The Tax Institute

# Tax Update

## November 2022


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## About Brown Wright Stein

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

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

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

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

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

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# 1. Cases

## 1.1 Duff – residency

**Facts**

Mr Ashley Duff is an Australian citizen and has worked as a chef for over 20 years. For the years ended 30 June 2014, 2015, 2017, 2018 and 2019, Ashley lodged tax returns in Australia as an Australian tax resident. Ashley did not lodge a tax return for the year ended 30 June 2016, on the basis that he was not a resident.

On 29 May 2015, Ashley accepted overseas employment with Viking Ocean Cruises Ltd, a Norwegian flagged cruise liner, with employment to commence from 3 August 2015. The letter of offer provided to Ashley noted that the address for Viking Ocean Cruises Ltd was Hamilton, Bermuda.

The Commissioner wrote to Ashley on 22 September 2017, suggesting that he may need to lodge an income tax return in respect of $81,072 of foreign sourced income. Ashley did not lodge a return.

The Commissioner again wrote to Ashley informing him that, if he did not lodge a return by a specified date, a default assessment would be issued. Ashley again failed to lodge a tax return, so the Commissioner issued a default assessment for $19,609 in respect of the foreign source income, and a penalty assessment of $14,706 (being 75% of the primary tax liability).

Ashley lodged an objection against the assessment of primary tax on the basis that he was not a resident for tax purposes in the year ended 30 June 2016. The objection was disallowed. Ashley applied to the AAT for a review of the Commissioner's decision. Ashley did not object to the penalty assessment.

The Commissioner had determined that Ashley was a resident under the domicile test. As such, the AAT was only required to consider whether Ashley satisfied the domicile test.

The domicile test provides that a person who has an Australian domicile will be a resident for tax purposes unless they can demonstrate that they have changed their domicile to a place outside of Australia during the relevant year, or satisfy the Commissioner that they had a permanent place of abode outside of Australia during the relevant year.

Ashley had provided a witness statement to the AAT stating that he had a permanent place of abode in Basel, Switzerland from 1 January 2016 until 26 November 2016. However, in cross examination, Ashley confirmed that he was never in Switzerland during that time.

Ashely argued that when a person works and lives on a cruise liner, their domicile becomes the domicile of the flag state of the cruise liner. On this basis, Ashley submitted that his domicile of choice was Norway, replacing his pre-existing Australian domicile.

Alternatively Ashley contended that the ship cabin which he occupied during his employment was his permanent place of abode during the 2016 year.

**Issue**

1. Could Ashley prove that he had changed his domicile of origin of Australia to a domicile of choice of Norway?
2. Alternatively, did Ashley have permanent place of abode outside Australia in the year ended 30 June 2016?

**Decision**

The AAT referred to the judgment in *Handsley v Commissioner of Taxation* [2019] AATA 917, where Deputy President O'Loughlin noted that, '[f]or a person to change his or her domicile it is necessary both to change the fact of residence in a place, i.e. become a resident of the new place, and intend that that new place of residence be indefinite – actions and intentions must co-exist'.

In relation to whether Ashley had established a permanent place of abode outside of Australia, the AAT referred to the case of *Harding v Federal Commissioner of Taxation* [2019] FCAFC 29, where it was determined that considering if a person has a permanent place of abode requires the identification of a single country in which the taxpayer is permanently living or residing.

The AAT noted that Ashley had difficulty in discharging the onus of proving that he had changed his domicile, as there was no evidence to establish Ashley's intention to give up his Australian domicile and adopt a domicile of Norway. To establish an intent to change domicile, residency in the new country must be general and indefinite in its future contemplation.

The AAT accepted that ships have been described as 'floating islands' and can be regarded as extensions of the territory of the flag state, however this is mostly for the purposes of determining jurisdiction over ships at sea.

The AAT noted that Ashley's presence on the cruise liner cannot in and itself evince a 'fixed and settled purpose' to 'abandon the domicile of origin' and to settle in Norway indefinitely, as the duration of his presence on the cruise liner was because of the terms and duration of his contract.

The AAT concluded that there was simply no basis upon which it could be said that Ashley intended to abandon his Australian domicile and adopt a domicile of Norway. Ashley's presence on the cruise liner was by incidence of his employment only.

In relation to the permanent place of abode test, the AAT determined that as the test requires a single country to be identified, in which the person is permanently living, Ashley could not satisfy the test as he was not living in Norway (the flag state) whilst he was aboard the various cruise liners, and those ships were outside Norwegian territorial waters. There was no further evidence to establish any other foreign country in which Ashley may have been residing as a permanent place of abode during the 2016 year.

The Commissioner's decision was affirmed.

Citation *Duff and Commissioner of Taxation (Taxation)* [2022] AATA 3675 (Senior Member Ehrlich KC, Melbourne)
w http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3675.html

## 1.2 T.D.S. Biz – R&D tax incentive

**Facts**

T.D.S Biz Pty Ltd was incorporated in December 2012. In the 2014 income year, TDSB commenced designing and developing an electric tricycle.

On 22 January 2018 and 29 May 2018, TDSB was issued invoices from HK Flistar Limited, a company based in China, in the amounts of $1,092,062 and $188,680, to produce vehicle components overseas. HK Flistar produced components designed by TDSB.

On 5 February 2018, Hefei Kelly Technology Investment Co Ltd issued to TDSB an invoice for US$249,540. Heifei supplied ‘off-the-shelf’ items to TDSB required for the construction of tricycle prototypes in Australia.

On 23 August 2018, TDSB lodged its R&D tax incentive application form to AusIndustry for the 2018 income year. TDSB did not register any supporting R&D activities for the 2018 income year. To be conducting core R&D activities rather than supporting activities it needed to be conducting (section 355-25):

> *… experimental activities:*
>
> *(a) whose outcome cannot be known or determined in advance on the basis of current knowledge, information or experience, but can only be determined by applying a systematic progression of work that:*
>
> *(i) is based on principles of established science; and*
>
> *(ii) proceeds from hypothesis to experiment, observation and evaluation, and leads to logical conclusions; and*
>
> *(b) that are conducted for the purpose of generating new knowledge (including new knowledge in the form of new or improved materials, products, devices, processes or services).*

AusIndustry issued a Notice of Registration to TDSB for the 2018 income year.

On 14 September 2018, TDSB lodged its income tax return for the year ended 30 June 2018 including its research and development tax incentive schedule, with the assistance of an R&D consultant and tax agent. TDSB claimed tax offsets totalling $748,476 in its income tax return for the year ended 30 June 2018. This included a $701,855 tax offset for expenditure on supporting R&D activities.

The Commissioner reviewed the 2018 tax return and notified TDSB that it would issue an amended assessment where $1,613,462 of the R&D notional deductions would be reclassified as general deductions under section 8-1 of ITAA 1997. The amount of $1,613,462 was comprised of the HK Flistar and Hefei invoices. As a result, TDSB's refundable tax offsets were decreased from $748,476 to $46,620.

A Notice of Assessment of Shortfall Penalty was issued to TDBS imposing an administrative penalty of $350,927.

On 11 July 2019, TDBS submitted an R&D Tax Incentive Registration Variation to AusIndustry, which sought to reclassify the construction and cost of the prototype from a 'core R&D activity' to a 'supporting R&D activity'. In the variation request, TDBS described the supporting R&D activities to be the '*design, development and fabrication and/or supply of components for the assembly of the project's prototypes are for the dominant purpose of supporting the core R&D activities...*'. The variation request did not disclose that the supporting R&D activities were conducted overseas to produce the components for the prototype. AusIndustry issued a variation to the R&D Tax Incentive Registration consistent with the variation request.

Section 355-205 of ITAA 1997 provides when notional deductions for R&D expenditure arise:

> *(1) An R&D entity can deduct for an income year (the present year) expenditure it incurs during that year to the extent that the expenditure:*
> *(a) is incurred on one or more R&D activities:*
> *(i) for which the R&D entity is registered under section 27A of the Industry Research and Development Act 1986 for an income year; and*
> *(ii) that are activities to which section 355-210 (conditions for R&D activities) applies; ….*

For a deduction for R&D expenditure to arise, the activities must be supported by at least one section 355-210 condition. Those conditions generally provide that in limited circumstances, the benefit of the R&D tax incentive is extended to overseas activities where it is covered by an overseas finding under paragraph 28C(1)(a) of the *Industry Research and Development Act 1986* (Cth).

The IRDA Act sets out conditions for a finding that overseas activities cannot be conducted in Australia. Broadly, the conditions are that the activities must be an R&D activity, must have a significant link to Australian core activities and must be unable to be conducted within Australia, and the expenditure must be less than that incurred on Australian core activities.

TDBS subsequently objected to the 2018 Notice of Assessment. The Commissioner disallowed the objection and TDBS sought a review in the AAT.

The Commissioner accepted that the activities of TDBS constituted 'supporting R&D activities' for the purposes of section 355-30 of ITAA 1997, consistent with the variation request made by TDBS. However, at hearing, TDBS contended that the approved supporting activities were the mere supply of parts and components from China for the dominant purpose of supporting the core R&D activities, and that the core R&D activities were solely conducted in Australia. If that were the case, then an overseas finding would not be required.

**Issues**

1. Was TDSB entitled to the R&D tax incentive in relation to its supporting R&D activities?
2. Is TDSB liable for an administrative penalty?

**Decision**

Senior Member Poljak found that the approved supporting R&D activities went beyond the mere supply of components. Accordingly, the supporting R&D activities of TDBS were not covered by paragraphs 355-210(1)(d) or 355-210(1)(e) as the supporting R&D activities were conducted overseas and TDBS did not have an overseas finding. TDBS was not entitled to a tax offset in respect of this expenditure.

TDBS claimed a $701,855 tax offset for expenditure on supporting R&D activities conducted outside Australia without an overseas finding, resulting in a tax shortfall amount of $701,855. Whilst TDSB engaged an R&D consultant and tax agent, no mention was made in the initial R&D Tax Incentive Registration Form of the variation request that the supporting R&D activities were conducted overseas in China.

Senior Member Poljak considered that a reasonable person in the same circumstances as TDSB would have taken steps to ensure that it was entitled to claim the tax offset given the significant size of the amount of tax offset claimed. On that basis, TDSB was liable to an administrative penalty pursuant to subsection 284-75(2) of schedule 1 to the TAA 1953, and the Senior Member did not consider there were any factors warranting a remission.

Citation *T.D.S BIZ PTY LTD and Commissioner of Taxation (Taxation*) [2022] AATA 3543 (Senior Member A Poljak, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3543.html

## 1.3 H & B Auto Repair Centre – eligibility to claim input tax credits

**Facts**

H & B Auto Repair Centre Pty Ltd operates a car repair workshop. H & B Auto Repair Centre Pty Ltd was a franchisee of Goodyear Dunlop Tyres, but the franchise ceased around December 2017 to early 2018. It now operates as a joint venture.

The expenses of the business were mostly made up of franchise fees, commercial rent, and purchases of specific parts for vehicle repairs as required and specified by the franchisor.

On 23 October 2020 the Commissioner notified H & B Auto Repair Centre Pty Ltd that it was conducting an audit of the business. On 29 October 2020 H & B Auto Repair Centre Pty Ltd sought an additional week to

provide requested information. On 11 November 2020, H & B Auto Repair Centre Pty Ltd lodged its BAS for the 31 December 2017 quarter.

On 18 November 2020, the Commissioner requested additional information and notified H & B Auto Repair Centre Pty Ltd that the audit had been extended to include the BAS lodgement for the 31 December 2017 quarter. On 30 November 2020 the additional information was provided.

On 10 December 2020 the Commissioner advised that bank statements could not be accepted as evidence for GST expenses.

On 5 February 2021, the Commissioner issued the audit findings and decision. The Commissioner found that H & B Auto Repair Centre Pty Ltd was not entitled to the input tax credits claimed on its BAS for the quarterly tax periods between 1 January 2016 and 30 June 2016 on the basis that the time limit to claim input tax credits had expired. The Commissioner also considered H & B Auto Repair Centre Pty Ltd did not report the correct amount of GST on purchases on its BAS for the quarterly periods between 1 July 2016 and 30 September 2017. The Commissioner also reduced all claims for input tax credits to zero, other than for the 30 September 2016 quarter, for which the Commissioner reduced the credits to $1,947.

On 8 February 2021, an amended notice of assessment was issued to H & B Auto Repair Centre Pty Ltd.

On 15 March 2021, H & B Auto Repair Centre Pty Ltd lodged an objection against the amended assessments.

The Commissioner allowed the objection in part for amounts claimed as input tax credits for the quarters ended 30 September 2017 and 31 December 2017.

On 15 June 2021, the Commissioner issued a notice of the objection decision.

On 19 November 2021, H & B Auto Repair made an application to AAT for review of the objection decision on the basis that:

1. all BASs were lodged in one go, once H & B Auto Repair Centre Pty Ltd was educated about their GST and tax obligations;
2. all bank statements, lease agreements and invoices were provided;
3. if the ATO accepted bank credits then it should accept GST credits;
4. the business has struggled financially due to lockdown restrictions.

The GST Act provides that an entity carrying on an enterprise will generally be liable to pay GST on taxable supplies and will be entitled to input tax credits on creditable acquisitions.

To be able to attribute an input tax credit to a tax period, an entity is required to hold a tax invoice for the creditable acquisition at the time that they lodge their GST return for the relevant tax period. The tax invoice must comply with section 29-70(1) of the GST Act.

*Practice Statement Law Administration 2004/11* sets out the guidance for when the Commissioner will exercise his discretion to allow a document to be taken to be a tax invoice for the purposes of section 29-70 (1).

Section 93-5 of the GST Act provides that there is a time limit on the entitlement to input tax credits and the claim for input tax credits must be made within the 4-year period after the day on which the entity is required to give the Commissioner a GST return for the period to which the input tax credit is attributable under section 29-10(1) or (2) of the GST Act or such further period as the Commissioner allows.

There are several exceptions to section 93-5 of the GST Act, none of which applied in this case.

The AAT broke the case into 2 parts, being the quarterly tax periods between 1 January 2016 and 30 June 2016; and the quarterly tax periods between 1 July 2016 and 31 December 2017.

<u>Quarterly tax periods between 1 January 2016 and 30 June 2016</u>

H & B Auto Repair Centre Pty Ltd lodged the relevant BASs on 16 October 2020.

Quarterly tax periods between 1 July 2016 and 31 December 2017

H & B Auto Repair Centre Pty Ltd lodged the relevant BAS within the 4-year time period. In order to be entitled to input tax credits, H & B Auto Repair Centre Pty Ltd must be able to establish that it made creditable acquisitions for that particular tax period.

The AAT therefore needed to consider if the Commissioner was correct to not exercise his discretion under section 29-70 to determine that the 'tax invoice' provided by H & B Auto Repair Centre Pty Ltd fulfilled the requirements to be considered a tax invoice.

Should amounts reported at 1A of the BAS be disregarded?

H & B Auto Repair Centre Pty Ltd also submitted that where they are found to not be entitled to claim input tax credits for the periods in question, then the 1A figures, being GST on sales, should also not be accepted.

**Issues**

In relation to the quarters from 1 January 2016 to 30 June 2016:

1. whether the entitlement of H & B Auto Repair Centre Pty Ltd to claim input tax credits had ceased;
2. if the entitlement had not ceased, then was the amount of the amended assessment excessive or otherwise incorrect; and
3. was H & B Auto Repair Centre Pty Ltd entitled to claim the input tax credits?

In relation to the quarters from 1 July 2016 to 31 December 2017, the issue was whether the amended assessment was excessive, and whether H & B Auto Repair Centre Pty Ltd discharged its onus of proving that it was entitled to claim the input tax credits.

**Decision**

Quarterly tax periods between 1 January 2016 and 30 June 2016

The AAT concluded that the time period to lodge had ceased, and H & B Auto Repair Centre Pty Ltd was no longer entitled to claim for input tax credits during that period.

The AAT noted that the GST Act is clear that the entitlement to an input tax credit ceases if it has not been included in a BAS during the period of 4 years after the day it was required to be submitted to the Commissioner. The AAT relied on the decision in *JHKW v Commissioner of Taxation* [2022] AATA 2875*,* which considered the use of the word 'ceases' and confirmed the GST Act makes it abundantly clear that the entitlement is extinguished in certain circumstances because of the unequivocal use of the word 'ceases'.

Quarterly tax periods between 1 July 2016 and 30 December 2017

The AAT noted that the documents provided by H & B Auto Repair Centre Pty Ltd did not constitute a tax invoice under section 29-70(1) of the GST Act. The AAT noted that the Commissioner can exercise discretion as to what is classified as a tax invoice and the AAT confirmed the Commissioner's decision that the evidence provided did not satisfy the requirements to be treated as a tax invoice.

The AAT noted that H & B Auto Repair Centre Pty Ltd was given ample opportunities to provide evidence to support the input tax credits in question but failed to take advantage of the opportunities and the evidence provided by the tax agent for H & B Auto Repair Centre Pty Ltd was of limited assistance.

The AAT agreed that H & B Auto Repair Centre Pty Ltd did not established sufficiently that it was entitled to the claimed input tax credits.

Should amounts reported at 1A of the BAS be disregarded?

The AAT agreed with the Commissioner that there is no provision in the GST Act or the TAA that provides that where input tax credits in relation to GST on purchases are disallowed, then GST on sales should also be disallowed or not considered.

The AAT found that H & B Auto Repair Centre Pty Ltd had not discharged its onus to prove that the amended assessments are excessive or otherwise incorrect. The Commissioner's decisions were affirmed.

**COMMENT** – the interaction between section 93-5 and sections 29-10 of the GST Act is that the 4 year period to claim an input tax credit can pass without a taxpayer ever being entitled to claim the input tax credits if they have not received a tax invoice or a document that the Commissioner is prepared to treat as a tax invoice by the time that a claim for input tax credits expires.

**COMMENT** – in this case the AAT member considered that the extended lodgement date under the tax agent's lodgement program was the relevant date for measuring the 4-year period.

**TIP** – the time period in which you are required to give the ATO a BAS is set out in section 31-8 of the GST Act, and is the time set out in the table in that provision, or such further period as the Commissioner allows. This means that if you are concerned that credits will expire under the 4-year rule, you should apply for an extension of time to lodge the original BAS.

Citation *H & B Auto Repair Centre Pty Ltd v Commissioner of Taxation (Taxation)* [2022] AATA 3561 (Member D Mitchell, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3561.html

## 1.4 Burdett – employee v contractor

**Facts**

Timothy Burdett and Drew Read provided services to GDM Projects Pty Ltd (**GDM**).

In his income tax return for the income year ended 30 June 2020, Timothy recorded non-primary production business income of $60,412 in respect of concreting services. Timothy also declared that he satisfied the 'results test' in respect of the personal services income. Timothy claimed JobKeeper as a sole trader.

In his income tax return for the income year ended 30 June 2021, Drew recorded non-primary production business income of $78,834 which included $7,500 in JobKeeper payments. Drew also declared that he was carrying on a business with a turnover of less than $10 million and he received a net small business tax offset of $874.

On 1 July 2022 Timothy and Drew were asked to cease providing services to GDM.

On 22 July 2022, Timothy and Drew made an application to the Fair Work Commission for unfair dismissal on the basis they were employees. Timothy and Drew claimed that their dismissal from GDM had been harsh and unreasonable.

GDM claimed that Timothy and Drew were independent contractors and not employees and therefore had no grounds to allege that they had been unfairly dismissed from GDM.

Timothy and Drew contended that they were employees and that the Commission should apply the multifactorial test to their day-to-day relationship with GDM, rather than the written contracts.

During a conference, the Commissioner observed that the recent High Court cases of *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, as well as the recent Full Bench decision of *Deliveroo Australia Pty Ltd v Diego Franco* [2022] FWCFB 156 confirmed that the correct approach was to consider the written contractual terms. Based on these cases, a 'multifactorial' examination of all aspects of the relationship is not permitted where there is a wholly written and comprehensive contract which is not a sham or otherwise ineffective, and where the rights and obligations of the parties are regulated by the contract.

Section 587(1)(c) of the *Fair Work Act 2009* (Cth) provides that the Commission may dismiss an application if it has no reasonable prospects of success.

GDM sought to have the applications dismissed on the basis that they had no reasonable prospects of success.

**Issue**

Should Timothy and Drew's applications be dismissed on the grounds that they have no reasonable prospects of success?

**Decision**

The Commissioner noted that, while his preliminary view was that there were no reasonable prospects of success, section 587 of the Fair Work Act provides a discretion to dismiss an application with no reasonable prospects of success, but does not require dismissal, due to the use of the word 'may' and not 'must'.

Due to Timothy and Drew's insistence that they 'want their day in court' and urging that the Commission schedule a hearing 'later this week', the Commissioner decided not to dismiss Timothy and Drew's applications.

The Commissioner emphasised that even if the multifactorial test could be considered, the declarations made to the ATO in their tax returns and in relation to the Jobkeeper payments meant that it would be extremely difficult for Timothy and Drew to establish that they were employees and not independent contractors.

The Commissioner also drew to Timothy and Drew's attention that if their applications are dismissed at hearing and GDM makes an application for costs, their insistence on proceeding rather than withdrawing their applications will be taken into account when deciding whether they should have to pay GDM's costs.

Citation *Mr Timothy Burdett v GDM Projects Pty Ltd* [2022] FWC 2814 (Commissioner Hunt, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWC/2022/2814.html

## 1.5 Grech – tax agent supervision

**Facts**

Adam Grech was a registered tax agent operating in Sydney. He contracted Jim Tzouvelis, who is a Victorian accountant, to work remotely for him from Melbourne. According to Adam, Jim prepared letters of engagement and tax returns for clients. Adam would review Jim's work using software, telephone, and videoconference software. Adam, as principal, would conduct a final review, sign off and lodge the returns via the tax agent portal.

Adam's tax practice electronically accessed the taxation records of an individual called Mr Farinelli three times between December 2019 and March 2020. The Tax Practitioners Board (**TPB**) conducted an investigation into Adam's practice and enquired about Mr Farinelli's tax affairs. Adam initially stated that he was not aware of a

client named Mr Farinelli and did not have the tax file number or date of birth of the individual, which he would have required to access the business tax portal.

In response to the TPB investigation, Adam later provided a copy of a client engagement letter allegedly signed by Mr Farinelli, a copy of an expired Victorian driver's licence and a copy of an expired Belgian passport. Mr Farinelli said that he had never contacted Adam or his associates, had not signed a form and that he was out of the country at the time the alleged engagement occurred.

Adam advised the TPB that Jim did not employ any subcontractors. However, six business activity statements prepared by an Anthony Cefala were lodged through the tax agent portal using Adam's tax agent number for a company called Havelock Holdings Proprietary Limited. These statements led to an erroneous refund of $5,000. The director of Havelock Holdings confirmed that the statements were prepared by Anthony Cefala and that Havelock Holdings had not had any dealings with Adam or Jim.

In response to the ATO's investigations into Havelock Holdings' tax affairs, Adam sent three responses to the ATO refusing to provide information, stating that his word was supreme above government laws and referring to himself as 'the king'. His submissions to the ATO contained many statements regarding conspiracy theories in relation to the Large Hadron Collider in Switzerland and 'the Council of Men who are the highest law in the world presently'. He also addressed the ATO officer as 'minion'.

On 31 March 2021, the ATO referred Adam to the TPB.

On 22 May 2021 the TPB was provided with a report from a clinical psychologist who concluded that Adam was fit to work after a period of hospitalisation. The report stated that Adam's client base was 500, when it was over 1,500 and did not refer to or apparently consider the inappropriate correspondence that had been sent to the ATO and the TPB.

On 28 June 2021, Adam sent an email to the TPB which contained further inappropriate statements, including '…the only way to stop a Council of Man that governs the LHC Collider is to be recognised as a King, that is the only way to stop it from happening is to have a superior position…'.

To be eligible to be a registered tax agent, the TPB must be satisfied that an individual is a 'fit and proper person'.

Section 30-10 of the *Tax Agent Services Act 2009* (Cth) sets out the professional code of conduct for tax agents. Subsection (7) requires that a tax agent service provided by the agent, or on the agent's behalf, must be provided competently.

On 15 July 2021 the TPB terminated Adam's registration.

Adam applied to the AAT to review the merits of the decision to terminate is registration.

On 5 May 2022 the clinical psychologist provided a further report reiterating that Adam was a fit and proper person. When asked why her opinion had not changed considering the ongoing correspondence, she responded that the email 'appears to me to be extracts from an unrelated private conversation unrelated to tax matters' and that Adam had been confused by the large amount of material sent to him by tax investigators.

**Issue**

Should Adam's tax agent registration have been terminated?

**Decision**

Fit and proper person

The AAT concluded that Adam was not a fit and proper person to be a tax agent. Deputy President Hanger stated that it was clear from the recent correspondence and submissions made by Adam during the hearing that Adam was suffering from a mental illness and was not a fit and proper person to handle the affairs of a client.

Competency

In relation to supervision, the AAT noted that while a certain amount of supervision can be undertaken using modern technology, there was a lack of oversight in relation to Jim's activities. The fact that Adam's tax agent portal account was used to access the tax records of entities that were not clients showed that he was not aware of the services being provided under his name. Adam therefore breached section 30-10(7) of the *Tax Agent Services Act*, by failing to ensure that tax agent services provided by him or on his behalf were provided competently.

Citation *Grech and Tax Practitioners Board* [2022] AATA 3401 (Deputy President I Hanger, Sydney)
w http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3401.html

## 1.6 Priority Matters – PAYG estimates regime

**Facts**

Priority Matters Pty Ltd was incorporated in 1999 as one of several companies which Janette Lee and her husband, Kia Silverbrook, were directors. The companies were involved in a business of creating, developing and commercialising Kia's inventions, including registering and managing patents. Janette is the sole director of Priority Matters.

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

Section 268-10 of Schedule 1 to the TAA empowers the Commissioner to estimate the unpaid and overdue amount of a PAYG withholding liability.

On 6 August 2015, the Commissioner served a Notice of Estimate of Liability for PAYG withholding amounts. The amount was not paid and on 9 March 2021 the Commissioner served a statutory demand for payment of $4,945,712, which included penalties and interest.

On 29 March 2021, Priority Matters applied to the Supreme Court of New South Wales to set aside the demand or vary the amount of the demand either under section 459G of the *Corporations Act 2001* (Cth) (**Corporations Act**) or under section 459J(1)(b) of the Corporations Act.

Section 459G of the Corporations Act provides as follows:

> *(1) A company may apply to the Court for an order setting aside a statutory demand served on the company.*
> *(2) An application may only be made within the statutory period after the demand is so served.*
> *(3) An application is made in accordance with this section only if, within that period:*
> *(a) an affidavit supporting the application is filed with the Court; and*
> *(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.*

Section 459J(1)(b) of the Corporations Act provides as follows:

> *On an application under section 459G, the Court may by order set aside the demand if it is satisfied that there is some other reason why the demand should be set aside.*

Section 268-40 of Schedule 1 of the TAA sets out three ways by which an estimate given by the Commissioner may be reduced or revoked. In particular, item 2 of section 268-40(1) in Schedule 1 of the TAA governs reducing or revoking an estimate when a person is 'party to proceedings before a court that relate to the recovery of the unpaid amount of the estimate'.

Section 268-90 of Schedule 1 of the TAA sets out that an affidavit to effect revocation of an estimate must verify the amounts withheld or required to be withheld and what has been done in relation to compliance with the PAYG withholding obligations.

Priority Matters filed an affidavit from Janette to the effect that Priority Matters did not pay wages to any person from 1 July 2009 to 30 June 2015 as the company did not trade or generate revenue during this period. The affidavit did not address whether there were any payments of salary, commission, bonuses, or allowances.

Priority Matters argued that the application to set aside a statutory demand under section 459G of the Corporations Act fell within item 2 of section 268-40(1) in Schedule 1 of the TAA and further, that the affidavit by Janette also met the requirements of item 2 of sections 268-40(1) and 268-90 in Schedule 1 of the TAA and therefore had the effect of revoking the estimate liabilities.

The Supreme Court held that an application to set aside a statutory demand under section 459G of the Corporations Act did not constitute, in the particular context of item 2 of section 268-40(1) of Schedule 1 of the TAA, 'proceedings before a court that relate to the recovery of the unpaid amount of the estimate'.

The Supreme Court varied the demand from $4,945,712 down to $4,675,830 on the basis that there was 'a plausible contention' that Priority Matters was not obliged to lodge BAS returns and thus no penalties were payable (nor any interest on penalties). However, the underlying liability in the Notice of Estimate remained due and payable regardless of the proceedings and that part of the statutory demand was not set aside.

Priority Matters sought leave to appeal the decision on the grounds that:

1. the primary judge erred in finding that the application brought by Priority Matters under section 459G of the Corporations Act to set aside the statutory demand was not a proceeding before a court that 'related to' the recovery of an estimate within the meaning of section 268-40 of Schedule 1 to the TAA; and
2. the primary judge erred in finding that there was not some other reason to set aside the statutory demand.

The Deputy Commissioner opposed the grant of leave.

Priority Matters argued that leave should be granted because the first proposed ground of appeal raised issues of general public importance and principle as to the proper construction of item 2 of section 268-40(1) and section 268-90 of Schedule 1 to the TAA. With respect to the second proposed ground of appeal, Priority Matters argued that leave should be granted because the primary judge failed to take account of the fact that failure to comply with the statutory demand created consequences that extended beyond exposing the applicant to the risk of being wound up.

Separate to this decision, in around May 2022, the Commissioner commenced proceedings in the Federal Court seeking orders that Priority Matters be wound up in insolvency on the basis that Priority Matters is presumed insolvent due to the company’s failure to comply with the statutory demand.

**Issue**

Did Janette's affidavit verify the relevant facts required by section 268-90 of Schedule 1 to the TAA sufficient to prove the underlying liability never existed as referred to in section 268-40(4) of Schedule 1 to the TAA?

**Decision**

Janette's affidavit did not comply with the relevant requirements and leave was not granted to appeal.

The Court considered whether Janette's affidavit complied with the relevant statutory requirements. The Court of Appeal was of the view that if the affidavit was not compliant, there would be little or no utility in granting leave to appeal on the two proposed grounds of appeal.

The Court found that Janette's affidavit did not comply with the relevant statutory requirements. In particular, the Court noted that the affidavit only focused on the issue of whether Priority Matters had paid wages during the relevant period, but was silent on the question of whether it paid any individual as an employee 'salary, commission, bonuses or allowances'. This amounted to 'a significant omission' according to the Court. The Court noted that the expression 'facts sufficient to prove' means that depending on the complexity of the subject-matter, an affidavit will often need to be accompanied by further evidence beyond 'mere assertions about the contents of records'. As those records were not specifically referred to nor provided as evidence, the brief affidavit did not *prove* the facts necessary for item 2 section 268-40(1) of Schedule 1 to the TAA.

The Court also rejected the second proposed ground of appeal as it considered that there was no issue of general principle or public importance, nor would Priority Matters suffer a significant injustice if leave were not to be granted. Priority Matters had an opportunity to file another affidavit by Janette in connection with the insolvency matter before the Federal Court.

The summons seeking leave to appeal was dismissed with costs.

**COMMENT** – when a Notice of Estimate is received, it is important to immediately take action to have the Notice of Estimate revoked as there are important time limitations which, if not complied with, may result in the Notice of Estimate not being able to be challenged.

Citation *Priority Matters Pty Ltd v Deputy Commissioner of Taxation* [2022] NSWCA 208 (Ward P, Macfarlan JA and Griffiths AJA)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2022/208.html

## 1.7 Ross – appropriation of estate assets

**Facts**

Ian Ivan Sebek (the deceased) died on 23 February 2020. The deceased was survived by his two adult daughters, Jana Ross and Martina Michelle Sebek.

Prior to his death, the deceased executed a will dated 10 July 2019 (**Will**). Probate of the Will (**Probate Grant**) was granted to Martina as sole executor and trustee appointed under the Will.

Under the Will:

1. Martina was gifted any motor vehicle owned by the deceased at time of death; and
2. the whole of the residue estate was gifted to Martina (as to 75%) and to Jana (as to 25%).

Clause 5 of the Will gave a number of powers to Martina (as executor) to exercise at her discretion. Relevantly, clause 5.6 of the Will provided that:

> *I direct my executor may in my executor's discretion:*
>
> *…*
>
> *without the consent of the beneficiary, appropriate in full or partial satisfaction of any beneficiary's share in my estate, any asset not specifically given in this will; the value of the asset appropriated must either be agreed among the beneficiaries affected or, failing agreement, be determined by an independent valuer*

*appointed by my executor; in appropriating any asset my executor need not take into consideration any differences in the capital gains tax cost bases of the assets appropriated.*

The inventory of property annexed to the Probate Grant listed the assets of the deceased as follows:

1. a property located on Sodwalls Road, Tarana (**Property**) with a known or estimated disclosed value of $370,000;
2. money held at bank valued at $10,003.

On 14 April 2020, Martina obtained two valuations of the Property as at the date of death of the deceased. Both valuations were carried out by Peter Craig of Cityside Valuers Pty Ltd who was a certified practising valuer and a member of the Australia Property Institute. One valuation was stated to be for 'probate purposes' and the other valuation was stated to be for 'stamp duty purposes'. Each valuation stated that the value of the Property was $370,000.

On 19 May 2020, Martina's solicitor sent an email to Jana stating that the value of the Property was $360,199 and that Jana's 25% interest in the estate was approximately $90,050. This amount was calculated by deducting a notional amount for estate expenses that were itemised for Jana. A copy of the valuation was attached for Jana as well as other evidence of the expenses. Relevantly, the correspondence from Martina's solicitor advised that Martina would like to purchase Jana's 25% interest in her father's estate (i.e. the Property).

On 6 November 2020, Jana emailed Martina's solicitor advising that she would agree to sell her interest in the Property for $150,000.

On 27 November 2020, Martina's solicitor queried Jana's calculation and requested copies of the valuations she sought to rely on.

On 9 December 2020, Jana replied by attaching two real estate agent market appraisals of the Property to support the amount she requested be paid to her. The appraisals valued the Property at between $500,000-$600,000 and $550,000-$580,000 respectively. Her counter-offer of $150,000 assumed the Property was valued closer to $600,000 (and did not account for the deduction of any estate or testamentary expenses). Both appraisals did not state that the sales potential of the Property was expressed by a valuer.

On 17 December 2020, Martina (via her solicitor) responded to Jana's 9 December 2020 email rejecting the agent appraisals of the Property as 'simply opinions expressed by two agents' and not being formal valuations.

Following multiple emails to Jana seeking a further response, Martina's solicitor advised Jana that Martina had instructed the solicitor to transfer the Property to Martina in her personal capacity for $90,050 and invited Jana to seek legal advice.

On 14 April 2021, Jana sent an email to Martina's solicitor attaching an updated agent appraisal of the Property. The agent advised that the Property had a sale potential of $600,000-$660,000 plus anticipated selling fee of $19,800 plus GST. Jana also repeated the offer of selling her interest in the Property to Martina for $150,000.

On 22 April 2021, Peter from Cityside Valuers Pty Ltd provided another valuation of the Property. This time, the value of the Property as at 22 April 2021 was $420,000.

On 26 May 2021, Martina's solicitor sent a trust cheque to Jana for $102,500 (being an amount equivalent to her 25% share in the Property after the deduction of estate and testamentary expenses). Jana did not bank that trust cheque.

On 12 May 2021, Martina transferred the Property to herself.

On 11 October 2021, Jana (as plaintiff) filed an amended statement of claim in the Supreme Court of NSW, relevantly, seeking (among other things) the following relief:

1. a revocation of the Probate Grant;
2. an order that the transfer of the Property to Martina on 12 May 2021 be set aside;
3. an order that the Property be sold; and
4. various orders as to costs.

A defence to the amended statement of claim was filed by Martina on 15 October 2021.

**Issue**

Whether the transfer of the Property by Martina (as executor) to herself in her personal capacity complied with the power of appropriation granted to Martina as executor and trustee under clause 5.6 of the Will.

**Decision**

Relying on various case law, Hallen J confirmed that the power of appropriation can be employed in lieu of a distribution to a beneficiary of an equivalent sum of money, to which that beneficiary, might otherwise be entitled in accordance with the terms of the will whether by way of specific legacy or by way of share of residue. In other words, a valid appropriation is substitute for a valid sale. The power, however, must be exercised in a way that is not to the detriment of the estate or to the beneficiary whose interest is affected, whether generally or particularly.

Normally, a trustee is prohibited from self-dealing including purchasing property for their own interest. But this does not apply to an executor or administrator appropriating specific assets in satisfaction of a share in residue.

While Hallen J held noted that a valuation for 'probate purposes' was not the proper valuation to rely on in matters where an appropriation was to be carried out, this was not the valuation relied upon by Martina to determine the amount attributed to Jana's 25% share in the Property. A valuation for the purpose of undertaking an appropriation is required to be from a qualified independent valuer and the value of the asset is as at the date of the appropriation (unless there is specific provision in the will stating otherwise).

Hallen J found that:

1. as the value of the Property was not agreed between Martina and Jana, as the only beneficiaries affected, the value of the Property was to be determined by an independent valuer. In this way, the value of the 25% share would be determined;
2. the purpose of the power in clause 5.6 of the Will was administrative and managerial. The effect on beneficial interests was incidental;
3. the deceased gave Martina the power to sell the Property to a third party and, thereafter, distribute the proceeds of sale (after deductions of testamentary expenses) to Martina and Jana in the stated proportions in the Will. The disadvantage of this option was that the costs and expense of sale would be incurred;
4. there was also a power given to Martina, as executor, to acquire, in full satisfaction, Jana's share in the deceased's estate. That power was provided to Martina at her discretion and not requiring the consent of Jana. If this option was pursued, Martina could trigger the power by engaging an independent valuer to value the property and pay Jana an amount equivalent to her 25% interest in the estate as a lump sum based on the valuation amount;
5. there was no impediment in the Will that prevented Martina from exercising the power of appropriation;
6. an independent valuer was to be appointed by Martina;
7. Peter from Cityside Valuers Pty Ltd fell within the definition of an 'independent valuer';
8. the date for the independent valuation was not stated in the Will and, therefore, the proper date for the valuation was the date on which Martina made the relevant acquisition;
9. the valuation dated April 2021 which valued the property at $420,000 was sufficiently close to the date of acquisition by Martina of the Property;
10. once the share of 25% was properly calculated and paid, Martina was entitled to transfer the Property to herself; and
11. there was no evidence of any differences in the capital gains tax cost bases of the property to be appropriated.

The method used by Martina was a substitute for a sale of the Property or the transfer of the Property to Martina and Jana as tenants in common in different shares. The method was not a breach of trust and effected the intention of the deceased to avoid associated costs and expenses of sale in the manner requested by Jana.

Given the value of the estate and the subject matter of the dispute before the court, Hallen J noted that this case 'provides an even more depressing example of sibling emotions overtaking commercial good sense'.

The amended statement of claim was dismissed.

Citation *Ross v Sebek* [2022] NSWSC 1300 (Hallen J)
w http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/1300.html

## 1.8 Elanor Operations – Appeal Update

The New South Wales Supreme Court of Appeal has dismissed the appeal of the Chief Commissioner of State Revenue from the decision of the Supreme Court in *Elanor Operations Pty Ltd v Chief Commissioner of State Revenue* [2022] NSWSC 104 (please refer to our March 2022 Tax Training Notes).

The case concerned the grouping of companies the shares in which were stapled with separate managed investment schemes. The unit trusts owned land and the companies owned the hotel businesses that operated from the land. The operating companies each had the same sole director.

At first instance, Elanor Operations applied to the Supreme Court to review the decision of the Chief Commissioner not to exercise his discretion under 79 of the *Payroll Tax Act 2007* (NSW) (**PTA**) to reconsider his determination that the companies were included in a group for payroll tax. The Chief Commissioner had previously issued two payroll tax assessments that grouped companies in the Elanor Operations group into five payroll tax sub-groups. In response to the assessments, the companies had had applied to the Chief Commissioner for an exemption from their inclusion in the sub-group under section 79 of the PTA. The Chief Commissioner refused to exercise the discretion under section 79 of the PTA.

At first instance Ward J held that the Chief Commissioner should have exercised the discretion under section 79 of the PTA as the companies were each carrying on a business independently of and not sufficiently connected to the businesses carried on by the other members of the sub-group.

**Grounds for appeal**

The Chief Commissioner appealed the decision of the Supreme Court on the grounds that there were four material errors in the decision of Ward J.

The first ground of the appeal was that Ward J gave too much weight to the inference that investors in a managed investment scheme would not be considered to be liable for the payroll tax liabilities of another managed investment scheme. The Court of Appeal disagreed with the contention of the Chief Commissioner that this conclusion lacked supporting evidence. Rather, it was a reasonable inference based on the nature of the managed funds involved in the business structure of the companies. These funds constituted separate enterprises, as the funds carried on separate business activities and operated under different business arrangements. The lack of artificiality in the arrangement was a relevant consideration.

The second error that was contended by the Chief Commissioner was that her Honour took into account in considering the common control of the business that, although there was a common sole director, the director had fiduciary obligations to run each company in a way that protected the interests of each respective group of investors and shareholders separately. The Court of Appeal considered that, contrary to the Chief Commissioner's submissions, this was a relevant consideration and properly taken into account.

The third ground of the appeal was that the Chief Commissioner argued that the primary judge had erred in placing insufficient weight on the factors that the Chief Commissioner contended supported a conclusion that the companies did not operate at arm's length. The Court of Appeal held that this ground required the Chief Commissioner to show that the primary judge's conclusion was one to which no reasonable judge considering the evidence could have come but that this was not established.

The fourth ground of the appeal was that because of the three errors alleged above, the primary judge erred in her conclusion. The Court of Appeal found that it was not sufficient to show that another judge taking into account all of the factors considered by the primary judge, would have come to a different decision. Rather, it was necessary to show that no reasonable judge could have reached that conclusion, which was not established in this case.

Citation *Chief Commissioner of State Revenue v Elanor Operations Pty Ltd* [2022] NSWCA 222 (Macfarlan JA, Gleeson JA and Griffiths AJA)
w https://www.caselaw.nsw.gov.au/decision/184355189c4540b71db3cd81

## 1.9 BBlood Enterprises – Appeal Update

BBlood Enterprises Pty Ltd has filed an appeal with the Full Federal Court in relation to the decision in *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 regarding section 100A and dividend stripping (please refer to our October 2022 notes).

## 1.10 Other tax and superannuation related cases in period of 11 October 2022 – 7 November 2022

| Citation | Date | Headnote | Link |
|---|---|---|---|
| *Du v Chief Commissioner of State Revenue* [2022] NSWCATAD 329 | 11 October 2022 | TAXES AND DUTIES – surcharge land tax – whether Applicant a foreign person – whether Applicant ordinarily resident – Applicant not in Australia during 200 or more days – reasons for absence – no discretion | http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD//2022/329.html |
| *The Uniting Church in Australia Property Trust (Vic) v Attorney-General (Vic)* [2022] VSC 610 | 12 October 2022 | CHARITABLE TRUST – Judicial advice – Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 54.02 – Breach of trust due to withdrawals of capital – Whether trustee personally liable to restore withdrawn capital – Whether traditional rules of equitable accounting apply to charitable trusts – Andrews v M'Guffog [1886] UKLawRpAC 31; (1886) 11 App Cas 313 applied – Target Holdings Ltd v Redferns (a firm) [1995] UKHL 10; [1996] AC 421 considered – Whether perpetuity is an object of a charitable trust – Application for relief from liability under Trustee Act 1958 (Vic) s 67 – The Uniting Church in Australia Act 1977 (Vic). | http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2022/610.html |
| *Aparekka v Chief Commissioner of State Revenue* [2022] NSWCATAD 333 | 13 October 2022 | TAXES AND DUTIES – surcharge purchaser duty – purchase of a residential property by a husband and wife where the husband is an Australian citizen and the wife is the holder of a Subclass 482 visa and a 'foreign person' – whether the husband is liable to pay the surcharge purchaser duty | http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD//2022/333.html |
| *Re Dove Family Trust* [2022] VSC 625 | 20 October 2022 | TRUSTS – Original trust deed lost - Trust administered in accordance with copy of trust deed with missing page – Declaratory relief inapplicable – Judicial advice given – r 54.02 of the Supreme Court (General Civil Procedure) Rules 2015 – *Sutton v NRS(J) Pty Ltd* (2020) NSWSC 826; *Re* | http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2022/625.html |

| | | | |
|---|---|---|---|
| | | *Cleeve Group Pty Ltd (No 2)* [2022] VSC 362. | |
| *TDWF and Commissioner of Taxation (Taxation)* [2022] AATA 3610 | 24 October 2022 | PROCEDURAL FAIRNESS – rules of evidence – cross-examination – costs – cards on the table | http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2022/3610.html |
| *Re Bel Investments Pty Ltd (in liq)* [2022] VSC 638 | 27 October 2022 | TRUSTS – Express trusts – Creation – Unclear if unit trust deed executed – Absence of trust deed – Whether certainty of intention, subject matter and objects manifested – Where corporate trustee holds property as bare trustee of joint endeavour constructive trust – Whether distribution of trust property to be governed by Corporations Act 2001 (Cth), s 556(1). | http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2022/638.html |
| *Cecere v Chief Commissioner of State Revenue* [2022] NSWCATAD 350 | 4 November 2022 | TAXES AND DUTIES – land tax – principal place of residence exemption – onus of proof | https://www.caselaw.nsw.gov.au/decision/1843ad33fcf90bb119a1a52b |

# 2. Legislation

## 2.1 Progress of legislation

| Title | Introduced House | Passed House | Introduced Senate | Passed Senate | Assented |
|---|---|---|---|---|---|
| Crimes Amendment (Penalty Unit) Bill 2022 | 9/11 | | | | |
| Treasury Laws Amendment (2022 Measures No. 2) Bill 2022 | 3/8 | 26/9 | 26/9 | | |
| Treasury Laws Amendment (2022 Measures No. 3) Bill 2022 | 8/9 | 27/10 | 27/10 | | |
| Treasury Laws Amendment (Electric Car Discount) 2022 | 27/7 | 8/9 | 8/9 | | |
| Income Tax Amendment (Labour Mobility Program) 2022 | 8/9 | 27/10 | 27/10 | | |

## 2.2 Duty on Russian and Belarussian imports

A tariff on goods imported from Russia or Belarus has been extended. An additional tariff of 35 per cent was originally introduced in April 2022 as part of 'Australia's continuing commitment to imposing costs on Russia for its unilateral, illegal and immoral aggression against the people of Ukraine'. The additional tariff applies to goods shipped to Australia on or after 25 April 2022. The measure has been extended for a further 12 months and is now due to end on 24 October 2022.

*Notice of Intention to Propose Customs Tariff Alterations (No. 7) 2022*
w https://www.legislation.gov.au/Details/F2022L01352/Explanatory%20Statement/Text

## 2.3 Property Tax (First Home Buyer Choice) Bill (NSW)

On 18 October 2022, the lower house of the NSW Parliament passed the *Property Tax (First Home Buyer Choice) Bill 2022*. Subject to the Bill being passed by the upper house of the NSW Parliament, the Bill is due to commence for purchase contracts signed on or after 16 January 2023.

The Bill will allow first home buyers purchasing a dwelling for up to $1.5 million to choose between stamp duty or to opt in to an annual property tax. For people buying vacant land, with the intention of building their first home, the purchase price can be up to $800,000.

Farmland is excluded from the Bill, which adopts the definition of 'land' used for primary production within the meaning of the *Land Tax Management Act 1956* to identify farmland that is not eligible for first home buyers to choose property tax instead of stamp duty.

The definition of a first home buyer in clause 5 of the Bill is consistent with the existing rules for the First Home Buyers Assistance Scheme in place since 2017. Occupation of the property must commence within 12 months of the first home buyer taking possession and must continue for a continuous period of at least six months.

The proposed tax rates for land that is owner-occupied:

1. for a financial year ending on or before 30 June 2024 - $400 plus 0.3% of the land value;
2. for any subsequent financial year, calculated on the below formula:

***F = P x G***

*where:*
*F is the fixed component amount for a financial year.*
*P is the fixed component amount for the previous financial year.*
*G is the Gross State Product per capita indexation factor for the financial year.*

The proposed tax rates for land that is not owner-occupied:

1. for a financial year ending on or before 30 June 2024 - $1,500 plus 1.1% of the land value;
2. for any subsequent financial year, calculated on the above formula.

The year-to-year growth of the property tax payments will be capped at a maximum of 4 per cent growth.

Any unpaid property tax (including any property tax which has been deferred) will create a charge on the land. However, the Chief Commissioner of State Revenue cannot require a person who is liable to pay property tax to sell land that is owner-occupied.

*Property Tax (First Home Buyer Choice) Bill 2022 (NSW)*
w https://legislation.nsw.gov.au/view/pdf/bill/63faea4e-8add-4c8d-873c-434f6d9eaefd

## 2.4 Auditor Fee Regulation consultation

The consultation period has opened for the *Superannuation Auditor Registration Imposition Regulations* 2022 (**Regulations**). The Regulations will replace the *Superannuation Auditor Registration Imposition Regulations 2012* (**2012 Regulations**).

The 2012 Regulations set out the scheme of fees for the regulation of self-managed superannuation fund auditors by ASIC. The Regulations are intended to improve the 2012 Regulations by ensuring that the language of the regulation is easier to understand, including the language around the method of indexation of the prescribed fees.

The consultation period will end on 10 November 2022.

w https://treasury.gov.au/consultation/c2022-323086

## 2.5 Commonwealth penalty unit Bill

A Bill has been introduced to increase the penalty unit value from $222 to $275 for offences committed on or after 1 January 2023. The existing indexation mechanism to automatically increase the value of the penalty unit every 3 years in line with the Consumer Price Index (CPI) will continue to apply, with the next indexation to occur on 1 July 2023.

*Crimes Amendment (Penalty Unit) Bill 2022*
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6942

## 2.6 Consultation on beneficial ownership register

Government has released a consultation paper concerning the introduction of a publicly available register of beneficial ownership.

Entities proposed for the first phase are those regulated under the *Corporations Act 2001*, including Australian proprietary companies, unlisted Australian public companies, unlisted Australian registered MISs, and unlisted Corporate Collective Investment Vehicles. These regulated entities would be required to maintain a register of:

- all natural persons who satisfy at least one of the threshold requirements for registration as a beneficial owner of the relevant entity; and
- all companies, registered MISs, CCIVs, and trusts that would satisfy at least one of the threshold requirements if they were a natural person.

In future phases, the Government intends to consult on proposed approaches to the:

- disclosure of beneficial ownership of property held through other legal vehicles such as trusts; and
- centralisation of information on individually maintained beneficial ownership registers in a single public registry, noting the centralised register will require consideration of technical feasibility and the timing of the work to modernise Australia's business registers.

Government proposes to adopt the United Kingdom's approach to thresholds for registration on a beneficial ownership register. Under this model, a regulated entity would include on its beneficial register entities or individuals who either:

- hold, directly or indirectly, 20 per cent of the shares or units in the regulated entity
- hold, directly or indirectly, 20 per cent of the voting rights in the regulated entity
- hold the right, directly or indirectly, to:
  - appoint or remove a majority of the board of directors of the regulated entity (where the regulated entity is an unlisted proprietary or unlisted public company)
  - appoint or remove the regulated entity's responsible entity (where the regulated entity is a MIS)
  - appoint or remove the regulated entity's corporate director (where the regulated entity is a CCIV)
- have the right to exercise, or actually exercise, significant influence or control over the regulated entity.

The closing date for submissions is Friday, 16 December 2022.

w https://treasury.gov.au/consultation/c2022-322265

# 3. Budget

## 3.1 Key tax measures

On 25 October 2022, the Labor Government has released its first budget, being the second Federal Budget for 2022.

The key tax related measures announced in the Budget were as follows:

1. reversing the option for taxpayers self-assess the effective life of intangible depreciating assets;
2. the tax treatment of off-market share buy-backs for listed companies will be aligned to the tax treatment of on-market share buy-backs;
3. the increase to the Commonwealth penalty unit from $222 to $275 from 1 January 2023;
4. confirmation that the eligibility age to make superannuation downsizer contributions will be lowered to age 55;
5. deferring the start date for the residency changes for SMSFs;
6. increasing the funding for the ATO Tax Avoidance Taskforce by around $200 million per year over four years from 1 July 2022;
7. increasing the funding for the TPB to investigate tax practitioners and unregistered preparers;
8. the introduction of an anti-avoidance rule to prevent significant global entities (SGEs) from claiming tax deductions for payments made directly or indirectly to related parties in relation to intangibles in low or no tax jurisdictions;
9. abandoning the proposal to permit certain SMSFs to only be audited every three years;
10. new tax reporting requirements for SGEs, Australian public companies (listed or unlisted) and tenderers for Australian government contracts worth more than $200,000; and
11. changes to the thin capitalisation rules.

We expand on some of these measures below.

Deferral of SMSF residency changes

The previous Government proposed to change the SMSF residency rules by extending the central management and control test safe harbour from two to five years and removing the active member test.

These changes, once legislated, were to be effective from 1 July 2022. However, the changes will now be effective from year after the legislation receives Royal Assent

Thin capitalisation rules strengthened

It is proposed that the Safe Harbour Test debt-to-equity ratio will be replaced by an earnings-based test that limits debt-related deductions to 30% of EBITDA. This approach aligns with the Organisation for Economic Co-operation and Development's best practice approach (BEPS Action 4). Draft legislation has not yet been released, but the measure is proposed to take effect for income years commencing on or after 1 July 2023.

Denying deductions for payments relating to intangibles in low-tax or no-tax jurisdictions

SGEs with global revenue of at least $1 billion will be prevented from claiming tax deductions for direct or indirect payments in relation to intangibles to related parties in low-tax or no-tax jurisdictions. The targeted payments include royalties and other payments in respect of intangibles, such as customer databases or advertising algorithms. A low-tax or no-tax jurisdiction includes a jurisdiction with a tax rate of less than 15% or with a tax preferential patent box regime 'without sufficient economic substance'.

Draft legislation has not yet been released, but the measure is proposed to take effect for payments made on or after 1 July 2023.

Tax transparency reporting

Additional reporting requirements will be introduced for some companies and the ATO will publicly publish information to improve tax transparency. The changes will include:

1. publication of country-by-country (CbC) reporting and a statement on approach to taxation by Significant Global Entities;
2. listed and unlisted public companies to disclose information about the number of subsidiaries and their country of tax domicile; and
3. entities tendering for Australian government contracts worth more than $200,000 will be required to supply their ultimate head entity's country of tax residence.

Draft legislation has not yet been released, but the reporting requirements are proposed to be introduced for income years commencing on or after 1 July 2023.

## 3.2 Measures not proceeding

The budget announced that the Government will not be proceeding with some previously announced tax measures:

- The 2013-14 MYEFO measure that proposed to amend the debt/equity tax rules.
- The 2016–17 Budget measure that proposed changes to the taxation of financial arrangements (TOFA) rules (a delayed start date was announced in 2018–19 Budget).
- The 2016–17 Budget measure that proposed changes to the taxation of asset-backed financing arrangements.
- The 2016–17 Budget measure that proposed introducing a new tax and regulatory framework for limited partnership collective investment vehicles.
- The 2018–19 Budget measure that proposed introducing a limit of $10,000 for cash payments made to businesses for goods and services (a delayed start date was announced in 2018–19 MYEFO).
- The 2018–19 Budget measure that proposed introducing a requirement for retirement income product providers to report standardised metrics in product disclosure statements.
- The 2021–22 MYEFO measure that proposed establishing a deductible gift recipient category for providers of pastoral care and analogous well-being services in schools.

## 3.3 Deferred start dates

In addition to the deferral of the SMSF residency measures mentioned above, the budget set out delays in relation to the following measures:

- The 2019–20 MYEFO measure that proposed introducing a sharing economy reporting regime, from:
  - 1 July 2022 to 1 July 2023 for transactions relating to the supply of ride sourcing and short-term accommodation, and
  - 1 July 2023 to 1 July 2024 for all other reportable transactions (including but not limited to asset sharing, food delivery and tasking-based services).
- The 2021–22 Budget measure that proposed making technical amendments to the TOFA rules, from 1 July 2022 to the income year commencing on or after the date of Royal Assent of the enabling legislation.

w https://budget.gov.au/
w https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Multinational-Tax-Integrity-Package---amending-Australia-s-interest-limitation-(thin-capitalisation)-rules/
w https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Multinational-Tax-Integrity-Package---denying-deductions-for-payments-relating-to-intangibles-held-in-low--or-no-tax-jurisdictions/
w https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/International/Multinational-Tax-Integrity-Package---improved-tax-transparency/

# 4. Rulings

## 4.1 Goods taken from stock for private use

The Commissioner has issued a determination providing updated amounts of the value of goods taken from trading stock for private use in certain industries which the Commissioner will accept for the 2023 income year.

A taxpayer needs to either use the ATO values, or maintain suitable records of items taken from trading stock for personal use. The determination does state that where the value of goods taken for own use would be significantly greater than the ATO values, the actual amount should be used.

**COMMENT** – the determination does not set out for what tax purposes the ATO will accept the values, so presumably they can be used in determining the income tax, Division 7A, FBT and GST outcomes of taking goods for own use.

ATO reference *Taxation Determination TD 2022/15*
w https://www.ato.gov.au/law/view/document?docid=TXD/TD202215/NAT/ATO/00001
w https://www.ato.gov.au/Business/Income-and-deductions-for-business/Accounting-for-trading-stock/Using-stock-for-private-purposes/

## 4.2 VIC land tax primary production draft ruling LTA-010

The State Revenue Office of Victoria has issued draft Ruling *LTA-010 Exemption for primary production land* which provides the Commissioner of State Revenue's interpretation of the key terms and elements relating to the primary production exemption in relation to sections 64, 65 and 66 of the *Land Tax Act 2005* (Vic).

The Land Tax Act imposes land tax on all taxable land in Victoria each year, unless an exemption or concession applies. The Act exempts land that is used primarily for primary production or used solely or primarily for the business of primary production, or land being prepared for use for primary production, depending on the location of the land.

Section 64(1) of the Land Tax Act defines primary production as:

1. cultivation for the purposes of selling the produce of cultivation (whether in a natural, processed or converted state); or
2. the maintenance of animals or poultry for the purpose of selling them or their natural increase or bodily produce; or
3. the keeping of bees for the purpose of selling their honey; or
4. commercial fishing, including the preparation for commercial fishing or the storage or preservation of fish or fishing fear; or
5. the cultivation or propagation for sale of plants, seedlings, mushrooms or orchids.

The ruling provides examples of each type of primary production the Commissioner will accept in applications for the exemption:

Cultivation covers the whole process of production from the soil to all aspects of husbandry. This is not limited to annual crops or crops with periodical production. The Commissioner accepts that cultivation of land includes improving the water supply to plants, spraying plants with insecticides and fungicides, and establishing wind breaks. These same principles apply to the land use for timber production and hydroponic cropping methods.

Maintenance means keeping in existence, or continuance of, live animals and poultry including the providing food, water and shelter to the animals. The maintenance must occur on the land where the animals live. The

animals must be maintained for the purpose of sale, or sale of their natural increase or bodily produce. The animals or poultry must also be owned by the person claiming to be the primary producer, and not necessarily the owner of the land. This ruling does not apply to wild animals.

Land located outside greater Melbourne, not in an urban zone that is used for agistment may qualify for a primary production exemption if the owner of the animals sells the animals, their offspring or bodily produce. Horses kept for recreational purposes will not qualify.

In determining whether the keeping bees for the purpose of selling the honey falls within the exemption, the following factors should be considered:

1. the number of hives;
2. the quantity of honey produced by the bees;
3. the length of time before and after December 31 of the year preceding the tax year during which bees are maintained on the land;
4. the area containing buildings and equipment used for maintaining the bees and producing honey;
5. the land containing suitable flora and watering points for which bees collect nectar and water to make the honey.

Land used primarily for commercial fishing, including preparation for commercial fishing or the storage or preservation of fish or fishing gear, may be eligible for primary production exemption. Preparation or storage of nets, storage of boats and other fishing equipment, preparation of bail or storage or preservation of fish are all examples of activities related to commercial fishing.

The cultivation of plants, seedlings, mushrooms and orchids includes activities such as growing of new plants, seedlings and breeding as part of early cultivation of plants. A retail nursery will not fall within this category.

Secondary production is defined as the activity of processing or converting the primary produce into derivative items. If a secondary production activity occurs on the same land as primary production, the primary production activity must be the primary use of the land for the exemption to apply.

The ruling specifies that in considering if land is 'used primarily' for a particular purpose requires an objective consideration of all activities carried out on the land, together with the taxpayer's evidence intention. The mere intention to use the land does not qualify for the exemption. Where there are multiple uses on the land, the Commissioner will weigh up each use against the other to determine what the primary use of the land is. There are a number of factors that the Commissioner considers in making this determination, including but not limited to:

1. the area of land over which each use extends;
2. the actual intensity of the primary production activities compared to the potential intensity of that use or capacity of the land;
3. its continuity and capabilities of the land for any other use;
4. the scale, extent and intensity of each use;
5. the extent to which land is put to uses that are unrelated;
6. the relative economic and financial significance of competing uses, including the amount of capital expenditure, current expenditure, revenue and profit attributed to each use;
7. the length of time that each use has been conducted on the land; and
8. time, labour and resources spent in using the land for each purpose.

If there has been temporary inactivity on the land (which is usually used for primary production), the short-term break must be demonstrated to be part of a primary production cycle for the exemption to still apply. For example, crop rotation.

Section 65(2) allows for land located outside greater Melbourne where only part of the land is used for primary production to be apportioned and for that part of the land to be exempt.

Section 66 explains parcels of land and how they are applied to the exemption.

LTA-010 is still in draft and comments are welcomed by the Commissioner.

SRO reference *Land Tax Draft Ruling LTA-010*
w https://www.sro.vic.gov.au/land-tax-exemption-primary-production

## 4.3 VIC land tax primary production draft ruling LTA-011

The office of State Revenue Victoria has issued draft Ruling LTA-011 *Primary production exemption for land in urban zone* which clarifies the Commissioner's interpretation of the requirement for the land tax exemption under section 67 of the *Land Tax Act 2005* (Vic). The exemption is in relation to land that is either solely or primarily used for the business of primary production.

The exemption requires that there must be a direct connection between the landowner, the business of primary production and the subject land. To be eligible, all the following conditions must be met:

1. the land must meet the location requirement and usage requirements by the owner; and
2. the landowner must meet the relevant ownership criteria.

The location requirements of the land are that the land must be:

1. wholly or partly in greater Melbourne, and
2. wholly or partly in an urban zone.

The usage requirement of the land is that the land must be used solely (only) or primarily for a business of primary production **by the landowner.**

LTA-011 should be read in conjunction with LTA-010.

LTA-011 is still in draft and comments are welcomed by the Commissioner

SRO reference *Land Tax Draft Ruling LTA-011*
w https://www.sro.vic.gov.au/land-tax-primary-production-exemption-land-urban-zone

## 4.4 Superannuation Guarantee Ruling – update

The ATO has issued an addendum *SRG 2009/2A2* to amend the *Superannuation Guarantee Ruling* SRG 2009/2, concerning the meaning of 'ordinary time earnings' and 'salary or wages', to reflect the *Superannuation Guarantee (Administration) Regulations 1993* (Cth) and its remake via the *Superannuation Guarantee (Administration) Regulations 2018* (Cth).

The addendum also reflects amendments made to subsection 27(2) of the *Superannuation Guarantee (Administration) Act 1992* (**SGAA**) by the *Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses invest) Act 2022* (Cth).

Section 27 of the Act specifies salary or wages that are *not* to be taken into account for the purposes of calculating an individual superannuation guarantee shortfall under section 19 of SGAA. In particular the addendum removes the reference to an exclusion for wages paid to an employee who is 70 years of age or older, and to the $450 threshold. The addendum also clarifies that the exclusion for private or domestic work is available if the person works not more than 30 hours per week, with the original ruling have a heading ‘under 30 hours per week’.

ATO reference *Superannuation Guarantee Ruling Addendum SGR 2009/2A2*
w https://www.ato.gov.au/law/view/document?docid=SGR/SGR20092A2/NAT/ATO/00001

## 4.5 FBT car parking benefits

The ATO has released a draft update to Taxation Ruling TR 2021/2 in relation to FBT car parking benefits.

Broadly, an employer provides a car parking benefit under section 39A of the FBT Act where on a particular day between 7am and 7pm:

1. a car is parked at a work car park for the minimum parking period;
2. an employee uses the car in connection with travel between their place of residence and primary place of employment at least once on that day; and
3. the work car park is located at or 'in the vicinity of' the primary place of employment on that day.

The draft update introduces a new section into the ruling that covers identifying an employee's primary place of employment where the employee performs duties at multiple business premises on a particular day, in light of the decision in *Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd* [2021] FCAFC 209 (please refer to our February 2022 notes).

The updates clarify that an employee's 'primary place of employment' on a particular day will be the business premises identified by the application of paragraph (c) or (d) of the definition set out in subsection 136(1) of the FBT Act.

Paragraph (c) of the definition refers to the business premises that are 'the sole or primary place of employment o the employee'. Paragraph (d) of the definition refers to business premises that are 'otherwise the sole or primary place from which, or at which, the employee performs duties of his or her employment'.

Where the employee's conditions of employment, such as rostering, scheduled rest periods, allowances or car parking entitlements, indicate that particular business premises are primary to their employment, those premises may satisfy paragraph (c) of the definition even if the employee does not undertake any activities from those premises on that day.

The draft also includes an example involving a pilot who has a particular 'home base' airport, in line with the facts in the *Virgin* decision.

*Example 1A - identifying an employee's primary place of employment where the employee performs duties at multiple business premises on a particular day*

15F. *Shirley is a pilot. Her employment is regulated by an enterprise agreement under which she was allocated a 'Home Base'. Various rights and obligations of her employment relate to Shirley's Home Base, such as her roster, rest periods, allowances and other entitlements (such as the provision of car parking).*

15G. *On a particular day, Shirley's employment duties commence when she signs on for duty at her Home Base and end when she signs off at her Home Base. During the course of that day, Shirley performs her employment duties at her Home Base by attending pre-flight briefings, reviewing operational notices and inspecting the aircraft she will command that day, among other things. She also performs her employment duties onboard that aircraft, by flying it between her Home Base and another airport terminal before returning it to her Home Base.*

15H. *On that day, Shirley's Home Base airport was her 'primary place of employment' per paragraph (c) of the definition.*

The draft is open for consultation, with comments to be emailed to PAGSEO@ato.gov.au by 2 December 2022.

ATO reference *Draft Compendium to Taxation Ruling TR 2021/2DC1*
w https://www.ato.gov.au/law/view/document?docid=DTC/TR20212DC1/NAT/ATO/00001

# 5. Private Binding Rulings

## 5.1 GST and M&A

**Facts**

Company X is a company registered for GST.

A third party proposed acquiring all the shares in Company X.

Company X sought corporate, legal and tax advice to effect the transaction. Company X and the third party explored the potential restructure of a subsidiary, however, did not proceed and the third party acquired the shares in the Company directly.

Company X advised that the company's enterprise consisted of taxable and GST-free supplies. Company X has not breached the financial acquisitions threshold.

Company X argued that the sale of the shares in Company X by the shareholders to the third party should make the shareholders the financial supply providers, not the company.

**Questions**

1. Is Company X entitled to claim full input tax credits on the acquisitions comprising the Advisor Costs and Tax Advisory Costs?
2. Is Company X making a supply to the shareholders under Division 72 of the GST Act?

**Decision**

The ATO ruled for question 1, yes. Section 11-5 of the GST Act provides that a creditable acquisition is made if:

*a) you acquire anything solely or partly for a creditable purpose; and*
*b) the supply of the thing to you is a taxable supply; and*
*c) you provide, or are liable to provide, consideration for the supply; and*
*d) you are registered, or required to be registered, for GST.*

Company X meets the criteria in section 11-5 (b), (c) and (d), as:

1. Company X made acquisitions in respect of the Advisor Costs and Tax Advisory Costs;
2. the Advisor Costs and Tax Advisory Costs, were taxable supplies to Company X;
3. Company X is registered for GST;
4. Company X is liable to provide payment for the acquisitions.

The ATO referred to *GST Ruling* GST 2008/1 where the Commissioner ruled that there needs to be a connection or link between the thing acquired and the enterprise. GST 2008/1 provided factors relevant to determining whether an acquisition is made in carrying on an enterprise. Such factors include, but are not limited to:

1. the acquisition is incidental or relevant to the commencement, continuance or termination of the enterprise;
2. the thing acquired is used by the enterprise in making supplies;
3. the acquisition secures a real benefit or advantage for the commencement, continuance or termination of the enterprise;
4. the acquisition is one which an ordinary business person in the position of the recipient would be likely to make for the enterprise;
5. the acquisition does not meet the personal needs of individuals such as partners or directors;
6. the acquisition helps to protect or preserve the enterprise entity, structure or organisation; and

7. the acquisition is made by the entity in accordance with, or to satisfy, a statutory requirement imposed on the enterprise.

Company X maintained that the Advisor Costs and Tax Advisory Costs were incurred as a result of the merger with the third party and are in the course of carrying on the enterprise.

In order for Company X to meet criteria (a) of section 11-5 of the GST Act, the Commissioner needed to determine whether the acquisitions related to supplies that would be input taxed. In this case, the supplies are the sale of shares in the company by the shareholders to the third party.

Section 40-5 of the GST Regulations provides that the provision, acquisition or disposal of an interest in shares is a financial supply and a financial supply is input taxed. The regulations provide that an entity is the financial supply of an interest if:

1. the interest was the entity's property immediately before the supply;
2. the entity created the interest when making the supply; or
3. the entity acquired the interest supplied (refer to as an acquisition-supply).

The Commissioner agreed with Company X and confirmed that the sale of the shares to the third party were made by the shareholders, and are not considered to be input taxed supplies made by Company X.

Company X advised that during the exploration of a restructure the financial acquisitions threshold was not reached, and the costs associated with the proposed restructure should be treated as general enterprise costs. The Commissioner agreed.

The Commissioner confirmed that the acquisitions made from the Advisor Costs and Tax Advisory Costs were not acquired for a private purpose or in connection with the entity making supplies that would be input taxed, and accordingly the acquisitions are for a creditable purpose and Company X met the requirements in section 11-5 of the GST Act.

In relation to question 2, the Commissioner ruled no on the basis that Division 72 did not apply, because the acquisitions of the Advisor Costs and Tax Advisory Costs are enterprise costs of Company X and there was no supply by Company X to the shareholders.

ATO reference *PBR Authorisation No 1051976063963*
w https://www.ato.gov.au/law/view/document?docid=EV/1051976063963

## 5.2 Deductions for travel

**Facts**

The taxpayer was employed as a national marketing manager who was required to travel frequently interstate and overseas for work. The taxpayer's employer had a policy that it would pay for economy airfares only. The taxpayer would voluntarily pay for flight upgrades to business class. The taxpayer was required to use a laptop and work on the flight and business class gave the taxpayer adequate room and privacy to work on the flight.

**Question**

Is the taxpayer entitled to a deduction for the costs incurred to voluntarily upgrade airfares when the travel is work-related?

**Decision**

The ATO ruled that a taxpayer can claim a deduction under section 8-1 of the ITAA 1997 for costs incurred in obtaining an airline upgrade when travelling for work.

The ATO found that such an upgrade had the necessary connection with the income earning activities, even if the upgrade was voluntary.

ATO reference *PBR Authorisation Number 1052008430280*
w https://www.ato.gov.au/law/view/document?docid=EV/1052008430280

## 5.3 Reporting obligations for ESS

**Facts**

Sub-Co is a wholly owned Australian subsidiary of Parent-Co, a foreign corporation. The predominant business activity of Sub-Co is not the acquisition, sale or holding of shares, securities or other investments.

The group has an Employee Incentive Plan (**Plan**), which provides all of Parent-Co's employees, including employees of the Australian Sub-Co, with equity ownership opportunities and performance-based incentives that are intended to better align the interests of such employees with those of Parent-Co's stockholders.

The Plan is administered by the board of Parent-Co (**Board**) who may grant awards and adopt, amend and repeal such administrative rules, guidelines and practices relating to the Plan.

The Board may, in its sole discretion, grant Units entitling the participant to receive shares of common stock or cash to be delivered at the time that such Units vest. Australian participants may only receive shares of common stock.

Each Unit represents the right to receive one share of common stock upon vesting of the Unit. Each participant agrees that the Units are subject to the vesting conditions set out in the Plan.

All the Units are unlisted and are granted for nil consideration.

The participant must remain employed by Sub-Co on the occurrence of certain events or dates for the Units to vest. If a participant ceases to be employed by the group before the Units vest, all of the Units that are unvested at the time of employment termination will be forfeited to Parent-Co.

Upon vesting, each participant will be issued and delivered one share of common stock in Parent-Co for each vested Unit. No consideration is paid by Participants upon vesting of the Units and distribution of shares represented by the vested Units.

Each Australian participant will not hold a beneficial interest in more than 10% of the shares or be in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of Parent-Co.

Division 392 of Schedule 1 to the TAA requires providers of employee share schemes (ESS) to report to the ATO if:

1. the provider provides ESS interests at a discount under Division 83A during the income year; or
2. the ESS deferred taxing point occurs during the income year in respect of ESS interests to which subdivision 83A-C applies.

**Question**

Whether Sub-Co has a reporting obligation under Division 392 of Schedule 1 to the TAA?

**Decision**

Yes.

The ATO noted that a reporting obligation arises for a financial year in which Parent-Co/Sub-Co provides a participant with the Unit under the Plan.

Units that are granted to the participants are rights to acquire a beneficial interest in a share in Parent-Co and are, therefore, ESS interests as defined in section 83A-10(1) of the ITAA 1997.

Subdivision 83A-B applies to an ESS interest if a taxpayer acquires the interest under an ESS at a discount (section 83A-20). The term 'discount' is not defined. However, paragraph 1.102 of the Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 states '[t]he discount is the market value of the ESS interests less any consideration paid or to be paid by the employee'.

As participants do not pay any consideration for the grant of the Units, nor do they pay any consideration upon the vesting of the Units, the Units are acquired at a discount. Therefore, Sub-Co has an obligation to report to the ATO in the income year in which the Units are granted.

Sub-Co will also have a reporting obligation under paragraph 392-5(1)(b) of the ITAA 1997 when the deferred taxing point in relation to the Units occurs.

**TRAP** – while there is no amount included in an employee's assessable income if a scheme qualifies for start-up treatment, subdivision 83A-B still applies to those interests so that they must be reported on an ESS statement.

ATO reference *Private Binding Ruling Authorisation Number 1051997007794*
w https://www.ato.gov.au/law/view/document?docid=EV/1051997007794

## 5.4 GST and provision of accounting services by non-resident

**Facts**

A non-resident business owner carries on an enterprise wholly overseas and is not registered for GST.

The non-resident business owner intends to provide services to an Australian business that has an ABN and is registered for GST. The service will be provided remotely. The non-resident business owner does not have a permanent establishment, workers or agents in Australia.

**Question**

Do you need to register for GST and charge GST as a non-resident business providing accounting services to an Australian GST registered business?

**Decision**

No.

GST is payable on a taxable supply. Section 9-5 of the GST Act provides that you make a taxable supply if:

(a) you make the supply for consideration; and
(b) the supply is made in the course or furtherance of an enterprise that you carry on; and
(c) the supply is connected with the indirect tax zone; and
(d) you are registered, or required to be registered.

The supply will not be a taxable supply to the extent that it is GST-free or input taxed.

A supply of anything other than goods or real property would be connected with the indirect tax zone if:

1. the thing is done in the indirect tax zone; or

2. the supplies makes the supply through an enterprise that the supplier carries on in the indirect tax zone; or
3. if the thing is a right or option to acquire another thing, the supply of the other thing would be connected with the indirect tax zone; or
4. the recipient of the supply is an Australian consumer.

An Australian consumer is an Australian resident entity that is not registered for GST, or if registered, does not acquire the thing supplied solely or partly for the purpose of its enterprise.

The supply of anything other than goods or real property by a non-resident would not be connected with the indirect tax zone even if the thing is done in Australia, provided that the supplier does not make the supply through an enterprise that the supplier carries on in the indirect tax zone and the recipient is an Australian based business recipient.

As the non-resident business owner does not have any employee, officer or agent carrying on the business in the indirect tax zone, the non-resident business owner is not carrying on the enterprise in the indirect tax zone. Further, the client is an Australian based business recipient, so the supply of services to the client will not be connected with Australia.

The non-resident business owner will not make a taxable supply to the client, and is not required to be registered for GST, or required to remit GST on those supplies.

ATO reference *Private Binding Ruling Authorisation Number 1051997552541*
w https://www.ato.gov.au/law/view/document?docid=EV/1051997552541

## 5.5 Deductions for gift of artwork

**Facts**

The Taxpayer owns the Artwork.

Before 30 June 20XX, the Taxpayer gifted the Artwork to the Foundation. The Foundation is endorsed as a deductible gift recipient (**DGR**).

The Taxpayer conveyed full title of the Artwork before 30 June 20XX but retained a right to use it up to 30 June 20XX. The Taxpayer will insure the Artwork until 30 June 20XX. The Deed of Gift outlines the details and conditions of the gift of the Artwork.

The Artwork is currently located in premises owned by the Taxpayer.

The Taxpayer obtained two valuations of the Artwork in accordance with section 30-200 of the ITAA 1997 to determine its GST inclusive market value.

A consulting actuary determined that a reduction of X% p.a. is appropriate to use for the valuation of the conditions attaching to the gift due to the fact that the Taxpayer retained the right to use the Artwork for two years, was to pay the insurance premiums for this period, and no other conditions attached to the gift.

**Questions**

1. Is the amount of the deduction equal to the average of the GST inclusive market values of the Artwork, determined under section 30-200 of ITAA 1997, reduced by X%, representing the adjustment in accordance with section 30-220?
2. For the year ending 30 June 20XX, is the Taxpayer entitled to a deduction equal to $XXXX under item 4 of the table in section 30-15 of the ITAA 1997 for the proposed gift of the Artwork to the Foundation?

**Decision**

Question 1

The ATO ruled yes.

The ATO has accepted that X per cent was an appropriate reduction under section 30-220 of the ITAA 1997 for the time period from the date of donation to 30 June 20XX. The Taxpayer was entitled to deduct the average of the GST inclusive market values specified in the written valuations, reduced by X per cent.

Question 2

The ATO ruled yes.

The ATO concluded that the Taxpayer will be entitled to a deduction equal to $XXX under item 4 of the table in section 30-15 of the ITAA 1997 for the proposed gift of the Artwork to the Foundation because the Taxpayer claimed an amount in the year the gift was made and made an election in that return to claim the balance of the value of the gift over the following four years.

Any election can be varied at any time such that in the year ended 30 June 20XX the Taxpayer was entitled to claim the balance of the deduction.

ATO reference *Private Binding Ruling Authorisation No* 1051999720423
w https://www.ato.gov.au/law/view/document?docid=EV/1051999720423

# 6. ATO and other materials

## 6.1 Working from home expense deductions

The ATO has released *Draft Practical Compliance Guideline* PCG 2022/D4 (the **Guideline**) which outlines the revised fixed-rate method for calculating the work-related additional running expenses incurred as a result of working from home. The Guideline is to be read in conjunction with *Taxation Ruling TR 93/30*.

For the 2022-23 income year and later income years, taxpayers will no longer be able rely on Practical Compliance Guideline PCG 2020/3 *Claiming deductions for additional running expenses incurred whilst working from home due to COVID-19* (the 80 cent method) or *Practice Statement Law Administration* PS LA 2001/6 at paragraph 5 to calculate their deduction for expenses incurred as a result of working from home (the 52 cents per hour).

From 1 July 2022, taxpayers can continue to claim their actual expenses or, alternatively, use the revised fixed rate method.

Taxpayers can rely on the Guidelines if they:

1. are working from home while carrying out their employment duties or carrying on their business on or after 1 July 2022;
2. are incurring additional running expenses which are deductible under section 8-1 as a result of working from home; and
3. keep and retain relevant records in respect of the time they spend working from home and for the additional running expenses incurred.

Where an expense is only partly incurred in gaining or producing assessable income, it must be apportioned and where there is no obvious method of apportionment, it must be done on a fair and reasonable basis.

The revised fixed-rate method apportions the following additional running expenses incurred on a fair and reasonable basis by using a fixed rate of 67 cents per hour for each hour worked from home during the relevant income year:

1. energy expenses (electricity and/or gas) for lighting, heating/cooling and electronic items used while working from home;
2. internet expenses;
3. mobile and/or home telephone expenses; and
4. stationery and computer consumables.

A taxpayer cannot claim any additional separate deduction for any of these expenses.

To calculate the total deduction for running expenses using this method, the taxpayer should:

1. calculate the number of hours worked from home during the income year;
2. multiply the total number of hours worked from home during the income year by 67 cents per hour;
3. calculate the work-related decline in value of any depreciating assets used to work from home during the income year and any other running expenses incurred;
4. add the amounts calculated at point 2 and 3 above.

<u>The practical compliance approach</u>

The Commissioner will not apply compliance resources to review a taxpayer's deduction for working from home expenses if:

1. the criteria outlined above is met; and
2. the revised fixed-rate method is used to calculate the additional running expenses incurred.

The Guideline does not apply to a taxpayer if:

1. the number of hours used in the methodology exceeds the number of hours the taxpayer actually worked at home; or
2. the taxpayer claims a separate deduction for any of the expenses listed above.

ATO reference *Draft Practical Compliance Guideline PCG 2022/D4*
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2022D4/NAT/ATO/00001

## 6.2 First homes for regional Australians

The Government's Regional First Home Buyer Guarantee (**Guarantee**) will begin helping Australians into their first home from 1 October.

The Guarantee will make 10,000 places available each financial year to support regional first home buyers to purchase new or existing homes with a deposit starting from 5%. The Guarantee will have the same price and income caps as the existing First Home Guarantee administered by the National Housing Finance and Investment Corporation.

**Eligibility Requirements**

Applicants must:

1. be Australian citizens;
2. purchase outside a capital city; and
3. demonstrate they have been living in the region in which they are purchasing the property (or adjacent regional area) for at least 12 months.

The Guarantee is part of the Government's housing reform agenda which includes a National Housing and Homelessness Plan, a National Housing Supply and Affordability Council to increase supply and improve affordability and a $10 billion Housing Australia Future Fund which aims to build 30,000 new social and affordable housing properties in its first five years.

w https://ministers.treasury.gov.au/ministers/julie-collins-2022/media-releases/albanese-government-help-thousands-regional-australians

## 6.3 Unpaid tax in NSW soars above $1 billion, 'no strategy' to correct it

In New South Wales, unpaid tax debt has increased by 171% compared to pre-pandemic figures. As at 1 August 2022, outstanding land tax, payroll tax, stamp duty and gaming machine taxes amounted to around $1.13 billion, up from a total of $477 million in July 2019. In addition, the Sydney Morning Herald reports that it has seen a briefing document presented to a meeting of senior compliance leaders at Revenue NSW in early October 2022 which stated that there is '*no current strategy'* to recover the unpaid tax debt.

According to the Sydney Morning Herald, a spokesperson at Revenue NSW has stated that the high amount of unpaid tax debt is due to the government granting tax deferrals and reductions offered to customers and businesses throughout the pandemic, and not seeking repayment of unpaid tax debt in the last 6 months given the ongoing impact of the pandemic and other recent natural disasters. Revenue NSW is now taking steps to recover the outstanding tax debts, including by working with customers and businesses to agree on instalment plans.

A further update regarding the financial position of New South Wales (including the amount of outstanding tax debt) is expected to be provided on or before 31 December 2022 in the NSW Budget Half-Yearly Review.

w https://www.smh.com.au/politics/nsw/unpaid-tax-in-nsw-soars-above-1-billion-no-strategy-to-correct-it-20221017-p5bqf0.html

## 6.4 Charities with outstanding reporting risk revocation

Registered charities have annual reporting obligations with the Australian Charities and Not-for-profit Commission (**ACNC**). Every year registered charities must lodge an Annual Information Statement with the ACNC. If a charity fails to lodge an Annual Information Statement for two years, the charity will be at risk of having its registration with the ACNC revoked.

The Annual Information Statements are lodged via the entity's ACNC portal for statements for the 2017 year and subsequent years. Annual Information Statements that remain outstanding for years prior to 2017 must be lodged through paper forms which can be obtained by contacting the ACNC.

The ACNC has identified over 700 registered charities that have failed to lodge two or more Annual Information Statements. These entities have been notified by the ACNC and will have their registration revoked if the outstanding Annual Information Statements are not lodged.

Other annual reporting obligations of registered charities include informing the ACNC of any material changes, such as changes in board membership, change in primary address and changing the sub-type that the particular charity is registered as on the ACNC register.

w https://www.acnc.gov.au/media/news/charities-outstanding-reporting-urged-get-date-or-risk-revocation

## 6.5 DTA with Iceland

Australia and Iceland have entered into a tax treaty, being the first tax treaty between the two countries.

The main features include lower withholding tax rates on dividends, interest and royalties, protection over natural resources, tax certainty for pension payments (superannuation), preserving domestic anti-avoidance rules, prevention of multinational tax avoidance, non-discrimination measures, sharing of taxpayer information and mechanisms for resolving tax disputes.

w https://treasury.gov.au/media-release/iceland-tax-treaty

## 6.6 Tax agents banned for lying about SMSF audits

Following a referral by the ATO, the Tax Practitioners Board (**TPB**) has terminated the registration of 2 tax agents who prepared and lodged self-managed superannuation fund (**SMSF**) annual returns with incorrect details about the fund's annual audit.

The agents were deemed to no longer meet the tax practitioner registration requirement of being a fit and proper person.

One agent lodged over 90 SMSF annual returns for more than 20 clients, including falsifying auditor details indicating that the funds had been audited. The tax agent was also found to have misled clients by advising them their SMSFs had been audited, and charging them for the audit, even though an audit had not been completed.

TPB Chair Mr Ian Klug AM commented that the 'decisions reiterate the importance of the relationship between the TPB and the ATO in ensuring that tax practitioners maintain a strong level of integrity in their lodgement

activities. Registered tax practitioners are in a privileged position of trust, and it is essential that they ensure their actions uphold the integrity of the tax and superannuation systems.'

In October, the ATO will be sending client lists for the 2021–22 financial year to all SMSF auditors where they can report to the ATO the details of any funds where their SMSF Auditor Number (**SAN**) has been reported, but no audit activity has been undertaken.

w https://www.ato.gov.au/Media-centre/Media-releases/Dishonest-tax-agents-banned-to-ensure-superannuation-integrity/

## 6.7 Commercial rent or lease payment changes

The ATO has issued guidance on its website for commercial tenants and landlords in working out the income tax and GST implications where there is a change in commercial rent payable. The guidance outlines the tax implications if a rent waiver is given, if the tenant cannot pay their rent or the obligation to pay rent is varied under a bankruptcy or insolvency law, or if there is a refund of rent. Some of the key views set out by the ATO are outlined below.

**Waiver or release of rent**

Tenants are entitled to a deduction, even if the waived rent relates to past occupancy and the deduction has already been claimed. There will however be commercial debt forgiveness consequences. Tenants are not entitled to a deduction if the waived rent relates to a future period of occupancy.

If GST is accounted for on an accruals basis and a GST credit for rent that is later waived has already been claimed by, a tenant should record an increasing adjustment to pay back the credit. For landlords, if accounts are prepared on an accruals basis, rent for past periods of occupancy already included in assessable income and later waived may entitle the landlord to a deduction. Further, if GST has already been paid on the full rent amount before the waiver, the landlord should make a decreasing adjustment to claim back the GST and issue an adjustment note to the tenant.

If a tenant has already claimed a GST credit for rent that is refunded, an increasing adjustment to pay back the credit should be recorded.

If a landlord prepares accounts on a cash basis, rent that is never collected is not included in assessable income. Further, GST is only paid on the amount of rent received.

**Rent deferral**

Tenants are entitled to a deduction when the obligation to pay rent is incurred.

If a tenant accounts for GST on a cash basis and the tenant has a tax invoice from the landlord, GST credits can only be claimed if the tenant has paid the rent. For landlords who prepare accounts on a cash basis, rent that is deferred is only included in assessable income when received and GST is only reported when received.

If the tenant accounts for GST on an accruals basis and the tenant has tax invoice from the landlord, a GST credit for the full amount can be claimed even if the invoice has not been paid. For landlords who prepare accounts on an accruals basis, rent that the landlord has a right to receive is included in assessable income even if the time for its payment has been deferred. Further, landlords need to pay GST on the entire rent amount payable for each lease period in the lease agreement, even if the deferred amount is not received at the time.

No CGT consequences should arise for either the tenant or the landlord if the rental agreement is changed without payment or other consideration being given.

w https://www.ato.gov.au/General/Property/Property-used-in-running-a-business/Commercial-rent-or-lease-payment-changes/

## 6.8 Detailed business record-keeping requirements

The ATO has updated its website in relation to 'detailed business record-keeping requirements'.

On the webpage, the ATO provides guidance and tips in relation to records that should be kept when a taxpayer is:

1. starting a business;
2. running a business;
3. changing their business structure;
4. selling or closing their business; or
5. receiving gifts or loans from related overseas entities (including family members).

The key tips for record keeping include:

1. keeping all records your business is required to meet taxation, super and employer obligations;
2. storing your records in a manner that protects the information from being damaged;
3. ensuring records are kept for at least five years;
4. the records should be readily available to the ATO if the ATO requests them to be produced;
5. records must be in English or easily converted to English.

w https://www.ato.gov.au/Business/Record-keeping-for-business/Detailed-business-record-keeping-requirements/

## 6.9 Time running out to apply for a Director ID

The deadline to apply for a Director ID is 30 November 2022.

The ATO recommends that applications for a Director ID are made now to ensure that there is plenty of time to complete the applications before the deadline.

Members of an SMSF in which a company acts as the trustee are also reminded to apply for a Director ID.

w https://www.ato.gov.au/Super/Sup/Time-is-running-out-to-apply-for-your-director-ID/ld.gov.au/statements/96181