The Tax Institute

Tax Update

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- Corporate & Commercial
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- Estate Planning
- Elder Law
- Intellectual Property
- Corporate Governance
- Insolvency & Bankruptcy

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Our tax training notes are prepared by Marianne Dakhoul, Jane Harris, Rose McEvoy, Matthew McKee, Gillian Tam, and Hayden Rudd.

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1. Tax Update Pitstop

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

Tax Update Matter	**Impact Summary**	**Further Detail**
Section 99B	The ATO has published guidance on its views on the application of section 99B of the ITAA 1936. The guidance is comprised of a Taxation Determination and a Practical Compliance Guideline.	Pages 31 and 50
Tax agent regulations	Further guidance has been issued by the Tax Practitioners Board in relation to the changes to the Tax Agents Code of Conduct, including in relation to the obligation to notify the ATO or TPB of a prior false and misleading statement.	Pages 60 to 65
Power	A transfer to a superannuation fund was set aside as against the members bankruptcy trustee as being a disposition to defeat creditors	Page 11
Coronica	The AAT has confirmed that the decision of the ATO to disqualify a superannuation fund trustee. The decision considers and distinguishes the recent decision in *Merchant and Commissioner of Taxation* [2024] AATA 1102.	Page 13
Foreign resident CGT regime	On 23 July 2024, the Treasury issued a consultation paper titled 'Strengthening the foreign resident CGT regime', seeking feedback on the proposed reforms on the foreign resident CGT rules contained in Division 855 of the ITAA 1997/	Page 50

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2. Cases

2.1 Ayshan v Abualadas – constructive trust, failed partition and CGT consequences

Facts

Linda Ayshan and her husband, Imad, live in Roselands in a dwelling (known as number 40) that adjoins a dwelling (known as number 40A) in which Linda's sister, Emaan Zarour, and her husband, Tareq Abualadas, lived. Tareq and Emaan separated in 2021 and Tareq no longer lives at number 40A.

Both dwellings were originally contained on a single legal lot of land, of which Tareq, Linda and Emaan were the registered proprietors as tenants in common in equal shares (i.e. as to 1/3 each). In 2017 the land was sub-divided so that 40 and 40A became separate lots of land but both lots were still owned by Tareq, Linda and Emaan as tenants in common in equal shares.

The land had been acquired in 2008 with a duplex then constructed. The two sets of couples sought to make equal financial contributions. Three loans were obtained from NAB. Loan 1 represented the Emaan and Tareq's share of the purchase price. Loan 2 represented Linda and Imad's share of the purchase price. Loan 3 was obtained for the purposes of funding the building work. Despite having separate loans, Linda, Emaan and Tareq were jointly and severally liable for all loans.

The relationship between the parties broke down in 2021 when Tareq and Emaan separated.

Linda and Imad wished to partition the properties so that Linda became the sole owner of number 40 and Tareq and Emaan became the sole owners of number 40A. Emaan consented to the partition, but Tareq did not. A deed of partition was prepared but Tareq refused to sign it. A statutory declaration was also prepared for Tareq to sign, which noted that there had been an error in the registration of the title of the property in Linda, Emaan and Tareq as tenants in common in equal shares and that, instead, the proportions should have reflected that Linda was to live in and own number 40 and Emaan and Tareq were to live in and own number 40A.

In May 2023 Linda commenced proceedings in the Supreme Court of New South Wales asserting that there was an enforceable contract between the parties for the partition of the properties. Alternatively, Linda contended that Emaan and Tareq held their interest in number 40 on resulting trust for Linda and Linda held her interest in 40A on resulting trust for Emaan and Tareq. Finally, Linda contended that the properties were held on constructive given a common intention of the parties.

Linda ultimately conceded that there was no agreement that she receive number 40 as when they acquired the land in 2008 and, accordingly, she abandoned the enforceable contract claim and resulting trust claim but continued to rely upon a common intention constructive trust.

Tareq, in contrast, contended that the properties were held pursuant to a failed joint endeavour constructive trust but did not set out the relief that would follow from this. Tareq's claim was that the occupation of the dwellings was only intended to be temporary and the original intention was for the properties to be sold subdivision.

It was common ground that the ownership proportions did not reflect the parties' agreed financial contributions, which had been 50-50 between the two couples.

The Court noted that the elements of a failed joint endeavour constructive trust are as follows:

1. the formation of a joint endeavour between the parties;

2. the acquisition of property pursuant to that joint endeavour; and
3. the premature termination of the joint endeavour, leaving one party with a legal interest which that party was not intended to enjoy beneficially in those circumstances.

The Court noted that there was no dispute that elements 1 and 2 were satisfied as it was common ground that the parties purchased the property in 2008 under an arrangement that they would undertake a duplex development on it. The Court considered that, irrespective of whether the intention was to sell or occupy the dwellings, the third elements was also satisfied.

In relation to a common intention constructive trust, the Court noted that it requires an agreement between the parties or a common intention that the claimant should have an interest in the property owned by the other, and the claimant acted to his or her detriment on the basis of that agreement or common intention. The Court was not satisfied that this was satisfied as Linda had conceded that there was no agreement for her to become the sole owner of number 40 in 2008 when the whole property was acquired.

Accordingly, the Supreme Court held that the arrangement amounted to a failed joint endeavour constructive trust and not a common intention constructive trust. The parties then agreed that this conclusion should be given effect to by imposing a constructive trust over both number 40 and number 40 and by appointing a trustee to sell the properties. The Court then considered it was necessary to hear from the parties further to consider whether entitlement adjustments need to be made and having regard to the taxation consequences of the proposed orders.

Tareq considered it unnecessary to prepare formal calculation of the parties' contributions but rather to proceed on the basis that the two couples would receive equal shares of the proceeds, subject to deducting the loan liabilities for which they had agreed to be responsible.

Linda contended that an accounting should be undertaken that has regard to the precise financial contributions made by the parties.

Issues

How are the entitlements under the constructive trust to be calculated?

Decision

Justice Parker followed the approach of Tareq, holding that the sales proceeds should be held equally between the two couples, but with a deduction for the loan liabilities that were unpaid.

However, in determining the appropriate orders to make, Parker J considered it necessary to have to the tax implications of the proposed constructive trust, noting as follows:

1. the Capital Gains Tax (CGT) provisions in the ITAA 1997 operate by designating various transactions as "CGT events," which may then trigger a taxable capital gain;
2. the ATO had considered the tax implications of the appointment of a trustee for sale in ID 2009/129, notably:
   (a) while the creation of a trust over property triggers CGT event E1, ID 2009/129 clarifies that CGT event E1 does not apply if the trust is established by court order or by operation of law;
   (b) upon transferring legal title to the trustee, CGT event A1 is triggered, resulting in a capital gain for the former co-owners. This gain is calculated as the difference between the property's value at the time of transfer to the trustee and the cost base incurred by the co-owners;
   (c) upon the trustee selling the property, another CGT event A1 occurs for the trustee. The gain in this instance is the difference between the sale price and the property's value at the time of transfer to the trustee but that the Commissioner generally accepts that the sale price reflects the property's value at the transfer time, assuming no significant value changes between transfer and sale. Thus, in most cases, the sale price is used to determine the co-owners' gain or loss, with no additional

gain or loss for the trustee.

3. in relation to the Roselands property, it was accepted that the same principles apply. It is anticipated that the transfer of the Roselands property to a trustee will result in a significant capital gain, subject to the potential exemption for main residences;
4. the capital gain would be split three ways between Emaan, Linda and Tareq, which requires a consideration as to whether an adjustment is required given the entitlement to the sales proceeds.

Justice Parker considered that any tax liabilities of Emaan, Linda and Tareq was a liability of the joint endeavour and, therefore, should be funded out of the sales proceeds and made an order that the parties be indemnified from any such liability before any division of the remaining surplus between the parties. The Court considered that this was the appropriate order having regard to the fact that it was unclear as to whether any main residence exemption would be available.

COMMENT – there is real question as to whether the main residence exemption would be available having regard to nature of the constructive trust declared by the Court and the absence of any agreement at the time that the land was acquired as to who would own which property. Trustees are generally not entitled to the main residence exemption and it would seem difficult to contend any of the persons were 'absolutely entitled' to any property as against Emaan, Linda and Tareq having regard to the original agreement for the purpose of section 106-50 of the ITAA 1997.

TIP – this case demonstrates the importance of documenting these types of arrangements even where they are family dealings. It important that the rights and obligations of the parties be clear in the event of a relationship breakdown. In addition, these arrangements should be documented to ensure that the intended tax outcome is achieved.

TRAP – the CGT implications of a partition can differ depending upon whether the sub-division is to be a strata sub-division or Torrens title sub-division as there is a CGT rollover and concession that only potentially applies to a strata sub-division.

Citation *Ayshan v Abualadas (No 2)* [2024] NSWSC 824 (Parker J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/824.html

2.2 Grenfell Jockey – superannuation guarantee and extended meaning of employee

Facts

The Grenfell Jockey Club Limited conducted thoroughbred horse races in New South Wales. The Club was an NSW Race Club registered with Racing NSW.

New South Wales thoroughbred racing is governed by Racing Australia and Racing NSW via an interlocking network of rules, including the Australian Rules of Racing and the New South Wales Local Rules of Racing. The Australian Rules of Racing operated as a set of arching general rules that was unalterable by the NSW Local Rules except in matters local to Racing NSW.

Under Rule 72 of the NSW Local Rules provides that clubs shall pay a fee to jockeys or apprentice jockeys for riding a horse in a race or barrier trial, with the quantum of the fee being set by Racing NSW. Jockeys who participated in various horse races conducted by the Club prior to 2014 were paid a riding fee by the Club in accordance with Rule 72.

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Rule 72 was amended in 2014, following consultation with the ATO, and now specifically provides clubs are not personally liable for the jockeys' fees.

On 7 September 2020, a notice of assessment was issued by the ATO to the Club for a Superannuation Guarantee Charge. The SGC concerned jockeys who participated in horse races conducted by the Club in the 2014 financial year.

On 12 July 2021 the Club objected to the SGC assessments on the basis that the jockeys were not their employees for the purposes of section 12 of the *Superannuation (Guarantee) Administration Act 1992* (Cth). The Club contended that the jockeys were employees of racehorse owners and racehorse trainers under section 12(3) of the SGAA, and the payments made by the Club to the jockeys were made on behalf of the owners or trainers.

The Commissioner disputed that section 12(3) of the SGAA applied on the basis that the engagement of a jockey to ride a horse in a race is not a contract "for the labour" of the jockey. Instead, the Commissioner contended that section 12(8) is the appropriate subsection. Section 12(8) applies to a person paid to perform or to participate in the performance of a sport. In such instance, the performer is deemed to be the employee of the person liable to make the payment to the performer for SGC purposes.

On 27 June 2022, the ATO issued an unfavourable objection decision.

On 24 August 2022, the Club applied to the AAT for review of the ATO's decision.

The Club raised new grounds of objection in the review, being:

1. it was an implied term of the contract between owners/trainers and jockeys that the owners/trainers were obliged to pay jockeys the riding fee;
2. owners/trainers assumed at least an obligation arising in restitution/quantum meruit to provide reasonable remuneration for the services of jockeys; and
3. Rule 72(1), properly construed, imposed an obligation on clubs to pay owners the riding fees that were otherwise payable by the owners to jockeys.

At the hearing, the Club submitted that the jockeys were not employees of the Club as they were contracted with a trainer or an owner, and neither the Club nor Racing NSW had any contractual relationship with the jockeys. The Club also contended that Rule 72 did not create a legal relationship between a race club and a jockey and did not absolve an owner or a trainer from their contractual obligations as regards the payment of a jockey, including SGC. Payments from the Club to jockeys were made on behalf of the trainer or the owner.

The Commissioner referred to the case of *Commissioner of Taxation v Scone Race Club* [2019] FCAFC 225 which held that the plain meaning of former Rule 72 does not support the proposition that the Club was not liable to pay riding fees. On that basis, the jockeys were deemed employees of the Club under section 12(8).

In *Scone Race Club*, Steward and Derrington JJ agreed with Griffiths J's construction of subsection 12(8)(a) of the SGAA in *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224.

The review was heard at the same time as four other applications, concerning the Armidale Jockey Club, Clarence River Jockey Club, Australian Turf Club and Illawarra Turf Club, which all involved a review of decisions to impose SGC on jockeys for tax periods from 30 September 2009 to 30 June 2014. 95 other thoroughbred racing clubs were interested in the outcome of these decisions to determine the impact, if any, on their circumstances.

Issues

1. Was the Club liable to payments to jockeys such that the jockeys are employees of the Club for the purposes of section 12(8) of SGAA?

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2. If the Club was an employer of the jockeys, are the jockeys also employees of the relevant owner or trainer under section 12(3) or 12(8) of the SGAA?
3. If both the Club and the relevant owner or trainer are employees, are they both liable for the SGC in respect of the jockey for the same performance?

Decision

The AAT held that the Club had not sufficiently discharged its onus of proving the jockeys were not employees of the Club under section 12(8) of the SGAA.

The AAT considered the case of *Scone Race Club* and noted that the evidence provided did not differentiate the Club's position from that in *Scone Race Club*. There were no contemporaneous records in evidence of any jockey arrangements with a trainer or jockey. Given the actual contract terms were not known, and all possible parties to the contracts have agreed with Racing NSW to be bound by and comply with the Local Rules. Rule 72 is clear in identifying the Club to be liable for the riding fee payment.

The AAT also rejected the restitution/quantum meruit claim as the evidence did not support that submission.

COMMENT – when considering whether a person is an employee for superannuation guarantee, it is necessary consider not only whether they may be an employee at common law but whether the arrangement falls within the extended meaning of employee in section 12 of the SGAA. Section 12(8) relevantly extends to the meaning employee as follows:

> *(8) The following are employees for the purposes of this Act:*
> *(a) a person who* ***is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills*** *is an employee of the person liable to make the payment;*
> *(b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;*
> *(c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.*

Citation *Grenfell Jockey Club Limited (Taxation)* [2024] AATA 2730 (Senior Member D K Grigg, Sydney)
w https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2730.html

2.3 Power – transfers to superannuation fund and bankruptcy

Facts

Roderic William Power and Margaret Christine Power were husband and wife.

Roderic and Margaret were directors and shareholders of RodMargy Pty Ltd, the trustee of the CA Unit Trust. They were also directors and shareholders of Rodmarg Pty Ltd, the trustee of the Power Secure Self-Managed Super Fund.

From June 1991, Roderic and Margaret owned a property in Blacktown. Roderic and Margaret also owned 10 units in the CA Unit Trust.

Roderic and Maragret had invested in the Great South management investment scheme and owed money to Javelin and Bendigo and Adelaide Bank.

On 20 January 2011, Javelin sent Roderic and Margaret a Notice of Demand for $146,762.

On 13 August 2014, Roderic and Margaret transferred the units in the CA Unit Trust to the Power Super Fund. The unit transfer was for no consideration.

In May 2015, Roderic and Margaret sold the Blacktown property for $670,000. $394,000 of the proceeds from the sale of the Blacktown property was applied towards the purchase of a property in Toukley by the CA Unit Trust.

On 10 July 2015, Javelin obtained judgment in the Supreme Court of Victoria for $224,127.

On 9 October 2015, Bendigo and Adelaide Bank sent the Roderic and Margaret a Notice of Demand for $230,935.18.

On 22 March 2016, Roderic was declared bankrupt by a sequestration order made by the court.

In April 2016, the CA Unit Trust sold the Toukley Property for $450,000. $117,367 of the settlement proceeds was used to paid out a mortgage secured over a property owned by the CA Unit Trust. The balance of $281,789 was paid into the Power Super Fund.

On 30 November 2017, Margaret was declared bankrupt by a sequestration order made by the court.

Alice Faye Ruhe was appointed the trustees of Roderic and Margaret's bankrupt estates.

On 2 April 2016 and 22 March 2019, Rodmarg and Rodmargy were deregistered. By court orders, they were reinstated on 15 April 2021 to be wound up and Alice was appointed as liquidator of Rodmarg and Rodmargy, and also the receiver of the Power Super Fund and the CA Unit Trust.

On 21 September 2022, Roderic died and Margaret was the sole executrix of Roderic's deceased estate.

On 30 November 2023, Alice commenced proceedings in the Federal Court of Australia in her capacity as the trustee of the bankrupt estates of Roderic and Margaret, seeking declarations under sections 121, 128B and 128C of the *Bankruptcy Act 1966* (Cth) that certain transactions to be void against the trustee.

Section 121 of the Bankruptcy Act provides transfers to be void against the trustee of bankruptcy, where the bankrupt's intention was to stop divisible assets becoming available to creditors or to defeat or delay the proper distribution of assets to creditors.

Section 128B of the Bankruptcy Act provides that transfers of property into superannuation fund to be void against the trustee, where the intention of the transfer was to defeat creditors. Section 128C extends this to include transfers made by third parties on a bankrupt's behalf into the bankrupt's superannuation fund.

Issues

1. Was the transfer of the units in CA Unit Trust from Roderic and Margaret to the Power Super Fund void against the trustee in bankruptcy?
2. Did the interest in the Blacktown property or its proceeds vest in the trustee of bankruptcy upon sequestration of Roderic and Margaret's estates?

Decision

Based on the evidence, Neskovcin J was satisfied that Roderic and Margaret's main purpose of transferring their units in the CA Unit Trust was to prevent the units from being divisible among their creditors. He held that the unit transfer was void against the trustee in bankruptcy.

Neskovcin J was also satisfied that the Blacktown Property was a joint asset of Roderic and Margaret prior to its sale, and the tracing of the proceeds of sale meant that:

1. 90% of the purchase price of the Toukley Property by the CA Unit Trust came from the proceeds of sale of the Blacktown property, and therefore 90% of the Toukley Property was held by the CA Unit Trust for Roderic and Margaret's benefit; and
2. the trustee in bankruptcy had an interest in the proceeds of sale of the Toukley Property, including the amount used to discharge the mortgage of a property of the CA Unit Trust, and the amount transferred to the Power Super Fund.

COMMENT – a separate issue to be considered in relation to the transfers to the superannuation fund is whether the acquisition of the units by the superannuation fund was permitted under section 66 of the *Superannuation Industry (Supervision) Industry Act 1993* (Cth).

Citation *Ruhe (Trustee) v Rodmarg Pty Ltd, in the matter of Bankrupt estates of Power* [2024] FCA 638 (Neskovcin J, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/638.html

2.4 Coronica – disqualification of SMSF trustee

Facts

Giuseppe Coronica was an accountant and tax agent with over 50 years' experience having started his own accounting practice. Giuseppe provides accountancy and tax agent services as an employee of G. Coronica Pty Ltd which was incorporated in 1974

Prior to 20 November 2018, G. Coronica Pty Ltd had two directors being Giuseppe and Yvonne Price who worked for Giuseppe as his personal assistant for 45 years. Prior to 20 November 2018, Giuseppe held 7,499 out of a total number of 7,500 shares on issue, and Yvonne held 1 share. From 20 November 2018, Giuseppe was the sole director of G. Coronica Pty Ltd and owner of all of its issued shares.

The G Coronica Superannuation Fund is a self-managed superannuation fund established on 16 May 1975 and its current trust deed was executed on 21 November 1994.

At all relevant times, Giuseppe has been the sole member of the Fund who has had an account balance. Yvonne became a member of the Fund in the 2011 income year, but her account balance was always nil. The Fund has been in pension phase since 1 July 2016 and commenced paying a pension to Giuseppe at that time.

The Fund's SMSF annual income tax returns for the 2008 to 2014 income years were prepared and lodged by Giuseppe. Giuseppe was appointed as the approved auditor for the Fund for the 2000 to 2007 income years. The Fund was audited by approved SMSF auditor Chantelle Mansour (being Giuseppe's daughter) for the 2010 to 2012 income years. In the 2013 and 2014 income years, the Fund was audited by approved SMSF auditor Simon McCormack.

During the 2009 to 2014 income years, the Fund held a Direct Investment Account with the Commonwealth Bank of Australia (**CBA Account**). This bank account was linked to the Fund's share trading account as the Fund principally invested in listed shares and used funds from the CBA Account to pay for share purchases. Dividends and proceeds from the sale of listed shares were similarly paid into the CBA Account.

The Fund also maintained a "suspense account" in respect of Giuseppe's dealings with the Fund, including to receive his concessional and non-concessional contributions. Giuseppe stated that when he transferred assets into the Fund or when he paid expenses incurred by the Fund from his personal funds, he recorded such amounts as an acquisition from him in the suspense account. He stated that the Fund would then pay him for those assets and expenses using cash from the CBA Account or by directing third parties who owed the Fund money, to pay him instead. Giuseppe stated that he recorded these payments by the Fund to him as repayments in the suspense account.

Giuseppe also claimed that on a regular or yearly basis, he would work out the balance of the suspense account and if he had given the Fund more than it had paid him, the balance was treated as his contribution to the Fund for that income year.

In 1999, Giuseppe acquired all of the 100 ordinary shares in G. Coronica Nominees Pty Ltd (**Nominees**) in consideration of $100. Giuseppe has been the sole director of the Nominees since 5 May 2004.

The Company's income tax returns for the 2004 to 2014 income years and its financial statements for the 2009 and 2011 to 2014 income years disclose that Nominee's main business activity was investments, including the acquisition of listed shares.

At the commencement of the 2009 income year, Giuseppe was indebted to the Fund in the amount of $248,842.50 (**Member Loan**). The Member Loan plus a further advance of $150,000, as well as further proceeds from the sale of the Fund's livestock that were all banked in Mr Coronica's personal account were all loans,

As of 30 June 2009, Nominees had an estimated franking credit account balance of $175,786.17. On or around 1 July 2008, Nominees and Giuseppe entered into a Division 7A excluded loan agreement and loan facility agreement for income tax purposes (**Div 7A Loan**). Relevantly, the balance of the loan outstanding as of 30 June 2009 was $174,803.13.

On or around 7 April 2009, Giuseppe transferred his shares in Nominees (**Shares**) to the Fund for $100,000. The "payment" was recorded by way of journal entry in the Fund's "suspense account".

Giuseppe valued the Shares on the basis that a significant discount was attributed in the value of the Div 7A Loan. The valuation did not take into account the retained earnings of Nominees or its available franking credits. Following the transfer of the Shares, Nominees declared fully franked dividends to the Fund of $35,000 in the 2009 to 214 income years. Nominees had not paid dividends in prior years when it was owned by Giuseppe.

On 9 June 2016, the Commissioner commenced an audit of the Fund for the 2011 to 2014 income years. On 5 September 2018, the Commissioner advised Giuseppe of the Commissioner's decision to disqualify Giuseppe from acting as a trustee of a SMSF under sections 126A(1) and 126A(3) of the SISA (**Disqualification Decision**).

On 25 September 2018, Giuseppe requested a review of both the Disqualification Decision. On 23 November 2018, the Commissioner advised Giuseppe of the completion of the review. Relevantly, the Commissioner confirmed the decision to disqualify Giuseppe.

On 11 December 2018, Giuseppe applied for review by the Tribunal of the Disqualification Decision.

On 1 April 2021, the review of the Disqualification Decision was determined by the AAT constituted by Senior Member James. Broadly, Senior Member James decided to set aside the Disqualification Decision and, in place of that decision, to accept undertakings from Giuseppe.

The Commissioner appealed to the Federal Court from the AAT decision. On 7 February 2022, Justice Davies allowed the appeal, setting aside the initial AAT decision and remitting the matter to the AAT for determination according to law.

Issue

Were the grounds for disqualifying Giuseppe in sections 126A(1) and 126A(3) established? If so, should the AAT exercise the discretion to disqualify Giuseppe as a trustee of the Fund?

Decision

Contraventions of the SISA

The AAT held that it was "indisputable" that the Fund's acquisition of the Shares contravened section 66(1) of the SISA because Giuseppe was a "related party" of the Fund and the acquisition was intentional. Further, the AAT found that the market value of the Company Shares was significantly higher than the consideration paid by the Fund to Giuseppe. The AAT inferred from all of the circumstances that Giuseppe was taking advantage of his position to "game the system". Giuseppe was reducing his personal tax liability and at the same time providing a benefit to the Fund which would accrue to him in the future.

The AAT stated that there was "no doubt" that section 65(!0 of the SISA was contravened as Giuseppe was indebted to the Fund pursuant to the Member Loan and other loans. Giuseppe accepted the existence of the loans, the fact that they remained in place for several months, were unsecured and interest-free. He also acknowledged they were not recorded until accounts for the Fund were prepared many months after the end of the financial year. further, the Member Loan was an in-house asset which in its own right, caused the Fund to breach the in-house asset rule in section 84(1) of the SISA.

The initial AAT decision stated there were also at least three contraventions of section 83(2) of the SISA owing to the subsequent acquisition of the Shares by the Fund. That provision states that where the market value ratio of the Fund's in-house assets exceeds 5%, a trustee of the Fund must not acquire an in-house asset. The acquisition of the Shares caused the Fund to exceed the in-house asset rule.

Giuseppe further breached the in-house asset rules by investing in trusts over certain mortgage loans in the 2012 and 2014 income years (**Mortgage Loans**). The AAT found that these investments were in-house assets of the Fund because Giuseppe, as a member of the Fund, and sole trustee of the trusts over the Mortgage Loans, controlled those trusts within the meaning of sections 70E(2), 70E(3)(a) and 70B(e) of the SISA. It followed that the investment in the trusts over the Mortgage Loans was an investment in a related trust of the Fund within the meaning of section 71(1) of the SISA.

The AAT also concluded that the sole purpose test in section 62(1) of the SISA was breached by the acquisition of the Shares by the Fund and the subsequent payment of dividends to the Fund because the Fund was not being maintained for the sole purposes prescribed in the SISA. In particular, as a result of the transfer of the Company Shares, dividends paid by Nominees that would otherwise have been taxed at Giuseppe's higher marginal tax rate were taxed at the concessional tax rate of 15% and the Fund was able to access franking credits. The AAT inferred that Giuseppe sought to minimise his tax liability.

The AAT also found that Giuseppe's way of doing things was also not in accordance with the prescribed operating standards set out in the SIS Regulations pursuant to section 34(1) of the SISA. Regulation 4.09A(2), which came into effect on 7 August 2012, provides that a trustee of a superannuation fund must keep the money and other assets of a fund separate from those held for the trustee personally. The AAT found that Giuseppe Coronica did not do so from 7 August 2012.

Disqualification decision

The AAT accepted that there were numerous and significant contraventions of the SISA in the 2009 to 2014 income years which had been established for the purposes of section 126A(1) of the SISA. The seriousness of the contraventions is also reinforced by the fact that some of the contraventions may result in criminal offences.

The AAT stated as follows:

> *The contraventions of the SISA were multiple and, in some cases, repeated in the period spanning the 2009 to 2014 income years. In all cases, the contraventions arose directly from Mr Coronica's actions (or inactions) and own views about the SISA. In other words, the contraventions were not claimed to be*

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> *accidental or due to honest mistakes, nor did Mr Coronica seek and rely on external independent advice. Mr Coronica was accountable in all situations and clearly failed to act professionally, competently and with due diligence in carrying out his duties as a trustee of the Fund.*

The AAT found that Giuseppe did not have the proper discipline and focus with respect to the regulatory regime governing superannuation funds. Rather, Giuseppe had adopted an "opportunistic attitude to suit his self-interests as he took advantage of his role as a trustee of the Fund". Moreover, once the Commissioner audited the Fund, Giuseppe defended his position rather than taking responsibility and remedying the breaches.

Giuseppe sought to draw parallels between his circumstances and that of Gordon Merchant in *Merchant and Commissioner of Taxation* [2024] AATA 1102. However, the AAT distinguished the two matters by reference to the following:

1. Gordon had been found to be a fit and proper person by the Commissioner whereas Giuseppe was not a fit and proper person;
2. Gordon had undertaken the relevant transactions based on independent advice, and there was no suggestion at the time of entering into the transaction that his actions were unlawful. Giuseppe did not seek external advice and was involved in multiple contraventions over many years;
3. Giuseppe was reluctant to cede control of his SMSF as evident from his alternative proposal to allow his daughter to be the trustee; and
4. the AAT agreed with the Commissioner’s submissions that it was appropriate to take into account the objects of the SISA in applying sections 126A(1) and 126A(3) and deterrence generally.

Accordingly, the AAT held that it could not be satisfied, on the balance of probabilities, that Giuseppe did not present a future compliance risk and will not deviate from the standards required of him as a trustee of a superannuation fund, even if undertakings were accepted. Therefore, the AAT was not prepared to exercise its discretion to set aside the Disqualification Decision. The Disqualification Decision was affirmed.

Citation *Coronica v Commissioner of Taxation* [2024] AATA 2592 (Senior Member Lazanas, Melbourne)
w https://classic.austlii.edu.au/au/cases/cth/AATA/2024/2592.html

2.5 Tao – landholder duty in Victoria

Facts

In 2011, Nicolaos Constantinou, an experienced property developer, travelled to China with Zhiyong Tao and met with Wilfred Wiemer, who lived in China, to discuss the potential of engaging in a joint venture to conduct property development in Melbourne.

Nicolaos, Zhiyong and Wilfred agreed to establish a special purpose vehicle to carry on the developments. On or about 18 March 2011:

1. 66 William Road Pty Ltd (**66WR**) was incorporated with Nicolaos as its sole director and shareholder;
2. 66WR entered into a deed to establish the WCT Unit Trust; and
3. units in the WCT Unit Trust were issued as follows: 50 units to Maclaw No. 547 Pty Ltd (**Maclaw**) as trustee for The Mountain Highway Unit Trust, 25 Units to Fredco Incorporated Limited (**Fredco**) as trustee for Nomsec No. 1 Limited, and 25 units to Amber Investments Pty Ltd (**Amber**),

Amber was a company of which Zhiyong was the majority investor. Maclaw and Fredco were entities associated with Nicolaos and Wilfred, respectively.

On 21 April 2011, 66WR (in its capacity as trustee of the WCT Unit Trust) entered a contract to purchase the property at 74-84A Hutchinson Road, Lynbrook (**Property**) for $2.7 million, taking possession on 10 February 2012.

In order to fund the purchase of the Property, meet the development costs and the capitalisation of interest for 12 months, 66WR entered an agreement to borrow $2.79 million from Southern Finance Limited (**Southern Finance**). The security for the loan was a first registered mortgage over the Property. The balance of the purchase price was funded by loans from Zhiyong and Wilfred in the amounts of $581,666 and $595,966, respectively.

In March 2013, the loan and the securities were transferred from Southern Finance to Bendigo and Adelaide Bank Limited (**Bendigo Bank**). By July 2013, the loan was in arrears of around $137,000 and Bendigo Bank was seeking to exit this loan and be repaid via the sale of the asset.

In late 2013, Wilfred travelled to Australia and he and Zhiyong arranged for an accountant to conduct an informal audit of 66WR's finances. The accountant formed the view that Nicolaos *"had mixed the funds (including bank loans) belonging to the WCT's two projects with his private project funds"*, and that there had been interest payment defaults by Nicolaos in respect of his personal project and the properties in the WCT Unit Trust.

Shortly after, a meeting was held between Nicolaos, Zhiyong and Wilfred during which Wilfred proposed that Nicolaos be replaced by Zhiyong as director of 66WR but without a change to the ownership of the WCT Unit Trust. On 11 February 2014, Zhiyong acquired all the issued shares in 66WR from Nicolaos. On 6 March 2014, Zhiyong was appointed as sole director of 66WR to replace Nicolaos.

On 7 March 2014, Zhiyong and Nicolaos met with Bendigo Bank to discuss the way forward regarding the loan. Zhiyong was unable to source funds to pay the loan, as requested by Bendigo Bank. Therefore, Zhiyong decided to proceed with the sale of 29 lots on the Property.

By March 2015, Bendigo Bank had become fed up with the delays in the settling of the lots. As a result, on 20 April 2015, Bruno Secatore and Daniel Juratowitch of Cor Cordis were appointed as controllers of 66WR by Bendigo Bank.

On 16 October 2015, a sale of the Property was completed with the sale proceeds used to repay the Bendigo Bank loan and the Controllers' costs. The unitholders did not receive any payment from the sale of the Property. The loans advanced by Zhiyong and Wilfred to 66WR were not repaid. 66WR was deregistered on 20 October 2019.

On 31 May 2019, the Commissioner of State Revenue issued a notice of assessment to Zhiyong imposing duty of $199,650.00 plus penalties of $49,912.50 and interest of $22,383.51 in respect of his acquisition of the shares the 66WR and his appointment as sole director of 66WR. The Assessment was issued on the basis that Zhiyong acquired control of the WCT Unit Trust pursuant to section 82 of the *Duties Act 2000* (Vic).

On 9 May 2022, the matter was referred to the Tribunal by the Commissioner, at the request of Zhiyong.

In Victoria, the landholder regime imposes duty on relevant acquisitions of:

1. direct interests in landholders (sections 78 to 80 of the Duties Act);
2. synthetic interests in a landholder (section 81 of the Duties Act), being economic entitlements to participate in the dividends or income of a landholder or a right to participate in the income, rent, profits or proceeds of sale of its land; and
3. control interests in a landholder (section 82 of the Duties Act).

Section 82 of the Duties Act provides as follows:

> *(1) Despite anything to the contrary in this Part, if a person within a 3 year period acquires, directly or indirectly, control over a private landholder, other than by a relevant acquisition dutiable under this Part, then, on the acquiring of that control, the person is taken, for the purposes of this Part, to have made a relevant acquisition in the landholder of—*
>
> > *(a) 100%; or*
> >
> > *(b) a lesser percentage determined by the Commissioner to be appropriate in the circumstances.*
>
> *(2) For the purposes of subsection (1), a person acquires control over a private landholder if the person acquires the capacity to determine or influence the outcome of decisions about the private landholder's financial and operating policies, taking into account—*
>
> > *(a) the practical influence the person can exert in addition to any rights the person can enforce; and*
> >
> > *(b) any practice or behaviour affecting the private landholder's financial or operating policies (even if that practice or pattern of behaviour involves the breach of an agreement or a breach of trust).*

The Commissioner contended that Zhiyong obtained control in the relevant sense in February/March 2014 because:

1. when he acquired the shares in 66WR and became its sole director, he acquired not just the capacity, but the practical ability, to determine or influence WCT Unit Trust's financial and operating policies;
2. he did not have the capacity to determine those matters before he became a director; and
3. the Tribunal could comfortably draw the necessary link between Zhiyong's control of the trustee company and the trust's policies.

Zhiyong contended that he had the day-to-day management of 66WR and therefore the WCT Unit Trust from the time of his appointment as its sole director, but this was simply fulfilling the policy set by the unit holders of the WCT Unit Trust at the outset, namely the development of the Property and sale of the resultant lots.

Issues

1. Did Zhiyong obtain control of the WCT Unit Trust when he acquired the shares in and became the sole director of 66WR?
2. Can section 82 of the Duties Act be engaged in the absence of Zhiyong acquiring any interest in the WCT Unit Trust equivalent to a beneficial interest?
3. Is it appropriate in the circumstances to determine a percentage less than 100% as the relevant acquisition?

Decision

<u>Control of the WCT Unit Trust</u>

The VCAT accepted that while the concept of control over 'financial and operating policies' envisaged by section 82 of the Duties Act is focused on the strategic direction of a landholder, as opposed to its day-to-day management, Zhiyong had controlled the strategic direction of the WCT Unit Trust between March 2014 and April 2015.

The VCAT stated that while the two other unit holders in the WCT Unit Trust could have used the power in clause 30 of the WCT Unit Trust deed to remove 66WR as trustee of the WCT Unit Trust, and brought any control exercised by Zhiyong to an end, they never did so.

Accordingly, the VCAT found that Zhiyong acquired the capacity to determine or influence the outcome of decisions about the WCT Unit Trust's financial and operating policies.

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Can section 82 apply?

The VCAT considered the process of statutory interpretation and stated that, on its face, section 82 of the Duties Act applies to any situation where control of a landholder is obtained. It was noted that this provision was modelled on the test of ‘control’ in section 50AA of the *Corporations Act 2001* (Cth), but that its application was broader than section 50AA as a private landholder can be a private unit trust as well as private companies.

In respect of the context of section 82, the VCAT stated that it was important that section 82 only applies where there is no relevant acquisition under section 79 (i.e. of a direct or beneficial interest in a trust) or section 81 (i.e. of a synthetic or economic interest in a trust). This, of itself, suggested to the VCAT that section 82 is not intended to be linked to any beneficial or synthetic interest in the trust. Further, section 82 does not contain any mechanism to determine the extent of the interest in the trust taken to have been acquired (whether beneficial, synthetic or equivalent), but rather defaults to a *prima facie* relevant acquisition of a 100% interest. The VCAT also noted that section 82 differed from section 81 as it is concerned with something other than the economic entitlements.

The VCAT accepted that section 35(1) of the Duties Act exempts a transfer of land from duty under Chapter 2 where it involves a change in trustee of a trust without any change in beneficial ownership of the land held by the trustee. However, the VCAT stated that it is not incongruous to impose duty under section 82 on a change in the control of the trustee where there is no change in the beneficial ownership of the land held by the trustee because:

1. Zhiyong could have made arrangements to set up his own company to become trustee in place of 66WR and then organise for 66WR to transfer the land to the new trustee company and claim the exemption in section 35;
2. by March 2014, the financial position of the WCT Unit Trust was dire and any steps to extend the loan or refinance in order to complete the development project was only likely to benefit Zhiyong and/or Wilfred as (unsecured) creditors of the trust; and
3. accepted the Commissioner’s submission that, if any such incongruity reveals a gap in the legislation, the words required to be read in to the provision to address that gap would be enormous and goes well beyond what can be achieved through an exercise of statutory interpretation.

Accordingly, the VCAT found that it was not necessary that Zhiyong also obtained an interest equivalent to a beneficial interest in the WCT Unit Trust for section 82 to be engaged.

Should a percentage less than 100% be determined to be the relevant acquisition?

The VCAT held that the discretion in section 82(1)(b) of the Duties Act was to be exercised having regard to those relevant considerations to be found in the subject-matter, scope and purpose of the provisions.

The VCAT noted that in circumstances where the landholder regime has been accepted as an anti-avoidance provision, to prevent the indirect acquisition of a landholder without paying duty, it was appropriate to take account of pre-existing interests held in the landholder, even where those interests are not held directly.

Zhiyong was one of two directors of Amber and personally held 6 out of the 10 issued shares in Amber. Therefore, the VCAT held that Zhiyong stood to receive 60% of any distributions Amber received from the WCT Unit Trust.

Accordingly, the VCAT held that Zhiyong held a pre-existing indirect economic interest of 15% (i.e. 25% x 60%) in the WCT Unit Trust. Therefore, the appropriate reduction is 15% from 100% which represented the 15% economic interest already held by Zhiyong.

The VCAT ordered that the assessment be set aside and that the Commissioner reassess Zhiyong in accordance with its reasons.

Citation *Tao v Commissioner of State Revenue* [2024] VCAT 637 (Senior Member R Tang AM, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2024/637.html

2.6 Premier Bay – primary production exemption from land tax in Victoria

Facts

Premier Bay Pty Ltd ACN 052 427 684 acts as the trustee of the Montalto Family Trust.

Tommaso Montalto is a beneficiary of the Montalto Family Trust

Premier Bay owned a property situated at 1145 Donnybrook Road, Donnybrook (**Donnybrook Property**).

Between the middle of 2017 and the middle of 2019, the Donnybrook Property was primarily used for the business of breeding cattle for sale by a partnership between Tommaso and the estate of his late wife, Angela Montalto (**T&A Partnership**). The T&A Partnership leased the Donnybrook Property from Premier Bay.

Premier Bay bred cattle for sale from a property located in Wildwood Road, Whittlesea (**Wildwood Property**), owned by Tommaso. Premier Bay also owns a number of other properties, of which, between the middle of 2017 and the middle of 2019, three were rented to third parties and the remaining properties were vacant.

Tommaso was normally engaged in a substantially full-time capacity in the business of primary production between the Donnybrook Property and the Wildwood Property.

On 29 August 2019, the Commissioner of State Revenue for Victoria issued land tax assessments in respect of the Donnybrook Property for the 2018 and 2019 land tax years.

Premier Bay objected against the assessments and later sought review by the Victorian Civil and Administrative Tribunal, relying on Section 67 of the *Land Tax Act 2005* (Vic). Section 67 exempts certain land used for the business of primary production from land tax. Section 67 relevantly provides:

(1) Land is exempt land if the Commissioner determines that—
(a) the land comprises one parcel that is—
(i) wholly or partly in greater Melbourne; and
(ii) wholly or partly in an urban zone; and
(iii) used solely or primarily for the business of primary production; and
(b) the owner of the land is a person specified in subsection (2).
(2) The owner of the land must be—
…
(d) a trustee of a discretionary trust of which—
(i) the principal business must be primary production of the type carried on the land; and
(ii) either—
(A) each specified beneficiary is a natural person; or
(B) at least one of the specified beneficiaries is a natural person and each of the specified beneficiaries who is not a natural person is either—
(a) a charitable institution or a trustee of a charitable trust; or
(b) a company all of the shares in which are owned by one or more of the specified beneficiaries who are natural persons; or
(c) a trustee of a trust (except a charitable trust), all of the beneficiaries or specified beneficiaries of which are specified beneficiaries of the discretionary trust who are natural persons; and

(iii) either—

(A) at least one of the specified beneficiaries is a natural person who is normally engaged in a substantially full-time capacity in the business of primary production of the type carried on the land; ...

The VCAT held that, while Premier Bay met the requirements of section 67(1) and 67(2)(d)(iii) of the Land Tax Act, it did not satisfy the requirement in section 67(2)(d)(i) of the Land Tax Act and, therefore, affirmed the assessments issued to Premier Bay for the 2018 and 2019 land tax years. The VCAT found that Premier Bay carried on two businesses of equal significance, being primary production from the Wildwood Property, and leasing of the Donnybrook to the T&A Partnership along with other properties leased to third parties, neither of which could be considered to be its principal business.

Premier Bay appealed the decision of the VCAT. In its appeal, Premier Bay relied on the High Court decision in *Spriggs v Commissioner of Taxation* (2009) 239 CLR 1 (**Spriggs**), where the High Court held that a taxpayer *"may pursue separate income-producing activities as part of a single business"* and that, in determining whether the separate income-producing activities were part of a single business, it was necessary to examine the *"degree of connection and interdependence between the activities"* and consider *"the whole of the operations concerned"*.

Premier Bay argued that the income streams of both the T&A Partnership and Premier Bay arose from the *"wholly integrated"* activities of the same primary production undertaking performed on the same land. The same cattle were rotated between the Donnybrook Property and the Wildwood Property, the same farm equipment was used, and the activity on both farms was largely carried out by the same individuals, namely Tommaso. Premier Bay argued that *"the lease was merely the mechanism by which the fruits of the primary production activity carried out by Mr Montalto on the subject land was conveyed to Premier Bay"*.

Issue

Did Premier Bay satisfy the requirements for the land tax exemption pursuant to section 67 of the Land Tax Act in each of the 2018 and 2019 years for the Donnybrook Property?

Decision

Justice Croft found that the lease of the Donnybrook Property to the T&A Partnership was a function of Premier Bay's primary production business. Justice Croft considered, consistent with Spriggs, that there is a synergy and a substantial degree of integration between the primary production activities of Premier Bay and the lease to the T&A Partnership. Accordingly, despite the return of income to Premier Bay from breeding activities on the Donnybrook Property being rental income, Croft J held that primary production was the Premier Bay's principal business and the land was exempt under section 67 of the Land Tax Act.

Justice Croft gave leave on all grounds and allowed the appeal with respect to grounds 1, 2, 3 and 4, and dismissed ground 5.

COMMENT – whether business activities are separate, or a single integrated business, may be relevant in other tax contexts. For example, the application of the non-commercial loss rules.

Citation *Premier Bay Pty Ltd v Commissioner of State Revenue* [2024] VSC 447 (Croft J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2024/447.html

2.7 Bo – principal place of residence of a married couple

Facts

Yujuan Bo and Faxiang Ying were born in China.

On 19 March 1997, Yujuan married Faxiang. Yujuan and Faxiang have two children, a son born in 2007 and a daughter born in 2008.

Faxiang is the chairman and part shareholder of a company based in the Jiangsu Province in China.

On 18 June 2016, Faxiang purchased a residential property at Killara in his own name. Shortly after, in 2016, Yujuan and her family came to Australia. Both Yujuan and Faxiang intended at the time for the family to live in Australia permanently. Yujuan and Faxiang enrolled their children at schools located near the property.

Since moving to Australia, Yujuan and the children lived in the house at the property. Whenever Faxiang has been in Australia, he lived with Yujuan and the children in the house at the property.

Faxiang frequently travels to China for work, sometimes for lengthy periods of time. From 2016 to 2018, when he was in China, Faxiang stayed at a property in Nanjing which he and Yujuan owned and had previously lived in together from about 2007. Since 2018, when in China, Faxiang has spent the majority of his time in a 3-bedroom apartment which is on the premises of a factory owned by the company in Jiangsu Province. Faxiang also travels for business and stays at hotels.

Yujuan and the children would also visit Faxiang and other family in China. Due to travel restrictions, as a result of the covid pandemic, Yujuan and the children remained in China for around 4 months, joining Faxiang in December 2020 for Christmas and returning to Australia in April 2021. Faxiang was in China from 10 June 2020 until 13 August 2021. He then remained in Australia until 17 December 2021.

In 2021, Yujuan, Faxiang and their children became permanent residents of Australia, with Yujuan and the children becoming Australian citizens in 2023.

On 17 May 2021, Yujuan signed a *"Purchaser/Transferee Declaration Form"* declaring that she had entered into a transaction that resulted in the acquisition by her of an interest in land in New South Wales, being the Killara property.

On 17 May 2021, Faxiang signed an *"Exemption From Duty – Transfers between Married Couples and De Facto Partners Form"* on which a box was ticked declaring the property was *"land that has erected on it a dwelling which at the time of transfer was used as [his and Yujuan's] principal place of residence"*.

On 11 June 2021, the property was transferred from Faxiang to himself and Yujuan as joint tenants, for no monetary consideration. When the transaction was assessed, an exemption from duty was granted under section 104B of the Duties Act. Under section 104B of the Duties Act, no duty is chargeable on a transfer of residential land if, relevantly:

(a) as a result of the transfer … the property is or will be held by a married couple … as joint tenants or as tenants in common in equal shares, and
(b) the residential land –
  (i) is land on which there is a dwelling that, when the transfer of dutiable property occurs, is used as the principal place of residence of the married couple …;
  (ii) …
(c) the residential land is used solely for residential purposes and not for any other purpose …, and
(d) both the transferor and the transferee are the married couple or one of them … and no other person is a party to the transfer …

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Sometime later, the property was transferred by Yujuan and Faxiang into Yujuan's name alone. At that time, transfer duty was paid on the transfer of 50% of the property. The reason for this transfer was to avoid surcharge land tax that Faxiang was liable to because of the amount of time he spent out of Australia.

On 16 August 2023, following an investigation, the Chief Commissioner of State Revenue issued an assessment to Yujuan in the amount of $320,188.42, comprising transfer duty of $242,990, penalty tax of $31,112 and interest of $46,086.42.

It was not in dispute that paragraphs (a), (c) and (d) of section 104B(1) of the Duties Act were satisfied as Yujuan and Faxiang were a married couple, the property was residential land on which there was a dwelling that was used solely for residential purposes, and the transfer resulted in the property being held by Yujuan and Faxiang as joint tenants.

The Chief Commissioner argued that paragraph (b) of section 104B(1) of the Duties Act was not satisfied. The Chief Commissioner considered that, as Faxiang was not in Australia and had not lived in Australia for almost a year at the time of the transfer of the property, the property could not be said to be his principal place of residence at the time of the transfer, and therefore, the property could not be said to be the principal place of residence of the married couple at the time of the transfer.

Yujuan argued, among other things, that she should "*have the benefit of*" section 104B of the Duties Act as she, the transferee and the addressee of the assessment, is married to Faxiang and the property is her principal place of residence. Yujuan noted that she was a resident of Australia at the time of the transfer, the property had been her home since 2016 and the property was the only property in NSW which she and Faxiang used as their primary residence as at the date of the transfer. It was also submitted that had Faxiang and Yujuan been properly advised at the time of the purchase, the property could have been purchased by them as joint tenants.

Yujuan objected to the assessment. The Chief Commissioner disallowed the objection by notice dated 21 September 2023.

Issue

When the transfer occurred, was the property used as the principal place of residence of Yujuan and Faxiang?

Decision

The NCAT noted that to satisfy section 104B(1)(b) of the Duties Act, the dwelling must be used as the principal place of residence of 'the married couple'. The Senior Member considered that, in the circumstances, Faxiang's absence from the property at the time of the transfer, being a period of twelve months, does not necessarily negate or diminish the status of the property as the principal place of residence of Yujuan and Faxiang as the married couple.

The NCAT found that the extent and quality of the use of the property by Yujuan and Faxiang, viewed objectively, clearly establishes it as their principal place of residence as their occupation of the home together had the requisite degree of permanence to establish it as their principal place of residence.

The NCAT found the transfer of the property was exempt under section 104B of the Duties Act.

The assessment was revoked.

Citation *Bo v Chief Commissioner of State Revenue* [2024] NSWCATAD 219 (Senior Member Dunn, Sydney)
w https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/219.html

2.8 Appeal update – Ierna

The Commissioner has appealed to the Full Federal Court against the decision in *Ierna & Ors v Commissioner of Taxation* [2024] FCA 592 (see our June 2024 Tax Training Notes).

In that case, the Federal Court allowed appeals by 3 taxpayers against amended assessments in which the Commissioner included payments under a corporate restructure as dividends pursuant to section 45B of ITAA 1936 or, alternatively, as a tax benefit arising under a 'scheme' pursuant to Part IVA. The Court found the restructure was effected to eliminate the adverse commercial impacts of Division 7A loans, not a scheme to collectively provide the taxpayers with a $52 million capital benefit.

Citation *Ierna v Commissioner of Taxation* [2024] FCA 592 (Logan J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/592.html

2.9 Appeal update – Kilgour

Two taxpayers have appealed against the Federal Court decision in *Kilgour v Commissioner of Taxation* [2024] FCA 687 (see our July 2024 Tax Training Notes).

In that case, the taxpayer sought to argue that the consideration received for the sale of shares in Punters Paradise were not at market value, and the market value substitution rule should apply as the parties to the transaction did not deal with each other at arm's length. For the two taxpayers appealing against the decision, there was also a consequential issue concerning satisfaction of the maximum net asset value test for the purpose of accessing the small business CGT concessions.

Citation *Kilgour v Commissioner of Taxation* [2024] FCA 687
w https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/687.html

2.10 Appeal update – Hyder

Two taxpayers have applied to the Full Federal Court for an extension of time and leave to appeal the decision in *Hyder & Ors v Commissioner of Taxation; EMH IV Pty Ltd ATF EMH IV Family Trust v Commissioner of Taxation* [2024] FCA 464 (see our May 2024 Tax Training Notes).

In that case, in 2 proceedings heard together, the Federal Court dismissed the taxpayers' application for review of the Commissioner's decision to refuse to defer the due date for payment of tax-related liabilities under alternative assessments but granted the application in respect of the Commissioner's refusal to remit the general interest charge (**GIC**). The Federal Court found the Commissioner had failed to consider or address the central issue raised, being that one of the taxpayers had already paid the tax and GIC that was reflected in alternative assessments, when making the relevant decision.

Citation *Hyder v Commissioner of Taxation* [2024] FCA 464 (Thawley J, Queensland)
w https://www.austlii.edu.au/cgibin/viewdoc/au/cases/cth/FCA/2024/464.html

2.11 Appeal update – MJH

The taxpayers have applied to the High Court for special leave to appeal against the decision in *Federal Commissioner of Taxation v Michael John Hayes Trading Pty Ltd ATF MJH Trading Trust & Ors* [2024] FCAFC 80.

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In that case, the Full Federal Court held the AAT had erred in its conclusion that a distribution of fully franked dividends was not made as part of dividend stripping operations because, despite the taxpayers having received the dividends free of tax, the original shareholders did not receive any capital sum as a substitute for taxable dividends paid and the requisite tax avoidance purpose was not present.

The Full Court found that the AAT failed to give proper effect to the words "by way of, or in the nature of", and that the AAT erred in its analysis of dominant purpose.

Citation *Federal Commissioner of Taxation v Michael John Hayes Trading Pty Ltd ATF MJH Trading Trust & Ors* [2024] FCAFC 80 (Bromwich, Thawley and Hespe JJ, Queensland)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/80.html

2.12 Other tax and superannuation related cases in period of 12 July 2024 to 8 August 2024

Citation	**Date**	**Headnote**	**Link**
YNVP and Commissioner of Taxation (Taxation) [2024] AATA 2588	30 June 2024	SMALL BUSINESS TAX AND COMMERCIAL – burden of proof – tribunal powers on review – alleged unreported income – decisions set aside and remitted.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2588.html
Deputy Commissioner of Taxation v Fayad [2024] FedCFamC2G 625	17 July 2024	BANKRUPTCY - Application for review of sequestration order made by Registrar – whether bankruptcy notice was served on debtor – bankruptcy notice served – whether hearing of creditor's petition should be adjourned pending determination of debtor's application before the Administrative Appeals Tribunal seeking review of rejection of debtor's objection to amended notices of assessment – application for review dismissed and sequestration order affirmed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FedCFamC2G/2024/625.html
Rusanov v Commissioner of Taxation [2024] FCA 777	18 July 2024	TAXATION – appeal from Administrative Appeals Tribunal (AAT) in which the AAT affirmed two objection decisions made by the Commissioner of Taxation – burden of proof imposed on taxpayer by s14ZZK Taxation Administration Act 1953 (Cth) – where applicants failed to discharge burden of proof – no error of law shown – no procedural unfairness – appeal dismissed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/777.html
Dou and Tax Practitioners Board [2024] AATA 2580	19 July 2024	APPLICATION FOR REGISTRATION AS A TAX AGENT – whether the applicant has the required relevant experience to be registered – whether the applicant has worked under the supervision and control of a registered tax agent for the required period – paucity of evidence to demonstrate 'supervision and control' –	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2580.html

Citation	Date	Headnote	Link
		decision under review	
Deputy Commissioner of Taxation v Aguer [2024] ACTSC 236	22 July 2024	CIVIL LAW – JURISDICTION, PRACTICE AND PROCEDURE – Claim for various taxation monies – Income Tax Assessment Act 1997 (Cth) s 167 – Taxation Administration Act 1953 (Cth) pt IVC – income tax assessments not lodged – administrative penalties – penalisation of the defendant for failing to lodge income tax returns – judgment	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTSC/2024/236.html
Denton v Chief Commissioner of State Revenue [2024] NSWCATAD 206	25 July 2024	TAXES AND DUTIES — Consideration of penalties and interest — no reasonable care — no remission	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/206.html
AusNet Services Ltd v Commissioner of Taxation [2024] FCA 839	25 July 2024	Interlocutory proceedings	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/839.html
CJYB and Commissioner of Taxation (Taxation) [2024] AATA 2640	29 July 2024	TAXATION – INCOME TAX – burden of proof – whether PAYG credits form part of assessment under review – where applicant did not give evidence – decisions affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2640.html
Griglio v Chief Commissioner of State Revenue [2024] NSWCATAD 212	30 July 2024	STATE TAXES - surcharge purchaser duty - whether applicant a "foreign person" - whether applicant "ordinarily resident" in Australia - whether continued presence in Australia subject to any limitation as to time imposed by law – bridging visa STATE TAXES - interest - market rate - premium rate - penalties - remission - remission of part of interest - discretion - reasonable care	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/212.html
Armidale Jockey Club and Commissioner of Taxation (Taxation) [2024] AATA 2726	30 July 2024	TAX – assessment of superannuation guarantee charge - whether correctly imposed - whether jockeys deemed "employees" of turf racing club pursuant to section 12(3) or section 12(8) of the Superannuation Guarantee (Administration) Act 1992 – decision under review affirmed	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2726.html
Illawarra Turf Club Ltd and Commissioner of Taxation (Taxation) [2024] AATA 2727	30 July 2024	TAX – assessment of superannuation guarantee charge - whether correctly imposed – whether jockeys deemed "employees" of turf racing clubs pursuant to section 12(3) or section 12(8) of the Superannuation Guarantee (Administration) Act 1992 – decision under review varied	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2727.html

Citation	Date	Headnote	Link
Australian Turf Club Ltd and Commissioner of Taxation (Taxation) [2024] AATA 2728	30 July 2024	TAX - assessment of superannuation guarantee charge - whether correctly imposed - whether jockeys deemed "employees" of turf racing clubs pursuant to section 12(3) or section 12(8) of the Superannuation Guarantee (Administration) Act 1992 – decision under review varied	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2728.html
Clarence River Jockey Club Ltd and Commissioner of Taxation (Taxation) [2024] AATA 2729	30 July 2024	TAX – assessment of superannuation guarantee charge - whether correctly imposed – whether jockeys deemed "employees" of turf racing clubs pursuant to section 12(3) or section 12(8) of the Superannuation Guarantee (Administration) Act 1992 – decision under review varied	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2729.html
Bootlis v Commissioner of Taxation (Taxation) [2024] AATA 2723	2 August 2024	Where applicant's tax agent lodged tax returns for relevant years – where applicant filed amended tax returns containing sizable deductions without tax agents knowledge in respect of a trust that did not exist – where applicant accepted statements made in the amended tax returns were incorrect – whether Commissioner has correctly imposed a penalty for recklessly making a false and misleading statement – whether Commissioner's decision to not exercise discretion to remit penalties should have been made differently – whether claimed hardships enliven discretion to remit – whether applicant has discharged her burden of proof pursuant to section 14ZZK(b)(i) of the Taxation Administration Act 1953 (Cth)	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2723.html
HFTS v Commissioner of Taxation (Taxation) [2024] AATA 2707	2 August 2024	PRATICE AND PROCEDURES – Third-party access request – decision published and anonymised – third-party access denied	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2730.html
Kirkovski v Chief Commissioner of State Revenue [2024] NSWCATAD 223	6 August 2024	TAXES AND DUTIES — First home buyer scheme – satisfaction of residence requirement	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/223.html

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3. Federal Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Superannuation (Objective) Bill 2023	16/11	19/3	20/3		
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11				
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11				
Taxation (Multinational—Global and Domestic Minimum Tax) 2024	4/7				
Taxation (Multinational—Global and Domestic Minimum Tax) Imposition 2024	4/7				
Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) 2024	4/7				

3.2 Notice of an online selling data-matching program

On 8 July 2024, the Australian Taxation Office gave notice by Gazette that it will acquire Australian sales data from online selling platforms for 2023–24 through to 2025–26.

The data items include:

1. client identification details – individuals (given and surname, date of birth, account holder's addresses, Australian business number, email address, contact phone number);
2. client identification details – non-individuals (business name, address, Australian business number, contact name, email address, contact phone number); and
3. account details (account name, account identification number, account registration date, account registration type, store type, seller status, IP address, number of annual sales transactions, value of annual sales transactions, number of monthly sales transactions, value of monthly sales transactions).

It is estimated that the total number of account records obtained will be between 20,000 to 30,000 each financial year with 10,000 to 20,000 of these records matching to individuals.

w https://www.legislation.gov.au/C2024G00406/latest/text

3.3 Extended amendment period for small and medium businesses

Treasury has released exposure draft materials in relation to the proposed amendments to allow small and medium businesses four years to self-amend tax assessments. This is to give effect to a 2023/24 Budget announcement.

The exposure draft legislation proposes the insertion of a new item in the table in section 170(1) as follows:

3A	*The Commissioner may also amend an assessment of an individual, a company or a person (in the capacity of a trustee of a trust estate) that is a small business entity or a medium business entity for a year of income within 4 years after the day on which the Commissioner gives notice of the assessment to the taxpayer if:* *(a) the individual, company or person applies for an amendment in the approved form before the end of that 4 year period; and* *(b) the Commissioner could amend the assessment within 2 years under item 1, 2 or 3.* *The Commissioner may amend the assessment to give effect to the decision on the application.*	This item does not limit item 1, 2 or 3. This item is subject to items 5 and 6.

The amendments are to apply in relation to assessments issued after the commencement of the amending Act for income years starting on or after 1 July 2024.

The exposure draft legislation is open for consultation until 9 August 2024.

COMMENT - The exposure draft legislation clearly only provided an extend amendment period where the application is made by the taxpayer. It was unclear from the budget announcement as to the whether extended amendment period would also apply to Commissioner initiated amendments. This change should possibly be considered in the context of the Commissioner's seemingly less generous approach requests to object out of time as seen by the amendments to *Practice Statement Law Administration* PS LA 2003/7 on 6 July 2023 (see our July 2023 Tax Training Notes).

w https://treasury.gov.au/consultation/c2024-557829

3.4 Location offset amendment rules 2024

The Location Offset Amendment Rules 2024 amend the Location Offset Rules 2018 to provide additional conditions that must be met by file producers to be eligible to receive the location offset rebate.

The new conditions are that:

1. one or more Australian providers must be used to deliver some of the post, digital and visual effects for the film (section 376-20(7) of the ITAA 1997); and
2. a minimum training expenditure requirement must be met (section 376-20(8) of the ITAA 1997).

The Location Offset Amendment Rules 2024 commence on 1 October 2024.

w https://www.legislation.gov.au/F2024L00902/asmade/text

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4. State Legislation

4.1 Tasmania transfer duty on new apartments halved

On 8 August 2024, the *Taxation Legislation (Miscellaneous Amendments) Bill 2024* passed the Tasmanian parliament and now awaits assent.

The Bill introduces a 50% duty concession to byers of new apartments or units off-plan, or under construction valued up to $750,00 for a two-year period commencing on 1 July 2024 and ending on 30 June 2026.

The Bill also makes a consequential amendment to the *Land Tax Act 2000* resulting from the increase in the land tax tax-free threshold legislated in the *Taxation Legislation (Affordable Housing and Employment Support) Bill 2024*. The amendment aligns the tax-free threshold for the special rate of land tax with the tax-free threshold under Schedule 1 of the *Land Tax Rating Act 2000*.

w https://www.parliament.tas.gov.au/bills/bills2024/taxation-legislation-miscellaneous-amendments-bill-2024-22-of-2024

5. Rulings

5.1 Interaction between non-arm's length income and CGT

On 17 July 2024, the ATO issued Taxation Ruling TR 2024/5: *Income tax: how the non-arm's length income and capital gains tax provisions interact to determine the amount of statutory income that is non-arm's length income* which replaces draft ruling TD 2023/D1. A summary of TD 2023/D1 was in our July 2023 Tax Training Notes.

The Ruling sets out the Commissioner's views as to how the non-arm's length income (**NALI**) and CGT provisions interact in determining the amount of statutory income that is NALI where a capital gain arises as a result of non-arm's length dealings.

The Ruling provides that, in determining 'the amount' of statutory income that is NALI, the amount of NALI is capped to the superannuation fund's net capital gain as calculated under subsection 102-5(1) of the ITAA 1997 for the relevant income year. This non-arm ‘s length capital gain is however the amount calculated without regard to the CGT discount or the small business CGT concessions (if applicable).

This Ruling applies to years of income commencing both before and after the date of issue of this Ruling.

ATO Reference *Taxation Ruling* TR 2024/5
w https://www.ato.gov.au/law/view/document?DocID=TXD/TD20245/NAT/ATO/00001

5.2 Exceptions to section 99B

On 31 July 2024, the ATO issued *Draft Taxation Determination* TD 2024/D2: *Income tax: factors taken into account in applying the exceptions to section 99B of the Income Tax Assessment Act 1936 contained in paragraphs 99B(2)(a) and 99B(2)(b)*, which sets out the Commissioner's views on the factors that are relevant in applying the hypothetical resident taxpayer tests in section 99B of the ITAA 1936.

Section 99B of the ITAA 1936 broadly results in accumulated profits and gains in trusts, that have not otherwise been subject to tax and are not corpus of the trust, being treated as income when they are paid to a person who was a tax resident of Australia at any time during the year in which the distribution is made.

Subsection 99B(1) of the ITAA 1936 provides that where a beneficiary who was an Australian resident at any time during an income year is paid an amount from a trust or has an amount of trust property applied for their benefit, that amount is to be included in the assessable income of the beneficiary in the income year it is paid.

Exceptions to the application of section 99B(1) are set out in subsection 99B(2)(a) of the ITAA 1936. Relevantly, it reduces the amount to be included in the beneficiary's assessable income under subsection 99B(1) by so much of that amount as represents:

1. the corpus of the trust. However, an amount will not be taken to represent corpus to the extent that it is attributable to income derived by the trust which would have been subject to tax had it been derived by a resident taxpayer; or
2. amounts that would not be included in assessable income of a resident taxpayer if they had been derived by that taxpayer.

The Commissioner's view on the hypothetical resident test is that the only characteristic of the hypothetical taxpayer is that they are an Australian resident. Further, because the only relevant characteristic of the hypothetical taxpayer is their status as an Australian resident, concessions such as availability of the CGT

general discount are not taken into account when determining whether an amount would or would not be included in the assessable income of a hypothetical taxpayer.

The Commissioner also considers that in applying the hypothetical resident taxpayer tests to determine whether an amount would be assessed in the hands of the hypothetical taxpayer, it is necessary consider the circumstances that gave rise to the relevant amount in the hands of the trustee.

Facts and events other than those that relate to the character of the amount at the time of its derivation are not relevant to the hypothetical resident taxpayer test. This includes the identification of the cost base of a CGT asset which the trustee disposed of.

The draft Taxation Determination is open for comments until 28 August 2024.

ATO Reference *Draft Taxation Determination* TD 2024/D2
w https://www.ato.gov.au/law/view/document?docid=DXT/TD2024D2/NAT/ATO/00001

5.3 Personal services income

On 17 July 2024, the ATO issued an Erratum to *Taxation Ruling* TR 2022/3 to correct terms used in the Personal Services Income Rules, by amending paragraph 270 to reflect that taxpayers with 80% or more of their income from one source, instead of 'more than 80%', can only self-assess against the results test.

ATO Reference *Taxation Ruling* TR 2022/3ER2 – Erratum
w
https://www.ato.gov.au/law/view/document?docid=TXR/TR20223ER2/NAT/ATO/00001&PiT=20240717000001

5.4 Deductibility of payments to trustee by super funds

On 24 July 2024, the ATO issued Taxation Determination TD 2024/6 which sets out the Commissioner's view on the deductibility of payments made by the trustee of a superannuation fund to the trustee in its own capacity to establish or build a trustee risk reserve to address the risk of exposure to penalties under section 56 of the SIS Act. The determination was previously issued as TD 2023/D3 (see our February 2024 Tax Training Notes).

A payment by the fund to the trustee will not be deductible to the fund under section 8-1 of the ITAA 1997 where it is objectively determined on the facts that:

1. the trustee is charging the fund the amount for the purpose of building or maintaining a reserve to address the trustee's risk because of the amendments to section 56 of the SIS Act (referred to as 'additional risk reserve payments'), and
2. the amount is charged by the trustee as a lump sum or a number of lump sum instalments or an ongoing amount that is separate and distinct from its existing ongoing and recurrent charges for trustee services.

A payment by the fund to the trustee will be deductible to the fund under section 8-1 of the ITAA 1997 where it is objectively determined on the facts that the fund is making a payment to the trustee for trustee services (referred to as 'trustee fees').

This Determination applies both before and after its date of issue.

ATO Reference *Taxation Determination* TD 2024/6
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20246/NAT/ATO/00001

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6. Private Binding Rulings

6.1 GST and bad debts

Facts

Entity X is an entity that carries on an enterprise and is registered for GST.

Entity X has made taxable supplies and reports on a non-cash basis for GST.

Between specified years, Entity X made taxable supplies to Entity Y, evidenced by tax invoices with due dates approximately one month from issuance.

Entity Y failed to pay these invoices by their due dates and the amounts remain outstanding. Entity Y has now entered liquidation.

Entity X and Entity Y entered into Agreement 1 and Agreement 2 in one specified year, and Agreement 3 in another specified year. Agreement 1 and Agreement 3 are debt acknowledgement deeds recognising Entity Y's indebtedness to Entity X, including the amounts due under the outstanding invoices and other owed amounts, with interest accruing daily if payment is not made by the due date.

Agreement 1 set a due date for the amounts due under the outstanding invoices together with other amounts owed to Entity X in late 2017.

Agreement 2 is a loan agreement acknowledging Entity Y's indebtedness to Entity X, with a due date for repayment in late 2017 and daily interest accrual for non-payment.

Agreement 3 included a clause extinguishing all prior debts and creating a new debt between the parties, with a due date in late 20XX.

The outstanding invoices are categorised as follows:

1. Category 1 invoices: Issued and due before the execution of Agreements 1, 2, and 3, with each agreement executed at least 12 months after the due date.
2. Category 2 invoices: Issued and due before Agreements 1 and 2, executed before 12 months had passed, with Agreement 3 not having effect.
3. Category 3 invoices: Issued and due after Agreements 1 and 2, but before Agreement 3.

Questions

Is Entity X entitled to make a decreasing adjustment in the tax period ending 31 March 2023 pursuant to section 21-5 and subsection 29-20(1) of the GST Act?

Ruling

The ATO ruled no.

Writing off a bad debt in respect of a taxable supply can give rise to a decreasing adjustment. Section 21-5 of the GST Act states:

> *(1) You have a decreasing adjustment if:*
> *(a) you made a *taxable supply; and*
> *(b) the whole or part of the *consideration for the supply has not been received; and*

(c) you write off as bad the whole or a part of the debt, or the whole or a part of the debt has been overdue for 12 months or more.
The amount of the decreasing adjustment is 1/11 of the amount written off, or 1/11 of the amount that has been overdue for 12 months or more, as the case requires.
*(2) However, you cannot have an *adjustment under this section if you *account on a cash basis.*

An adjustment that is attributable to the tax period in which you become aware of the adjustment.

Paragraph 21-5(1)(c) of the GST Act provides that you have a decreasing adjustment where you make a taxable supply and the related debt is later written off as bad, or the debt has been overdue for 12 months or more.

Goods and Services Tax Ruling GSTR 2000/2 describes the circumstances in which adjustments arise for taxable supplies or creditable acquisitions where a debt is written off as bad or is overdue for 12 months or more.

Paragraph 13 of GSTR 2000/2 states that if you make a taxable supply and the related debt is later written off as bad, or the debt has been overdue for 12 months or more, you have a decreasing adjustment to your net amount. However, if you later recover the whole or part of the debt for which you previously had a decreasing adjustment, you will have an increasing adjustment to your net amount.

Paragraph 15 of GSTR 2000/2 explains that a decreasing adjustment for a bad debt can arise in respect of a supply if either you attributed the GST on the supply on your BAS in a previous tax period, or you are attributing the GST on the supply in the same period as you write off the related debt, meaning you account for the GST payable and the bad debt adjustment separately on your BAS.

Paragraph 16 of GSTR 2000/2 clarifies that you attribute an adjustment to the tax period in which you become aware of it. You have a decreasing adjustment in the tax period in which the debt is written off, or, if the debt has not been written off, in the tax period in which you become aware that the debt has been overdue for 12 months or more.

Paragraph 17 of GSTR 2000/2 states that if a debt, or part of a debt, is recovered for which you previously had a decreasing adjustment, you attribute the corresponding increasing adjustment to the tax period in which the debt is recovered.

'Overdue' is a defined term in section 195-1 of the GST Act which states:

> *A debt is overdue if there has been a failure to discharge the debt, and that failure is a breach of the debtor's obligations in relation to the debt.*

The key issue is whether Entity Y has, in breach of its obligations to Entity X, failed to pay the outstanding amounts and whether this has been the case for the relevant debts for more than 12 months. This is to be determined based on the objective evidence of the agreement between the parties.

The ATO recognised that parties may enter into negotiations for payments after a due date for a debt has passed without it altering the position that the debt is overdue. It would need to be clear on the evidence that due date for the debt had actually been changed. Changes made to a due date before the debt becomes due are more likely to result in a changed due date. Further, for the purposes of paragraph 21-5(1)(c) of the GST Act, any evidence dated more than 12 months after the due date had passed would not be relevant to determining if the section was met.

<u>Category 1 invoices – issued and due more than 12 months before any agreements signed</u>

The invoices had a due date approximately one month from their issue date. They documented the obligation to make a payment by the specified date, and failing to pay by this date constituted a breach of this obligation.

Therefore, amounts not paid by the due date were considered overdue. The facts showed that these payments remained outstanding 12 months after the invoice due date, making them overdue for at least 12 months.

Even if Agreement 1, Agreement 2, and Agreement 3 were relevant to the debt obligations, these agreements were entered into after the debts had already been outstanding for more than 12 months. Therefore, the requirement in paragraph 21-5(1)(c) had already been met, entitling you to a decreasing adjustment.

Category 2 invoices – issued and due within 12 months before Agreements 1 and 2 signed

Each invoice had a due date approximately one month from its issue date, documenting the obligation to make a payment by the specified date. Failing to pay by this date constituted a breach of the obligation, making the amounts overdue.

Before 12 months had passed, the parties entered into Agreement 1 and Agreement 2, acknowledging an outstanding amount owed to Entity X and setting a payment date in late 20XX. Despite this, there was insufficient evidence to suggest that the parties no longer considered the amounts overdue or that the obligation to pay by the invoiced due date was not breached. Thus, this did not impact when the debts met the requirements in paragraph 21-5(1)(c). Agreement 3, which provided a new "Due Date" in late 20XX, did not modify this view.

Category 3 invoices – issued and due after Agreements 1 and 2, but before Agreement 3

These invoices were issued after Agreement 1 and Agreement 2. Additionally, all invoices had a due date prior to Agreement 3, making this later agreement irrelevant to the terms on which the debt was payable at that time. The payment terms were documented in the issued invoices. Failure to pay by the invoice due date constituted a breach of the debtor's payment obligations. If the invoices remained unpaid after 12 months, the requirements in paragraph 21-5(1)(c) were met.

Correct period for adjustment

An increasing adjustment occurs in the tax period in which the entity becomes aware that the debt is written off, or if the debt has not been written off, at the time when the debt has been overdue for 12 months or more.

This adjustment is made in the tax period in which the entity becomes aware that the debt has been overdue for 12 months or more. Therefore, the increasing adjustments are attributable to an earlier tax period, being 12 months after each debt was due and remained unpaid. Entity X was not eligible to make the adjustments in the tax period ending 31 March 2023.

ATO Reference *Private Binding Ruling* Authorisation No. 1052252797232
w https://www.ato.gov.au/law/view/document?docid=EV/1052252797232

6.2 Short term accommodation not commercial

Facts

The taxpayer is not registered for GST.

The taxpayer has leased residential houses from their respective owners, with lease agreements that grant the taxpayer the ability to sublet the houses for short-stay accommodation. The taxpayer advertises the houses using online marketplaces such as Airbnb and Stayz, as well as on their own website.

The taxpayer may potentially add more properties to their leasing enterprise in future years, depending on the economic climate at the time.

The houses have the following physical characteristics:

1. Property 1: four bedrooms, two bathrooms, study (can be used as a bedroom), kitchen, laundry, and powder room.
2. Property 2: three bedrooms, two bathrooms, laundry, and kitchen.
3. Property 3: four bedrooms, three living spaces (one can be used as a bedroom), two bathrooms, laundry, and kitchen.

The taxpayer supplies the houses to short-term occupants fully furnished and provides them to guests staying for an average occupancy period of 2-4 nights. Only one guest/group can book and occupy each house at any one time, and each house permits occupancy for multiple related guests. There are no communal facilities or reception area available to the guests.

The taxpayer does not provide any meals to the guests as part of the stay but provides basic amenities such as coffee, tea, shampoo, conditioner, body wash, towels, coffee pods for the coffee machine, dishwashing liquid, and toilet paper in each house. Internet access with three TV streaming services is also provided in each house.

The taxpayer does not meet guests on site; guests access the houses by using a key secured in a lockbox. A cleaning fee is charged for each occupancy period, and the houses are cleaned and serviced between guests. The taxpayer does not offer cleaning services during occupancy periods. The taxpayer is the contact for guests and attends to any issues or concerns that arise.

Payments are received from the booking platforms or directly to the taxpayer's bank account. In some instances, the taxpayer collects a bond.

The taxpayer spends 5-6 hours per week dealing with the provision of the accommodation.

Question

Is the taxpayer making taxable supplies under section 9-5 of the GST Act?

Ruling

The ATO ruled no, the taxpayer is making input taxed supplies of residential premises in accordance with section 40-35 of the GST Act.

Paragraph 40-35(1)(a) provides that a supply of premises by lease, hire or license is input taxed if the supply is of residential premises, other than a supply of commercial residential premises or accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises.

Paragraph 40-35(2)(a) provides that the supply is input taxed only to the extent the premises are to be used predominantly for residential accommodation, regardless of the term of occupation.

'Residential premises' for GST purposes is defined in section 195-1 as land or a building that:

> *(a) is occupied as a residence or for residential accommodation, or*
> *(b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation.*
> *(regardless of the term of the occupation or intended occupation) …*

'Commercial residential premises' for GST purposes is relevantly defined in section 195-1 as:

> *(a) a hotel, motel, inn, hostel or boarding house; or*
> *…*

(e) a caravan park or a camping ground; or
*(f) anything similar to * residential premises described in paragraphs (a) to (e).*

The houses were found not to be commercial residential premises. An essential characteristic of commercial residential premises is the capacity for multiple occupancy, meaning they must provide accommodation to multiple, unrelated guests or residents simultaneously. According to *Goods and Services Tax Ruling GSTR 2012/6*, hotels, motels, inns, hostels, and boarding houses share this feature. In contrast, each of the taxpayer's houses is supplied to only one guest or group at any one time, lacking the multiple occupancy characteristic. As a result, the houses do not exhibit sufficient similarity to commercial residential premises.

ATO Reference *Private Binding Ruling* Authorisation No. 1052260854866
w https://www.ato.gov.au/law/view/document?docid=EV/1052260854866

6.3 FBT and EV home charging stations

Facts

An employer wishes to provide electric vehicle (EV) leasing arrangements to its employees.

Under the proposed novated EV lease arrangements, the financier will acquire the EV and lease it to the employee who will then novate the lease to their respective employer. The amount paid by the financier for the acquisition of the EV will include any accessories which can be fitted by the dealer, or aftermarket, such as bull bars, tow bars, window tinting, etc.

The lease payments will incorporate:

1. the purchase cost of the car;
2. the provision and installation of the home charging equipment;
3. the financing for the acquisition price of both (including any added accessories); and
4. the various running costs associated with the EV (such as fuel, servicing, insurance, et cetera).

The employer's novated lease arrangement will not entitle the employee to purchase the EV at the end of the lease, nor will the employee be able to keep using that car after the expiry of the lease.

The EV charging station is:

1. bolted into the wall of the house;
2. sits on a bracket, where the bracket is mounted onto the wall; and
3. needs to be installed and de-installed by a licensed electrician as it is wired into the household electricity supply.

Questions

1. Where the cost of installing home charging equipment is capitalised into the lease for an electric vehicle, is the lease considered a bona fide lease of the car for the purposes of the application of the fringe benefits tax legislation? In particular, is the lease considered bona fide for the purposes of section 162 of the FBTAA and for the purpose of determining the car's "leased car value" as defined in section 136(1) of the FBTAA?
2. Is the only fringe benefit provided by the employer under the novated electric vehicle leasing agreement a car fringe benefit in accordance with section 7 of the FBTAA?
3. Is the provision of a home charging station a property fringe benefit under section 40 of the FBTAA?

4. Where the statutory formula method is used to calculate the taxable value of the car benefit in accordance with section 9 of the Act, is the base value of the car inclusive of any costs in relation to installing a home charging station?
5. Where the operating cost method is used to calculate the taxable value of the car benefit in accordance with section 10 of the Act, are the lease payment amounts (inclusive of home charging station installation costs) included in the operating costs of the vehicle?
6. If the car benefit provided under the novated electric vehicle lease is considered exempt from fringe benefits tax in accordance with section 8A of the Act, are the home charging station installation costs included in the provision of that benefit, and therefore also exempt from fringe benefits tax?

Ruling

Question 1

The ATO ruled yes, the component of the lease relating to the car is a bona fide lease for the car for FBT purposes.

Under section 136(1) of the FBTAA, a fringe benefit is a benefit provided to an employee or associate by an employer or a third party under an arrangement with the employer, or its associate, in respect of the employee's employment and such benefit is not otherwise exempted. Relevant, a 'car fringe benefit' means a 'fringe benefit that is a car benefit'.

Section 7(1) of the FBTAA provides the following would constitute a 'car benefit' to

(1) Where:

(a) at any time on a day, in respect of the employment of an employee, a car held by a person (in this subsection referred to as the provider):

(i) is applied to a private use by the employee or an associate of the employee; or

(ii) is taken to be available for the private use of the employee or an associate of the employee; and

(b) either of the following conditions is satisfied:

(i) the provider is the employer, or an associate of the employer, of the employee;

(ii) the car is so applied or available, as the case may be, under an arrangement between:

(A) the provider or another person; and

(B) the employer, or an associate of the employer, of the employee;

that application or availability of the car shall be taken to constitute a benefit provided on that day by the provider to the employee or associate in respect of the employment of the employee.

A car for the purpose of FBTAA means a motor vehicle designed to carry a load of less than 1 tonne and fewer than 9 passengers. An electric vehicle is a car as defined in subsection 136(1) of the FBTAA.

In order for a car fringe benefit to be provided, the lease must be a bona-fide lease.

The *Fringe Benefits Tax - a guide for employers* provided that an arrangement will be a bona fide lease if all the following criteria are met:

1. the lease is made on an arm's length basis and is on commercial terms;
2. the residual value of the vehicle is based on the cost price of the car, that is, a reasonable valuation of the estimated market value at the end of the lease;
3. there is no pre-existing agreement to buy the vehicle at the end of the lease.

The term 'cost price' is defined in section 136(1) to mean the expenditure incurred by the person (other than expenditure in respect of registration or in respect of a tax on, or on a transfer of, registration) that is directly attributable to the acquisition or delivery of the car.

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In this case, the lease is made on an arm's length basis with commercial terms and there are no pre-existing agreement to buy the vehicle at the end of the lease. However, purchase of the home charging equipment, and installation, does not form part of the 'cost price' of the car.

On that basis, the lease must be split into components, with the component of lease that is for the car a 'bona fide lease' for FBT purpose.

Question 2

The ATO ruled that the benefits provided under the Novated Lease Quote are a car fringe benefit, being the electric vehicle, and separate benefits, being the home charging equipment and installation.

A home charging station hardwired into a residential premises was not considered to be a non-business accessory for FBT purposes. A 'non-business accessory', as defined in subsection 136(1) in relation to a car, means an accessory fitted to the car, whether at the factory where the car was assembled or at some other place, other than an accessory required to meet the special needs of any business operations in relation to which the car is used.

The ATO considered that the electric vehicle and the associated accessories are not composite benefits, as the home charging equipment did not form part of the car, did not travel with, or otherwise belonged to the car.

On that basis, the home charging equipment and installation are considered to be separate benefits.

Question 3

The ATO ruled that the provision of the home charging equipment is a property fringe benefit.

Section 40 of the FBTAA provides that a property benefit is provided where, at a particular time, a person provides property to another person.

"Provide" for the purpose of FBTAA includes disposing the benefit interest of a property, and "property" includes a lease in respect of tangible property.

For external property fringe benefits, section 43 of the FBTAA states that the taxable value of the benefits in relation to an employer to a year of tax is:

(a) where the provider was the employer or an associate of the employer and the recipient's overall benefit was purchased by the provider under an arm's length transaction - the amount paid or payable by the provider in respect of the recipients current benefit;
(b) where the provider was not the employer or an associate of the employer and the employer, or an associate of the employer, incurred expenditure to the provider under an arm's length transaction in respect of the provision of the recipient's current benefit - the amount of that expenditure; or
(c) in any other case - the notional value of the recipient's current benefit.

In this case, the ATO considered the methodology in (a) is appropriate to determine the taxable value of the home charging equipment.

Question 4

The ATO ruled that the base value of the car was exclusive of any costs in relation to the provision and installation of home charging equipment.

Section 9 of the FBTAA provides the statutory formula which is used to calculate the taxable value of the car fringe benefit. An element of this statutory formula requires a determination of the 'cost price' of a car, or the 'leased car value' of the car.

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As noted in Question 1, the leased car value does not include the cost of home charging equipment and installation as it is not directly attributable to the acquisition or delivery of the car.

Question 5

The ATO ruled that the home charging equipment and its installation would need to be separately identified and not included in the operating cost method.

Subsection 10(3)(a) of the FBTAA provides that the 'operating cost' of the car includes:

(i) any 'car expenses' (other than insured repair expenses or expenses in respect of registration and insurance) relating to the car incurred during the holding period; and

(ii) so much of any expense paid or payable in respect of the registration of, or insurance in respect of the car as is attributable to the holding period;

...

(iv) In a case where the car is leased to the provider so much of the charges paid or payable under the lease agreement as are attributable to the holding period.

'Car expenses' is defined in section 136(1) of the FBTAA as the registration or insurance in respect of a car, repairs to or maintenance of the car, or fuel for the car.

The ATO considered the provision and installation of home charging equipment does not fall within the meaning of 'registration' for the purposes of paragraph (a) or the definition of the term 'car expense' in subsection 136(1), and therefore not included in the operating cost method.

Question 6

The ATO ruled that the provision and installation of home charging equipment was not exempt under section 8A of the FBTAA.

The requirements of section 8A as outlined in the ATO Fact Sheet entitled 'Electric vehicles and fringe benefits tax' notes that for the exemption to apply, one of requirements is that the benefit must be a car benefit.

As the provision and installation of home charging equipment is a property fringe benefit, it is not exempt from FBT under section 8A of the FBTAA.

ATO Reference *Private Binding Ruling* Authorisation No. 1052199224005
w https://www.ato.gov.au/law/view/view.htm?docid=EV/1052199224005&PiT=99991231235958

6.4 Super Guarantee and workers compensation

Facts

The Company employs staff at locations around Australia. At various times, a number of employees have received worker's compensation payments from the employer's insurer. Some affected employees have returned to work in a reduced capacity.

Several employees who were receiving worker's compensation payments are no longer employed by the employer.

The working arrangements for the employees are established under the Company's Enterprise Agreement. The Company provided the ATO with a copy of the Enterprise Agreement, however, this document does not contain any specific clauses regarding injured workers and compensation payments.

ATO ruling SGR 2009/2 Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages' explains where a superannuation guarantee liability exists for employees receiving worker's compensation payments. Paragraph 68 of this ruling advises:

> *Any workers' compensation payments received by an injured employee for the hours the employee performs work or attends work as required form part of 'salary or wages'. In contrast, if the employment has been terminated, or if the employee is paid workers' compensation for hours not worked (or not attending work as required); the payment would not be 'salary or wages' as in these situations it cannot be said that the payment is a reward for the services of the employee to the employer.*

Question

Does the Company have an obligation under the *Superannuation Guarantee (Administration) Act* 1992 (SGAA) to pay superannuation guarantee on "top-up" worker's compensation amounts paid by the insurer to employees for hours not worked?

Ruling

The ATO ruled that only workers' compensation payments made by or on behalf of the employer to employees who have returned to and attend work following an injury or incapacity are considered salary and wages and ordinary time earnings (**OTE**) of the employees for the purposes of subsection 6(1) of the SGAA. Consequently, the Company does not have an obligation under the SGAA to pay superannuation guarantee on top-up payments made to injured or incapacitated employees where those employees do not attend work or have not performed work as required.

Ordinary time earnings, in relation to an employee, is defined in subsection 6(1) of the SGAA. The Commissioner's view on OTE is set out in SGR 2009/2. Generally, an employee's 'earnings', for the purpose of the definition of OTE, is the remuneration paid to the employee as a reward for the employee's services. The practical effect for superannuation guarantee purposes is that the expression 'earnings' means 'salary or wages'.

At paragraphs 68 and 76 of SGR 2009/2, the Commissioner discusses and expands on the meaning of 'not working' where compensation payments do not meet the definition of salary or wages nor ordinary time earnings where the employment has been terminated. They state that any workers' compensation payments received by an injured employee for the hours the employee performs work or attends work as required form part of 'salary or wages'. In contrast, if the employment has been terminated, or if the employee is paid workers' compensation for hours not worked (or not attending work as required); the payment would not be 'salary or wages' as in these situations it cannot be said that the payment is a reward for the services of the employee to the employer.

Workers' compensation payments made by or on behalf of an employer to an employee who is not required to attend work due to incapacity, or whose employment has been terminated, are not salary or wages for superannuation guarantee purposes.

At paragraphs 271 to 273 of SGR 2009/2, the Commissioner considers that workers' compensation payments and other payments made on behalf of the employer are considered to be salary and wages only where the employee performs work or is required to attend work.

At paragraphs 147-153 in Example 18 of SGR 2009/2, the Commissioner provides an example of two employees who were both injured and both received workers' compensation payments to illustrate the different treatment of workers' compensation payments. In the case of the employee who returned to work and was placed on lighter duties, the workers' compensation payment was salary and wages. In the case of the employee who was not able to return to work as a result of the accident, the workers' compensation was not salary or wages.

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The Company does not have an obligation under the SGAA to pay superannuation guarantee on top-up payments made to injured or incapacitated employees where those employees do not attend work or have not performed work as required. The top-up payments are not considered to be salary and wages as they are not a reward for services provided by the employee to the employer.

ATO Reference *Private Binding Ruling* Authorisation No. 1052251090252
w https://www.ato.gov.au/law/view/document?docid=EV/1052251090252

6.5 Occupancy expenses and WFH

Facts

The Taxpayer was an essential worker employed by employer A.

The Taxpayer rented a home with X bedrooms, using the second bedroom exclusively as a home office.

Due to government-mandated COVID-19 lockdowns, the Taxpayer was unable to work from the office for several periods, totalling XX calendar days across multiple intervals.

The Taxpayer, being an essential worker with a desk-based job, could perform their duties from home.

As a safety precaution, the Taxpayer's employer instructed them to work from home between lockdowns. The Taxpayer worked exclusively from home during the specified period.

Questions

Is the Taxpayer eligible to claim a deduction for occupancy expenses in relation to the home office space under section 8-1 of the ITAA 1997?

Ruling

The ATO ruled that the Taxpayer is not eligible to claim a deduction for occupancy expenses in relation to the home office space under section 8-1 of the ITAA 1997.

Section 8-1 allows for a deduction of losses and outgoings incurred in gaining or producing assessable income, except where these outgoings are of a capital, private, or domestic nature. According to Paragraph 13 of Taxation Ruling TR 2020/1, the expenses must be incurred 'in the course of' gaining or producing assessable income. This interpretation emphasises that the expenses should not merely be 'in connection with' or 'for the purpose' of deriving assessable income.

It is necessary and sufficient for the loss or outgoing to be occasioned by the activity that produces assessable income. Taxation Ruling TR 93/30 highlights that home-related expenses typically have a private or domestic character and are not deductible under section 8-1 unless a part of the home has the character of a place of business rather than a private study.

Practical Compliance Guideline PCG 2020/3 clarifies that additional expenses incurred due to working from home during COVID-19 are addressed separately and occupancy expenses are only deductible if a part of the home has the character of a place of business.

To determine whether an area of a home qualifies as a place of business, TR 93/30 provides several factors, including whether the area is identifiable as a place of business, is unsuitable for private purposes, is used almost exclusively for business, and is regularly used for client or customer visits.

Despite the Taxpayer having an exclusive home office space, the ATO did not consider it to have the character of a place of business. The Taxpayer's employer provided a place to work, and the requirement to work from home was deemed temporary. Furthermore, it was not an inherent requirement of the Taxpayer's income activities to have a place of business at home. Therefore, the Taxpayer's home office did not meet the criteria for deductibility of occupancy expenses under section 8-1 of the ITAA 1997.

ATO Reference *Private Binding Ruling* Authorisation No. 1052256351350
w https://www.ato.gov.au/law/view/document?docid=EV/1052256351350

6.6 Individual residency

Facts

The Taxpayer's country of origin is Country A, and they are a citizen of Country A.

The Taxpayer has permanent employment in Country A. The Taxpayer's employment contract requires the Taxpayer to be based in Country A, and they lodge Country A tax returns each year as a Country A tax resident. The Taxpayer is not a citizen of Australia and cannot vote in Australia.

The Taxpayer has a spouse and a dependent child.

The Taxpayer has an ownership interest in two properties in Country A jointly with their spouse and one property in Country A jointly with their sibling.

Additionally, the Taxpayer solely purchased two properties in Australia.

On [date], the Taxpayer and their family were granted Australian permanent residency through a Skilled Nominated visa (subclass 190), allowing them to stay in Australia permanently. The Taxpayer came to Australia to activate the permanent residency on [date] and returned to Country A on [date]. Between [date] and [date], the Taxpayer was in Australia under a temporary agreement with their employer for one year, while their spouse wrapped up employment in Country A. During this period, the Taxpayer maintained the same work responsibilities as in Country A.

In [month, year], the Taxpayer and their child returned to Australia for the child's high school education and stayed at property E. The Taxpayer purchased a motor vehicle in Australia but did not maintain professional, social, or sporting connections in Country A or develop any in Australia during this time. The Taxpayer obtained an Australian driver's licence and stated that their spouse was meant to arrive in Australia in [month, year], but was delayed due to work commitments in Country A.

In [month, year], the Taxpayer's spouse ceased employment in Country A and arrived in Australia. The Australian border closed due to COVID-19, leading the Taxpayer to stay in Australia with their employer's approval to work remotely. On [date], the Taxpayer received approval for a Resident Return (subclass 155) visa to travel between Australia and Country A.

In [month, year], the Taxpayer's employer instructed them to return to Country A by [date], or face termination. The Taxpayer returned to Country A on [date] after successfully delaying the return. The Taxpayer's spouse now uses the motor vehicle in Australia. Upon returning to Country A, the Taxpayer moved into a house jointly owned by their spouse and the spouse's mother, which is always available to them. When the Taxpayer is in Australia, their mother-in-law stays at the house.

The Taxpayer has stated that their intention was to visit family in Australia while residing permanently in Country A due to full-time employment there. Since returning to Country A in [month, year], there has been no formal agreement with the employer to work part-time in Australia.

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In each of the relevant financial years, the Taxpayer spent some time in Country A and some time in Australia, though always less than 183 days. During trips to Australia, the Taxpayer continued their work duties for the employer in Country A.

The Taxpayer did not apply for citizenship during their time in Australia. When completing incoming and outgoing passenger cards, the Taxpayer says:

1. they are a permanent resident returning to Australia;
2. they do not intend to live in Australia for the next 12 months; and
3. the reason for their trip to Australia is visiting friends or relatives.

The Taxpayer's spouse is currently employed in Australia and contributes to the living expenses and home loan repayments. The Taxpayer also contributes towards the home loan in Australia and their child's education.

The Taxpayer and their spouse were not Commonwealth of Australia Government employees for superannuation (super) purposes and are not members of the Public Sector Superannuation Scheme (PSS) or eligible employees in respect of the Commonwealth Superannuation Scheme (CSS).

Questions

1. Is the taxpayer a resident of Australia for tax purposes as defined by subsection 6(1) of the ITAA 1936?
2. Is the taxpayer a resident of Australia under Article X of the Double Tax Agreement (DTA) between Australia and Country A?
3. Is the taxpayer's Country A employment income assessable income in Australia under Articles X and X of the DTA between Australia and Country A?

Ruling

<u>Domestic law</u>

The ATO considered that the taxpayer was a resident under the ‘resides’ test.

For completeness, the ATO also considered the domicile test, 183-day test and commonwealth superannuation test, none of which resulted in the taxpayer being deemed to be an Australian resident. In relation to the domicile test, the ATO was satisfied that the Taxpayer’s permanent place of abode was outside Australia because:

1. while in Country A, the taxpayer stays in a property owned by their spouse and mother-in-law;
2. the nature of this accommodation is that it will always be available to the taxpayer;
3. the taxpayer spent more time in Country A than in Australia during the financial years; and
4. their long-term employment is in Country A.

<u>DTA</u>

The ATO considered that the tiebreaker tests in Article X of the DTA between Australia and Country A apply so that the taxpayer is deemed to be a resident only of Country A for treaty purposes. The provisions of the Country A Agreement will therefore apply on the basis that the taxpayer is a resident of Country A for tax purposes and not of Australia.

The ATO concluded that the taxpayer had a permanent home in Country A based on the following:

1. the taxpayer resided in a property owned by their spouse and mother-in-law while in Country A;
2. this property is always available to the taxpayer;
3. the property is not intended for a short stay.

The ATO concluded that the taxpayer had a permanent home in Australia based on the following:

1. the taxpayer owned the property their spouse and child live in; and
2. the property is always available to the taxpayer.

The ATO also considered where the taxpayer had a 'habitual abode' and determined that the taxpayer had a habitual abode in both Australia and Country A because:

1. the taxpayer is employed in Country A;
2. the taxpayer's spouse and child are in Australia;
3. the taxpayer has a settled routine for working in both Australia and Country A; and
4. the taxpayer spends the majority of the financial year in Country A.

The ATO then considered the taxpayer's personal and economic ties and concluded that the personal and economic ties were closer to Country A because the taxpayer:

1. is employed in Country A;
2. has extended family in Country A;
3. has properties in Country A; and
4. is a resident and have citizenship in Country A.

Tax treatment of Australian employment income

The ATO ruled that, by reason of the provisions of paragraph X of Article X of the DTA, the taxpayer is a resident of both Australia and Country A. However, by reason of the provisions of paragraph X or X of that Article, the taxpayer is deemed for the purposes of this Agreement to be a resident solely of Country A. Therefore, under Article XX of the DTA, if the taxpayer derives income from sources in Country A or from sources outside both Australia and Country A, that income shall be taxable only in Country A.

ATO reference *Private Binding Ruling* Authorisation No. 1052253278181
w https://www.ato.gov.au/law/view/document?docid=EV/1052253278181

6.7 Division 7A payments through interposed entities

Facts

Two individuals, A and B control and are beneficial owners of Company A, Trust A and Trust B.

Company A primarily derives its income from Trust B's distributions.

Trust A is a discretionary trust that holds the family group's investment assets.

Trust B is a trading trust that owned and operated a business.

In June of an income year, Trust B sold the business. The proceeds of the sale of the business were transferred to Trust A. Trust A subsequently made a loan to individuals A and B, who used the loaned funds to purchase property.

As at 30 June of the income year, there were:

1. loan owing by Trust A to Trust B (Loan Y);
2. loan owing by Trust A to Company A (Loan Z); and
3. unpaid present entitlement payable by Trust B to Company A.

Before the lodgment date of the relevant tax return:

1. Company A (as lender) and Trust A (as borrower) entered into a complying Division 7A loan agreement in respect to Loan Z; and
2. the UPE was converted into a loan from Company A (as lender) and Trust B (as borrower), and the parties entered into a complying Division 7A loan agreement.

Question

Will the loan, or parts thereof, made by the trustee of Trust A to individual A and individual B be deemed dividends under Division 7A of the ITAA 1936**?**

Ruling

The ATO ruled that Division 7A did not apply to the loan made by Trust A to individual A and individual B.

Section 109D(1) provides that a private company is taken to pay a dividend to an entity at the end of the private company's year of income if:

1. the private company makes a loan to the entity;
2. the loan is not fully repaid before the lodgment day;
3. the loan is not excluded by Subdivision D; and
4. either:
   - (a) the entity is a shareholder in a private company (or its associate) at the time when the loan is made; or
   - (b) a reasonable person would conclude (having regard to all the circumstances) that the loan is made because the entity has been such a shareholder or associate at some time.

However, a loan made to a shareholder by a company will not be a deemed dividend under section 109D if a loan agreement is entered into which complies with section 109N of the ITAA 1936.

Section 109T of the ITAA 1936 extends the operation of Division 7A as if a private company makes a payment or loan to its shareholder or associate where the company makes a payment or a loan to an interposed entity, a reasonable person would conclude that the company made the payment or loan solely or mainly as part of an arrangement involving a payment or a loan to the shareholder or associate, and the interposed entity made a loan to the shareholder or associate.

Sections 109XA(2) and section 109XB provide that a loan will be deemed a dividend where a trustee makes a loan, including through an interposed entity, to a shareholder of a private company or its associate, and either at the time or after the actual transaction, the company is, or has become, presently entitled to an amount from the net income of the trust estate, but that entitlement has not been satisfied before the earlier of the due date for lodgment and the date of lodgment of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place.

In this instance, the Commissioner considered that:

1. section 109T did not apply as Loan Z made by Company A to Trust A is subject to a complying Division 7A agreement; and
2. section 109XA did not apply to the UPE payable by Trust B to Company A as the whole of the UPE was converted into a Division 7A compliant loan before the relevant lodgment day.

ATO Reference *Private Binding Ruling* Authorisation No. 1052256512059
w https://www.ato.gov.au/law/view/view.htm?docid=EV/1052256512059

6.8 Zoning and main residence exemption

Facts

The taxpayer purchased an industrial usage zoned office/warehouse unit.

The factory unit property has a mezzanine floor which is fully carpeted and includes a bathroom (with a toilet, vanity, and shower). There is also a small kitchenette with a sink and cupboards (but no cooking facilities).

The property was originally used to store personal collections.

The taxpayer moved into the factory unit property.

The contract for the purchase of the property refers to it as "light industrial." There is a clause within the relevant zoning regulations that allows for "temporary overnight accommodation for the working population and businesses in the area."

The contract also contained an occupation certificate.

The taxpayer purchased a residential property and later moved into this residential property.

The factory unit property was sold.

Questions

Can the taxpayer claim a partial main residence exemption for the factory unit property under section 118-185 of the ITAA 1997?

Ruling

The ATO ruled no.

The ATO referred to the definition of 'dwelling' in section 118-115 of the ITAA 1997 which provides that:

> *(1) A dwelling includes:*
> > *(a) a unit of accommodation that:*
> > > *(i) is a building or is contained in a building; and*
> > > *(ii) consists wholly or mainly of residential accommodation; and*
> >
> > *(b) a unit of accommodation that is a caravan, houseboat or other mobile home; and*
> > > *(c) any land immediately under the unit of accommodation.*

The ATO clarified that a dwelling is anything used wholly or mainly for residential accommodation, such as:

1. a house or cottage;
2. an apartment or flat;
3. a strata title unit;
4. a unit in a retirement village; or
5. a caravan, houseboat or other mobile home.

As the factory unit was in a light industrial zone, it was unable to be legally used wholly or mainly for residential accommodation. Choosing to reside in a property does not make it automatically eligible to be considered a "dwelling." The clause which allowed "temporary overnight accommodation" in the relevant zoning regulations for the property confirmed that the factory unit had not achieved the required approvals to be used wholly or mainly for residential accommodation.

The state government body responsible for planning and infrastructure stated that the provision of an occupation certificate merely confirmed that the factory unit had been inspected and met the requirements for occupancy, meaning that it was fit to be occupied (as in used) in accordance with the property's Building Codes of Australia (BCA) classification; it was not a certificate of approval for residential use.

As the property was not a "dwelling" a partial main residence exemption was not available in respect of the capital gain when it was sold.

ATO Reference *Private Binding Ruling* Authorisation No. 1052253418536
w https://www.ato.gov.au/law/view/document?docid=EV/1052253418536

6.9 Payments from trust under Family Court orders

Facts

The Family Trust is an Australian discretionary trust, the trustee of the Family Trust is a company incorporated in Australia. The Company Trustee carries on a business.

The sole director of the Company Trustee is the Husband.

The Wife was employed by the Trustee Company for a period of time and paid a wage, before the martial relationship between the Husband and the Wife broke down and they separated.

The Wife filed an application in the Family Court week orders for interim financial and financial orders.

The Court made Interim Orders and held that without admission as to need, the Wife receive an amount per week and the Husband take all necessary steps to effect this Order. The weekly payment was the same amount as the Wife's previous net pay from her employment with the Family Trust. The Husband complied with the Order by causing the Family Trust to make weekly payments to the Wife.

The Husband and Wife reached a settlement where the Husband would pay the Wife a cash payment, following which the Husband's weekly payments to the Wife will be discharged.

Question

In determining the net income of the Family Trust pursuant to subsection 95(1) of the ITAA 1936, are the amounts of the weekly payments paid to the Wife allowable deductions in accordance with section 8-1 of the ITAA 1997?

Ruling

The ATO ruled no. The payments were not deductible under section 8-1 of the ITAA 1997 as there is not the required connection or sufficient nexus between the payments made to the Wife and the assessable income or business of the Family Trust.

The ATO considered the legal proceedings were a private dispute between the Husband and the Wife in their capacity as individual taxpayers. Further the Family Trust is not a party to the proceedings in the Family Court.

In determining the net income of the Family Trust under subsection 95(1) of the ITAA 1936, the weekly payments made to the Wife cannot be considered allowable deductions under section 8-1 of the ITAA 1997. The weekly payments lack the necessary connection or sufficient nexus to the assessable income or business of the Family Trust, and therefore, they are not allowable deductions under section 8-1.

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Section 8-1 of the ITAA 1997 allows deductions for losses or outgoings incurred in gaining or producing assessable income, unless they are capital, private, or domestic in nature, related to exempt income, or specifically non-deductible under the ITAA 1997.

For an expense to be deductible, there must be a nexus between the outgoing and the income-producing activities. Various court decisions, including *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47, *Lunney v Federal Commissioner of Taxation* (1958) 100 CLR 478, *and Federal Commissioner of Taxation v Hatchett* 71 ATC 4184, have established that expenses must be incidental and relevant, possess the essential character of an income-producing expense, or have a perceived connection to income production.

In the *Federal Commissioner of Taxation v Wood* [2023] FCA 574 case, a settlement sum paid to end litigation related to the taxpayer's consultancy agreement was deemed deductible due to its direct connection to income-producing activities. However, the legal proceedings in this matter were a private dispute between the Husband and Wife, unrelated to the Family Trust's income production. The Family Trust was not a party to the litigation, and the payments were ordered in the context of a private property dispute.

The Husband, in compliance with court orders, caused the Family Trust to make weekly payments to the Wife. The court orders did not direct the Family Trust to make these payments nor did they relate to the Wife's past employment or the Trust's business activities.

Given the lack of a sufficient nexus between the payments and the Family Trust's income-producing activities, the weekly payments are not deductible. Consequently, in determining the net income of the Family Trust under subsection 95(1) of the ITAA 1936, these payments are not allowable deductions.

ATO Reference *Private Binding Ruling* Authorisation No. 1052257797787
w https://www.ato.gov.au/law/view/document?docid=EV/1052257797787

7. ATO and other materials

7.1 Strengthening the foreign resident capital gains tax regime

On 23 July 2024, the Treasury issued a consultation paper titled 'Strengthening the foreign resident CGT regime', seeking feedback on the proposed reforms on the foreign resident CGT rules contained in Division 855 of the ITAA 1997

The proposed new measures will apply to CGT events occurring after 1 July 2025.

Broadened asset base

The new measures will clarify and broaden the types of assets that foreign residents are subject to CGT on. Assets with a close economic connection to Australian land and/or natural resources will be captured under the Division 855 of the ITAA 1997. These will include:

1. leases or licenses to use land situated in Australia, including pastoral leases and an agreement to lease land that is used in a manner that gives rise to the creation of emissions permits;
2. Australian water entitlements in relation to land situated in Australia;
3. infrastructure and machinery installed on land situated in Australia, including land subject to a
4. mining, quarrying or prospecting right of an entity;
5. an option or right to acquire one of the above assets; and
6. a non-portfolio membership interest in an entity where more than 50 per cent of the underlying entity's market value is derived from the above assets.

New principal asset test

The new measures will amend the principal asset test from a point-in-time test to a 365-day test, so that if the underlying entity derives more than 50 per cent of its market value from TARP at the time of testing or at any time during the preceding 365 days, it will satisfy the principal asset test.

New notification requirement

The measures will require foreign residents disposing of shares and other membership interests exceeding $20 million in value to notify the Australian Taxation Office in an approved form prior to the transaction being executed.

The consultation paper is open for feedback until 20 August 2024.

w https://treasury.gov.au/sites/default/files/2024-07/c2024-546457-cp.pdf

7.2 ATO draft practical compliance guideline on section 99B

On 31 July 2024, the ATO issued Draft Practical Compliance Guideline PCG 2024/D1: *Section 99B of the Income Tax Assessment Act 1936 - ATO compliance approach*, to support taxpayers in complying with section 99B of the ITAA 1936.

The Draft Practical Compliance applies to a payment or benefit to a resident beneficiary from a trust that accumulated property while the trust was a non-resident of Australia for tax purposes, and sets out the Commissioner's compliance approach to distributions and benefits which they considers to be low risk, the

common scenarios where section 99B may need to be considered, and the evidentiary requirements to enable the exemptions in section 99B(2) to be applied.

Common Scenarios

The Commissioner considers the common scenarios where section 99B may need to be considered include

1. when a non-resident migrates to Australia;
2. when a resident beneficiary receives a distribution from a non-resident trust;
3. when a resident beneficiary receives a loan from a non-resident trust;
4. when a resident beneficiary is allowed to use a non-resident trust property; or
5. when a resident beneficiary receives an amount from a deceased estate.

Evidence

The Commissioner considers that the core documents and information required to demonstrate the source of the funds include the signed and executed trust deed or will of the deceased, signed trust minutes, resolution and distribution statement confirming an amount was paid or applied for the beneficiary from the trust's corpus, and copies of the trust financial statements for the relevant years.

Further documentation that may be relevant will be determined on a case-by-case basis and could include, but are not limited to the following:

1. records detailing the property used to settle the trust, such as payment records or documents; demonstrating the transfer of property;
2. for a deceased estate, a document setting out the assets owned by the deceased at their date of death, or a valuation of their assets at the date of death;
3. documents showing property being contributed to the trust;
4. other records or working papers prepared by the trustee or their professional advisers, for example, accounting working papers;
5. bank statements or payment records;
6. copies of all trustee minutes, resolutions or distribution statements confirming the payment of capital amounts;
7. accounting records, for example, general ledgers;
8. correspondence from the executors or their legal advisers setting out the terms of the will;
9. advice from professional advisers, including foreign advisers, to support the evidence provided
10. foreign legal advice;
11. tax distribution statements;
12. foreign country tax returns of the beneficiary where the beneficiary is required to lodge in the foreign jurisdiction; or
13. foreign resident withholding tax statements from the foreign jurisdiction.

Compliance approach

The draft Guideline provides an outline of the Commissioner's compliance approach with regards to arrangements where section 99B may apply:

Where arrangements are low risk, the ATO will not apply compliance resources to those arrangements. Where arrangements do not meet the criteria to be a low-risk arrangement, the ATO may engage with such taxpayers to better understand the arrangement.

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The draft Practical Compliance Guidance is open for feedback until 28 August 2024.

Draft Practical Compliance Guideline PCG 2024/D1
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2024D1/NAT/ATO/00001

7.3 Disputed tax debts for large business and wealthy groups

On 24 July 2024, the ATO updated *Practice Statement Law Administration* PS LA 2011/4: *Collection and recovery of disputed debts* to clarify its expectation that large businesses and wealthy group taxpayers with a disputed debt pay their debt in full or enter into a 50/50 arrangement. For other taxpayers, a risk based approach is adopted

Large business and wealthy group taxpayers are defined to include a member of a group with a turnover of greater than $250 million, a member of a private group with over $250 million in net assets or a significant global entity.

ATO Reference *Practice Statement Law Administration* PS LA 2011/4
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20114/NAT/ATO/00001

7.4 Penalty for failure to lodge on time \

On 11 July 2024, the ATO updated Practice Statement Law Administration PS LA 2011/19: *Administration of the penalty for failure to lodge on time* to clarify the taxpayer's review rights in paragraph 15.

ATO Reference *Practice Statement Law Administration* PS LA 2011/19
w https://www.ato.gov.au/law/view/document?docid=PSR/PS201119/NAT/ATO/00001

7.5 Offsetting of refunds and credits against taxation and other debts

On 18 July 2024, the ATO updated Practice Statement Law Administration PS LA 2011/21: *Offsetting of refunds and credits against taxation and other debts* to clarify when an individual taxpayer is in serious financial hardship when a taxpayer is considered to be unable to meet the basic necessities of life. This may include where a person would be left without the means to afford basics such as food, clothing, medical supplies, accommodation or reasonable education. The update also removes references to baby bonus credits and childcare tax offsets.

ATO Reference *Practice Statement Law Administration* PS LA 2011/21
w https://www.ato.gov.au/law/view/document?docid=PSR/PS201121/NAT/ATO/00001

7.6 2024 tax time summary of non-individual form changes

The ATO has issued a summary providing notification of the changes made to non-individual tax return forms and schedules for the 2023–24 income tax reporting period.

These non-individual tax return forms include company tax returns, fund income tax returns, partnership tax returns, trust tax returns, attribution managed investment trust returns, attribution corporate collective investment vehicle sub-fund tax returns.

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The changes to the schedules include trust income schedule, international dealings schedule, reportable tax position schedule, research and development tax incentive schedule, capital gains tax schedule, consolidated group losses schedule, and losses schedule.

The ATO reminds taxpayers that they must always refer to the final published version of the relevant publication to view the changes to the products.

w https://www.ato.gov.au/forms-and-instructions/tax-time-summary-of-non-individual-form-changes-2024

7.7 Have you paid your employees' super guarantee?

The ATO reminds taxpayers that eligible employees' super guarantee contributions are due by 28 July 2024.

If an employer does not pay its superannuation guarantee contributions by the due date each quarter, it will need to pay the superannuation guarantee charge. The superannuation guarantee charge is not deductible.

From 1 July 2024, the superannuation guarantee rate increased to 11.5%. The superannuation guarantee rate will progressively increase to 12% by July 2025.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/have-you-paid-your-employees-super-guarantee

7.8 Are you an employer?

The ATO reminds employers that to keep on top of their payroll governance, including:

1. using payroll software to record the amounts paid;
2. withholding the right amount of tax; and
3. calculating super guarantee correctly.

The ATO also reminds employers to check their reporting obligations and key dates in respect of PAYG withholding, superannuation guarantee rate change and single touch payroll reporting.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/are-you-an-employer

7.9 Productivity Commission final report on philanthropic giving

On 18 July 2024, the Commonwealth Government released the final report of the Productivity Commission's inquiry into philanthropy in Australia. The report includes 19 final recommendations, which focus on the following main areas:

1. improving the system that determines which charities have access to tax-deductible donations;
2. improving access to philanthropic networks for Aboriginal and Torres Strait Islander people;
3. enhancing the regulatory framework for charities and ancillary funds; and
4. improving public information on charities and donations.

Notably, the Commission calls for an overhaul to the Deductible Gift Recipient system, which it considered not fit for purpose.

The Government is now considering its response to the report, though the Government has said the recommended changes to tax settings for donations to school building funds are not being considered.

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w https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/productivity-commission-final-report-philanthropic
w https://www.pc.gov.au/inquiries/completed/philanthropy/report

7.10 Changes to First Home Super Saver scheme for APRA funds

On 15 September 2024, the ATO will update the First Homer Super Saver (**FHSS**) scheme with FHSS technical legislative changes. This means that, in some cases, released amounts may be returned to a members' superannuation fund

The ATO states that superannuation funds must be prepared to accept repayments of FHSS amounts from the ATO on behalf of members. The repayments process will happen outside of SuperStream and will be sent via Online services for business.

The repaid amount can be credited to any super interest the member holds. The repaid amount will be treated as a rollover, it should not be recorded as a reversal of a transaction on the fund's registry.

w https://www.ato.gov.au/tax-and-super-professionals/for-superannuation-professionals/super-funds-newsroom/changes-to-first-home-super-saver-scheme-for-apra-funds

7.11 Administrative Review Tribunal to commence in October

On 14 October 2024, the Administrative Review Tribunal (**ART**) will commence operations and replace the Administrative Appeals Tribunal.

The ART's objective will be to provide administrative review that:

1. is fair and just;
2. resolves applications in a timely manner, with as little formality and expense as possible;
3. is accessible and responsive to the diverse needs of parties;
4. improves the transparency and quality of government decision-making; and
5. promotes public trust and confidence in the Tribunal.

All ongoing matters before the AAT will transition automatically to the ART on its commencement. All ongoing and non-ongoing AAT staff will transition to the ART on its commencement on equivalent terms and conditions.

w https://ministers.ag.gov.au/media-centre/administrative-review-tribunal-commence-october-19-07-2024

7.12 Stamp duty on motor vehicles in South Australia

On 17 July 2024, RevenueSA issued Information Circular 108: *Stamp Duty on Motor Vehicles*.

The Information Circular:

1. clarifies the correct value of a motor vehicle for stamp duty purposes (the definition of which includes a motor car, a passenger vehicle, a motorcycle and a commercial vehicle);
2. clarifies the correct application of dealer exemptions;
3. outlines future RevenueSA activity that will be conducted to ensure compliance with the guidelines contained in the Information Circular; and
4. provides advice on voluntary disclosure of tax defaults and applicable payment methods.

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w https://www.revenuesa.sa.gov.au/forms-and-publications/information-circulars-and-revenue-rulings/information-circulars/information-circular-108

7.13 Revenue NSW scam warming

On 24 July 2024, the Revenue NSW issued a publication noting that Revenue NSW is currently the target of a SMS, email and letter scam which sought payment for fake fine notices. Revenue NSW confirms that Customers can confirm and review their fines online via myPenalty, myEnforcement Order or their MyserviceNSW accounts.

w https://www.revenue.nsw.gov.au/news-media-releases/scam-sms

7.14 Self-review checklist – GST classification of food and health products

The ATO has published a self-review checklist for small to medium businesses to provide practical, step-by-step guidance to assist them to adopt better practice process and controls.

The checklist includes questions to assess the robustness of a taxpayer's GST classification process and controls, to identify gaps in the new product onboarding process, and to review the taxpayer's product list for GST classifications.

w https://www.ato.gov.au/law/view/document?docid=SGM/Checklist_GST_product_classification

7.15 Updated Tasmanian guidance on payroll tax rebate for apprentices, trainees and youth

State Revenue Office Tasmania has issued guidance on the payroll tax rebate scheme for apprentices, trainees and youth employees between 1 July 2023 and 30 June 2025.

To receive payment of the rebate, employers must:

1. have lodged their returns and paid their payroll tax by the due date to be eligible for the rebate for the same period;
2. comply with all legislative requirements of the *Payroll Tax Act 2008* and the *Payroll Tax Rebate (Apprentices, Trainees and Youth Employees) Act 2017*;
3. provide any information requested by the Commissioner of State Revenue and cooperate with any compliance checks made by the State Revenue Office within the time permitted, and/or repay any rebate payment received when demanded;
4. not be the subject of any incomplete investigations in relation to payroll tax; and
5. not have any unpaid payroll tax liabilities.

To register for the rebate, employers are required to complete and return to the State Revenue Office the Payroll tax rebate scheme for apprentices and youth employees application form.

Following registration, the employer can lodge claims via its Payroll Tax Account on Tasmanian Revenue Online. The claim must be made within the 9month period immediately after the end of the relevant financial year, and provide any additional information requested by the Commissioner.

w https://www.sro.tas.gov.au/Documents/payroll-tax-rebate-scheme-for-apprentices-trainees-and-youth-employees-guideline.pdf

7.16 How to meet your reporting obligations – lodge your NFP self-review return now

The not-for-profit (**NFP**) self-review return is available for lodgment in Online services.

Taxpayers can lodge their 2023–24 NFP self-review return by 31 March 2025, as part of the ATO's transitional arrangements. Taxpayers do not need to contact the ATO to request this extra time.

The ATO has provided website guidance on how to prepare, view, lodge an amend a NFP self-review return.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/how-to-meet-your-reporting-obligations
w https://www.ato.gov.au/tax-and-super-professionals/digital-services/in-detail/online-services-for-agents-user-guide/lodgments/not-for-profit-self-review-return

7.17 Fuel tax credit rates from 1 July 2024 to 30 June 2025

On 31 July 2024, the ATO published the new fuel tax credit rates from 1 July 2024 to 30 June 2025 for business and non-business.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/incentives-and-concessions/fuel-schemes/fuel-tax-credits-business/rates-business/from-1-july-2024-to-30-june-2025
w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/incentives-and-concessions/fuel-schemes/fuel-tax-credits-non-business/rates-non-business

7.18 Clarifying the tax treatment of ‘exploration’ and ‘mining, quarrying and prospecting rights’

In response to the decision of the Full Federal Court in *Commissioner of Taxation v Shell Energy Holdings Australia Limited* [2022] FCAFC 2, the Government has amended the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) to clarify that ‘exploration for petroleum’ is limited to the ‘discovery and identification of the existence, extent and nature of the petroleum resource’ and doesn't extend to ‘activities and feasibility studies directed at evaluating whether the resource is commercially recoverable’.

It will also be clarified that mining, quarrying and prospecting rights (**MQPRs**) cannot be depreciated for income tax purposes until they are used (not merely held) and will limit the circumstances in which the issue of new rights over areas covered by existing rights lead to tax adjustments.

The amendments are contained in the *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024* which received Royal Assent on 9 July 2024.

The amendments apply to payments made on or after 21 August 2013 and apply in respect of all MQPRs acquired or started to be used after the date of announcement, being on 9 May 2023.

The Commissioner's administrative treatment and written binding advice is set out in Taxation Ruling TR 2014/9.

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w https://www.ato.gov.au/about-ato/new-legislation/in-detail/businesses/clarifying-the-tax-treatment-of-exploration-and-mining-quarrying-and-prospecting-rights

7.19 Does your business pay contractors to provide certain services?

The ATO is reminding taxpayers that f their business provides any of the following services and pays contractors to provide these services, they may need to lodge a taxable payments annual report (**TPAR**):

1. building and construction;
2. cleaning;
3. courier and road freight;
4. information technology (IT); and
5. security, investigation and surveillance.

TPARs are used by the ATO to ensure that contractors report all their income.

The TPAR will need to record the contractor's name, address, ABN, and the total amount paid to the contractor for the previous financial year (including GST and any cash payments).

Penalties may apply if TPARs are not lodged by 28 August 2024.

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

7.20 Tax time 2024 update

The ATO provided the following messages and themes from the Tax Practitioner Stewardship Group tax time meeting held on 23 July 2024:

1. approximately 3 million returns have been lodged since 1 July 2024, which is around 1% increase compared with the same time last year;
2. the volume of refunds is down, and the average refund amount has increased compared with the same time last year;
3. current ATO communications focus is on encouraging taxpayers and agents to start lodging as most pre-fill data is now available;
4. reminders were issued about quarterly activity statements due on 28 July, the small business tax time toolkit, and requirements for rental property owners to include the gross amount of rent in the year their tenants paid it, not the net amount their property manager sends to them; and
5. further courses have been added to the Essentials to strengthen small business online learning resources.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/prepare-and-lodge/tax-time/tpsg-tax-time-updates/tax-time-2024-update---23-july

7.21 Revenue NSW to switch to eDuties portal for large land sales

Revenue NSW is intending to transition to require that agreements for the sale of land with a dutiable value of $20 million or more to be lodged via eDuties for assessment rather than using the Electronic Duties Return (**EDR**) portal. This change applies to transactions involving both residential and non-residential land.

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Revenue NSW will provide an EDR update with more information in the coming weeks.

w https://www.revenue.nsw.gov.au/property-professionals-resource-centre

7.22 New thin capitalisation rules

On 6 August 2024, the ATO updated its thin capitalisation website guidance to assist entities who need to apply the new thin capitalisation rules. The new thin capitalisation rules, introduced in the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Act 2024* apply to tax assessments for income years commencing on or after 1 July 2023, while the debt deduction creation rules apply to assessments for income years starting from 1 July 2024.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/new-thin-capitalisation-rules---web-guidance-available

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8. Tax Professionals

8.1 Main residence exemption tips

The ATO has identified that they are seeing issues with non-reporting of a capital gain, loss or main residence exemption for property sales.

The ATO provides the following tips for tax agents:

1. ask clients if they have started earning income from their home;
2. if the client wants to use the 6-year absence rule, make this election in the client's return by including the main residence exemption in the CGT section;
3. do not ignore prompts in Online services regarding when property has been transferred;
4. a client can only have one main residence, unless the 6-month rule applies and they are moving from one home to another; and
5. if a client's tax residency has changed during the year, their CGT obligations may have also changed.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/main-residence-exemption-tips

8.2 Rental property – repairs or capital expenses

The ATO is reminding tax agents to consider the following factors when determining claims for repairs and improvements made to a client's rental property:

1. repairs and general maintenance are expenses for work done to remedy, or prevent, defects, damage or deterioration from using the property to earn income. These expenses can be claimed in the year the expense occurred;
2. initial repairs include any work done at the time they acquired the property. These are capital repair expenses and can't be claimed as a deduction. Instead, initial repairs are part of the acquisition cost and included in the cost base of the property for CGT purposes, unless they are capital works or depreciating assets;
3. capital works are structural improvements, alterations and extensions to the property claimed at 2.5% over 40 years (with some exceptions), or can only be claimed after the work has been completed;
4. improvements and renovations that are structural are also capital works. Work going beyond remedying defects, damage or deterioration and improves the function of the property are improvements;
5. repairs to an 'entirety' are capital and can't be claimed as repairs. Repairs to an entirety generally involve the replacement or reconstruction of something separately identifiable as a capital item, for example, a depreciating asset; and
6. depreciating assets (capital allowances) must be claimed over time according to their effective life.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/rental-property-repairs-or-capital-expenses

8.3 So let's talk record keeping

The ATO is seeking to bust some common myths when it comes to records, deductions, and work-related expenses. the ATO would like tax agents to reiterate to their clients that having records to substantiate claims is essential to prove the deductions.

The ATO refers to the following four matters:

1. a bank or credit card statement on its own will not be enough evidence to support a work-related expense claim. Taxpayers will need written evidence that shows the supplier, the cost, date of purchase, date the document or receipt was produced, and the nature of the goods or services being claimed;
2. if the total claim for a work-related expense is more than $300, the taxpayer must have written evidence to support those claims. Where the work-related expense is under $300, the taxpayer must be able to show that they spent the money and how they calculated the amount being claimed;
3. to claim a deduction for a work-related expense:
   (a) the taxpayer must have spent the money and not have been reimbursed;
   (b) the expense must directly relate to earning of the taxpayer's income; and
   (c) the taxpayer must have a record to prove it.
4. the ATO encourages tax agents to read and share the ATO's guide titled 'Keeping records for work-related expenses' covers all the different types of records required for car expenses, working from home deductions, travel, self-education, and others.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/so-lets-talk-record-keeping

8.4 Implementation of new code obligations deferred

On 1 July 2024, the *Tax Agent Services (Code of Professional Conduct) Determination 2024* was issued (see our July 2024 Tax Training Notes). The Determination introduced eight additional obligations to supplement the existing Code of Professional Conduct and strengthen integrity and accountability in the tax profession.

The original start date for compliance with these obligations was 1 August 2024. Following feedback from the tax professional's industry, the Government will include a transitional approach in the Determination and finalise the development of guidance for practitioners.

The Government will insert a transitional rule into the Determination that will provide firms with 100 employees or fewer until 1 July 2025 and larger firms with 101 employees or more until 1 January 2025 to bring themselves into compliance with these new obligations, so long as they continue to take genuine steps towards compliance during this period.

w https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/albanese-government-lifts-professional-standards-tax

8.5 TPB consultation on new code obligations guidance

The Tax Practitioners Board (TPB) has issued draft guidance for consultation concerning three new obligations under the Tax Agent Services (Code of Professional Conduct) Determination 2024. The draft guidance covers TPB(I) D54/2024, addressing false or misleading statements to the TPB or Commissioner, and TPB(I) D55/2024, managing conflicts of interest and maintaining confidentiality in dealings with the government. These

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draft materials cover two of the eight new obligations introduced by the Determination, which aims to enhance ethical standards among tax practitioners.

TPB Chair, Mr Peter de Cure AM, emphasised the ongoing commitment to finalising the guidance through consultation and aiding tax practitioners in understanding the new obligations. He acknowledged existing compliance by many practitioners with these additional Code requirements and invited feedback on the guidance materials.

The TPB has invited comments on the draft guidance by 3 September 2024, which can be submitted via email or mail. The TPB will review all submissions before finalising its stance. Further guidance on the remaining Code obligations will be issued progressively, with an indicative timeline available on the TPB's website.

Comments can be submitted via email to tpbsubmissions@tpb.gov.au or by mail to Tax Practitioners Board, GPO Box 1620, Sydney NSW 2001.

The draft guidance is summarised below.

w https://www.tpb.gov.au/tpb-commences-consultation-draft-guidance-new-code-obligations

8.6 TPB guidance on false and misleading statements code obligations

The Tax Practitioners Board (**TPB**) has released draft guidance TPB(I) D54/2024 for public comment. This guidance addresses the administration and interpretation of rules regarding false or misleading statements made to the TPB or Commissioner of Taxation.

The draft is designed to assist registered tax and BAS agents in understanding their obligations under section 15 of the Tax Agent Services (Code of Professional Conduct) Determination 2024, and section 50-20 of the *Tax Agent Services Act 2009* (**TASA**). The guidance does not impose new legal obligations but explains how existing laws will be applied.

The guidance outlines obligations to avoid making, preparing, or allowing others to make or prepare false or misleading statements to the TPB, Commissioner, or other Australian government agencies. Registered tax practitioners must correct any false or misleading statements they become aware of as soon as possible.

Truthfulness and Integrity

The TPB emphasises the importance of maintaining high standards of truthfulness and integrity in all statements made by tax practitioners. The guidance explains that statements can be considered false, incorrect, or misleading based on content or omission of material information.

Reasonable Steps

Reasonable steps are measures that a prudent and diligent tax practitioner would take under similar circumstances to ensure the accuracy of the information they provide or prepare. This involves a thorough review of all relevant documents and information, cross-checking data for consistency, and clarifying any ambiguities with the client or third parties involved.

Practitioners should also stay updated with changes in tax laws and regulations to ensure compliance. If a practitioner relies on information provided by others, they should assess the credibility and reliability of the source. For instance, if information is provided by a third party, practitioners should consider the third party's reputation, history of accuracy, and any previous interactions.

In cases where the information appears inconsistent or suspicious, practitioners are expected to make further enquiries to resolve any doubts. This may include requesting additional documentation or verification,

consulting with colleagues or experts, and possibly seeking legal advice if the matter involves complex legal interpretations.

Furthermore, practitioners must document their due diligence processes, including the steps taken to verify information and any communications with clients or third parties. This documentation can serve as evidence of the practitioner's efforts to ensure accuracy and compliance with their obligations under TASA.

Material Particulars

The draft guidance details what constitutes a material particular, indicating that minor or inconsequential errors do not breach section 15. A statement is false if it is contrary to fact or wrong. A statement may be false because of something contained in the statement or because something is omitted from the statement. If a statement was correct at the time it was made but is subsequently made incorrect because of a retrospective amendment to the law, it is not later considered false or misleading.

A statement is misleading if it creates a false impression, even if it is literally true. It may be misleading because of something contained in the statement or because of something omitted from the statement. The reason the statement is misleading may be because it is uninformative, unclear, or deceptive.

Material particulars refer to aspects of a statement that are significant to an entity's obligations or entitlements under TASA or tax law in general. The guidance clarifies that "an inconsequential statement which is minor in nature and does not affect an entity's legal obligations or entitlements will generally not be a material particular for the purposes of section 15 of the Determination." Materiality is determined at the time the statement is made. However, materiality may become apparent only after a subsequent event or the emergence of further evidence revealing that the statement was false or misleading in a material particular at the time it was made. In such cases, registered tax practitioners are required to correct the false or misleading statement.

Correction of Statements

The draft guidance requires registered tax practitioners to promptly correct any false or misleading statements made to the TPB or Commissioner. Practitioners must inform the original statement maker of the need for correction and, if not corrected in a reasonable time, notify the TPB or Commissioner themselves. The correction process involves providing detailed information about why the statement is false, incorrect, or misleading. Practitioners are responsible for correcting statements they made or those made by others under their guidance. Prompt action is crucial and should be documented to show compliance. Failure to take corrective action can lead to breaches of the Code of Professional Conduct and may result in penalties or sanctions by the TPB.

Civil and Criminal Penalties

The guidance highlights potential civil penalties under TASA and criminal liabilities under the Taxation Administration Act 1953 for knowingly or recklessly making false or misleading statements.

Case Studies

Several case studies are included to illustrate practical applications of the guidance.

1. Lottie and OSH Pty Ltd: Lottie, the director of a BAS agent company, provides false information to the TPB to maintain the company's registration.
2. Esther the Sole Practitioner: Esther omits her status as an undischarged bankrupt in her tax agent registration renewal, a material particular affecting her eligibility;
3. Archie and Carter: Archie fails to verify the identities of individuals represented by Carter, leading to false statements in lodged tax returns;

4. Ella and FinTax Pty Ltd: Ella, a registered BAS agent, discovers and corrects a false statement regarding professional indemnity insurance coverage;
5. Julian and Work-Related Expense Claims: Julian, a tax agent, is found to have made numerous incorrect work-related expense claims across his client base;
6. Kate and Peter: Kate notifies the Commissioner about an incorrect statement in a client's previous tax return after the client refuses to correct it;

The TPB invites comments and feedback on the draft, with consultation questions provided to guide submissions.

Comments on the draft should be submitted by 3 September 2024, via email or mail to the TPB.

COMMENT – the draft guidance makes it clear that, in the view of the TPB, the obligation under the Code to notify the TPB or Commissioner overrides any confidentiality obligations to the client.

w https://www.tpb.gov.au/tpbi-d542024-false-or-misleading-statements-tpb-or-commissioner

8.7 TPB guidance on working with government code obligations

The Tax Practitioners Board (TPB) has released draft Information Sheet TPB(I) D55/2024 for public consultation. The guidance, open for comments until 3 September 2024, aims to elucidate the TPB's interpretation and administration of the rules regarding conflicts of interest and confidentiality in dealings with government. This draft specifically addresses obligations under sections 20 and 25 of the Tax Agent Services (Code of Professional Conduct) Determination 2024.

Obligations under Section 20

Section 20 of the Determination requires practitioners to identify, document, disclose, manage, mitigate, and where appropriate and possible, avoid conflicts of interest in their professional dealings with Australian government agencies.

To meet the obligation of identifying and documenting conflicts of interest, practitioners must take reasonable steps to recognise any material conflict of interest (real or apparent) related to activities undertaken for an Australian government agency. Adequate records should be maintained, detailing the nature, extent, and management strategies of such conflicts. The draft guidance suggests that this documentation process should include preliminary conflict checks, maintaining a conflict of interest register, and implementing information handling procedures to limit access to those with a legitimate need to know.

When it comes to disclosure, practitioners are required to reveal any material conflict of interest to the relevant government agency as soon as they become aware of it. The disclosure should be specific and detailed, encompassing the nature, extent, and implications of the conflict. This helps the government agency assess the impact of the conflict and decide on the continued engagement of the practitioner.

The guidance outlines various strategies for managing and mitigating conflicts of interest, such as enforcing internal governance policies, allocating staff to projects in a way that manages or avoids potential conflicts, and conducting regular training for employees on conflict of interest policies. In certain cases, avoiding a conflict of interest altogether may be the best course of action, which could involve declining an engagement to ensure impartiality and integrity.

Obligations under Section 25

Section 25 of the Determination addresses confidentiality and the use of information. Practitioners must not disclose information received from a government agency related to their professional activities unless legally

required or explicitly authorised by the agency. The draft guidance emphasises the importance of secure handling of information and the implementation of appropriate technological measures to prevent inadvertent disclosures.

Furthermore, practitioners are prohibited from using information obtained from a government agency for personal gain or for the advantage of associates, employees, employers, or clients unless the agency has authorised such use. This ensures that no personal advantage is derived from confidential information obtained through professional engagements with the government.

Consequences of Non-Compliance

Failure to comply with the requirements set forth in the Determination can result in TPB sanctions, which may include written cautions, orders to rectify breaches, suspension, or termination of registration. Non-compliance might also lead to the practitioner being deemed unfit for registration or violating other Code obligations, such as the duty to act with honesty and integrity.

Additional Considerations

The guidance references other relevant standards and legislation, including the Corporations Act 2001, APESB standards, and the Privacy Act 1988, to provide a thorough framework for managing conflicts of interest and confidentiality. Practitioners are encouraged to seek legal advice when necessary and ensure their practices align with these standards.

Case Studies

The draft guidance includes a series of case studies that illustrate practical applications of the obligations under sections 20 and 25. These examples provide context and clarity on how practitioners can effectively manage conflicts of interest and maintain confidentiality in various scenarios.

Case Study 1: Conflict of Interest Not Disclosed to Government Agency

Ann, a registered tax agent and partner at a large consulting firm, is invited to a confidential consultation by an Australian government agency regarding proposed legislation. She identifies a potential conflict of interest due to her firm's clients being affected by the new rules but fails to document or disclose this conflict to the agency. Consequently, Ann breaches her obligation under section 20 by not managing, mitigating, or avoiding the conflict.

Case Study 2: Agency Authorises Continued Engagement Following Disclosure of Conflict

Max, a registered tax agent with expertise in company tax law, is engaged by The Treasury to assist in tax law reform. Max immediately discloses his conflict of interest due to his existing clients being impacted by the reform. The Treasury reviews Max’s mitigation steps and provides written consent for his continued engagement, highlighting proper conflict management.

Case Study 3: Conflicts of Interest Considered Not Material

John, a registered tax practitioner and superannuation expert, is engaged to provide advice on a superannuation reform package. Although he identifies a minor conflict of interest due to his membership in a super fund, he assesses it as not material but documents and discloses it to the government agency. John meets his obligation under section 20 by appropriately handling the conflict.

Case Study 4: Agency Authorises Disclosure of Information to Third Party Practitioner

Thomas, a tax partner at an accounting firm, participates in confidential discussions with The Treasury regarding tax rate increases. The Treasury authorises him to share information with a select group within his

firm. Thomas complies with the authorisation, ensuring no further disclosure, thus adhering to his confidentiality obligations.

Case Study 5: Disclosure Inconsistent with Authorisation

Continuing from Case Study 4, Thomas breaches his obligation by sharing printed confidential documents with colleagues, contrary to The Treasury's stipulation for email-only communication. This case illustrates the importance of adhering strictly to the terms of authorisation.

Case Study 6: Agency Does Not Authorise Disclosure of Information

Isabella, engaged in a confidential consultation on tax law measures, signs a confidentiality agreement with The Treasury. She breaches her obligation by sharing confidential information with her firm's partners and staff without authorisation, demonstrating a clear violation of section 25.

Case Study 7: Using Information for Personal Advantage

In addition to breaching confidentiality, Isabella uses the confidential information for her personal gain and that of her colleagues, further contravening section 25 by deriving unauthorised personal advantage from government information.

Case Study 8: Using Information for Employer's Advantage

Adam, a tax practitioner and programme head, shares confidential information from The Treasury with his employer, intending to develop a competitive training programme. This unauthorised use of information for personal and employer gain breaches section 25, highlighting the importance of adhering to confidentiality obligations.

Further Information

The guidance document concludes with references to additional materials and guidance notes that provide further assistance on managing conflicts of interest and maintaining confidentiality, such as TPB Information Sheets and APESB standards.

Consultation and Feedback

The TPB encourages practitioners to provide feedback on various aspects of the guidance, including the adequacy of the steps and factors outlined for managing conflicts of interest and maintaining confidentiality. To facilitate structured feedback, the draft includes consultation questions that aim to gather comprehensive input for refining the final guidance

w https://www.tpb.gov.au/tpbi-d552024-managing-conflicts-interest-and-maintaining-confidentiality-dealings-government

8.8 TPB FAQs on new code obligations

The Tax Practitioners Board has published a webpage setting out frequently asked questions regarding the new code obligations. Questions addressed include:

1. Why was a Determination issued to create new Code obligations on tax practitioners?
2. How were these new obligations developed?
3. Where can the Determination be found?
4. When do these new obligations commence?
5. How can tax practitioners comply with the new obligations by 1 August 2024?

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6. When can we expect the TPB to release guidance materials to assist tax practitioners?
7. How will this consultation be carried out and what will it cover?
8. Will the TPB run webinars on the new Code requirements?
9. What is the TPB's approach to non-compliance with the new obligations from 1 August 2024?
10. Will the TPB's guidance recognise the differences in how a small practice and a large firm operates?
11. One of the new obligations requires that tax practitioners keep their clients informed of all relevant matters that could influence the client's decision to engage them – what is a 'relevant matter'?
12. Do the new obligations conflict with the existing Code items?
13. Does the new obligation to ensure tax agent services being provided on your behalf are provided competently require your staff to have formal training?

w https://www.tpb.gov.au/faqs-code-determination

8.9 Tax practitioners board registration review

On 17 July 2024, Treasury released a consultation paper and fact sheet regarding a review of the eligibility requirements for tax practitioner registration with the Tax Practitioners Board.

This initiative is part of the Government's response to regulatory issues highlighted by the PwC matter. Key areas for improvement and feedback include strengthening registration requirements by:

1. enhancing eligibility for company and partnership registrations;
2. reevaluating the pathways and recognition of professional associations; and
3. expanding the TPB's criteria to accept alternative forms of relevant experience.

Feedback is sought on:

1. potential amendments to the Tax Agent Services Regulations 2022 (TASR) and the *Tax Agent Services Act 2009* (**TASA**) to allow more flexible acceptance of qualifications;
2. the adequacy and impact of the 'fit and proper person' test under TASA in protecting consumers without creating excessive entry barriers; and
3. additional proposals to modernise the registration framework and address emerging challenges, including:
    (a) introducing an additional registration requirement for companies and partnerships to satisfy the TPB that they have sufficient governance arrangements in place to ensure compliance with their obligations as a registered tax practitioner, at the time of registration;
    (b) amending the Code to require tax practitioners to maintain contingency and succession plans to ensure service continuity during significant or disruptive events;
    (c) amending the TASA to allow the TPB to consider qualifications outside traditional tax practitioner courses, following recommendations from recent reviews;
    (d) amending the TASA to regulate existing and emerging tax intermediaries, including digital software providers, cryptocurrency tax advisers, and conveyancers;
    (e) amending the TASA to change the definition of tax agent services, potentially requiring in-house tax advisers and secondees to register with the TPB for consistent regulation; and
    (f) amending the TASA to reconsider the exemption for legal practitioners from TPB registration, even if they provide tax agent services without preparing or lodging returns.

Due to high levels of interest in the consultation, Treasury has extended the consultation period until 14 August 2024. Treasury will also endeavour to consider the views presented in any submissions made after that date.

COMMENT – at this stage these proposals are merely open for consultation and are not announced changes nor the subject of draft legislation.

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w https://treasury.gov.au/consultation/c2024-536402
w https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/consultation-eligibility-requirements-tax-practitioner

8.10 Updated TPB guidance on proof of ID process for practitioners

The TPB has updated its website regarding its proof of ID process for registered tax practitioners.

All registered individual tax practitioners, and those applying to register with us, must complete a one-off proof of identity (POI) process that helps protect their personal information and aligns with Australian Government standards.

Individuals who have yet to complete the proof of ID process, will need to complete this process at their next registration renewal.

The key change is the removal of the requirement (or ability) to undertake the proof of ID process at an Australia Post outlet. Going forward, it appears from the website that all proof of ID will need to be undertaken using the Document Verification Service (DVS), a national online system that allows authorised agencies to verify certain identity documents issued by a range of Australian, State or Territory government agencies.

The DVS is a secure system that matches key details in Australian-issued identity documents with a government record and provides timely online results.

The webpage details how proof of ID checks are conducted, what documents are required, what you need to do before commencing the process and the implications of failing to complete the process. There is also a video outlining the process and providing tips.

w https://www.tpb.gov.au/proof-identity-checks-tax-practitioners

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