the County Court of Victoria to enforce these penalties. Michael did not dispute that the DPNs had been served or that the amounts claimed were correct. However, he defended the claim on three main grounds:

1. that he had taken all reasonable steps to avoid the penalties by eventually placing the companies into administration or liquidation;
2. that the Deputy Commissioner was estopped from enforcing the penalties due to its conduct in the external administrations; and
3. that payments made by the companies through dividends or under a Deed of Company Arrangement (DOCA) discharged or reduced his personal liability.

The Court rejected Michael's "all reasonable steps" defence under section 269-35 of Schedule 1 to the TAA, finding it had no real prospect of success. While Michael ultimately placed Custom Clad into voluntary administration in December 2018, Custom Clad Services into voluntary administration in April 2019, and Custom Clad Projects into liquidation in April 2019, the Court emphasised that this was too late to satisfy the statutory test. The obligation on a director to take all reasonable steps arises from the time the PAYGW debts fall due and continues until one of the statutory outcomes, payment of the debt, appointment of an administrator or liquidator, is achieved.

The evidence showed long periods in which PAYGW obligations remained unpaid without any steps being taken to cause compliance. For example, Custom Clad withheld PAYGW amounts from December 2016 but was not placed into voluntary administration until two years later, despite continuing to receive payments from its head contractor until August 2017. Similarly, there was no explanation of what steps were taken in the months between November 2018, when it became clear the companies could not pay their debts, and April 2019, when Custom Clad Services and Custom Clad Projects entered external administration. The Court concluded that taking some steps after significant delay did not amount to taking "all reasonable steps" throughout the relevant periods. Simply waiting in the hope that outstanding debts from another company would be paid was insufficient to meet the statutory test, which requires prompt action to ensure either compliance or formal insolvency processes.

Citation *Deputy Commissioner of Taxation v Slowey* [2025] VCC 817 (Wise J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2025/817.html

3.2 Jayasinghe – director penalty notices

Sampath Jayasinghe became a director of Marine & Civil Pty Ltd ACN 147 854 635 in January 2017. The company subsequently failed to meet its PAYG withholding obligations, accumulating unpaid liabilities exceeding $5 million.

In May 2018, the ATO issued a DPN to Sampath. Although the company was wound up later that year, on or about 21 August 2018, the Commissioner sought to recover the unpaid liabilities directly from him.

In defending the claim, Sampath argued that he had been appointed only as a "Special Purpose Director" to facilitate negotiations with the Sri Lankan government on behalf of Marine & Civil and was not a director in the general sense. Sampath claimed that he was neither involved in the day-to-day running of the company or its financial management, nor was he required to be. Sampath argued that he relied in good faith on assurances from John Neylon, the company's chairman, that any tax debts were being managed. Sampath also referred to a later deed of settlement with the liquidator, which he believed released him from any liabilities associated with Marine & Civil.

The County Court of Victoria rejected the arguments made by Sampath, holding that the *Corporations Act* does not recognise any concept of a "Special Purpose Director" and that directors cannot contract out of, or limit, their statutory obligations to ensure a company meets its tax compliance obligations.

The Court also held that dividing up management responsibilities among directors, or relying on assurances from fellow directors, does not relieve a director of personal liability under Division 269 of Schedule 1 to the TAA. The Court further noted that the deed of settlement with the liquidator did not bind the Commissioner, who was not a party to it, and therefore did not extinguish Sampath's statutory liability.

Finding that Sampath's defence had no real prospect of success, the Court entered summary judgment for the Deputy Commissioner for the full amount claimed plus interest and indicated that costs would follow.

COMMENT – This case serves as a reminder that private arrangements or deeds of settlement with a liquidator do not bind the Commissioner, nor do they extinguish statutory tax liabilities.

Citation *Deputy Commissioner of Taxation v Jayasinghe* [2025] VCC 766 (Kirton J, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2025/766.html

3.3 Samadi – Reviewable decisions

General interest charge (**GIC**) was imposed on Abdul Samadi under section 8AAB of the TAA. On 25 March 2025, the Commissioner declined to remit the GIC. On 15 April 2025 Abdul filed an application in the ART seeking review of the decision.

The matter was listed for an interlocutory hearing on 29 May 2025 to determine whether the ART had jurisdiction to hear the matter. Abdul was advised at the hearing that the ART can only review decisions where an Act or legislative instrument expressly provides for such a review.

The ART found that the Commissioner's decision not to remit GIC under section 8AAG(5) of the TAA did not give rise to a *"reviewable objection decision"* under Part IVC of the TAA. Unlike penalty remission decisions, there is no statutory right to object to a GIC remission refusal. As a result, the ART did not have jurisdiction to hear the matter under section 97 of the *Administrative Review Tribunal Act 2024* (Cth) and dismissed the application.

COMMENT - Taxpayers in this situation would generally need to pursue relief in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Federal Court is limited to determining whether the decision was made within the Commissioner's power and, unlike a tribunal, the Federal Court cannot re-make the decision on the merits of the case.

Citation *Samadi and Commissioner of Taxation (Practice and Procedure)* [2025] ARTA 787 (Senior Member L. McBride, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/787.html

3.4 Viera Family Unit Trust – fixed trust for land tax New South Wales?

Nunc Coepi Pty Ltd is the corporate trustee of Viera Family Unit Trust, which owned four commercial properties in New South Wales. Nunc Coepi administered the trust pursuant to the trust deed executed on 8 May 2018.

Nunc Coepi proceeded on the basis that the trust was a fixed trust and did not receive any contrary indication from Revenue NSW for several years.

On 26 October 2023, the Chief Commissioner determined that the trust was not a fixed trust under section 3A of the LTMA but rather a special trust. As a result, Nunc Coepi was assessed for land tax at the premium rate on the entire taxable value of the land for the years ended 31 December 2019 to 2023, without the benefit of the land tax threshold, resulting in a liability of $39,076.60.

Nunc Coepi objected to the assessment, arguing that the trust deed satisfied the statutory requirements for a fixed trust. The Chief Commissioner disallowed the objection on 12 April 2024. Nunc Coepi then sought an administrative review by NCAT.

The NCAT found that under the trust deed, the unitholders did not own the equitable estate in the land. Clauses 3.4, 9.4, 10.1 and 15.2 of the deed gave Nunc Coepi broad powers, including the discretion to redeem units, apply trust capital to offset losses, and limit the unitholders' entitlement to the trust property. This meant the unitholders were not presently entitled to the income or capital in the way required by section 3A(3B) of the LTMA.

The NCAT also found that the deed's overriding clause (clause 2.9), which intended to deem the trust a fixed trust, was ineffective. Unlike the clear override provisions in the case of *Sayden Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 111 (*Sayden*), which not only mirrored the language of sections 3A(3A) and 3A(3B) of the LTM Act, but it also provided an added protection by stating that the entirety of the sub-clause would apply, *"notwithstanding any other provision"* of the deed, clause 2.9 was vague, referring only to "*the most logical provisions conceivable not expressed in this Deed"*, which did not compel the deed to operate consistently with the statutory criteria for fixed trusts.

Having regard to authorities including *Sayden*, the NCAT concluded the trust did not meet the requirements of a fixed trust under either section 3A(2) of the LTMA or the criteria under s 3A(3A)–(3B) of the LTMA. Nunc Coepi failed to discharge its onus to prove the assessments were excessive.

The Chief Commissioner's decision was affirmed.

TRAP - For a trust to qualify as a fixed trust, the deed must precisely satisfy the statutory requirements. Discretionary powers, such as those allowing the trustee to redeem units, apply capital to offset losses, or otherwise alter the entitlements of beneficiaries, will generally prevent the trust from being treated as a fixed trust. Boilerplate override clauses, unless clearly drafted to override all inconsistent provisions and to mirror the statutory tests, will not prevent a trust from being characterised as a special trust.

Citation *Nunc Coepi Pty Ltd atf Viera Family Unit Trust v Chief Commissioner of State Revenue* [2025] NSWCATAD 143 (Senior Member J Gatland, New South Wales)
w https://www.caselaw.nsw.gov.au/decision/1977bfad6f540e2c82611a87

3.5 Asan Construction Management – surcharge land tax

Asan Construction Management Pty Ltd is the trustee for the Nikkhah Family Trust. Peirouz Nikkah is the director of Asan Construction Management. Peirouz and his father conducted a building and construction business together for many years.

In June 2015, the Trust was established. Under the Trust Deed, a broad group of family members and entities could be beneficiaries of the Trust, unless specifically excluded. Clause 20.4 of the Trust deed allowed the trustee to exclude beneficiaries, but unless explicitly stated, such exclusions were revocable.

On 21 March 2016, a deed of variation to the Trust deed was executed. The preamble to the deed of variation made it clear that the intent was to amend the Trust deed to exclude "any foreign persons". The deed of variation attempted to exclude foreign beneficiaries by stating only Australian citizens could benefit from the Trust. However, the deed of variation did not make the exclusion irrevocable, nor did it amend clause 20.4, which allowed future changes of the Trust deed.

From 2017 to 2022, the Trust held and sold several residential properties in Mosman and Rozelle.

Surcharge land tax applies from the 2017 land tax year onwards to residential land owned by 'foreign persons'. Section 5D of the *Land Tax Act 1956* (NSW) provides that, unless a trust deed both excludes all foreign persons as potential beneficiaries and makes that exclusion irrevocable, the trustee is deemed a foreign person and surcharge land tax applies.

In February 2021, the Commissioner issued assessments for the 2018 to 2021 land tax years, and later for the 2022 land tax years. No penalties or interest were imposed.

After receiving the correspondence from the Chief Commissioner saying that the deed of variation did not satisfy the requirements to avoid surcharge land tax, Peirouz contacted the lawyer who prepared the deed of variation. She told him to get some specialist advice, so he approached another solicitor in February 2024. The solicitor prepared a Rectification Deed, and also an out of time objection to the Chief Commissioner. The Chief Commissioner accepted that the Rectification Deed complied with section 5D of the Land Tax Act.

The objection was disallowed and the trustee applied to the NCAT for revie of the decision.

While the NCAT accepted that no foreign individuals were among the family members named in the Trust deed as beneficiaries, the NCAT noted that the Trust deed allowed for a wide class of beneficiaries, including corporations, entities, and charities, which could potentially include foreign persons. As a result, the 'no foreign beneficiary' requirement under s 5D(3)(a) of the Land Tax Act was not met.

In addition, as clause 20.4 of the Trust deed allowed future amendments, the NCAT held that the Trust did not meet the 'no amendment requirement' under s 5D(3)(b) of the Land Tax Act. The NCAT a confirmed that the rectification of the Trust deed, which was executed on 30 April 2024, could not retrospectively affect the land tax liabilities already arisen.

The NCAT was sympathetic to Peirouz's situation as he had relied in good faith on legal advisers and acted without any intention to avoid tax, but confirmed that the Chief Commissioner and the NCAT had no discretion to waive or reduce the surcharge land tax.

Citation *Asan Construction Management Pty Ltd atf Nikkah Family Trust v Chief Commissioner of State Revenue* [2025] NSWCATAD 156 (Senior Member J Sullivan, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/156.html

3.6 Appeal updates

Hall

The Commissioner has appealed to the Full Federal Court from the decision of the ART in *Hall v Commissioner of Taxation* [2025] ART 600 (see our June 2025 Tax Training Notes). The ART allowed deductions for occupancy expenses and car expenses incurred by Nathaniel Hall during the COVID-19 pandemic, rejecting the Commissioner's argument that such expenses were private or domestic in nature.

Sepl

The taxpayer has appealed the decision in *Commissioner of Taxation v Sepl Pty Ltd as trustee of the SFT Trust* [2025] FCA 581 (see our June 2025 Tax Training Notes). The decision concerned whether the use of luxury cars by beneficiaries of a trust constituted a fringe benefit.

Bendel

The Commissioner has been granted special leave to appeal to the High Court from the Full Federal Court decision of *Commissioner of Taxation v Bendel* [2025] FCAFC 15 (see our March 2025 Tax Training Notes). The decision concerned whether an unpaid present entitlement (UPE) owing to a corporate beneficiary constituted a "loan" under section 109D(3) of the ITAA 1936. The Full Federal Court unanimously affirmed the AAT's conclusion that such UPEs do not amount to loans for Division 7A purposes.

Liang

An application by Zhi Dong Liang and Lai Chu Yeung for special leave to appeal to the High Court from the Full Federal Court decision of *Commissioner of Taxation v Liang* [2025] FCAFC 4 has been refused. The decision concerned whether an amount of unexplained deposits received by a trust was not assessable income. The Full Federal Court overturned the decision of Logan J, finding that the AAT did not err in holding that Zhi and Lai had failed to discharge their onus of proving that the bank deposits were not assessable income.

3.7 Other tax and superannuation related cases published from 10 June to 8 July 2025

Citation	Date	Headnote	Link
Karazincir v Chief Commissioner of State Revenue [2025] NSWCATAD 138	13 June 2025	STATE TAXES - surcharge purchaser duty - tax default - interest - market rate - premium rate - penalties - remission - discretion - circumstances beyond control of taxpayer -reasonable care - exceptional circumstances - personal circumstances	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/138.html
Liu v Chief Commissioner of State Revenue [2025] NSWCATAD 141	16 June 2025	TAXATION AND REVENUE – surcharge purchaser duty – whether the Applicant was a "foreign person" – whether the Applicant met the requirements for the exemption under s 104ZKA of the Duties Act 1997 (NSW) TAXATION AND REVENUE – interest and penalties	https://www.caselaw.nsw.gov.au/decision/19767b80d8f6c459a93c4163
Warry v Commissioner of Taxation [2025] ARTA 836	18 June 2025	TAXATION - PRACTICE AND PROCEDURE – Applicant seeking to provide additional affidavit and documentary evidence on day of hearing – Tribunal's power to exclude or limit evidence or issues – Tribunal's obligation to ensure a party is given a reasonable opportunity to present their case, make	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/836.html

Citation	Date	Headnote	Link
		submissions and adduce evidence – grounds for dismissal of application – failure to comply with Tribunal direction or failure to proceed with application within reasonable time – dismissal of application where Tribunal satisfied that application has no reasonable prospects of success – Tribunal declines to receive additional affidavit or evidence – application dismissed	
Lee v Commissioner of Taxation (Practice and procedure) [2025] ARTA 879	2 July 2025	PRACTICE AND PROCEDURE – jurisdiction question – Applicant seeks to review Commissioner of Taxation's refusal to determine a hardship application – no reviewable objection decision – application dismissed for lack of jurisdiction PRACTICE AND PROCEDURE – stay application – Applicant seeks to stay recovery and enforcement activity undertaken by the Commissioner of Taxation – review application dismissed for lack of jurisdiction – stay application dismissed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/879.html
Tran v Commissioner of State Revenue [2025] VCAT 581	3 July 2025	Review and Regulation List – *Duties Act 2000* (Vic), ss 57J, 57JA, 57K and 57M – Residence requirement for duty concession and reduction – Applicant has failed to discharge onus of proof to establish that residence requirement met – Assessment confirmed.	https://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2025/581.html
Impala Kitchens and Bathrooms Pty Ltd v Chief Commissioner of State Revenue [2025] NSWCATAD 162	7 July 2025	REVENUE LAW - State taxes - payroll tax - assessment - objection - appeal REVENUE LAW - penalties - reasonable care -whether tax default due to matters beyond control of taxpayer - remission - Revenue Ruling PTA 036 - Practice Note CPN 024 ADMINISTRATIVE LAW - reviewable decision - correct and preferable decision - Civil and Administrative Tribunal	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/162.html

4. Federal Legislation

4.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11	9/10	10/10		
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11	9/10	10/10		

4.2 Additional time to register foreign acquisitions of Australian interests

On 18 June 2025, the Commissioner of Taxation, as Registrar of the Register of Foreign Ownership of Australian Assets, released draft legislative instrument LI 2025/D13 under section 58M(1) of the *Foreign Acquisitions and Takeovers Regulation 2015*.

The instrument permits the Registrar to extend the standard 30-day period, in section 130W(2)(b) of the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**), for foreign persons to lodge register notices about acquisitions or changes in interests in land, water, entities, businesses and other Australian assets.

The Registrar may grant extensions for any length of time and issue multiple extensions, with requests required to specify the period sought. Extensions will be assessed by reference to factors such as the type and complexity of interests, timing and reasons for delay, the person's efforts to comply, whether the person possess all necessary information, technical issues with the ATO's systems, and the person's compliance history.

Comments on the draft instrument are due by 16 July 2025.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI2025D13/00001

4.3 ESS safe harbour valuation methodologies

The ATO has issued a draft Legislative Instrument 2025 (LI 2025/D16) in relation to methods for valuing unlisted shares for the employee share scheme start-up concession. The draft instrument intended to commence on 1 October 2025 and will repeal and replace the existing ESS 2015/1.

Concessional treatment can apply to shares or rights acquired by employees under an ESS, particularly under the ESS start-up concession in Division 83A of the ITAA 1997. This concession generally allows employees of eligible start-ups to defer or reduce the tax on ESS interests, provided certain requirements are met, including that the market value of the shares or options at grant does not exceed specified limits. Consequently, having clear, approved methods for valuing unlisted shares is critical.

The draft 2025 instrument limits its scope expressly to valuations for the purposes of the ESS start-up concession, aligning the instrument's operation with the specific concession in subsection 83A-33(5). It preserves two approved valuation methods, largely consistent with those under the 2015 instrument:

Method One - Market-based valuation method

This method allows the value to be determined by either the chief financial officer of the company or a person having the knowledge, experience and training to perform such valuations. In the draft 2025 instrument, a person with these qualities is defined as a "suitable valuer".

The valuation must reasonably take into account the company's tangible and intangible assets, the market value of similar businesses (including earnings multiples), adjustments for control premiums, lack of marketability and key person risk, and net present value of future cash flows. These considerations have been re-ordered to the above order in the draft 2025 instrument, but otherwise remain unchanged.

Under both the 2015 and 2025 instruments, the directors must endorse both the valuation methodology and the resulting value in a written resolution.

Method Two - Net tangible assets method

This method remains available for early-stage or small companies, being those that have not raised more than $10 million in capital in the preceding 12 months and are either under seven years old or classified as a small business entity. This method calculates the market value by determining the net tangible assets of the company (disregarding certain aspects of preference shares) and dividing this by the total number of ordinary and participating preference shares on issue. Apart from minor clarifications in structure, this method remains unchanged.

While the core valuation approaches and eligibility thresholds under both methods remain unchanged from the 2015 framework, the draft 2025 instrument introduces a clearer structure. It includes a dedicated definitions section covering terms such as "Act," "financial report," "raised capital," and "suitable valuer."

Comments on the draft instrument are due on 16 July 2025.

w https://www.ato.gov.au/law/view/document?DocID=OPS/LI2025D16/00001

4.4 Remaking ITAA 1936 Regulations

The Treasury has published the following draft regulations for consultation:

1. Income Tax Assessment (1936 Act) Regulations 2025 (regulations)
2. Treasury Laws Amendment (Income Tax Assessment Repeal and Consequential Amendments) Regulations 2025 (consequential regulations)

The Income Tax Assessment (1936 Act) Regulations 2025 remake and replace the 2015 Regulations ahead of their sunset on 1 October 2025. The changes update references, align terminology with current law, and remove obsolete provisions without altering the substantive operation of the regulations. Some examples of the changes are set out below.

Amendment periods

The following updates have been made to provisions extending the Commissioner's amendment period from two to four years:

1. updating a reference to the provision of the ITAA 1997 containing the integrity rule about share trading and investment companies in relation to employee share schemes to ensure the appropriate provision is referenced following amendments made in 2015; and
2. updating references to ‘small business entity’ to also include ‘medium business entity’ to align with table items 2 and 3 of subsection 170(1) of the ITAA 1936, which were amended on 1 January 2021.

Transactions involving associates, private company dividends under Division 7A, employee share schemes and certain foreign income, among other things, continue to fall within these extended timeframes.

Definitions and technical updates

References to repealed section 159N were removed, and rebate terms were streamlined without changing calculation methods. Definitions for “permanent establishment” and “ordinary capital gains” are now confined to the controlled foreign company sections, rather than applying throughout the regulations.

Transitional provisions

The regulations will apply to income years starting on or after 1 October 2025. The 2015 Regulations continue to apply to income years commencing before that date.

Consultation is open until 15 July 2025.

w https://consult.treasury.gov.au/c2025-674208

4.5 Input tax credits for second hand goods

On 18 June 2025, the ATO published *Draft Legislative Instrument LI 2025/D11* to continue to allow GST registered entities to apply a global accounting method for calculating GST liabilities on acquisitions of certain kinds of second-hand goods. It repeals and replaces the instrument made in 2015, which would otherwise sunset on 1 October 2025.

Under subdivision 66-A of the GST Act, GST registered entities can clam an input tax credit for certain acquisitions of second-hand goods, even though GST was not included in their purchase price. The credits can be claimed once a subsequent taxable supply is made of the second hand good. Subdivision 66-B provides for a global account method that allows these input tax credits to be pooled for eligible acquisitions and offset against the GST payable on subsequent sales of these second-hand goods. Under this global accounting method, entities do not need to keep records of the acquisition and sale of each individual second hand good.

The new instrument has the same substantive effect as the 2015 Determination.

Comments on the draft instrument are due on 16 July 2025.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI2025D11/00001

4.6 Queensland and NSW floods declared natural disasters for deductible gifts or contributions

A legislative instrument has been enacted to declare the Queensland floods of March 2025 and the New South Wales floods of May 2025 as disasters for the purposes of enabling tax-deductible donations. This declaration allows individuals and organisations to make deductible gifts or contributions to Australian disaster relief funds assisting those affected by these events.

Specifically, the *Income Tax Assessment (Australian Disaster Relief Funds) Amendment Declaration (No. 2) 2025* amends the original 2022 declaration to include the floods that began on 21 March 2025 in western Queensland and on 18 May 2025 in north-eastern NSW. These events are now recognised as disasters under section 30-45A(1) of the ITAA 1997.

This new declaration took effect on 2 July 2025.

w https://www.legislation.gov.au/F2025N00522/asmade/text

5. State legislation

5.1 ACT 2025-26 Budget

On 24 June 2025, the ACT Treasurer handed down the 2025-26 Budget.

From 1 July 2026, the payroll tax-free threshold will drop from $2 million to $1.75 million, tightening the base for payroll tax collections. Tax rates will adjust so that employers with wages between $1.75 million and $20 million pay 6.75% (down from 6.85%), rates remain at 6.85% for wages up to $50 million, while higher brackets rise to 7.25% for $50 million to $100 million and 7.75% above $100 million.

For conveyance duty, from 1 July 2025, the Home Buyer Concession, Pensioner Duty Concession and Disability Duty Concession thresholds will increase to $1,020,000, indexed each year to the Canberra CPI. This new threshold also applies to Off-the-plan and RZ1 unit exemptions. Additionally, as part of the ACT's long-term transition from transaction taxes to land-based taxes, the lowest marginal conveyance duty rate will reduce from 0.4% to 0.28%.

Other changes include ending full motor vehicle duty concessions for zero-emission vehicles from 1 September 2025, with all new transactions subject to at least a 2.5% duty, and an 8% rate on vehicles over $80,000. The Budget also proposed a new $250 annual health levy, which will apply to all rates bills for residential, commercial and rural properties starting in 2025-26, continuing until at least 2029-30, when it will be reviewed.

COMMENT – in the days following the release of the budget, the proposed health levy has now been reduced to $100 for residential and rural property owners, but will remain at $250 for commercial properties.

w https://www.treasury.act.gov.au/budget/budget-2025-26/home

5.2 NSW 2025-26 Budget

On 24 June 2025, the NSW Treasurer handed down the 2025-2026 State Budget.

The Budget confirms that from the 2026 land tax year, the existing 50% land value reduction for eligible new build-to-rent (**BTR**) developments under section 9E of the *Land Tax Management Act 1956* (NSW) will be made permanent, removing its former expiry of 31 December 2039. In addition, the requirement that at least 10% of construction hours be performed by apprentices, trainees, long-term unemployed or similar workforce groups (the "participation requirement") will also cease from the 2026 land tax year. Eligible BTR projects will also continue to be able to access permanent exemptions from foreign purchaser duty and land tax surcharges, or apply for refunds of surcharges previously paid. However, projects that have already accessed or applied for the BTR concession for the 2025 land tax year or earlier will not be eligible for the extended permanent concession.

Separately, the Budget implements changes via the *Revenue and Other Legislation Amendment Bill 2025* (NSW) to tighten the Jobs Plus payroll tax exemption. The exemption will now be limited to agreements entered before 1 July 2024, with wages under those agreements remaining exempt until 1 October 2028, providing a short extension to cover lags between job creation and initial payroll payments. Annual reporting for these agreements will be required until 1 July 2029 to monitor ongoing eligibility.

w https://www.budget.nsw.gov.au/2025-26/budget-papers/#bp1
w https://www.revenue.nsw.gov.au/help-centre/resources-library/budget/2025-2026-state-budget
w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18767

5.3 Western Australia 2025-26 Budget

On 19 June 2025, the Western Australian Treasurer handed down the 2025–26 State Budget. On the same day, royal assent was given to the *Duties Amendment Bill 2025* (WA), which amended the *Duties Act 2008* (WA) to expand transfer duty concessions for first home buyers.

The amendments increase the exemption and concession thresholds for established homes and vacant land, applying to contracts entered into from 21 March 2025 to 30 June 2026. Refunds will also be available for certain purchases of units or apartments in multi-tiered strata schemes entered into before 21 March 2025.

The Budget also introduced enhanced land tax incentives for build-to-rent projects. The land tax exemption will rise from 50% to 75% for eligible developments that become operational between 1 July 2025 and 30 June 2028, with the higher exemption applying for up to three assessment years before reverting to 50%. This means the 75% exemption can still apply in the 2030-31 year for developments that commence by 2027-28, providing a significant boost to long-term rental supply initiatives.

w https://www.ourstatebudget.wa.gov.au/2025-26/budget-papers/bp3/2025-26
w
https://www.parliament.wa.gov.au/Parliament/Bills.nsf/D83AFDAC0B9A49D248258C67000BE0FE/$File/Bill%2B4-2.pdf

5.4 Revenue and Other Legislation Amendment Bill – Queensland

The *Revenue and Other Legislation Amendment Bill 2025* (Qld), containing amendments to the first home buyers grant, payroll tax, duties and land tax legislation, has received assent.

First home owner grant extension

The Bill extends the temporary increase of the First Home Owner Grant (**FHOG**) from $15,000 to $30,000 for eligible transactions up to 30 June 2026. This follows the initial increase which applied to transactions between 20 November 2023 and 30 June 2025. The FHOG continues to apply to contracts to purchase or build a new home, including those by owner-builders, and the eligibility criteria under the *FHOG Act 2000* (Qld) remain unchanged.

Payroll tax rebate extension

In line with the 2025-26 Queensland Budget, the Bill amends the *Payroll Tax Act 1971* (Qld) to extend the 50% payroll tax rebate on exempt wages paid to apprentices and trainees for a further 12 months. The rebate, which supports employer participation in skills development, will now apply until 30 June 2026.

Windfall duty and tax safeguard

Amendments to the *Duties Act 2001* (Qld) and the *Land Tax Act 2010* (Qld) address the ongoing interaction between Queensland's foreign surcharge provisions and international tax treaties. These changes aim to resolve inconsistencies that existed prior to federal clarification on 8 April 2024 regarding the application of non-discrimination clauses in treaties. The Bill aligns state law with Commonwealth changes and includes retrospective validation of surcharges imposed from 1 January 2018 to 8 April 2024, as enacted through the *Revenue Legislation Amendment Act 2025* (Qld).

To protect state revenue, the Bill introduces a windfall duty and windfall tax in relation to surcharge liabilities arising on or before 8 April 2024. The windfall tax will apply only if a court rules the foreign surcharges invalid under the Constitution, or if a taxpayer seeks a refund or challenges their surcharge liability. In that case a windfall tax applies equal to the foreign surcharge originally imposed. The provisions also establish charges over land that allow for sale by court order to recover unpaid windfall tax.

w https://www.legislation.qld.gov.au/view/html/bill.first/bill-2025-034

5.5 State Taxation Acts Amendment Bill – Victoria

The *State Taxation Acts Amendment Bill 2025* (Vic) has successfully passed through the Victorian Parliament and awaits royal assent. Several amendments were made to the Bill before its passage in the Legislative Council.

One significant change is the extension of the off-the-plan transfer duty concession under the *Duties Act 2000* (Vic). This concession, initially set to end on 21 October 2025, will now be extended for an additional 12 months, until 21 October 2026. The extension applies to off-the-plan dwellings such as apartments, townhouses, and units.

The Bill also introduces tax relief provisions for victims of family violence, ensuring they can access exemptions from certain requirements under the *Duties Act 2000* (Vic), the *First Home Owner Grant and Home Buyer Schemes Act 2000* (Vic), and the *Land Tax Act 2005* (Vic).

Amendments have also been made to address duty implications for transactions involving subdivided land under tax reform schemes. Additionally, the Bill provides a clarification of regional employee definitions under the *Payroll Tax Act 2007* (Vic). The revised definition specifies that only services performed within Victoria will count when determining if an employee's work is mainly in regional Victoria, excluding time spent working in other states or territories. This change will take effect from 1 July 2025.

A new recklessness penalty has been introduced under the *Taxation Administration Act 1997* (Vic). This amendment establishes a 50% base rate penalty for taxpayers or their representatives who are reckless in their dealings with taxation laws or their obligations.

The *Land Tax Act 2005* (Vic) also sees several key amendments, including adjustments to rules for build-to-rent developments, new notification requirements for trust-held land, and expanded exemptions for principal place of residence use. In addition, the Bill extends the current 2-year exemption for uninhabitable homes due to natural disasters to 4 years without the need for supporting evidence. The Commissioner of State Revenue will have a discretion to grant an additional 2-year extension if the property remains uninhabitable.

w https://www.legislation.vic.gov.au/bills/state-taxation-acts-amendment-bill-2025

5.6 Expansion of payroll tax and stamp duty exemptions for charities and non-profits (NT)

The *Revenue Legislation Amendment Bill 2025* (NT) has been passed by the Northern Territory Parliament and now awaits assent. The Bill introduces significant changes to broaden the eligibility for payroll tax and stamp duty exemptions available to charities and non-profit entities.

Payroll tax – broader exemption for charitable wages

The Bill amends section 48C of the *Payroll Tax Act 2009* (NT) to extend the exemption for wages paid by charitable entities. Under the new provisions, wages will be exempt from payroll tax if they are paid or payable to a person who is engaged exclusively in work ordinarily performed in connection with the charitable activities of the entity.

This replaces the current, more restrictive test, which limits the exemption to wages paid to individuals predominantly engaged in charitable services and who are not involved in any commercial or competitive activities of the entity.

The amended provision will apply to wages paid or payable on or after 1 July 2025 but will exclude wages paid on or after that date if they relate to entitlements that arose prior to 1 July 2025, as an anti-avoidance safeguard.

Stamp duty – removal of "exempt use" requirement

The Bill also amends item 14 of Schedule 2 to the *Stamp Duty Act 1978 (*NT), removing the current "exempt use" condition required for stamp duty exemptions on the transfer of dutiable property to charities and non-profit organisations (referred to as "exempt entities").

The changes will apply to conveyances and leases first executed on or after 1 July 2025, with transitional provisions ensuring that the expanded exemption does not apply to arrangements entered into before that date.

w
https://legislation.nt.gov.au/LegislationPortal/Bills/~/link.aspx?_id=5DB74A20AF244211BF6811E1FC39A87B&_z=z

6. Rulings

6.1 Part IVA and ESIC investment arrangements

On 18 June 2025, the ATO published *Taxation Determination TD 2025/3*, which finalises the position of the ATO first set out in draft TD 2025/D1 (see our March 2025 Tax Training Notes).

The determination confirms the view of the ATO that Part IVA of the ITAA 1936 may apply to certain arrangements involving investments in early stage innovation companies (**ESICs**) where they display features designed primarily to secure the early stage investor tax offset with minimal commercial risk to the investor. This includes schemes identified in Taxpayer Alert TA 2024/1, such as circular financing arrangements that recycle the subscription funds, enabling investors to claim the 20% non-refundable carry-forward offset (capped at $200,000) and interest deductions, while effectively bearing little or no economic risk.

In response to submissions received on the draft determination, the ATO noted in its compendium:

1. it will not provide advance comments on structures purported to be commercially distinct from TA 2024/1 unless approached on a case-specific basis;
2. TA 2024/1 is not inconsistent with the ESIC regime's legislative purpose of encouraging start-up funding; and
3. the determination properly applies both before and after its issue date, with no case to apply it only prospectively.

The ATO also confirmed that where it is reasonable to conclude that an arrangement was entered into for a dominant purpose of securing a tax benefit, the normal 2-year amendment period under section 170(1) of the ITAA 1936 does not apply. Instead, under paragraph 170(1)(e) of the ITAA 1936, the Commissioner generally has four years to amend assessments, increasing exposure for participants.

TD 2025/3 reiterates that whether Part IVA applies depends on a holistic weighing of the eight factors in section 177D(2) of the ITAA 1936, but the Commissioner is likely to conclude that arrangements involving features such as the follow are primarily motivated by obtaining tax benefits:

1. financing the share subscription through a third party with little personal outlay;
2. the company redepositing funds with the financier;
3. the tax offset refund being used to repay the finance; and
4. ultimate repayment of the loan out of company buy-backs.

If Part IVA of the ITAA 1936 applies to an arrangement, the Commissioner can cancel offsets and related deductions under section 177F(1) of the ITAA 1936.

ATO reference *TD 2025/3*
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20253/NAT/ATO/00001
ATO reference *TD 2025/3EC*
w https://www.ato.gov.au/law/view/document?docid=CTD/TD2025EC3/NAT/ATO/00001

6.2 Meaning of 'incurred' - timing of deductions

On 2 July 2025, the ATO issued TR 97/7A2, an addendum to TR 97/7, to clarify when a loss is incurred and to draw the distinction between losses and outgoings, following the decision in *Bowerman and Commissioner of Taxation* [2023] AATA 3547.

The addendum confirms that a loss is only incurred when it is definitively encountered, run into or fallen upon by the taxpayer, and must be more than impending, threatened or expected. A taxpayer will not have incurred a loss if there is any contingency such that they are not definitively committed.

Importantly, the ATO reaffirms that the taxpayer's accounting system does not determine when a loss or outgoing is incurred.

TR 97/7A2 also distinguishes losses from outgoings by drawing on authorities such as *Amalgamated Zinc (De Bavay's) Ltd v Commissioner of Taxation (Cth)* (1935) 54 CLR 295 and *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163. It notes that outgoings may be incurred in gaining or producing income, whereas losses simply reduce income or capital.

ATO reference *TR 97/7A2*
w https://www.ato.gov.au/law/view/document?docid=TXR/TR977A2/NAT/ATO/00001

6.3 Land transfer duty rulings in relation to economic entitlements (Victoria)

The State Revenue Office of Victoria has finalised rulings on land transfer duty in relation to acquisition of economic entitlements in land and the relevant calculations.

Section 32XC of the *Duties Act 2000* (Vic) establishes the criteria for when a person acquires an economic entitlement. This occurs if, after 19 June 2019, an arrangement involving relevant land with an unencumbered value of more than $1 million grants the person (directly or indirectly) the right to:

1. participate in the income, rents or profits derived from the land;
2. participate in the capital growth of the land;
3. participate in the proceeds of sale of the land;
4. receive any amount determined by reference to any of the above matters; or
5. acquire any entitlement described above.

When a person obtains an economic entitlement, they are considered to have acquired beneficial ownership of the land. The percentage of beneficial ownership is determined under section 32XE of the Duties Act. In certain circumstances, the assumption is that the person has acquired 100% beneficial ownership, unless the Commissioner decides otherwise. This 100% ownership assumption is particularly relevant when the arrangement involves other entitlements or payments to associated persons, as defined in section 3(1) of the Duties Act.

Revenue ruling DA-065:

1. clarifies the application of the economic entitlement provisions to service fees; and
2. sets out when the economic entitlement provisions can apply to a resident in a retirement village.

The draft of this ruling also addressed acquisitions of shares in companies and units in unit trust schemes that may be outside the scope of the landholder provisions in the Duties Act. However, these references and examples have been omitted from the finalised ruling. Instead, the ruling encourages taxpayers to seek a ruling regarding situations not covered by this guidance.

Revenue ruling DA-065 does not deal with any other arrangement or the acquisition of an economic entitlement in relation to a private landholder under section 81 of the Duties Act.

In considering whether a service fee determined by reference to one or more economic benefits of land amounts to an economic entitlement, the Commissioner will have regard to the following factors

1. the nature and scale of the arrangement as a whole, including the rights, obligations, risk allocation, and responsibilities of the parties to the arrangement. The assumption by a service provider of economic risks associated with the ownership and/or development of land generally indicates that this type of service fee will amount to an economic entitlement;
2. the nature and magnitude of the service fee, including whether the percentage used to calculate the fee is at market rates and the structure of the fee is similar to standard fees chargeable by a comparable service provider for the identified services. The larger the percentage of an economic benefit of land used to calculate the service fee, the more indicative the service fee will amount to an economic entitlement; and
3. the nature of the service provider, including whether the service provider ordinarily provides the identified services to third-party recipients within the course of its business.

Revenue ruling DA-066 provides guidance on how to determine the percentage of beneficial ownership of land taken to have been acquired under an economic entitlement, including circumstances where the Commissioner considers it appropriate to exercise the discretion under section 32XE(3) of the Duties Act to determine a percentage less than 100%.

The finalised version provides slightly clearer conclusions on why discretion would be exercised, emphasising the link to “entitlement acquired at the time the arrangement is entered into” (not eventual net profit). There is also more explanation around cost contingencies (noting that reimbursement contingent on profitability may be treated as an economic entitlement). A further example 6 has been added in the finalised version in relation to how aggregation works when individual retirement village units are less than $1 million, but the combined arrangement exceeds the threshold.

State Revenue Office Victoria reference *DA 065* and *DA 066*
w https://www.sro.vic.gov.au/legislation/land-transfer-duty-acquisition-economic-entitlements-relation-land-service-fees
w https://www.sro.vic.gov.au/legislation/land-transfer-duty-calculation-economic-entitlements

6.4 Ruling on land tax exemption for a home updated (Queensland)

The Queensland Revenue Office has updated its Ruling in its respect of the land tax exemption for a home.

The Ruling now provides guidance in respect of the transitional home exemption which provides relief for individuals who temporarily own two homes during the process of moving. As of 30 June (the liability date for land tax), only the property being used as the person’s residence qualifies for the standard home exemption. However, the transitional exemption can apply to the other property, either the old home (if the person has already moved) or the new home (if the person has not yet moved).

A transitional exemption can apply to the old home after the individual has moved into the new one, provided certain conditions are met. These include:

1. the new home must qualify for a home exemption on the current liability date;
2. the person did not own the new home on the previous liability date but owned the old home continuously since then;
3. the old home qualified for a home exemption on the previous liability date; and
4. the person must no longer own the old home by the next liability date.

If these conditions are met, the old home is exempt from land tax for that financial year, to the extent it was previously exempt. However, the exemption does not apply if the person receives rental income from the old home after moving out, or from the new home before moving in, unless the new home was acquired with a lease that ends (or vacant possession is given) within six months.

Alternatively, a transitional exemption may apply to the new home before the person has moved in, provided these conditions are satisfied:

1. the old home still qualifies for a home exemption on the current liability date;
2. the person does not (and will not) own the old home by the next liability date;
3. the person did not own the new home on the previous liability date; and
4. the new home is suitable for residential use and will qualify for a home exemption on the next liability date.

If all conditions are met, the new home is exempt for the current year, to the same extent as the old home was exempt. However, the exemption is lost if the person rents out the new home before moving in, or rents the old home after moving out, noting the same lease exception as above.

If a person benefits from a transitional home exemption but later fails to meet the required conditions, they must notify the Commissioner in writing within 28 days. The Commissioner is then required to reassess the person's land tax liability, treating the land as not exempt for that financial year.

Queensland Revenue Office reference *LTA000.1.3*
w https://qro.qld.gov.au/resource/lta000-1/

6.5 Guideline on remission of interest (New South Wales)

Revenue NSW has issued Guidelines under section 25(2) of the *Taxation Administration Act 1996* (NSW). Section 25(3) of the TAA provides that interest must be remitted only in accordance with these Guidelines and section 25(4) of the TAA provides that the imposition or remission of penalty tax is not relevant to the imposition or remission of interest.

Where a tax default occurs, the Chief Commissioner can impose interest. The interest rate applied is made up of two components: the market rate and a premium component.

Interest begins to accrue immediately after a tax default occurs. This includes late lodgment interest, charged from the day after a return or instrument was due, and late payment interest, charged from the day after a payment was due. Interest is calculated daily until the default is resolved.

Interest can be remitted by the Chief Commissioner under the Guidelines. To seek remission, taxpayers must make a written request to the Chief Commissioner, explaining why the tax was not paid or the return or instrument was not lodged on time and providing supporting evidence. Remission is only granted for the period in which the qualifying circumstances applied and may fall under more than one remission category.

Interest may be remitted under four main categories:

25% remission criteria

Up to 25% interest may be remitted in cases such as:

1. delays caused by external factors like postal issues or industrial action;
2. inability to act due to death, illness, or absence of key personnel;

3. taxpayers under protective guardianship;
4. new land tax customers who recently became liable for land tax or have not had a liability in at least three consecutive years. Companies, related companies, partnerships and trustees of any category of trusts are not considered to be new land tax customers; or
5. voluntary disclosure of a tax default before any investigation begins. A Voluntary Disclosure does not include information relating to the late lodgement of a return required under a taxation law or the late payment of duty on a dutiable transaction under Chapter 2 & 2A of the *Duties Act 1997* (NSW).

Exceptional circumstances

Up to 100% of interest can be remitted in cases involving:

1. system or payment platform failures;
2. errors or delays caused by Revenue NSW;
3. natural disasters; or
4. specific public declarations made by the Chief Commissioner.

Approved payment extensions

If tax is not yet overdue, taxpayers may request an extension in writing. Approved extensions may come with conditions, including whether interest continues to accrue. If the taxpayer fails to meet the extension's terms, interest is applied from the original due date.

Approved payment plans

If a default has already occurred, the Chief Commissioner may approve a plan for paying in instalments. Interest will continue to accrue over the duration of the plan. While the accrued interest may be remitted if eligible under the Guidelines, failure to comply with the plan results in full interest becoming payable. The Chief Commissioner may reject payment plans if a taxpayer is deemed non-compliant or poses a revenue risk.

These Guidelines apply from 1 July 2025, regardless of when the tax liability arose or when an assessment was issued. They apply to:

new requests for interest remission;
new approvals of payment extensions or plans; and
objections lodged after publication.

However, existing payment arrangements or legal proceedings that began before publication are not affected by the Guidelines.

Comment – the Guidelines provide a substantial change as to when interest can be remitted for States taxes in New South Wales. Of note, is that the Guidelines make no distinction between the market rate of interest and the premium rate of interest, contrary to prior practices and authorities.

Revenue New South Wales reference *TA 001*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/guidelines-archived/taa-001-remission-of-interest-guidelines

6.6 Payroll tax ruling on reduced tax rate for regional employers (Victoria)

The State Revenue Office Government has replaced PTA-042 with PTA-042v2 to reflect the updated definition of a 'regional employee' in section 3B of the *Payroll Tax Act 2007* (Vic), as introduced by the *State Taxation Acts Amendment Act 2025* (Vic). The revised definition will apply from 1 July 2025.

Under section 3B, a regional employee is defined, for a particular month, as a person who:

1. is paid, or is entitled to be paid, wages by an employer in that month for services performed in Victoria (regardless of whether the person also receives wages for services performed in other Australian states or territories); and
2. performs those services mainly in regional Victoria during that month.

The definition includes natural persons deemed employees under sections 34 or 39 of the Payroll Tax Act. Regional Victoria is defined as in section 18(8) of the *First Home Owner Grant and Home Buyer Schemes Act 2000* (Vic).

The Commissioner's approach is to interpret the term 'regional employee' based on its ordinary meaning. When determining where the services are performed, the Commissioner will consider the physical location of the employee while they are performing their duties. In the case of remote working arrangements, such as working from home, the location of the employee's home will be used to assess whether they qualify as a regional employee.

The term "mainly" is not specifically defined in the Payroll Tax Act but is understood by the Commissioner to mean more than 50% of the time. If an employee works both remotely and from their employer's premises, the location where the employee spends more than 50% of their time is considered when determining if they are a regional employee.

Additionally, only the time spent in Victoria performing services for the employer is relevant for this classification. Time spent in other Australian jurisdictions is disregarded. For instance, if an employee spends 60% of their time in the Australian Capital Territory, New South Wales, and Queensland, 10% in Melbourne, and 30% in regional Victoria, only the 40% of time spent in Victoria is counted. If 30% of that 40% is in regional Victoria, the employee is considered a regional employee, as 75% of their work time within Victoria was spent in regional areas.

State Revenue Office Victoria reference *PTA-042v2*
w https://www.sro.vic.gov.au/legislation/application-regional-rate-0

7. Private rulings

Taxpayers cannot rely on private rulings obtained by other taxpayers. Private rulings are not binding on the Commissioner in relation to taxpayers other than the rulee(s) and provide no protection (including from any underpaid tax, penalty, or interest). Additionally, private rulings are not an authority for the purposes of establishing a reasonably arguable position for taxpayers to apply to their own circumstances. For more information on the status of edited versions of private advice and the reasons the ATO publishes them, refer to PS LA 2008/4.

7.1 Maximum net asset value test

Facts

A unit trust operated a business that sold equipment. The business had been operated for over 15 years.

All units in the unit trust were owned by a family trust, which is a discretionary trust. he trustee of the family trust is an individual. For a number of years, the family trust had only distributed income and capital to this individual, who is single and has no dependents. The individual and the family trust were the only entities associated with the unit trust. The individual did not carry on a business but controlled all these entities.

In the relevant financial year, the unit trust was approached by an unrelated third party, a corporate entity, to purchase its operations. An equity sale was agreed upon, under which all the units in the unit trust were sold.

The unit trust's assets and liabilities primarily consisted of business assets. It held some other assets including cryptocurrency and loans to the family trust (the unit holder) and the individual. The book value of the cryptocurrency before the contract of sale was approximately $X. There were multiple loans, representing amounts drawn from the unit trust exceeding the beneficiaries' entitlements, with a combined value before the contract of sale of $Z.

The sale agreement specifically addressed the treatment of the unit trust's assets. It listed the business assets and cryptocurrency as being part of what the purchaser would take on through the acquisition of the units, although no value was specifically attributed to them in the consideration for the units.

The sale agreement expressly excluded loans owed to the unit trust by the individual and discretionary trust. As a condition precedent to the sale, a deed of forgiveness and release had to be executed, removing the loans from the balance sheet.

The family trust intends to apply the small business CGT concessions under Division 152 of the ITAA 1997 to reduce the resulting capital gain. Its income tax return for that year included the capital gain from the sale of the units, although no choice was made in that year to apply the small business CGT concessions, due to uncertainty about their application to these circumstances.

To access the small business CGT concessions, a taxpayer must first satisfy a set of basic conditions. These include that the taxpayer is a small business entity or satisfies the maximum net asset value (**MNAV**) test. The CGT asset must also satisfy the active asset test. Where the asset being sold is a share in a company or a unit in a unit trust, the object entity (here, the unit trust) must either be a small business entity itself or satisfy the MNAV test immediately before the CGT event.

The estimated value of the unit trust's net assets immediately before the contract of sale was calculated to be a $X. If the value of the loans and cryptocurrency were excluded, the estimated net asset value of the unit trust for the purpose of the MNAV test would be less than $6 million. Alternatively, if the loan owing by the family trust to the unit trust were included as a liability in calculating family trust's net assets, the net asset value would be under the $6 million threshold.

However, if the value of the cryptocurrency and the loan receivable from the family trust was included at the unit trust level and no liability was recognised at the family trust level in respect of the loan, the discretionary trust would exceed the $6 million threshold.

Questions

1. Will the loans owing to the unit trust by the family trust and individual be included in calculating the net value of the CGT assets of the unit trust as the object entity?
2. If the answer to question 1 is yes, is the value of the loan its market value just before the sale of the units in the unit trust?
3. Will the cryptocurrency assets be included in calculating the net value of the CGT assets of the unit trust as the object entity?
4. In calculating the maximum net asset test, will the value of the CGT assets of the unit trust be their market value just before the CGT event happens?
5. If the answer to question 4 is yes, will the total market value of the CGT assets of the unit trust be considered to be the same as the sale price of the units in the unit trust?
6. Does the object entity pass the $6 million maximum net asset value test using the assets described in questions 1 and 4 above?
7. Will the Commissioner allow further time for the family trust to choose to apply the small business retirement exemption in respect of a capital gain made in the income year ended 30 June 2023?

Ruling

<u>Are the loans included in calculating the net value of the unit trust's CGT assets?</u>

The ATO concluded that the loans owing to the unit trust by the family trust and the individual constitute CGT assets of the unit trust and must be included in calculating the net value of its CGT assets. This follows from the express inclusion of debts as CGT assets under Note 1 to section 108-5. At the time immediately before the CGT event (the signing of the sale contract), the loans were reflected on the unit trust's balance sheet as enforceable debts. Although the loans were later forgiven to facilitate settlement, their status as assets at the relevant time required them to be included in the calculation under the maximum net asset value test.

<u>Is the value of the loans their market value just before the sale?</u>

The Commissioner determined that the loans should be valued at their market value immediately before the CGT event. In the absence of evidence to indicate impairment or a reduced recoverable amount, the market value of the loans was taken to be their face or book value, consistent with general principles applied by the AAT in *Case 2/2010* [2010] AATA 455. Thus, for purposes of the net asset value calculation, the outstanding amount of the loans as recorded in the unit trust's financial statements was adopted as their market value.

<u>Are the cryptocurrency assets included in the net value calculation?</u>

The ATO found that the cryptocurrency held by the unit trust was properly included in the calculation of the net value of its CGT assets. As assets of the unit trust immediately before the CGT event, the cryptocurrency formed part of the pool of assets whose aggregated market values are used to determine whether the unit trust satisfies the maximum net asset value test. This aligns with the ordinary operation of section 152-20, which captures all CGT assets held by the entity at the relevant time.

Is the value of the unit trust's assets determined at their market value just before the CGT event?

The ATO confirmed that for the purposes of applying the maximum net asset value test, the unit trust's CGT assets must be valued at their market value as at the point immediately before the CGT event occurred. This is consistent with section 152-20, which requires the sum of the market values of the relevant assets (less allowable liabilities) to be compared against the statutory threshold. It ensures the test captures the true economic position of the entity at the critical time.

Is the total market value of the assets the same as the sale price of the units?

In the circumstances of this case, the ATO accepted that the negotiated arm's length sale price for the units in the unit trust was the best evidence of the market value of the underlying business and cryptocurrency assets. This approach is supported by the Commissioner's position in the Decision Impact Statement on *Syttadel Holdings Pty Ltd v FCT* [2011] AATA 589, as well as the observations in *FCT v Miley* [2017] FCA 1396, which recognise that a recent arm's length transaction typically provides a reliable proxy for market value. As a result, the sale price was taken to represent the aggregated market value of those assets.

Does the unit trust pass the $6 million maximum net asset value test?

The ATO determined that the net value of the unit trust's CGT assets, comprising the market value of its business assets, cryptocurrency, and the outstanding loans, exceeded the $6 million threshold immediately before the CGT event. As there were no connected entities, affiliates or additional liabilities to adjust this calculation under the modified test in paragraph 152-10(2)(c), the unit trust failed to satisfy the maximum net asset value test. Consequently, the family trust did not meet the additional basic conditions required to access the small business CGT concessions.

Will more time be allowed to choose the retirement exemption?

Given the unit trust failed the MNAV test, the family trust was not eligible for the small business CGT concessions, including the retirement exemption. Accordingly, the question of whether the Commissioner would exercise discretion to allow further time to make a choice under the retirement exemption provisions did not arise, and no determination was made on that point.

TRAP - The MNAV test is applied immediately before the CGT event happens, which, in the context of CGT event A1, is immediately before the contract is signed, not at settlement (see ATO ID 2003/744). Here, although the purchaser required the outstanding loans to be forgiven as a condition precedent to completing the transaction, the forgiveness only occurred after the contract was executed. As a result, at the key time for applying section 152-15, the loans remained CGT assets of the unit trust and were included at their face value in the net asset calculation. This pushed the total net value above the $6 million threshold, disqualifying the trust from the small business concessions.

ATO reference *Edited Private Advice Authorisation No. 1052371240298*
w https://www.ato.gov.au/law/view/document?docid=EV/1052371240298

7.2 Main residence exemption absence rule

Facts

The taxpayer purchased a property following a marriage separation. The property included a dwelling and was less than two hectares in size. Shortly after, the taxpayer moved into the property with their children, bringing all household contents from the previous residence. It was the taxpayer's intention to reside at the property for a considerable period.

The taxpayer changed the address on their driver licence and also updated their details with their electricity provider, internet provider, and salary packaging provider. Additionally, the taxpayer informed the other parent of the children of the new address by email.

The taxpayer provided a statutory declaration stating that they had contacted the police on several occasions due to the conduct of neighbours, expressing concerns about noise, offensive language, domestic violence, and frequent arguments occurring at the neighbouring property. As a result of these issues, the taxpayer quickly decided that they had no choice but to remove themselves and their children from an environment where they did not feel safe or comfortable.

The taxpayer moved out of the property and into a rental property after residing at the property for only XX days. The property was later sold. Throughout the period of ownership, the taxpayer did not treat any other dwelling as their main residence.

Question

Can the taxpayer claim the main residence exemption under the 6-year absence rule?

Ruling

The ATO ruled yes.

The absence rule under section 118-145 of the ITAA 1997 allows a taxpayer to treat a property as their main residence for up to 6 years when rented out as long as they are choosing to treat no other dwelling as their main residence for the same period.

The ATO was satisfied that the dwelling was established the taxpayer's main residence, despite the short duration of their residence at the property.

ATO reference *Edited Private Advice Authorisation No.* 1052382064071 w https://www.ato.gov.au/law/view/document?docid=EV/1052382064071

7.3 Main residence exemption choices

Facts

The taxpayer purchased property A on an unspecified date in 19XX. Property A was rented out from a date in 19XX until a date in 20XX. The taxpayer did not establish property A as their main residence before renting it out.

Between two dates in 20XX, the taxpayer resided in property A. Subsequently, the taxpayer purchased property B and began living there. At that time, the taxpayer chose to continue treating property A as their main residence under the 'absence choice' provisions. During this period, property A remained unoccupied.

The taxpayer later moved back into property A and intends to reside there indefinitely. Property B was sold. The taxpayer wishes to have property A regarded as their main residence for CGT purposes and to pay CGT on the disposal of property B.

Questions

1. Is the taxpayer entitled to a full main residence exemption from CGT upon disposal of property A?
2. Is the taxpayer entitled to a partial main residence exemption from CGT upon disposal of property A?
3. Is the taxpayer entitled to make an absence choice upon disposal of property A?

Ruling

Entitlement to a full main residence exemption

The taxpayer is not entitled to a full main residence exemption from CGT upon disposal of property A. Under section 118-110 of the ITAA 1997, a full exemption generally applies if the dwelling was the taxpayer's main residence for the entire period of ownership and was not used to produce assessable income. However, as property A was rented out and therefore used to derive income for a continuous period early in the taxpayer's ownership, these conditions are not satisfied. Consequently, the taxpayer cannot disregard the entire capital gain on disposal of property A.

Entitlement to a partial main residence exemption

The taxpayer is entitled to a partial main residence exemption under subdivision 118-B of the ITAA 1997. Because property A was not the taxpayer's main residence throughout the whole ownership period, only the proportion of the ownership period during which it was the main residence (or was covered by a valid absence choice) will be exempt from CGT. Although section 118-192 of the ITAA 1997 provides a market value reset rule where a dwelling is first used to produce income after 20 August 1996, this does not apply here because property A was first used to produce income before that date. As a result, the capital gain must be apportioned by reference to the days the dwelling was not the taxpayer's main residence over the total days of ownership.

Entitlement to make an absence choice

The taxpayer is entitled to make an absence choice under section 118-145 of the ITAA 1997. This provision allows a taxpayer who has established a dwelling as their main residence to continue treating it as such during periods of absence. Where the dwelling is left vacant, there is no time limit on this choice. In this case, after moving into property A, the taxpayer later vacated and lived in property B while property A remained unoccupied. Because property A was not used to produce income during this absence, the taxpayer may continue to treat it as their main residence for an unlimited period. By making this choice, the taxpayer ensures that property A remains their main residence for CGT purposes, which means they pay CGT on the disposal of property B instead.

ATO reference *Edited Private Advice Authorisation No.* 1052382631029
w https://www.ato.gov.au/law/view/document?docid=EV/1052382631029

7.4 Family court ordered property transfer from trust

Facts

A discretionary trust was established several years ago, with Individual 2 and Individual 3 acting as its trustees. Individual 2 is the sole named beneficiary of the Trust, while Individual 1, Individual 2's parent, is a general beneficiary by virtue of that relationship.

Following the matrimonial breakdown of Individual 1 and Individual 4, the Federal Circuit Court of Australia formalised a settlement agreement. Under this agreement, Individual 1 and Individual 4 agreed to transfer ownership of their family home to Individual 2 and Individual 3 in their capacity as trustees of the Trust. This transfer was to be for the benefit of Individual 2. As part of the arrangement, the existing mortgage over the property, held by Individual 1 and Individual 4, was to be discharged, with the trustees taking out a new bank loan to achieve this. The loan amount covered both the payout of the existing mortgage and additional funds required for repairs to the property. Repayments were structured over several years.

It was also agreed that Individual 1 would have the exclusive right to occupy the property. To satisfy the bank's lending requirements, Individual 1 and the trustees entered into a written lease under which Individual 1 paid rent to the trustees for residing at the property.

Since these arrangements were put in place, the only money flowing through the Trust has comprised payments from Individual 1 to cover the loan repayments, the trustees' repayments of the loan, and certain property-related expenses. The trustees have treated the payments from Individual 1 as loan repayments. Accordingly, they have not lodged any tax returns for the Trust, although they have prepared annual trust resolutions. In the Trust's first year, it was resolved that any distributions would be made to Individual 2. In subsequent years, it has been resolved that any distributions would instead be made to Individual 1.

Individual 1 has continuously lived in the property since originally acquiring it with Individual 4 and continues to reside there. Individual 1 also conducts several small businesses from the property. The trustees have incurred various holding costs in relation to the property, including interest, rates, insurance, and repairs.

Questions

1. Are the payments Individual 1 makes to the Trust assessable income of the Trust on the basis the payments are considered to be payments of rent?
2. Does the Trust need to file a tax return?
3. Will Individual 1 be taken to be a person in control (significant individual) of the Trust?
4. Will any CGT small business concessions apply to the property sale?
5. Is the first element of the cost base of the property the market value at the date of transfer into the Trust?
6. Will the holding costs such as interest, rates, insurance and repairs be included in the cost base of the property when it is sold?

Ruling

<u>Are the payments Individual 1 makes to the Trust payments of rent?</u>

The ATO determined that the payments Individual 1 makes to the Trust are assessable as ordinary income under subsection 6-5(2) of the ITAA 1997. This provision includes in assessable income the ordinary income derived directly or indirectly by an Australian resident from all sources during an income year. The ATO noted that courts have identified characteristics of ordinary income, such as whether receipts are earned, expected, relied upon, and have an element of periodicity or regularity. In this case, the Trust receives monthly lease payments from Individual 1 for the right to reside at the property and to operate small businesses from it. The regularity, expectation and reliance on these payments mean they possess the qualities of ordinary income and are therefore assessable to the Trust.

<u>Does the Trust need to file a tax return?</u>

Because the monthly lease payments made by Individual 1 are assessable income of the Trust, the Trust has derived taxable income. As a result, the ATO concluded that the Trust is required to lodge a tax return to report this income in accordance with the relevant tax laws.

<u>Will Individual 1 be taken to be a person in control (significant individual) of the Trust?</u>

The Commissioner declined to issue a private ruling on whether Individual 1 would be regarded as a person in control, or a significant individual, of the Trust. This was because the scheme had not been fully set out or considered in sufficient detail to allow a ruling to be made on this question. Taxpayers retain the right to seek judicial review of this decision under the Administrative Decisions (Judicial Review) Act 1977 within 28 days.

Will any CGT small business concessions apply to the property sale?

Similarly, the ATO declined to make a private ruling on whether any CGT small business concessions would apply upon the eventual sale of the property. This was again due to the scheme not being fully presented or considered. The Commissioner therefore did not provide a view on the eligibility of the Trust or Individual 1 for such concessions, and formal review rights apply to this refusal.

Is the first element of the cost base of the property the market value at the date of transfer into the Trust?

The ATO concluded that the first element of the cost base of the property under section 110-25 of the ITAA 1997 is its market value at the time it was transferred into the Trust. This reflects the market value substitution rule which generally applies when property is acquired by a trust through means such as a family law settlement where no money changes hands.

Will the holding costs such as interest, rates, insurance and repairs be included in the cost base of the property when it is sold?

The ATO determined that the holding costs, including interest, rates, insurance and repairs, will not form part of the property's cost base under section 110-25 of the ITAA 1997. This is because under section 110-45(2), expenditure is excluded from the cost base to the extent that it has been deducted or can be deducted. In this case, the holding costs have been or are able to be claimed as deductions against the lease income received by the Trust, and thus cannot also be included in the CGT cost base calculation when the property is eventually sold.

TIP - Under section 359-35 of Schedule 1 to the TAA, the Commissioner is generally obliged to make a ruling upon application, but may decline to do so in specified situations. These include where making the ruling would prejudice or unduly restrict the administration of a taxation law, where the matter has already been considered by the Commissioner for that entity, or where the correctness of the ruling would depend on uncertain assumptions about future events. The Commissioner may also refuse if requested information is not provided within a reasonable time or if providing the ruling would breach tax secrecy or privacy obligations.

ATO reference *Edited Private Advice Authorisation No.* 1052386725966
w https://www.ato.gov.au/law/view/document?docid=EV/1052386725966

7.5 Franking deficit due to unexpected refund

Facts

During the income year ending 30 June 20XX, the taxpayer had PAYG instalment amounts totalling $XXX,XXX. These comprised $XXX,XXX for the September 20XX quarter, $XXX,XXX for the December 20XX quarter, $XXX,XXX for the March 20XX quarter, and nil for the June 20XX quarter. The taxpayer's activity statements for these periods were varied using code 21 at label T4 on each statement.

In the same income year, the taxpayer received an income tax refund for the year ending 30 June 20XX. This unusually large refund contributed to the taxpayer incurring a franking deficit for the 20XX income year.

On 30 June 20XX, the taxpayer paid two fully franked dividends totalling $XXX,XXX to the directors of the company.

In March 20XX, the taxpayer requested that the Commissioner exercise the discretion under section 205-45 of the ITAA 1997 to disregard the franking deficit tax liability, or to allow it to be adjusted, for the 202X income year. This request was made on the basis that the franking deficit arose due to circumstances considered unusual and not reflective of the taxpayer's ordinary dividend or franking practices.

Question

Will the Commissioner exercise the discretion and allow the full franking deficit offset?

Ruling

The Commissioner decided not to exercise the discretion under subsection 205-70(6) of the ITAA 1997 to allow the taxpayer the full franking deficit tax offset for the year ending 30 June 20YY.

Under the franking rules in the ITAA 1997, if a company's franking account ends the income year in deficit, it is generally required to pay franking deficit tax. Ordinarily, this tax is offset against the company's income tax liability for that year. However, where the franking deficit tax exceeds 10% of the total franking credits for the year, the offset is reduced by 30%, unless certain exceptions apply. One of these exceptions is where the Commissioner exercises discretion to disregard the reduction because the franking deficit arose from events outside the company's control.

In this case, the taxpayer argued that the deficit resulted from an unusually large income tax refund that reduced its franking account balance. However, the ATO concluded that the shortfall was not caused by unforeseen events outside the taxpayer's control. Instead, it arose from decisions made by the company to pay fully franked dividends based on calculations that incorrectly assumed sufficient franking credits would be available at year end. The Commissioner noted that this situation was the result of inadvertent or internal governance errors that could have been avoided through more careful management and monitoring of the franking account.

The Commissioner acknowledged that the company took prompt action to address the deficit once identified and that there was no intention to exploit the franking system. However, these factors did not satisfy the statutory test under subsection 205-70(6), which requires that the deficit result from events beyond the company's control. Given that the decision to pay fully franked dividends prior to ensuring sufficient franking credits was a matter within the company's control, the Commissioner determined that there were no grounds to exercise discretion to relieve the company from the 30% reduction in its franking deficit tax offset.

ATO reference *Edited Private Advice Authorisation No.* 1052384134034
w https://www.ato.gov.au/law/view/document?docid=EV/1052384134034

7.6 Property ceasing to be trading stock

Facts

Entity A was originally established to acquire and commercially develop a property (the Property). In its financial reports, Entity A treated the Property as trading stock, reflecting its initial intention to develop and sell it as part of a property development business.

To advance this objective, Entity A set project milestones, conducted feasibility studies, and entered into agreements to hire staff, which resulted in substantial project costs. However, between 1 July 20xx and 30 June 20xx, Entity A's plans changed. It decided not to proceed with property development and ceased to hold the Property as trading stock.

After this change, Entity A shifted its approach and undertook various steps aimed at leasing the Property. From 30 June 20xx onwards, it no longer included the Property as trading stock in its financial statements. Throughout Entity A's ownership, the Property was leased to unrelated parties. Eventually, sometime after 30 June 20xx, Entity A entered into a contract to sell the Property, noting that long-term holding for leasing purposes was neither its original intention nor part of its long-term strategy.

Question

Will subsection 70-110(1) of the ITAA 1997, which treats an asset as if it had been sold and immediately reacquired at cost when it ceases to be held as trading stock but is still owned, apply to the Property held by Entity A?

Ruling

The ATO concluded that subsection 70-110(1) of the ITAA 1997 applies in this case because there was a genuine change in how Entity A used the Property. This provision is triggered when a taxpayer stops holding an asset as trading stock but continues to own it. In such situations, the law treats the taxpayer as having sold the asset at its cost and then immediately bought it back, preventing income distortions that could otherwise arise.

Initially, Entity A acquired the Property to develop and sell it, and accounted for it as trading stock. This was supported by detailed activities such as feasibility studies, engaging consultants, hiring staff, and incurring significant development costs. Entity A's records and operations clearly pointed to an intention to run a property development business.

However, during the year ended 30 June 20xx, Entity A abandoned its development plans. It then began treating the Property differently by excluding it from its trading stock in the financial accounts and instead undertaking steps to lease it. There was no evidence that Entity A continued development activities or that leasing was ever part of its long-term business strategy. The ATO also noted that the eventual decision to sell the Property supported the view that there had been a genuine shift in intention and use.

Given these factors, the ATO accepted that Entity A had ceased holding the Property as trading stock. As a result, subsection 70-110(1) operated to deem a notional sale and repurchase at cost at the time the Property stopped being trading stock, ensuring that the tax treatment aligned with the new way Entity A held the asset.

COMMENT - It is worth noting that this private ruling only addresses whether the trading stock provisions in Division 70 of the ITAA 1997 apply when Entity A ceased to hold the property as trading stock. It does not consider whether the property, after that point, was held on capital or revenue account for the purposes of assessing any later profit on sale.

Establishing that the property has reverted to being held on capital account could be challenging. As Taxation Ruling TR 92/3 makes clear, if at the time of acquisition there was an intention or purpose to make a profit, even if the profit is ultimately realised by a different means or in an unanticipated way, that may still lead to the conclusion that the profit is assessable as ordinary income, particularly if the sale occurs in the course of carrying out a commercial transaction. Therefore, whether the property is treated as a capital asset on disposal would require careful analysis of the facts and the taxpayer's intentions throughout the period of ownership.

ATO reference *Edited Private Advice Authorisation No. 1052381474802*
w https://www.ato.gov.au/law/view/document?docid=EV/1052381474802

7.7 GST adjustments

Facts

A trust was established as a special purpose trust to invest in real estate. The trust is registered for GST from a specified date, accounts for GST on a cash basis, and lodges quarterly returns. Its principal activities involve investing in real property, specifically through build-to-rent (BTR) projects. This includes acquiring, developing, and leasing real estate.

The trust entered into a contract to purchase a property from a vendor. Before completion, the vendor granted a lease over the property to a third party (the initial tenant) to allow preliminary site investigations. This initial development lease commenced and is set to expire on specified dates.

Subsequently, the trust entered into a development management agreement with another party (the development manager). Under this agreement, the development manager is responsible for preparing for and managing the construction of the BTR development on the property.

The trust, as landlord, granted a lease to the development manager over the property. This development lease commenced and is scheduled to expire on a future date, aligning with the anticipated handover of the site to a builder appointed by the trust, at which point the development manager will no longer have exclusive possession.

Upon completion, the BTR development is expected to comprise a multi-storey residential rental complex offering long-term housing in various unit configurations. It may also feature amenities such as a gym, landscaped gardens, communal BBQ areas, a pool with sundeck, resident lounge and kitchen, business centre, management office, dog wash station, and an electronic parcel locker system. Practical completion of the development is expected on a specified future date.

Questions

1. Does the taxpayer have an increasing adjustment under section 135-5 of the GST Act, and what is the proportion of non-creditable use in relation to the acquisition of the property as a GST-free going concern?
2. Does the taxpayer have increasing adjustments under section 135-10 of the GST Act in respect of the acquisition of the property as a GST-free going concern?
3. Does Division 129 of the GST Act apply in respect of the taxpayer's acquisition of the property?
4. If Division 129 of the GST Act applies, when does the first adjustment period end, and how many adjustment periods apply under section 129-20 of the GST Act?
5. Is the taxpayer required to make an adjustment under Division 129 of the GST Act in the first adjustment period?
6. Is the taxpayer required to make adjustments under Division 129 of the GST Act in the following nine adjustment periods?

Ruling

<u>Increasing adjustment under section 135-5 and proportion of non-creditable use</u>

The ATO found that the taxpayer had an increasing adjustment under section 135-5 of the GST Act because the property was acquired as a GST-free supply of a going concern, with the intention that it would be predominantly used to make supplies that are neither taxable nor GST-free. In particular, the property was intended for a build-to-rent (BTR) development involving residential leasing, which is input taxed under section 40-35(1)(a). Although there was an initial period during which the property was subject to a commercial lease, this generated only minor revenue compared to the expected returns from the BTR development. As a result, the ATO concluded that the proportion of non-creditable use was effectively 100%, or close to 100%. This triggered an increasing adjustment in the tax period in which the property was acquired, calculated under subsection 135-5(2) by reference to the prices of the intended supplies.

<u>Increasing adjustments under section 135-10</u>

The ATO confirmed that section 135-10 applies because the taxpayer was the recipient of a GST-free going concern. This provision ensures that Division 129 operates in these circumstances to capture any change over time in how the property is actually applied. If the extent of use for making non-creditable (input taxed) supplies increases beyond what was intended at acquisition, an increasing adjustment will be required. Conversely, if the extent of use for making creditable (taxable) supplies increases, a decreasing adjustment would arise. This allows ongoing alignment between the GST treatment and the actual use of the property.

Application of Division 129

Division 129 was found to apply to the taxpayer's acquisition. This Division requires adjustments if the actual use of the property for creditable purposes differs from what was originally intended. Given the brief initial period of commercial leasing followed by the exclusive use for input taxed residential leasing, the taxpayer will need to compare intended and actual applications in each adjustment period. The ATO emphasised the importance of maintaining adequate records to support how the property is used across these periods.

Timing of first adjustment period and total number of adjustment periods

The ATO determined that under section 129-20, the first adjustment period ends on 30 June in the year after at least twelve months have passed since the property was acquired. Based on the acquisition date, the first adjustment period concluded on 30 June of the relevant year. Because of the acquisition cost, ten adjustment periods apply under paragraph 129-20(3)(c). This means the taxpayer will be required to test for adjustments annually for ten years following the acquisition.

Adjustment required in the first adjustment period

Applying the five-step method in section 129-40, the ATO concluded that by the end of the first adjustment period, the actual application of the property was less for creditable purposes than even the already minimal intended application at acquisition. This was because the property quickly moved from a short period of commercial leasing to being used almost entirely for input taxed residential leasing. As a result, the taxpayer was required to make an increasing adjustment in the first adjustment period to reflect this greater extent of non-creditable use.

Adjustments in the following nine adjustment periods

For each of the subsequent nine adjustment periods, the taxpayer must compare the actual application of the property against the 'former application' determined in the prior adjustment period. If the property's extent of creditable use decreases further, additional increasing adjustments will be necessary. If the extent of creditable use improves, a decreasing adjustment may arise. This process under Division 129 ensures that the GST consequences continue to reflect the actual use of the property across the entire ten-year adjustment period.

ATO reference *Edited Private Advice Authorisation No. 1052380155473*
w https://www.ato.gov.au/law/view/document?docid=EV/1052380155473

7.8 Sole trader GST on director fees

Facts

The taxpayer is registered for GST and operates a consulting business as a sole trader in Australia. The taxpayer is required to be registered for GST based solely on the GST turnover from this consulting business.

In addition to consulting, the taxpayer serves as a non-executive director for companies within the X group and may also consider serving on the boards of other organisations. The X companies are charities that provide aged care services. The taxpayer is paid by Y, the company responsible for managing the X entities.

The taxpayer is not an employee of the X companies but has received a letter of appointment from the X group of companies. This letter appoints the taxpayer as a non-executive director for each company listed in an attached schedule for a specified term. The appointment offers remuneration, including superannuation, with the taxpayer receiving an aggregate director's fee of $X per year for these services. This director's fee is not exempt income for income tax purposes. The letter also describes the taxpayer as key personnel.

Under the appointment, the taxpayer is expected to provide services as a non-executive director, comply with legal and governance standards, prepare adequately for meetings, and perform any special duties agreed with the relevant boards. The taxpayer does not manage any of the X companies and does not perform financial tasks in this role. Instead, the taxpayer acts as a sounding board for ideas, votes on matters affecting the X companies, is involved in implementing charitable activities, and participates in discussions about the direction of the X group.

Non-executive directors in this sector generally sit on boards that oversee a company's operations without being part of the executive team or day-to-day management. The taxpayer's position on these boards supports compliance with legislative requirements to maintain an appropriate mix of skills and experience to ensure quality care and services.

The taxpayer's duties as a non-executive director are different from the consulting work undertaken in the taxpayer's own business. The consulting work mainly focuses on the community not-for-profit sector, including advocacy and the development of new services to improve outcomes for disadvantaged groups. For example, the taxpayer recently worked with Z to develop a specific proposal in an unrelated sector. The taxpayer has never undertaken consulting work in the aged care sector and did not have any consulting connections with the X companies before becoming a director.

At the time the taxpayer applied for and was successfully appointed as a non-executive director of Y, the taxpayer was employed full-time by an unrelated company and was not conducting any consulting work. The taxpayer only commenced working as a consultant after being appointed to the director role and after leaving that full-time employment.

The taxpayer applied for the advertised director vacancy on a certain organisation's website by submitting a CV and cover letter, then completed a series of interviews and competency assessments. The taxpayer was appointed based on being a Graduate of a relevant course offered by that organisation and having prior experience as a General Manager for a different provider, which uniquely positioned the taxpayer to represent Australian interests on the board.

Currently, the taxpayer uses a single bank account to receive both consulting fees and director's fees. However, the director's fees are recorded separately within a specific accounting system.

Question

Is the taxpayer making a taxable supply under section 9-5 of the GST Act for the supply of services as a director of companies within the X group?

Ruling

The ATO concluded that the taxpayer's supply of services as a director of companies within the X group is not a taxable supply under section 9-5 of the GST Act. This is because, although most requirements of section 9-5 are satisfied, the key element in paragraph 9-5(b) is not met.

While the taxpayer's director services are provided for consideration, are connected with Australia, and the taxpayer is registered for GST, the supply is not made in the course or furtherance of an enterprise that the taxpayer carries on. Under the GST Act, activities done by an individual in earning payments that are subject to PAYG withholding for directors (under section 12-40 of Schedule 1 to the TAA) are generally excluded from being an "enterprise". An exception exists if the directorship was accepted in the course of or in connection with the taxpayer's own enterprise (such as the consulting business).

After closely examining the circumstances, the ATO found there was no connection between the taxpayer's director role and the consulting enterprise. The directorship arose independently: the taxpayer applied for the role through a standard recruitment process unrelated to the consulting business, had no prior consulting connection with the X companies, and the director duties are quite distinct from consulting work. In particular, the taxpayer's consulting focuses on developing services for disadvantaged groups outside the aged care sector, whereas the directorship involves oversight and governance without any project-based or fee-for-service consulting characteristics.

Further, the taxpayer was not even conducting the consulting business at the time the directorship was secured, only commencing that business after the appointment. Although director fees and consulting fees are paid into the same bank account, they are recorded separately, which also supported the conclusion that the directorship is not carried on as part of the consulting enterprise.

Because of these factors, the ATO determined that the taxpayer is not supplying the director services in the course of an enterprise. As a result, one of the core conditions under section 9-5 of the GST Act is not satisfied, meaning there is no taxable supply, and GST is not payable on the director fees.

ATO reference *Edited Private Advice Authorisation No. 1052371073239*
w https://www.ato.gov.au/law/view/document?docid=EV/1052371073239

8. ATO and other materials

8.1 Division 7A benchmark interest rate 2025-26

The benchmark interest rate for the 2025-26 income year for the purposes of Division 7A is 8.37% per annum, a slight decrease from the rate of 8.77% per annum which applied in the 2024-25 income year.

w https://www.ato.gov.au/tax-rates-and-codes/division-7a-benchmark-interest-rate#ato-Benchmarkinterestrates

8.2 Interim impact statement – Hall's case

The Commissioner has released an interim decision impact statement following the decision in *Hall v Federal Commissioner of Taxation* [2025] ARTA 600 (see our June 2025 Tax Training Notes), which dealt with deductions for occupation and car expenses incurred during the COVID-19 restrictions in Melbourne.

In this case, the ART found that the taxpayer was entitled to claim deductions under sections 8-1 and 28-12 of the ITAA 1997 for:

1. occupation expenses: a proportion of rent attributable to a home office within a residential property; and
2. car expenses: travel between the taxpayer's home and their employer's workplace.

The ART rejected the Commissioner's argument that these expenses were private or domestic in nature, finding instead that the specific circumstances justified deductibility. The Commissioner has lodged an appeal to the Full Federal Court.

The ATO has stated that it does not intend to revise its current views on the deductibility of occupancy and work-related transport expenses until ongoing appeal processes are finalised. These views are outlined in key documents including *Taxation Ruling* TR 93/30 (regarding home office expenses), *Taxation Ruling* TR 2021/1 (concerning transport expenses), and the *Employees guide for work expenses*.

Generally, home-related expenses such as rent are considered private or domestic and are not deductible for tax purposes. An exception applies when part of the home is used as a 'place of business' and the expense loses its private character. However, the ATO maintains that simply setting aside a room for work during COVID-19 lockdowns is not sufficient to claim a deduction for a portion of rent, unless the space meets the stricter definition of a place of business.

In relation to transport, the ATO confirms that travel between home and a regular workplace is typically non-deductible, with very limited exceptions. Working from home does not alter this principle, even if some duties are carried out at home or if travel occurs during work hours. Subject to the outcome of the appeal, the ATO takes the view that COVID-19 lockdowns, which required some work to be done from home, do not change this treatment. These positions remain subject to the final decision of the appeal.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/2022/8986/00001

8.3 Giving funds reform – distribution rate and smoothing

The Australian Government has released a consultation paper seeking feedback on proposed reforms to public and private ancillary funds.

Ancillary funds are trusts established solely to provide money, property or benefits to deductible gift recipients (**DGRs**). While ancillary funds themselves are DGRs, they do not conduct charitable activities directly. Instead, they function as intermediaries, distributing funds to DGRs that carry out charitable work. Public ancillary funds must source donations from the general public, whereas private ancillary funds are limited to receiving contributions from their founders, relatives, associates, and employees.

As part of the proposed reforms, both public and private ancillary funds would be renamed "giving funds" to better reflect their purpose in facilitating charitable giving. The Government is seeking views on two key proposed changes:

1. increasing the minimum annual distribution rate to ensure more timely support for charities; and
2. introducing a three-year distribution averaging mechanism to support long-term planning and flexibility in giving.

Under the TAA, ancillary funds are required to distribute a minimum amount each financial year to DGRs involved in charitable work. Currently, this minimum is:

1. for public ancillary funds: the greater of $8,800 or 4% of the fund's net asset value; and
2. for private ancillary funds: the greater of $11,000 or 5% of the fund's net asset value.

The Government is considering aligning the distribution rates for both types of funds to a single rate between 5% and 8%, as recommended by the Productivity Commission. A five-year transition period is proposed to help funds adjust their investment strategies in response to any new rate.

Additionally, the government supports allowing distribution smoothing over a three-year period. This would mean that instead of meeting the minimum distribution requirement every year, funds could meet a cumulative three-year target, offering more flexibility for funding larger projects like infrastructure or social programs. The government is now inviting feedback on how these smoothing rules should be implemented.

The public consultation on these proposals is open until 1 August 2025.

w https://consult.treasury.gov.au/c2025-667008

8.4 ATO withdraws rulings on allowances, reimbursements, and work-related deductions

The ATO has withdrawn a number of rulings relating to allowances, reimbursements and work-related deductions as they are no longer current due to developments in case law and legislation.

Each withdrawal notice states that guidance on the subject matter is contained in various publications and other rulings that are available on the ATO website, including Taxation Ruling TR 2020/1 and the Employees guide for work expenses.

w https://www.ato.gov.au/law/view/document?docid=TXR/TR958/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=SAV/EGWE/00001
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20201/NAT/ATO/00001

8.5 Central management and control test of residency

The ATO has updated its guidance in relation to determining whether foreign-incorporated companies are residents under the central management and control test of company residency under section 6(1) of the ITAA 1936.

The update to *Practical Compliance Guideline* PCG 2018/9 confirms that the PCG may assist public companies required to produce a Consolidated Entity Disclosure Statement (CEDS) in annual financial reports.

The 2025 version (at paragraph 5D) introduces references to the new Consolidated Entity Disclosure Statement (CEDS) obligations for public companies under the Corporations Act amendments from the Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Act 2024.

It explains that:

1. from financial years commencing on or after 1 July 2023, some public companies must disclose both their Australian and foreign tax residency positions; and
2. for financial years from 1 July 2024, a company will not be considered "low-risk" under this Guideline if it self-assesses as a non-resident for tax purposes but inconsistently reports itself as an Australian tax resident in its CEDS disclosures.

Disclosures in company CEDS are expected to align with income tax return disclosures, to improve multinational tax transparency.

The updated version expands the guidance in paragraphs 107D to 107F, clarifying that:

1. a public group may rely on group governance processes (such as regional investment committee approvals) to demonstrate that directors in the relevant foreign jurisdiction exercise independent judgment, even if some Australian staff participate; and
2. this reflects a more practical acceptance of multinational governance structures.

The updated version also includes changes to Table 2 under the risk assessment framework (paragraph 118) by adding a specific transitional low-risk factor for companies that intended to change governance arrangements to move central management and control outside Australia under the transitional compliance approach, but were unable to do so by 30 June 2023, and so did not meet all criteria under paragraphs 102–104B, provided this was the only failing.

This effectively offers limited low-risk treatment for certain companies just outside the transitional safe harbour.

The update is applicable to financial years commencing on or after 1 July 2024. This guideline applies from 21 June 2018.

w https://www.ato.gov.au/law/view/document?docid=COG/PCG20189/NAT/ATO/00001
w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/updates-to-guidance-about-ceds
w https://www.ato.gov.au/businesses-and-organisations/international-tax-for-business/working-out-your-residency

8.6 Top 500 private groups – documented advice procedures

The ATO has noted, based on its engagements, that some Top 500 private groups do not have documented processes for seeking advice or where the process is documented the thresholds for seeking advice are not clear.

The ATO recommends that private groups set in place documented processes to:

1. identify the escalation thresholds, including quantitative and qualitative factors, for when external advice should be sought;
2. inform advisers of any significant changes within the group, or any new, or atypical transactions;
3. make sure the facts and assumptions underpinning the advice received are always based on accurate and current information;
4. consider published guidance and advice from the ATO; and
5. know when, and how, the group should engage with the ATO directly and, where pre-lodgment positions are agreed to, lodge in accordance with that position.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/top-500-private-groups-know-when-to-seek-the-right-advice

8.7 Small business tax-time guidance

On 4 July 2025, the ATO released guidance to assist small businesses to prepare for the preparation of tax returns. The guidance includes tips such as ensuring all business income is declared, understanding the difference between business losses and non-commercial losses, as well as keeping track of the payment of personal expenses with business money. Where personal expenses have been made from business money, the ATO reminds taxpayers to ensure they apportion any deductions (if the expense is for a mix of business and private use), and to keep adequate records in relation to deductions. The ATO also highlighted the availability of concessions, such as the instant asset write-off.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/ready-steady-tax-time

8.8 Taxable Payments Annual Report

The ATO is reminding taxpayers that businesses that engage contractors to deliver services in the building and construction, cleaning, courier and road freight, IT, or security, investigation or surveillance industries may be required to lodge a Taxable Payments Annual Report (**TPAR**).

The TPAR is due annually by 28 August and must be lodged online. From 29 August 2025, paper lodgments will no longer be accepted, so businesses must ensure they are setup for online submission.

The TPAR must include the following details for each contractor paid in the previous financial year:

1. name, address, and ABN; and
2. total payments made (including GST and any cash payments).

This information is typically available on the contractor’s invoices and is also used when claiming deductions or GST credits.

TPAR can be lodged via SBR-enabled accounting software, online services for business, or through a registered tax or BAS agent. Penalties apply for late or non-lodgment.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/does-your-business-pay-contractors

8.9 Country-by-country (CBC) regime

On 3 July 2025, the ATO released new guidance on the Public CBC regime. The regime, which came into effect on 1 January 2025, requires certain large multinational enterprises to publish selected tax information to the public.

The guidance sets out who must report under the Public CBC rules, the reporting obligations, the list of specified jurisdictions, how information is published, available exemptions, and the registration process for Public CBC reporting parents.

The ATO has indicated that instructions on the approved form (required for Public CBC reporting parents to publish the information by lodging it with the ATO) are currently under development and will be available in the second half of 2025.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/public-country-by-country-reporting

8.10 Mutual Agreement Procedures for treaty-related dispute resolution

Many tax treaties between jurisdictions include a provision for a Mutual Agreement Procedure (**MAP**) to resolve disputes regarding jurisdictions' entitlement to tax certain types of income. MAP requires the competent revenue authority in each jurisdiction (in Australia's case, the ATO) to reach agreement about the tax treatment. MAP is separate from the standard legal remedies available under domestic law.

The new assessment methodology under the BEPS Action 14 Minimum Standard, which seeks to improve the resolution of treaty-related disputes through the MAP, includes a simplified peer review process for jurisdictions that do not have "meaningful MAP experience". This will allow those jurisdictions to set up a more robust MAP programme in response to a possible increase in cases in the future. It also includes a full peer review process for jurisdictions considered to have a "meaningful MAP experience" for continued monitoring purposes.

The OECD has released 36 new peer review results on MAP for treaty-related dispute resolutions.

Some highlights from the peer review results include:

1. the signing and ratification of the BEPS Multilateral Instrument by all of the reviewed jurisdictions to bring a large number of tax treaties in line with Action 14 Minimum Standard, with bilateral negotiations ongoing or planned for several other treaties;
2. issuance of MAP guidance and publication of MAP profiles by all jurisdictions;
3. the establishment of policies and practices that provide access to MAP, enable the effective resolution of MAP cases, and support the implementation of MAP agreements in most eligible cases; and
4. all jurisdictions have made efforts to improve the resources in their competent authorities and to close their MAP cases within or close to the 24-month targeted average.

The OECD will continue to publish peer review reports of the simplified review process and the full peer review process in batches, in accordance with the BEPS Action 14 peer review assessment schedule.

COMMENT – certain treaties, including those relevantly modified by the BEPS Multilateral Instrument (MLI) prescribe MAP as the method for tie-breaking dual tax residency. Until agreement is reached between the competent authorities under MAP, treaty benefits are not available to the taxpayer.

w https://www.oecd.org/en/about/news/announcements/2025/06/inclusive-framework-on-beps-reports-continuing-progress-towards-making-tax-dispute-resolution-more-effective.html

8.11 Tax Ombudsman releases list of systemic reviews

The Tax Ombudsman has released her forward work plan for the upcoming financial year, highlighting key areas of review including the ATO's handling of tax debt interest and compromised tax accounts. A major focus will be on the ATO's application of the general interest charge (GIC) on tax debts, which has been a major source of complaints. The Ombudsman aims to determine whether the ATO's approach to remitting interest, especially in cases where debts are being paid or are under a payment plan, is fair, reasonable, and consistently applied.

Ombudsman, Ruth Owen, emphasised the importance of ensuring that the GIC is not used to unfairly penalise taxpayers with valid reasons for payment delays. The review will build upon the ATO's current efforts to improve transparency and fairness in the tax system. Another significant review will investigate how the ATO handles compromised tax accounts, a growing concern as more Australians fall victim to identity fraud. Despite previous recommendations to improve account security, many taxpayers continue to face difficulties in regaining access to their accounts after fraud incidents.

Ruth noted the strong support from taxpayers and professionals for further examination of identity fraud issues in the tax system, underscoring the widespread impact and urgency of the matter. In 2026, the Ombudsman also plans to explore how the ATO engages with First Nations taxpayers. She acknowledged that Aboriginal and Torres Strait Islander people face unique challenges in dealing with the tax system, and aims to collaborate with communities to develop meaningful recommendations.

Lastly, the Ombudsman will review the ATO's online services for tax agents, building on her office's current review of the registered agent phone line. This review seeks to support agents, who play a crucial role in helping Australians navigate tax processes and laws, by identifying improvements in the digital tools available to them. The full work plan, with further details and opportunities for public contribution, is available on the Ombudsman's website.

w https://www.taxombudsman.gov.au/media-release/tax-debt-interest-and-account-fraud-top-of-ombudsmans-list/

8.12 ATO Vulnerability Framework Consultation

The ATO has released a draft Vulnerability Framework for public consultation. A person experiencing vulnerability is an individual who faces an increased risk of harm, exploitation, exclusion, or isolation. This can be due to various factors including, but not limited to, social, economic, physical or mental health conditions, disability, age, lack of access to essential services, or other personal circumstances. While the framework does not alter any legal obligations, it is intended to guide the ATO in providing respectful and inclusive engagement with individuals experiencing vulnerability within the tax and superannuation systems.

To ensure the framework is both practical and effective in real-world application, the ATO is particularly seeking input from professionals, organisations, and individuals who support vulnerable populations.

Interested stakeholders can review the consultation paper and submit their feedback via email to VulnerabilityConsultation@ato.gov.au by 18 July 2025.

w https://www.ato.gov.au/tax-and-super-professionals/for-superannuation-professionals/super-funds-newsroom/ato-vulnerability-framework-consultation-opens-12-june

8.13 Art of Tax Reform Summit (NSW)

The NSW Government has announced it will host *The Art of Tax Reform Summit* at the Sydney Opera House on 26 September 2025, aiming to explore ways tax policy could better support Australia's creative industries. Bringing together tax experts, economists, artists, donors, venue operators and others from the arts and culture sectors, the summit will develop recommendations for the next National Cultural Policy, due in 2028. The NSW government notes that many organisations struggle to remain competitive and artists continue to face precarious incomes, with a recent report revealing professional artists earn on average $54,500 (including non-arts work), far below similarly skilled professionals. The summit will examine a range of tax reforms, including:

1. a Live Theatre Tax Offset to incentivise investment in new productions;
2. tax rebates for live music venues proposed by APRA AMCOS; and
3. a review of tax rules on prize money raised by the National Association for the Visual Arts, noting winners of government-funded prizes currently pay tax on these earnings.

The NSW Government is seeking public submissions until 10 August 2025 to help shape the summit's agenda and ensure proposed reforms reflect the realities and needs of creative workers and organisations.

w https://www.nsw.gov.au/departments-and-agencies/dciths/ministerial-media-releases/art-of-tax-reform-unlocking-opportunities-to-improve-taxation-for-australian-creative-industries

8.14 Permanent concession extension for certain build-to-rent properties (NSW)

The NSW Government has announced that the land tax concession for build-to-rent (**BTR**) housing developments will be made permanent.

Currently, section 9E of the *Land Tax Management Act 1956* (NSW) provides a 50% reduction in the assessed land value for eligible new BTR developments. This concession applies from the 2021 land tax year (for land owned as at 31 December 2020) and was originally scheduled to expire after the 2040 land tax year (for land owned as at 31 December 2039).

Under the reform, this time limitation will be removed, and the land tax concession will be made available indefinitely. This change forms part of a broader package of reforms aimed at boosting the supply of rental housing and supporting the construction of new homes across the state.

The concession under section 9E applies to land meeting the following criteria:

1. a building is situated on the land;
2. construction of the building commenced on or after 1 July 2020; and
3. the Chief Commissioner is satisfied that a significant proportion of total labour hours spent on the building's construction were performed by individuals belonging to one or more of the following categories: apprentices or trainees, long-term unemployed persons, individuals requiring upskilling,

persons with barriers to employment, including individuals with disability, Aboriginal jobseekers or Graduates.

w https://www.nsw.gov.au/ministerial-releases/supporting-more-homes-and-better-infrastructure-for-nsw

8.15 Guide to Payroll Tax legislation (SA)

Revenue SA has released its 2025-26 guide to payroll tax legislation. Guide to Legislation provides a general guide for employers of their South Australian payroll tax responsibilities under the *Payroll Tax Act 2009* (SA) but it does not constitute a Revenue Ruling.

w https://www.revenuesa.sa.gov.au/resources/publications/guides-to-legislation/guide-to-legislation-payroll-tax/2025-26-guide-to-legislation-payroll-tax

9. Tax professionals

9.1 Registered agent lodgment program 2025-26

The ATO has announced that the Registered agent lodgment program for 2025–26 is now available on its website. The ATO outlines that the program includes due dates listed by month, tax return type and obligation type. It also explains how overdue prior-year returns or a lodgment prosecution can impact a client's future due dates. The ATO further notes that due dates for clients' tax returns will be available in ATO online services by the end of July.

While the ATO provides this lodgment program to assist agents in planning workloads, it emphasises that careful planning and progressive lodgment remain essential.

Tips for managing lodgments

The ATO also offers specific recommendations to help registered agents manage their lodgments effectively. The ATO recommends that registered agents:

1. engage clients early to obtain the information needed to lodge;
2. know how to ensure clients are covered by the lodgment program;
3. review client lists to add new clients and remove those who no longer use the agent's services;
4. regularly check clients' lodgment due dates, as these may change if client circumstances change; and
5. notify the ATO if lodgment is not required or if further returns are unnecessary.

Finally, the ATO highlights that if an agent or their practice is facing challenges beyond their control, there are a range of support options available to help them get back on track.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/registered-agent-lodgment-program-available-now

9.2 ATO reminder to review client list

On 16 June 2025, the ATO published a reminder for tax practitioners to review their client list to ensure that new clients are included the practitioner's lodgment program, the ATO does not contact the practitioner about former clients, and the practitioner's lodgment performance percentage remains accurate.

Lodging a final return or advising that further returns are not necessary does not automatically remove a client from a practitioner's list. Practitioners must manually remove clients via Online services for agents or the Practitioner Lodgement Service.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/review-your-client-list

9.3 Warning about tax time loans

The Tax Practitioners Board (TPB) has issued a warning to tax practitioners about offering or promoting tax time loans, highlighting concerns that such arrangements may not be in clients' best interests and could particularly harm vulnerable consumers.

These loans typically involve providing clients with short-term advances against expected tax refunds, but the TPB is worried about issues such as high or non-transparent fees, unmanaged conflicts of interest (especially when practitioners receive fees tied to refund estimates), breaches of client confidentiality, and failures to exercise reasonable care. The TPB Chair, Peter de Cure AM, emphasised that tax practitioners must consider whether they can genuinely act in their clients' best interests if they profit from these loans, and urged them to uphold transparency, comply with legal and ethical obligations, and inform clients of all associated risks.

The TPB restated its commitment to consumer protection and warned that it will take regulatory action against practitioners who fail to comply with professional standards.

w https://www.tpb.gov.au/tpb-warns-tax-practitioners-selling-tax-time-loans

9.4 ATO Community forum

The ATO is encouraging small business taxpayers to make use of its ATO Community, an online forum that provides practical, jargon-free support on general tax and superannuation questions. This platform allows taxpayers to seek guidance on matters such as GST, PAYG instalments, and super guarantee obligations, with responses from both the ATO and other members of the business community. The forum also features a growing collection of easy-to-read articles covering topics relevant to small businesses, including business structuring, reporting requirements, and record-keeping obligations. As tax time approaches, the ATO is urging taxpayers to join the ATO Community and ask their questions there rather than navigating their obligations alone or waiting on hold. In addition, the ATO offers tailored communication channels to keep small businesses informed, such as the Small business newsroom, a free monthly email newsletter, and website notifications specifically targeting the "Business and organisations" category to help taxpayers stay updated on information that matters to them.

COMMENT – the ATO Community forum contains answers to a large number of tax questions. On occasion, the answers provided are overly simplified and potentially misleading. Reyling on the answers provided in the ATO Community forum is unlikely to be considered taking reasonable care for the purpose of determining administrative penalties.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/small-business-tax-questions-answered-by-joining-ato-community

9.5 Proposed changes to TPB sanctions

On 1 July 2025, the Tax Practitioners Board (TPB) announced the outcomes of Treasury's public consultations on reforms to the Tax Agent Services Act 2009 (TASA). These reforms are intended to strengthen the TPB's regulatory powers, following the government's response to the PwC matter and the recommendations from the 2019 independent review of the TPB and TASA.

The proposed start date of the new changes to the sanctions regime is 1 July 2026. The proposed changes include:

1. reintroducing criminal penalties for unregistered preparers;
2. increasing maximum civil penalties amounts in the TASA;
3. adding infringement notice penalties for alleged contraventions of the TASA;
4. introducing enforceable voluntary undertakings;
5. creating contingent and interim suspensions;

6. broadening civil penalties for breaches of the Code and for false or misleading statements made by unregistered preparers; and
7. extending the maximum banning period to 10 years.

There are also proposed changes to the tax agent registrations framework, which will come into effect from 1 July 2027. The proposed changes include:

1. allowing the TPB to assess exceptions and adding longer, alternative timeframes to gain relevant experience;
2. amending the fit and proper person test by requiring disclosure of spent convictions relevant to providing tax practitioner services and extending the timeframe the TPB considers; and
3. requiring companies and partnerships to demonstrate they have appropriate governance arrangements in place to be registered.

The government will consult on exposure draft legislation to implement these reforms. Once legislation is enacted, the TPB will begin consulting on administrative policies and guidance to support the changes. Tax practitioners will have the opportunity to provide input during these consultation phases.

w https://www.tpb.gov.au/treasury-consultation-outcomes-enhance-tpbs-sanctions-regime-and-modernise-registrations-framework