The Tax Institute

Tax Update
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About Brown Wright Stein

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

- Tax
- Dispute Resolution
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- Franchising
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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 Aurizon – contribution to share capital

Facts

Aurizon Operations Limited (**Operations**) was owned by the Queensland Government and operated the State's 'above and below rail coal' businesses. In 2009, the Queensland government announced that these businesses would be publicly floated and listed on the ASX under the name QR National.

As part of the planned listing, Aurizon Holdings Limited (**Aurizon**) was incorporated on 14 September 2010 with two ordinary shares fully paid at $1 each issued to the Treasurer and State Minister for Transport respectively who held the shares on behalf of the State of Queensland. The issue price for those shares was credited to an account labelled 'Authorised Capital' in the general ledger of Aurizon.

On 21 September 2010, all of the issued shares in Operations were transferred from the State of Queensland to Aurizon. The consideration for the transfer was the issue of 98 fully paid ordinary shares in Aurizon to be held in equal proportions by the Treasurer and State Minister for Transport on behalf of the state of Queensland.

On 6 October 2010, Aurizon caused the 100 fully paid ordinary shares issued by Aurizon to be converted into 2,440,000,000 ordinary shares.

The State of Queensland had a receivable of $4,388,252,224, owed to it by Operations.

Under specialised legislation enacted to facilitate the listing, the Treasurer issued a 'Transfer Notice – Project Direction' on 15 November 2010. Under this Project Direction, the Treasurer transferred the right to the receivable to Aurizon, with the result that Operations owed the amount to Aurizon. This transfer is referred to as the **State Contribution**.

Relevantly, the Project Direction stated as follows:

> *6. Provide that the consideration provided for transfer of the Receivable from the State of Queensland to QR National [Aurizon] is nil.*
>
> *7. Designate the transfer of the Receivable from the State of Queensland to QR National [Aurizon] to be a contribution by the State of Queensland and to be adjusted against the contributed equity of QR National [Aurizon].*

The minutes of the meeting of the directors of Aurizon of 17 November 2010 included a resolution to give effect to this direction:

> *The Company [Aurizon]:*
>
> *(a) is to recognise the transfer of the Receivable from the State of Queensland to the Company [Aurizon] as a contribution of equity from the State of Queensland to the Company [Aurizon] in accordance with AASB Interpretation 1038; and*
>
> *(b) the intention is that the impact of the transfer of the Receivable to the Company [Aurizon] and the subscription for shares in QR Limited [Operations] should be reflected within the Company's accounting records as:*
>
> > *DR Investments*
> >
> > *CR Contributed Equity*

Australian Accounting Standard AASB Interpretation 1038 addresses 'contributions by owners made to wholly-owned public sector entities'. Paragraph [8] of Interpretation 1038 states that regardless of the other features or conditions of a transfer, the transfer is a contribution by owners where its equity nature is evidenced by issue of equity instruments, a formal agreement establishing a transferable or redeemable interest in the net assets of the entity, or 'formal designation of the transfer (or a class of such transfers) by the transferor or a parent of the

transferor as forming part of the transferee's contributed equity, either before the transfer occurs or at the time of the transfer'.

Aurizon gave effect to paragraph (b) of the directors' resolution by creating a separate account within its accounting system (account 311105 (Capital Distribution)) in the financial year ended 30 June 2011. The amount of $4,388,252,224 was posted to the Capital Distribution account to reflect a contribution to Aurizon made by the State of Queensland on 19 November 2010.

Aurizon sought declarations under section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and section 21 of the *Federal Court of Australia Act 1976* (Cth) to the effect that the 'Authorised Capital' and 'Capital Distribution' accounts were 'share capital accounts' for the purpose of section 975-300(1) of the ITAA 1997 and that they are taken to be a single share capital account in accordance with section 975-300(2).

The Commissioner accepted that the Authorised Capital account was a share capital account, but denied that the Capital Distribution account is a share capital account, because the State Contribution was expressly made for 'nil' consideration and it was not made in exchange for the issue of any shares. The Commissioner's position was that the State Contribution formed a part of the capital of Aurizon, in the sense that it formed part of Aurizon's assets in excess of Aurizon's share capital but that it never formed part of Aurizon's share capital.

Aurizon contended that the State Contribution was an amount of share capital, with the result that the Capital Distribution account is a share capital account.

The Commissioner submitted that the Court should decline declaratory relief because the appropriate remedy was for Aurizon to seek a private ruling from the Commissioner and, in the event that it did not agree with that ruling, to object under the process in Part IVC of the TAA 1953,

Issues

1. Is the State Contribution of $4,388,252,224 credited to the Capital Distribution account share capital?
2. Is it appropriate for the Federal Court to grant declaratory relief?

Decision

Is the contribution share capital?

The Court held that the contribution, as 'contributed equity', was share capital.

Although the documentation expressly stated that the consideration for the contribution was 'nil', the Court found that when read in context, this statement was making clear that the contribution was not a loan and that it was a contribution in respect of which further shares would not be issued.

Thawley J found that the word 'designating' was specifically used in the documentation due to the terms of Interpretation 1038. This was supported by a board resolution which expressly referred to Interpretation 1038. A detailed examination of Interpretation 1038 showed that a 'formal designation' is intended to reflect an ownership interest capable of redemption and thus one which should be recognised directly in equity. While the accounting treatment did not determine the legal nature of the State Contribution, it formed part of the objective evidence of the State's intention of making a capital contribution to be reflected as share capital, rather than a gift.

Under the terms of the documentation, the contribution was to be 'adjusted against the contributed equity'. At the time, the 'contributed equity' constituted only share capital. This suggested that the contribution was intended to be share capital despite no new shares being issued.

Thawley J held that while the term 'share capital' almost invariably refers to the capital contributed to a company in exchange for shares, however, as this case demonstrates, this does not supply an exhaustive definition of share capital.

The contribution was made by the State of Queensland, as sole shareholder, intending it to form part of the company's share capital. The contribution was treated by Aurizon as forming part of share capital, without the requirement to issue further shares in exchange and the Capital Distribution account was a share capital account.

Is it appropriate for the Federal Court to grant declaratory relief?

Thawley J found that, while the private ruling regime is useful, it was not well suited to dealing effectively with this as the resulting ruling would only be binding on the Commissioner in relation to Aurizon and not in relation to Aurizon's shareholders. There was also significant dispute between the parties as to the relevant facts.

If there was any appeal on a private ruling, the appeal would be confined to the facts as put in the ruling application. If the facts were incorrect in any regard, the process would miscarry and need to start again.

For these reasons, Thawley J held that the Court should not decline relief on discretionary grounds and the declaration should be granted.

COMMENT – if the Capital Distribution account was not a share capital account, then any amount debited to it would be a dividend to the shareholders, whether as part of a capital return or share buyback. However, even if not share capital, it should not be treated as a taxable liquidator's distribution on winding up, as the amount should not represent 'income' of the company which would form part of a taxable liquidator's distribution. Taxable liquidator's distributions are treated as dividends.

Citation *Aurizon Holdings Limited v Commissioner of Taxation* [2022] FCA 368 (Thawley J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/368.html

1.2 Automotive Invest – LCT and GST

Facts

Since 28 May 2016, Automotive Invest Pty Limited has operated the Gosford Classic Car Museum. Automotive Invest was controlled by Anthony Denny, who had a background in second-hand motor vehicle dealings in Australia and Europe.

The museum had over 300 vehicles on display, including a De Havilland Rapide, an old New York fire truck, a DMC DeLorean, a La Ferrari, and a Formula 1 racing car. The museum charged an admission fee which had increased over time, and also had a merchandise shop and a diner.

Automotive Invest employed staff who worked at the museum's admission/ticket desk, gift shop and the floor of the exhibits. It also promoted the museum to the public generally through its website, media and social media. The website stated that the museum was the largest car museum in Australia and one of the five largest car museums in the world. It also provided links to facilitate travel bookings, local hotels, and also noted that the museum was available for hire for functions or weddings.

From time to time, the museum put on special events, such as Royal Favourites Exhibition, Australian Day exhibition and a vintage fair.

From October 2016, Automotive Invest's website noted that many museum cars were for sale. The website noted that it was part of the museum's mandate to facilitate the purchase of vehicles, and excess stock would be available for sale via the website.

From February 2017, Automotive Invest started a monthly newsletter to report on events.

In July 2017, Automotive Invest's marketing manager prepared a submission for the Central Coast Business Excellence Awards to put the museum in the category of the 'Start Up Superstar'. The submission described the museum 'as a world class, diverse and evolving collection of rare and classic cars offering visitors a unique and inspiring experience of automotive engineering experience'.

During the first full financial year of the museum's operation, Automotive Invest received $1.32 million in admission fees and $4.39 million of profits from car sales.

When acquiring and importing its cars, Automotive Invest quoted its ABN and was not subject to Luxury Car Tax (LCT). Where an entity is not subjected to LCT because the entity has quoted for the supply, it will have an 'increasing luxury car tax adjustment' if it later uses the car for a purpose 'other' than a 'quotable purpose' under sections 15-30 and 15-35 of the LCT Act. Relevantly, a quotable purpose includes holding a car as trading stock, other than holding it for hire or lease. The Commissioner considered an 'other' purpose to be an additional purpose to holding the car as trading stock.

Automotive Invest also claimed input tax credits for the cars that it acquired or imported.

The Commissioner considered that Automotive Invest had increasing luxury car tax adjustment as Automotive Invest had acquired each relevant car with the intention of using the car for exhibition purposes.

The Commissioner also contended that section 69-10 of the GST Act applied in relation to each car that Automotive Invest acquired or imported after 28 May 2016 to limit the input tax credits it could claim. Section 69-10 of the GST Act relevantly provides that if an entity acquires or imports a car the value of which exceeded the 'car limit', and the entity is not entitled to quote under the LCT Act, the entity is only entitled to claim an input tax credit up to 1/11th of the 'car limit'.

The Commissioner assessed Automotive Invest on the basis that the limits under section 69-10 of the GST Act also applied in relation to 'notional GST acquisitions', being acquisitions that were not taxable supplies to it.

Automotive Invest appealed the Commissioner's decision in the Federal Court.

At the hearing, the parties agreed that the LCT and GST question would be answered in the same way, even though the LCT question concerned actual use and the GST question concerned the intended purposes.

In the Federal Court, Anthony made submission that Automotive Invest's business venture was to deal in exclusive high-end classic and luxury cars. He submitted that he had observed a similar marketing technique in Las Vegas where car stock was presented in a 'museum' format, which gave the impression of each of the vehicle displayed having a greater value than they might otherwise have.

Automotive Invest contended that the Commissioner's position that the display of the cars in the showroom was for an 'other purpose', because it was styled as a 'museum' and charged an entry fee to enter the premises, was excessively narrow and uncommercial. Automotive Invest submitted that its main intention behind the museum concept and the charging of admission fees was to create a level of exclusivity, attract genuine potential customers, and to discourage 'tyre kickers'. Automotive Invest submitted that its sole purpose was to maximise the value it could obtain, and that the museum was nothing more than a competitive and inventive means of selling stock.

Automotive Invest also submitted that the Commissioner should approach the question of whether there is an increasing adjustment by reference to each vehicle individually, rather than the vehicles as an indivisible group.

Automotive Invest further submitted at the hearing that 'for no other purposes' in section 9-5(1) should be read as 'alternative' rather than 'additional'. That is, Automotive Invest held the cars as trading stock and any use of the cars for any additional purpose was not use which took it out of being trading stock.

Issue

Did Automotive Invest import or acquire each relevant car for the purpose of holding the car as trading stock 'and for no other purpose'?

Decision

Thawley J rejected the claim that the museum was solely 'an enterprising strategy intended to increase the price of the car'. Objectively assessed, the museum sought to attract as many visitors as it possibly could and would naturally have attracted many people who were uninterested in purchasing a car. In displaying the cars in the manner that it did, Automotive Invest used the car for the purpose in addition to holding the cars as trading stock.

Although Thawley J agreed that the question of purpose must be considered for each car individually, he considered that it did not assist Automotive Invest as each car available for sale was also used as an exhibit in the museum.

Thawley J further rejected Automotive Invest's construction of section 9-5(1) and held that the word 'other' and the phrase 'for no other purposes' was unambiguous. He noted that the LCT tax provided that if, at the time of the quoting, the taxpayer has the intention of using the car for one of the purposes set out in section 9-5(1), but later uses the car for an additional purpose, then an increasing adjustment will happen. The statute did not provide relief from LCT where there are multiple purposes at the time of quoting.

As such, Thawley J held that the Commissioner was correct to conclude that Automotive Invest had an increasing LCT adjustment and that its input tax credit was limited. However, he allowed Automotive Invest's appeal in relation to the 'notional GST acquisition', as those acquisitions were creditable acquisitions by reason of section 66-5 of the GST Act (concerning second hand goods), and the limit under section 69-10 of the GST Act did not apply in relation to those notional acquisitions.

COMMENT – it is not clear whether Automotive Invest would have been successful had it called itself a car dealer, but still have charged for admission to its facilities and allowed functions to occur at its facilities.

Citation *Automotive Invest Pty Limited v Commissioner of Taxation (Gosford Classic Car Museum)* [2022] FCA 28 (Thawley J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/281.html

1.3 London – deductions

Facts

Aaron London had engaged a tax agent to prepare his income tax return for the year ending 30 June 2018. The tax return prepared by the tax agent claimed a number of deductions which were initially accepted by the ATO. The deductions relate to Aaron's employment as a dog handler in the South Australian Department of Correctional Services.

As part of his employment, Aaron housed and maintained the dogs at his home. Aaron built an enclosure in his backyard to house the dogs and was responsible for their maintenance and welfare. Part of Aaron's role was to assist in emergencies in the Emergency Response Group.

The deductions in question included:

1. expenses claimed for travel between Aaron's residence, his place of employment and the gym;
2. deductions claimed for prick-resistant gloves, beanie, uniform belt, water proof jacket, water proof shoes, water proof gear, polar fleece, sunglasses and other items of clothing;
3. dog training video and equipment;
4. home office expenses.
5. mobile phone; and
6. gym memberships.

When the ATO conducted an audit of Aaron, it disallowed the deductions that were claimed in the initial income tax return. The ATO issued Aaron with a notice of amended assessment.

Aaron lodged an objection to the amended assessment. The objection was disallowed and Aaron applied to the AAT to have the objection reviewed.

At the hearing, it was conceded by the ATO that gloves are a common item used by correctional officers. Aaron conceded that the deductions otherwise included everyday apparel for which no deduction could be claimed.

In relation to the home office supplies, Aaron claimed they were purchased in respect of his study for a certificate in Correctional Practice. In relation to mobile phone expenses, he had a personal mobile phone that was used, along with personal use, for the purpose of being notified of an emergency as part of his role in the Emergency Response Group.

Aaron submitted, in relation to the gym membership, that because of the nature of his employment, he was implicitly required to maintain a high level of fitness for his employment, particularly as part of the Emergency Response Group.

The Commissioner made the argument in the AAT that Mr London was not able to claim expenses without receipts. Mr London gave evidence that he had lost many receipts in two house moves, and this was accepted by the AAT.

Decision

Travel Expenses

The AAT determined that no deduction could be claimed for Aaron's travel between his home, workplace and the gym. The claim for deductions for travel to and from his work could not be maintained as he was provided with a vehicle by his employer. The claim for car-wash costs for the work vehicle were however deductible, with the Senior Member stating 'Paying for work equipment (including a car) to be cleaned so that it is in a fit and proper state to be used is a deductible expense in my opinion.'

In respect to the deductions for travel between his residence and the gym, Aaron used his private vehicle. The AAT acknowledged that Aaron was required to maintain a high level of physical fitness for his job but this did not extend to making travel expenses in relation to maintaining his physical fitness deductible. The Senior Member was of the view that if travel to work was non-deductible, and the employer was not requiring Aaron to attend a particular gym, that there was no difference between home to work travel, and home to gym travel, that is, it was private in nature.

Items of clothing

The Commissioner conceded in the AAT that the prick resistant gloves should be deductible, but considered that the balance of the clothing items were normal items of clothing or apparel for which no deduction could be claimed and that further they were not items of clothing or apparel prescribed or recommended by the employer as a necessary or reasonably appropriate employee purchase, so the purchase should not be found to be deductible for this reason as well.

The Senior Member then set out:

15. I do not accept this second submission, at least as a general proposition. The prime question the respondent's officers must ask in connection with a voluntary expenditure by an employee, it seems to me, is whether the employee in question has bona fide purchased the clothing, apparel or equipment in question for use in the course of his or her employment. This question may often, but not always, be answered by an examination of the facts without a consideration of the taxpayer's state of mind. The respondent's officers do not need to ask − at least they do not usually need to ask − whether the purchase in question was by some objective measure a necessary or reasonably appropriate one for the employee to make. Of course, the fact that, objectively, a particular item of clothing, apparel or equipment may be judged to be quite unnecessary may lead one to query the bona fides of the purchase in question for work purposes; i.e., the voluntary purchase in question, whilst ostensibly for use in a work setting, may in fact be better explained as one for a private or domestic purpose. But, leaving this situation aside, I do not believe there is a separate question as such requiring that the necessity or reasonable appropriateness of a purchase be examined when deductibility is being assessed by the respondent's officers.

16. A simple illustration may demonstrate my point. To take what I trust is a non-controversial example, a tradesperson may purchase steel-capped boots that he or she finds more appropriate or convenient for use on work-sites than the steel-capped boots supplied by his or her employer. The employee may, in this circumstance, claim the full cost of the boots as they have been purchased for exclusive use at work. When assessing the claimed deduction, the respondent does not have to decide in law whether the purchase was, objectively, a necessary or reasonably appropriate purchase for the employee to make in light of the comfort and functionality of the boots supplied by the employer. Again, if the employer declined to supply steel-capped boots to its employees because the risk of toe-injury was judged to be minor, an employee, bona fide purchasing such boots as a protective measure against such a risk at work, is entitled to a deduction, notwithstanding any view held by the employer of the lack of any real need for such protective clothing. The respondent's officers would not be required, as a general rule, to assess the reasonableness of the employee's choice in this regard when assessing deductibility although, as I have said, an apparent lack of reasonableness may bear on the question of the bona fides of the purchase for work purposes.

17. I do accept, however, the [ATO's] first submission, namely, that a broad distinction has emerged in the case-law between, on the one hand, items of clothing/apparel that may be said to constitute ordinary or normal items (the cost of which is not deductible) and, on the other hand, items that may be said to be unusual (the cost of which is deductible). So far as the first category is concerned, it does not matter that the item in question may have been purchased solely for use at work. The cost of an ordinary business suit that is purchased for work and stays at the workplace and is only ever worn in the workplace is not, for example, a deductible purchase as a general rule. I accept that the dividing line between the two categories is not clear; but in my opinion, a useful

practical test to apply in this case is to ask whether the item of clothing or apparel in question might be worn on other than work occasions or whether it is so unusual or distinctive that it can be said, practically speaking, to have a use limited to the workplace.

The AAT concluded that the uniform belt was used only in connection with Aaron's uniform as the belt was used to hold equipment. The claim for the waterproof jacket was accepted as it was considered to be a tactical jacket that had no use other than in the workplace. The AAT also accepted that a beanie, whilst not deductable on its own, was purchased with the jacket and so could be deducted.

The purchase of waterproof boots, which were used to run through wet grass with dogs was also accepted as there was no practical use of the boots outside of the course of employment. A stopwatch was also considered to be deductible as Aaron had no private use for it.

The AAT disallowed the purchase of dry weather gear and polar fleece as it considered these items to be used in normal situations other than in the workplace.

The AAT gave particular attention to the claim for sunglasses as it considered sunglasses to be a common form of apparel in everyday life. Although there are some circumstances where sunglasses are considered to be protective gear for employment, Aaron had purchased his sunglasses at the airport. There was no evidence to suggest that sunglasses were necessary in the outdoor component of Aaron's employment. The AAT subsequently disallowed the deduction, considering the sunglasses to be a normal item of apparel.

Dog Training Video and Equipment

The AAT held that items relating directly to the maintenance of dogs and a dog training video were all deductable as they related directly to Aaron's duties as a dog handler.

Home Office Expenses

The AAT noted that home office expenses usually arise where an identifiable part of the premises is occupied and used exclusively in respect of income-producing activities. The AAT held that although Aaron was undertaking a course to assist him to progress his career, the course was not relevant to his income-producing activities for that particular income year.

Mobile Phone

The AAT held that it was not a condition of Aaron's employment to personally hold a mobile phone at his own expense for work purposes. The fact that Aaron's employer occasionally contacted him on the mobile did not justify the maintenance of a mobile phone to be a deductible expense.

Gym Memberships

The AAT accepted that the gym memberships were held by Aaron primarily for maintaining a high level of fitness for his employment. The AAT applied Taxation Ruling 95/113 which permitted police officer's fitness expenses to be deducted if the activities of their employment involved 'strenuous physical activities on a regular basis'. The AAT held that this should be applied to a correctional officer involved in emergency situations, and therefore held that the gym memberships were deductible. However, the AAT held that the implicit requirement did not extend to the purchasing of gym clothes and supplements.

COMMENT – the ATO often contact an employer to query whether the item purchased by the employee was required for the employment and, if the employer responds negatively, will deny the deduction.

Citation *London and Commissioner of Taxation (Taxation)* [2022] AATA 644 (SM Dr N A Manetta, Adelaide)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/644.html

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1.5 Bonner – employment agency contracts and relevant contracts

Facts

Chelsea Bonner was initially a sole trader, and later operated her business through Bella Management Group Pty Ltd (together, **Bella Management**), which was a model and talent agency.

Bella Management acted as an intermediary between models and clients, and they would source models for their clients, and clients for their models.

The models signed standard written contracts with Bella Management, under which the model appointed Bella Management to act as their exclusive agent. The nature of the relationship was such that Bella Management would provide career advice to the model, negotiate modelling contracts, and administer the contracts. The agreement stipulated that the model must *'perform every [modelling] contract entered by [the model] or on [the model's] behalf…. fully and to the best of [the model's] ability'*.

The written contract between the models and Bella Management also included the following terms:

1. a fee divided into 12 equal monthly payments,
2. exclusivity for the 12-month period and an agreement that the model will not work for a specified list of competitors during that period;
3. 8 shoot dates comprising six full days and two half days with the dates to be advised;
4. fortnightly shoot dates.

Bella Management would operate on a job by job basis. Bella would offer the job to a model, who would accept or decline. Once it was accepted, Bella would enter into a written contract with the client and negotiated the specifics on behalf of the model.

The model attended a location determined by the client and worked under the client's direction. Neither Bella Management nor the model had any 'significant control' or creative input over the client.

Some models would book 'repeat jobs' which meant they were regularly working with those clients for their businesses.

After completion of a job, Bella would invoice the client on behalf of the model. Bella would receive payment, and pay the model after deducting their commission fee.

The Chief Commissioner claimed that the arrangement between Bella Management, their clients and the models were employment agency contracts under Division 8 of the *Payroll Tax Act 2007* (NSW) (**PTA**) and, therefore, payments from Bella Management to the models were deemed wages under s 40(1)(a) of the PTA, making them liable for payroll tax. The employment agency arrangement provisions in Division 8 of the PTA provide that amounts paid or payable by a person taken to be an employer under an employment agency contract (which is defined) to or in relation to a person taken to be an employee for the provision of services, are taken to be wages for the purposes of payroll tax.

Accordingly, the Commissioner assessed Bella Management to payroll tax in respect of payments made to the models for the 2014, 2015, 2016 and 2017 financial years, and the period from 1 July 2017 until 30 November 2017. The Commissioner also assessed Bella Management as liable to pay the market rate of interest on the unpaid payroll tax, plus 20% penalty tax in accordance with the *Taxation Administration Act 1996* (NSW).

Upon its objections being disallowed, Bella Management sought review in the NSW Civil and Administrative Tribunal.

<u>NSW Civil and Administrative Appeals Tribunal</u>

At first instance, NCAT held that Bella Management was an employment agent, the models were service providers and the agreements between Bella Management, and the models were employment agency contracts. Subsequently, amounts paid to the models were deemed to be wages.

NCAT upheld the Chief Commissioner's reassessments and the Chief Commissioner decision to not remit penalty tax and interest.

Appeal Panel

Bella Management then appealed to the Appeal Panel of NCAT.

The essence of the appeal was that at first instance NCAT had misconstrued the application of the employment agency provisions. In particular, Bella Management submitted that the models did not in fact work in a way akin to employees, in and for the business of the client.

The grounds were as follows:

1. work done 'on site' or at a location determined by the end client that is not their usual place of business, is contrary to the concept that the models worked 'in and for' the business of the end client;
2. models were not 'continuously or regularly' employed by the end clients; and
3. models were not 'akin to staff' of the end client.

Ultimately the Appeal Panel dismissed the appeal.

The Appeal Panel had regard to decisions on the employment agency provisions in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852, *Securecorp (NSW) Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 744, *Bayton Cleaning Co Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 657 and .

In UNSW Global, White J had formulated an 'in and for the conduct of the business of the client' test to determine if a contract is an employment agency contract. In *Banfilm* Payne J held that factors to have regard to in applying that test included whether the services are provided

1. by individuals 'who would comprise, or who would be added to, the workforce of the client for the conduct of the client's business';
2. to help the client 'conduct its business in the same way, or much the same way, as it would do through an employee'; and
3. where the service providers are 'working in the client's business'.

The decision of the Appeal Panel was then appealed to the Supreme Court of New South Wales.

Issue

Whether Bella Management was an employment agent in relation to the arrangements with the models?

Decision

Basten J in the Supreme Court of New South Wales considered the approaches taken in in *UNSW Global*, *Securecorp*, *Bayton* and *Banfilm*.

Basten J referred to the *UNSW Global* approach as being a 'gloss' on the statute as the text of the employment agency provisions did not support such an approach.

Basten J also noted that judicial applications of the *UNSW Global* approach in the subsequent cases had led to 'glosses' on the 'gloss' on the statute.

Basten J considered that having regard to such formulations as in *Banfilm* were inappropriate as such factors are not the words of the statute and that whether a contract is an employment agency contract requires a consideration of the terms of the contract between the putative employment agent and the worker, not the manner in which the services are performed by the worker for the client.

Basten J considered it is not appropriate to read down the meaning of an employment agency contract to limit it to arrangements that are 'employee-like' as such an approach is not consistent with the statutory language.

Work done 'on site' ground of appeal

The Court did not agree that the Appeal Panel had supplanted the 'in and for the business of the end client' test with the factors in *Banfilm* and *Bayton*. The Court considered that the Appeal Panel had rightly applied the *UNSW*

Global test using a fact-sensitive analysis, which required an assessment between the service provided, the business of the client and the connection between the two.

The Court noted that, while whether the work is conducted on the premises of a client may be relevant in a cleaning services context, it may not be relevant in other contexts. Accordingly, that the models may not provide the services at the premises of a client did not lead to a conclusion that the contracts were not employment agency contracts,

Whether the models were 'akin to staff' of the end client

Basten J noted that there was a repeated issue of Bella Management attempting to treat wording from judicial decisions, such as *UNSW Global*, as statute. Basten J noted that Bella Management conflated two separate ideas from White J in *UNSW Global*, namely whether the end client had control and supervision over the models, and whether the models were added to the workforce of the end client. These are not the statutory tests, and are merely indicators used in the *UNSW Global* case. On this basis Basten J found again that the argument put forward by Bella Management was not an error of law, but a finding of fact, on the basis that the 'grounding' for their arguments was judicial comment and not the statutory test.

Ultimately the Supreme Court dismissed the appeal in its entirety with costs.

COMMENT – the Chief Commissioner has appealed to the NSW Court of Appeal against the decision of Ward CJ in Eq (as she then was) in *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 (see our October 2021 tax training notes) concerning the application of the employment agency provisions. This should provide the clarity from an appellate court as to the scope of the provisions.

Citation *Bonner v Chief Commissioner of State Revenue* [2022] NSWSC 441 (Basten J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/441.html

1.6 Godolphin – land tax primary production exemption

Facts

Godolphin Australia Pty Ltd operates a thoroughbred stud operation on properties in the Hunter Valley. Its business activities involve the breeding and racing of thoroughbred horses and selling thoroughbred horses or their semen or progeny. Godolphin's business model is 'breeding to race and racing to breed'. It also engages in agricultural activities such as raising cattle and growing lucerne.

Godolphin's business is integrated between four properties, being Woodlands, Kelvinside, Osborne Park and Crown Lodge.

On Woodlands, Godolphin maintains thoroughbred broodmares and their offspring. About 70% of the offspring are sold early on after commencing their racing career. Most of the thoroughbred horses that are not sold are used as part of Godolphin's breeding program. Godolphin also uses substantial parts of Woodlands for the purpose of maintaining cattle and for growing lucerne.

On Kelvinside, Godolphin maintains a thoroughbred stud operation in which stallions inseminate (or 'cover') mares for substantial fees. About 10% of the land is used for this purpose. Substantial parts of Kelvinside are used for maintaining cattle for sale and to spell horses from other parts of its operations, and for the raising and education of yearlings. Typically, racehorses will race for a period and spell for a time, with the majority of Godolphin's horses spelling at Kelvinside.

Kelvinside and Woodlands together comprised 7 separate parcels of land each with a separate PID.

On Crown Lodge, Godolphin conducts racehorse training.

On Osborne Park, Godolphin operates its primary training facility for racehorses as well as for spelling horses.

The Chief Commissioner assessed Godolphin for land tax for the 2014 to 2019 land tax years in respect of Kelvinside and Woodlands, on the basis that whilst the dominant use of the properties was for the maintenance of animals, the use was not for the purpose of selling those animals, their natural increase or bodily produce.

Godolphin accepted that the primary production exemption for land tax did not apply to Crown Lodge and Osborne Park and the land tax assessments for those properties were not the subject of the proceedings.

Godolphin's properties are rural land within the meaning of section 10AA(4) of the LTMA.

Godolphin maintained that the dominant use of the Kelvinside and Woodlands was the maintenance of stallions for the purpose of selling their bodily produce (specifically, their semen) or their natural increase, the maintenance of horses for the purpose of selling horses or their natural increase; and the maintenance of cattle for the purpose of selling cattle and their natural increase.

The Chief Commissioner argued that, while the dominant use of the properties was for the maintenance of animals, the purpose was for breeding and training thoroughbred racehorses and spelling thoroughbred racehorses in between race events. The Chief Commissioner contended that any horse of a racing age that was spelling between races was maintained on the land for the purpose of racing. Further the Chief Commissioner determined that any sale of the thoroughbred horses was ancillary or incidental to that purpose.

In the alternative, the Chief Commissioner argued that where there was a purpose of sale, it was not the dominant purpose or sufficiently proximate to the current use of the properties for the maintenance of animals. The Chief Commissioner considered that although a majority of horses were sold, the vast majority of those horses were sold after they have been educated to race, trained to race, and had raced. This demonstrated that the horses were maintained on the land to race for commercial gain, rather than being sold. The Chief Commissioner contended that, where there are multiple purposes, the purposes of selling must be associated with the dominant use of the land. The Chief Commissioner also considered that the dominant use must be demonstrated for each PID separately, and that a use cannot be dominant because of its proximity to other land where that use is dominant.

Godolphin argued that the dominant use of its land was for the maintenance of horses for overlapping purposes (racing and sale), each of which reinforced the other. In particular, the racing of horses increased the sale price of the horses, their natural increase and their bodily produce. Godolphin argued that the sale of horses, their progeny or their semen was not an ancillary or incidental step in achieving another purpose but rather were complementary or mutually reinforcing uses. Accordingly, this was not a situation where competing purposes needed to be weighed up, but rather the purpose of sale was central to the dominant use. Goldolphin also submitted that the activity on each parcel should be assessed in the full context of the operations and not confined to each individual PID boundary.

Godolphin sought a review of the Chief Commissioner's decision in the Supreme Court.

Godolphin submitted in evidence that when its profit-making activities were considered as a whole, the sale of horses, their progeny or their semen predominated over racing, although Godolphin maintained that both were important features of the integrated operations.

Godolphin's financial records did not always differentiate between expenditure incurred and revenue generated by property. The combined revenue from all stallion coverings and the sale of thoroughbred horses during the years ending 31 December 2013 to 2019 averaged over $40 million per year. The prizemoney derived from racing horses varied from year to year, averaging just under $20 million per year. The average revenue from cattle sales was just under $1 million per year.

In each of the land tax years, Godolphin's racing operations incurred losses despite significant race winnings and appearance money. Expenses on racing operations were more than twice the amount spent on breeding and three to four times more than that spent on stallions. The Chief Commissioner submitted that this demonstrated there was not a commercial focus on selling horses, as there was not a concentration of resources and expenditure on covering activities.

Godolphin submitted in evidence that the substantial majority of the activities that lead to the expenses on racing operations occurred on Crown Lodge and Osborne Park. Godolphin submitted that this reinforced the position that the dominant use of Crown Lodge and Osborne Park was different from the dominant use of Kelvinside and Woodlands, even though all four properties were used as part of an integrated business. Godolphin accepted that the stallion covering operations took place on a relatively small part of one PID, being part of Kelvinside. Considering the activities on that PID alone and taking into account the level of development or infrastructure on

the land, the financial benefit derived, and the centrality of the activity to the whole of Godolphin's operations, the stallion covering activities were dominant.

Issue

Was the dominant use of the land for the 2014 to 2019 land tax years the maintenance of horses for the purpose of selling them, their natural increase or bodily produce?

Decision

The Court held that the dominant use of the properties was for the maintenance of animals for the purpose of selling their bodily produce or natural increase such that Godolphin was entitled to exemption from land tax for Kelvinside and Woodlands as 'land used for primary production' under s10AA(3)(b) of the LTMA.

The Court considered that the relevant question was whether there were two separate activities such that it was necessary to determine which was the dominant use on each parcel of land or whether there was an integrated or composite activity such that the dominant use of all parcels (whether for breeding, training or spelling) was for the purpose of the ultimate sale of semen and progeny.

The Court found that there was an integrated operation in which the preparation of horses for racing was done with the dominant purpose of increasing or maximising the revenue from the sale of bodily produce and from the sale of the progeny.

The Court agreed with Godolphin in finding that there were not two distinct purposes carried out on the land, but rather the objectives of racing and the pursuit of stallion excellence were part of the overall objectives of increasing the value of Godolphin's stud operations, and further, that the sales were sufficiently proximate to the maintenance of the animals on the properties. The Court considered that the substantial expenses for training racehorses for the production of stallions capable of being sires pointed to an objective intention to increase the value of the thoroughbred stud and the purchase of stallions to achieve that simply reinforced that conclusion.

Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue [2022] NSWSC 430 (Ward CJ in Eq, NSW)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/430.html

1.7 ZH International – insolvent transactions

In 2001, Hui (John) Zhang and his wife, Ngoc Hong Ly established a company known as ZH International Pty Ltd which acquired four properties being 268 Cabramatta Road, Cabramatta, 87 Hughes Street, Cabramatta, 110 and 112 Gladstone Street, Cabramatta (**Cabramatta Properties**) with a view to property development. The couple also owned seven other properties in their own names.

John and Ngoc contributed some funds to acquire the Cabramatta Properties which were imperfectly recorded in a Shareholder's Loan Account. The bulk of funds were provided by bank loans to ZH International which were secured over the Cabramatta Properties. ZH International obtained a builders licence and started undertaking building works on the Cabramatta Properties. However, two projects encountered difficulties concerning legal proceedings brought against ZH International for building defects on properties it had developed.

From 2003 to 2015, ZH International did not produce or appear to maintain any general ledgers or management accounts (apart from three pages of general ledgers for 2016). From 2004, ZH International stopped lodging GST returns (except for 2006 and 2009). After 2010, ZH International stopped filing income tax returns.

In around 2011, John and Ngoc separated. Although Ngoc asked for a property settlement in relation to their assets various times, John refused.

By 2014, ZH International had been experiencing cashflow problems for some time: ZH International's bank account was overdrawn, cheques were being dishonoured and bills paid by '*round sums'* or potentially using John and Ngoc's personal funds. ZH International faced building defects claims exceeding $3 million.

In early 2014, John agreed to a partial property settlement with Ngoc but only in relation to the Cabramatta Properties (and not the seven other properties they personally owned or any other assets). In May 2014, John and Ngoc's lawyer filed an Application for Consent Orders (**Application**). The Application:

1. contained no information on the financial position of ZH International beyond the estimated value of the Cabramatta Properties and the amount owing on the associated loans;
2. did not disclose the significant claims made against ZH International for building defects which, if successful, would eclipse ZH International's net assets;
3. did not disclose that ZH International was then insolvent or facing serious and well-defined claims; and
4. did not join ZH International to the Family Court proceedings nor the proposed orders.

On 9 May 2014, consent orders agreed between John and Ngoc (**2014 Consent Orders**) were made by a Registrar in the Local Court. The 2014 Consent Orders obliged John to transfer all of *'all his rights, title and interes*t' in 110 and 112 Gladstone Street, Cabramatta to Ngoc and similarly, for Ngoc to transfer *'all her rights, title and interest'* in 268 Cabramatta Road and 87 Hughes Street to John.

Following this:

1. John and Ngoc paid out the four mortgages secured over the Cabramatta Properties. John stated that, in order to do so, he sold another property that he owned personally in order to pay out the mortgages over 110 and 112 Gladstone Street; and
2. on 19 and 23 September 2014
   (a) 110 and 112 Gladstone Street were transferred from ZH International to Ngoc;
   (b) 87 Hughes Street was transferred from ZH International to John; and
   (c) 268 Cabramatta Road was transferred from ZH International to John.

   (together, the **Transfers**)

At the time of the Transfers, the net equity in the Cabramatta Properties was $2.23 million.

Following the Transfers, John continued to use ZH International's building licence and conducted further building projects.

As legal proceedings against ZH International were determined, a judgment creditor issued a statutory demand which went unanswered. Following this, on 13 September 2016, ZH International was wound up by the Court and Mr Hayes was appointed as liquidator.

During the course of being appointed, Mr Hayes made 88 requests for books and records of ZH International from various persons including John, Ngoc, their daughter (who worked as a manager and assisted John with the business from time to time). The records that Mr Hayes was able to obtain did not correctly record and explain ZH International's transactions and financial position. All financial statements were drafts. For 2011, two draft versions of financial statements were produced which were materially inconsistent (the profit differed by $485,272, total assets by $1.33 million and total liabilities by $1.746 million), for which no explanation was provided.

Mr Hayes prepared draft financial statements showing repayment of the Shareholder's Loan Account of $1.238 million.

It was unclear whether the Shareholders Loan Account was a valid loan because John only produced limited financial material to the liquidator and this did not enable the Shareholder's Loan Account to be supported or reconciled.

On 22 December 2016, further consent orders were made by a registrar (**2016 Consent Orders**), pursuant to which Ngoc agreed to transfer her shares in ZH International and any interest in Shareholder's Loan Account to John and John agreed to indemnify Ngoc from any liability arising from the liquidation of ZH International.

Since the Transfers, both John and Ngoc continue to own the Cabramatta Properties. John has developed 87 Hughes Street into an apartment building with 20 apartments. 16 of the 20 apartments have been sold. John continues to own 4 of the units subject to a mortgage to V & T Vuong Pty Limited.

Mr Hayes now seeks to retrieve the Cabramatta Properties (being ZH International's assets) from John and Ngoc, so that ZH International's creditors may be paid.

Issues

1. Were the 2014 Consent Orders, the Transfers and the apparent use of net equity to 'repay' the Shareholder's Loan Account and advance funds to the directors now recorded in 'Trade and other Receivables' each (and together):
   (a) a transaction within the meaning of section 9 and Part 5.7B of the Corporations Act;
   (b) an unfair preference within the meaning of section 588FA;
   (c) an uncommercial transaction within the meaning of section 588FB;
   (d) an insolvent transaction within the meaning of section 588FC;
   (e) an unreasonable director-related transaction within the meaning of section 588FDA;
   (f) a voidable transaction within the meaning of section 588FE; and
   (g) a transaction with a related entity of the Company within the meaning of section 588FE(4) and section 588FH.
2. Did John and Ngoc breach their director's duties and fiduciary duties?

Decision

Presumption of Insolvency

Under section 588E of the *Corporations Act* a company is presumed to be insolvent where it has faild to keep adequate financial records. The Court was satisfied, on the basis of Mr Hayes' evidence together with minimal accounting records prepared before ZH International went into liquidation, the voluminous history of requests for production of the books and records by Mr Hayes and the very poor quality of the financial statements produced since (all draft and unsigned) that ZH International did not comply with its obligations under section 286 of the *Corporations Act* to keep adequate financial records at the relevant time and thus insolvency is presumed.

The Court found that ZH International was insolvent in May 2014 to September 2014 (at the time of the 2014 Consent Orders and the Transfers) having regard to its immediate lack of funds but looking forward to assess its 'reasonably immediate future'.

The Court considered factors including:

1. the absence of proper books and records and difficulty with reliability of the records that did exist or were provided to Mr Hayes;
2. the fact that by this time, ZH International was making rounded sum payments, dishonouring cheques and its accounts were overdrawn;
3. the fact that, given the Transfers, ZH International did not have any other source of funds;
4. ZH International was then owed more than $1 million for the Bronte development but was unlikely to be paid in a timely manner or at all;
5. ZH International was being sued by the Bronte developer for building defects;
6. the developer, who was in receivership, had also purported to terminate the contract for sale in respect of Unit 8, being ZH International's way of being paid 'in kind'.
7. the fact that the bank had also commenced proceedings against ZH International and had put the company 'on notice' of a building defects claim.

Voidable Transactions

Where the court is satisfied that '*a transaction of the company*' is voidable because of section 588FE of the Corporations Act, the court may make orders including an order directing a person to pay money or transfer property to the company that fairly represents the money paid or property transferred by the company.

Section 588FE provides that, amongst other things, if a company is being wound up, a transaction is a transaction can be voidable in certain circumstances including where (relevantly):

(a) it is an insolvent transaction, and also an uncommercial transaction, of the company; and

(b) it was entered into, or an act was done for the purpose of giving effect to it, during the 2 years ending on the relation-back day.

OR

(a) it is an insolvent transaction of the company; and

(b) a related entity of the company is a party to it; and

(c) it was entered into, or an act was done for the purpose of giving effect to it, during the 4 years ending on the relation-back day.

OR

(a) it is an insolvent transaction of the company; and

(b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and

(c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.

OR

(a) it is an unreasonable director-related transaction of the company; and

(b) it was entered into, or an act was done for the purposes of giving effect to it:

(i) during the 4 years ending on the relation-back day; or

(ii) after that day but on or before the day when the winding up began.

Transaction of the company

The Court considered that the 2014 Consent Orders were not a '*transaction*' of ZH International because they:

1. did not oblige ZH International to do anything, such as to transfer the properties to John and/or Ngoc;
2. did not create an equitable interest in the Cabramatta Properties in favour of John and Ngoc; and
3. were directed to John and Ngoc as they were named in, and consented to, the Consent Orders in their personal capacities.

However, ZH International was a party to each of the Transfers. ZH International was not obliged by the 2014 Consent Orders to transfer the properties but it did so. The Transfers were '*transactions*' by which ZH International divested itself of its principal assets.

Similarly, ZH International was a party to any repayment of the Shareholder's Loan Account and any 'advance' of the excess net equity in the four properties to ZH International's directors and shareholders.

Unreasonable director-related transactions

The Transfers were an unreasonable director related transaction because of the detriment to ZH International, and its creditors, by these transactions outweighed any benefits given that the four properties were its only assets at the time. The transaction was unreasonable given ZH International's financial condition at the time, where ZH International was 'in uncertain financial and commercial circumstances in which questions as to its continuing solvency could arise in the short to medium term'.

Using the net equity to repay the Shareholder's Loan Account and advance the excess net equity to the directors – being an accounting treatment likely effected much later – falls into the same category. There were far more pressing needs which this net equity could reasonably have been used to satisfy than the manner in which it was used for.

Uncommercial transaction

A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction having regard to the benefits (if any) and detriment of the company in entering into the transaction.

For the same reasons as given in respect of the unreasonable director-related transactions, the court considered that the transfers and any associated repayment of the Shareholder's Loan Account were uncommercial transactions. Any benefits attained by ZH International by resolving the family law proceedings were not such as to transform an uncommercial transaction into a commercial transaction.

Unfair preference

A transaction is an unfair preference given by a company to a creditor of the company if, and only if:

1. the company and the creditor are parties to the transaction (even if someone else is also a party); and
2. the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

The Court was satisfied that any repayment of the Shareholder's Loan Account was an unfair preference. John and Ngoc were unsecured creditors of ZH International in respect of the Shareholder's Loan Account and have been paid in full whereas they will receive less as unsecured creditors in the liquidation.

Insolvent transaction

The Court was satisfied that the Transfers and any repayment of the Shareholders Loan Account were an insolvent transaction. This is because:

1. the Transfers was an unfair preference;
2. the Transfers were an uncommercial transaction;
3. ZH International became insolvent because of the Transfers;
4. John and Ngoc were 'related entities' of ZH International; and
5. the Transfers took place within four years of the relation back day.

588FG and discretion

John and Ngoc sought to rely on 588FG of the Corporations Act, which provides that the Court is not to make an order under section 588FF in particular circumstances. John and Ngoc contended that they became a party to the transactions in good faith on the basis of legal advice, had no reasonable grounds for suspecting ZH International was insolvent (nor would a reasonable person in the circumstances have so suspected), and provided valuable consideration and changed their position in reliance upon the transactions.

Ngoc added that, in addition to discharging the mortgages over the Gladstone Street properties, she waived repayment of the Shareholder's Loan Account and avoided action being taken against ZH International to wind it up or obtain orders against it to cease trading and distribute its assets pursuant to her family law property dispute with John.

The Court determined that section 588FG(1) has no application here. The sub-section provides, '*A court is not to make under section 588FF an order materially prejudicing a right or interest of a person other than a party to the transaction*...'. John and Ngoc were a party to each transaction. Section 588FG(2) does not apply either as it does not apply to an unreasonable director-related transaction.

The Court was not minded to refrain from making orders under section 588FF give that a clear purpose of Part 5.7B of the Corporations Act is to assist liquidators to obtain orders to rectify the effect of transactions that prevent fair distribution of the assets of an insolvent company to creditors. The Court was satisfied that there are creditors to whom ZH International owes substantial monies (including the ATO and the party who had commenced proceedings against ZH International for building defects). The Court was satisfied that both John and Ngoc were aware of significant claims for building defects, which had the potential to swallow the ZH International's assets. Both were keen to transfer ZH International's assets to themselves in order to defeat ZH International's creditors. The Court considered it was telling that John and Ngoc decided in 2014 to only do a property settlement in relation to the Cabramatta Properties.

The Court agreed that it seemed John had provided funds to discharge the existing mortgages on the Gladstone Properties by selling his personal properties. However, the Court considered that John and Ngoc received more than they were entitled to.

Director's Duties and Compensation

The court considered Ngoc and John breached their director's duties of acting in good faith and a proper purpose in relation to ZH International. The Court considered that this was a classic 'asset-stripping' case. ZH International was, at the time when John and Ngoc signed the 2014 Consent Orders, the object of two well-defined and substantive claims for building defects which potentially eclipsed its assets. The Court considered that John and Ngoc were aware of these claims.

Transferring the company's assets at an undervalue was not something that a reasonable person appointed as a director of a company in ZH International's circumstances would have done especially as ZH International was insolvent at the time and lacked funds to continue its business operations. The transfers were of no benefit to ZH International and conferred a corresponding windfall gain on Ngoc and John.

Equitable compensation

The Court considered that equitable compensation would have been appropriate comprising the current value of the Cabramatta Properties less the secured debt repaid by John and Ngoc (if, overall, the net equity in the four properties has not been eroded or destroyed by the mortgages now registered) less the holding costs since September 2014 (being interest expense less rental income) borne by John and Ngoc.

There was not enough evidence to quantify compensation. The Court determined it was appropriate to give the parties a further opportunity to adduce further evidence on this matter.

The Court:

1. ordered that, within 30 days, John and Ngoc deliver ZH International a transfer in respect of each of the Cabramatta Properties (in relation to 87 Hughes Street, John transfer the 4 units that he continues to own);
2. noted that the transfer of the Cabramatta Properties does not affect the V & T Vuong Pty Ltd's interest in the mortgage registered over the four apartments which John retained from the development of 87 Hughes Street (as registered mortgagee);
3. noted that the transfer of the Cabramatta Properties to ZH International and ZH International's interest in those properties may be subject to further orders to account John and Ngoc for any benefits received by ZH International because of ZH International's transfer of properties to John and Ngoc in 2014 (**Benefits**);
4. deferred the question of costs until determination of what further orders should be made in respect of the Benefits; and
5. noted that the debt which ZH International owed the defendants, recorded in the Shareholder's Loan Account, may be proved by the defendants in the winding up of ZH International.

Citation *In the matter of ZH International Pty Ltd (in liquidation)* [2022] NSWSC 2 (Rees J, NSW)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/2.html

1.8 Balasubramaniyan – foreign acquisitions and FIRB

Facts

The Commissioner of Taxation sought orders from the Federal Court to fix a penalty against Vijay Balasubramaniyan, a foreign resident, who admitted to four contraventions of section 94 and section 95 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the **FATA**).

Namely, Vijay acquired interests in four Victorian properties without giving notice to the Treasurer as required under the Act and owned two established properties at one time.

Section 94(1) of the FATA provides:

> *A foreign person who proposes to take a notifiable action that is a residential land acquisition must not take the action if the foreign person has not given a notice relating to the action under section 81.*

A notifiable action includes a proposed action to acquire an interest in Australian land.

Vijay relocated to Australia in 2015 on a temporary visa as a foreign resident.

In June 2016, Vijay commenced a relationship with his future wife, an Australian citizen, whom he married on 9 October 2017.

On 19 July 2016, Vijay acquired the property known as 2/60 Warringa Crescent, Hoppers Crossing (**Warringa Crescent Property**) for $350,000 (**Contravention 1**).

Due to his wife being a casual worker on a low income, Vijay was allegedly advised to apply for the mortgage in his own name (after having a joint mortgage previously declined). Consequently, the Warringa Crescent Property mortgage was registered in Vijay's name alone, as was the title to the property.

Vijay contended that his wife contributed approximately $30,000 to the equity required, and an estimated further $35,000 of joint assets was spent on improvements on the Warringa Crescent Property.

On 9 November 2016, Vijay purchased the property known as 6 Oriole Drive, Werribee (**Oriole Drive Property**) for $300,000. A further $155,000 was spent on improvements (**Contravention 2**).

On 14 August 2017, Vijay purchased the 20 Argyle Crescent, Werribee (**Argyle Crescent Property**) as an investment property (**Contravention 3**).

On 26 February 2018, Vijay purchased the 89 Fields Street, Aintree (**Fields Street Property**), which was vacant land, as an investment property (**Contravention 4**).

Vijay held each of the properties as sole proprietor.

At the time of contraventions 1 to 4, section 94(4) of the FATA provided that the maximum penalty for contravention of section 94(1) is the greater of:

1. 10% of the consideration for the residential land acquisition; or
2. 10% of the market value of the interest in the relevant residential land.

Section 95 of the FATA provides:

> *A foreign person who is a temporary resident must not hold an interest in more than one established dwelling at the same time.*

Vijay held an interest in the established dwellings Warringa Crescent Property and Oriole Drive Property at the same time, beginning on 9 November 2016 (the date Vijay became bound under contract for the Warringah Crescent Property) and ceasing on 30 April 2021 upon transfer of the Warringa Street Property (**Contravention 5**).

Vijay also held an interest in the Argyle Crescent Property at the same time as the Warringah Crescent Property and Oriole Drive Property during the period 14 August 2017 to 22 October 2019 (the date Vijay ceased to hold an interest) (**Contravention 6**).

At the time of contraventions 5 and 6, the maximum penalty for section 95(1) (as provided by sections 95(7) and (8)) of the FATA was the greatest of:

1. the amount of the capital gain that was made or would be made on the disposal of the interest;
2. 25% of the consideration for the acquisition of that interest;
3. 25% of the market value of that interest.

For contravention 5, the interest to be measured was Vijay's interest in the Oriole Drive Property.

For contravention 6, the interest to be measured was Vijay's interests in both the Oriole Drive Property and the Warringa Crescent Property.

Issue

What penalties should be fixed with respect to Contraventions 1 to 6 of the FATA?

Decision

The Court ordered Vijay to pay a penalty in total of $250,000 to the Commonwealth of Australia, constituting separate penalties as to $30,000 for contraventions 1 to 4 of section 94 of the FATA and as to $65,000 for each of the two contraventions of section 95 of the Act. The $250,000 penalty was to 'wipe out' the net gain Vijay had made on disposal of the properties.

In its determination, the Court noted that:

1. the Commissioner decision not to proceed by way of infringement notices under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) whereby the maximum penalty was $68,400;
2. if Vijay applied under section 82 of the FATA for a no objection notification in respect of proposals to acquire and hold properties with established dwellings for the purpose of passive investment, such applications would have been refused;
3. had Vijay applied to purchase the vacant land being the Fields Street Property, it was likely that any approval to purchase would have been subject to conditions to develop the land within specific timeframes;
4. Vijay's contentions that each of the properties were acquired with joint funds and that repayments were made from pooled resources;
5. on 13 August 2018, Vijay was made aware by the Commissioner that he was likely to be in contravention of the Act. Vijay continued to hold interests in two established dwellings, and made no retrospective applications under section 81 of the FATA;
6. Vijay made gross capital gains amounting to $710,300 and was satisfied that the $250,000 represented Vijay's net gain.

Citation *Commissioner of Taxation v Balasubramaniyan* [2022] FCA 374 (Beach J, Victoria)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/374.html

1.9 Sharlin – Victorian land tax primary production exemption and discretionary trust

Facts

Sharlin Pty Ltd was the trustee of the Sharlin Unit Trust in Pakenham, Victoria.

The sole unit holder of the Sharlin Trust is Kameel Pty Ltd as trustee for the Mondous Family Trust. Souhail Mondous is the sole director and shareholder of both Sharlin and Kameel.

The Sharlin Trust was established by trust deed on 6 June 2002.

The First Schedule to the trust deed recorded that Kameel's unit holding at the time of the formation of the Sharlin Trust was '100 Ordinary units at a cost of $100'. The register of unit holders confirmed that Kameel continued to hold 100 Ordinary units and that there were no other unit holders.

The term 'General Beneficiaries' was defined in the Trust Deed to include the Corpus Beneficiaries. The Corpus Beneficiaries were defined as '[t]he person or persons who own one or more of the units issued and if such person is a company includes its shareholders and directors'.

Clause 6 of the Trust Deed contains the declaration of trust and provides that the income of the fund was held for the benefit of the General Beneficiaries and of the unit holders in proportion to the number of units respectively held by them. Clause 6 also acknowledged that, subject to the discretionary entitlements of the General Beneficiaries, the unit holders were beneficially entitled to all assets of the Trust fund.

Clauses 22 to 24 of the Trust Deed dealt with the 'Income of the Trust Fund', with clause 23 addressing the distribution of that income for an accounting period in the following terms: '(i) *the trustee shall pay or apply or appropriate the whole or such part of the income of the Trust Fund...as the Trustee shall in its absolute discretion think fit to or for the benefit of one or more of the members of each class of general beneficiaries...(iv) to pay apply or set aside the same for such charitable purposes as the Trustee (with the consent of the Unit Holders) may think fit.'*

On 16 February 2018, the Commissioner assessed Sharlin for land tax in respect of the Pakenham property for the 2018 land tax year on the basis that Sharlin was not exempt from land tax under 67 of the *Land Tax Act 2005* (Vic) (the **LTA**).

At the relevant time, section 67 of the LTA provided that urban land was exempt from land tax if the Commissioner determined that:

1. the land was used solely or primarily for the business of primary production; and
2. the owner of the land was 'a person specified in subsection (2)', with the requirements to be met in order to satisfy section 67(2) of the LTA varying depending on whether the owner of the Urban Land was a natural person, a company (not acting as trustee), the trustee of a discretionary trust, the trustee of a superannuation trust or the trustee of another kind of trust.

Where the owner of the Urban Land was a trustee of a discretionary trust, the requirements to be met included specific requirements as to the specified beneficiaries of the trust, namely that all specified beneficiaries needed to be natural persons or that at least one specified beneficiary be a natural person and any other specified beneficiaries meet certain requirements.

Section 64(1) of the Act defines a discretionary trust as follows:

> ***discretionary trust*** *means a trust under which the distribution or vesting of the whole or any part of the trust income or property—*
>
> *(a) is required to be determined by a person either in respect of the identity of the beneficiaries or the quantum of interest to be taken, or both; or*
>
> *(b) will occur in the event that a discretion conferred under the trust is not exercised;*

Specified beneficiaries is defined as follows:

> *specified beneficiary, of a discretionary trust, means a beneficiary who is specifically named in the trust deed or specifically declared in writing pursuant to the trust deed as a beneficiary to or in whom, by the terms of the trust, the whole or any part of the trust income or property may be distributed or vested—*
> *(a) in the event of the exercise of a power or discretion in favour of the beneficiary (whether or not that power is presently exercisable); or*
> *(b) in the event that a discretion conferred under the trust is not exercised;*

The Commissioner contended that the Sharlin Trust was not a discretionary trust and the specified beneficiaries were not natural persons such that the requirements of section 67 of the LTA were not met.

Sharlin objected to the land tax assessments and, upon the objection being disallowed, appealed to the Victorian Civil and Administrative Tribunal. Sharlin argued that Souhail Mondous, as a director and shareholder of Kameel, was a specified beneficiary as he was a General Beneficiary.

Issues

1. Is the Sharlin Trust a discretionary trust as defined in section 64(1) of the LTA?
2. Who are the specified beneficiaries of the Sharlin Trust and did they meet the requirements under section 67(2) of the LTA?

Decision

Is the Sharlin Trust a 'discretionary trust'?

The VCAT recognised that the definition of a discretionary trust in section 64(1) of the LTA is very broad, and that this definition applies only for the purposes of the primary production exemption relating to urban land.

The VCAT considered the clauses in the Trust Deed which conferred power on Sharlin to distribute income. The VCAT determined that under either or both of clause 23(a)(i) and clause 23(a)(iv), Sharlin has a discretion under which the identity of the beneficiaries or the quantum of interest to be taken may be determined and, it is only if neither discretion is exercised that Kameel, as sole unit holder, will be entitled to the income (or any residual

income) under clause 23(d). As such, the VCAT concluded that the Sharlin Trust was a discretionary trust as defined in section 64 of the Act.

Specified beneficiaries?

The VCAT said that the specified beneficiaries of a trust are those beneficiaries that are 'specifically named in the trust deed' or who are 'specifically declared in writing' by the trustee.

As neither of these applied to Mr Mondous, he was not a specified beneficiary of the Sharlin Trust. As no specified beneficiary was a natural person, the Sharlin Trust did not meet the requirements of section 67(2)(d)(ii) of the LTA.

Accordingly, the Pakenham property was not exempt from land tax.

COMMENT –where the term 'discretionary trust' is defined in revenue legislation it is often defined in broad terms and may extend to trusts thar are not conventionally understood to be discretionary trusts. See, for example, the Dictionary in the *Duties Act 1997* (NSW).

Citation *Sharlin Pty Ltd v Chief Commissioner of State Revenue* [2022] VCAT 378 (Member R Tang AM, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/378.html

1.10 Other tax and superannuation related cases in period of 7 April 2022 – 11 May 2022

Citation	Date	Headnote	Link
Arshad and Tariq v Commissioner of State Revenue (Review and Regulation) [2022] VCAT 391	7 April 2022	Review and Regulation List – Duties Act 2000 (Vic), s 3 ('foreign purchaser', 'foreign natural person'), s 28A – Migration Act 1958 (Cth), s 30(1) – Whether purchaser of property, who was permitted to enter and remain in Australia under a provisional partner visa, was a foreign purchaser at time of acquisition – Whether applicants were misled by State Revenue Office and, if so, whether principles of estoppel can apply in state tax review proceedings – Whether any discretion as to imposition of foreign purchaser additional duty – Concession as to remission of interest	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/391.html
Narlexi Pty Ltd and Commissioner of Taxation (Taxation) [2022] AATA 993	11 April 2022	TAXATION – CORONAVIRUS ECONOMIC RESPONSE PACKAGE - CASH FLOW BOOST – where applicant incorporated in December 2019 – whether applicant could satisfy the requirement that it 'made a taxable supply in a tax period that applied to it' that started on or after 1 July 2018 and ended before 12 March 2020 – where applicant accounted for GST quarterly and made its first made taxable supplies in the quarterly tax period ending March 2020 – decision affirmed	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/993.html
Deputy Commissioner of Taxation v Miraki (Funds Paid out of Court) [2022] FCA 392	13 April 2022	PRACTICE AND PROCEDURE – where respondent paid moneys into Court under freezing order regime – where consent orders later made for moneys to be paid out of Court – where the parties and their solicitors were aware of a claim of substance by a third party to a beneficial interest in those funds – where that beneficial interest in the funds might be established by a reserved decision of the NSW Court of Appeal – where Court not informed of third party's claims when parties sought consent orders – consent orders set aside	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/392.html
RFZD and Commissioner of Taxation (Taxation) [2022] AATA 988	14 April 2022	TAXATION – objection decision - superannuation guarantee charge - shortfall – whether the amended SGC assessments and SGC and PAYGW penalties correctly imposed – whether the penalty imposed on the Applicant by the Commissioner should be remitted in whole or in part - decision under review affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/988.html#
Oueik v Chief Commissioner of State Revenue [2022] NSWCATAD 132	26 April 2022	TAXES AND DUTIES – administration – interest – remission	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/132.html

Twin Rivers Developments Pty Limited and Commissioner of Taxation (Taxation) [2022] AATA 887	28 April 2022	TAXATION – CORONAVIRUS ECONOMIC RESPONSE MEASURES – CASH FLOW BOOST – whether applicant paid wages in March and June 2020 quarterly tax periods – whether scheme for the dominant purpose of obtaining or increasing cash flow boost – decision that applicant entitled to cash flow boost for March 2020 quarter but not June 2020 quarter substituted	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/887.html
Hyder v Commissioner of Taxation (No 3) [2022] FCA 493	3 May 2022	TAXATION – consideration of the determination of the costs of and incidental to the proceedings the subject of the primary judgment given on 22 March 2022 in Hyder v Commissioner of Taxation [2022] FCA 264 and Hyder v Commissioner of Taxation (No 2) [2022] FCA 421	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/493.html
Raissis v Chief Commissioner of State Revenue [2022] NSWCATAD 146	9 May 2022	TAXES AND DUTIES - land tax - liability - principal place of residence exemption - exemption available to owner of property - time at which availability of exemption to be determined – requisite degree of permanence – taxpayer's onus of proof	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2022/146.html
Landcom v Commissioner of Taxation [2022] FCA 510	9 May 2022	CONSTITUTIONAL LAW – s 114 of the Constitution prohibits the Commonwealth imposing 'any tax on property of any kind belonging to a State' – where GST is not imposed on States, but States have voluntarily agreed to pay notional GST – where the A New Tax System (Goods and Services Tax) Act 1999 (GST Act) addresses notional GST, including the amount of notional GST which might be voluntarily paid – where applicant being a State owned corporation sought private binding ruling from Commissioner of Taxation in relation to application of a provision facilitating calculation of notional GST relevant to a proposed sale of land – where Commissioner issued private binding ruling and made an objection decision in relation to notional GST – private ruling and objection decision later claimed only to be a 'purported' private ruling and a 'purported' objection decision – on commencement of Part IVC appeal, Commissioner argued Court did not have jurisdiction – whether Court has jurisdiction to hear Part IVC appeal – whether there is 'matter' within the meaning of ss 75 and 76 of the Constitution – whether there is a justiciable controversy in circumstances where GST cannot be and is not imposed – whether notional GST scheme can give rise to real and enforceable tax liabilities on the part of states – whether issue before the Court was hypothetical – Court found to have jurisdiction – states found to have real interest in the calculation of notional GST – states entitled to seek rulings about how provisions of GST Act apply TAXATION – where applicant proposed to transfer several freehold interests in land to third party as part of single contract – whether a single 'supply' of land for the purpose of calculating the 'margin' contained in s 75-10 of the GST Act – held that each supply of a freehold interest was a separate supply	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/510.html
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'	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2022/153.html

2 Legislation

2.1 Bills lapse because of calling of federal election

The following bills were before parliament when the federal election was called on 10 April 2022. The Parliament has been prorogued and the House of Representatives dissolved, with the result that, relevantly, the following tax bills have lapsed.

Treasury Laws Amendment (2021 Measures No 7) Bill 2021

This Bill included amendments to the sharing economy reporting regime to require electronic platform operators to provide certain transaction information to the ATO, facilitation of transitional arrangements associated with the replacement of the Superannuation Complaints Tribunal with the Australian Financial Complaints Authority and the removal of the $250 non-deductible threshold for work-related self-education expenses.

Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022 and Income Tax Amendment (Labour Mobility Program) Bill 2022

This Bill had amendments to expand protections for unfair contract terms, to allow taxpayers to choose self-assess the effective life of certain intangible depreciating assets, to allow the Commissioner of Taxation to direct an entity to complete a course on record-keeping, income tax and withholding tax exemptions for the FIFA Women's World Cup, recovery grants for Cyclone Seroja and reduction the effective tax rate on certain income earned by foreign resident workers under certain labour mobility programs.

Treasury Laws Amendment (Modernising Business Communications) Bill 2022

This Bill proposed, amongst other things, to extend the availability of electronic execution to all documents required to be executed under the Corporations Act to expand the scope of the changes made by the *Corporations Amendment (Meetings and Documents) Act 2022* (Cth).

Treasury Laws Amendment (Tax Concession for Australian Medical Innovations) Bill 2022

This Bill proposed to introduce a 'patent box' regime with concessional tax treatment for eligible medical, biotechnology, agricultural and veterinary patents. For details please see our March 2022 and April 2022 training notes.

Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022

This Bill sought to extend and adapt the financial reporting and auditing requirements in Chapter 2M of the Corporations Act to apply to registrable superannuation entities (RSEs) and to enable small business entities to apply to the Small Business Taxation Division of the AAT for an order staying, or otherwise affecting, the operation or implementation of decisions of the Commissioner that are being reviewed by the AAT. For further detail please see our March 2022 training notes.

2.2 Miscellaneous Tasmanian revenue amendments

On 7 April 2022, the *Treasury Miscellaneous (Affordable Housing and Youth Employment Support) Bill 2022* (Tas) received Royal Assent.

The Bill amends the *Duties Act 2001*, the *First Home Owner Grant Act 2000*, the *HomeBuilder Grants Act 2020*, and the *Payroll Tax Rebate (Apprentices, Trainees and Youth Employees) Act 2017*.

Namely, the Bill provides:

1. *Duties Act 2001* –
   (a) extend the duty concessions for first home buyers and pensioners downsizing until 30 June 2023;
   (b) increase the maximum dutiable value of property for both of these duty concessions from $500,000 to $600,000;
2. *First Home Owner Grant Act 2000* – retain the First Home Owner Grant at $30,000 for an additional 12 months to 30 June 2023;

3. *HomeBuilder Grants Act 2020* – give the Commissioner of State Revenue discretion to extend the construction completion date for recipients of the Tasmanian HomeBuilder grant; and
4. *Payroll Tax Rebate (Apprentices, Trainees and Youth Employees) Act 2017*– extend the payroll tax rebate scheme for apprentices, trainees and youth employees until 30 June 2024.

The measures contained in the Bill commenced on the date of Royal Assent with the exception of:

1. the amendments to the First Home Buyer Duty Concession and the Pensioner Downsizing Duty Concession, which are to apply retrospectively from 1 January 2022; and
2. the amendments to the *First Home Owner Grant Act*, which are to commence from 1 July 2022.

Reference *Treasury Miscellaneous (Affordable Housing and Youth Employment Support) Bill 2022* (Tas)
w https://www.parliament.tas.gov.au/Bills/Bills2022/7_of_2022.html

2.3 Defacto Super Split (WA)

On 6 April 2022, the *Family Court Amendment Bill 2022* was introduced to the Western Australian Parliament.

The Bill amends the *Family Court Act 1987* (WA) to facilitate the exercise of federal jurisdiction in respect of the superannuation interests of separating de facto couples in family law proceedings in Western Australia.

The Bill also facilitates the exercise by the Family Court of Western Australia of federal bankruptcy proceedings concurrently with family law proceedings.

The Bill also makes consequential amendments to other Acts.

Reference *Family Court Amendment Bill 2022* (WA)
w
https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=DBCD3282603D62794825881B003056CD

2.4 Duties amendments in Western Australia

On 6 April 2022, the *Duties Amendment Bill 2022* was introduced to the Western Australian Parliament. The Bill seeks to amend the *Duties Act 2008* (WA) to introduce tax simplification measures to align the general and residential property transfer duty rates.

Reducing the general rate of duty

At present, transactions involving residential property are assessed at a concessional residential rate of duty, compared to transactions involving commercial property, land and business assets, which are assessed at the general rate of duty. The Bill seeks to amend the general rate of duty that applies to non-residential property to be the same as the concessional residential rate of duty. The result of this is that the concessional rate of duty will apply to all dutiable transactions.

Removing the concessional residential rate of duty

The Bill removes the concessional residential rate of duty, as a result of the alignment of the general rate of duty for non-residential property. The concessional rate is no longer required. The lower rate will apply to all dutiable transactions.

Adjusting the residential or business property concession

At present, transactions involving residential land or business property valued at $200,000 or less, are assessed at a separate concessional rate of duty. The Bill seeks to adjust this concessional rate to provide a concession to all eligible transactions valued at less than $200,000. This will align the concessional treatment of transactions involving residential property and business property as a consequence of the new single general rate of duty.

Other amendments

The Bill also:

1. introduces a vehicle licence duty exemption for new service demonstrator vehicles that are loaned to customers having their vehicles serviced at a dealership;
2. abolishes duty on transactions for prospecting licences unless they include other dutiable property; and
3. amends the duty treatment of family law court orders following a marriage or de facto relationship breakdown to make them exempt from duty, nominal duty will apply to eligible transfers of property made under these orders.

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

2.5 Foreign land tax and duties surcharges in Tasmania

On 3 May 2022, the Tasmanian Government introduced three Bills proposed to introduce a foreign investor land tax surcharge and duties surcharge.

Foreign investor land tax surcharge

The *Land Tax Amendment (Foreign Investors) Bill 2022* and *Land Tax Rating Amendment (Foreign Investors) Bill 2022* will amend the *Land Tax Act 2000 (Tas)* and *the Land Tax Rating Act 2000 (Tas)* to introduce a 2% foreign investor land tax surcharge from 1 July 2022.

The proposed amendments will apply to any interest in residential land that is:

1. acquired by a foreign person on or after 1 July 2022 (a foreign person is defined in the *Duties Act 2001* (Tas));
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 thresholds of the *Land Tax Rating Act 2000* will not apply for the purposes of the surcharge, such that the surcharge may imposed even if no land tax is payable.

The surcharge will not apply to principal residence land held by foreign persons or to commercial residential properties such as hotels, boarding houses, housing provided by or on behalf of educational institutions, residential care facilities and retirement villages.

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.

Non-foreign discretionary trust deeds can be amended within a 6-month window after each assessment date to prevent unintended imposition of the surcharge. The Commissioner will have 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.

Amendments applying retrospectively from 1 July 2018, the commencement date of the duty surcharge, include clarify that:

1. commercial residential properties such as hotels, boarding houses, housing provided by or on behalf of an educational institution, residential care services and retirement villages 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 also proposes to 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.

Reference *Land Tax Amendment (Foreign Investors) Bill 2022; Land Tax Rating Amendment (Foreign Investors) Bill 2022; Duties Amendment Bill 2022*
w https://www.parliament.tas.gov.au/Bills/Bills2022/17_of_2022.html
https://www.parliament.tas.gov.au/Bills/Bills2022/16_of_2022.html
https://www.parliament.tas.gov.au/Bills/Bills2022/18_of_2022.html

2.6 Victoria miscellaneous revenue amendments

On 3 May 2022 the Victorian government introduced the State Taxation and Treasury Legislation Amendment Bill 2022 Bill, which makes miscellaneous amendments to the *Duties Act 2000* (Vic), *Land Tax Act 2005* (Vic), *Payroll Tax Act 2007* (Vic) (PTA) and the *Taxation Administration Act 1997* (Vic).

The changes include the following:

1. amendments provide exceptions to the prohibition of disclosure of information obtain in the course of administering a taxation law;
2. imposing a 5-year time limit on the power of the Chief Commissioner to allow objections out of time; and
3. amendments to the PTA to reduce the application of the employment agency provisions where "employment agents" are supplying their own common law employees where the wages would have been exempt if the service provider had been an employee of the client.

w https://content.legislation.vic.gov.au/sites/default/files/bills/591333exi1.pdf

3 Rulings

3.1 Victorian LTA009 – Charity Exemption

The Commissioner has finalised LTA-009 Land tax – Charity exemption, which reflects the amendments to the land tax exemption for charitable institutions under section 74 of the *Land Tax Act 2005* (Vic).The draft ruling replaces LTA-004 and LTA-005, which will continue to apply for land tax years prior to 2022.

The draft ruling was covered in our March Tax Training notes. The ruling has been finalised with some minor amendments to the draft ruling.

The ruling clarifies that to qualify for the current charity exemption, the use and occupation of land must be exclusively for charitable purposes of the charity. Generally, if a charity has given up exclusive possession of land through the grant of a lease, the tenant is in occupation of the land, not the charity. However, a charity may remain in occupation of the land if:

1. it leases land from the landowner, irrespective of the charitable status of the landowner, or
2. a charity, who either owns the land or leases it from a landowner, engages a service provider under a service contract or licence to provide certain goods or services on the land.

Ultimately, whether a charity occupies land will be a factual enquiry.

Reference State Revenue Office Victoria, *Revenue Ruling LTA 009 Land tax – Charity exemption*
w https://www.sro.vic.gov.au/legislation/land-tax-charity-exemption

4 Private Binding Rulings

4.1 Franking a marriage breakdown payment

Facts

The taxpayer was a party to Family Court proceedings to divide matrimonial property.

In those proceedings, the Family Court made interim orders which included Orders that the taxpayer receive a partial property settlement comprising an amount of $X paid to the taxpayer by a company,

The due date for the income tax return lodgement for the company was deferred and is yet to be lodged.

Question

Is the payment made by the company, which will deemed to be a dividend under Division 7A, able to be franked under section 109RC of the ITAA 1936?

Decision and reasons

The ATO answered yes.

The ATO noted that section 109RC of the ITAA 1936 provides that a deemed dividend under Division 7A may be franked if it was paid because of a family law obligation', which includes an order made by the Family Court.

However, it can only be franked under subsection 109RC(3) of ITAA1936 if:

1. The dividend is franked at the private company's benchmark franking percentage for the 'franking period in which the dividend is taken to be paid; or
2. if the private company does not have a benchmark franking percentage for the period--the dividend is franked at a franking percentage of 100%.

The ATO stated that assuming the dividend is franked in accordance with section 109RC(3) it would be frankable.

TRAP – the requirement for a dividend to be franked at the benchmark rate or at 100% could result in a franking deficit for the company concerned. Where there are insufficient franking credits available it would be important to establish a benchmark franking percentage before the section 109RC dividend is paid so that after the section 109RC dividend there is not a deficit. Care should be taken as to how to manage the ATO if the benchmark franking percentage causes the disclosure rule to be breached (where the benchmark franking percentage moves by a substantial amount from one franking period to the next, generally by more than 20 percentage points).

ATO reference *Private Binding Ruling Authorisation No. 1051939580301*

w https://www.ato.gov.au/law/view/document?docid=EV/1051939580301

4.2 Interposing a holding company and rollover requirements

Facts

A taxpayer is tax resident of Australia.

Company A is an Australian incorporated proprietary limited company is an Australian tax resident. The taxpayer is the sole director of Company A.

The taxpayer and Company A own ordinary shares in 2 foreign resident companies. The shares in the two companies are on capital account and carry voting rights.

There are other shareholders in 2 foreign companies and there is substantial commonality in shareholders but the shareholdings are not exactly the same.

The shares in the 2 foreign companies are not taxable Australian property.

A new foreign holding company is proposed to be interposed between the shareholders of the 2 foreign companies with the purpose of the restructure being to improve the business structure, to allow for future expansion and growth, and mitigate risk with respect to the ownership of assets.

Prior to the restructure, minority shareholders in one of the foreign companies will be bought out so that the shareholdings in the 2 foreign companies will mirror each other.

As part of a single scheme of arrangement, a new Holding Company will be incorporated (Foreign Holding Company), which will then acquire the entire issued share capital (ordinary shares) of both foreign companies from the existing shareholders, and as consideration, will issue ordinary shares in itself to those same existing shareholders in the same proportion as their shareholding in the foreign companies.

Assumptions

The ATO made three assumptions when issuing the ruling:

1. the taxpayer and the other shareholders in the original companies (the two foreign companies) will continue to own shares in the interposed company from the time they are issued until at least completion time;
2. the new interposed holding company (Foreign Holding Company) will make the choice for section 615-65 of the ITAA1997 to apply within 2 months of the completion time. The taxpayer will obtain evidence such choice has been made; and
3. the taxpayer will elect to apply the rollover contained within Division 615 by the date they lodge their 20XX-YY tax return, and this will be evidenced by the way they lodge your return.

Question

Is the taxpayer eligible for the rollover in Division 615?

Decision and reasons

The ATO answered yes.

The ATO noted that section 615-5 of the ITAA 1997 provides that a taxpayer can choose to obtain the rollover if:

- you are a member of a company (the original entity);
- you and at least one other entity (the exchanging members) own all of the shares in it;
- under the scheme for reorganising its affairs the exchanging members dispose of all their shares to an interposed company in exchange for shares in the interposed company (and nothing else); and
- the requirements of Subdivision 615-B are satisfied.

The ATO noted that the requirements in Subdivision 615-B of the ITAA 1997 are as follows

- the interposed company must own all the original interests immediately after the 'completion time' (the time all the exchanging members have had their shares disposed of under the scheme) (section 615-15 of the ITAA 1997)
- immediately after completion time, each exchanging member must own:
  - a whole number of shares in the interposed company; and
  - a percentage of the shares in the interposed entity that were issued to all of the exchanging members that is equal to the percentage of the shares in the original entity that were owned by the member and disposed of under the scheme (subsection 615-20(1) of the ITAA 1997)
- the following ratios must be equal:
  - the market value of each exchanging member's shares in the interposed company to the market value of the shares in the interposed company issued to all exchanging members (worked out immediately after the completion time); and
- the market value of that member's shares or units in the original entity that were disposed of, redeemed or cancelled under the scheme to the market value of all the shares or units in the original entity that were disposed of, redeemed or cancelled under the scheme (worked out immediately before the first disposal). (subsection 615-20(2) of the ITAA 1997)

- the taxpayer must be Australian resident at the time that their original interests were disposed of (subsection 615-20(3) of the ITAA 1997)
- the shares issued in the interposed entity must not be redeemable shares (subsection 615-25(1) of the ITAA 1997)
- each exchanging member who is issued shares in the interposed company must own the shares from the time they are issued until at least completion time (subsection 615-25(2) of the ITAA 1997),
- immediately after completion time the exchanging members must own all of the shares in the interposed company (subsection 615-25(3) of the ITAA 1997); and
- the interposed company must make the choice that section 615-65 of the ITAA 1997 applies within 2 months of completion time (section 615-30 of the ITAA 1997).

The ATO concluded that the requirements of Subdivision 615-B of the ITAA 1997 will be met because:

1. under the proposed restructure the interposed company will become the owner of 100% of the shares in both of the original companies;
2. immediately after the restructure you and the other exchanging members will own a whole number of shares in the interposed company and your ownership percentage of the interposed company will equal your ownership interest in the original companies;
3. we consider that the relevant market ratios will be met;
4. you are an Australian resident;
5. there are no redeemable shares being issued in the interposed company;
6. all of the shareholders will continue to own the shares in the interposed company until at least immediately after completion; and
7. the interposed company will make the choice that section 615-65 of the ITAA 1997 applies within 2 months of completion time.

Accordingly, rollover relief will be available under Division 615 of the ITAA 1997.

COMMENT – while it is clearly the case it is a common question as to whether Division 615 or subdivision 124-M can apply for Australian resident shareholders where a foreign company is interposed between them and a foreign company. Where the other requirements of Division 615 or subdivision 124-M are met, a rollover is available. It is not a requirement that the interposed company be a resident company.

TRAP – the requirement that the interposed company make a choice that section 615-65 applies within 2 months of the completion time is a reference to a requirement that the choice be made by that time or such later time as the Commissioner allows. Interestingly section 615-30 provides that a company can evidence the choice by the way it prepares it tax return, but there is nowhere in the company tax return to indicate such a choice has been made, and the time that the choice is made is within 2 months of completion or such further period as the Commissioner allows, not the time that the tax return is prepared. It is prudent in any Division 615 rollover to have the company evidence such a choice within 2 months of completion. Note that the choice under section 615-30 must be made within 28 days of completion if the interposed company is the head entity of a tax consolidated group. Failing to make the choice under section 615-30 invalidates the rollover for the shareholders.

ATO reference *Private Binding Ruling Authorisation No. 1051942651062*
w https://www.ato.gov.au/law/view/document?docid=EV/1051942651062

4.4 Liquidator declares no return and capital loss

Facts

A shareholder had an investment in an unlisted public company where from the date of their share purchase, the turnover had grown significantly. In the early years, the company paid significant dividends. With the onset of the Global Financial Crisis, the company became squeezed for capital due to its funding arrangements and subsequently experienced difficult financial times.

A few years ago, the company went into liquidation with liquidators appointed as at that date.

A letter from the liquidators dated shortly after their appointment is silent about any consequences for shareholders. It makes the following statement under the heading 'Return to Creditors:

Given the debts outstanding to priority and secured creditors, there will be no funds available to unsecured creditors from the sale of the company's asset.

Any return to unsecured creditors will be dependent upon recoveries from voidable transactions and an insolvent trading claim.

After contacting the liquidator, the shareholder received a letter from them dated (after the ruling year) stating in part:

... I can confirm that given the extent of the company's creditors, no surplus funds will be available in the liquidation for a distribution to be made to the company's shareholders.

The shareholder has also received a more recent e-mail from the liquidator stating:

I confirm the following:-

- The liquidator has not issued an 'Official Loss Declaration' to shareholders at any time during the liquidation.

- At no point during the liquidation has there been an expectation that sufficient funds would be available for a return to shareholders of the company. Accordingly, the Liquidator can confirm that as at the 20XX/20XX financial year, there was no expectation of a return to shareholders.

The shareholder has made a large capital gain from an unrelated CGT event during the 20XX-XX income year.

Question

Did CGT event G3 happen to your Company A shares in the 20XX-XX income year?

Decision and reasons

The ATO ruled no.

CGT event G3 provides that:

> *(1) CGT event G3 happens if you own * shares in a company, or financial instruments issued by or created by or in relation to a company, and a liquidator or administrator of the company declares in writing that the liquidator or administrator has reasonable grounds to believe (as at the time of the declaration) that:*
>
> *(a) for shares--there is no likelihood that shareholders in the company, or shareholders of the relevant class of shares, will receive any further distribution for their shares; or*
>
> *(b) for financial instruments--the instruments, or a class of instruments that includes instruments of that kind, have no value or have only negligible value.*
>
> *(2) The time of the event is when the declaration was made.*

The ATO set out that the letter dated shortly after the liquidator's appointment was not acceptable as a written declaration for the purposes of CGT event G3as the letter was only preliminary in nature and was written shortly after the liquidators were appointed. It was silent about the effect of the liquidation on shareholders.

The letter dated after the ruling year was acceptable as a written declaration for the purposes of CGT event G3 as the letter specifically stated that shareholders would not receive any distributions for their shares.

As CGT event G3 happens in the later income year as a result of the declaration any capital loss the shareholder chooses to make from it will not be available to reduce the capital gain they made in the 20XX-XX income year.

The more recent e-mail was not acceptable as a written declaration for the purposes of CGT event G3as an effective declaration had already been made.

The ATO closed by setting out that TD 92/101 notes that there is no requirement for the liquidator to notify shareholders that they have made a written declaration for the purposes of CGT event G3.

COMMENT – it is interesting that the second letter was accepted as a declaration for the purposes of CGT event G3 given it did not used the form of words set out in the CGT event.

TIP – while it is clear that an administrator or liquidator can made a declaration for the purposes of CGT event G3 it is not as clear that a Deed Administrator in a Deed of Company Arrangement (DOCA) can make such a declaration. Examples of such declarations can be found for ASX listed companies that have entered into DOCAs.

ATO reference *Private Binding Ruling Authorisation No. 1051951741033*
w https://www.ato.gov.au/law/view/document?docid=EV/1051951741033

4.5 GST and mortgagee in possession

Facts

A financier had a mortgage over a number of properties.

The borrower defaulted on a loan so that the financier is now able to sell the properties as mortgagee in possession.

The supply of the properties would have been a taxable supply if the borrower had made the supply.

The borrower, if it had sold the properties, could have chosen to apply the margin scheme.

The borrower has not given written notice to the mortgagee in possession that the supply, had the borrower made it, would not have been a taxable supply.

The mortgagee in possession has entered into a contract of sale with a purchaser in respect of the properties. The consideration under the contract of sale is the same amount as what the debtor acquired the properties.

Question

Can the mortgagee in possession choose to apply the margin scheme under the GST Act when it exercises its power and makes a supply of the Properties to the purchaser?

Decision and reasons

Yes.

The ATO set out that Division 105 of the GST Act deals with supplies made by creditors of property belonging to a debtor, where the supply is in satisfaction of a debt owed to the creditor. The supply is a taxable supply if it would have been a taxable supply had the debtor made the supply. The creditor is liable for any GST payable on the supply of the debtor's property.

The ATO observed, the creditor, the mortgage in possession, is taken to be standing in the shoes of the debtor, the borrower, when the mortgagee in possession makes the supply or is acting as agent for the borrower. As a result, for the purpose of the mortgage in possession applying the margin scheme to the sale, the word 'you' as used in Division 75 is taken to mean the borrower.

The ATO also ruled that as the sale price was the same as the purchase price of the properties by the borrower the margin was nil.

TIP – a debtor can give a written notice stating why the supply would not be a taxable supply stating fully the reasons for this position, and that would render the supply non-taxable. It will also be non-taxable where the creditor believes on the basis of reasonable information that the supply would not be a taxable supply. Making sure the supply is not a taxable supply would mean that the creditors retains more of the sale price, would reduce more of the debt owed to the creditor by the borrower.

ATO reference *Private Binding Ruling Authorisation No. 1051952087756*
w https://www.ato.gov.au/law/view/document?docid=EV/1051952087756

4.6 Sale of asset used to produce input taxed supplies

Facts

A person acquired a residential property located in Australia. The property was rented for the period between MM/YYYY to MM/YYYY.

In MM/YYYY, the property was placed on the market for sale but failed to sell

In MM/YYYY, the person made a decision to take the property off the market and subdivide the property into two smaller lots. The intention was to sell both lots once the subdivision had been completed.

The subdivision process commenced in MM/YYYY and was completed in MM/YYYY and there was no rental income received during this period.

The subdivision activities undertaken were minimal, with tasks completed for the purpose of fulfilling planning, shire, and government requirements only. The owner engaged a company to oversee the sub-division process including planning, obtaining agreements/approvals from the Shire, liaising with the relevant State water authority, and arranging fencing.

The subdivision resulted in two separately registered lots of Property A (land and existing residential dwelling) and Property B (land only). The land and existing residential dwelling known as Property A is not the subject of the private ruling.

In MM/YYYY, the newly created vacant land at Property B, was placed on the market for sale and ultimately sold.

Under the sale contract clause X of the GST Withholding Annexure to the Sale Contract stated the margin scheme was applied to the sale of the property and an amount equal to 7% of the purchase price was required to be paid to the Commissioner at settlement.

The owner had not been involved in any previous subdivisions or property development activities and you have no intention of engaging in future planning or development activities.

Question

Was the sale of the vacant land a taxable supply?

Decision and reasons

Yes.

The ATO stated that the primary issue, given that the owner was registered for GST at the time of the supply, was whether the supply was made as part of the course or furtherance of an enterprise.

They then set out that the term 'enterprise' includes, amongst other things, an activity or series of activities done on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property (subsection 9-20(1)(c) of the GST Act).

Section 195-1 of the GST Act then states that the phrase 'carrying on' in the context of an enterprise includes 'doing anything in the course of the commencement or termination of the enterprise'.

The leasing of a property (whether commercial or residential property) falls within the scope of an 'enterprise' for GST purposes. The ATO noted this is the case regardless of the fact that proceeds generated from the rental of residential premises are not subject to GST.

The leasing of residential premises and the subsequent subdivision and sale of the newly created vacant land (in this case Property B) are all considered by the ATO to be activities done in the course or furtherance of (including the termination of) your enterprise that you carry on.

The ATO noted that the circumstances in which a supply is GST-free or input taxed are found in Divisions 38 and 40 respectively. In the owner's case, in the ATO view there were no provisions in the GST Act under which your sale of the vacant land would be GST-free or input taxed.

The ATO ruled therefore that as the vacant land located at Property B satisfies all of the positive limbs of section 9-5 of the GST Act to be a taxable supply and was neither GST-free nor input taxed the sale would be a taxable supply.

TIP – subsection 9-30(4) of the GST Act provides 'A supply is taken to be a supply that is * input taxed if it is a supply of anything (other than * new residential premises) that you have used solely in connection with your supplies that are input taxed but are not * financial supplies.' As the property here had only been used to make input taxed supplies of residential rent, presumably it should have been input taxed, and not taxable on sale.

ATO reference *Private Binding Ruling Authorisation No. 1051952112656*
w https://www.ato.gov.au/law/view/document?docid=EV/1051952112656

4.7 15-year retirement exemption and continuing to work

Facts

A Business that has operated in excess of 15 years is being sold. The purchaser will acquire the assets of the Business and the current owner will continue to work for the Business.

The current owner has a significant individual that will be over 55 years of age at the time of the sale of the Business. The person has been a significant individual in the owner for at least 15 years.

The Business satisfies the basic conditions in section 152-10 of ITAA1997 (the small business entity test or the maximum net asset value test) and the Business assets are active assets, having been used by the Business for over 7.5 years.

The current owner has agreed that they will work for the purchaser for a period not longer than two years, decreasing the time they spend in the business from XX hours per week to a reduced work week of XX hours. Their duties will also be significantly reduced during this period.

The current owner will permanently retire at the end of the two-year period after sale.

Question

Is the capital gain on sale eligible to be exempted by the 15-year retirement exemption?

Decision and reasons

Yes. The considered that the sale of the Business will be in connection with the retirement of the significant individual for the purposes of the small business 15 year exemption. The ATO stated that there will a significant

change in the nature of the significant individual's present activities as a result of the sale of the Business and an overall reduction in the number of hours they work.

COMMENT – the guidance in this PBR is consistent with the ATO website guidance on retirement where they have an example where a person working for a purchaser of a business for a 'few' hours each week for two years and then ceasing work would be considered to result in a sale in connection with the person's retirement.

ATO reference *Private Binding Ruling Authorisation No. 1051948899275*
w https://www.ato.gov.au/law/view/document?docid=EV/1051948899275

4.8 Renting premises near home during Covid-19

Facts

An employee usually works in a capital city.

During the 20XX income year the State Government were contemplating Covid restrictions.

In anticipation of these restrictions, the employee rented a residential unit out of the city to use as an office to carry out their work duties.

The employee connected the electricity and set up Wi-Fi capability at the unit.

The rent on this unit was $XXX per week and was cheaper than renting commercial space.

The employee also offered this unit to their employer for any staff who lived nearby who were unable to travel to the capital city (where the employer is based) if that capital city went into a lockdown situation and movement of people was possibly restricted.

The employee was the only one who used the unit to work from for the period it was rented.

The unit was only used for work purposes and there was no private use.

The premises were only rented for a number of weeks and when it became clear the restrictions were not going to happen the renting ceased.

The employee was not able to work from their home due to insufficient space.

Question

Is the rent deductible for the employee?

Decision and reasons

No.

The ATO quoted from paragraphs 13 to 15 of TR 2020/1 which states:

> *13. The pivotal element of section 8-1 for work expenses is the requirement that expenses be incurred 'in gaining or producing assessable income'. The High Court majority in Payne said it is well established that these words are to be understood as meaning incurred 'in the course of' gaining or producing assessable income, and do not convey the meaning of outgoings incurred 'in connection with' or 'for the purpose' of deriving assessable income.*
>
> *14. The majority further stated that the meaning of 'in the course of' gaining or producing income was amplified in Ronpibon Tin NL where it was held that:*
>
> *... to come within the initial part of [section 8-1] it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income, or if none be produced, would be expected to produce assessable income...*

> *15. While the High Court authority indicates the nature of the connection that needs to be found between outgoings and assessable income, the sufficiency of the connection in a given case cannot simply be determined by reference to a precise formula. Section 8-1 is expressed in such terms that it is intended to cover any number of legal and factual situations. In many cases, only a proper consideration of all the relevant facts and circumstances will reveal whether the occasion of a particular outgoing is to be found in what produces assessable income.*

The ATO then considered TR 93/30 *Income tax: deductions for home office expenses* which considers the deductibility of occupancy and running expenses incurred by taxpayers who work from home.

The ATO summarised the position in that ruling as being that generally, expenses associated with the ownership and use of a home, such as rent, are private or domestic in nature. An exception to this is where part of the home is used for income producing activities and has the character of a 'place of business'. Whether an area of a home has the character of a 'place of business' is a question of fact and depends on the particular circumstances of the case. In the case of an employee, this is likely to be the case where the home is used as the sole base of operations for their income producing activities, that is where no other work location is provided to the employee by an employer.

The ATO consider it is the absence of an alternative place for conducting the income producing activities that has influenced the decision to treat part of an employee's home as the sole base of operations for their income producing activities. In those circumstances, a place of business/sole base of operations will exist only if:

- it is a requirement inherent in the nature of the employee's activities that the taxpayer needs a place of business
- the employee's circumstances are such that there is no alternative place of business and it was necessary to work from home, and
- the area of their home is used exclusively or almost exclusively for income producing purposes.

The ATO noted that while it was necessary for employees who were locked down due to the covid pandemic to work from home, they considered employees in that situation can be contrasted to the taxpayer in *Swinford v FCT* 84 ATC 4803, *Case F53* 74 ATC 294 and *Case T48* 86 ATC 389 (cases where occupancy expense have been allowed). In those cases, the taxpayers' home was the only place they could carry out their income producing activities.

In the case the ATO noted that the employee rented a unit to use as office space in anticipation of a State Government Health Order causing restrictions coming into force.

The ATO noted the employee was not prevented from working from their employer's office during those weeks and that they rented the unit while the employer's office was available.

Therefore, the ATO considered that the unit was not the sole base of operations or a place of business, so that the rent was not deductible.

COMMENT – while it is the ATO view that occupancy expenses cannot be claimed for employees working from home, see https://www.ato.gov.au/general/covid-19/support-for-individuals-and-employees/employees-working-from-home/ it is interesting that the cases that allowed occupancy expenses occurred where the taxpayers' home was the only place from which income producing activities could be carried out. During various lockdowns, attendance at employer's premises was effectively prohibited.

TRAP – the ATO view is that where an employee choses to live away from where their primary place of employment they are not permitted to claim travel costs for travelling to their employer's office – see - https://www.ato.gov.au/law/view/document?src=rs&pit=99991231235958&arc=false&start=1&pageSize=10&total=57&num=0&docid=TXR%2FTR20211%2FNAT%2FATO%2F00001&dc=false&stype=find&df=17&tm=phrase-basic-travel%20expenses at paragraph 48.

ATO reference *Private Binding Ruling Authorisation No. 1051949982464*
w https://www.ato.gov.au/law/view/document?docid=EV/1051949982464

4.9 Image rights entity sponsors event

Facts

A Trust is the owner of trademarks of a professional sportsperson's name, signature and logo as well as various other contractual rights.

The Trust carries on a business which derives income from the exploitation of these assets and rights.

The Trust has three employees and hires the services of a consultant to assist in the pursuit of its business objectives.

The Trust intends to sponsor a series of sports events in regional Australia. The professional sportsperson will not participate as a player.

The sportsperson's logo, name and signature will be visible on promotional materials and advertising hoardings at these events. Branded apparel and equipment will also be available for purchase by patrons.

All funds contributed by the Trust will be solely for the operational activities of these specific events.

The Trustee considers the sponsorship to be a loss or outgoing connected with its business pursuits and it is incurred under the relevant power of the Trustee to undertake such pursuits. The sponsorship outgoing will be expensed in a drawing up of the trust accounts for the reporting period. The Trustee considers the sponsorship will attract custom to (and thereby enhance the quantum of) the sources of income derived by the taxpayer's business in present and future income years.

The day-to-day operations of the events will be conducted by the clubs hosting the events.

Question

Are the sponsorship expenses deductible?

Decision and reasons

The ATO ruled the expenses were deductible as they were necessarily incurred in carrying on a business for the production of assessable income, and were not private, domestic or capital in nature.

COMMENT – what was of interest here was that there was no reference to whether the income of the trust should be treated as the income of the professional sportsperson as was announced to be the case with effect from 1 July 2019. Although Treasury released a consultation paper[1] on the issue in December 2018, no legislation has ever emerged in relation to this issue.

ATO reference *Private Binding Ruling Authorisation No. 1051951652879*
w https://www.ato.gov.au/law/view/document?docid=EV/1051951652879

4.10 No deduction for payments connected to loan

Facts

An ABN holding, GST registered lender initially agreed to lend a borrower a specified amount for the purpose of a specified project only, unless another purpose was approved by the lender. The loan was documented through a loan agreement.

The borrower entered into a contract with a supplier to complete the project.

A request for a loan for additional funds was requested by the borrower with a loan agreement being entered into on for the additional funds.]

[1] https://treasury.gov.au/sites/default/files/2019-03/Consultation-paper-1.pdf

When the second loan was agreed to a tripartite deed was entered into with the lender, borrower and the supplier. The deed gave the lender step-in rights for the project.

The borrower failed to repay the lender's loan amount by the due date.

The lender paid the builder and all project associated costs of a specified amount for a specified period. The invoices for this period were issued to the borrower.

The borrower failed to comply with a notice of demand and on or around a specified date the lender exercised its powers as mortgagee of the property and look possession of the land.

ASIC later deregistered the borrower under the *Corporations Act 2001* and the lender was unable to appoint a receiver prior to this occurring.

Question

Can the lender claim a deduction for the property development costs it financed under the loan?

Decision and reasons

The ATO answered no.

The ATO noted that you can deduct from your assessable income any loss or outgoing to the extent that:

- it is incurred in gaining or producing your assessable income; or
- it is necessarily incurred in carrying on a *business for the purpose of gaining or producing your assessable income.

They then noted that based on case law, for there to be a deduction under section 8-1 there must be sufficient connection between the loss or outgoing and the production of assessable income. The loss or outgoing must be incidental and relevant to the earning of assessable income.

The ATO stated that the lending of funds does not equate to incurring development expenditure. Furthermore, in their view, there is no nexus between the development costs and the assessable income the lender derived from their lending activities.

The ATO concluded that as the lender did not incur the expenditure at a time you were carrying on a property development business the expenditure is not deductible.

The ATO finished the ruling by stating the requirements of section 8-1 ensure that expenses are not claimed by multiple entities.

COMMENT – the decision here is curious, as there could be multiple claims under section 8-1. A lender could claim a bad debt deduction for a loan for construction costs, and the borrower could claim under section 8-1 for those construction costs. Here, what should have been analysed, is whether the lender was carrying on a business of money-lending: if so, their loans to the borrower that became unrecoverable should have resulted in a deduction under section 8-1. If they were not in the business of money lending then the lost money would likely form part of a capital loss.

ATO reference *Private Binding Ruling Authorisation No. 1051957703457*
w https://www.ato.gov.au/law/view/document?docid=EV/1051957703457

4.11 Deceased estate as fixed trust

Facts

Under a Will, the residue of the Estate was left to Person A, who is not a resident for Australian taxation purposes. They are presently entitled to income including capital gains from the Estate.

In the course of administering the Estate, the Executor sold shares that are not taxable Australian property for the purposes of Division 855 of the ITAA 1997.

If the Estate is a fixed trust, a sale of shares that are not taxable Australian property will not result in a tax liability for a foreign resident beneficiary.

Questions

1. Is the Estate a 'fixed trust' trust under section 272-65 in Schedule 2F to the ITAA1936 for the purpose of section 855-40 of ITAA 1997?
2. Are the executors liable to income tax on any capital gains that arose when shares that were not taxable Australian property of the deceased were disposed of and will be paid to a non-resident beneficiary?

Decision and reasons

The ATO ruled that the Estate was a fixed trust, so that the Executors were not liable for tax on the capital gains.

The ATO set out that section 272-65 of Schedule 2F to the Income Tax Assessment Act 1936 (ITAA 1936) provides that a trust is a 'fixed trust' if persons have fixed entitlements to all of the income and capital of the trust.

In this case, the ATO considered the residuary beneficiary had a vested interest in the income and capital of the Estate. There was no condition in the Will by which the residuary beneficiary could lose their interest in the Estate. The interest of the residuary beneficiary in the income and capital of the Estate were therefore vested and indefeasible, and as such, fixed entitlements in accordance with subsection 272-5(1) of Schedule 2F to the ITAA 1936.

As the trust was a fixed trust, and as the property disposed of was not taxable Australian property, the Executors were not taxable on any capital gains made.

TIP – if the shares had been passed to the non-resident beneficiary rather than sold, any capital gain or loss up to the date of the death of the deceased would need to have been included in the date of death tax return pursuant to CGT event K3.

ATO reference *Private Binding Ruling Authorisation No. 1051942120899*
w https://www.ato.gov.au/law/view/document?docid=EV/1051942120899

5 ATO and other materials

5.1 Non-commercial losses and flood, bushfires and COVID-19

The Commissioner has issued a Draft Practical Compliance Guideline (PCG 2022/D2 concerning the discretion under section 35-55 of the ITAA 1997 to disregard the denial of deductions under the non-commercial loss rules where certain requirements are met. Those circumstances include where the business has been affected by special circumstances outside the control of the operators of the business activity, including drought, flood, bushfire or some other natural disaster.

Ordinarily a taxpayer needs to apply to the Commissioner for the discretion to be exercised. However, if the 'safe harbour' conditions in PCG 2022/D2 (once it is finalised) are satisfied, taxpayers can manage their taxation affairs as if the Commissioner has exercised the discretion.

Safe harbour conditions

A person satisfies the safe harbour if they made a tax profit from their business activity in the immediately preceding income year and satisfy all of the following conditions:

1. they satisfy the income requirement in subsection 35-10(2E) of the ITAA 1997 (i.e. the sum of the person's taxable income, reportable fringe benefits, reportable super contributions and net investment losses is less than $250,000)
2. they made a loss from their business activity;
3. their business activity was affected by one or more of the following events;
   (a) flood;
   (b) bushfire; or
   (c) a government-imposed lockdown, business closure and/or restriction due to COVID-19
3. the event meant that:
   (a) the person was not able to carry on their business activity, or unable to carry it on to the same scale as they usually carry on their business activity, or
   (b) some or all of their customers were not able to access their business activity, or access it in the same way as they usually did;
4. the person has not applied for a private ruling requesting the Commissioner exercise the 'special circumstances' discretion in relation to their business activity in the relevant income year; and
5. they have evidence to support that they are eligible for the safe harbour.

The draft PCG provides a number of examples on the application of the safe harbour.

Consultation on the draft PCG closes on 21 June 2022.

ATO reference *Draft Practical Compliance Guideline* PCG 2022/D2
w https://www.ato.gov.au/law/view/document?DocID=DPC/PCG2022D2/NAT/ATO/00001&PiT=99991231235958

5.2 ATO Media Release on New Scams Approach

The ATO has issued a warning to taxpayers as a result of increased reports of fake websites offering to provide tax file numbers and Australian business numbers. These websites charge for but do not provide the service. These websites often steal money and personal information from users. These websites are often advertised on social media.

The ATO has also reported instances of scammers claiming to be the ATO to issue fake debts or claim that a TFN has been suspended.

Those wishing to obtain a TFN or ABN should do so through government online services. When using a tax agent, taxpayers should also ensure that the tax agent is registered with the Tax Practitioners Board.

w https://www.ato.gov.au/Media-centre/Media-releases/ATO-urges-vigilance-following-new-scams-approach/

5.3 Review of reverse charge findings

ATO released its findings of their review into the financial services sector and its application of the reverse change provision under Division 84 of the *A New System (Good and Services) Act 1999* (Cth).

The ATO noted the one of most common GST errors identified for taxpayers in the financial services industry has been the failure to identify acquisitions where GST is payable under these provisions. Such errors can lead to significant amounts of underpaid GST.

In the ATO's review, it has identified errors made in applying the reverse charge provisions, including:

1. lack of documented processes as part of the BAS preparation procedure to account for the reverse charge on cross-border acquisitions;
2. procedures for accounts payable staff to escalate offshore transactions to the tax team were not lived in practice;
3. little involvement from the tax team in identifying relevant offshore acquisitions subject to reverse charges;
4. review of offshore acquisitions as part of the BAS preparation process being restricted to particular areas of the business or to high-value transactions, rather than being a comprehensive process covering the entire business;
5. identification of transactions subject to the reverse charge by the accounts payable team was based on a vendor list and the nature of supplies made by a particular vendor had changed since the initial vendor list was prepared;
6. no built-in controls to flag offshore acquisitions for the application of the reverse charge;
7. input tax credits being claimed on offshore acquisitions despite no GST being remitted, due to the failure to apply the reverse charge; and
8. failure to identify offshore supplier's supplies having ceased to be connected with Australia.

The ATO has noted that the best practice is to have in place procedures at the time transactions are processed to make sure these acquisitions are flagged as being subject to the reverse charge. If not, there is an expectation of the ATO that a documented process is followed prior to lodging the BAS to ensure that acquisitions from offshore are not recorded without GST being remitted.

w https://www.ato.gov.au/law/view/document?DocID=JST/Application-reverse-charge-provisions&PiT=99991231235958

5.4 Media release from Assistant Treasurer on section 100A and disclaimers

On 7 April 2022, the Hon Michael Sukkar MP, Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and Community Housing, published a media release regarding the recent ATO guidance and High Court decision in relation to family trusts.

The media release welcomes clarifications by the ATO that the draft guidance on section 100A that is contained in draft *Taxation Ruling TR 2022/D1* and *Practical Compliance Guideline PCG 2022/D1* will not apply on a retrospective basis where taxpayers have relied on the ATO's 2014 website guidance. It also welcomes the ATO's clarification that ordinary advice services provided in exchange for an advisory fee are not subject to the promoter penalty provisions.

In relation to the decision handed down by the High Court in *Commissioner of Taxation v Carter* regarding the ineffectiveness of trust disclaimers after 30 June of an income year, the media release acknowledges the concerns raised by the Court that 'both its interpretation, and the alternative interpretation offered by the respondent, were capable of giving rise to apparent unfairness'. The media release states that, if re-elected,

> *[t]he Government will carefully consider the implications of the decision, particularly for hard-working small business families, whether it raises any inequitable outcomes that may not have been the intention of the tax law, and whether they can be dealt with by legislative change.*
>
> *A re-elected Morrison Government will not hesitate to make common-sense legislative amendments to provide certainty for family trusts and prevent unfair application of the tax law. The Government will continue to back small businesses through cash flow support, tax relief, supporting business to invest in their digital capability and boosting skills and training as part of our plan for a stronger future.*

For further information regarding the ATO's guidance on section 100A, please refer to our March 2022 and April 2022 Tax Training Notes. The High Court's decision in *Commissioner of Taxation v Carter* [2022] HCA 10 is discussed at item 1.1 of our April 2022 Tax Training Notes.

w https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/certainty-and-stability-family-trusts

5.5 WA Hardship Grants

Applications are now open for the Small Business Hardship Grants expanded program in Western Australia.

The program is designed to provide financial support for businesses most impacted by 'Level 2' public health and social measures that came into effect on 3 March 2022.

Under an expanded program, two tiers of grants will now be available to businesses that experienced a decrease in turnover for a consecutive two-week period between 1 January and 30 April 2022:

1. a revised tier for businesses that experienced a decline in business turnover of 40% (reduced from the original 50 per cent decline) or more; and
2. a new tier for businesses that experienced a decline in business turnover of 30% or more.

Eligible applicants will receive a tiered grant payment, dependant on their reduction in turnover and the number of Full Time Equivalent (FTE) employees of the business. For the purpose of this calculation, the business owner is excluded from the FTE calculation. The grant payments can be found on the Small Business Development Corporation website.

To be eligible, applicants must meet all of the following criteria:

1. verify their identity using MyGovID;
2. hold a valid and active ABN for the period covered by their application;
3. be currently trading in Western Australia and:
   (a) have an annual turnover of more than $50,000, excluding GST;
   (b) have an Australia-wide annual payroll of less than $4 million;
4. demonstrate a reduction in turnover for a consecutive two-week period between 1 January and 30 April 2022, compared to an equivalent period in the previous year
   (a) for the 40 per cent tier, a reduction of at least 40 per cent;
   (b) for the 30 per cent tier, a reduction of at least 30 per cent;
5. provide evidence of the number of FTE or equivalent employees of their business;
6. provide an unredacted PDF copy of their business bank statement showing 2022 transactions, a BSB, an account number and the business name associated with the application; and
7. agree to the program's Terms and Conditions.

w https://www.smallbusiness.wa.gov.au/coronavirus/grants/hardship-grant

5.6 TPB proof of identity checks at registration renewal

On 26 April 2022, the Tax Practitioners Board (**TPB**) announced that all registered individual tax practitioners, and those applying to register with the TPB, must complete a one-off proof of identity (**POI**) process to help protect practitioners personal information and to meet Australian Government security standards.

The TPB noted that due to COVID concessions and the exemption to lodge annual declarations since 2020, a number of individual tax practitioners have yet to complete the POI process and will be prompted to do so at their next renewal.

Information on how to complete the POI process can be accessed on the TPB website.

w https://www.tpb.gov.au/news-media/news/verify-your-identity-your-next-registration-renewal

5.7 APRA: Crypto assets risk management expectations and policy roadmap

On 21 April 2022, APRA released a letter setting out its initial risk management expectations for all regulated entities that engage in activities associated with crypto assets and a policy roadmap.

APRA expects that all regulated entities will adopt a prudent approach if they are undertaking activities associated with crypto assets and ensure that any risks are well understood and well managed before launching material new initiatives.

Entities also need to ensure they comply with all conduct and disclosure regulation administered by ASIC. Entities are also expected to consult with APRA and ASIC where they are unclear on prudential, disclosure or conduct requirements and expectations when undertaking activities associated with crypto assets.

APRA is developing the longer-term prudential framework for crypto-assets and related activities in Australia in consultation with other regulators internationally, including consulting on requirements for the prudential treatment of crypto-asset exposures in Australia for ADIs, progressing new and revised requirements for operational risk management, and considering possible approaches to the prudential regulation of payment stablecoins.

w https://www.apra.gov.au/crypto-assets-risk-management-expectations-and-policy-roadmap