The Tax Institute

Tax Update June 2022

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About Brown Wright Stein

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

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

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

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

1 Cases

1.1 Guttikonda and Sheth – character of lump sum payments in arrears

Facts

Naga Babu Guttikonda and Hardrik Sheth were employed over a number of years at different 7-Eleven stores. In around 2015, there was widespread reporting that 7-Eleven was underpaying staff. Naga and Hardrik were among these employees who reported underpayment.

7-Eleven Pty Ltd set up an independent panel to assess the various claims of underpayment. Staff could submit an application with supporting documentation to the panel for payment of unpaid amounts. These applications were assessed by the independent panel. 7-Eleven would then pay the amounts to the claimants approved by the panel on an uncapped basis. Independent Claims Pty Ltd was established to make payments of the claim amounts.

Naga and Hardrik each entered into a Deed of Acknowledgement and Assignment (**Deed of A&A**) with Independent Claims Pty Ltd. The terms of the deeds entered into were in a standard form, except for the details of the claimant and the debt amount.

Following execution of the deeds, Naga received a lump sum payment of $174,877, less tax withheld of $60,333 plus an interest payment of $29,039 and an amount of superannuation paid to Naga's super fund. This lump sum amount was paid by Independent Claims Pty Ltd in the year ended 30 June 2017.

Hardrik received a lump sum payment of $131,673, less tax withheld of $45,427 plus an interest payment of $27,404 and an amount of superannuation paid to Hardrik's super fund. This lump sum amount was paid by Independent Claims Pty Ltd in the year ended 30 June 2017.

Neither Hardrik nor Naga were employed by Independent Claims Pty Ltd at any time.

An example of the standard form wording in each of the Deed of A&A was as follows:

1. *The Company has agreed to pay to You the amount set out in Schedule 1 ("the Debt").*
2. *The Debt has been determined in resolution of your Claim 2399865/13078 ("Claim") to the 7-Eleven Wage Repayment Program ("Program").*
3. *The Debt will be paid by the Company via electronic funds transfer to your nominated account within 10 business days of receiving a copy of this Deed signed by You.*
4. *The Debt relates to monies owed to You arising from your employment by the following 7-Eleven franchisee as a result of underpayments of wages and employee entitlements set out in your Claim.*
   Kapoor International Pty Ltd ("7-Eleven Franchisee")

   ... [ACN & address]

5. *You acknowledge that the Debt is in full satisfaction of any unpaid wages or employee entitlements that you may have been entitled to arising from your employment by the 7-Eleven Franchisee up until the date of your Claim.*
6. *You acknowledge that the Debt has not been repaid or otherwise compromised, settled or abandoned prior to you executing this Deed.*
7. *You acknowledge that on signing this Deed you are receiving payment for the Debt from the Company all rights for recovery of the Debt will vest in the Company and will no longer be exercisable by You.*
8. *In consideration for the payment of the Debt by the Company, You absolutely and unconditionally assign and transfer to the Company any rights, title or interest in the Debt, including such right or rights of action necessary to recover the Debt from the 7-Eleven Franchisee you were employed by until the date of this Deed (which may include amongst other things instituting legal or other proceedings for recovery of the Debt from the 7-Eleven Franchisee).*
9. *The Company may at its sole discretion assign this Deed or otherwise transfer the benefit of this Deed or any right or remedy under it, without prior written consent from You.*
10. *You acknowledge you have had the opportunity to seek independent legal advice regarding the contents of this Deed.*
11. *You acknowledge you are wholly responsible for your own personal taxation or immigration arrangements.*

12. You acknowledge that this Deed has not been executed under duress, that You are not relying on any representations or matters contained in this Deed and that the Company in relying on this acknowledgment.

Executed As A DEED ... etc

Naga and Hardrik were both assessed by the Commissioner on the lump sum amounts and interest as ordinary income under section 6-5 of the ITAA 1997.

Naga and Hardrik both lodged objections to the assessments. Their objections were denied. Naga and Hardrik sought a review of the decision by the AAT.

Naga and Hardrik contended that the lump sum amount paid by Independent Claims Pty Ltd was a receipt that should be characterised as capital in nature, on the basis that it represented a payment as consideration for the relinquishment of a right (by reference to clause 8 of the Deed of A&A).

Naga and Hardrik also contended that the component that was labelled "interest" was, in fact, not interest. They submitted that interest must flow from a principal amount as "compensation to the lender for being kept out of the use and enjoyment of the principal amount". Naga and Hardrik contended that there was no principal amount advanced by them, as such interest cannot flow.

The Commissioner submitted that the lump sum amount was a receipt that should be characterised as income in nature, on the basis that it was a payment for unpaid wages connected with the services provided by Naga and Hardrik to their former employers. The Commissioner further contended that simply because the payment was made by someone other than the employer, and was expressed to be in consideration for a disposal of rights, did not mean that the characterisation of the payment as income was lost. Ultimately, the Commissioner's argument was that Naga and Hardrik were finally receiving their unpaid wages and employee entitlements by signing the deeds. Naga and Hardik were each allowed a tax offset for the lump sum payment in arrears that they received.

Issues

1. Was the gross amount of the lump sum payment paid to Naga and Hardrik income or capital in nature?
2. Was the amount referred to as "interest" in the Deed of A&A interest assessable to the Naga and Hardrik as ordinary income?

Decision

The AAT found in favour of the Commissioner in relation to the characterisation of the lump sum payment. In particular, the AAT accepted the Commissioner's submission that cases such as *Blank v Commissioner of Taxation* [2016] HCA 42*, Reuter v Federal Commissioner of Taxation* [1993] FCA 576, *Federal Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18*;* and *Sommer v Federal Commissioner of Taxation* [2002] FCA 1205 demonstrate that "*regard should be had to the surrounding circumstances, and should not be limited to the agreements under which the particular payments were made*".

The AAT stated that the payment described in the Deed of A&A should be considered in the wider context of the circumstances which gave rise to the arrangements under the Deed of A&A. The fact that the Deed of A&A was only prepared to remedy the underpayment of wages and employee entitlements, being amounts of ordinary income, was an important consideration in characterising the lump sum amount as income.

The AAT confirmed that the gross amount of the lump sum payment paid to Naga and Hardrik was in fact ordinary income, and assessable to each of Hardrik and Naga.

In relation to the characterisation of the interest amount, the Commissioner referred to a case heard by the Privy Council, *Riches v Westminster Bank Ltd* [1947] AC 390 which provided an example of where interest is income despite the fact that there was no loan in the traditional sense, but where the interest was paid as compensation for the use or retention by one person of a sum of money belonging to another. The AAT confirmed that the amount referred to as interest in the Deed of A&A was ordinary income, and assessable to each of Hardrik and Naga.

Citation *Guttikonda and Sheth and Commissioner of Taxation* [2022] AATA 1325 (DP I R Molloy, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/1325.html

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1.2 Papadam – winding up of SMSF trustee

Facts

The Smidam Superannuation Fund was established on 17 October 2012. Smidam Pty Ltd was appointed as trustee of the super fund.

Jennifer Papadam and Anthony Smith were the directors and shareholders of Smidam Pty Ltd and the beneficiaries of the Smidam Superannuation Fund.

In 2018, Jennifer commenced proceedings against Smidam Pty Ltd and Anthony about the distribution of the net sale proceeds of a property that was the principal asset of the Smidam Superannuation Fund, their respective entitlements as members of the Smidam Superannuation Fund, and the financial statements and reports of the Fund for the financial years since 2017.

Pursuant to orders of the court, the principal asset of the Smidam Superannuation Fund was sold with the proceeds being paid into Court.

Following mediation, the Court made an order by consent in 2019 to appoint an auditor, David Saul, to prepare an audited statement of financial position and an audited operating statement for the Smidam Superannuation Fund for the 2019 financial year, and to prepare tax returns for the 2017-2019 financial years.

The auditor identified numerous reportable compliance issues arising from his audit of the fund for each of the 2017-2019 financial years and prepared a *"*Rectification Plan*"* outlining matters that needed to be addressed in order to bring the Smidam Superannuation Fund into compliance with the SIS Act.

On 21 May 2020, Daniel Frisken was appointed as receiver and manager of the assets and undertaking of Smidam Pty Ltd with the powers set out in section 420 of the *Corporations Act 2001* (Cth) conferred on him. The appointment was made by consent orders and it was intended that the appointment extended to the assets held by Smidam Pty Ltd in its capacity as trustee of the Smidam Superannuation Fund. The consent orders directed the receiver to implement the items under the Rectification Plan.

Between 21 May 2020 and 1 March 2022, the receiver worked with Jennifer and Anthony in an effort to correct and finalise the financial statements and reports of the Smidam Superannuation Fund so that it could ultimately be wound up, with any balance to be rolled over into complying super funds. Due to an ongoing dispute and complete breakdown between Jennifer and Anthony, material deficiencies in the books and records of the Smidam Superannuation Fund, and having regard to the auditor's audit report, the receiver came to the conclusion that he would not be able to comply with the orders of the Court to implement the Rectification Plan.

On 1 March 2022, the receiver filed a notice of motion seeking the Court to make the relevant orders:

1. to increase the cap of the receiver's remuneration;
2. to vacate the order directing the receiver to implement the Rectification Plan; and
3. pursuant to sections 420(2)(u) and 461(1)(k) of the *Corporations Act,* the winding up of Smidam Pty Ltd; and
4. that the receiver cease to act as a receiver and be appointed as liquidator of Smidam Pty Ltd.

Jennifer did not oppose the order sought by the receiver and did not seek to be heard at the hearing.

Anthony opposed to the order sought in relation to the receiver's remuneration but otherwise consented to the other orders sought by the receivers.

Issues

1. Should the receiver's remuneration be increased; and
2. Should the Court make an order winding up the SMSF trustee and appoint the receiver as the liquidator of the Company.

Decision

The Court allowed the orders regarding the receiver's remuneration, having regard to the detailed time records by staff member and category of work and the description of the work in the remuneration report.

In relation to an order winding up Smidam Pty Ltd, the Court refused to make that order.

The Court noted that the receiver had wrongly assumed that the proposed winding up of Smidam Pty Ltd would be the first step in the proposed winding up of the Smidam Superannuation Fund and that a liquidator would be able to cause Smidam Pty Ltd to take steps to wind up the Fund without consulting further with Jennifer and Anthony.

The Court noted that Rule 4.6 of the governing rules of the trust deed arguably meant that Smidam Pty Ltd ceased to be the trustee of the Smidam Superannuation Fund upon the appointment of the receiver on 21 May 2020. Even if Rule 4.6 of the governing rules were construed to leave Smidam Pty Ltd in office unless and until a new trustee is appointed after the appointment of a receiver or a winding up order, Smidam Pty Ltd would become a *"disqualified person"* upon the making of the proposed winding up order by reason of section 120(2)(e) of the SIS Act.

The Court noted that it would be an offence under section 126K of the SIS Act for Smidam Pty Ltd to exercise any power as trustee of the Smidam Superannuation Fund thereafter, including by taking steps to wind up the Fund. Further, the liquidator may be liable as an accessory to any such offence.

The Court directed that the proceedings be stood over to a later date to accommodate any further applications for a winding up order or such other application as they may be advised to make to facilitate a winding up of the Smidam Superannuation Fund and distribution of each member's respective entitlements into an alternative compliant fund to be held on trust for that member.

Citation *Jennifer Helen Papadam v Smidam Pty Limited [2022] NSWSC 629* (William J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/629.html

1.3 Meyers – duty on transfer of property from super fund to super fund member

Facts

In November 2013, LKM Taxation/Accountancy Services Pty Limited (**LKM Services**) in its capacity as the trustee of Ross Meyers' Superannuation Fund purchased a residential property at Woy Woy (the **Property**).

The Fund's trust deed dated 10 June 1988 declared that all property in the Fund is held and is to be held on trust for the beneficiaries and that Ross is the sole beneficiary. The trust deed was amended on 1 July 2012. Resolutions of the Fund record that the Property was purchased for and was held for Ross' sole benefit.

The purchase money for the acquisition of the Property by the Fund in November 2013 were provided by Ross from his Transfer to Retirement Income Stream (**TRIS**) account in the Fund. The stamp duty on the transfer of the Property to the Fund was withdrawn from Ross' TRIS account.

From the time of its purchase by the Fund, the Property had been segregated in the Fund in Ross' favour.

A transfer for zero consideration of the Property from Ross' superannuation fund to him was prepared (the Transfer). On 14 May 2021, Ross signed a purchaser/transferee declaration (**Declaration**) relating to the Transfer, in which he made a declaration to the effect that in completing the Transfer he was acting as a trustee for his Fund and that the dutiable value of the transaction reflected by the Transfer was zero.

On 20 May 2021, Ross' solicitors sent the Declaration and Transfer to Revenue NSW seeking:

1. in the first instance, to have the Transfer be assessed for concessional under section 57 of the *Duties Act 1997* (NSW) as liable for duty of $50; or
2. in the alternative, that concessional duty of $50 be applied under section 55 of the *Duties Act*.

Section 57 of the Duties Act provides concessional duty for transfers of property of a trust to a beneficiary. It provides as follows:

(1) Duty of $50 is chargeable in respect of a transfer for no consideration of dutiable property to a beneficiary made under and in conformity with the trusts contained in a declaration of trust, subject to subsections (2) and (3).

(2) Subsection (1) applies only to the extent that the property being transferred is property that the Chief Commissioner is satisfied is--

(a) wholly or substantially the same as the property the subject of the declaration of trust and that--

(i) duty charged by this Chapter has been paid in respect of the declaration of trust over that property, or
(ii) the declaration of trust is exempt from duty, or

(b) dutiable property representing the proceeds of re-investment of property referred to in paragraph (a), or

(c) property to which both paragraphs (a) and (b) apply.

(3) Subsection (1) applies only if the transferee was a beneficiary at the time at which duty became chargeable in respect of the declaration of trust.

Under section 55 of the Duties Act, duty of $50 is chargeable if there is a transfer of dutiable property from an apparent purchaser to the real purchaser where the property is property, or part of property, vested in the apparent purchaser upon trust for the real purchaser, and the real purchaser provided the money for the purchase of the property and for any improvements made to the dutiable property after the purchase.

On 16 June 2021, Revenue NSW responded to the effect that because there was no stamped declaration of trust over the Property, section 57 had no application and the Transfer was, therefore liable to duty at the general rate under section 32 of the *Duties Act*.

On or about 28 June 2021, an assessment of duty on the Transfer of $29,760 was issued and was paid by or on behalf of Ross to the Chief Commissioner. The assessment issued was based on a dutiable value of the Property of $765,000.

On 9 July 2021, Ross completed and lodged an Objection to an Assessment, relying upon section 57 of the *Duties Act*. The objection was disallowed. On 28 June 2021, an amended objection was lodged relying upon both sections 55 and 57 of the *Duties Act*.

On 18 October 2021, the Chief Commissioner disallowed Ross' objection.

On 29 October 2021, Ross lodged an application in the NCAT.

Issues

Whether any one or more of sections 55, 57 and 60 of the *Duties Act* applied to the Transfer?

Decision

Section 57

The NCAT noted that concessional duty on the Transfer will not be available by operation of section 57, unless:

1. the Transfer was made under and in conformity with the trusts in that declaration of trust; and
2. the further conditions set out in sub-sections 57(2) and (3) are satisfied and, in particular, duty has been paid on the declaration of trust, or it is exempt from duty.

The NCAT, relying on cases such as *DKLR Holding Co No 2 Pty Ltd v Commissioner of Stamp Duty* (1982) 149 CLR 431and *Al-Saeed and Association Pty Ltd ATF Al-Saeed Educational and Welfare Trust v Chief Commissioner of State Revenue* [2014] NSWCATAP 11 held that the property must be sufficiently identified at the time of the declaration of trust.

The NCAT concluded that at the time of the relevant declaration of trust, and subsequent amendments to the trust deed, which was around 19 June 1998 and 1 July 2012 respectively, the Property had not been purchased and it could not, therefore, have been as asset of the Fund.

Further, the trustee's resolutions which record resolutions to purchase the Property occurred after the declarations of trust, that is, nearly 15 months after the amendment deed and 5 years after the trust deed.

Therefore, the NCAT concluded that there was no declaration of Trust over the Property, and the concessional rate of duty under section 57 was not available.

Section 55

The NCAT noted that the contract for sale of the Property was listed as LKM Services as trustee for the Fund, and various records of the demonstrate that, at all relevant times, the Property was and was treated as an asset of the Fund. There was no evidence to prove that LKM Services was authorised to or in fact did act as the trustee for Ross personally.

The NCAT concluded that Ross was not the real purchaser and, therefore, the concessional rate of duty in section 55 was not available.

Nonetheless, the NCAT also considered the other requirements in section 55 and observed that the test under section 55 and proving the whole of the purchase money was provided by Ross personally is a strict test and the onus on establishing this element is heavy. Ross did not produce evidence to demonstrate that he had access, through the TRIS or otherwise, to the full amount of the purchase price at the time of the sale transaction or as to the broader issue, being whether he provided the whole of the purchase money.

Therefore, Ross failed to discharge his onus of establishing that the whole of the purchase money was provided by him personally so that section 55 could not apply.

The Commissioner's assessment of duty at the ad valorem rate was confirmed.

Citation *Meyers v Chief Commissioner of State Revenue* [2022] NSWCATAD 176 (SM J S Currie, Sydney)
w https://www.caselaw.nsw.gov.au/decision/18112f24989d00f5a4fbde5e

1.4 Twigg – breach of trust

Facts

William Twigg established a waste disposal and landfill business that was operated through a number of discretionary trusts established for the benefit him and his family. The relevant entities were as follows:

1. Twigg Plant Hire Pty Ltd as the trustee of the Twigg Family Trust;
2. Brooklyn Landfill & Waste Recycling Pty Ltd as the trustee of the Brooklyn Landfill Trust; and
3. Ipswich Landfill Pty Ltd as the trustee of the Ipswich Landfill Trust.

With his wife, Diane, William had three children, Max, Elizabeth and Frances.

Upon William's death, Max took over the running of the business interests and became a director of the corporate trustees. Diane was the other director but was also the sole shareholder and chairperson for each trustee.

Diane left the operational affairs of the trusts to Max but continued to play a part in some essential decision-making functions of the trustee, in particular in respect of the distribution of income each year from 1996 to 2006. However, there was a suggestion that Diane would, at this time, sign any document that Max placed before her.

On 2 April 2007 the business interests of the three trusts were sold for around $155 million to Cleanaway. $30 million of the sale price was paid by way of an issue of shares in Cleanaway to Twigg Landfill Pty Ltd as trustee of the Max Twigg Family Trust. Max was the sole director and shareholder of Twigg Landfill. $113 million was deposited into the bank account of Twigg Plant Hire Pty Ltd. Cleanaway was required to pay deferred consideration under the sale agreement.

Max caused debts and tax to be paid from the proceeds and then distributed the balance as to $5million to each of Diane, Elizabeth and Frances with the remaining apportioned as to $50,225,300 to the Ipswich Trust, as to $41,978,347 to the Brooklyn Trust, and as to $5,674,033 to the Twigg Family Trust. However, the amounts apportioned to the three trusts were applied by Max for his own benefit.

Max had told Diane that the business was under financial pressure and had a large amount of debt. Max did not tell Diane that the net sale proceeds were in the order of $113 million. Max also did not tell Diane of his intention to distribute nearly $100 million for his own benefit.

Max signed meeting minutes for each trustee, as 'Chairman'. under which the corporate trustees appointed a large portion of the proceeds to entities connected with Max. The meeting minutes indicated that only Max was present at the apparent meeting. The meeting minutes were dated 30 June 2007, which was a Saturday.

Diane, Frances and Elizabeth invested the $5 million paid to each of them on advice from an investment adviser, Ronald Bray but largely lost the amounts they invested during the GFC. As a result, Diane, Frances and Elizabeth had capital losses.

Diane knew that Max had received some of the proceeds of sale. She was aware he had purchased certain assets. However, she did not know the quantum of the amount that Max received.

In 2009, Cleanaway paid the deferred consideration, which would result in capital gains tax being payable by the ultimate recipients. The accountants for the Twigg family suggested to Max that the proceeds be "distributed" to Diane, Frances and Elizabeth by Twigg Investments Pty Ltd as the trustee of the Twigg Investments Trust so that their capital losses could be used to offset the capital gain. Max agreed to indemnify Diane, Frances and Elizabeth for any tax payable. The amounts distributed to Diane, Frances and Elizabeth were never actually paid to them and they had unpaid present entitlements from the Twigg Investments Trust of $2,577,295 to each of Frances and Elizabeth and $2,147,746 to Diane.

Max contended that there an agreement by Diane, Frances and Elizabeth that Twigg Investments Trust would not pay distribution entitlements to them.

In 2013/2014 Diane, Frances and Elizabeth settled a claim against Mr Bray for negligence and received $900,000 each in compensation. At that time, they needed to amend their tax returns for 2009, which had reported their capital gains from the Twigg Investments Trust. Prior to this, Diane, Frances and Elizabeth had not understood that their capital losses had been utilised.

Diane, Frances and Elizabeth subsequently commenced proceedings in the Supreme Court of New South Wales against Twigg Investments Pty Ltd in relation to the unpaid present entitlements. That claim was subsequently amended to include a claim against Max for breach of his duties as a director of Twigg Investments Pty Ltd by putting the company in a position where it could not pay the unpaid present entitlements.

Diane and the three trustees of the prior business owning trusts then commenced separate proceedings in the Supreme Court of New South Wales against Max and other entities concerning the disbursement of the Cleanaway sale proceeds claiming as follows:

1. Max breached his fiduciary duties as a director of the trustee companies by causing those companies to distribute trust assets in breach of the respective trusts;
2. Max is liable as a trustee de son tort (a person who owes fiduciary duties but is not actually appointed a trustee) in respect of trust assets distributed to himself or entities he controlled and holds those assets as a constructive trustee either for the corporate trustees or Diane;
3. that Max was a knowing recipient of trust property;
4. Max knowingly induced or procured a breach of trust by the corporate trustees;
5. that Max assisted the corporate trustees with knowledge of a dishonest and fraudulent design; and
6. that the decisions in question were not made honestly and in good faith or without real and genuine consideration.

Max contended that Diane had also expressly or impliedly delegated the power to make decisions on behalf of the corporate trustees to Max and the decisions he made were made in exercise of that power, with the result that there was no breach of trust. Max also contended that there was such a delay that he had a defence of *laches* to any claims for breach of fiduciary duty or breach of trust.

Max also raised various limitation defences, including under section 21 of the *Limitation of Actions Act 1955* (Vic), which provides as follows:

> *21 Limitation of actions in respect of trust property*
>
> *(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—*
>
> *(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
>
> *(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.*
>
> *(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:*
>
> *Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.*

At first instance, Ball J in the Supreme Court of New South Wales found as follows:

1. that, while there was an implied delegation to Max for operational matters, Max had not been authorised to make the decisions on behalf of the trustees in relation to distributions to beneficiaries and, therefore, the trustees had not validly made the distribution decisions. By causing the trustees to pay the proceeds to the various entities without a valid resolution of the directors, Max had breached his fiduciary duties as a director of the trustees;
2. that Max's actions in not getting Diane to sign the meeting minutes had been dishonest as Max had done this to prevent Diane having an opportunity to question his decisions as to the appointment of the sale proceeds;
3. the trustees had a duty to consider at least the circumstances of Max, Diane, Frances and Elizabeth. However, given the decision to appoint $5m to each of Diane, Frances and Elizabeth, in circumstances where Max had been working in the business over the years and had contributed the increase in value of the assets, the trustees had not breached any duties to act in good faith or give real and genuine consideration;
4. it was not necessary to resolve the issue as to the unpaid present entitlements created by the trustee of the Twigg Investment Trust as the amount held by the trustee of the Twigg Investment Trust was property that the trustee held on constructive trusts for the three family trusts due to the other findings. However, importantly, but for the constructive trust, Ball J considered that there would have remained an amount owing to Frances and Elizabeth as the amount of the unpaid present entitlements were held on sub-trust for Frances and Elizabeth and were not debts. Ball J considered that sub-trusts were necessary to achieve the tax outcome sought by Max;
5. no amount remained owing to Diane as Ball J accepted that Diane had agreed to forego her entitlements;
6. the trustee of the Twigg Investments Trust had acted in breach of trust in dissipating the assets of the trust despite amounts owing to Frances and Elizabeth. However, Ball J considered that Max was not knowingly concerned in such breaches of trust as '[h]e had no reason to think that he had made decisions on behalf of the trustee that had the result that Frances and Elizabeth became entitled to the UPEs shown in the accounts; and, no doubt, would have been surprised to find out that he had';
7. a defence of laches for delay as against claims by Diane could be made out in respect of assets that had been paid away by Max and entities as Diane had been sufficiently aware of Max's use of the proceeds and Max and his entities had acted to their detriment. However, laches did not apply in relation to assets still held by Max and his entities as there was no detriment; and
8. that the limitation defences were not made out as section 21 of *Limitation of Actions Act 1955* (Vic) does not apply to remedial trusts (as opposed to institutional trusts).

Max and his various entities appealed the decision of Ball J to the NSW Court of Appeal. Diane appealed against the decision that *laches* prevented her from recovering against Max personally.

On appeal, Max raised section 5 of the *Limitation of Actions Act 1955* (Vic), which provides as follows:

> *5 Contracts and torts*

(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued—

(a) Subject to subsections (1AAA), (1AA) and (1A), actions founded on simple contract (including contract implied in law) or actions founded on tort including actions for damages for breach of a statutory duty;

(b) Actions to enforce a recognizance;

(c) Actions to enforce an award, where the submission is not by an instrument under seal;

(d) Actions to recover any sum recoverable by virtue of enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

...

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

Issues

1. whether there was a breach of fiduciary duty by Max by making the payments without authority of the corporate trustees?
2. whether Max was liable as a trustee de son tort?
3. whether Max had acted dishonestly in concealing the payments made to him and entities controlled by him?
4. whether Max and his entities had a valid defence of laches to both the personal claim against Max and the claim for any trust property held by him and entities?
5. whether the claims against Max were barred under the *Limitation of Actions Act 1955* (Vic)?

Decision

Was Max authorised to make the payments?

The Court of Appeal agreed that Max was not authorised to make the payments as there was no valid decision by the trustees to distribute the Cleanaway proceeds to the relevant entities. The Court of Appeal agreed that, while there may have been implied delegation to Max on operational matters, that delegation did not extend to decisions as to whom to distribute to income of the trusts.

As there no valid decision to distribute the income of the trusts, the payments were made by Max in breach of fiduciary duty.

Trustee *de son tort?*

The Court of Appeal noted that before a person can be liable as a trustee do son tort, they must first voluntarily assume the role of trustee. The Court of Appeal did not consider that Max had assumed the role of trustee. The Court of Appeal noted that, in the case of a trust with a corporate trustee, a director would not become a trustee *de son tort* merely by acting on behalf of the company, they would need to take on the role of trustee themselves.

The Court of Appeal considered that there was nothing in the facts that suggested Max had taken on the role of trustee. Accordingly, Max was not liable as a trustee de son tort.

Whether Max acted dishonestly?

The Court of Appeal noted that it was not clear what the relevance was of whether Max had an dishonest design. However, the Court of Appeal found that the primary judge had not erred in its finding of dishonesty, noting that Max must have instructed Pitcher Partners to depart from its usual practice of preparing trustee resolutions with Diane signing them.

The Court of Appeal considered that Max had "made" the resolutions in the form that he had knowing that Diane placed trust and confidence in him and that, if he disclosed his intentions, some beneficiaries may object. The Court of Appeal considered such conduct, in order to benefit himself, was plainly a transgression of ordinary

honest behaviour. The Court of Appeal considered that Max's conduct in seeking to avoid discovery indicated that he knew he was not entitled to act as he did.

Laches defence

The Court of Appeal considered that Diane did not have sufficient knowledge of the amount of the proceeds from the Cleanaway sale, or that Max had applied them for his personal benefit, in order for a laches defence to apply to the personal claim against Max. The Court of Appeal accepted that up until 2018 Diane had complete trust in Max. The Court of Appeal considered that Diane acted with reasonable expedition once she became aware of the extent to the benefit he had received. Accordingly, the Court of Appeal allowed Diane's appeal concerning the laches defence.

Limitation defences

The Court of Appeal held that section 21 of the *Limitation of Actions Act 1955* (Vic) did not bar the claims in respect of breach of fiduciary duty. The liability of Max and his entities was not as a trustee (of an institutional trust) within the meaning of s 21, but a remedial trustee only.

The Court of Appeal held the section 5 of the *Limitation of Actions Act 1955* (Vic) could operate to the equitable claims against Max and his entities by way of analogy but only from when the claims were discoverable by Diane. The Court of Appeal held that the causes of action were only discoverable in 2018.

The Court of Appeal held that, in any event, any limitation period was postponed until 2018 by operation of section 27 of the *Limitation of Actions Act 1955* (Vic), which provides as follows:

> *Where, in the case of any action for which a period of limitation is prescribed by this Act—*
>
> *(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*
>
> *(b) the right of action is concealed by the fraud of any such person as aforesaid; or*
>
> *(c) the action is for relief from the consequences of a mistake—*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:*

Citation *Twigg v Twigg* [2022] NSWCA 68 (Bell CJ, Payne JA and Brereton JA, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2022/68.html

1.5 Cihan – amendment of trust deed

Facts

The Cihan Family Trust is a discretionary trust that was established in 1997 on the instructions of Mr Mehmet Cihan. Mehmet and his wife have two sons, Kadir and Memduh. Both Kadir and Memduh have adult children of their own. Mehmet was trustee of the trust.

The trust deed provided for there to be a "Nominator" to the trust who had the power to replace the existing trustee with a new trustee. The trust deed specified the nominator as Kadir.

The parties entered into various deeds that purported to supplement or alter the terms of the trust deed by changing the identity of the nominator and/or the trustee.

The second deed, being a first deed of variation of the trust, concerned changes to beneficiaries that was not relevant to this dispute.

The Third Deed

The Third Deed was entered into in March 2018. Among other things, the Third Deed included provisions for:

1. the Nominator to remove Mehmet as Trustee and replace him with Memduh and Kadir; and
2. the Trustee to amend the Trust Deed by replacing Kadir as Nominator with Memduh.

The parties to the deed were by Mehmet, Memduh and Kadir, but Kadir refused or otherwise failed to sign it.

Kadir argued that the Third Deed was ineffective or invalid because the power to amend the Trust Deed did not extend to changing the Nominator. Alternatively, Kadir argued that the Third Deed was ineffective because he did not sign it.

The Fourth and Fifth Deeds

The Trust had borrowed from the National Australia Bank and was not permitted to change the Trustee without the bank's approval, under the covenants relating to the loan. The Fourth Deed and Fifth Deed had the handwritten date 5 June 2018 but were in fact signed on 31 May 2018 by Kadir and Cihan Property Pty Limited (**CPPL**) and then held in "escrow" until bank approval was obtained. The Fourth Deed was titled "Deed of Removal and Appointment of Trustee", under which Kadir purported to exercise his power a Nominator to replace Mehmet as Trustee with CPPL. Mehmet was not a party to the Fourth Deed and was not notified of its execution.

The Fifth Deed was titled "Deed of Variation" and purported to amend the Trust Deed so as to impose limitations on the powers of the trustee and to require the Nominator's consent to future amendments to the Trust Deed and the addition of eligible beneficiaries. Mehmet was not a party to the Fifth Deed and was not notified of its execution.

Mehmet contended that, even if Kadir was still the Nominator of the trust, the Fourth Deed was ineffective or invalid due to one or more of the following reasons:

1. the doctrine of "fraud on a power" applied; or
2. the deed did not take effect before the Sixth Deed took effect and superseded it; or
3. the failure to notify Mehmet as trustee of his removal from the role.

The Sixth Deed

About a week after the Fourth and Fifth Deeds were executed, Mehmet, who was unaware of the Fourth and Fifth Deeds, executed a Sixth Deed. The Sixth Deed purported to appoint Mehmet and Memduh alongside Kadir as the Nominator for the Trust.

Issues

1. Was the Third Deed effective to replace Kadir as Nominator with Memduh?
2. Was the Fourth Deed effective for Kadir to exercise his power as Nominator to remove Mehmet as Trustee and appoint CPPL in his place?
3. Was the Sixth Deed effective to appoint Mehmet and Memduh alongside Kadir as the Nominator?

Decision

Was the Third Deed effective?

The Court held that the Third Deed was not effective to replace Kadir as Nominator with Memduh, because Kadir was included as a party to the Deed and did not sign it.

The Court first considered whether the broad variation power provided to the trustee under the Trust Deed included the power to replace the Nominator. Following the decision in the Western Australian Court of Appeal in *Mercanti v Mercanti* (2016) 50 WAR, Parker J held that the Trustee's power of amendment extends to all the terms of the Trust Deed, apart from exceptions and restrictions that were not relevant to this case.

Having found that the trustee had the power to replace the Nominator, the Court then considered the effect of Kadir's failure to sign the Third Deed. The Court reviewed the objective circumstances, including the wording of the recitals in the Third Deed and concluded that it was clear on the evidence that Mehmet and Memduh signed the Third Deed before Kadir was asked to do so, with the intention that the Third Deed would become effective when all the parties had signed.

Parker J noted that it would have been open to Memduh and Mehmet to agree, once it became clear that Kadir would not be signing the Third Deed, that it should nevertheless have effect between them. However, instead of returning to the Third Deed after Kadir refused to sign, the parties moved on by executing the Sixth Deed instead.

Was the Fourth Deed effective?

If the Third Deed had been effective, Kadir would not have been Nominator at the time the Fourth Deed was executed. However, as the Third Deed was ruled to be ineffective, it was necessary to consider the Fourth and Fifth Deeds.

The Fourth Deed never took effect.

The Court considered whether Kadir's motivation in purporting to remove his father as Trustee could be a "fraudulent" exercise of power. An exercise of power will be "fraudulent" where the power is exercised with an intention contrary to, or not justified by, the instrument creating it. The Court found that Kadir's motivation was both to avoid having to share the family assets equally with Memduh, and also to ensure that he would have a larger say in the operation of the trust. This was not an illegitimate purpose and did not suggest that he would act otherwise than properly in the interests of the trust and in accordance with its terms. The exercise of power was not fraudulent.

The instructions in relation as to how the Fourth and Fifth Deeds were to remain in escrow were unclear. The Court was not satisfied that the handwritten date of 5 June 2018 in fact represented the date the Fourth and Fifth Deeds were released from escrow, as there was some contemporaneous evidence that negotiations with the bank were ongoing. The Court held that the Fourth and Fifth Deeds were still in escrow when the Sixth Deed was executed. As such, the parties to the Fourth and Fifth Deeds were removed from their respective roles by the Sixth Deed before the Fourth and Fifth Deeds could take effect.

Was the Sixth Deed effective?

The Court held that the Sixth Deed was valid and effective. The argument in relation to the Trustee's power to change the Nominator was addressed in respect of the Third Deed and it was concluded that the Trustee does have the power, on the terms of the Trust Deed, to make such a change.

Mehmet was still trustee when the Sixth Deed was executed, due to the ineffectiveness of the Third, Fourth and Fifth Deeds, and was able to appoint himself and Memduh alongside Kadir as Nominator.

Citation *Cihan v Cihan* [2022] NSWSC 538 (Parker J, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/538.html

1.6 Raissis – principal place of residence exemption

Facts

As at 31 December 2020, two brothers, Spiro and Emanuel Raissis (who had been the subject of a case in our May 2021 training notes), together with Anna Raissis were the registered proprietors of land at Randwick (**Randwick Property**), a property in Bondi (**Bondi Property**) and a property in Paddington (**Paddington Property**).

When the Randwick Property was purchased, it contained one building, and some time before 9 May 2016, Spiro, Emanuel and Anna converted the one residence into two separate units, being Unit 1 (at the rear of the residence) and Unit 2 (at the front of the residence). They also constructed a granny flat on the Randwick Property.

In late 2020, the granny flat was demolished, but the demolition of the granny flat did not affect the habitability of the primary residence. The primary residence had not been demolished as at 31 December 2020.

Both Unit 1 and Unit 2 of the Randwick Property were leased out from time to time. Unit 1 was leased out between 9 May 2016 to 9 May 2017 and again between 22 June 2019 and 22 June 2020. Unit 2 was leased to a Mr McLaughlin on 21 September 2019 and he stayed on in that unit after his tenancy agreement had expired until sometime in January 2021.

On 22 July 2020, Emanuel changed his address on the electoral roll and changed his address with Roads and Maritime Services to the Randwick Property.

The Paddington Property was leased to tenants for the period 1 September 2020 to 31 August 2021.

On 27 January 2021, a land tax assessment was issued to Spiro, Emanuel and Anna for the 2021 land tax year (**Assessment**).

On 15 February 2021, Spiro lodged an objection to the Assessment on the basis that the Randwick Property was used as Emanuel's principal place of residence for the 2021 land tax year.

On 23 July 2021, the Chief Commissioner disallowed the objection on the basis that aerial photographs showed that building works on the Randwick Property commenced around August and September 2020. Further, other than a change in address details with RMS and the electoral roll information, there was no other evidence to demonstrate that Emanuel left his former principal place of residence to physically use and occupy the Randwick Property.

An application for review of the decision was lodged with the NCAT.

During the proceedings, the evidence from Emanuel was limited to a one-page statement from him which stated:

1. he was a self-employed builder;
2. he resided in the Randwick Property between 2 July 2020 and 2 November 2020;
3. he resided in the rear of the main residence i.e. Unit 1 and not the granny flat;
4. a fence separated the granny flat and main residence;
5. he moved from the Paddington Property which was leased on 1 September 2020.

Spiro, Emanuel and Anna contended that the principal place of residence exemption should apply because, even though the period of his occupation was relatively short, the NCAT should be satisfied that Emanuel's occupation of the Randwick Property was not of a transient or temporary nature.

Issue

Did Emanuel use and occupy the Randwick Property as his principal place of residence for the 2021 land tax year (i.e., taxing date of 31 December 2020)?

Decision

To claim the principal place of residence exemption, Emanuel needed to show that he either:

1. used and occupied the Randwick Property as his principal place of residence, and for no other purpose, since 1 July in the preceding tax year in which the land tax is levied; or
2. otherwise, the Chief Commissioner needed to be satisfied that Emanuel used and occupied the Randwick Property as his principal place of residence.

The NCAT confirmed that, in order for Emanuel to establish that the Randwick Property was his principal place of residence, he was required to show that it was his principal place of residence as at 31 December 2020.

As it was Emanuel's evidence that he resided at the Randwick Property between 2 July 2020 and 2 November 2020, he was not residing at the Randwick Property as at 31 December 2020, and so the NCAT considered that the Randwick Property was not his principal place of residence at 31 December 2020.

The NCAT confirmed that the relevant enquiry was not whether Emanuel merely resided at the Randwick Property, but whether he resided there as his principal place of residence. The NCAT also confirmed that the mere fact that the period of time Emanuel resided at the Randwick Property is not determinative and that a person can occupy a property for a relatively short period of time as their principal place of residence. It is the quality and nature of occupation which determines the element of permanence.

However, there was insufficient evidence before the NCAT to be satisfied as to the quality or nature of Emanuel's occupation of the Randwick Property during the period 2 July 2020 and 2 November 2020. That is, there was no evidence as to how many nights Emanuel spent at the Randwick Property, whether he moved his belongings into

the Randwick Property or even ate at the Randwick Property. The NCAT commented that merely changing the electoral roll and address details with RMS does not substantiate residence.

The NCAT concluded that the correct and preferable decision is for land tax to be assessed in respect of the Randwick Property for the 2021 land tax year.

Citation *Raissis v Chief Commissioner of State Revenue* [2022] NSWCATAD 146 (SM Dunn, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/146.html

1.7 Appeal Updates

1.7.1 Hyder & Ors

The taxpayers have appealed against the decision of the Federal Court in *Hyder & Ors v Commissioner of Taxation* [2022] FCA 264. In Hyder, multiple taxpayers were issued with alternative assessment in relation to, in part, the same income for the same income years. While the taxpayers were successful in establishing that the Commissioner's conduct in not deferring recover of the assessments was oppressive, the Court also refused to quash the assessments issued to the taxpayers.

1.7.2 Gosford Classic Car Museum

The taxpayer has appealed to the Full Federal Court against the decision in *Automotive Invest Pty Ltd v FC of T (Gosford Classic Car Museum)* [2022] FCA 281 (see our May 2022 Tax Training Notes). The case involved luxury car tax for vehicles that were used in a car museum. The Commissioner found that the cars were liable to luxury car tax because the cars were not used solely as trading stock.

1.8 Other tax and superannuation related cases in period of 12 May 2022 – 9 June 2022

Citation	Date	Headnote	Link
Deputy Commissioner of Taxation v O'Donoghue [2022] WASC 153	12 May 2022	Alleged partnership - Facilitative provisions - Whether dissolution due to business becoming unlawful - Whether dissolution due to inferred agreement - RBA deficit debt - Judgment against other alleged partner - Whether judgment transformed the RBA deficit debt into a 'secondary tax debt'	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2022/153.html
Shaikh and Anderson v Commissioner of State Revenue (Review and Regulation) [2022] VCAT 554	13 May 2022	Review and Regulation List – Duties Act 2000 (Vic), ss 3 ('foreign purchaser', 'foreign natural person'), 28A – Migration Act 1958 (Cth), s 30(1) – Whether purchaser of property, who was permitted to enter and remain in Australia under a temporary partner visa, was a foreign purchaser at time of acquisition – Relevance of Visa Entitlement Verification Online (VEVO) Entitlement Check – Whether, if VEVO Entitlement Check issued to purchaser was misleading, principles of estoppel can apply in state tax review proceedings – Concession as to remission of interest.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/554.html
Deputy Commissioner of Taxation v Discountgroceries.com.au Pty Ltd [2022] FCA 592	13 May 2022	CORPORATIONS – winding up – balance of defendant company's debt to Commissioner unsatisfied – formal requirements for the making of a winding up application met – company's insolvency established – application allowed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/592.html
Whiteman v Deputy Commissioner of Taxation [2022] FCA 568	18 May 2022	BANKRUPTCY – application for extension of time within which to seek leave to appeal made prior to sequestration order – where action was stayed by operation of s 60(2) of the Bankruptcy Act 1966 (Cth) – whether in the circumstances the action should be stayed or dismissed – question of costs.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/568.html
Ferella v Chief Commissioner of State Revenue [2022] NSWCATAD 154	18 May 2022	REVENUE LAW – Land Tax – exemption for land used for primary production	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/154.html

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Fitzpatrick Investments Pty Ltd atf for The Number One Trust v Chief Commissioner of State Revenue [2022] NSWCATAD 159	20 May 2022	COSTS – land tax – Applicant unsuccessful on review of assessments in respect of three years – Applicant withdraws application for review in respect of fourth year on second last business day prior to hearing – Applicant fails to establish dominant use of land was for primary production for two of the three years requiring determination – Applicant fails to establish primary production use had a significant and substantial commercial purpose or character for the remaining year – whether special circumstances warrant an award of costs – whether the Applicant conducted the proceedings in a way that unnecessarily disadvantaged the Respondent – whether the Applicant's claims had no tenable basis in fact or law or were lacking in substance – effect of the Applicant's rejection of a settlement offer	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/159.html
Ely v Commissioner of State Revenue [2022] QCAT 201	20 May 2022	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – revenue and taxation – where objection decision made -– where application filed to review the objection decision – whether the requirements under s 69 of the Taxation Administration Act 2001 (Qld) apply – where the Commissioner applies to dismiss the proceeding – whether the Tribunal has jurisdiction to review the objection decision	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2022/201.html
Deputy Commissioner of Taxation v Huang (No 4) [2022] FCA 618	20 May 2022	PRACTICE AND PROCEDURE — application to vary freezing order to prevent use of Australian assets to pay legal expenses — where substantial judgment debt for income tax and penalties unpaid by respondent — where enforcement of debt will be far easier against remaining Australian assets than overseas assets — where substantial overseas assets sufficient to pay for ongoing legal proceedings — variation of freezing order necessary to allow efficacious execution of order for judgment debt — application granted	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/618.html
Deputy Commissioner of Taxation v Miraki [2022] FCAFC 96	20 May 2022	PRACTICE AND PROCEDURE – application for leave to appeal – where the primary judge made an interlocutory order requiring the Deputy Commissioner of Taxation to lodge a "Request" that the Registrar-General remove notifications of certain freezing orders – whether the decision of the primary judge was attended with sufficient doubt to warrant its reconsideration on appeal – whether substantial injustice would result if leave were refused, supposing the decision to be wrong – whether the case raised an issue of principle of public importance – held: application for leave to appeal dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2022/96.html
Mustapha and Commissioner of Taxation (Taxation) [2022] AATA 1519	7 June 2022	TAXATION – Income Tax –objection to default assessment – applicant bears onus of proving taxable income – whether amended assessments excessive or unreasonable – ATM withdrawals – sole director and shareholder of company – decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/1519.html
Dua and Commissioner of Taxation (Taxation) [2022] AATA 1520	8 June 2022	TAXATION - application for review of an objection decision - application for release from taxation liability - eligible and non-eligible taxation liabilities - whether taxpayer would suffer serious hardship if he were required to satisfy his taxation liabilities – meaning of phrase "serious hardship" – income/outgoing test – assets/liabilities test – other relevant factors in deciding whether to exercise discretion to grant release from taxation liabilities – no serious financial hardship found – other relevant factors weigh against exercising discretion - reviewable decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/1520.html
Parr v Commissioner of Taxation [2022] FCA 678	9 June 2022	ADMINISTRATIVE LAW - application for extension of time to appeal against a decision of the Administ... proposed notice of appeal filed two days late - matters to be taken into account on extension applicatio...	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/678.html

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2 Legislation

The new Federal Parliament has not yet scheduled any sitting dates, and therefore no federal legislation has been introduced.

2.1 Duties Amendment Bill (WA)

The *Duties Amendment Bill 2022* (WA) containing various amendments the *Duties Act 2008* (WA) has been passed by the Western Australian Legislative Assembly.

The Bill removed the current concessional residential rate of duty and reduced the general rate of duty that applies to non-residential property to align the rate of duty that will apply to all dutiable transactions. The Bill also provide for a separate concessional rate of duty involving residential land or business property valued at less than $200,000.

The Bill introduced a vehicle licence duty exemption for new service demonstrator vehicles that are loaned to customers having their vehicles serviced at a dealership and abolished duty on transactions for prospecting licences unless they include other dutiable property.

The Bill also provided a duty exemption for eligible transfers of property made under the family law legislation following a marriage or de facto relationship breakdown.

Duties Amendment Bill 2022 (WA)
w
https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=12EC7C258C6613094825881B002EC0DD

2.2 State Revenue and Fines Legislation Amendment (NSW)

In our April 2022 Tax Training Notes, we reported that the State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 was introduced into NSW Parliament on 22 March 2022. It was assented to on 19 May 2022.

The Act introduces a number of significant changes to the *Duties Act 1997* (NSW) and *Taxation Administration Act 1996* (NSW). Revenue NSW have issued a Technical Guide to be read in conjunction with the Act.

The duties changes included the introduction of two new dutiable transactions, being the a "change in beneficial ownership in dutiable property" and "acknowledgment of trust over dutiable property". A summary of these changes was provided in our April 2022 Tax Training Notes.

Change of beneficial ownership and acknowledgment of trust

The introduction of a change of beneficial ownership in dutiable property as a dutiable transaction means that duty is now imposed on at least the following transactions that were not previously dutiable in New South Wales:

1. a grant of an option over dutiable property: this could be in the form of a call option, a put option, or a put and call option;
2. a grant of an easement for consideration; and
3. a creation of a life interest in land, other than under a will or testamentary instrument.

In relation to the grant of an option, which was not previously a dutiable transaction, Revenue NSW states in the Technical Guide that duty is calculated on the option fee paid for the grant of the option but that the option fee does not include security deposits, performance payments and legal costs. There is no mention in the Technical Guide that the dutiable value would be the greater of the option fee and the unencumbered value of the option, which is how dutiable value is ordinarily calculated. Revenue NSW notes in the Technical Guide that there is no credit for the option fee when the option is exercised.

In addition, a statement which purports to be a declaration of trust, but merely acknowledges that property is already held, or is to be held, on trust for a person, is now dutiable. Duty will be calculated on the dutiable value of the dutiable property at the time of the acknowledgment of the trust.

Anti-avoidance provisions

The Act inserts a new anti-avoidance regime in the *Taxation Administration Act 1956* (NSW). The purpose of this is to extend the anti-avoidance provisions to apply to all tax liabilities, not just duty (as was previously the case).

A 'tax avoidance scheme' is a scheme that a person, whether alone or with others, enters into, makes or carries out for the sole or dominant purpose of enabling a tax liability to be avoided. A 'scheme' is defined broadly to include any contract, arrangement, agreement, understanding or course of conduct.

If you are found to have entered into a tax avoidance scheme, you will be liable to pay the amount of tax avoided. There is no requirement that there need to be an intention to enter into a tax avoidance scheme, only that you have avoided tax.

The liability to pay the tax avoided arises on the date the amount of tax would have been payable had the scheme not been entered into. Therefore, a tax default is taken to occur which means that penalty tax and interest may also be charged.

The Act also introduces new provisions prohibiting the promotion of tax avoidance schemes.

Other Amendments

Further amendments introduced under the Act include:

1. primary production transfers between family members: previously, the exemption from duty on primary production land transfers between family members only applied if the transferee was an individual. From 19 May 2022, the exemption is extended so that it also applies when the transferee is also a deceased estate, a trust, a superannuation fund, a private unit trust scheme or a proprietary limited company where the family member is a 'person directing' the transferee;
2. surcharge purchaser duty: a refund of surcharge duty paid in relation to the transfer of residential land would be made if, after the transfer, the land is used wholly or predominantly for commercial or industrial purposes;
3. land tax surcharge: the Chief Commissioner is now permitted to waive the 200-day residence requirement in exceptional circumstances where a brief absence from Australia has occurred;
4. penalty taxes: the amendments aim to reform the penalty tax system to take into account the nature of the taxpayer. For 'significant global entities' (as defined in the ITAA 1997), the base penalty rate will be increased to 50%. The Chief Commissioner is also empowered to provide penalty relief for genuinely inadvertent errors made by individuals or small businesses in accordance with guidelines;
5. breakup of marriages and defacto relationships: the exemption from duty due to the break-up of de facto relationships will, from 19 May 2022, include transfers or agreements effected by an agreement made for the purpose of dividing relationship property as a consequence of the breakdown of the relationship.

State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022
w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3950

2.3 State Penalties Enforcement (Modernisation) Bill (QLD)

The *State Penalties Enforcement (Modernisation) Amendment Bill 2022* (the **Bill**) proposes to amend the *State Penalties Enforcement Act 1999*, the *State Penalties Enforcement Regulation 2014* and the *State Penalties Enforcement Amendment Act 2017*.

The Bill also proposes to make changes including to amend the *Land Tax Act 2010* to ensure that trustees of Special Disability Trusts are subject to the higher tax-free threshold and lower land tax rates that apply to individuals.

Penalties Enforcement (Modernisation) Amendment Bill 2022
w https://www.legislation.qld.gov.au/view/html/bill.first/bill-2021-060

2.4 Land Tax Rating Amendment Bill (TAS)

The *Land Tax Rating Amendment Bill 2022* (Tas) amends the *Land Tax Rating Act 2000* (Tas) to increase the land tax threshold in Tasmania tax from $50,000 to $100,000.

The Bill also increases the upper tax threshold to $500,000 and lower the tax rate for land valued between $100,000 and under $500,000 from 0.55% to 0.45%.

The amendments take effect from 1 July 2022.

Land Tax Rating Amendment Bill 2022 (Tas)
w https://www.parliament.tas.gov.au/Bills/Bills2022/6_of_2022.html

2.5 Land Tax Amendment (Foreign Investors) Bill and Duties Amendment Bill (Tas)

The *Land Tax Amendment (Foreign Investors) Bill 2022* (Tas) and *Duties Amendment Bill 2022* (Tas) await assent by the Tasmania Parliament.

Foreign investor land tax surcharge

The *Land Tax Amendment (Foreign Investors) Bill 2022* seeks to introduce a 2% foreign investor land tax surcharge from 1 July 2022. The land tax thresholds will not apply for the purposes of the surcharge, such that the surcharge may be imposed even if there is no land tax payable.

Under the amendments, the surcharge will apply to any interest in residential land that is:

1. acquired by a foreign person on or after 1 July 2022
2. owned by a foreign company or trust that becomes foreign on or after 1 July 2022; or
3. acquired by a foreign person prior to 1 July 2022, where that person acquires a further interest in the same land after 1 July 2022.

The meaning of 'foreign person' is defined in the *Duties Act 2001* (Tas). A foreign natural person means anyone that is not an Australian citizen, not a holder of a permanent visa, and not a New Zealand citizen who is the holder of a special category visa.

The surcharge will not apply to principal residence land held by foreign persons or to commercial residential properties, including boarding houses, hostels, retirement villages, and residential care services. Tasmanian-based foreign developers that build at least 50 residential dwellings in Tasmania during a 12-month period will be able to apply for relief from the surcharge.

There will be a 6-month window for non-foreign discretionary trusts to amend their trust deeds after each assessment date to prevent the unintended imposition of the surcharge. The Commissioner will have the discretion to determine and publish the circumstances where a landowner is not considered foreign for the purposes of the surcharge.

Foreign investor duty surcharge

The *Duties Amendment Bill 2022* will amend the *Duties Act 2001* (Tas) to clarify operation of the foreign investor duty surcharge. Th amendments applying retrospectively from 1 July 2018, and clarify that:

1. commercial residential properties are not subject to the duty surcharge;
2. members of self-managed superannuation funds have a beneficial interest in the assets of the fund for the purposes of the surcharge duty; and
3. beneficiaries of testamentary estates have beneficial interest in the assets of the trust for the purposes of the duty surcharge.

The Bill will also introduce duty surcharge relief from 1 July 2022 for Tasmanian-based foreign developers that build at least 50 residential dwellings in Tasmania during a 12-month period.

COMMENT – The definition of 'foreign person' in the *Duties Act 2001* (Tas) does not require a permanent resident or New Zealand citizen be in Australia for a prescribed period to not be a foreign person. This can be compared to the definition of 'foreign person' in the *Duties Act 2001* (NSW) (taken from the *Foreign Acquisitions and Takeovers Act 1975* (Cth)) which requires that a permanent resident or New Zealand citizen be in Australia for a continuous period of 200 days before the relevant taxing date in order to not be a foreign person.

Land Tax Amendment (Foreign Investors) Bill 2022 (Tas) and *Duties Amendment Bill 2022*
w https://www.parliament.tas.gov.au/Bills/Bills2022/17_of_2022.html
w https://www.parliament.tas.gov.au/Bills/Bills2022/18_of_2022.html

2.6 State tax amendments (VIC)

The *State Taxation and Treasury Legislation Amendment Bill 2022 (Vic)* containing various tax and tax-related measures has been passed by the Victorian Legislative Assembly.

The Bill amended the *Land Tax Act 2005 (Vic)* to provide an upfront exemption from land tax where a person is absent because of the construction or renovation of a residence with an exemption. The prior provisions imposed land tax but provided a refund model. This imposed a potentially significant financial burden on landowners, as it required the land tax to be paid upfront until construction or renovation has finished before the land tax is refunded. The exemption will be available for a maximum of four years in total from the commencement of construction or renovation and is subject to certain requirements. A clawback mechanism would enable the revocation of the exemption, in full or part, if the requirements of the exemption are not met.

The Bill also introduced an exemption from land tax for land on which a specialist disability accommodation (SDA) enrolled dwelling provided by an SDA provider within the meaning of the *Residential Tenancies Act 1997 (Vic)* is being constructed.

The Bill amended the *Payroll Tax Act 2007* to ensure an exemption applies to certain wages paid under an employment agency contract and other related arrangements, where the agent on-hires their employees to a client exempt from payroll tax (for example, a charity or public hospital). The amendments also enable the Governor in Council to prescribe, by regulation, specific circumstances, and persons, eligible for the exemption, to enable the Government to respond quickly to changes in industry practices and developments in case law.

The Bill amends the *Taxation Administration Act 1997 (Vic)* to:

1. clarify the time at which a deemed assessment of a dutiable transaction processed using the on-line duty payment system is made and served; and
2. impose a time limit of 5 years in relation to the power of the Commissioner of State Revenue to permit an objection to be lodged out of time.

State Taxation and Treasury Legislation Amendment Bill 2022 (Vic)
w https://www.legislation.vic.gov.au/bills/state-taxation-and-treasury-legislation-amendment-bill-2022

3 Private Binding Rulings

3.1 Sale of farmland

Facts

Farmland was acquired by a farming family in the middle of the last century. The family has conducted farming operations in the district for generations.

As some time, the ownership of the farmland was transferred to a company, controlled by the family.

The farmland was used by the company in operating a dairy farming business for around XX years, but this was later changed to cattle grazing.

Several years ago, the local council released a Local Environmental Plan which introduced changes to zoning within the region. A section of approximately XX acres along the Northern Boundary of the farmland was rezoned as residential.

Since the rezoning, land values have increased, resulting in a substantial increase in the annual council rates for part of the farmland that has been rezoned.

The company has received offers for the purchase of sections of the farmland but it was decided the offers were too low.

The company proposes to develop and subdivide the rezoned section of the farmland.

The company has not attempted to sell the farmland as a whole, and plans to continue cattle farming operations on the parts of the land that it retains.

The work involved with the development of the land would be limited to the minimum requirements set out by Council to develop the farmland. The work expected to meet the minimum council requirements will include roads, street lighting, footpaths, landscaping, drainage, water and sewage. The development costs are expected to be more than $X million and the development is expected to take 3-4 years. The company will need finance to fund the development costs.

The company will engage the required consultants to prepare the applications to be lodged with Council.

The company will engage a professional developer to undertake the proposed development on a quoted fee for service arrangement.

The sale of the subdivided lots will be arranged through local real estate agents.

Questions

1. Will any part of the proceeds or profit made by the Company on the sale of the Subdivided Lots, constitute assessable income under section 6-5 of the ITAA 1997?
2. Will the gain from the sale of the subdivided lots be assessable as the mere realisation of a capital asset?

Ruling and reasons

The ATO ruled yes to the first question and no to the section question.

The ATO considered that the company's activities in developing the land would constitute a land development business and, therefore, the subdivided lots will be trading stock.

The ATO noted that, generally, there are three ways by which the proceeds or gains from dealing in land will be treated for tax as follows:

1. sale proceeds are treated as ordinary income under section 6-5 of the ITAA 1997 where the land is held as trading stock and sold as part of carrying on a business.

2. profits are treated as ordinary income under section 6-5, where land is not trading stock and is sold as part of an isolated commercial transaction entered into with a profit-making intention.
3. gains are treated as statutory income under the CGT provisions in Part 3-1 and Part 3-3, where the land is neither trading stock nor the subject of an isolated profit-making scheme or undertaking and the proceeds of sale are the mere realisation of a capital asset.

The ATO noted that, where the sale of property is held to be a 'mere realisation', the sale is on capital account and only the CGT rules apply.

Trading stock?

The ATO noted that under section 70-10 of the ITAA 1997, 'trading stock' is defined as including 'anything produced, manufactured or acquired that is held for purposes of manufacture, sale or exchange in the ordinary course of a business'.

This required consideration of whether the activities of the company constituted a business of property development and sale. Whether a business is being carried on is a question of fact and degree.

The ATO noted that in distinguishing between proceeds that is mere realisation of capital and ordinary income, stated in *California Copper Syndicate v Harris* (1904) 5 TC 159 Lord Justice Clark stated as follows:

> *...What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being - Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?*

The ATO noted that in *Whitfords Beach Pty Ltd v Commissioner of Taxation* 82 ATC 403 the mere realisation approach was narrowed with Mason J stating as follows:

> *However, apart altogether from this factor, the facts previously mentioned show that there was involved more than mere realization of an asset. Deane J. was right in pointing to the circumstance that the asset was divided and improved in the course of a business of dividing and improving the asset. In this respect I do not agree with the proposition which appears to be founded on remarks in some of the judgments that sale of land which has been subdivided is necessarily no more than the realization of an asset merely because it is an enterprising way of realizing the asset to the best advantage. That may be so in the case where an area of land is merely divided into several allotments. But it is not so in a case such as the present where the planned subdivision takes place on a massive scale, involving the laying out and construction of roads, the provision of parklands, services and other improvements. All this amounts to development and improvement of the land to such a marked degree that it is impossible to say that it is mere realization of an asset. We need to bear in mind that the subdivision of broad acres into marketable residential allotments involves much more in the way of planning, development and improvement than was formerly the case.*

The ATO also referred to the decision in *Statham & Anor v. Federal Commissioner of Taxation* (1988) 89 ATC 4070 where Woodward, Lockhart and Hartigan JJ provided at page 4075 that:

> *It is well established by the reported cases, including those mentioned above, that the mere realisation of an asset at a profit does not necessarily render the profit taxable. The profit must arise from the carrying on of a business or a profit-making undertaking or scheme. The mere magnitude of the realisation does not convert it into such a business, undertaking or scheme; but the scale of the realisation activities is a relevant matter to be taken into account in determining the nature of the realisation, i.e. in determining whether the facts establish a mere realisation of a capital asset or a business or profit-making undertaking or scheme.*

The ATO cited *Taxation Ruling* TR 97/11 which outlines the Commissioner's view on whether a taxpayer is carrying on a business and states that it requires a consideration of a range of indicia as set out in the following table:

Indicium	**Application to the circumstances**

Whether the activity has a significant commercial purpose or character	The ATO noted that, while the company will not undertake the engineering, planning, surveying, development, marketing and sales activities themselves, but will engage professional third parties to do this as agents on their behalf it will maintain a high level of decision making and control of the overall activity. The ATO noted that a high level of control by owners over property developments on their land, leads more readily to the conclusion that the landowner is engaging in a property development business.
Whether the taxpayer has more than just an intention to engage in business.	The company is already engaging in business being its beef cattle farming enterprise. The ATO accepted that that the preliminary planning, engineering, development approval and the assessing of financial viability would likely not be considered to be part of the business activity of the company but considered that on signing a development agreement, the land will change from one of farming to development, providing a positive indicator that the company has commenced carrying on the business of land subdivision and sale.
Whether the taxpayer has more than just an intention to engage in business.	As the company has conducted research in the activities and has indicated that it will undertake the development itself in order to maximise its financial returns, there is a strong indication of a profit-making intention. The ATO also had regard to the prior decisions to not sell the land in accordance with the offers received.
Whether the taxpayer has a purpose of profit as well as a prospect of profit from the activity.	The information provided indicates that the company expects to make a considerable profits and decisions will be made to maximise the profit.
Whether there is repetition and regularity of the activity	While the company has not previously undertaking land development and sale, the proposed activity involves a significant amount of work expected to be carried out over three to four years.
Whether the activity is of the same kind and carried on in a similar manner to that of the ordinary trade in that line of business	The ATO notes that an activity is more likely to be a business when it is carried on in a manner similar to that of other participants in the same industry. The ATO considers that the engaged professionals and subcontractors will act as agents of the company and that Their conduct will be the conduct of the company. The ATO notes that the engagement of professionals and experienced subcontractors to utilise skills and expertise that a person does not itself hold is a common business practice and will help ensure the work is carried out in a professional way. As such, the development activities in this case will be of the same kind and carried out in a similar way to the that of the ordinary trade.

The activity is planned, organised and carried on in a businesslike manner such that it is directed at making a profit, and	A high level of planning and organisation will be required to undertake the land subdivision and sale in this case.
The size, scale and permanency of the activity.	The ATO noted that extensive works over three to four years at a cost of more than $X million will be undertaken. These are expected to include roads, street lighting, footpaths, landscaping, drainage, water and sewage.
The activity better described as a hobby, a form of recreation or a sporting activity	The proposed activities are not a hobby or a form of recreation

Having regard to the above factors, the ATO concluded that proposed development will go beyond merely realising the area of land subject to rezoning in an enterprising way.

ATO reference *Private Binding Ruling Authorisation No. 1051958927908*
w https://www.ato.gov.au/law/view/document?docid=EV/1051958927908

3.2 CGT and subdivision of land

Facts

In 19XX, Person A purchased a block of land.

The land was XX hectares across two titles. It was zoned rural residential and has not been rezoned. In approximately 19XX, after the boundary was re-aligned, the smaller portion of land (XX hectares) on the second title, was sold.

Person A built their family home on the remaining hectares in 20XX, moving into the home shortly after. There is a portion of the land on the block which Person A does not visit, but has significant overheads in relation to annual fire reduction which Person A undertakes. This unimproved land has attracted dumping and unauthorised woodcutting which is a liability to Person A. Person A is in their 60's and wants to reduce their workload and liabilities.

Person A's home loan is becoming onerous in relation to Person A's other outgoings.

As a result, Person A undertook to subdivide three Lots of the land which comprise of approximately two hectares each. The development application was approved by Council in August 20XX.

Various financial constraints and contractor delays led to delays in the commencement of the subdivision and led to the requirement for subsequent extensions to Council approval. The extension was approved in 20XX.

On XX May 20XX, Person A received Council's Substantial Commencement letter, although the physical works had already commenced several months beforehand.

The market value of the land just prior to the subdivision was $X million.

Person A undertook the role of overall project management, but engaged the services of a landscape architect, a surveyor and a consultant to oversee the various activities. Person A incurred costs related to the subdivision and sale of the Lots of $X. The subdivision costs were funded through Person A's existing loan.

Development activities are nearing completion. Upon completion titles for the three new Lots will be issued in the names of Person A and Person B.

The Lots have been advertised for sale with a local Real Estate Agent. They were advertised on approximately XX January 20XX. The asking price for each block was $X. Person A has accepted offers to sell Lots 1 and 2. Lot 3 has not yet been sold.

Person A has not undertaken any subdivision activities or any business of land development in the past. Person A does not have plans to undertake subdivision activities or any business land development in the future. The land as a whole has not been on the market for sale.

Person A is not registered for GST.

Questions

Will the profit from the sale of subdivided Lots of land be treated as being taxable under the CGT provisions?

Ruling and reasons

Yes.

The ATO ruled that the proceeds from the sale of the subdivided lots will not be ordinary income and not assessable under section 6-5 of the ITAA 1997 as either the carrying on of a business (in accordance with the factors listed in Taxation Ruling 97/11) or a profit-making or commercial transaction (in accordance with Taxation Ruling TR 92/3).

The ATO concluded that any proceeds received on the disposal of the subdivided Lots will represent a mere realisation of capital assets which will be assessed under the capital gains tax provisions.

COMMENT – Private Binding Ruling Authorisation No. 1051920009944 considers similar circumstances to the above. In that Private Binding Ruling, Person B had always intended to build their family home on a block of land. However, due to a breakdown of Person B's marriage and the increased constructions costs in building Person B's home on the land, Person B determined to subdivide the land into two lots. The two lots were sold with council approval, and the only construction works on the land was the erection of a boundary fence, driveway, sewerage, stormwater, electrical and NBN connections. The ATO determined that the proceeds received from the sale of the vacant subdivided lots were not assessable as ordinary income on the basis that the Person B was not carrying on a business or engaging in a profit-making or commercial transaction.

ATO reference *Private Binding Ruling Authorisation No. 1051955986207*
w https://www.ato.gov.au/law/view/document?docid=EV/1051955986207

3.3 Small business restructure rollover

Facts

A company is owned by discretionary trusts. The company operates a business of accounting and taxation services. The company is a registered tax agent and a practice entity registered with Chartered Accountants Australia and New Zealand ("CAANZ").

All of the trusts have made FTEs.

The company proposes to transfer the business to the trusts so that they can operate the business in partnership.

The company previously held an AFSL and SMSF auditor registration but has relinquished them.

Questions

1. Will the proposed transaction be part of a genuine restructure of an ongoing business for the purpose of paragraph 328-430(1)(a) of the ITAA 1997?
2. Will the proposed transaction result in the ultimate economic ownership of assets being maintained for the purposes of paragraph 328-430(1)(c) of the ITAA 1997?

Ruling and reasons

Question 1

Yes.

The ATO notes that the meaning "genuine restructure of an ongoing business" was considered in LCR 2016/3, where the following is stated:

> *5. Whether a transaction is or is part of a 'genuine restructure of an ongoing business' is a question of fact that is determined having regard to all of the circumstances surrounding the restructure.*
>
> *6. A 'genuine restructure of an ongoing business' is one that could be reasonably expected to deliver benefits to small business owners in respect of their efficient conduct of the business. It can encompass a restructure of the way in which business assets are held where that structure is likely to have been adopted had the business owners obtained appropriate professional advice when setting up the business. However, it is a composite phrase emphasising that the SBRR is not available to small business owners who are restructuring in the course of winding down or realising their ownership interests.*

The ATO then applied factors set out in LCR 2016/3 as follows:

Features	**Application to circumstances**
It is a bona fide commercial arrangement undertaken in a real and honest sense to: • facilitate growth, innovation and diversification • adapt to changed conditions, or • reduce administrative burdens, compliance costs and/or cash flow impediments.	The ATO noted that the partnership structure is more flexible and allow the terms of the partners to be governed by a partnership agreement without the restrictions of the *Corporations Act 2001*. The partnership model will assist with bringing on new business owners as the business will be able to provide financial assistance to incoming partners. A partnership model is a lower cost structure and is better suited to the changed environment for the business.
Is the arrangement authentically restructuring the way in which the business is conducted as opposed to a 'divestment' or preliminary step to facilitate the economic realisation of assets	Restructure is being undertaken to create a more appropriate business model and is not a step towards divestment of the business.
Is ultimate economic ownership maintained	Yes
Do the small business owners continue to operate the business through a different legal structure?	Yes, as same five discretionary trusts that are currently the shareholders in the company will operate the business
Is it reasonable to conclude that the proposed restructure will result in a structure likely to have been adopted had the small business owners obtained appropriate professional advice when setting up the business?	Had the business been established today without the need for the AFSL and SMSF audit services, a partnership structure would have been adopted. Partnerships models are a common structure for professional services firms due to flexibility and administrative simplicity. The ATO also noted that the transaction is not predominantly tax-driven.

Having regard to the above matters, the ATO considered that the proposed restructure is considered to be part of a genuine restructure of an ongoing business.

Question 2

The ATO noted that for the rollover to apply the restructure must not have the effect of materially changing which individual has, or which individuals have, the ultimate economic ownership of the business assets and, where

ownership of an asset passes to or from a discretionary trust, this requirement would generally not be able to be met for discretionary trusts but that there is an alternative test for discretionary trusts in section 328-440 of the ITAA 1997.

The ATO considered the requirements of section 328-440:

(a)(i) just before the transaction took effect, the asset was included in the property of a non-fixed trust that was a family trust:

the ATO considered this was satisfied as, just before the restructure the shares in the company that owns the business are owned by the trustees of the five trusts that are family trust so that, the business assets are owned by trustees of non-fixed trusts that are all family trusts just before the transaction;

(a)(ii) just after the transaction takes effect, the asset is included in the property of a non-fixed trust that is a family trust:

the ATO concluded that after the restructure the business assets will be owned by family trusts

(b) every individual who, just before the transfer took effect, had the ultimate economic ownership of the asset was a member of the family group (within the meaning of Schedule 2F to the ITAA 1936) for the trust or trusts;

Each trust has made an FTE with the specified individuals disclosed.

(c) every individual who, just after the transfer takes effect, has the ultimate economic ownership of the asset is a member of that family group.

The ATO noted that none of the trust deeds for the family trusts will be amended as part of the restructure.

COMMENT – it is interesting that the ATO considered that company assets are 'owned' by the shareholders for the purposes of the small business restructure rollover. This also appears to be a generous interpretation of the underlying ownership requirement.

ATO reference *Private Binding Ruling Authorisation No. 1051911760454*
w https://www.ato.gov.au/law/view/document?docid=EV/1051911760454

3.4 Inheriting debtors

Facts

A child of a deceased lawyer ("the deceased") inherited a right to payment of a share of the deceased's law practice receivables.

The deceased was the largest shareholder a law firm in Brazil where the deceased conducted the practice.

The practice was almost exclusively litigating on a contingency fee basis

The child began receiving payments from the right acquired from death of their parent.

The law firm does have some separate existence, but it is not a corporation as understood in Australia.

The child's tax agent advises that the child is simply receiving your inheritance, albeit as and when the inheritance can be paid to child.

The child considers that since they never were, and are not, a shareholder of the law firm, there is no assessable dividend in terms of section 44 of the ITAA 1936.

The child became a resident on XXXX and using a foreign exchange rate applicable on the next business day, the total value of the receivables from the law firm to which they were entitled amounted to XXXX.

After the parent died, two of the child's siblings, who were practising lawyers, decided to continue the law firm, and the child continues to receive amounts from the law firm in discharge of its obligations to pay them even after they became an Australian resident.

Questions

1. Are the amounts received ordinary income or dividends?
2. Is the child taken to acquire a CGT asset being a right to payments when they became an Australian resident?
3. Does a CGT event occur every time a payment is received?
4. What is the cost base for the CGT asset?
5. Will the Commissioner simplify accounting between the child and the Commissioner by treating the receivables due to you as your inheritance as a single asset, so that you effectively begin to account for a capital gain on the collective asset once the cost base is exhausted?

Ruling and reasons

The ATO ruled that the amounts were not ordinary income, but that there was a right to receive an amount that was a CGT asset that was inherited. As a result of the change in residency, the right had a cost base equal to its market value at that time.

The ATO consider that CGT event C2 occurred each time funds were received, and declined to allow a simplified accounting to occur.

COMMENT – if CGT event C2 happens to part of an asset you are required to determine how much of the cost base gets used in calculating the capital gain based on a formula = capital proceeds received x cost base of asset ÷ (capital proceeds + market value of remaining asset): section 112-30 of ITAA 1997. This can lead to costly compliance when valuing the remaining right.

As the right is to receive an amount of foreign currency, the forex rules will also apply.

TRAP – the taxpayer in this ruling is fortunate in that they have a cost base in the debtors. Usually debtors have no cost base, as the cost of creating a debtor has been deducted, or there were no such costs.

ATO reference *Private Binding Ruling Authorisation No. 1051922629100*
w https://www.ato.gov.au/law/view/document?docid=EV/1051922629100

3.5 CFD activity is a business

Facts

A person is a full-time employee who satisfies the less than $250,000 income requirement for the relevant income years.

They began trading in CFD's in 20XX.

They began CFD trading to access global assets at a lower cost than buying the asset outright, ease of executions and the ability to go long or short.

In relation to the trading activities:

- They are completed online.
- On average 20 hours per week is spent on CFD trading activity.
- There are two types of strategies when you are entering and closing a trade.
- There are strategy and planning sessions with an Account Manager at CMC on a weekly basis.
- There is a business plan.
- The person undertakes Continuous Professional Development (CPD) webinars on-line.
- The person has obtained a CMC Pro certificate due to their experience in trading and passing a knowledge test which now recognises you as a sophisticated investor.
- On average 10 alerts per day are received for trading related events and news.

- Research is carried our through various providers such as 'While you were sleeping', 'Ord Minnett' and 'Australia Morning Focus'.
- On average 7 hours per week is spent researching.

There were approximately XXX transactions in the 20XX financial year, XXX transactions in the 20XX financial year and XXX transactions in the 20XX financial year.

The assessable income from the trading activity was more than $XXXX in the relevant years.

There was a loss as at 30 June 20XX, 30 June 20XX and a profit as at 30 June 20XX.

The person entered into trading CFD's with a view to make a profit.

Question

Are the gains and losses from carrying on a business?

Ruling and reasons

Without providing any analysis in the published ruling the ATO considered a business was carried on stating:

The determination of whether or not an activity amounts to a business being carried on is a result of the weight and influence of the facts in that situation. After applying the facts of your situation to the relevant indicators as listed in Taxation Ruling TR 97/11, Income tax: am I carrying on a business of primary production? (TR 97/11) it is considered that you were carrying on a business of trading in CFD's. Further information about carrying on a business can be found by searching 'QC 31733' on ato.gov.au

COMMENT – the ATO have issued multiple private rulings where they considered CFD activity to not amount to a business, see for example Private Binding Ruling Authorisation No. 1051961865460 or 1051933600135.

TRAP – if the activity is a business, the non-commercial loss rules can operate to deny deductibility to any losses.

ATO reference *Private Binding Ruling Authorisation No. 1051957612726* w https://www.ato.gov.au/law/view/document?docid=EV/1051957612726

3.6 Loss through fraud and black hole deduction

Facts

A person conducts a share trading business and in the 20XX year invested into a foreign trading platform to diversify the share trading activities.

There were deposits totalling $XXX,XXX made.

The person chose what to buy and when to sell. Trades were monitored daily and checking was done that the real time charts in Australia were correct.

The trading platform did not follow instructions on certain buys/sells.

The person instructed the trading platform to sell a number of trades and transfer the investments back to the person however at this point the trading platform ceased contact with the person.

The person could not get recourse through their financial institution and pursued legal action.

Through the legal action it was discovered that trading platform was fraudulent. There is no prospect of recovery from the fraud.

Question

Is the loss able to be deducted over five years under the blackhole provisions?

Ruling and reasons

The ATO considered that, at the time the outgoing was incurred, the expectation was that the outgoing would result in capital expenditure in relation to expanding the business of share trading. As none of the exclusions in section 40-880 of the ITAA 1997 applied, the capital expenditure is deductible under section 40-880 of the ITAA 1997 over 5 years.

COMMENT – the opportunity for such fraud to occur in relation to internet based business may ultimately lead to it being accepted that the possibility of such fraud is an ordinary incident of business so that any loss would be merely be outright deductible per *C of T (NSW) v Ash* (1938) 61 CLR 263.

ATO reference *Private Binding Ruling Authorisation No. 1051964156206*
w https://www.ato.gov.au/law/view/document?docid=EV/1051964156206

3.7 Meaning of affiliate

Facts

The taxpayer and their parent purchased a property in joint names in 20XX.

The parent operated a primary production business on the property.

The taxpayer did not join in the primary production business due to drought conditions but assisted from time to time for which he or she was not paid, although the parent did pay for some personal expenses of the taxpayer.

For a brief period, while the parent was recovering from surgery, the taxpayer managed the property.

The taxpayer agreed to transfer his or her share of the property to the parent for no consideration.

Questions

Is the parent the affiliate of the taxpayer?

Ruling and reasons

The ATO noted that for an entity to be a person's affiliate, the following requirements must be met for under section 328-130 of the ITAA 1997:

1. the entity must be an individual or company;
2. the entity must carry on a business; and
3. in relation to its business affairs, the entity must act, or could reasonably be expected to act according to the directions or wishes of the entity or in concert with the entity.

The ATO notes that, importantly, subsection 328-130(2) of the ITAA 1997 provides that an individual is not your affiliate merely because of the nature of the business relationship shared by the individuals.

The ATO considered the meaning of "acting in concert" noting that it requires a substantial degree of dependence on, or connection with, the taxpayer.

The ATO referred to the factors set out in Explanatory Memorandum that introduced the affiliate test that are considered to have a bearing on whether an individual or company acts in concert with or in accordance with a persons directions and wishes as follows

1. family or close personal relationships;
2. financial relationships or dependencies (e.g. shared banking arrangements);
3. relationships created through links such as common directors, partners, co-trustees or shareholders;
4. the degree to which the entities consult with each other on business matters; and
5. whether one entity is under a formal or informal obligation to purchase goods or services or conduct aspects of its business with the other entity.

The ATO noted that additional relevant factors, as identified in Ruling TR 2002/6 (withdrawn) and the ATO guide (March 2015), include:

1. whether the entities have common employees, resources, facilities or services;
2. any common flow of profits;
3. any common ownership or capital backing;
4. whether goods and/or services supplied by one entity to the other account for a large percentage of the potential affiliate's business and/or a large proportion of its income;
5. whether a customer's overall business is shared; and
6. whether the entities provide identical or similar goods or services.

The ATO noted that, in general, 2 businesses will not be taken to be acting in concert if they:

1. have different employees;
2. have different business premises;
3. have separate bank accounts;
4. do not consult on business matters; and
5. conduct their business affairs independently in all regards.

The ATO considered that the family relationship between the taxpayer and the parent and that was some consultation on business matters were not sufficient to create an affiliate relationship.

The ATO noted that there were no shared bank accounts and that while the parent provided financial assistance, that was a private arrangement unconnected with the business.

Accordingly, the ATO concluded the parent was not the taxpayer's affiliate.

COMMENT – the comment that for someone to be an affiliate as a result of 'acting in concert' is something that 'requires a substantial degree of dependence on, or connection with, the taxpayer' is an unattributed statement that is not made on the ATO summary of what is necessary for someone to be your affiliate at https://www.ato.gov.au/Business/Small-business-entity-concessions/Concessions/CGT-concessions/Affiliates/#Actinginaccordanceorinconcert In the ATO website guidance they merely say it is a question of fact dependent on the circumstances.

The outcome of this PBR is that the small business CGT concessions would not be available to shelter any gain when the property is transferred to the parent.

ATO reference *Private Binding Ruling Authorisation No. 1051961514971*
w https://www.ato.gov.au/law/view/document?docid=EV/1051961514971

3.8 Partition Agreement

Facts

Two spouses with the parents of one of them agreed to purchase a property together.

A partition agreement was entered into on following relevant terms:

1. the Spouses and the Parents agreed to purchase a property;
2. due to the Parents inability to secure finance, the property would initially only be in the Spouses names but held for the benefit of the parties in equal shares, as tenants in common, until such time as the property could be subdivided and separate titles obtained;
3. as soon as practicable the property would be partitioned and a repayment arrangement established in relation to the mortgage;
4. the partitioning was to occur as follows:
   (a) the Parents would receive Lot A, being the northern half of the property; and
   (b) the Spouses would receive Lot B, being the southern half of the property.
5. the parties would contribute equally to the purchase cost of the property as well as all other costs relating to the property in equal shares;

6. each party would be responsible for all costs associated with the construction of their own house and improvements on their own lot;
7. upon completion of the development the parties agree to do all things necessary to register a strata plan and transfer the title to each respective lot to the party entitled to the ownership of that lot.

The property was subdivided into Lot A and Lot B

Lot B was transferred to the Parents for a nominal value of $X. Stamp duty was paid on the transfer at half the market value of the property.

Questions

1. Does the partition agreement give rise to an ownership interest in property for CGT purposes?
2. Is the transfer of Lot B a CGT event?

Ruling and reasons

In relation to question 1, the ATO ruled that the agreement provides sufficient evidence and detail to support that Person A, Person B, Person C and Person D all have an equal beneficial ownership interest in the property.

In relation to question 2, the ATO ruled yes.

The ATO considered that when the block was subdivided it became two separate assets for CGT purposes. As both the Spouses, and the Parents had equal beneficial ownership of the original block, when the Spouses transferred Lot B to the Parents, they disposed of their 50% interest in Lot B. Conversely, the Parents had a CGT event for the disposal of their 50% interest in Lot A. As the transaction was not arm's length, the ATO set out that the market value of the property is used to calculate the capital gain at the time of the CGT event.

COMMENT – presumably the transfer of interests occurred before the strata titling took effect, otherwise section 118-42 of ITAA1997 might have exempted the gain.

ATO reference *Private Binding Ruling Authorisation No. 1051959466902*
w https://www.ato.gov.au/law/view/document?docid=EV/1051959466902

3.9 Conversion of shares as CGT event

Facts

An Australian resident company has ordinary and preference shares on issue.

The preference shares rank equally with ordinary shares, except in relation to liquidation, reclassification and conversion.

On conversion the preference shares convert into a number of ordinary shares obtained by multiplying the applicable Conversion Rate then in effect by the number of Preference Shares being converted. The Conversion Rate in effect at any time shall be the quotient obtained by dividing the Preference Share Original Issue Price by the Preference Share Conversion Price in effect at the time of conversion.

The company is proposing that the preference shares be converted.

The Constitution of the company provides subject to the *Corporations Act* and unless the directors determine otherwise in writing, any conversion or reclassification of shares will occur by way of variation of the rights attaching to the relevant shares (and will not cause the cancellation of any existing share or the issue of any new share).

Questions

1. Did the conversion of the preference shares to ordinary shares trigger a Capital Gains Tax (CGT) event?
2. Does the modification of the first element of the cost base as set out in item 1 of the table in subsection 130-60(1) of the Income Tax Assessment Act 1997 apply to the converted shares?

Ruling and reasons

The ATO considered there could be two relevant CGT events as a result of the conversion, CGT event H2 and CGT event C2.

The ATO considered that CGT event H2, which occurs if an act, transaction, or event occurs in relation to a CGT asset and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base may occur. They based this position on Paragraph 10 of TR 94/30 which provides that a variation in rights for money or other consideration, may give rise to a deemed disposal under subsection 160M(7) of the ITAA 1936 where the other requirements of the subsection are met. The ATO noted that subsection has been rewritten as CGT event H2. Although not acknowledging that here there is no money or other consideration being given, the ATO considered that CGT event H2 does not occur because a cost base adjustment occurs.

The view that a cost base adjustment occurs is as a result of the ATO considering that the preference shares were a convertible interest in the company. A convertible interest includes

> *An interest issued by the company that:*
>
> *(a) gives its holder (or a * connected entity of the holder) a right to be issued with an * equity interest in the company or a * connected entity of the company; or*
>
> *(b) is an * interest that will, or may, convert into an equity interest in the company or a connected entity of the company.*

The ATO reason that, notwithstanding there is no cancellation and only a rights change, that the preference share is a convertible interest as it gives the shareholder the right to be issued with ordinary shares, being equity interests.

The ATO reach the conclusion that there is a cost base adjustment under subsection 130-60(1) as the conversion of the preference shares, which they say, as shares, are traditional securities, results in modifications under item 1 of the table in subsection 130-60(1). It should be noted that there is a similar modification if the shares are not traditional securities.

As there is a modification to cost base, the ATO conclude CGT event H2 does not occur.

The ATO state that CGT event C2 can occur as a result of the conversion of a convertible interest, which they consider the preference shares to be, so that CGT event C2 occurs. They then note however that subsection 130-60(3) provides that a capital gain or loss you make from converting a convertible interest is disregarded.

COMMENT – it is difficult to understand how a preference share, that appears to be an equity interest, can convert into an equity interest. The better view would appear to be that absent there being capital proceeds so that CGT event H2 has a tax impact, nothing occurs as a result of the conversion.

ATO reference *Private Binding Ruling Authorisation No. 1051936870893*
w https://www.ato.gov.au/law/view/document?docid=EV/1051936870893

4 ATO and other materials

4.1 PCG 2016/3 – update

The ATO has published an update to *Practical Compliance Guideline* PCG 2016/3 concerning acceptable practical approaches to determining the fuel tax credit rate for non-business claimants lodging fuel tax credit claim forms. Non-business claimants include:

1. a taxpayer that is not registered for GST and acquires taxable fuel for their use in generating electricity for domestic use, and
2. a non-profit body that is not registered for GST or required to be registered and acquires taxable fuel for use in a vehicle (or vessel) that provides emergency services and is clearly identifiable as such.

The rate of fuel tax credit is generally determined by reference to the rate of excise or customs duty in force on the day on which the taxable fuel was acquired (section 42-5 of the *Fuel Tax Act 2006*). This means that a non-business claimant may have entitlement to fuel tax credits at differing rates depending on the day on which the taxable fuel was acquired. PCG 2016/3 provides that the Commissioner will accept that the fuel in a claim period was acquired on the last day of that period, to reduce the administrative burden for non-business claimants.

The updates to the ruling clarify that this approach will apply only in circumstances where the rate of fuel tax credit has changed during the claim period solely due to indexation.

If rates change for a reason other than indexation, for example, the 2022–23 Budget measure 50% reduction of fuel excise tax for a six-month period, it will be necessary to lodge separate claim forms for the periods before and after the rate change. The updated guideline introduces two examples to illustrate how the guideline should apply.

The updated guideline was published on 18 May 2022.

ATO reference Practical Compliance Guideline PCG 2016/3
w https://www.ato.gov.au/law/view/document?docid=COG/PCG20163/NAT/ATO/00001&PiT=20220518000001

4.2 Media Release – remarks delivered to CPA retreat

On 19 May 2022, Jeremy Hirschhorn, Second Commissioner Client Engagement Group delivered a speech to CPA Australia's Public Practice Retreat.

The ATO has estimated that for the 2018-19 financial year, it is operating at 93% performance – 91% at lodgement and 2% through compliance actions. The ATO's Tax Avoidance Taskforce was said to have been successful in ensuring performance of 96% for Australia's largest companies, with a residual gap of $2-3 billion.

The ATO is seeking to work closely with Certified Practising Accountants, namely to address small business compliance (which represents up to $15 billion of the estimated $33.5 billion compliance gap) and individual compliance (to address the over claiming of work expenses, property investments and cryptocurrencies, NFTs or other digital assets).

To improve the ATO's relationship with tax agents, the Commissioner advised that the ATO is focusing on:

1. protecting the high levels of engagement and integrity of the system;
2. safeguarding the security of data and the digital environment the ATO operates in;
3. improving the tax performance of tax agent clients;
4. increasing the community's trust and confidence in the system;
5. increasing the sustainability of professional practices;
6. improving business performance and levelling the playing field.

The Second Commissioner also recognised significant interest in the ATO's recent guidance on Section 100A, Division 7A and professional services firms. The Second Commissioner put forward that while the consequences in these areas may be binary, the ATO believes that it is better for the views to be out for consultation rather than only within the knowledge of our ATO auditors and individuals chosen for audit.

The ATO is working on its engagement with taxpayers as Australia continues to emerge from the pandemic and the recommencement of audit activity. As part of its awareness programs, the ATO has recently written 30,000 awareness letters for disclosure of business tax debts and 52,000 awareness letters about the use of director penalty notices.

The ATO is also using digitisation and data to minimise the risk, such as utilising 'nudge messaging' to help small businesses get their GST reporting right by delivering client-specific messaging to clients before their activity statement with a refund claim is lodged online.

The Second Commissioner advised on how the ATO views data. Firstly, the ATO looks to share data with the tax payer 'pre-lodgement' reducing the risk of mistakes. Secondly, the ATO obtains third-party data where intrusiveness is outweighed by the 'gap' problem to be solved or service offered. The ATO has a high appetite to obtain third party data about rental properties due to significant non-compliance, either deliberate or accidental.

The ATO is putting in place measures to address emerging cyber risks for its IT systems and data. For example, stronger levels of identity proofing and additional verification before accessing ATO systems or seeking information.

The Commissioner advised that the ATO are requesting practitioner to take steps to:

1. verify clients identity;
2. educate themselves on how to keep their practice safe from physical and cyber threats;
3. stay up-to-date with our alerts and warnings around scams and other suspicious activity.

w https://www.ato.gov.au/Media-centre/Speeches/Other/The-practitioner-s-experience--The-latest-from-the-ATO/

4.3 Media release – ATO focus areas this tax time

The ATO has announced that it will focus on four key focus areas for 2022 tax time. These are:

1. record-keeping;
2. work-related expenses;
3. rental property income and deductions; and
4. capital gains from crypto currency.

w https://www.ato.gov.au/Media-centre/Media-releases/Four-priorities-for-the-ATO-this-tax-time/

4.4 Media release – ATO prioritising debt collection efforts

The ATO has issued a media release informing of its commitment to engage with taxpayers and offer tailored support and assistance to taxpayers with overdue debts. The ATO is encouraging taxpayers to engage with the ATO even where the full amount cannot be paid immediately.

The ATO state their debt collection activities prioritise those taxpayers representing higher risks and refusing to engage, and taxpayers with superannuation guarantee debts irrespective of the debt value.

Where taxpayers do not engage with the ATO, the ATO has warned it will use firmer actions to recover the debt including garnishees, recovery of director penalties, disclosure of business tax debts, and legal actions including summons, creditors petition, wind-up and insolvency action.

In addition to those measures, the ATO is writing to businesses under two key awareness programs – disclosure of business tax debts and the use of Director Penalty Notices.

Under the disclosure of business tax debts, the ATO is issuing letters of intent to disclose business tax debts. The disclosure of business tax debts measure allows the ATO to report significant tax debts (over $100,000) to Credit Reporting Bureaus under certain circumstances.

Under the Director Penalty Notice awareness program, directors are notified of the ATO's intent to issue a Director Penalty Notices where the company has not met their existing debts including PAYG(W), Superannuation Guarantee Charge and GST.

w https://www.ato.gov.au/Media-centre/Media-releases/ATO-prioritising-support-and-assistance-for-debt-collection-efforts/

4.5 Media release – vaccine incentives or pets and FBT obligations

The ATO has published a media release urging employers that have provided their employees with fringe benefits, particularly because of Covid-19, to consider their FBT obligations, including registering, reporting, lodging and paying FBT.

The ATO have seen more employers providing employees with fringe benefits because of Covid-19, including:

1. paying for items that allow employees to work from home; and
2. providing non-cash benefits as an incentive or reward for employees to get their Covid-19 vaccination.

In one instance, the ATO has seen an employer provide employees with pets to keep them company at home.

The FBT year runs from 1 April to 31 March. FBT returns are due by 23 May 2022. Employers lodging through a registered tax professional have until 27 June to lodge their FBT return.

w https://www.ato.gov.au/Media-centre/Media-releases/Providing-employees-with-vaccine-incentives-or-pets-can-lead-to-FBT-obligations--ATO/

4.6 Media release – GST considerations for buy-now, pay-later providers

The Commissioner has issued guidance on GST considerations for buy-now, pay-later providers in the financial services industry.

The ATO consider key GST considerations for buy-now, pay-later providers are:

1. tax governance: entities must have a well-designed tax control framework which is fit for purpose in mitigating tax risks. The ATO's GST governance, data testing and transaction testing guide sets out how the ATO will review GST governance for top 100 and top 1000 taxpayers. For entities below this size, the ATO state investing in a tax governance framework will assist with confidence in reporting, minimising reporting errors and providing a strong foundation for the future;
2. GST classification of supplies: entities must ensure that supplies are classified correctly for GST purposes and that GST is remitted on taxable supplies. The ATO has seen errors arise where supplies are incorrectly treated which has resulted in significant GST shortfalls, including where entities fail to remit GST on taxable supplies made to related entities that are not within their GST group;
3. claiming input tax credits: input tax credits are generally not available on acquisitions to the extent they relate to making input taxed supplies. Apportionment methodologies used to determine the extent of recoverable GST must be fair and reasonable and reflect the objective use of an entity's costs in making input taxed and non-input taxed supplies. Entities must ensure that their apportionment methodology is well-documented, regularly reviewed, and consistent with ATO guidance materials;
4. claiming reduced input tax credits (**RITC**): Entities must be able to provide supporting documentation to support RITC claims;
5. reverse charged GST: cross-border acquisitions that relate partly or solely to making input taxed supplies must be reverse charged under Division 84 of the GST Act, subject to exceptions. In such transactions, an entity will need to account for GST on their purchase and then claim back any available input tax credits. The ATO has observed a number of entities failing to reverse charge cross-border acquisitions from third-party suppliers or overseas related parties. The ATO has published guidance on the application of the reverse charge provisions; and
6. significant and unusual transactions: the GST consequences of significant and unusual transactions require careful consideration. An example provided is ensuring that input tax credits on costs associated with initial public offerings, capital raising activities and costs associated with funding the buy-now, pay-later product are identified and appropriately denied.

Entities which identify errors in reviewing their arrangements are encouraged to make a voluntary disclosure to the ATO. The ATO may reduce any penalties that would ordinarily apply if a voluntary disclosure is made.

w https://www.ato.gov.au/law/view/document?docid=GFS/GST-buy-now

4.7 Base rate entities

The ATO has released an alert that there have been a number of corporate tax entities in privately owned and wealthy groups, and public and international groups that have incorrectly claimed that they are base rate entities, and therefore apply a lower corporate tax rate than they would otherwise be entitled to.

Incorrectly claiming the lower rate of company tax will influence the rate of tax paid in an income year and may also influence the maximum franking credit subsequently allocated to a frankable distribution.

The ATO intends to contact certain taxpayers who have previously claimed the lower rate of company tax in recent tax returns. The ATO will be asking taxpayers to check the tax return and ensure eligibility criteria for a base rate entity has been met.

The ATO encourages taxpayers to re-assess their eligibility for base rate entity treatment each year. If a taxpayer identifies issues with wrongly claiming base rate entity status, they should engage with the ATO to ensure compliance. Taxpayers may also submit a private binding ruling application to confirm whether they meet the eligibility requirements.

w https://www.ato.gov.au/Tax-professionals/Newsroom/Lodgment-and-payment/Base-rate-entities-and-the-lower-company-tax-rate/?landingpage

4.8 ACNC report on integrity of Charity Register

In the 2021 financial year, the ACNC commenced a project to improve the integrity of the Charity Register. The project is part of the DGR reforms to enhance confidence in the charity sector by ensuring DGR endorsements are reserved for eligible charities.

The project involved reviewing information for charities to ensure that information on the Charity Register is accurate and up to date, and that the Charity Register contains only charities that are entitled to be registered.

The ACNC project includes a review of 2% of charities with DGR endorsement annually to ensure they remain eligible for their charity registrations.

The review of DGR entities that commenced in the 2021 year was limited to Public Benevolent Institutions because they comprise the largest group of charities with DGR endorsement, and receive more tax concessions than other charities. The review encompassed 303 charities, with 15% of charities having the review completed with no action required, 56% reviewed being resolved after a request for rectification and 19% having its registration revoked. A majority of the revocations were voluntary due to the charity no longer operating.

The ACNC also completed a review of charities to ensure their purposes were charitable and had not been affected by changes in case law. The ACNC's concerns about entitlement to registration fell into four main categories:

- disconnect between a charity's purpose and the activities it undertook to achieve that purpose;
- the charity's governing document did not reflect its current objectives and contained clauses that contradicted the not-for-profit and public benefit requirements of a charity;
- being registered with charity subtypes that were not appropriate for the charity's purpose
- not having charitable purposes.

Of the 577 charities reviewed for charitable purpose, 413 were escalated. The ACNC have completed 61 escalated reviews in the 2021 financial year, with the balance to be reviewed in subsequent years.

ACNC report – integrity of Charity Register 2 June 2022
w https://www.acnc.gov.au/tools/reports/integrity-charity-register

4.9 SGR increases and eligibility

Super guarantee rate increases

On 1 July 2022, the super guarantee (**SG**) rate will increase from 10% to 10.5%. The Norfolk Island transitional SG rate will increase from 6% to 7%.

The rate used will depend on when your employee is paid, not when income is earned. This means the new rate will need to be applied to any payments of salary or wages made on and after 1 July 2022, even if some or all of the relevant pay period is before 1 July 2022.

The SG rate is scheduled to progressively increase to 12% by July 2025.

Super guarantee eligibility

From 1 July 2022, the $450 per month super guarantee (**SG**) threshold eligibility will be removed, meaning that employers will be required to pay super for their employees regardless of how much they earn.

The change does not affect other SG eligibility requirements. Workers under 18 years of age will still be required to work more than 30 hours to be eligible for SG support.

As with the rate increase, an employee's eligibility for SG is to be determined on the date they are paid salary and wages, not on the date they earn the income.

w https://www.ato.gov.au/Newsroom/smallbusiness/Super/Eligibility-for-super-is-changing-from-1-July/
w https://www.ato.gov.au/Newsroom/smallbusiness/Super/The-super-guarantee-rate-increases-from-1-July/

4.10 Donating crypto assets

The ATO has issued a publication on claiming tax deductions from donating crypto assets on 25 May 2022.

The ATO confirmed that a taxpayer may claim a tax deductions for gifts or donations to organisations that are DGRs.

As crypto assets are property, there may be CGT consequences on the disposal of a crypto asset. The ATO has however indicated that taxpayer will not be paying CGT when donating crypto assets to DGRs for:

1. gifts made under a will (testamentary gifts);
2. properties donated under the Cultural Gifts Program; and
3. where they are personal use assets.

Taxpayers will need to report the crypto asset transaction at both the CGT and the gifts and donations sections of their tax return.

w https://www.ato.gov.au/Tax-professionals/Newsroom/Income-tax/Donating-crypto-assets/

4.11 Sub-trusts and Division 7A

The ATO have updated their Practical Compliance Guideline 2017/13 that allows expired sub-trust arrangements to be brought under complying 7-year Division 7A loan agreements so that it applies to sub-trusts that expire in the year ended 30 June 2022 or that are created in the year ended 30 June 2022.

w https://www.ato.gov.au/law/view/document?DocID=COG/PCG201713/NAT/ATO/00001&PiT=99991231235958

4.12 100A – LinkedIn update from the ATO

On 6 June 2022, Louise Clarke, Deputy Commissioner, Private Wealth at Australian Taxation Office posted an update on LinkedIn regarding the ATO's draft guidance on section 100A and Division 7A that was originally released on 23 February 2022. According to the brief update, the ATO is still reviewing the feedback on the draft guidance and will include a compendium showing how the feedback was addressed, when the guidance is finalised.

The guidance will not be finalised before 30 June 2022, so the ATO is compiling some information on the basic elements of section 100A and what advisors and trustees need to do when making decisions about beneficiary entitlements at year end 2022.

The ATO will share this information with the Tax Practitioner Steering Group and once its feedback is provided, the ATO will publish the information and circulate it amongst the professional bodies.

w https://www.linkedin.com/pulse/division-7a-s100a-additional-guidance-tax-time-2022-louise-clarke/w