Tax Update

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

Brown Wright Stein tax partners:

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

www.bwslawyers.com.au

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Contents

Our tax training notes are prepared by Marianne Dakhoul, Jane Harris, Matthew McKee, Gillian Tam, Hayden Rudd, Aritree Barua and Amy Burriss.

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 Bendel	The Full Court held that an unpaid present entitlement is not a 'loan' for the purposes under section 109D(3) of the ITAA 1936 as a long requires there to be an obligation to repay and does not extent to a mere obligation to pay an amount. This was contrary to the long term view held by the ATO.	Page 6
Item 2.3 Quy	The Administrative Review Tribunal has affirmed the decision of the Administrative Review Tribunal to find that a taxpayer was a resident of Australia in four income tax years. This followed a decision by the Federal Court setting aside an early Administrative Appeal Tribunal decision due to it not correctly applying the residency principles.	Page 9
Item 2.4 Toowoomba Regional Council	The Federal Court has held that a shopping centre carpark is not a 'commercial parking station' for the purposes of FBT. This is contrary to the view currently held by the ATO	Page 15
Item 3.1 DJG Consulting	The Administrative Review Tribunal has affirmed a decision of the ATO to impose a failure to withhold penalty on a entity that made payments of salary and wages to employees of another entity. The ART confirmed that the withholding obligation in section 12-35 of the Schedule 1 to the TAA applies to the entity making a payment of salary or wages whether or not the employees are employees of that entity or another entity.	Page 23
Items 3.1 Ausnet	The Full Court has held for the ATO in relation to the eligibility of the Division 615 rollover in a case where the interposed company sought to contend the conditions for the rollover were not satisfied. The Full Court decision has important implications for the rollover and indicates it will be available in scenarios where the interposed company is not a "clean" shelf company.	Page 27

2. Cases

2.1 Bendel – Division 7A and UPEs

Facts

Steven Bendel was the sole director and shareholder of Gleewin Pty Ltd. Gleewin Pty Ltd was the trustee of The Steven Bendel 2005 Discretionary Trust (**2005 Trust**). Steven was a beneficiary of the 2005 Trust, and was also the sole director and shareholder of Gleewin Investments Pty Ltd, a corporate beneficiary**.**

In the years ended 30 June 2014 to 30 June 2017, the 2005 Trust made Steven presently entitled to a share of its income and, from 2013 until 2017, the 2005 Trust made Gleewin Investments Pty Ltd presently entitled to a share of its income.

The trust deed for the 2005 Trust contained terms which allowed the trustee to determine to set aside, pay or apply any part of, or all of the income of the trust in each year for any of the beneficiaries of the trust. In relation to amounts set aside for a beneficiary, the trust deed provided that "[a]ny amount set aside for any beneficiary ...shall cease to form part of the Trust Fund and upon such setting aside ... shall thenceforth be held by the Trustee on a separate trust for such person absolutely …".

The trust deed then provided the trustee with the power to invest amounts held on separate trusts for beneficiaries, in such manner as the trustee thinks fit.

During each of the 2013 to 2017 years, the financial affairs of the 2005 Trust were managed as follows:

1. Steven caused the 2005 Trust to advance money from its resources to him or for his benefit from time to time;
2. the advances to Steven were recorded with the description 'Drawings' by way of journals posted to a beneficiary account, 'Bendel Current Account';
3. distributions of (or creation of entitlements to) the 2005 Trust's income or capital were made from time to time;
4. when the amounts of the distributions (entitlements) were ascertained, journals were posted to the Bendel Current Account; and
5. for each year, Steven's entitlement to income from the 2005 Trust was less than the balance owed by him to the 2005 Trust so that his entitlement to the 2005 Trust's income was always fully discharged or paid (i.e. the current account was always in debit).

For each of the years under review, the 2005 Trust reported Steven's entitlement as discharged and paid (due to the set off against amounts owed by Steven to the 2005 Trust).

The financial affairs of Gleewin Investments Pty Ltd were similarly managed. During each of the 2013 to 2017 years:

1. Steven caused the 2005 Trust to meet the tax liabilities and other expenses of Gleewin Investments Pty Ltd;
2. when the expenses of Gleewin Investments Pty Ltd were met by the 2005 Trust, entries were made to both entities' accounts – in the 2005 Trust accounts, expenses were recorded in the Gleewin Investments Current Account, and in the accounts of Gleewin Investments Pty Ltd, the expenses were recorded in the account named 'Steven Bendel 2005 Discretionary Trust';
3. amounts belonging to Gleewin Investments Pty Ltd (PAYG tax refunds) were received by the 2005 Trust and not passed on. These amounts also were posted to the same accounts by or on behalf of each of

the 2005 Trust and Gleewin Investments Pty Ltd and reflected an increase in the obligations of the 2005 Trust to Gleewin Investments Pty Ltd; and

4. for each year the entitlement of Gleewin Investment Pty Ltd to income from the 2005 Trust was also posted to the Gleewin Investments Current Account, and for each of the 2013 to 2017 years that income entitlement was greater than the taxation and other expenses paid on behalf of Gleewin Investments Pty Ltd by the 2005 Trust from its resources so that its entitlement to the income of the 2005 Trust was always recorded as at least partly outstanding (i.e. the loan account was always in credit in the 2005 Trust).

The entitlements of Gleewin Investments Pty Ltd were reported in the 'Gleewin Investments Current Account' showing a running balance of unpaid present entitlements (UPEs).

Despite the requirements under the trust deed, Gleenwin Pty Ltd did not report any asset held separately, did not purport to alienate or create any interest in any identified asset to meet or correspond with the UPEs and did not report or account for any separate trust.

ATO audit

The ATO conducted an audit of Steven's tax affairs, during which the UPEs of Gleewin Investments Pty Ltd were discovered.

On 4 September 2019 the ATO issued amended assessments contending that:

1. the UPEs of Gleewin Investments Pty Ltd to prior year trust income comprised loans within the meaning of section 109D(3) of the ITAA 1936 made by Gleewin Investments Pty Ltd in the current year to the 2005 Trust;
2. those loans were taken to be dividends paid within the meaning of section 109D(1) of the ITAA 1936;
3. those dividends were taken to be paid out of the profits of Gleewin Investments Pty Ltd by operation of section 109Z of the ITAA 1936;
4. the dividends taken to be paid out of profits were assessable income by operation of section 44(1) of the ITAA 1936 and included in the section 95 net income of the 2005 Trust; and
5. the beneficiaries who were entitled to the income of the 2005 Trust were liable to be assessed under section 97 for a proportion of each such dividend determined by reference to their proportionate shares of the income of the 2005 Trust.

Section 109D(3) provides as follows:

> *What is a loan?*
> *(3) In this Division, **loan** includes:*
> *(a) an advance of money; and*
> *(b) a provision of credit or any other form of financial accommodation; and*
> *(c) a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and*
> *(d) a transaction (whatever its terms or form) which in substance effects a loan of money.*

The ATO considered that a UPE is a loan under either paragraph (b) or (d).

Objections were lodged on 1 November 2019. On 23 March 2021 the objections were disallowed for the 2014 to 2016 years, and allowed in part for the 2017 year. The ATO also issued penalty assessments.

Steven sought review in the AAT.

The AAT concluded that there was no “loan” under section 109D(3) of the ITAA 1936 as a loan for this purpose 'does not go so far as to embrace the rights in equity created when entitlements to trust income are created but

not paid, and remain unpaid'. The AAT found that 'the balance of an outstanding or unpaid present entitlement of a corporate beneficiary of a trust, whether held on a separate trust or otherwise, is not a loan to the trust'.

This conclusion was reached having regard to the following reasons:

1. the policy of Division 7A to tax those who enjoy the benefit of corporate profits without paying the tax that would arise had the company paid dividends in the usual way;
2. statutory construction principles call for:
   (a) regard to statutory context and legislative history; and
   (b) potentially competing provisions to be construed in a manner which 'gives effect to harmonious goals';
3. that there is no tiebreaker provision which mandates which of two competing assessing provisions would apply if an unpaid present entitlement constitutes a loan within the meaning of section 109D(3);
4. that the section 109RB discretion is not designed to allow relieving discretions to be exercised outside the section 109RB(1)(b) gateways of honest mistakes and inadvertent omissions and, therefore, is not a discretion that would relieve inappropriate double taxing;
5. Subdivision EA being a specific and, therefore, a lead provision containing an express set of rules that can be regarded as a particular path that has been chosen to deal with the taxation effect of UPEs in favour of corporate beneficiaries in prescribed circumstances;
6. the lack of clarity as to the nature of a UPE and the separate trust concept;
7. the expressed explanation accompanying the former section 109UB of the ITAA 1936 to the effect that:
   (a) an unpaid present entitlement in favour of a corporate beneficiary and a contemporaneous loan by the trustee to a shareholder in the corporate beneficiary (or associate) is in substance a loan by the company to the shareholder; and
   (b) an amount to which a company is entitled 'held on a secondary trust for the benefit of the company' is regarded as unpaid and within the ambit of section 109UB of the ITAA 1936;
8. the operation of Subdivision EA which taxes the shareholder in the foregoing circumstances as if the company had lent money directly to that shareholder which falls squarely within the Division 7A policy framework; and
9. there being no provision in either of the tax acts that expressly allows assessment of two people arising out of the same circumstance with one of those people potentially not enjoying any benefit of the corporate profits that are the underlying cause of the assessment.

The AAT also confirmed that the amount taken to be a dividend paid by Gleewin Investments Pty Ltd to the 2005 Trust was not the same as the amount determined to be assessable income by operation of sections 95 and 97 for Gleewin Investments Pty Ltd. This meant that section 6-25 of the ITAA 1997 which prevents double taxation of the 'same amount' would not apply and tax could be applied both to the distribution of trust income and the deemed dividend arising from a UPE.

The AAT set aside the ATO's objection decisions. The ATO appealed to the Full Federal Court.

Issue

Is an outstanding UPE a 'loan' within the meaning of section 109D(3) of the ITAA 1936?

Decision

The Full Federal Court dismissed the ATO's appeal.

The Full Federal Court noted that, in construing paragraphs (b) and (d) of section 109D(3), regard had to be had to the balance of the definition and the full statutory context of Division 7A. In particular, the Full Court considered that paragraph (d) should not be interpreted in a way that leaves the other three paragraphs in section 109D(3) with no work to do.

Applying this approach, the Full Federal Court determined that for a "loan" to exist under section 109D(3) of the ITAA 1936, there must be a transaction that creates an obligation to repay an amount, rather than merely an obligation to pay.

Citing *Fischer v Nemeske Pty Ltd* [2016] HCA 11, the Full Federal Court reaffirmed that, while an equitable relationship between a trustee and beneficiary can give rise to a debtor-creditor relationship, this alone does not create a 'loan' for the purpose of section 109D. Division 7A of the ITAA 1936 distinguishes between a "loan" and a "debt." Section 109F deals specifically with the forgiveness of a "debt" owed to a private company, while section 109G provides circumstances in which a company is taken not to have paid a dividend due to the forgiveness of a debt resulting from a loan. This distinction indicates that not all debtor-creditor relationships constitute loans under section 109D, reinforcing the requirement that a loan must involve an obligation to repay rather than merely an obligation to pay.

The Full Federal Court also addressed the interaction between section 109D and Subdivision EA of Division 7A, which specifically applies when a trustee makes a loan to a shareholder or associate while a private company has an unpaid present entitlement from the trust. The AAT had found that Subdivision EA acted as a "lead provision" in these circumstances, ensuring that a deemed dividend would only arise if both an unpaid present entitlement existed and a loan was made by the trustee to a shareholder or associate. The AAT considered that to interpret the section 109D(3) in the manner with the ATO did could result in double tax, as the UPE could be assessed as a deemed dividend under section 109D(1) and Subdivision EA. The Full Federal Court disagreed with such an approach as a matter of statutory construction as the approach did not engage with the statutory text of section 109D(3).

The AAT had erred in not fully engaging with the statutory text, but the Commissioner's construction of section 109D was ultimately incorrect.

COMMENT – this finding is contrary to the ATO's current position as set out in *Taxation Determination TD 2022/11.* The Commissioner has until 19 March 2025 to seek special leave to appeal the decision to the High Court. If an appeal is not made, or if special leave to the High Court is either not granted or the appeal is dismissed, the ATO will likely withdraw and update its guidance on this matter. However, the ATO may still seek to apply Subdivision EA in many cases. The ATO has also indicated that section 100A may apply in circumstances where UPEs are retained in a trust for an indefinite period or applied in a way that is inconsistent with an intention that the corporate beneficiary would ultimately receive the amount of its entitlements (see TR 2022/4 and PCG 2022/2).

For taxpayers who have placed outstanding UPEs to companies on complying Division 7A loan terms and/or declared dividends from a company to offset against the amount owed by the trust, these transactions have occurred and are not undone or invalidated by the Court's interpretation of section 109D(3). Minimum repayments must still be made consistently with the loan agreements.

Citation *Commissioner of Taxation v Bendel* [2025] FCAFC 15 (Logan, Hespe and Neskovcin JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/15.html

2.2 Quy – individual residency

Facts

Trong Quy was born in Vietnam and obtained Australian citizenship in 1978.

Trong is a mechanical engineer. In January 1998, Trong's employer, C&BI Constructions Australia, posted him in Dubai, United Arab Emirates, for work. Trong, his wife and three daughters moved with him at this time.

In late 2009, the Global Financial Crisis reduced work in Dubai and Trong moved back to Australia with his family and continued to work for C&BI Constructions in a new position.

On 13 September 2015, Trong accepted an international assignment to Dubai.

Trong's employment conditions were governed by three documents. These documents relevantly set out:

1. Trong was being offered an international assignment with CB&I Eastern Anstalt, being the host company. The host country was Dubai;
2. the contract commenced on 29 September 2015 and would end at the completion of the international assignment;
3. the remuneration package included that superannuation guarantee contributions would be made;
4. Trong would be paid the base salary to his Australian bank account and the remainder of his salary was to be paid into a United Arab Emirates (**UAE**) bank account so that payment of salary could be made in accordance with the Wages Protection System which is compulsory for all employers registered with the Ministry of Labour in the UAE;
5. there were various assignment benefits including a cost-of-living allowance, provision of a vehicle, provision of temporary accommodation until he found more suitable permanent accommodation, cost of accommodation for a maximum of one year, furniture and furnishings allowance, and relocation allowance of US$5,000;
6. CB&I would meet all host country tax liabilities arising solely from and related to Trong's salary and other employment income received from CB&I during Trong's assignment. CB&I would arrange for any tax returns to be lodged on behalf of Trong;
7. CB&I's policy is that Trong's total tax burden with respect to Trong's work-related earnings while on assignment will not exceed the amount that would have been incurred if he had remained in the Home Location for the entire year. Trong would be tax equalised for the duration of his assignment; and
8. leave provisions and repatriation entitlements at the end of the assignment.

Trong took his clothes with him to Dubai and a few musical instruments. He purchased his own cutlery and crockery in Dubai.

In September 2015, Trong's two older daughters were undertaking university studies in Perth and his youngest daughter was completing her final year of high school. Trong's daughters did not relocate to Dubai with him. Trong's wife travelled to Dubai from Australia to visit Trong but spent most of her time in Australia.

Trong owned properties in Parramatta and Merrylands, New South Wales and Beldon, Western Australia. Trong purchased the property in Beldon as the family home in 2010, when relocating to Perth. During the tax years relevant to the proceedings, at least one of Trong's daughters resided in the Beldon property rent free. At all times, Trong paid the mortgage and all costs associated with the Beldon property, including the utility costs. Trong also owned, registered, and maintained three cares and a motorcycle. Trong financially supported his wife and daughters. The New South Wales properties were tenanted.

Trong was provided with employer-sponsored UAE residency permits. Those permits were issued for the periods 21 October 2015 to 20 October 2017, 27 September 2017 to 26 September 2019 and 1 September 2019 to 31 August 2021. These permits allowed Trong to live and work in the UAE. Trong's wife held a spouse-sponsored UAE residency permit which commenced on 14 January 2016 and expired on 21 November 2019. Trong was not eligible to become a citizen of the UAE.

Trong resided in the same apartment in Downtown, Dubai for the duration of his international assignment. The lease showed that the tenant was CB&I Eastern Anstalt. Trong also purchased a car while in Dubai. During the income years ended 30 June 2016 to 2020, Trong's immigration records indicated the following:

Financial Year	Days in Australia	Days out of Australia	No. of Departures
2016	119	247	3
2017	47	318	3
2018	29	336	2
2019	34	331	2
2020	41	325	2

In February 2021, Trong moved to Thailand on a further international assignment with CB&I.

Trong renewed his Western Australian driver's licence in 2017 and in 2022. At all times his recorded address with the Department of Transport was the Beldon property address.

Trong filed his income tax returns for the income years ended 30 June 2016 to 2020 declaring the income he received from CB&I. The Commissioner issued notices of assessment for each year. On 29 March 2021, Trong lodged objections in relation to those notices of assessment. Trong objected to the notices of assessment on the basis that he believed he was not a resident of Australia for taxation purposes.

On 6 January 2022, the Commissioner disallowed Trong's objection regarding his residency status. On 29 March 2022, Trong applied to the AAT for review of the Commissioner's objection decision.

When asked by the AAT what his long-term intentions were, Trong said that he would complete his current contract in Thailand, which he thinks will be another three to five years and then retire. Trong said he would return to Australia to retire, but likely to his Sydney residence because that is where his wife's family is located.

In respect of the ordinary concepts test, the Commissioner contended that Trong had maintained extensive connections to Australia and, taking the evidence into account, was a resident in Australia for tax purposes for each of the relevant tax years. In respect of the domicile test, the Commissioner contended that on departing Australia, Trong did not take any steps commensurate with an individual intending to quit Australia and set up a permanent place of abode elsewhere. Whilst Trong may have been physically present in Dubai, when viewed objectively, the Commissioner contended there was no intention to make that his permanent place of abode.

The AAT found that Trong had a long-term plan to return to Australia for family purposes and through his behaviour could not prove a definite plan in any of the relevant income years to abandon Australia completely, ether for a period of time or indefinitely. For the purposes of the ordinary concepts test, Trong was a resident of Australia for the income years ended 30 June 2016 to 30 June 2020.

The AAT concluded that Trong had not abandoned his residence in Australia during the relevant income years, nor had he established a permanent place of abode in Dubai or anywhere else outside of Australia. For the purposes of the domicile test, Trong was a resident of Australia for the income years ended 30 June 2016 to 30 June 2020.

Trong appealed to the Federal Court, which found that the AAT had erroneously incorporated a reference to intention for the purpose of determining a person’s domicile and had incorrectly conflated the tests for ordinary concepts residence with domicile. The matter was remitted to the AAT for re-decision. Prior to the decision being delivered, the AAT became the Administrative Review Tribunal (ART).

Issues

1. Was Trong an Australian resident under to the ordinary concepts test for the income years ended 30 June 2016 to 30 June 2020?
2. Was Trong an Australian resident under the domicile test for the income years ended 30 June 2016 to 30 June 2020?

Decision

Ordinary concepts test

The ART considered that, whether Trong "resided" in Australia under ordinary concepts, required an assessment of his physical presence, intention, continuity of association with Australia, and other relevant factors.

Physical presence

The ART noted that Trong had been living and working full-time in Dubai during the relevant years, spending the majority of his time outside Australia. Although he returned to Australia on twelve occasions between December 2015 and January 2021, these visits were typically for two to three weeks at a time and coincided with his annual leave. When he returned, he stayed at the family home in Perth or visited extended family in Sydney. The ART found that these short visits were best characterised as holiday trips rather than evidence of an ongoing residence in Australia.

Employment arrangements

The ART considered that Trong's employment arrangements also supported the conclusion that he was based in Dubai. Although he was employed by an Australian company, his work was conducted under the employment framework of Dubai, and his role was subject to the employment laws of that jurisdiction. While part of his salary was paid into an Australian bank account, this was largely for practical reasons, such as supporting his daughters and maintaining his Australian properties. His full-time role, together with allowances for living expenses in Dubai, indicated that his primary place of work and daily life was outside of Australia.

Family ties

The ART noted that Trong's wife and daughters remained in Australia, with his daughters completing their secondary and tertiary education in Perth. His wife spent a significant portion of her time in Australia during the relevant years, although she made some visits to Dubai. While the presence of close family members in Australia is often a strong indicator of residence, the ART accepted that in this case, the wife’s presence was largely dictated by their daughters’ education rather than a reflection of Trong's own intention to maintain Australia as his home.

Assets in Australia

The ART noted that Trong retained multiple properties in Australia, including the family home in Perth and two investment properties in New South Wales. However, the ART found that Trong's continued ownership of these properties was not necessarily indicative of an intention to reside in Australia. The Beldon Property, where his daughters lived, was retained to provide them with stable accommodation while they completed their studies. Trong did not take furniture or household items from Australia to Dubai, but instead furnished his Dubai apartment separately, which suggested an intention to make his overseas residence his home.

Intention

The ART found that, while Trong had not formally severed ties with Australia, his actions demonstrated a clear shift towards residing in Dubai. Trong's employment was based in Dubai, he engaged in local community activities, and he lived in a fully furnished apartment provided by his employer. Although he maintained financial ties to Australia, including bank accounts and superannuation, these were consistent with managing existing investments and family obligations rather than an intention to continue residing in Australia.

Conclusion on ordinary concepts test

The ART concluded that Trong did not "reside" in Australia during the relevant years. His extended physical absence, full-time work overseas, and pattern of life in Dubai outweighed the factors that connected him to Australia.

Domicile test

The ART noted that under the domicile test, a person is a resident if their domicile is in Australia, unless the Commissioner is satisfied that they have a permanent place of abode outside Australia.

Trong's domicile was not disputed. As an Australian citizen who migrated to Australia as a child, he was domiciled in Australia during the relevant years. The key question was whether he had established a permanent place of abode outside Australia, specifically in Dubai, where he worked during those years.

The ART considered that this required an assessment of whether Trong had abandoned his residence in Australia and settled in Dubai on a permanent, rather than temporary or transitory, basis.

The ART considered the Trong's physical presence and manner of living in Dubai, acknowledging that his residency permits, though temporary in nature, were renewed for nearly six years. The ART considered that the fact that accommodation was rented did not preclude it from being considered a permanent place of abode, but that it was relevant that the lease and utilities were in his employer's name. The ART noted that Trong furnished the apartment with what was necessary for comfortable living, but that this alone did not establish a permanent commitment to residing in Dubai.

The ART explained that, for Trong to have a permanent place of abode outside of Australia, it was necessary for him to have definitively abandoned his residence in Australia. In this respect, although Trong did not treat Australia as his home during the relevant years, he maintained substantial connections with the country. His wife and daughters remained in Australia, living in the family home in Perth. He frequently returned to Australia, albeit for short visits, and retained a house that was fully furnished, which he could return to at any time. He also maintained Australian bank accounts, superannuation, and private health insurance. His vehicles in Australia remained registered in his name, and he retained personal belongings at his Australian home.

The ART concluded that, while the Applicant had relocated for work and lived in Dubai for several years, he had not permanently abandoned his Australian residence and, therefore, he did not meet the threshold of having permanently settled elsewhere.

COMMENT – the decision here in relation to the permanent place of abode test is hard to rationalise with earlier cases. The leading authority in the permanent place of abode test is the Full Court decision in *Federal Commissioner of Taxation v Applegate* [1979] FCA 37, in which Northrop J explained the test as follows:

> *The word "permanent" as used in par. (a)(i) of the extended definition of "resident", must be construed as having a shade of meaning applicable to the particular year of income under consideration. In this context it is unreal to consider whether a taxpayer has formed the intention to live or reside or to have a place of abode outside of Australia indefinitely, without any definite intention of ever returning to Australia in the foreseeable future. The Act is not concerned with domicile except to the extent necessary to show whether a taxpayer has an Australian domicile. What is of importance is whether the taxpayer has abandoned any residence or place of abode he may have had in Australia. Each year of income must be looked at separately. If in that year a taxpayer does not reside in Australia in the sense in which that word has been interpreted, but has formed the intention to, and in fact has, resided outside Australia, then truly it can be said that his permanent place of abode is outside Australia during that year of income.*

Given the ART's finding that Trong did not treat Australia as his home in the relevant years but treated Dubai has his home, the reasoning in *Applegate* suggests it should have followed that Trong had a permanent place

of abode outside of Australia in those years. Aspects of the reasoning of the ART appear to conflate the permanent place of abode test with whether a person has acquired a new domicile outside of Australia, which does require the person to have definitely abandoned Australia. It is worth noting that in *Applegate*, an intention to live in Vanuatu for 2 years was sufficient to make Vanuatu the permanent place of abode of the taxpayer.

Citation *Quy and Commissioner of Taxation (Taxation*) [2024] AATA 245 (Member D Mitchell, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/245.html

2.3 VSVS – small business CGT concessions and active asset test

Facts

VSVS, a third-generation primary producer, ran a beef cattle business with his wife near Craigieburn, Victoria, adjacent to his parents' dairy farm. His parents, Francis and Ruth, had structured a family arrangement in the late 1990s, allowing VSVS's brothers, Harold and Eric, to take over the dairy farm while Francis and Ruth retained ownership and income rights.

On 31 March 2007, Francis passed away and his will divided his 50% share in the Lindum Vale farm property and 25% share in the Ridley View farm property equally among his children. As a result, VSVS inherited a 12.5% interest in Lindum Vale and a 6.25% interest in Ridley View. Initially, VSVS was unaware of his inheritance as Harold and Eric, the executors, withheld information. Once informed, VSVS did not challenge the existing arrangement, allowing Harold and Eric to continue running the dairy farm.

Eric died in 2008 and Harold assumed full control of the dairy farm.

In 2010, VSVS agreed to a land swap: Harold would continue using Lindum Vale and Ridley View, while VSVS received exclusive, rent-free access to a separate paddock on a property known as 630 Old Sydney Road for his cattle business. When the dairy ceased operations in 2011, Harold transitioned to cattle farming on the properties, and VSVS continued with the use of the paddock on 630 Old Sydney Road.

In 2014, tensions between VSVS and Harold escalated, leading to the breakdown of their arrangement. Despite losing access to the paddock, VSVS still did not use Lindum Vale or Ridley View for his business.

On 16 May 2016, VSVS sold his inherited interest to Harold.

VSVS sought to apply the small business CGT concessions to reduce or eliminate the capital gain. He claimed that his inherited interests in Lindum Vale and Ridley View met the "active asset" test under section 152-40(1), which requires that you own the asset and it is used, or held ready for use in the course of carrying on a business that is carried on by you, your affiliate or an entity connected with you. The Commissioner accepted that the properties met most conditions for the concession but disputed that they were active assets, as they had never been used in VSVS's cattle business.

While VSVS contended that he intended to use the properties but was prevented by family disputes, the Commissioner argued that the properties were always used by others, first for a dairy business and later for cattle farming by Harold. The Commissioner also pointed to agreements VSVS had made which allowed Harold to continue using the land in exchange for access to another paddock. Since the properties were not actively used or held ready for imminent use in VSVS's business, the Commissioner denied the CGT concession.

VSVS objected to the tax assessment, but his objection was unsuccessful. VSVS then applied for review at the AAT (now the ART).

Issue

Were the properties active assets?

Decision

The ART considered the history of the properties and found that from the time VSVS inherited his interests in 2007, they were either used in Harold's dairy and cattle businesses or were part of a land swap arrangement that granted VSVS access to another paddock. Although VSVS claimed he intended to use the properties for his cattle business but was prevented by family disputes, the ART found that an asset is only "held ready for use" if its deployment in the business is imminent. Because VSVS had voluntarily agreed to arrangements where Harold continued using the land, and he had secured alternative grazing land instead, the ART concluded that the properties did not qualify as active assets.

COMMENT – it does not appear that VSVS ever contended that Harold was his 'affiliate' such that Harold's use of the land could count for the active asset test for VSVS. This may have been a difficult argument on the facts given their relationship breakdown as for Harold to be his affiliate it would have been necessary to establish that Harold acted, or could reasonably be expected to have acted, in accordance with VSVS's directions or wishes, or in concert with VSVS, in relation to the affairs of Harold's business. Had the circumstances of their relationship been different, the land swap arrangement may have been a factor to suggest that Harold was acting in concert with VSVS in conducting his business.

Citation *VSVS and Commissioner of Taxation (Taxation and Business)* [2024] ARTA 249 (Deputy President D O'Donovan, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2024/249.html

2.4 Toowoomba Regional Council – FBT and carparking stations

Facts

On 29 June 2023, the Toowoomba Regional Council applied to the Commissioner for a private ruling regarding its liability under the FBTAA.

Section 39A of the FBTAA sets out the conditions under which employer-provided car parking is subject to FBT. It applies when an employee parks at or near their workplace for more than four hours between 7:00 AM and 7:00 PM on a business day, and there is a "commercial parking station" within one kilometre that charges more than the ATO's car parking threshold. The taxable value of the benefit is determined based on the lowest all-day parking fee at a nearby commercial parking station.

The Council sought clarification on whether the Grand Central Shopping Centre parking facility qualified as a "commercial parking station" under section 39A of the FBTAA and whether the lowest representative fee for all-day parking should be $7.50.

On 21 November 2023, the Commissioner issued a private ruling answering both questions in the affirmative. The Commissioner determined that the Grand Central parking facility was a commercial parking station and that the lowest representative fee was $7.50.

On 26 September 2024, the Commissioner upheld this ruling after the Council lodged an objection. The Council sought review of the objection decision in the Federal Court.

The Commissioner argued that the term "commercial" should be interpreted broadly to include any facility engaged in commerce, regardless of whether it was operated for profit. Since Grand Central charged fees for parking beyond three hours, the Commissioner contended that it was a commercial facility under the law.

Relying on *Commissioner of Taxation v Qantas Airways Ltd* (2014) 227 FCR 554, the Commissioner asserted that the purpose of the provision was to determine the taxable value of employer-provided parking, not whether employees actually used the facility. He also stated that Grand Central's parking rates, particularly the $7.50

all-day fee, met the threshold for commercial parking stations. The Commissioner also contended that the Court was bound by the facts outlined in the private ruling and the Council was not permitted to introduce new evidence.

The Council argued that, while Grand Central charged fees for extended parking, its primary function was to attract shoppers to the centre rather than generate standalone revenue. The extensive free parking periods, discounted rates for staff, and various concessions for customers indicated that the parking facility was designed to support retail activity rather than function as a commercial business in its own right.

Issue

Was the Grand Central Shopping Centre parking facility a “commercial parking station”?

Decision

The Court held that the term "commercial" within the definition of “commercial parking station” was ambiguous and could mean either "engaged in commerce" or "operated for profit." Given this ambiguity, the Court considered the broader legislative context and the Explanatory Memorandum that introduced section 39A, which indicated that a facility must have a profit-making purpose to qualify as a commercial parking station.

The Court determined that Grand Central’s parking facility was primarily operated to attract shoppers to the centre rather than to generate profit as a standalone business. The extensive free parking options and discounted rates reinforced this conclusion. Because the facility was not designed to function as a profit-driven commercial entity, it did not meet the statutory definition, and the appeal was allowed.

COMMENT – this decision contradicts the ATO’s view in TR 2021/2 (see example 2). The Court ruled that a car park must be operated for profit to be a "commercial parking station," while the ATO applies a broader definition. This decision suggests that parking facilities integrated into businesses, like shopping centres, may not trigger FBT. Employers may now have stronger grounds to challenge FBT assessments where parking primarily serves a business purpose rather than operating as a standalone profit-driven facility.

TIP – the small business car parking exemption under section 58GA of the FBTAA, eligible small and medium business employers may provide car parking benefits without incurring FBT. To qualify, the employer must meet several conditions. Specifically, the car must not be parked at a commercial parking station, the employer cannot be a public company or a subsidiary of one, and it must not be a government body. The sum of the employer’s ordinary and statutory income must be less than $10 million for the income year ending most recently before the start of the FBT year, or the employer must have been a small or medium business for the income year ending most recently before the start of the FBT year. From 1 April 2021, the exemption was extended to medium business entities, which applies where the employer would be a small business entity if the aggregated turnover threshold were $50 million.

COMMENT – the Commissioner lodged an appeal to this decision on 5 March 2025.

Citation *Toowoomba Regional Council v Commissioner of Taxation* [2025] FCA 161 (Logan J)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/161.html

2.5 Nguyen – beneficial ownership of property

Facts

In 1993, Uyen Nguyen’s parents purchased land in Richmond, Victoria. At the time of purchase, the land was in a state of disrepair and required substantial renovations. However, Uyen's parents did not have the financial resources or borrowing capacity to fund the necessary work.

In 2001, the title to the land was transferred from Uyen's parents to her name. This transfer enabled Uyen to secure a loan in her name, which was used to finance the renovations and pay off the remaining balance on the property. Renovations were completed around 2004. Uyen resided on the land for a time up until 2001, after which her parents moved into the house on the land.

From 2011 up until they passed away, Uyen's parents lived in the house on the land and paid some related expenses, such as utilities and loan repayments. They did not pay rent to Uyen, and their legal and personal correspondence was sent to the property. Uyen's father passed away in 2019, and her mother died in early 2021. Neither parent had a will at the time of their deaths.

On a date in December 2021, Uyen sold the land to a third party. From the time of her parents' deaths until the sale, Uyen paid for costs associated with the land. The sale proceeds were distributed according to her late mother's informal wishes: Uyen and her brother each received 37%, while her children received 25%.

On 10 January 2023, Uyen applied for a private ruling from the Commissioner of Taxation, arguing that she held the land on trust for her parents and should not include any capital gain from its sale in her assessable income. On 24 May 2023, the Commissioner issued a private ruling, determining that Uyen was both the legal and beneficial owner of the land and must declare the capital gain in her income.

On 29 May 2023, Uyen lodged an objection to the private ruling. She argued that a trust had existed, supported by a letter she sent to her representative in March 2023 and a statutory declaration signed in April 2023. Despite these submissions, the Commissioner rejected her objection on 10 November 2023, stating that there was insufficient evidence of a trust arrangement.

On 11 November 2023, Uyen sought a review of the Commissioner's decision by the ART.

Uyen argued that she held the land on trust for her parents and was not the beneficial owner. She contended that the title was transferred to her in 2001 solely to enable her to obtain financing for renovations, as her parents lacked the financial capacity to do so. Uyen maintained that her parents retained equitable ownership of the property and continued to treat it as their primary residence until their deaths.

The Commissioner highlighted that the land had been "gifted" to Uyen in 2001, as reflected in both the private ruling and Uyen's own submissions. It was contended that the absence of a formal trust deed, combined with the lack of contemporaneous documentation evidencing an intention to create a trust, supported the conclusion that Uyen was the beneficial owner.

Uyen provided a March 2023 letter and a statutory declaration in support of her claim, stating that her parents had assumed responsibility for loan repayments and other expenses related to the property. She argued that these arrangements evidenced the existence of a trust, either express or implied, in favour of her parents. Uyen also pointed to the distribution of sale proceeds in accordance with her mother's wishes as further evidence that she had merely held the legal title on their behalf.

Finally, Uyen challenged the Commissioner's characterisation of the transfer as a "gift," arguing that this did not reflect the true nature of the arrangement, which she claimed was always intended to preserve her parents' beneficial ownership of the property. She submitted that the capital gain from the sale should not be included in her assessable income.

The Commissioner argued that the statements in Uyen's March 2023 letter and April 2023 statutory declaration were insufficient to establish a trust. These documents, prepared long after the relevant events, were characterised as retrospective assertions of intent rather than contemporaneous evidence.

The Commissioner maintained that the informal arrangements between Uyen and her parents, such as their payment of some expenses and loan repayments, did not amount to evidence of a trust. Instead, these could be explained by other familial arrangements unrelated to ownership.

Ultimately, the Commissioner asserted that, for capital gains tax purposes, Uyen was the person who disposed of the Property under CGT event A1 and was therefore required to include the resulting capital gain in her assessable income.

Issues

1. Did the ART have the authority to consider additional evidence or reassess the "scheme" outlined in the private ruling, including whether a trust arrangement existed?
2. Did Uyen hold the property as a trustee for her parents, or did she acquire both legal and beneficial ownership of the property when the title was transferred to her in 2001?
3. Was the Commissioner's application of the capital gains tax provisions correct in concluding that Uyen was required to declare any capital gain from the sale of the property in her assessable income?
4. Could the ART deviate from the description of the "scheme" in the private ruling to account for additional submissions or general law principles raised by Uyen?
5. Did the ART need to address whether the use of the term "gift" in submissions impacted the determination of ownership for capital gains tax purposes?

Decision

The ART concluded that it was bound by the description of the "scheme" outlined in the Commissioner's private ruling. The ART determined that it could not consider additional evidence or submissions, such as Uyen's March 2023 letter and statutory declaration, to alter or redefine the scheme. The ART found that its role was limited to applying the law as it pertained to the scheme described in the private ruling, which identified Uyen as both the legal and beneficial owner of the property.

In relation to the question of a trust, the ART found that there was insufficient evidence to establish either an express or implied trust in favour of Uyen's parents. The March 2023 letter and statutory declaration, while suggesting that Uyen held the land for her parents' benefit, were prepared long after the relevant events and lacked the certainty of intention required to demonstrate an express trust. Similarly, the evidence provided did not support the existence of an implied trust, as the arrangements surrounding the payment of expenses and mortgage repayments were informal and not clearly documented.

The ART also rejected Uyen's contention that the Commissioner's reliance on the term "gift" was flawed. The ART determined that this description, as reflected in both the private ruling and Uyen's own submissions, indicated that the legal and beneficial ownership of the land had transferred to her in 2001. Since no trust arrangement was evident, Uyen was the person liable for any capital gain arising from the property's sale under the capital gains tax provisions.

Ultimately, the ART upheld the Commissioner's application of the capital gains tax rules, finding that Uyen had disposed of the land within the meaning of CGT event A1 and was, therefore, required to include the capital gain in her taxable income.

COMMENT – this case highlights the limited scope of the ART's ability to review objections to private rulings. The ART is bound by the facts and scheme described in the Commissioner's ruling and cannot redefine or expand upon them, even if additional evidence or arguments are presented. Tax agents should ensure that all relevant facts and supporting documentation are clearly included in private ruling applications, as any omissions or ambiguities could restrict the ability to challenge the ruling effectively in a review.

TIP – in certain cases, taxpayers should consider lodging their tax returns in accordance with the Commissioner's private ruling and then lodge an objection to the assessment if they disagree with the outcome, rather than objecting to the ruling decision. This approach allows the taxpayer to dispute the substantive tax treatment while avoiding the limitations placed on the ART when reviewing private rulings, as objections to assessments provide broader opportunities to present additional evidence and arguments. It still protects

against penalties, as the return is lodged conservatively and the tax is paid, so there is no shortfall in the event of an unsuccessful objection.

Citation *Nguyen v Commissioner of Taxation* [2025] ART 8412 (General Member C Willis, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/173.html

2.6 Teterin v Linrod – trust disclaimer

Facts

The Norman Teterin Family Trust was established by a deed dated 14 December 1977, with its principal asset being a 108-acre farm in Melville, New South Wales. Initially, Teterin Turbocharging Pty Ltd acted as the trustee. Norman was named as the Principal Beneficiary and appointor under the Trust Deed.

In 1981, Linrod Pty Ltd replaced the original trustee, with Norman Teterin and his wife as directors.

From 1983, the Melville property became the family home for Norman, his wife Kay, and their children. Stephanie Teterin, Norman's daughter, later took over managing farming operations on the property.

Since 1998, Stephanie has lived on the property and carried out farm work without payment, personally covering expenses exceeding $500,000 over the years. Stephanie did not record loans when she paid expenses on behalf of the trust, but she did record big ticket expenditure items.

In 2002, Norman sought to retire and qualify for the aged pension. Norman sought accounting and legal advice. On 25 March 2002, a variation deed was executed, removing Norman as appointor but leaving him as Principal Beneficiary. Stephanie became the sole director of Linrod, with Norman and Kay transferring their shares to her.

On 19 April 2002, Norman signed a letter declaring to Centrelink that he would exert no control or derive any benefit from the Trust, which he subsequently relied upon to qualify for the pension.

By 2018, farming operations on the Melville property were restructured. Stephanie began operating the farm as a personal business, leasing the property informally and offsetting farm expenses against her non-farm income. No formal lease agreement was in place, and income generated was not distributed to other beneficiaries.

Payments made by Stephanie were recorded as lease payments to Linrod, reflected as income in Linrod's accounts, while personal payments were not recorded. Whenever an expense arose for Linrod regarding the Melville property, Stephanie transferred funds into Linrod's bank account to enable payment of the expenses. Expenses in Linrod's name were generally paid from Linrod's bank account, while day-to-day running costs for the Melville property were paid directly by Stephanie. Stephanie understood that this arrangement would result in no income being available for distribution to beneficiaries but believed it would not give her an unfair advantage, as she continued to bear the financial burden of the farm's losses.

In 2019, discussions arose about transferring the Melville property to Stephanie or mortgaging it to buy another property. These proposals were not pursued after legal advice.

In March 2020, a family dispute culminated in Norman temporarily leaving the Melville property and his wife Kay after a physical altercation between Stephanie's partner and Norman's son, Bruce. Norman later attempted to remove Linrod as trustee, appointing his solicitor Peter Evans in its place. This appointment was ultimately invalidated by an agreement in August or September 2020, confirming Linrod's trusteeship.

On 7 September 2021, David Teterin, Norman's son, initiated proceedings seeking Linrod's removal as trustee. Mediation efforts failed, and a paternity test confirmed David as Norman's son, which had been questioned during the dispute.

David argued that Linrod, as trustee under the sole control of Stephanie, failed to properly discharge its duties and should be replaced by an independent trustee. He alleged that Stephanie operated the farming business on the Melville property for her personal benefit, creating conflicts of interest and breaching fiduciary duties, including the conflict and profit rules. David also contended that Linrod failed to maintain proper accounts and did not distribute any income to the Trust beneficiaries, as required. Furthermore, he claimed that Linrod and Stephanie were not impartial and did not consider the interests of all beneficiaries equally, alleging specific hostility toward him.

David also sought a declaration that Norman had disclaimed any interest or entitlement in the Trust based on a 2002 letter to Centrelink, which would affect the distribution of interests among the remaining beneficiaries. David argued that these issues demonstrated Linrod's unfitness to continue as trustee, necessitating its removal to protect the interests of all beneficiaries.

By 2024, the land value of the Melville property was assessed at $2.29 million.

Issues

Should Linrod Pty Ltd be removed as trustee of the Norman Teterin Family Trust?
Did Norman disclaim any interest, benefit, or entitlement in or under the Trust?

Decision

Linrod not removed as trustee

The Court concluded that Linrod, under the sole directorship of Stephanie, had not breached fiduciary duties or acted improperly. It found that Stephanie's management of the farm, including paying expenses personally and operating the farming business on the Melville property, aligned with the Trust's best interests. There was no evidence that other beneficiaries were disadvantaged, as no other family member expressed interest in contributing to or managing the property. The Court also noted that replacing Linrod with a professional trustee would impose significant financial burdens on the Trust, potentially necessitating the sale of the Melville property and displacing Norman and Kay from their long-term home.

No disclaimer of interest

One of the first issues the Court had to consider was whether a discretionary object of a trust, as opposed to taker-in-default, is able to disclaim any right to be considered to receive income or capital from the trust. The Court considered that discretionary objection could disclaim their rights under the trust prior to there being any exercise of discretion in their favour.

The Court also considered whether a beneficiary could disclaim any right to be considered to receive income or capital from a trust where they have previously accepted distributions of income or capital. Having regard to the decision in *Re Gulbenkian's Settlements (No.2) Stephens & Anor v Maun & Ors* [1970] Ch 408 the Court considered that, while this was more properly described as a release, an object of a discretionary trust could release the trustee from a duty to consider them and from that time the object ceases to be an object of the power. The difference between a disclaimer and a release is that a disclaimer is the avoidance of the interest in the first place whereas the release operates only from the time of the release.

The Court found that Norman Teterin had not disclaimed or released his interest in the Trust, rejecting David Teterin's argument that Norman's 2002 letter to Centrelink constituted an effective disclaimer. A key reason was that the letter was directed to Centrelink, not Linrod as trustee. The Court emphasised that a disclaimer must be communicated to the trustee to be effective, and no formal renunciation had been made to Linrod. Furthermore, despite the 2002 Variation Deed, Norman remained the Principal Beneficiary under the Trust Deed, and if he had intended to disclaim his interest, this could have been explicitly reflected in the Trust's terms.

COMMENT – there are many reasons under tax and revenue legislation why it may be prudent that a person cease being a beneficiary of a trust. There will usually be an exclusion or amendment power in the trust deed that enables the trustee to take such action. However, there may be circumstances where a beneficiary wishes to cease being a beneficiary and they are unlikely to obtain the cooperation of the trustee or the cooperation of the trustee may require steps and time that are impractical in the circumstances. In such case, a disclaimer or release by the beneficiary may provide the desired outcome.

TIP – advisors assisting clients in qualifying for pensions or other government benefits must carefully assess how trust arrangements interact with means-testing requirements. In making any declarations or disclaimers consideration should be given as to the impact on the beneficiary's rights under the trust.

Citation *Teterin v Linrod Pty Ltd* [2024] NSWSC 1635 (Pike J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1635.html

2.7 Re EM McPherson Settlement – amending vesting date and beneficiaries of trust

Facts

On 27 June 1972, the Ethel McPherson Settlement Trust was established by a deed of settlement. Ethel McPherson settled $100 on trust for beneficiaries including her daughter Barbara Hamer, Barbara's husband David Hamer, and their children. According to the trust deed, the vesting date for the Trust was 30 June 2030.

On 6 October 2021 and 24 November 2021, legal advice was provided to the Trustee and beneficiaries recommending amendments to the Trust deed to extend the vesting period, manage capital gains tax liabilities, and enhance succession planning. The trust deed did not contain a power to vary the Trust.

On 30 June 2023, David Berry, the Trustee, initiated legal proceedings in the Supreme Court of Victoria seeking approval for several amendments. These included extending the Trust's vesting date beyond 30 June 2030, broadening the beneficiary class to include companies and trusts associated with current beneficiaries, allowing income streaming and sub-trust creation, and inserting administrative powers.

On 3 October 2023, notices of the application were sent to the ATO and State Revenue Office (SRO), which declined to participate in the proceedings.

Issues

1. Should the Court approve amendments to extend the vesting date and introduce an 80-year perpetuity period?
2. Is it appropriate to broaden the beneficiary class to include companies and trusts, and would this alter the substratum of the Trust?
3. Should the Trustee be granted powers to stream income, allocate expenses, and hold trust funds in sub-trusts?
4. Can tax advantages justify the proposed amendments, and are they in the best interests of the beneficiaries?
5. Should the Court authorise a general power of amendment, and do the proposed changes fall within the scope of the *Trustee Act 1958* (Vic)?

Decision

Extension of the vesting date

The Court approved the extension of the vesting date, finding it to be beneficial for both current and unborn beneficiaries. The extension would allow the Trust to continue as a vehicle for managing family wealth, delay the crystallisation of tax liabilities, and accommodate future generations. The Court concluded that the proposed 80-year perpetuity period was permissible under section 5 of the *Perpetuities and Accumulations Act 1958* (Vic), as the necessary consents and court order constituted an "instrument" for the purposes of the Act.

Broadening the beneficiary class

The Court approved the amendment to include companies and trusts in which beneficiaries have an interest, provided that the definition of corporate beneficiaries was limited to private companies in which beneficiaries have a controlling interest. This narrower scope ensured the amendment was for the benefit of minor and unborn beneficiaries, balancing the advantages of flexibility and tax efficiency against the potential dilution of their interests.

The Court held that the proposed changes did not destroy the substratum of the Trust or constitute a resettlement. The Trust's fundamental purpose—to benefit the Hamer family—remained intact, and there was sufficient continuity of trust property, beneficiaries, and obligations.

Streaming and sub-trusts

The Court approved the inclusion of powers to stream income and hold funds on sub-trusts, recognising the financial and tax advantages these amendments offered to beneficiaries. The powers would provide flexibility in managing trust distributions, particularly for beneficiaries with varying tax positions.

Tax-related amendments

The Court found it appropriate to approve amendments aimed at achieving tax efficiency, including income streaming and the creation of sub-trusts. These changes would reduce the tax burden on trust income and align with the Trust's purpose of preserving and growing family wealth. The Court acknowledged that tax benefits alone could justify a variation if they ultimately benefitted all classes of beneficiaries, including minors and unborn persons.

General power of amendment

The Court declined to approve the introduction of a general power of amendment. It found that such a broad power could potentially be exercised in ways detrimental to minor and unborn beneficiaries, and no compelling justification was provided to support its inclusion.

Authorisation under the Trustee Act

The Court determined that the proposed amendments could be authorised under section 63A of the *Trustee Act 1958* (Vic), as they were for the benefit of beneficiaries who could not consent and constituted a fair and proper arrangement. Alternative reliance on section 63 was unnecessary.

Citation *Re EM McPherson Settlement* [2024] VSC 744 (Harris J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2024/744.html

2.8 DJG Consulting – PAYG obligations of an entity that was not the employer

Facts

David Gerrans is an accountant and registered tax agent. He is the sole shareholder and director of DJG Consulting Pty Ltd, which acts as trustee of the David Gerrans Family Trust.

DJG Employees Pty Ltd, in its capacity as trustee of the DJG Employees Trust #4 (**DJG Employees**), employs individuals who provide accountancy, tax advisory and related services to clients. DJG Employees would enter into employment contracts with these individuals. The payslips of the individual's reflected that the employer was DJG Employees and the TFN declarations of the individuals refer to DJG Employees as their employer.

DJG Employees did not have its own bank account. Accordingly, all wages, superannuation, workers compensation and other employment expenses were paid from a bank account of DJG Consulting. The BASs lodged by DJG Employees disclosed PAYG withholding amounts referable to the salary and wages paid by DJG Consulting.

On 1 July 2016, DJG Consulting entered into a service agreement with DJG Employees. Clause 2.4 of the agreement provided that the parties may pay expenses directly to third parties on behalf of DJG Employees whenever 'it', presumably DJG Employees, sees fit.

In February 2021, the Commissioner commenced a review of various entities controlled by David, which was followed by audits of DJG Employees, which commenced in February 2021, and DJG Consulting in September 2021.

The Commissioner determined that DJG Consulting had PAYG withholding obligations that had not been fulfilled for the quarterly periods 1 July 2016 to 30 June 2021, and on 17 January 2022, issued a PAYGW Assessment indicating PAYG withholding liabilities of $294,845.

The Commissioner also issued penalty assessments on 21 January 2022 and 28 January 2022 for shortfall penalty amounts totalling $129,508.60, for the periods from 1 July 2016 to 31 March 2020, and $45,799.20, for the periods from 1 April 2020 to 30 June 2021, respectively. These assessments were based on DJG Consulting making false or misleading statements due to recklessness.

Section 12-35 of Schedule 1 to the TAA states that *"An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity)".*

DJG Consulting argued that whilst section 12-35 of Schedule 1 to the TAA can apply to payments of salary or wages to an employee made by a person other than the employer, DJG Consulting did not have an employer/employee relationship with those employees because their employer was DJG Admin. It also argued that, because DJG Employees does not have a bank account, the payments made by DJG Consulting were on behalf of DJG Employees i.e. it did not pay the wages and the payments are 'constructive' only in nature.

DJG Consulting also claimed that it and DJG Employees had followed ATO advice and guidance, in the form of website content, public rulings, and advice and recommendations by ATO officers during the course of the 2011, 2015 and 2019 review and audit activities.

The Commissioner argued that on a straightforward application of the language of section 12-35 of Schedule 1 to the TAA, DJG Consulting has PAYG withholding obligations. The wording does not require DJG Consulting to be the employer.

The Commissioner claimed that DJG Consulting made false or misleading statements by not disclosing PAYG withholding obligations or liabilities in its lodgements. It also did not take reasonable care, which, considering DJG Consulting provides accountancy services and its current and former directors are qualified accountants, demonstrates a level of recklessness.

On 29 July 2022, DJG Consulting objected to the penalty assessments but not the PAYGW assessments, which the Commissioner allowed in part.

Issue

Does DJG Consulting have PAYG withholding obligations?

Decision

The Member disagreed with DJG Consulting's argument that it was not the entity that paid the wages to employees for the purposes of section 12-35 of Schedule 1 to the TAA. The existence of a direction or authorisation under the service agreement by DJG Employees to the DJG Consulting to discharge the obligation to pay wages, due to its lack of a bank account, supported the conclusion that DJG Consulting was paying the wages for the purposes of section 12-35 of Schedule 1 to the TAA. Further, by not notifying or reporting those wages to the Commissioner in its BASs, notwithstanding that it believed another entity had done so, the BASs lodged by DJG Consulting were false or misleading.

The Member held that there had been a high degree of carelessness or indifference by DJG Consulting as to its position on the application of PAYG withholding rules. This was especially so given DJG Consulting provides accountancy services and the current and former directors are qualified accountants.

The Commissioner's decision was affirmed.

Citation *DJG Consulting Pty Ltd as Trustee for the David Gerrans Family Trust and Commissioner of Taxation (Taxation and business)* [2025] ARTA 84 (General Member C Willis, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/84.html

2.9 Baya Casal – genuine redundancy

Facts

Florencia Baya Casal was employed by the Ivanhoe Grammar School as an early learning centre assistant. She was employed on a part-time basis for 34.56 hours per week.

On 5 October 2021, the school notified Florencia that the structure of the early learning centre was to be remodelled, with Florencia's part time hours to decrease and working days changed. The skills and duties for the remodelled roles were similar.

Florencia was advised that she was eligible to be redeployed to the remodelled early learning centre roles, or could take a redundancy. Had she accepted the role, her hours would have been reduced by 20% to 40% and her remuneration would have been reduced by approximately 20% to 40%. Florencia accepted redundancy, as the days and numbers of hours offered were not acceptable to her.

On or around 9 December 2021, Florencia received a payment of $15,327 from the school on termination of her employment. The school treated the payment to Florencia as an employment termination payment (**ETP**), rather than as a genuine redundancy payment.

Under section 83-175(1) of the ITAA 1997, a genuine redundancy payment is so much of a payment received by an employee who is dismissed from employment because the employee's position is 'genuinely redundant'

as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the dismissal.

If the payment was a genuine redundancy payment, the entire amount would be non-assessable non-exempt income and excluded from Florencia's assessable income. ETPs are taxed differently from genuine redundancy payments and do not receive the same tax-free concession.

Florencia argued her position was genuinely redundant. In support of her argument, she referred to TR 2009/2, noting that where there is a reallocation of duties and functions from one position to another as part of an organisational restructure, the former position is redundant. Florencia also argued the alternative positions offered to her were not appropriate because they involved a material reduction in her hours and remuneration, and her working days changed. In support of her argument, she pointed to a series of cases brought under the *Fair Work Act 2009* (Cth) which had held that a meaningful reduction in remuneration to be inherent in redundancy.

The ATO argued that there is only a genuine redundancy if an employee's position ceases to exist, and that if an employer still has a job that it wishes the employee to perform, particularly if the duties of that job are not too dissimilar from the existing one job, there may not be a genuine redundancy. The ATO claimed that Florencia could have performed one of the remodelled roles but chose not to do so. Therefore, the payment was not a genuine redundancy payment because Florencia's position was not genuinely redundant.

On 21 December 2021, Florencia applied to the ATO for a private ruling on the question of whether her payment ought to be treated, and taxed, as a genuine redundancy payment.

On 26 April 2022, the ATO ruled that the payment was an ETP and not a genuine redundancy payment. Florencia objected to the private ruling decision on 10 June 2022.

On 1 December 2022, the ATO issued the objection decision, in which the objection was disallowed and the private ruling confirmed.

Issue

Was Florencia's position genuinely redundant?

Decision

Justice McEvoy considered that Florencia's position became genuinely redundant.

His Honour held that redundancy arises when an employer no longer requires a particular job to be performed by anyone. Redundancy is not about removing a particular employee but about the position itself ceasing to exist or being so significantly altered that it is, in effect, a different job.

Justice McEvoy accepted that when an employee's role is altered to the extent that their hours and remuneration are materially reduced, the job they once performed no longer exists in its original form. His Honour emphasised that a "job" is not merely a set of tasks but a structured collection of functions, duties, and responsibilities—including work hours and remuneration. A meaningful reduction in hours and pay, therefore, represents a fundamental change that can amount to redundancy.

Justice McEvoy dismissed the ATO's argument that industrial cases should be applied with caution in the tax context, noting that that the concept of redundancy is consistent across both domains.

Ultimately, the Court held that Florencia's position was genuinely redundant due to the material reduction in hours and pay. The alternative roles offered were not merely reallocations of duties but fundamentally different positions. Since redundancy is concerned with whether the job in its original form continues to exist, and not

just whether an employee's tasks persist in some altered capacity, Florencia's position was properly characterised as redundant.

The appeal was allowed.

Citation *Baya Casal v Deputy Commissioner of Taxation* [2025] FCA 87 (McEvoy J, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/87.html

3. Cases in brief

3.1 Ausnet Services – 615 roll-over

AusNet had been inserted as the new holding company of a previously stapled group, acquiring all shares in three entities, Transmission, Finance, and Distribution, through a prearranged sequence of transactions on the same day. See our March 2024 Tax Training Notes for a full summary of the facts in this case.

The case concerned that the application of the CGT rollover in Division 615 of the ITAA 1997 to the exchange of shares in Distribution for the shares in AusNet. The happened last sequentially in the transaction.

AusNet argued that the CGT roll-over in Division 615 of the ITAA 1997 did not apply, on the basis that the transactions were not a "scheme for reorganising its affairs", which is referred to in Division 615, given that the exchange of shares in Distribution was part of a transaction involving shares in Transmission and Finance and, accordingly, it was not limited to reorganising the affairs of Distribution.

AusNet also argued that the statutory ratio test in section 615-20(2) of the ITAA 1997 was not met. The statutory ratio test in section 615-20(2) of the ITAA 1997 requires that each shareholder's proportionate interest in the interposed company after the restructure, measured by market value, must be equal to their proportionate interest in the original entity before the restructure. AusNet contended this was not met because, before the final step of the restructure, it had already issued shares in exchange for Transmission and Finance, which artificially increased the value of pre-existing shares. It contended that this "boost" distorted the required ratios, preventing the proportionality between shareholders' interests before and after the restructure.

AusNet also contended that the 'boost' meant that the original interest holders also received something else for their shares in Distribution, as the shares in AusNet had a value that reflected the assets of Finance and Distribution and this was something else. Section 615-5(1)(c) of the ITAA 1997 requires that exchanging shareholders receive only shares in the interposed company ("and nothing else") in exchange for their shares in the original entity.

If the roll-over did not apply, AusNet would receive a market value cost base for the shares in Distribution.

The primary judge found that the Division 615 roll-over applied, dismissing AusNet's argument that the restructure went beyond a reorganisation and functioned as a broader amalgamation. The Court also rejected AusNet's claim that the restructuring created a "boost" in the value of pre-existing AusNet shares that resulted in the shareholders received something other than just new shares in exchange.

On appeal, the Full Federal Court agreed with the primary judge, finding as follows:

<u>Statutory ratio test</u>

The key question was whether the statutory ratio test necessitated that only shares issued under the scheme be included in the calculation, or whether all shares held by exchanging members in the interposed company (including those acquired outside the scheme) should be considered. AusNet contended that the provision should be interpreted literally, meaning that all shares held by an exchanging member in the interposed company (including any acquired before the scheme) must be counted. If correct, this would mean the rollover relief under Division 615 only applies where the interposed company is a "shelf company" with no pre-existing shareholders.

The Court noted that the statutory text must always be read in its context to determine its legal meaning beyond its grammatical meaning and in this case noted the following:

1. section 615-20(1)(b) (which requires shareholding percentages to remain proportionate) is clearly focused on shares issued under the scheme. It would be incongruous if s 615-20(2) were to suddenly widen its focus to include all shares ever held by an exchanging member;
2. the drafting style of Division 615 sometimes omits words for brevity and, therefore, requires careful interpretation;
3. earlier iterations of the law (such as s 124-365(3) and s 160ZZPA(1)(m)) contained clearer wording that restricted the ratio test to shares issued under the scheme;
4. there was no evidence that Parliament intended to change this policy when reformulating Division 615.

The Court held that the reference to "each exchanging member's shares in the interposed company" in section 615-20(2)(a)(i) should be read as referring only to shares issued under the scheme and, therefore, the market value ratio requirement should only compare the values of shares exchanged under the scheme, ensuring that pre-existing holdings do not distort the calculation.

A scheme for reorganising the affairs of Distribution?

The Court noted that the terms "reorganising" and "affairs" are not technical terms under tax law. They are broad terms that refer to any structured change in ownership or corporate structure. Section 615-10(1) provides that the scheme must involve a "change of ownership" of shares or units, which defines the type of reorganisation needed.

The Court noted that the scheme transformed Distribution from a widely held company into a wholly owned subsidiary of AusNet. No fundamental changes occurred to Distribution's business operations, asset base, or relationships—only the ownership structure changed.

The Court noted that it does not matter if the affairs of another entity are affected. In any corporate reorganisation under Division 615, the interposed company (AusNet here) will always be affected because it must acquire shares and issue new shares. If AusNet's argument were correct, no scheme would ever qualify, as every interposed company is affected by the reorganisation. The law does not require that only one entity's affairs be affected—only that there is a reorganisation of the original entity's affairs.

Nothing else condition

The Court held that the phrase "in exchange for shares … (and nothing else)" refers to the consideration received for the transfer—not indirect economic effects. The test is whether the shareholder received anything additional from the acquiring company (AusNet), not whether market conditions led to a change in share value. The legislative history of former section 160ZZPA(1)(b) (which referred explicitly to "consideration") supported this view.

COMMENT – the decision on the 'nothing else condition is relevant to the ATO's approach to back-to-back rollovers. The ATO has previously indicated a view that a back-to-back rollover can result in the conditions for the earlier rollover not being satisfied where the earlier rollover contains a nothing else condition. It is difficult to see how the ATO will continue to maintain such a view. However, the ATO has also indicated that it considers Part IVA could be applied to back-to-back rollovers. The ATO has had advice under development for back-to-back rollovers for a number of years and the ATO website currently states that the expected completion of that advice is in early 2025. The website page can be found here: https://www.ato.gov.au/about-ato/ato-advice-and-guidance/advice-under-development-program/advice-under-development-capital-gains-tax-issues#ato-3953BacktobackCGTrollovers

Citation *AusNet Services Limited v Commissioner of Taxation* [2025] FCAFC 21 (Logan, Thawley and Kennett JJ)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2025/21.html

3.2 Tabcorp – TOFA

Tabcorp Maxgaming Holdings Limited (**Tatts**) sought to claim a deduction for a $1.49 billion loss in the income year ended 30 June 2013, arguing that a loss arose from 'financial arrangement' under the Taxation of Financial Arrangements (**TOFA**) regime arose when its gaming operator's licence expired in 2012. The alleged arrangement consisted of a contingent right to receive a terminal payment from the Victorian government, contingent on a new gaming operator's licence being issued to another entity, although this could never occur from 23 June 2009 due to a legislative change removing the possibility of the issue of a new gaming operator's license.

Tatts contended that the payments it had made over many years, including statutory licence fees and consideration paid in a corporate restructure, were financial benefits provided under this arrangement, thereby justifying the deduction. The TOFA regime provides for a loss from a financial arrangement to be deducted where the loss arises from the disposal or complete cessation of the financial arrangement.

The case turned on whether the claimed right was a 'financial arrangement' under section 230-45 of the ITAA 1997. Section 230-45 of the ITAA 1997 defines a financial arrangement as an arrangement under which a party has:

1. a cash-settlable legal or equitable right to receive a financial benefit;
2. a cash-settlable legal or equitable obligation to provide a financial benefit; or
3. a combination of such rights and obligations.

However, a financial arrangement does not exist if there are additional non-cash-settlable rights, or rights or obligations that are not financial benefits, and those rights and/or obligations are not insignificant in comparison to the cash-settlable rights.

Section 230-85 of the ITAA 1997 clarifies that contingent rights and obligations (those dependent on future events) still qualify as rights and obligations under Division 230.

Tatts argued that it only had a financial arrangement after the expiry of its gaming operator's licence at midnight on 15 August 2012 as:

1. before 15 August 2012, no financial arrangement existed because its rights and obligations included operating under a gaming licence, which prevented the application of s 230-45 due to the exclusion under paragraphs (d) to (f);
2. after 15 August 2012, when its gaming operator's licence expired, it had a financial arrangement consisting of its contingent right to receive a terminal payment under Clause 7 of a 1995 agreement or section 3.4.33 of the Gambling Regulation Act 2003 (Vic); and
3. this right was contingent on a new gaming operator's licence being granted to another entity within six months.

A critical issue was whether the right Tatts relied upon survived legislative changes that restructured the gaming industry in Victoria.

The Court dismissed Tatts's appeal for the following reasons:

1. whilst ever the gaming operator's licence existed, there could not have been a "financial arrangement" under section 230-45 of the ITAA 1997 due to the exclusion under paragraphs (d) to (f) relating to other not insignificant non-cash settlable rights;
2. Tatts' gaming licence created a right to operate within a State-sanctioned duopoly, but this right ended with the 2009 legislative changes and hence when the gaming licence came to an end in 2012, there was no longer any right to receive any financial benefits, contingent or otherwise; and

3. because the conditions for payment could never be met when the licence came to an end, Tatts did not have a financial arrangement under section 230-45 of the ITAA 1997.

COMMENT – a unique issue in this case was that Tatts had originally deducted a large portion of the outgoings that formed part of the loss under section 8-1 of the ITAA 1997 at the time that the outgoings were incurred. If the arrangement was a financial arrangement, a deduction for those outgoings should not have been allowed under section 8-1 in accordance with section 230-20, but the Commissioner was now out of time to amend Tatts's assessments for the earlier years. However, as the Court found that since no financial arrangement existed, TOFA did not apply and the previous deductions under section 8-1 remained valid.

Citation *Tabcorp Maxgaming Holdings Limited v Commissioner of Taxation* [2025] FCA 115 (Thawley J)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/115.html

3.3 One Tree – appointment and resignation of directors

Louise Lye was the sole director and shareholder of A & B Plant Management Services Pty Ltd, which operated an agricultural business and acted as trustee of the A&B Family Trust. In June 2016, she resigned as director, and her husband, Colin Lye, was appointed in her place. Colin was declared bankrupt in January 2017, after which he convinced Louise to reassume the directorship on 1 April 2017, while he continued to be involved in the company's affairs.

Colin was discharged from bankruptcy on 18 January 2021. Louise claimed that they agreed she would resign as director on 1 July 2021, but Colin failed to file the necessary paperwork with ASIC. Between November 2021 and February 2022, Colin engaged in grain trading contracts totalling $800,000 on behalf of A&B. In March 2022, One Tree Agriculture Pty Ltd served A&B with a statutory demand for outstanding debts. Only then did Colin arrange for ASIC to be notified of the directorship change, which was officially recorded on 27 April 2022.

A&B failed to comply with the statutory demand and was wound up in insolvency on 8 July 2022. One Tree pursued Louise and Colin for insolvent trading. Louise sought a court order to backdate her resignation to 1 July 2021, which would absolve her of liability. However, the Court found that Colin was never validly appointed as a director because he had not provided written consent, making Louise's resignation ineffective under section 203AB(1) of the Corporations Act. As A&B would have been left without a director, she legally remained in the role. The Court also found no evidence that she ceased acting as a director after 1 July 2021. Accordingly, her application was denied.

TRAP – Director appointments and resignations require more than just lodging ASIC forms. Under the Corporations Act, a director must provide written consent before their appointment is valid (s 201D). A resignation is ineffective if it leaves the company without a director (s 203AB). Even if a director intends to resign, they remain legally responsible until proper procedures are followed, including board resolutions and ASIC notifications within 28 days. Failure to comply can expose individuals to liabilities, including insolvent trading claims.

Citation *One Tree Agriculture Pty Ltd v Lye* [2025] FCA 126 (Derrington J, Queensland)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2025/126.html

3.4 Benson Healthcare – extension of time to lodge application for review of decision

In 2020, Benson Healthcare Enterprises Pty Ltd claimed an entitlement to a payment under the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (Cth) (**CFB Act**). The ATO decided

Benson was not entitled to the payment, which was the subject of an objection lodged in April 2021. The objection was disallowed in July 2021 and Benson did not pursue a review of that decision at that time.

In late 2023, the TPB decided to terminate the registration of Warren Seeto, a former director of Benson, as a tax agent, in part because he had caused Benson to enter a scheme to obtain a payment in contravention of the integrity provisions within the CFB Act. Warren commenced separate proceedings in 2024 to review the decision to deregister him. Warren believed to fully argue his case he needed to challenge the decision to disallow the objection regarding the CFB Act payment.

Under section 19 of the *Administrative Review Tribunal Act 2024* (Cth), a person may apply to the tribunal to extend the period during which the person may apply for a review of a decision. The section does not prescribe the criteria that must be considered. However, the matters set out by Wilcox J in *Hunter Valley Developments Pty Limited v Cohen* (1984) 3 FCR 344 have been applied by courts and tribunals in relation to the exercise of a statutory discretion to extend time. These matters include:

1. length of, and explanation for, the delay in making the application;
2. other action taken by the applicant;
3. prejudice to the respondent;
4. public interest considerations and fairness;
5. strength of the applicant's case;
6. fairness to other parties in like circumstances; and
7. other matters.

While Benson could demonstrate that it may have an arguable case, the Member was not satisfied with the explanation provided for the delay in seeking the review. The Member was not convinced by the contentions made that allowing the review was in the public interest and fairness, which Benson tried to claim would support the transparency and quality of government decision-making and that it would be fair to allow Warren to challenge the disciplinary proceedings.

Benson was not given an extension to apply for a review of the objection decision.

Citation *Benson Healthcare Enterprises Pty Ltd and Commissioner of Taxation (Practice and Procedure)* [2025] ARTA 19 (General Member C. Willis, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/19.html

3.5 Lemezina Discretionary Trusts – landholder duty

GLDT Pty Ltd and Zina Pty Ltd, were trustees of two discretionary trusts, GLDT and MLDT, which each held equal 50% of the units in the Lemezina Investment Unit Trust (**LIUT**). LIUT had significant landholdings in the ACT, and in early 2009, its net value was $18.27 million.

In March 2009, a deed of variation split LIUT's assets between GLDT and MLDT, with each acquiring 100% beneficial interest in specific properties, instead of receiving 50% of all LIUT assets on a winding-up. The variation split the trust's assets, allocating specific properties to each unit holder while maintaining their equal percentage interests in the trust. The Commissioner viewed this as a significant interest acquisition in a landholder and imposed landholder duty and penalties totalling over $3.4 million.

In effect, the Commissioner was arguing that, for the purpose of determining whether a relevant acquisition in a landholder is made, it is sufficient that a person's interest in a particular landholding increases, even though the amount of land, by value, they are entitled to if all the property of the landholder was distributed remains the same.

On review to the ACT Civil and Administrative Tribunal (ACAT), the ACAT disagreed with the Commissioner for ACT Revenue, allowing the objections in full and setting aside the duty and penalty tax. The Commissioner appealed the ACAT's decisions to the ACAT appeal panel.

On appeal, the Commissioner maintained that the transaction constituted an "acquisition" under section 84 of the *Duties Act* because it altered the rights attached to the units. The Commissioner also argued that the variation resulted in an interest in a landholder as defined in section 83. However, the appeal panel upheld ACAT's decision, affirming that duty was only payable on an increase in interest, not on pre-existing entitlements. The ACAT found that since the taxpayers retained their 50% share of the trust's assets both before and after the variation, no dutiable transaction occurred. The Commissioner's appeals were dismissed, as were the taxpayers' cross-appeals concerning costs.

COMMENT – there is a question as to whether the 'trust split' here would be a dutiable transaction in New South Wales outside the landholder duty provisions. From 19 May 2022, dutiable transactions in New South Wales include a change in beneficial ownership. The meaning of change in beneficial ownership is broad but it does not include an 'excluded transaction' unless the excluded transaction is part of a scheme or arrangement that, in the Chief Commissioner's opinion, was made with a collateral purpose of reducing the duty otherwise chargeable under this Chapter. An 'excluded transaction' includes 'the abrogation or alteration of a right relating to a unit in a unit trust scheme.'

Citation *Commissioner for ACT Revenue v GLDT Pty Ltd ACN 607 932 799 as trustee of the George Lemezina Discretionary Trust; Commissioner for ACT Revenue v Zina Pty Ltd ACN 008 586 016 as trustee for the Michael Lemezina Discretionary Trust (appeal)* [2025] ACAT 7 (President MT Daniel and Senior Member Meagher SC, Australian Capital Territory)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2025/7.html

3.6 Conexa – landholder duty

Conexa Sydney Holdings Pty Ltd has been unsuccessful in its appeal to the Court of Appeal against the decision of Richmond J in the Supreme Court of New South Wales in *Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 628 (see our June 2024 Tax Training Notes).

The case concerned the acquisition by Conexa of shares in SGSP Rosehill Network Pty Ltd and whether or not the value of 19-km pipeline constructed and owned by SGSP Rosehill Network Pty Ltd to facilitate the supply of recycled water was to be included for determining the duty payable by Conexa on the acquisition of the shares. SGSP Rosehill Network Pty Ltd was already a landholder for the purposes of the *Duties Act 1997* (NSW) without regard to the value of the pipeline.

SGSP Rosehill Network Pty Ltd did not own the land in which the pipeline was constructed and installed but under section 64 of the *Water Industry Competition Act 2006* (NSW) (**WIC Act**) it owned the pipeline.

For the value of the pipeline to be included for the purpose of assessing landholder duty on the acquisition of shares by Conexa, it had to be the case that the pipeline was either land or goods. Conexa contended the pipeline, while a fixture under common law principles, was not 'land' as the ownership of the pipeline had been severed from the ownership of the land by section 64 of the WIC. Further, Conexa contended that as the pipeline was otherwise a fixture, it was not 'goods' as only moveable chattels are 'goods'. According to Conexa, the pipeline was a *sui generis* property right that was neither land nor goods.

At first instance, Richmond J considered that he was bound by the decision of the Court of Appeal in *Chief Commissioner of State Revenue v Shell Energy Operations No 2 Pty Ltd* (2023) 116 ATR 337, which had concluded that an energy infrastructure asset (a power station in that case) was not land due to the statutory

severance of ownership and that, as such, the pipeline here was also not land. However, Richmond J held that the pipeline was goods was goods included chattels legally severed from land.

Given the decision in *Shell Energy*, Conexa's appeal to the Court of Appeal was heard by a 5-member bench of the Court, as opposed to the usual 3-member bench. The Court dismissed Conexa's appeal, finding as follows:

1. the pipeline was 'land' under the Duties Act for the following reasons:
   (a) the terms 'land holdings' and 'interest in land' are broadly and non-exhaustively defined in the Duties Act. Section 147(1) states that a land holding is an 'interest in land', excluding those held by mortgagees, chargees, or secured creditors. Clause 4 of the Dictionary to the Duties Act expands on what constitutes an interest in land, including mining leases and fixtures affixed under statutory authority;
   (b) at common law, affixed structures typically become part of the land (Holland v Hodgson [1872] UKLawRpCP 24). Despite the pipeline's separate ownership, its burial in the ground and intended permanence made it a fixture. The Court referred to cases such as Chief Commissioner of State Revenue v Pacific National (ACT) Limited (2007) 70 NSWLR 544 and Metropolitan Railway Co v Fowler [1893] UKLawRpAC 39, which upheld that tunnels and underground infrastructure can constitute land;
   (c) "land" is not merely a two-dimensional surface but includes the subsoil, airspace, and structures affixed to it. The pipeline occupied a distinct stratum of land, akin to a subterranean tunnel;
   (d) section 64(1) of the WIC Act ensures that a licensed network operator retains ownership of its infrastructure even when located on another's land. Section 64(3) provides that these rights override the indefeasibility provisions of the Real Property Act 1900 (NSW), conferring a statutory interest in land by granting the pipeline owner exclusive rights to occupy and control the stratum where the pipeline is laid.
2. in the event that the pipeline was not 'land', it was 'goods' under the Duties Act for the following reasons:
   (a) section 163K of the Duties Act defines "goods" broadly and excludes only specific categories such as stock-in-trade, materials for manufacture, and registered motor vehicles;
   (b) the Duties Act applies landholder duty to both land and goods, reinforcing that "goods" should not be narrowly confined to movable chattels;
   (c) if the WIC Act did not confer an interest in land, the pipeline would have been "statutorily severed" and classified as goods, noting that in Shell Energy (No 1) it was held that infrastructure legally severed from land resumes its previous status as chattels or goods;
   (d) the pipeline, though embedded, was not immovable—it could be disassembled and valued on a break-up basis; and
   (e) excluding the pipeline from both "land" and "goods" would create a legal gap, inconsistent with the purpose of the Duties Act.

COMMENT – under the *Duties Act 1997* (NSW), only landholdings are taken into account in determining whether the unit trust scheme or company is a landholder but, once the entity is a landholder, both landholdings and goods are included for determining the landholder duty payable on the relevant acquisition. The approach is similar in most States and Territories.

Citation *Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue* [2025] NSWCA 20 (Ward P, Payne JA, Stern JA, McHugh JA and Basten AJA, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2025/20.html

3.7 Pascuzzo – first home buyer duty exemption

Daniel Pascuzzo purchased an apartment in Sydney in early 2019 with plans to rent it out initially and live there later as an owner-occupier. Daniel sought approval for a loan from his employer, which noted the apartment

would be an investment for 2-3 years and then occupy it himself. This was because Daniel was not able to service the loan an owner-occupier. Daniel intended to change the status of the loan once he was ready to move in and would have included his partner on the loan to make it serviceable. Settlement of the purchase occurred on 23 May 2019.

Daniel settled the apartment purchase in May 2019 and continued living with his parents. He leased the apartment from June 2019 to April 2020, while still residing with his parents. In March 2020, Daniel started working from home due to COVID-19.

After the tenant vacated the apartment in April 2020, Daniel updated his address the RMS to be the apartment and had electricity connected in his own name. Daniel made improvements to the apartment in mid-2020 and continued to save money by spending considerable time in the family home with his parents. He continued to work from the family home. Daniel's electricity usage at the apartment was low during this time.

The Chief Commissioner determined that Daniel was not entitled to the first home buyer exemption on the basis that Daniel had not occupied the apartment as his principal place of residence for the required time under section 76 of the *Duties Act 1997* (NSW). The requirement in section 76 is that the property be occupied as the principal place of residence of the person for a continuous period of 6 months commencing within 12 months of settlement of the purchase.

In January 2024 Daniel was reassessed for transfer duty, penalty tax and interest. Daniel objected to the reassessment, but the Chief Commissioner's decision was upheld. Daniel then applied to the NCAT for a review of the reassessment.

Despite limited time spent at the apartment, the NCAT concluded that the apartment was Daniel's principal place of residence. This is supported by the fact that he slept there, updated his address with authorities, and gradually made the apartment more liveable, even though the family home played a significant role during work periods. The NCAT emphasised that Part 8 of the Duties Act is aimed to assist first-time homebuyers and that the relevant criteria should not be applied in a way that prevents access to exemptions for first-time buyers, especially when circumstances are unique.

The NCAT did not considered that the terms of loan should be determinative of the position and Daniel had provided an adequate explanation for why the loan was taken out as an investment loan.

COMMENT – this is another in a series of recent cases where the NCAT has interpreted 'principal place of residence' generously (see, for example, *Anderson v Chief Commissioner of State Revenue* [2024] NSWCATAD 329 from our November 2024 Tax Training Notes).

Citation *Pascuzzo v Chief Commissioner of State Revenue* [2025] NSWCATAD 49 (Senior Member EA MacIntyre, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2025/49.html

3.8 New Country Developments – duty on transfer to beneficiary

New Country Developments Pty Ltd owned land in Western Australia, which it acquired under a 2018 Heads of Agreement from the original landowners. As part of the agreement, New Country Developments was to develop the land, subdivide it, and return certain lots to the original owners (**Owners Lots**). The agreement provided that the Owners Lots were to be held by New Country Developments on trust for the original owners and the original owners were to retain the beneficial interest in the Owners lots.

On 21 September 2018, a declaration of trust was signed on behalf of New Country Developments, in which it was stated that New Country Developments would hold the Owners Lots on trust for the original owners and that New Country Developments did not have any beneficial interest in the Owners Lots.

On 7 November 2019, the original owners executed a transfer of the land to New Country Developments with duty assessed for $16,360 (**First Assessment**).

On 24 February 2021, a transfer was executed to transfer the Owners Lots from New Country Developments to the original owners. The transfer was assessed for duty of $51,885 (**Second Assessment**).

On October 2021, the transfer of the land in 2019 to New Country Developments was reassessed for duty with the amount being $37,465 plus interest less the duty paid under the First Assessment.

New Country Developments sought a review of these assessments in the State Administrative Tribunal (**SAT**), contending that the dutiable for the property transferred in 2019 should exclude the Owners Lots and that the transfer of the Owners Lots back to original owners should have been assessed at the nominal duty rate under section 116 or section 118 of the *Duties Act 2008* (WA).

Section 116 provides a nominal duty exemption for the transfer of dutiable property from a trustee to a beneficiary if there is no consideration and the transfer conforms with a duty-endorsed trust declaration.

Section 118 applies nominal duty to a transfer back to the original owner if the property was initially transferred to a bare trustee and no other party held a beneficial interest in it. If nominal duty is payable on the transfer back, nominal duty is also payable on the original agreement to transfer or transfer to the bare trustee.

The SAT rejected the arguments of New Country Developments. The SAT held that section 118 did not apply as part of the land was transferred to New Country Developments for its own benefit and not solely as trustee for the original owners and, therefore, was not a bare trustee. Further, the property transferred back was not the same as the property transferred to New Country Developments as only the Owners Lots were transferred back. Section 118 of the was also precluded from applying as New Country Developments' right of indemnity out of trust assets was not excluded and, therefore, another person other than the original owners had a beneficial interest in the trust property between the original transfer and transfer back.

Section 116 also did not apply because the trust declaration was not duty endorsed, which is a requirement for the exemption.

Since the transactions did not qualify for nominal duty, the SAT upheld the general duty rate and dismissed the company's application.

COMMENT – the exemption in section 116 of the Duties Act requires, in effect, that the duty be paid at the ad valorem rate on the declaration of trust. The provision exists to prevent double duty when the dutiable property is transferred to a beneficiary of the trust in accordance with the terms of the trust. If duty was not paid on the declaration of trust, the exemption does not apply.

Citation *NEW COUNTRY DEVELOPMENTS PTY LTD and SENIOR REVENUE CONSULTANT AS DELEGATE OF THE COMMISSIONER OF STATE REVENUE* [2025] WASAT 9 (Judge F Vernon, Deputy President, Perth)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASAT/2025/9.html

3.9 Caloutas Family Trust – land tax on trust property

The Caloutas Family Trust was established in October 1995. The trustees of the trust were Effie Caloutas and John Caloutas and their two sons, Nick Caloutas and Peter Caloutas (**Trustees**). The trust operated various businesses and owned a motel situated at 85 Gavan Street, Bright.

Various family members were the registered proprietors (Registered Proprietors of other parcels of land as follows:

1. Nick was the registered proprietor of the property situated at 19 Butler Street, Preston, from October 1992 until it was sold in 2015;
2. John and Effie were the registered proprietors of one of the three parcels of land comprising the property situated at 366-368 Maroondah Highway, Healesville, from September 1982; and
3. Effie was the registered proprietor of the other two parcels of land from October 1992.

The Commissioner became aware that the rental income from the properties referred to above was being reported as income of the Caloutas Family Trust for income tax purposes. It was also noted that in 2014, a mortgage over the Butler Street property was provided as security for a loan from the NAB to the trustees, in their capacity as trustees for the trust, to enable the purchase of the property situated at 370-372 Maroondah Highway.

The Commissioner reassessed the land tax liabilities for the 2014, 2015 and 2016 land tax years and included penalty tax on the basis that the properties were owned by the Registered Proprietors as trustees of the Caloutas Family Trust and, therefore, subject to the trust surcharge land tax rates in Victoria and aggregated with other land owned for the Caloutas Family Trust.

Section 46A of the *Land Tax Act 2005* (Vic) provides that a person who holds land as trustee is liable for land tax at the trust surcharge rate. There is then a mechanism under section 46B of the Land Tax Act to avoid the trustee rate if a beneficiary is nominated to the State Revenue Office, with the effect that both the trustee, at the ordinary rate, and beneficiary are assessed, albeit a credit under section 46D of the Land Tax Act is given to avoid double tax. Section 46B deems the beneficiary to also be the 'owner' of the land for the purpose of the Land Tax Act. However, if no nomination is made by the trustee, there is no deeming of the beneficiary as an 'owner' of the land.

The Registered Proprietors claimed the properties were not held for the Caloutas Family Trust. In particular, Nick claimed the family's accountant made an error with the trust's tax returns, and that, in any event, what mattered was who the registered proprietors were. Nick also argued, in respect of the penalty tax applied, that it was a "cash grab" and complained that his own taxes were being used to fund the proceeding.

The Commissioner argued that Nick's evidence should be rejected on the basis that the ATO was not informed of the error, and the accountant was not called to give evidence. The Commissioner referred the NCAT to the decision of *Zheng v Sunning Pty Ltd* [2016] VCAT 809 as support for the proposition that a taxpayer cannot assert one thing to the ATO and another thing to the State Revenue Office. However, following questions from the NCAT, the Commissioner accepted that this was merely a rebuttable presumption.

The NCAT held that the Registered Proprietors held the properties bare or fixed trust for the trustees, who in turn held the equitable title for the beneficiaries of the Caloutas Family Trust. Accordingly, the trustees had an 'unqualified right' to the properties and were the 'owners' for land tax purposes. However, the Registered Proprietors were also owners of the properties for land tax and the question in this scenario is who should be assessed.

The NCAT considered that the appropriate person to assess in this scenario, particularly as the arrangements had not been structured to avoid aggregation of land, was the Registered Proprietors as the registered proprietors of the properties and, as such, while the trust surcharge rate should apply, the properties of each Registered Proprietor should not be aggregated with the land held by the other Registered Proprietors or the Trustees.

The Senior Member set aside the reassessments and remitted them to the Commissioner for reconsideration, including as to whether penalty tax should be imposed.

Citation *Caloutas atf Caloutas Family Trust v Commissioner of State Revenue (Review and Regulation) [2025] VCAT 82* (R Tang AM, Senior Member)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2025/82.html

3.10 Other tax and superannuation related cases published from 5 Feb to 12 March 2025

Citation	Date	Headnote	Link
QWYN and Commissioner of Taxation (Taxation and business) [2025] ARTA 83	5 February 2025	TAXATION – INCOME TAX – payments from Public Sector Superannuation Scheme – whether payments should be classified as a lump sum or as a superannuation income stream benefit – whether payments are a pension under the Superannuation Industry (Supervision) Act 1993 – whether definition of pension in Superannuation Industry (Supervision) Act includes the ordinary meaning of the word pension – decision under review affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/83.html
World Brand Importers Pty Ltd and Commissioner of Taxation (Practice and procedure) [2025] ARTA 95	11 February 2025	PRACTICE AND PROCEDURE – TAXATION – summons – objection to produce summonsed documents – summonsed parties subject of audit – legal professional privilege – documents in summonsed party's possession, custody or control – documents do not exist – Commissioner's model litigant obligations	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/95.html
Lecky and Tax Practitioners Board (Taxation and Business) [2025] ARTA 119	25 February 2025	Tax Agents -Breach of TASA Code of Professional Conduct -— whether the applicant provided tax agent services competently, whether the applicant is a fit and proper person- reviewable decision varied - suspend rather than terminate for a period of two years, or until the applicant has filled all of the outstanding income tax and business activity statements for the tax agents business and the partnership the tax agent is a partner in- order the applicant complete a course of education that satisfies the Board's requirement for BAS agents of 30 hours of continuing professional education.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/119.html
Murphy and Australian Securities and Investments Commission (Taxation and business) [2025] ARTA 75	3 March 2025	SUPERANNUATION – Applicant disqualified from being an approved auditor of Self- Managed Superannuation Funds (SMSFs) – Applicant's failure to comply with conditions imposed by Respondent (ASIC) on registration as an SMSF auditor – Applicant's failure to	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2025/75.html

Citation	Date	Headnote	Link
		comply with applicable auditing standards and reporting requirements – whether the Applicant is a fit and proper person – specific and general deterrence considerations – Reviewable Decision to disqualify the Applicant affirmed	
Qasim and Commissioner of Taxation (Practice and procedure) [2024] ARTA 295	6 March 2025	PRACTICE AND PROCEDURE – application for extension of time – application for review of objection decision ten years out of time – GST credits and penalties – Hunter Valley principles – whether examination of relevant circumstances support the grant of an extension of time – application refused.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/ARTA/2024/295.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		
Treasury Laws Amendment (Tax Incentives and Integrity) 2024	28/11				

4.2 Distribution of superannuation interests under the Family Law Act

On 20 February 2025, the *Family Law (Superannuation) Regulations 2025* and the *Family and Other Laws (Superannuation) (Repeal and Consequential Amendments) Regulations 2025* were made by the Governor-General. Both regulations commence on 1 April 2025.

These new regulations repeal and replace the *Family Law (Superannuation) Regulations 2001*. The current regulation, due to sunset on 1 April 2025, gives effect to the distribution of superannuation interests under Parts VIIIB and VIIIC of the *Family Law Act 1975* (Cth) by prescribing the methods for valuing superannuation interests, specifying how payment splits are to be carried out, and detailing the information trustees must provide to the parties involved.

Family Law (Superannuation) Regulations 2025

The superannuation splitting framework under the new regulation remains substantially the same as the framework under the current regulations. However, the new regulation contains several changes that clarify provisions and ensure that superannuation splitting arrangements keep pace with developments in superannuation products and with broader superannuation policy.

Family and Other Laws (Superannuation) (Repeal and Consequential Amendments) Regulations 2025

This regulation makes consequential amendments to the *Corporations Regulations 2001*, *Income Tax Assessment Regulations 2021*, *Judges' Pensions Regulations 1998*, *Retirement Savings Accounts Regulations 1997*, *Superannuation Contributions Tax (Assessment and Collection) Regulations 2019* and *Superannuation Industry (Supervision) Regulations 1994*.

The purpose of this new regulation is to facilitate the smooth repeal of the current regulation and commencement of the remade regulations. As such, this new regulation removes references to the current regulation and replaces them with references to the new regulations. This new regulation does not give effect to any policy change.

w https://www.legislation.gov.au/F2025L00178/asmade/text
w https://www.legislation.gov.au/F2025L00179/asmade/text

5. Rulings

5.1 Division 7A anti-refinancing rules

The ATO has published draft *Taxation Determination TD 2025/D2* concerning the application of section 109R of the ITAA 1936 in situations involving notional loans. This determination clarifies how certain loan repayments to private companies should be disregarded when assessing whether a loan has been repaid or if a minimum yearly repayment has been made under Division 7A.

Section 109R is an anti-avoidance measure within Division 7A, designed to prevent shareholders and their associates from using artificial loan repayments to avoid deemed dividends. Specifically, it disregards certain repayments of loans to private companies if those repayments are made using funds obtained through new loans from the same private company. This ensures that taxpayers cannot cycle funds through a company to create the appearance of loan repayments while effectively retaining access to company profits in a tax-free manner.

Section 109R applies where:

1. a reasonable person would conclude that the entity making the repayment intended to reborrow a similar or larger amount from the same company; or
2. the entity had already obtained a loan of a similar or larger amount before making the repayment, and a reasonable person would conclude that the loan was obtained to fund the repayment.

The ATO's view is that section 109R applies not only to direct loans but also to notional loans created through interposed entity arrangements under sections 109T and 109W. These provisions apply where a private company provides funds to an interposed entity, which in turn lends the money to the ultimate borrower. If a reasonable person would conclude that the private company's loan to the interposed entity was made as part of an arrangement to provide a loan to the ultimate borrower, Division 7A treats the private company as having made a notional loan directly to the borrower.

When a repayment is made on a notional loan, section 109R can still apply to disregard that repayment if it was effectively funded by another loan from the same private company. This is intended to ensure that the anti-avoidance rules operate effectively, even in more complex loan structures involving interposed entities.

The determination provides practical examples to illustrate its application. In one scenario, a trust borrows from a private company and later receives a notional loan from the same company via an interposed entity to repay the original loan. The repayment is disregarded, resulting in a deemed dividend. In another example, a trust repays a notional loan using a direct loan from the same private company, and this repayment is also disregarded, leading to a deemed dividend.

The ATO also confirms that if repayments are disregarded under section 109R, the original loan remains outstanding, potentially triggering a deemed dividend under section 109D.

This determination, once finalised, will apply both prospectively and retrospectively, except where it conflicts with pre-existing settlement agreements.

ATO reference *TD 2025/D2*
w https://www.ato.gov.au/law/view/document?docid=DXT/TD2025D2/NAT/ATO/00001

5.2 Part IVA and early stage innovation concession company finance arrangements

The ATO has published Draft Taxation Determination TD 2025/D1, which outlines the ATO's preliminary view on the potential application of Part IVA of the ITAA 1936 to certain investment arrangements involving early stage innovation companies (**ESICs**). The determination is based on concerns identified in *Taxpayer Alert* TA 2024/1 regarding structured arrangements that facilitate access to the early stage investor tax offset.

Early stage innovation company investment arrangements

The ATO is concerned by investment arrangements that typically involve:

an investor being offered an opportunity to invest in a company that qualifies as an ESIC;

1. a financing arrangement funding the investor's share subscription, with only a nominal deposit required;
2. the company placing the subscription amount back on deposit with the financier, restricting its use for innovation and commercialisation activities;
3. the investor claiming the early stage tax offset, which results in a refund;
4. the refund being used to partially repay the financing; and
5. the remaining balance being repaid from funds returned by the company, often through a selective share buy-back.

For sophisticated investors, these arrangements may allow for an extended period, enabling them to claim tax deductions for interest expenses on borrowings.

Application of Part IVA

Part IVA enables the Commissioner to cancel tax benefits obtained through tax avoidance schemes. Its application requires identifying a tax benefit and determining whether the arrangement was entered into for the dominant purpose of obtaining that benefit. The ATO considers that:

1. the tax benefit arises from the tax offset and, in some cases, from deductions for interest expenses;
2. the scheme, as described, generally meets the definition of a tax avoidance scheme under section 177A of the ITAA 1936;
3. the arrangements appear to be structured to ensure investors can repay their financing with minimal financial risk; and
4. the dominant purpose of obtaining a tax benefit can be inferred from factors such as circular funding, financial risk minimisation and the sharing of tax benefits among parties.

If Part IVA applies, the Commissioner may cancel the tax benefit and disallow the tax offset and any related deductions.

Adjustments to period of review

Under subsection 170(1) of the ITAA 1936, individual taxpayers generally have a two-year amendment period. However, this does not apply if it is reasonable to conclude that a scheme was entered into or carried out for the dominant purpose of obtaining a tax benefit. In such cases, the review period is extended to four years.

The ATO states that if Part IVA applies to these ESIC investment arrangements, the two-year review limitation will generally not apply, allowing the Commissioner to amend assessments within four years.

Public consultation

The draft determination is open for public comment until 28 March 2025.

ATO reference *TD 2025/D1*
w https://www.ato.gov.au/law/view/document?docid=DXT/TD2025D1/NAT/ATO/00001

5.3 Concessions for homes and first homes updated (QLD)

The Queensland Revenue Office has updated Public Ruling DA085.1.11 which clarifies the Commissioner's interpretation of the *Duties Act 2001* (Qld) in relation to transfer date, occupation date, what is meant by the term "principal place of residence", and the circumstances in which a reassessment will be issued.

Circumstances that will result in partial loss of the concession are discussed in the public ruling and several new examples have been inserted. For example, if a person disposes of land within one year of occupying it, the concession may be partially removed. Disposals can include transferring or leasing the land. However, certain transfers (e.g., to a spouse or retirement village leasing) are exempt from this rule.

The public ruling also discusses circumstances where the full concession will be removed and a new example has been inserted to demonstrate an exception. Namely, the full concession will be removed if a transfer duty concession for a home or vacant land was assessed, and either:

1. the transferee disposes of the land (e.g., transfers, leases, or grants exclusive possession) before the occupation date; or
2. the transferee fails to occupy the land within one or two years, depending on the type of land.

A disposal is not considered if:

1. the occupier vacates the land within six months of the transfer date. For example, if tenants don't vacate the property within six months of the transfer date, the home concession will be removed, and reassessment is required;
2. the transferee transfers part of the land to their spouse, exempt under section 151; or
3. the transferee enters a retirement village leasing arrangement.

Queensland Revenue Office reference *DA085.1.11*
w https://qro.qld.gov.au/resource/da085-1/

6. 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.

6.1 Individual residency under DTA

The taxpayer was born in Australia, holds Australian citizenship, and has lived in Australia for most of his life. He is married to an Australian citizen, and they have two adult children who reside in Country Y. In or around 20XY, the taxpayer and his wife began investing in real estate in Country Y.

Since 20AB, the taxpayer has divided his time between Australia and Country Y, also travelling to other countries for vacations. Due to COVID-19 travel restrictions, he was unable to leave Country Y for parts of 2020 and 2022 and for all of 2021. His wife later obtained permanent residency and then citizenship in Country Y, without renouncing her Australian citizenship. The taxpayer also obtained permanent residency in Country Y during the COVID-19 period due to uncertainties regarding his visa status.

In Australia, the taxpayer and his wife own a home in Queensland, which was their primary residence when in Australia until Month 20XZ. This home was always kept vacant and available for their use when overseas but has since been listed for sale. In Month 20XZ, they purchased a nearby unit, moved their personal belongings there, and now stay in this unit when in Australia. This unit is also left vacant and available for their use while overseas.

The taxpayer intended his departures from Australia to be temporary, always maintaining a residence in Queensland as his home. He planned to return to his Australian home as part of his regular life pattern and never intended to cease residing in Queensland.

The taxpayer owns several business and investment interests in Australia, including shares in an investment company, a contracting company, and a partnership involved in primary production. He is actively involved in managing these businesses, even when overseas. He also serves as a director for corporate trustees managing Australian real estate and company shares. Additionally, he and his wife are members of an Australian self-managed superannuation fund (SMSF).

The taxpayer does not own any assets in Country Y but has indirect interests in entities that own properties there. His wife, however, is the sole shareholder of an investment company in Country Y that holds a share portfolio. They reside in a house in Country Y owned by a local company in which they are directors, though they do not have a formal lease.

In Australia, the taxpayer maintains bank accounts, credit cards, private health insurance, and vehicles. He earns all of his income from Australian businesses and investments, has a local doctor, dentist, and optometrist, and maintains a strong social network. He returns to Australia at least four times per year. All SMSF-related decisions, including contributions and pensions, are made while he is in Australia.

In contrast, the taxpayer has no personal income, bank accounts, health insurance, or significant social connections in Country Y. His share portfolios are managed by professional firms based in both Australia and Country Y.

For tax treaty purposes, the taxpayer is considered a resident of both Australia and Country Y under their respective domestic tax laws.

Question

Is the taxpayer deemed to be a resident solely of Australia for the purpose of the Double Tax Agreement (DTA) between Australia and Country Y (Country Y DTA)?

Ruling

The ATO determined that the taxpayer is solely a resident of Australia for tax purposes under Article 4(3) of the Double Tax Agreement (DTA) between Australia and Country Y. While the taxpayer was considered a resident of both countries under their respective domestic laws, the DTA's tie-breaker rules were applied to establish a single residency status for tax treaty purposes.

Under the tie-breaker rules, the first test considered was whether the taxpayer had a *permanent home* in either country. The ATO found that the taxpayer had permanent homes available in both Australia (his Queensland home and later the Queensland Unit) and Country Y (a residence available to him through a company in which he and his wife were directors). Since permanent homes existed in both countries, the analysis moved to the next test: *personal and economic relations*.

The ATO assessed the taxpayer's *centre of vital interests* by considering his personal, social, and economic ties. It concluded that the taxpayer's strongest connections remained with Australia due to several factors:

1. his business activities were primarily in Australia, and he earned all his income from Australian sources;
2. he owned significant assets in Australia, whereas he held no direct ownership of assets in Country Y;
3. his Australian home was under his full control, whereas his Country Y residence was owned by a company and had no formal occupancy rights;
4. his social and community ties were stronger in Australia;
5. he maintained all his bank accounts, credit cards, and health insurance in Australia; and
6. his long-term intention was to maintain his association with Australia and spend more time there.

Based on these considerations, the ATO concluded that the taxpayer's personal and economic relations were closer to Australia. As a result, he was deemed a resident *solely* of Australia for the purposes of the DTA. This determination meant that Australia retained primary taxing rights over his worldwide income, and Country Y could not tax him as a resident under the DTA's provisions.

TRAP – Country Y may not agree. Country Y may determine that the individual is a resident of Country Y. In that case, it would be necessary for the competent authorities (the ATO and its equivalent in County Y) to reach agreement about the residence of the taxpayer. In the absence of mutual agreement, no treaty benefits are available.

ATO reference *Edited Private Advice Authorisation No. 1052191727792*
w https://www.ato.gov.au/law/view/document?docid=EV/1052191727792

6.2 Trust residency

Facts

A discretionary trust was established in a foreign country. The trustees include Taxpayer A, who was an Australian tax resident until a specified date, Taxpayer B, who is solely a foreign tax resident and citizen, and Company A, a foreign-resident company controlled by the trust's legal advisers.

Taxpayer A was appointed as one of the appointers of the trust under a deed of variation on a specified date. Taxpayer A became an Australian tax resident in a particular month and later obtained Australian citizenship, but subsequently relocated to a foreign country.

The trust is considering selling a real property located in the foreign country but has not yet taken any steps to do so. Since its establishment, the trust has not made any distributions to beneficiaries, retaining its profits within the trust, with the trustee paying foreign income tax on the property.

The majority of the trustees reside in the foreign country, and trust decisions are made unanimously. All accounting matters, including financial statements and tax returns, are handled by an accountancy firm based in the foreign country, where filings also occur.

The trust's real property was purchased in the foreign country and financed through a foreign bank. The acquisition took place several years before Taxpayer A became an Australian tax resident and citizen. The property is managed locally in the foreign country by a property manager, who oversees relevant decisions.

Question

Will the Trustee for the Trust be a resident for CGT purposes in accordance with section 995-1 of the ITAA 1997?

Ruling

The ATO determined that the trust was a resident trust for CGT purposes until DD MM YYYY being the date the last remaining Australian trustee ceased their Australian residency status. From this date the Trust will be a foreign trust.

A trust is a resident trust for CGT purposes where at any time during the income year, a trustee is an Australian resident and the trust is not a unit trust.

COMMENT – the question posed in this ruling is whether the trustee is a resident, but the answer given by the ATO relates to the residence of the trust itself. The ruling reasoning is only two lines and states that the trust is a foreign resident "from this date", being the date the last trustee ceased to be a resident. However, as noted in the second line, a trust is a resident when a trustee is a resident at any time during the income year. As such, the trust would in fact cease to be an Australian resident from the start of the following income year.

ATO reference *Edited Private Advice Authorisation No. 1052321687067*
w https://www.ato.gov.au/law/view/document?docid=EV/1052321687067

6.3 Trust residency under DTA

Facts

The Trust is a discretionary trust established by deed, with Person A as the settlor. The trustees initially comprised Person A and Trustee Company A, located in Country X. The discretionary beneficiaries included Person A, their spouse, and other individuals. The trustees had full discretion to distribute income and capital after covering trust-related expenses, asset acquisitions, or debt repayments.

Person A originally purchased a property in Country X (the **Property**), where they and their family resided. Several years later, the Property was settled into the Trust, and the family continued to live there. Subsequent amendments to the Trust Deed removed some discretionary beneficiaries, leaving Person A and Person B as the primary beneficiaries.

After some years, Person A and their family moved to Australia, and the Property was rented out. Trustee Company A later retired, and Company B, a corporate trustee in Country X, was appointed in its place. Further variations to the Trust Deed reaffirmed Person A and Person B as the primary beneficiaries and named their children as secondary beneficiaries.

For Australian tax purposes, the Trust is considered an Australian resident due to the residency of one of its trustees. However, a Mutual Agreement Procedure (MAP) request was lodged to clarify the Trust's residency status under the Double Taxation Agreement (DTA) between Australia and Country X. The MAP decision determined that under the tie-breaker test, the Trust was solely a resident of Country X for DTA purposes.

The Trust is considering selling the Property.

Question

Will any capital gain made by the Trust on the sale of the Property be assessable in Australia?

Ruling

The ATO determined that any capital gain made by the Trust on the sale of the Property would not be assessable in Australia.

For domestic taxation purposes, the Trust was considered an Australian resident under section 95 of the ITAA 1936 because one of its trustees was an Australian resident. However, the Trust's residency status was also subject to the Double Taxation Agreement (**DTA**) between Australia and Country X. A Mutual Agreement Procedure (**MAP**) request was lodged, and the MAP decision applied the DTA's tie-breaker test, concluding that the Trust was solely a resident of Country X.

Under Article 13 of the DTA, as the Trust was deemed to be exclusively a resident of Country X, any capital gain arising from the disposal of the Property was taxable only in that country. Consequently, the gain was not subject to Australian tax.

Under section 6-20 of the ITAA 1997, income that is not taxable in Australia due to a double tax agreement is treated as exempt income. Therefore, any capital gain from the sale of the Property would not be included in the Trust's net income under section 95 of the ITAA 1936.

TIP – a Mutual Agreement Procedure (MAP) is a dispute resolution process under a DTA. It applies when taxpayers face potential double taxation due to conflicting residency or tax treatment between two countries. MAP allows, or in some cases, requires tax authorities to resolve disputes and determine the correct taxing rights.

ATO reference *Edited Private Advice Authorisation No. 1052200775862*
w https://www.ato.gov.au/law/view/document?docid=EV/1052200775862

6.4 Temporary residency

Facts

A and B may receive capitalised distributions from an overseas discretionary trust (the Trust), comprising both accumulated income and the original corpus. A is a citizen only of Country Q, while B is a citizen of both Country R and Country S, holding only a passport from Country S. They first arrived in Australia on an unspecified date and currently hold visas but are not Australian citizens or permanent residents. They have no criminal history, have not been deported, and do not have tuberculosis. A and B own property in Australia and are considering making their relocation permanent.

The Trust was settled by A and B in Country S several years ago, and they are discretionary beneficiaries. There is no corporate trustee, and the current trustees, who are not Australian tax residents, are tax residents of Country S. The Trust's management and control are located in Country S, where the trustees independently make investment decisions, maintain financial records, and submit tax filings. Trustees' meetings take place in Country S, usually through phone calls and emails.

The Trust holds bank accounts, term deposits, investment and property funds, and shares in Country S. It derives income from interest, dividends, capital gains, and foreign investments. While it has never held Australian real property, it has invested in Australian equities through managed funds. All income has been accumulated by the trustees and forms part of the Trust's capital. The Trust has been subject to and has paid income tax in Country S on its taxable income.

It is assumed that A and B's residency and temporary resident status under subsection 995-1(1) of the ITAA 1997 will remain unchanged for the income year ending 30 June of the relevant year. The Trust's decision-makers are also expected to remain the same during this period.

Questions

1. Are A and B both temporary residents for Australian tax purposes under subsection 995-1(1) of the ITAA 1997?
2. Will A and B be assessed on the capital distribution from the Trust that is attributable to a source outside Australia?

Ruling

The ATO determined that A and B are temporary residents under subsection 995-1(1) of the ITAA 1997. As a result, capitalised distributions received from the Trust, which is a foreign trust for Australian tax purposes, will be classified as non-assessable non-exempt (NANE) income under section 768-910 of the ITAA 1997. Consequently, these distributions will not be subject to Australian tax.

Temporary resident status

A and B were confirmed as Australian tax residents from 1 July 2008. To qualify as temporary residents under subsection 995-1(1) of the ITAA 1997, they had to satisfy the following conditions:

1. **hold a temporary visa under the *Migration Act 1958*** – This condition was met;
2. **not be Australian residents under the *Social Security Act 1991*** – Under subsection 7(2) of this Act, an Australian resident must either be a citizen, a permanent visa holder, or a protected special category visa holder. Since A and B did not meet any of these criteria, they satisfied this condition;
3. **their spouse must also not be an Australian resident under the *Social Security Act 1991*** – Since both A and B met condition (2), this condition was also satisfied; and
4. **not have been an Australian resident for tax purposes before 6 April 2006 without continuing to satisfy the above conditions** – this was also met.

Since A and B satisfied all the criteria, the ATO concluded that they were temporary residents.

Tax treatment of trust distributions

Under subsection 99B(1) of the ITAA 1936, any distribution from a trust to an Australian resident beneficiary is generally included in their assessable income. However, subsection 99B(2) excludes from assessable income any distribution that represents the corpus of the trust, unless that corpus includes accumulated income that would have been taxable in Australia had it been derived directly by a resident taxpayer.

The Trust had been a foreign trust for Australian tax purposes, meaning it was a non-resident trust for the relevant income years. It had paid tax in Country S, and its capitalised distributions consisted of both original corpus and accumulated income.

As temporary residents, A and B could apply section 768-910 of the ITAA 1997, which excludes foreign-sourced statutory income (other than net capital gains) from assessable income.

Source of trust distribution

For Australian tax purposes, a trust is considered an Australian tax resident under subsection 95(2) of the ITAA 1936 if either:

1. a trustee is an Australian resident at any time during the income year; or
2. the central management and control of the trust is in Australia at any time during the income year.

The ATO concluded that the Trust was a non-resident trust because:

1. the trustees were tax residents of Country S;
2. the trustees independently managed the Trust, including making investment decisions, preparing financial statements, and lodging tax returns in Country S; and
3. there was no evidence that A or B exercised control over the Trust's decisions.

Since the Trust remained a non-resident trust, its capitalised distributions were foreign-sourced.

As temporary residents, ordinary income derived from foreign sources, other than remuneration for employment or services, is non-assessable non-exempt under section 768-910 of the ITAA 1997. Because the Trust was a foreign trust and its capitalised distributions were foreign-sourced, these distributions were not assessable in Australia. Therefore, A and B would not be liable for Australian tax on these distributions in the relevant income year.

ATO reference *Edited Private Advice Authorisation No. 1052251302902*
w https://www.ato.gov.au/law/view/document?docid=EV/1052251302902

6.5 GST and substantial renovations

Facts

The taxpayer is registered for GST and operates an enterprise. They own a property containing four units, which was purchased with the intention of refurbishing the units and selling them individually. The property was initially leased to tenants before the refurbishment process commenced.

The refurbishment included cosmetic, non-structural, and structural work. Cosmetic work involved painting, replacing curtains, sanding floors, and replacing windows and external bricks. Non-structural work included replacing electrical wiring, plumbing, gutters, hot water cylinders, kitchens, bathrooms, and wardrobes. Structural work involved demolishing existing walls in all units to create new open-plan kitchen and lounge areas, completely replacing the first-floor landing, and demolishing and rebuilding garages due to structural issues. Additionally, a new penthouse unit was added to the top floor, and an elevator was installed for access to the penthouse and other units.

Common area renovations included constructing two additional carports, replacing concrete in common areas with pavers, and upgrading sewer systems and mailboxes. The entire roof was removed and reinforced with additional layers of bricks to support the new penthouse. However, certain elements of the original building were retained, such as door frames, staircases, and exterior walls.

Question

Will the refurbishment of the property and its four units be considered new residential premises created through substantial renovations under section 40-75 of the GST Act?

Ruling

The ATO determined that the refurbishment of the property and its units does not qualify as the creation of new residential premises through substantial renovations under section 40-75 of the GST Act.

Under section 195-1 of the GST Act, substantial renovations require that work affects the building as a whole and involves the removal or replacement of all or substantially all of the building. While the taxpayer undertook significant work, including structural modifications, some original components of the building remained, such as door frames, staircases, and external walls. Additionally, while both structural and non-structural components were altered, the renovations did not meet the threshold of affecting the entire building to the extent required by the legislation.

The ATO referred to *Goods and Services Tax Ruling GSTR 2003/3*, which outlines that substantial renovations must directly impact most rooms in a building and not merely involve cosmetic improvements. The ruling concluded that while extensive work was carried out, the retained elements of the building meant the renovations did not constitute substantial renovations as defined in the GST Act. Consequently, the refurbished units were not considered new residential premises for GST purposes.

ATO reference *Edited Private Advice Authorisation No. 1052318690274*
w https://www.ato.gov.au/law/view/document?docid=EV/1052318690274

6.6 Trust resettlement

Facts

The taxpayer established a successful business and later created a discretionary trust to hold the business assets and other investments. The taxpayer passed away, and the business remained family-run. Before their passing, the taxpayer communicated their intention for the trust to continue for future generations.

The trust was created by a deed of settlement and had been varied over time. The trustee had broad powers to amend or revoke trust provisions, as specified in the trust deed. The vesting date of the trust was defined within the deed, with provisions allowing for its extension under specific circumstances.

The trustee planned to make two amendments through a First and Second Deed Poll of Variation. The first variation sought to change the governing law of the trust from one Australian state to another. The second variation aimed to modify the definitions of the trust's "vesting date" and "beneficiaries," expanding the latter to include lineal descendants.

These changes were anticipated to be made before the trust vested and were considered to be within the trustee’s powers under the trust deed.

Question

If the Trustee executes the First and Second Deed Poll of Variation, will that cause either CGT event A1, CGT event E1, or CGT event E2 in sections 104-10, 104-55, and 104-60 of the ITAA 1997 to happen?

Ruling

The ATO determined that the execution of the First and Second Deed Poll of Variation would not result in a CGT event A1, E1, or E2 under sections 104-10, 104-55, and 104-60 of the ITAA 1997. This means that the

proposed variations to the trust would not cause a resettlement or trigger a deemed disposal of trust assets for tax purposes.

The ATO's reasoning was based on the principle that CGT events E1 and E2 occur when a new trust is created or when assets are transferred to a different trust. However, in this case, the amendments were made pursuant to a valid power of variation contained within the trust deed. The variations did not cause the existing trust to terminate or lead to the establishment of a separate trust with different rights and obligations.

The ATO referred to *Taxation Determination* TD 2012/21, which states that CGT events E1 and E2 will not occur if trust amendments are made in accordance with an express power in the trust deed or approved by a relevant court. The ruling also referenced case law, including *FCT v Commercial Nominees of Australia Ltd* [1999] FCA 1455 and *FCT v Clark* [2011] FCAFC 5, which support the view that amendments within the permitted scope of a trust deed do not necessarily lead to a new trust for tax purposes.

Regarding CGT event A1, the ATO noted that it applies when there is a disposal of an asset involving a change in ownership. Since the proposed amendments did not alter the beneficial ownership of the trust's assets or create a new trust, there was no disposal that would trigger CGT event A1.

As a result, the ATO concluded that the proposed variations would not give rise to CGT liabilities and would not constitute a resettlement of the trust.

ATO reference *Edited Private Advice Authorisation No. 1052343206797*
w https://www.ato.gov.au/law/view/document?docid=EV/1052343206797

6.7 Trust distribution to tax exempt entity

Facts

Entity A, acting as the Trustee of a Trust, resolved at the end of the income year to set aside all the Trust's income for the benefit of the Beneficiary. The Trust's income tax return for that year recorded the Beneficiary as being presently entitled to a specified amount of income. The Beneficiary is a tax-exempt entity for the purposes of section 100AA of the ITAA 1936

The Trustee, however, failed to comply with the requirement to notify the Beneficiary in writing of its present entitlement within two months after the end of the income year. This failure was attributed to the need to finalise the Trust's first tax return and confusion regarding the 31 August deadline. Upon becoming aware of the oversight, the Trustee promptly informed the Beneficiary of its entitlement.

The Commissioner had not previously exercised discretion in favour of the Trustee regarding this requirement.

Question

Will the Commissioner exercise discretion under subsection 100AA(4) of the ITAA 1936 to disregard the Trustee's failure to notify the tax-exempt Beneficiary of its present entitlement within the required two-month period?

Ruling

Having reviewed the circumstances, the Commissioner determined that discretion under subsection 100AA(4) of the ITAA 1936 would be exercised in this case. The failure to notify the Beneficiary within the prescribed timeframe was due to genuine administrative oversight rather than an attempt to avoid compliance. The Trustee took corrective action by informing the Beneficiary as soon as the mistake was identified.

Given these factors, the Commissioner agreed to disregard the failure to comply with the two-month notification requirement, allowing the Beneficiary's entitlement to remain valid for tax purposes.

TRAP – Section 100AA of the ITAA 1936 is self-executing. Failure to notify a tax-exempt beneficiary within two months automatically means there is deemed to be no present entitlement for tax purposes, regardless of intent. This may result in the trustee being taxed on the income at the highest marginal rate. While the Commissioner may exercise discretion to disregard the failure, this is not guaranteed. To avoid unintended tax liabilities, trustees must meet the notification deadline. If section 100AA applies, the exempt entity may still be entitled to call for the distribution under trust law.

ATO reference *Edited Private Advice Authorisation No. 1052314549152*
w https://www.ato.gov.au/law/view/document?docid=EV/1052314549152

6.8 Joint interest income on account in sole name

Facts

The taxpayer held an investment bank account in their name only, which was opened on a specified date. Bank statements indicated that funds were transferred from another person's account to the taxpayer's investment bank account on a particular date. Prior to this transfer, the taxpayer's account had a substantial balance.

The primary purpose of these funds was to jointly purchase real property with the taxpayer's spouse. Interest received on the investment bank account for the relevant tax year was a specified amount, and it was intended that the interest income would be shared equally between the taxpayer and their spouse.

The funds in the account were held beneficially for both the taxpayer and their spouse, in proportion to their contributions. Subsequently, the funds were transferred to a new account held in both names. The taxpayer and their spouse proceeded with the joint purchase of land, with settlement occurring on a specified date. The settlement statement confirmed the purchase was made in joint names for a specified amount. The title to the property was registered in both names.

At the time of the ruling request, the taxpayer and their spouse had not yet lodged their income tax returns for the relevant income year, awaiting the outcome of the private ruling.

Question

Can the income generated from bank account be assessable to both the taxpayer and their spouse in proportion to their beneficial ownership of the account?

Ruling

The ATO determined that the income generated from the Bonus Saver bank account is assessable to both the taxpayer and their spouse in proportion to their beneficial ownership.

Under section 6-5 of the ITAA 1997, assessable income includes ordinary income, which encompasses interest earned on a bank account. Subsection 6-5(2) of the ITAA 1997 states that for Australian residents, assessable income includes all ordinary income derived from sources within or outside Australia during the income year. Additionally, section 6-10 of the ITAA 1997 covers statutory income, which also forms part of assessable income.

When assets, such as bank accounts, are jointly held, there is a presumption that the income from those assets is split equally. However, this presumption can be rebutted with evidence demonstrating a different beneficial ownership proportion. According to *Taxation Determination TD 2017/11*, beneficial ownership is determined based on factors such as contributions to the account, withdrawals, and use of the funds.

In this case, although the account was initially in the taxpayer's name alone, evidence indicated that both the taxpayer and their spouse contributed funds to the account, and the ultimate purpose of the funds was to purchase property in joint names. The Commissioner accepted that both parties beneficially owned the funds and, therefore, should declare the income in their respective tax returns in proportion to their beneficial ownership.

COMMENT – this ruling highlights that beneficial ownership depends on evidence of intent rather than just legal ownership. The ATO presumes joint ownership of bank account income, but this can be rebutted with documentation showing contributions, withdrawals, and intended use of funds. Taxpayers should maintain clear records demonstrating their financial arrangements, particularly when funds are co-mingled or used for joint purposes, to ensure correct tax treatment.

ATO reference *Edited Private Advice Authorisation No. 1052320305335*
w https://www.ato.gov.au/law/view/document?docid=EV/1052320305335

7. ATO and other materials

7.1 Managed investment trusts – restructures to access MIT withholding regime

The ATO has issued *Taxpayer Alert* TA 2025/1 regarding concerns over the inappropriate use of the Managed Investment Trust (MIT) withholding regime through the restructuring of inward investment structures. TA 2025/1 indicates that the ATO is actively reviewing arrangements that attempt to exploit this concessional tax regime, particularly where restructuring efforts aim to secure benefits such as deemed capital gains tax (CGT) treatment and reduced withholding tax rates.

The ATO's primary concern is that some entities, which do not originally qualify for MIT status, are being restructured in a way that artificially meets the requirements. TA 2025/1 describes arrangements where existing Australian entities holding passive assets undertake steps to transform themselves into eligible MITs, despite lacking a genuine commercial purpose. Such restructures may include the unnecessary reallocation of ownership interests, the interposition of unit trusts with multiple unitholders, or changes to management structures solely to comply with the licensing conditions in the MIT provisions.

The ATO considers that such arrangements may not actually meet the requirements for the MIT to be eligible for the MIT withholding regime, with an example being a unit trust all the units in which are owned by companies that are members of the same corporate group. Such a structure may not qualify, as the unit trust may not meet the definition of a managed investment scheme in section 9 of the *Corporations Act 2001* (Cth).

Further, the ATO considers that Part IVA may apply to such arrangements.

ATO reference *Taxpayer Alert* TA 2025/1
w https://www.ato.gov.au/law/view/document?docid=TPA/TA20251/NAT/ATO/00001

7.2 Disqualification of SMSF trustees

The ATO has made minor updates to PS LA 2006/17 which concerns disqualification of individuals to prohibit them from acting as a trustee of a self-managed superannuation fund. The PS LA has been updated to reflect the fact that disqualifications are now published via notifiable instrument under subsection 126A(7) of the SISA.

w https://www.ato.gov.au/law/view/document?docid=PSR/PS200617/NAT/ATO/00001

7.3 Extension of time to apply for a director identification number

On 28 February 2025, the ATO published PS LA 2025/1, which sets out the policy to be applied to the use of the Registrar's power to extend an eligible officer's time to apply for a director identification number.

In making a request for an extension of time, the request should be made before a person applies for their director ID and should be made in writing. The request must include the eligible officer's details, the details of the circumstances that have prevented or are preventing the eligible officer from applying for their director ID, and the proposed extended due date.

The matters the ATO considers when deciding whether to grant an extension of time include:

1. the reasons why the eligible officer did not apply before their appointment;

2. the length of time the eligible officer needs to apply for their director ID. An extension of time will usually be granted where the timeframe is less than 90 days from the appointment date;
3. the eligible officer's director ID compliance history, for example, where there have been prior extensions;
4. the circumstances which reasonably prevented or are preventing the eligible officer from applying for their director ID;
5. the purpose of the director ID regime; and
6. whether the eligible officer is subject to enforcement action.

The ATO would generally consider it appropriate to grant an extension of time where the inability to apply is reasonably attributed to exceptional or unforeseen circumstances, such as the serious illness or death of a family member, system issues such as outages in our online services, or impeded access to records.

ATO reference *Practice Statement Law Administration PS LA 2025/1*
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20251/NAT/ATO/00001

7.4 Payday Super consultation continues

On 24 February 2025, the ATO updated its website guidance on the Payday Super reform. The reform, which is slated to begin from 1 July 2026, is not yet law. Despite this, the ATO has been consulting with industry and stakeholders and is keeping the Payday Super Working Group section on its website updated. The key topics discussed to date include re-designing the super guarantee charge that applies when employers do not pay the correct amount to the right fund on time, and closure of the Small Business Super Clearing House.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/payday-super-consultation-continues

7.5 Small businesses to move to monthly GST reporting

The ATO has announced that it will focus on small businesses that may need to transition from quarterly to monthly GST reporting to help them remain compliant.

If a business has a history of failing to meet its taxation obligations, the ATO may require it to move from quarterly to monthly reporting.

From March 2025, the ATO will begin notifying affected businesses of their new monthly reporting cycle, which will take effect from 1 April 2025.

A history of non-compliance includes, but is not limited to:

1. paying late or failing to pay the full amount due;
2. not lodging or lodging late; and/or
3. incorrectly reporting tax obligations.

Businesses required to transition to monthly reporting will be notified in writing.

If a business objects to the ATO's decision, it can lodge an objection to a reviewable GST decision within the prescribed timeframe.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/our-focus-areas-for-small-business/building-good-habits/quarterly-to-monthly-gst-reporting

7.6 Small business risks that attract ATO attention

Non-commercial business loss risks

The ATO is focusing on individuals who incorrectly claim and offset non-commercial business losses against other income. Non-commercial losses arise when a business activity (not the primary income source) incurs losses. These losses cannot be offset against other income in the same year but must be deferred. Common errors include offsetting hobby losses, misapplying the income threshold ($250,000), and failing eligibility tests.

Small business boost measures risks

Small businesses may claim a 20% additional deduction under two schemes:

1. Skills and Training Boost (for external employee training from 29 March 2022 – 30 June 2024); and
2. Technology Investment Boost (for digital business improvements from 29 March 2022 – 30 June 2023).

Errors include claiming when not eligible, exceeding the expenditure cap, and misreporting training or technology costs. Businesses should verify eligibility and ensure expenses align with deduction criteria.

Small business CGT concession risks

The ATO is monitoring incorrect applications of small business CGT concessions. Businesses must ensure they meet eligibility rules, including turnover limits ($2 million) and asset thresholds ($6 million). Errors often stem from misreporting concession codes, incorrect date usage, and improper application of CGT discounts or roll-overs.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/our-focus-areas-for-small-business/deductions-and-concessions

7.7 Tax consequences of land subdivision and sales

The ATO has updated its website pages in relation tax consequences on sales of property. The guidance covers whether a sale of property is a capital gain or ordinary income and outlines the potential income tax and GST consequences. It also provides examples.

The ATO has also updated its page on the tax consequences of small scale subdivisions to provide seven examples.

w https://www.ato.gov.au/law/view/view.htm?docid=GUI/tax-consequences-land-sales
w https://www.ato.gov.au/businesses-and-organisations/assets-and-property/property/tax-consequences-on-sales-of-property

7.8 Effective record keeping for Next 5,000

The ATO expects privately owned and wealthy groups in the Next 5,000 performance program to maintain accurate and up-to-date records for tax returns and business activity statements. Inadequate record keeping can result in costly audits and the denial of deductions and input tax credits. Findings from the 2024 Next 5,000 report indicate that some claims were rejected due to insufficient substantiation of expenses and a lack of clear links between income and deductions. This issue was particularly prevalent in related party transactions, where discrepancies arose between reported income and associated deductions.

To mitigate these risks, the ATO recommends using the *Record keeping for business* resource, which provides essential guidance on maintaining compliance. This includes a core index of record-keeping requirements, an overview of the rules, instructions on setting up and managing records, and guidance on required documentation throughout the business lifecycle.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/effective-record-keeping-for-the-next-5000

7.9 Review of the effectiveness of the ATO's registered agent phone line

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) is conducting a review of the effectiveness of the ATO's registered agent phone line in response to increased reports of dissatisfaction with the service.

The review will look at:

1. why there is a mismatch between what agents want from the registered agent phone line and what the ATO provides;
2. the skills, training and support for ATO officers working on the phone line and what improvements could be made;
3. whether registered agent phone line service standards align with agents' expectations and whether they are being met; and
4. whether the registered agent phone line service support for the new client-agent linking service is adequate and fit for purpose.

Formal submissions will close on 28 March 2025, with the IGTO expecting to deliver its report in June 2025.

w https://www.igt.gov.au/current-investigation-reports/systemic-review-of-the-effectiveness-of-the-atos-registered-agent-phone-line/

7.10 Report on ATO complaints handling

On 5 March 2025, the Australian National Audit Office (ANAO) published the Auditor-General Report No. 28 (2024-25), evaluating the ATO's management of complaints. The report found that the ATO's complaint handling is largely effective, though improvements are needed in root cause analysis, documentation of interactions with complainants, and public reporting on complaint trends.

Between 2020-21 and 2023-24, the number of complaints received by the ATO nearly doubled, with timeliness-related complaints making up 56.5% of the total. While the ATO has established a clear and accessible complaints process, it does not consistently document discussions with complainants before extending due dates or properly communicate taxpayer review rights. The report also noted that the ATO does not conduct root cause analysis of significant complaint trends, impacting its ability to address systemic issues.

The ANAO made four recommendations:

1. conduct and document discussions with complainants before extending complaint due dates and ensure review rights are properly communicated;
2. analyse the root causes of complaints, particularly when there is a significant increase in volumes;
3. enhance public reporting on complaint trends, causes, and outcomes in the ATO's annual report to improve transparency; and
4. ensure sufficient assurance of implementation by properly documenting the closure of external recommendations.

The ATO agreed to all recommendations and committed to strengthening its complaints framework.

w https://www.anao.gov.au/work/performance-audit/management-of-complaints-the-australian-taxation-office

7.11 When a worker leaves your business

On 10 February 2025, the ATO updated its website guidance for business owners on working out a worker's final pay and entitlements when they leave the business.

When a worker leaves a business, there are several types of 'lump sum' payments that may be made which are taxed and reported differently to normal income, such as employment termination payments, unused leave payments and tax-free and genuine redundancy payments.

If the worker was provided with fringe benefits, the business owner needs to calculate the FBT provided and include it in their FBT return at the end of each FBT year.

Business owners also need to calculate and pay super guarantee on any final salary and wage payments that form part of the worker's ordinary time earnings, and should also let the ATO know that their STP reporting for the worker is complete by finalising the STP data.

w https://www.ato.gov.au/businesses-and-organisations/hiring-and-paying-your-workers/engaging-a-worker/when-a-worker-leaves-your-business

7.12 FBT record keeping and plug-in hybrids

The ATO has updated its website guidance in relation to the FBT record-keeping requirements and the end of the FBT exemption for plug-in hybrid electric vehicles.

Alternative record-keeping changes

From this FBT year ending 31 March 2025, employers can use existing corporate records instead of travel diaries and declarations for some fringe benefits. Employers may still use the current approved forms or a combination of both methods per employee and benefit. These records must meet minimum information requirements at the time of lodging the FBT return to ensure accurate tax calculations and compliance.

Plug-in hybrid electric vehicle (PHEV) exemption changes

The FBT exemption for PHEVs will end on 31 March 2025. However, employers can continue to apply the exemption if:

1. the PHEV was used or available for use before 1 April 2025 under the exemption; and
2. there is a financially binding commitment to continue providing the vehicle for private use after 1 April 2025.

Employers providing fringe benefits between 1 April 2024 and 31 March 2025 should ensure they maintain appropriate records to support their FBT position. More information is available from the ATO to assist employers in meeting their obligations.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/fbt-record-keeping-and-plug-in-hybrid-exemption-changes

7.13 NFP self-review returns

The ATO has released a statement reminding not-for-profits to check their governing documents before they lodge their self-review return before 31 March 2025.

The ATO will only recognise an organisation as a not-for-profit organisation if its governing document prohibits the distribution of profits or assets for the benefit of specific individuals, both during its operation and upon winding up.

The governing document must also include provisions ensuring that members or other private individuals do not receive the organisation's property or assets, except as reimbursement for services provided or expenses incurred on its behalf.

If a not-for-profit does not currently have these clauses in its governing document, it may still self-assess as income tax-exempt for the 2023–24 income year, provided it has not distributed any income or assets to members. However, the governing documents must be updated by 30 June 2025.

Failure to do so will mean the organisation cannot self-assess as income tax-exempt from 1 July 2024.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/check-your-governing-documents-before-31-march

8. Tax Professionals

8.1 TPB factsheet to give to clients

On 20 February 2025, the TPB published a fact sheet outlining tax practitioners' obligations under section 45 of the *Tax Agent Services (Code of Professional Conduct) Determination 2024*.

From 1 January 2025 (for registered agents with more than 100 employees) or 1 July 2025 (for those with 100 or fewer employees), registered agents must provide written information to all current and prospective clients regarding:

1. **the TPB public register**: clients must be informed that the TPB maintains a register of registered tax and BAS agents, including how to access and search it. Practitioners are encouraged to provide a direct link to their registration details;
2. **the TPB's complaint process**: clients must be advised on how to lodge a complaint about a tax or BAS service, including a link to the TPB's complaint form and further details about the process;
3. **rights, responsibilities, and obligations**: registered agents must outline their general responsibilities under taxation laws and inform clients of their own obligations when engaging their services;
4. **prescribed events**: registered agents must disclose certain significant events within the past five years, including suspensions, terminations, bankruptcies, serious tax offences, fraud convictions, and penalties for promoting tax exploitation schemes; and
5. **prescribed matters**: If a registered agent's registration is subject to conditions limiting the scope of services they can provide, they must disclose this to clients.

Tax practitioners must ensure this information is presented clearly and prominently. The TPB website indicates that tax practitioners may choose their preferred method of advising clients. One example of meeting the requirements of section 45 includes:

1. publishing the information on a publicly accessible website used to promote the tax agent or BAS services offered;
2. including the information in letters of engagement or re-engagement with clients; and
3. providing clients, upon engagement or re-engagement, with a copy of the TPB fact sheet on general information for clients.

The TPB notes that this is not the only way to satisfy the obligation. For example, if a practitioner does not have a publicly accessible website, they may comply by undertaking steps 2 and 3 above.

The fact sheet can be downloaded from the TPB website link below.

w https://www.tpb.gov.au/keeping-your-clients-informed

8.2 Less frequent ATO statements of account

The ATO has ceased issuing automated statements of account when the only transaction on an account is a general interest charge (GIC).

This change aims to reduce unnecessary correspondence for tax professionals and their clients while ensuring continued access to up-to-date account information on accruing interest. Account balances and recent transactions remain accessible through Online Services for Agents and ATO online services. Regular debt

correspondence will still inform taxpayers that GIC may accrue until the debt is fully paid, with the outstanding amount reflecting any incurred interest.

In certain cases, the ATO may send reminders via SMS, myGov message, or email regarding accruing GIC. Taxpayers or their agents can request a statement of account at any time if needed. The ATO will continue issuing statements of account for specific events, such as interest accruing on early payments, credits or refunds offsetting other debts, and in some cases, upon issuing a Notice of Assessment.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/happy-to-hear-from-us-a-little-less

8.3 Clarifying the client verification process

The ATO has updated its client verification guidance, and tax professionals should review this before providing tax agent and BAS services to both new and existing clients. This should be done in conjunction with the Tax Practitioners Board's Practice Note TPB(PN) 5/2022 on proof of identity requirements.

The ATO has confirmed that the client-to-agent linking process does not replace the obligation to verify a client's identity. This process only confirms that an individual has the authority to act on behalf of an entity within Online Services for Business but does not verify the identity of the person engaging tax or BAS services. Examples to assist with client verification are available through ATO resources on client verification and engagement letters.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/clarifying-the-client-verification-process
w https://www.tpb.gov.au/tpb-practice-note-tpbpn-52022-proof-identity-requirements-client-verification

8.4 Rise of online tax schemes

The ATO is urging tax professionals to help educate their clients about the risks of unlawful tax schemes promoted online, including on social media. These schemes often promise significant tax reductions or avoidance but can lead to severe penalties. Recent examples include schemes encouraging individuals to divert income through a purported not-for-profit foundation and misleading investment opportunities claiming eligibility for tax offsets under early-stage innovation company provisions. Many taxpayers may be unknowingly drawn into such schemes without understanding the risks.

Tax professionals should advise clients to be wary of offers that seem too good to be true, reject and report suspicious schemes, and understand that the clients remain responsible for their tax obligations. Clients already involved in such schemes should contact the ATO immediately, as early engagement may reduce potential penalties. More information on recognising, rejecting, and reporting unlawful tax schemes is available on the ATO website.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/online-tax-schemes-on-the-rise-protect-your-clients