The Tax Institute

Tax Update

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

Brown Wright Stein tax partners:

Amanda Comelli	E: akc@bwslawyers.com.au	P: 02 9394 1044
Andrew Noolan	E: ajn@bwslawyers.com.au	P: 02 9394 1087
Geoff Stein	E: gds@bwslawyers.com.au	P: 02 9394 1021
Matthew McKee	E: mpm@bwslawyers.com.au	P: 02 9394 1032
Michael Malanos	E: mlm@bwslawyers.com.au	P: 02 9394 1024
Rachel Vijayaraj	E: rlv@bwslawyers.com.au	P: 02 9394 1049
Suzie Boulous	E: sjm@bwslawyers.com.au	P: 02 9394 1083

www.bwslawyers.com.au

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

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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**
Item 1.2 Peter Hatfield Trust	The Administrative Appeals Tribunal has determined that a worker was not being engaged under an unwritten contract wholly or principally for the labour of that person under section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) as it was a contract for the worker to produce a result. The decision considers recent	Page 9
Item 1.3 BSKF	The Administrative Appeals Tribunal has held that the terms of settlement deed entered into by the Commissioner of Taxation are not relevant in proceedings in the Tribunal under Part IVC of the *Taxation Administration Act 1953* (Cth) as the Tribunal's role is to consider whether the assessments are excessive by reference to the relevant taxing provisions.	Page 12
Item 1.5 Gainer	The Supreme Court of New South Wales has given judicial advice to the trustee of a self-managed superannuation fund in relation the payment of superannuation death benefits in circumstances where the trustee did not comply with section 17A of the *Superannuation Industry (Supervision) Act 1993* (Cth) and an invalid binding death benefit nomination had been made by the deceased. Consideration was given to the principles as to whether a dependant is to be preferred to the legal personal representative	Page 16
Item 5.20 QLD payroll tax and dentists	The Queensland government has announced that it will provide a general exemption from payroll tax for contracted dentists	Page 55
Items 6.1 to 8.2 TASA Code Changes	There have been a number of updates to the proposed changes to the Code of Conduct for the *Tax Agents Services Act 2009* (Cth) with an amended Determination being published and a disallowance motion being withdrawn.	Page 58

2. Cases

2.1 Sladden – settlement sum characterised as ordinary income

Facts

Dr Julie Ann Sladden is a medical practitioner.

On 13 April 1999, Julie entered two linked policies of insurance with National Mutual Life Association of Australasia Limited, which were collectively issued under the policy number P700129518, as follows:

1. a Life Protection Plan, with a commencement date of 13 April 1999 and an expiry date of 3 April 2068; and
2. a Professional Income Protection Plan, with a commencement date of 13 April 1999 and an expiry date of 3 April 2038.

In February 2013, Julie was diagnosed with breast cancer.

On around 4 March 2013, Julie made a claim for an income protection benefit under the Professional Income Protection Plan, following which she received monthly benefits. The monthly benefits were assessable income of Julie.

In January 2017, National Mutual transferred its life insurance business to AMP Life Ltd.

On 9 May 2019, Julie appointed Colin Fullagar of Integrity Resolutions to negotiate with AMP on her behalf *"re a possible commutation of [her] income protection insurance benefit"*.

On 26 June 2019, AMP offered $1,000,000 to Julie in full and final settlement of her claim, with the policy to be surrendered.

To assist in assessing the offer made by AMP, Julie engaged an actuary to calculate the value of her income protection benefits. The actuary estimated the value, on 5 July 2019, to be between around $1.78 million and $1.94 million. The actuary did not calculate the value of her cover under the Life Protection Plan.

On 11 July 2019 Julie accepted the offer of $1 million.

On 30 July 2019, AMP provided a draft deed of release.

On receipt of advice, Julie sought confirmation as to whether the life insurance component of the policy would continue as a stand-alone policy. On 1 August 2019, the AMP case managed advised that the entire policy would be surrendered. Despite this, Julie did not seek to re-negotiate the settlement sum so it remained at $1,000,000.

On or around 11 September 2019, the parties executed a deed of release, which relevantly included the following terms:

> *Recital D: On about 4 March 2013, [Dr Sladden], made a claim for an income protection benefit ("IP Benefit") under the Policy, identified by claim number P1B3411 ('the Claim').*
>
> *Recital G: Without admission of liability, the parties to the Deed agree to compromise the Claim, the Policy and all insurance cover held under the Policy. [Dr Sladden] agrees to provide the release and indemnity set out in clause 3 in exchange for payment of the Settlement Sum pursuant to clause 2.*
>
> *Clause 1.1(e): Settlement Sum is $1,000,000;*

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Clause 2.3: The Policy will be terminated by AMP on receipt of this Deed executed by the Releasor.

Following execution of the deed of release, Julie received the settlement sum of $1,000,000. The settlement sum was included in her assessable income for the income year ended 30 June 2020 as ordinary income under section 6-5 of the ITAA 1997.

Julie objected to the income tax assessment, which was disallowed by Commissioner on 13 April 2022. Julie then sought a review of the decision by the Commissioner to disallow her objection.

On 16 November 2023, the AAT affirmed the Commissioner's decision to disallow Julie's objection.

Julie argued that the settlement sum was not assessable as ordinary income as it was an undissected lump sum which comprised of capital and income and, as such, was all on capital account. Julie submitted that, in characterising the settlement sum, the matter is determined entirely by the "*agreement between the payer and the payee*" and, as the deed is not a sham, the nature of the consideration for which the settlement sum was paid is governed by the terms of the deed. In advancing her argument, Julie relied on the cases of *McLaurin v Federal Commissioner of Taxation* (1961) 104 CLR 381 and *Allsop v Commissioner of Taxation (1965) 113 CLR 341.*

In the case of *Allied Mills Industries Pty Ltd v Commissioner of Taxation* [1989] FCA 135 (***Allied Mills***), the Full Federal Court held that, in characterising payments made under an agreement, *"the terms of the agreement must, of course, be examined; but so must the whole of the circumstances surrounding its execution, its operation and the receipt of the money in question"*.

In affirming the Commissioner's decision to disallow Julie's objection, the AAT, following *Allied Mills*, held that the terms of the deed are not determinative of the issue and instead, considered, notwithstanding the deed was not a sham, that regard may be had to the facts and circumstances that led to the deed being executed. In reaching its decision, the AAT observed the following:

1. Julie and AMP considered, and had communicated, that what became the settlement sum, as at 11 July 2019 when Julie accepted AMP's offer, represented what AMP would pay for the commutation or settlement of Julie's income protection benefits;
2. consideration was only given to the life insurance cover at a later point, when the draft deed of release was drawn up. Despite agreeing to surrender the cover under the Life Protection Plan, the settlement sum was unchanged;
3. Julie did not take steps, similar to her engaging an actuary to value the income protection benefits, to value the cover under the Life Protection Plan before entering into the deed of release; and
4. in reality, Julie and AMP negotiated and resolved to commute Julie's entitlements in respect of the income protection claim in consideration of the payment of the settlement sum and no thought was given, by either party, to any other claim or entitlement in reaching agreement on the amount AMP was to pay to Julie.

Issue

Was the settlement sum entirely income in character?

Decision

The Full Court determined that the deed of release should be considered in light of the surrounding circumstances known to both parties and that to confine itself to the deed of release when determining the character of the receipt is unsustainable as a matter of law.

The Full Court considered that the settlement sum of $1,000,000 was in respect of the commutation of Julie's monthly benefits payable under the income protection cover and no part of the settlement sum was paid or payable in respect of the termination of the Life Protection Plan.

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The appeal was dismissed with costs.

Citation *Sladden v Commissioner of Taxation* [2024] FCAFC 122 (O'Sullivan, Hespe and Neskovcin JJ, Queensland)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/122.html

2.2 Peter Hatfield Trust – extended meaning of employee for SGC

Facts

Between 1 January 2010 and 30 September 2020, the trustee of the Peter Hatfield Trust operated a plumbing business under the name “Peter Hatfield Plumbing.” The sole director of the trustee was Peter Hatfield

In 2010, Christopher Hargreaves approached Peter about becoming a subcontractor. Christopher expressed his desire to pursue a career in the film and television industry while building his own business. He had obtained a Queensland Building and Construction Commission (QBCC) Plumber & Drainage Licence as a Trade Contractor, which enabled him to work directly in building work as a sole trader, partner, or trustee. Throughout the working relationship, Christopher was engaged on a “do and charge” basis, setting his own hourly rate, which he increased multiple times between 2010 and 2020.

Peter would contact Christopher when work was available, and Christopher would confirm his availability. Most of the work subcontracted to Christopher between 2010 and 2020 involved maintenance jobs that typically lasted only a few hours. At the end of any week in which Christopher was engaged, he would submit an invoice for payment.

Sometime between December 2013 and April 2014, Christopher had an accident and was unable to work, for which he was compensated by Workcover. There were long periods during this time when Christopher was unavailable to perform work for Peter.

Christopher used his own tools, which he purchased and maintained. Occasionally, Peter would provide specialised large equipment if necessary. Christopher advertised his own business, "Backflow," on his work van and held business cards under various trade names, such as "Resort Plumbing" and "Sandy Point Plumbing."

In February 2021, Christopher contacted the ATO, complaining that the Peter Hatfield Trust had not paid superannuation on his behalf for a 10-year period. He was then asked to complete a “Status of the worker questionnaire - worker,” which he did in March 2021, stating that he considered himself an employee of the Trustee. Christopher provided the ATO with documents, including invoices issued during the relevant periods detailing work performed and hours worked, bank account statements showing payments received from the Trustee, statements of transactions under “Resort Plumbing ABN,” and CBUS superannuation statements indicating payments received from Peter Hatfield Plumbing in 1996.

Subsequently, the ATO informed Peter that it was conducting an audit to verify compliance with superannuation guarantee obligations, requesting completion of a “Status of the worker questionnaire - payer” and other documentation. The Trustee provided various documents, including ASIC business searches, pictures of Christopher’s business cards, transaction records, contractor licence history, and advertising material for Christopher's services.

In the Payer Questionnaire, Peter indicated that Christopher was contracted to perform agreed plumbing maintenance work on a verbal agreement as a subcontractor, charging an hourly rate inclusive of GST, and having the right to refuse work. It was highlighted that Christopher worked unsupervised, advertised his business, did not receive employee benefits like sick pay, travel allowance, or superannuation, and was responsible for his own insurance. The trustee of the Peter Hatfield Trust also supplied additional material

following the audit, including advertising documents, payment ledgers, invoices, timesheets, and proof that Christopher subcontracted to at least three other businesses.

The trustee of the Peter Hatfield Trust submitted that Christopher's services were "ad hoc" and not provided on a daily basis, noting that any agreement in writing was limited to the invoices issued. Christopher's hourly rates changed over time, increasing to $40 per hour plus GST in February 2010, $45 per hour in April 2010, and $55 per hour in July 2012.

On 2 February 2022, the ATO concluded the audit, determining that the relationship between trustee of the Peter Hatfield Trust and Christopher constituted an employer and employee arrangement under the extended definition of section 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGAA**).

Section 12(3) of the SGAA provides that if a person works under a contract that is wholly or principally for their labour, that person is deemed to be an "employee" for superannuation guarantee purposes. Notices of assessment for SGC were issued, for a total of $123,521.77 including interest.

On 1 April 2022, the trustee of the Peter Hatfield Trust lodged an objection to the assessments.

On 16 December 2022, the Commissioner disallowed the objection. On the same day, the trustee of the Peter Hatfield Trust applied to the AAT for review of the objection decision.

In the AAT, Peter confirmed that a plumber required a licence to engage in subcontracting work. Christopher's licences allowed him to operate as a subcontractor, and he provided job and time sheets to record the work performed and hours spent. Peter did not supervise Christopher, who was expected to work independently. Christopher operated his own business while contracting with Peter, and he was responsible for his own plumbing tools and insurance. He used his work vehicle to transport himself and his tools to job sites. If Christopher wished to delegate work, he would have required Peter's permission, although this arrangement was not initially discussed. Christopher was paid above the award rate for his work.

Christopher's engagement was primarily due to his specialised skills as a plumber. He described a typical day of working for Peter, where he would receive instructions face-to-face, by phone, or on-site, noting the job details in his diary. Christopher would introduce himself as "Chris from Peter Hatfield Plumbing" and, when handling Peter's phone, answered in a similar fashion. The tasks involved general plumbing maintenance, hospital maintenance, renovations, repairs, and commercial premises refit. Materials were often sourced through Peter's supplier account, though Christopher occasionally sourced specific materials like oxyacetylene, which he then included in his invoices.

In terms of payment and invoicing, Christopher agreed verbally to a fixed hourly rate, which included occasional double time. Throughout the ten years working for Peter, only one pay increase was negotiated. Christopher did not issue quotes but recorded his hours on an Individual Job Sheet and submitted a Daily Run Sheet, detailing the day, jobs completed, and hours spent. Weekly invoices were submitted and paid by direct transfer within seven days, without the issuance of pay slips. Payment was based on hours worked rather than job completion.

Christopher charged GST on his invoices and managed his own GST through BAS statements. He continued to have other clients separate from Peter, as he did not seek full-time employment and wanted to maintain his own plumbing business. Christopher owned his work vehicle and tools, bearing the costs of any replacement or maintenance, which he claimed as a business expense under his personal ABN. The ability to delegate work was never discussed, and he never delegated any tasks. Christopher was expected to complete each job and would fix any issues that arose, maintaining his independence throughout his engagement with Peter.

Contrary to his written statement, Christopher later confirmed that he worked independently and unsupervised. In a Worker Questionnaire, Christopher inaccurately answered that he could not provide services to others independently of Peter. At the hearing, he clarified that he meant he could not work for someone else while on

a job for Peter due to physical constraints of being in two places simultaneously. Additionally, the questionnaire inaccurately noted that Christopher only occasionally worked independently and that he did not submit invoices or set fees, which contradicted his oral evidence. Christopher acknowledged that the hourly fee was, in fact, negotiated between the parties.

Issue

Was Christopher an employee for superannuation guarantee charge?

Decision

The AAT referred to ATO guidance from *Superannuation Guarantee Ruling* SGR 2005/1 - Who is an Employee for Superannuation Guarantee Purposes and draft *Taxation Ruling* TR 2023/4DC1 - Income Tax and Superannuation Guarantee: Who is an Employee? to interpret section 12(3) of the SGAA. Both guidance documents reinforced the importance of assessing whether a contract is “wholly or principally for labour” and the significance of a right to delegate and working to achieve a result. The factors considered by the AAT are set out below.

Control and autonomy

The AAT considered *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and found that Christopher had significant control over how, when, and where he worked, without supervision. This autonomy, alongside his ability to accept or refuse jobs without repercussions, indicated an independent contractor relationship rather than employment. The AAT also referred to *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76, which emphasised that the level of control a party has over the performance of work is a key factor in distinguishing between an employee and an independent contractor.

Right to delegate and achieving a result

The AAT referred to *Jamsek v ZG Operations Australia Pty Ltd* [2022] HCA 2, which highlighted that a contract permitting the contractor to perform work personally or delegate to another suggests an independent contractor relationship. Although the contract between Christopher and the trustee of the Peter Hatfield Trust did not explicitly address delegation, the AAT concluded that any requirement for consent was likely to ensure the substitute was suitably licensed, not to exert control. Further, Christopher’s responsibility for achieving specific outcomes in each job supported the view that he was engaged to produce a result, not to provide personal labour, aligning with the principles in *Neale v Atlas Products (Vic) Pty Ltd* [1955] HCA 18.

Provision and use of tools and equipment

Christopher’s use of his own tools, vehicle, and equipment - without reimbursement from the trustee of the Peter Hatfield Trust - was a significant factor. Citing *Williams v Trimview Roof Restoration Pty Ltd* [2001] WASCA 414, where a tradesperson’s ownership of tools and equipment supported independent contractor status, the AAT concluded that Christopher's investment in and responsibility for his equipment distinguished him from an employee.

Payment structure and business operations

The AAT considered *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118 in addressing the definition of an “employee” under section 12(3) of the SGAA. Christopher was paid above award rates on a "do and charge" basis, invoicing weekly, and receiving no typical employment benefits, such as superannuation or leave. This payment structure aligned with independent contractor status. Moreover, Christopher’s operation of his plumbing business under his ABN and advertising of his services independently of the Trustee indicated he worked in his own business, a factor emphasised in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76.

The AAT found that Christopher's contract was not “wholly or principally for labour,” but for providing plumbing services as an independent contractor, leading to the conclusion that the trustee of the Peter Hatfield Trust was not liable for superannuation contributions.

Citation *The Trustee for the Peter Hatfield Trust and Commissioner of Taxation (Taxation)* [2024] AATA 3428 (Senior Member Grigg, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3428.html

2.3 BSKF – review and amendments after ATO settlement

Facts

BSKF is an individual who is also a tax agent. BSKF controls a number of entities.

On April 2009, BSKF and related entities entered into a settlement deed with the Commissioner to resolve a tax dispute regarding earlier income years. The settlement required SOPL, a company controlled by BSKF, to pay $3,900,000 to the Commissioner to settle disputed taxation liabilities.

Denial of franking credit

On 28 June 2010, SOPL made the final payment under the settlement deed, totalling $3,350,000 plus General Interest Charge (**GIC**) of $108,161, despite the terms of the deed allowing until 21 July 2010 for this payment. This payment allowed SOPL to frank a dividend declared within that income year.

BSKF lodged his personal income tax return for the income year ended 30 June 2010 including the franked dividend. On August 2011, the Commissioner released a franking credit of $2,993,610 to BSKF as a refundable tax offset.

However, in September 2019, the Commissioner sought to recover this amount by making a determination under section 177EA of the ITAA 1936 to cancel the benefit of the franking credit and issuing notices under section 8AAZN of the TAA for BSKF to repay the amount, alleging it was an administrative overpayment.

BSKF and HGYT applied to the AAT to challenge the Commissioner’s determination and notices on the grounds that the franking credit and dividend were contemplated by the settlement deed, and also argued that the AAT did not have jurisdiction to enforce the deed's terms against the Commissioner or consider the section 8AAZN notices, as no relevant decision regarding these notices was before the AAT for review.

GIC

General Interest Charge (**GIC**) of $13,698,643 accrued in respect of shortfalls later covered by the settlement, which BSKF claimed as a deduction in the 2009 income year. The Commissioner credited this amount to BSKF’s income tax account in 2011, treating it as an assessable recoupment under section 20-20(3) of the ITAA 1997. The Commissioner determined that under section 20-20(3), a recouped amount from a previously deducted loss or outgoing is assessable income. BSKF's 2009 GIC deduction reduced taxable income, and when the GIC was credited back in 2011, it was included as assessable income.

BSKF applied to the AAT for review of this decision.

BSKF argued the GIC liability should not be treated as assessable, because the settlement deed had resolved the matter of the primary tax and the GIC should be considered as having never been payable.

<u>Penalties</u>

In the 2011 and 2012 income years, BSKF and related entities engaged in several transactions that the ATO later scrutinised. These transactions included debt defeasance arrangements where BSKF assumed principal and interest payment obligations under deeds executed between himself and entities he controlled. BSKF claimed significant deductions for these obligations, which the Commissioner later disallowed. It also included an employee share scheme under which HGYT, a company associated with BSKF, claimed a deduction of $21.3 million.

The ATO issued amended assessments for the 2011 and 2012 income years, citing that the deductions were not allowable. Alongside the amended assessments, the Commissioner initially assessed administrative penalties for recklessness at 25% of the tax shortfall. However, upon reviewing the taxpayers' objections, the Commissioner increased the penalties to 75% for the 2011 year, arguing that BSKF's conduct demonstrated intentional disregard of the law. For the 2012 year, the Commissioner imposed a 90% penalty, which included a 20% uplift due to a prior penalty being applied.

BSKF applied to the AAT for review of this decision, contending that that the Commissioner was not legally permitted to increase the penalties once the original assessment had been made and the penalty notices had been issued.

BSKF based this argument on section 14ZY of the TAA, which outlines the Commissioner's authority in the objection process. According to BSKF, the Commissioner's powers were limited to either allowing the objection (in full or in part) or disallowing it, but did not extend to increasing penalties that had already been assessed. Essentially, BSKF claimed that once penalties were assessed, the Commissioner could not impose a higher penalty during the objection phase.

In response, the Commissioner argued that section 33(3) of the *Acts Interpretation Act 1901* (Cth) granted the authority to amend or vary any assessment or decision, including increasing penalties. The Commissioner maintained that during the objection process, if further review of the facts revealed more serious conduct, such as intentional disregard of the law, it was within the Commissioner's power to increase the penalties to reflect the correct base rate of 75%.

Issues

1. Can the AAT review whether an assessment is excessive and whether a Part IVA determination should have been made, where the Commissioner has entered into a deed of settlement with the taxpayer on the same subject matter?
2. Should the determination to cancel franking credits made under section 177EA of the ITAA 1936 be upheld?
3. Was the GIC an assessable recoupment under section 20-20(3) of the ITAA 1997?
4. Does the Commissioner have the power to increase an administrative penalty on objection?

Decision

<u>Settlement deeds</u>

The AAT found that its task is to determine whether the assessments are excessive according to the taxation laws, not by reference to the terms of the settlement deed.

Specifically, the AAT concluded that while the deed of settlement may outline the parties' agreed resolution on certain tax disputes, it does not override the Commissioner's statutory duty to assess tax liabilities based on the provisions of the tax law. The AAT must decide the case solely by reference to the taxation legislation, not by reference to the terms of the settlement deed, which is a contractual arrangement that does not alter the

application of the relevant tax statutes. Therefore, the settlement deed could not be used as a basis to challenge the legality or correctness of the Commissioner's assessment or a Part IVA determination.

Determination to cancel franking credits

The AAT determined that the determination made under section 177EA of the ITAA 1936 to cancel franking credits should be upheld. The Commissioner had made a determination under section 177EA to cancel BSKF's franking credits on the basis that the distribution of franked dividends resulted in an imputation benefit, and the arrangement had the purpose, or dominant purpose, of obtaining such a benefit.

BSKF argued that the franking credits should not have been cancelled because the dividend distribution and the resulting imputation credit were contemplated by the settlement deed. However, the AAT found that the settlement deed did not prevent the application of section 177EA, and the statutory conditions for making the determination were satisfied.

Further, the AAT rejected BSKF's argument that the Commissioner could not make a section 177EA determination without issuing an amended assessment. Section 177EA(11) specifically provides that a determination under subsection 177EA(5)(b) takes effect according to its terms and does not require an amended assessment to be issued. As such, the AAT upheld the Commissioner's determination to cancel the franking credits.

GIC

The AAT determined that the GIC credited to BSKF's account was an assessable recoupment under section 20-20(3) of the Income Tax Assessment Act 1997 (ITAA 1997). The AAT found that BSKF had previously claimed a deduction for the GIC in the 2009 income year. When the Commissioner credited the amount back to BSKF's account in 2011, this constituted a recoupment of an amount for which BSKF had already received a tax benefit.

Under section 20-20(3) of the ITAA 1997, an amount is considered an assessable recoupment if the taxpayer has deducted the corresponding loss or outgoing in a previous income year. Since BSKF had deducted the GIC and subsequently received a credit for it, the credited amount was treated as an assessable recoupment, meaning it was taxable income in the year it was credited. The AAT rejected BSKF's argument that the GIC should not be assessable due to the terms of the settlement deed, concluding that the relevant provisions of the tax law, rather than the deed, governed the assessability of the recoupment.

Penalties

The AAT determined that the Commissioner does have the power to increase an administrative penalty on objection. The AAT concluded that under section 33(3) of the *Acts Interpretation Act 1901* (Cth), the Commissioner is empowered to amend, vary, or increase an assessment or penalty, including increasing a previously assessed penalty, during the objection process. This power applies unless a contrary intention is expressed in the relevant tax legislation, which was not the case here.

The AAT found that the Commissioner could lawfully increase the administrative penalty from the original assessment if, upon further review during the objection process, it was determined that the taxpayer's conduct (in this case, BSKF) warranted a higher penalty. The AAT rejected BSKF's argument that the Commissioner was limited to either disallowing or reducing the penalties at objection, affirming that the Commissioner had the authority to increase the penalty if the facts justified it.

Citation *BSKF and Commissioner of Taxation (Taxation)* [2024] AATA 3377 (Senior Member R Olding, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3377.html

2.4 Peng – Land tax and evidence

Facts

Shaohong Peng owned a property in Balwyn, that was comprised of 2 units, Unit 1 and Unit 2. Shaohong accepted that Unit 2 was rented out but claimed that Unit 1 was used by him and his wife as their principal place of residence.

The evidence in support of Shaohong's claims included documents such as utility statements, a 2021 Residential Tenancy Agreement, statutory declarations, and letters from him, his wife, one of the tenants, Mr. Peng's accountant, and two property managers. Shaohong testified at the hearing and was cross-examined; however, he did not arrange for others who provided statutory declarations to attend the hearing to confirm their statements.

There was evidence that was inconsistent with Peng having used Unit 1 as his and his wife's principal place of residence as follows:

1. Shaohong's tax returns from 2017 to 2020 indicated a different address in Mount Albert North as his residential address. This was a property owned by Shaohong's son. Shaohong explained that he lived there initially and did not know he needed to change his address with the ATO;
2. the insurance policy for the Balwyn property did not cover contents, which suggested there were no valuable belongings owned by Shaohong at the property;
3. the electricity usage was below the average for a single household; and
4. there was a lack of photographs showing the interior of the residence or any images of Shaohong and his wife at the property.

Issue

Was the Unit 1 used by Shaohong as his principal place of residence?

Decision

The VCAT concluded there was insufficient evidence to support Shaohong's claims. The VCAT made the following comments concerning the onus borne by taxpayers in land tax matters:

> *It has been observed that the burden of proof can be important in land tax cases and that 'self-serving, non-contemporaneous statements made by taxpayers must be treated with caution', particularly where such statements are 'general, vague and lack detail'. Further, where a Court (or the Tribunal) is faced with 'very uncertain evidence, a focus must be maintained on whether the onus has been met'. While those observations were made in the context of claims for the primary production exemption, the principles are relevant to, and have been applied in the context of, claims to the PPR exemption.*

Accordingly, the VCAT held that Shaohong was not entitled to the principal place of residence exemption under sections 54 and 55 of the *Land Tax Act 2005* (Vic).

Citation *Peng v Commissioner of State Revenue (Review and Regulation)* [2024] VCAT 880 (Senior Member Tang, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2024/880.html

2.5 Gainer – trustee discretion and superannuation death benefits

Facts

Gail Thelen and Werner Thelen established the Gainer Associates Superannuation Fund (**Fund**), with Gainer Associates Pty Ltd (**Gainer Co**) appointed as trustee and both Gail and Wener as the only members.

Rule 2.5(b) of the Fund's rules allowed a trustee to be removed if their continued appointment risked the Fund's compliance status as a self-managed superannuation fund. Rule 2.9(a) stipulated that upon a member's death, their legal personal representative could become a replacement trustee or director of the corporate trustee, provided the Fund retained its SMSF compliance status.

Werner Thelen died in 2014 and, as a result, Gail became the sole member.

Later that year, Gail met Steven Bone, a U.S. attorney specialising in estates and trusts, on a cruise. They developed a close relationship.

In 2019 Gail made a will naming Steven as her partner, and which left him $1 million and her art collection. In April 2021, shortly before death, Gail made a final will, which appointed her solicitor, John Lakos, as executor, and in the case of his death, the New South Wales Trustee and Guardian (**NSWTG**). The April 2021 will left Steven a $1 million legacy together with her Lexus car, furniture and household items and artworks, together with a life estate in her Clontarf home. Gail also made a binding death benefit nomination, that was only witnessed by one person, that nominate her legal personal representative to receive her death benefits. It appears to have been accepted that, as the binding death nomination was only witnessed by one person, it was not valid.

Following Gail's death, her brother challenged the validity of the April 2021 wills. After Lakos' death in December 2021, the NSWTG took interim administration of Gail's estate in March 2022.

Steven's solicitors requested the death benefit from the Fund be paid to him and Steven commenced family provision proceedings in the Supreme Court of New South Wales.

On 14 June 2022 the NSWTG appointed Mr Heesh, an experienced liquidator, as director of Gainer Co. The NSWTG, as a corporation, was not able to become a director. Mr Heesh began the task of resolving outstanding issues, including considering whether the binding death benefit nomination had been validly made. Mr Heesh obtained legal advice for this purpose. In providing the legal advice, the lawyers raised potential non-compliance issues under the SIS Act, being the following:

1. that the conditions in section 17A(3) of the SIS Act were not satisfied as Mr Heesh was not the legal personal representative; and
2. that Mr Heesh was not permitted to be paid remuneration as a director of Garnier Associates Pty Ltd in accordance section 17A(2) of the SIS Act. In this respect, section 17B of the SIS Act provides as follows:

> *17B Definition of self managed superannuation fund–remuneration of trustees etc.*
>
> *...*
>
> *(2) Paragraph ... (2)(d) do[es] not apply to remuneration for any duties or services performed by a director of a body corporate that is a trustee of a fund if:*
>
> *(a) the director performs the duties or services other than:*
>
> *(i) in the capacity of director; and*
>
> *(ii) in connection with the body corporate's capacity of trustee; and*

> *(b) the director is appropriately qualified, and holds all necessary licences, to perform the duties or services; and*
>
> *(c) the director performs the duties or services in the ordinary course of a business, carried on by the director, of performing similar duties or services for the public; and*
>
> *(d) the remuneration is no more favourable to the director than that which it is reasonable to expect would apply if the director were dealing with the relevant other party at arm's length in the same circumstances.*

The non-compliance was raised with the ATO and by November 2023, the ATO agreed not to issue a non-compliance notice, allowing time for the Fund's resolution.

On 13 February 2024, Steven commenced proceedings to have Gainer Co removed as trustee and replace by the NSWTG. Steven also sought an order that Gainer Co be prohibited from being indemnified from the assets of the Fund for its fees and prohibiting Mr Heesh being paid remuneration.

On 26 February 2024 Gainer Co determined that both Steven and the NSWTG were eligible death benefit recipients and that it proposed to pay one-third of the benefits to Steven and two-thirds to the NSWTG. Steven objected to this decision.

Gainer Co applied to the Supreme Court of New South Wales for judicial advice on a range of matters, including the following:

1. whether it was justified in paying the death benefits in the manner proposed;
2. whether it was justified in defending the trustee removal proceedings; and
3. whether it had a right to be reimbursed for its costs out of the Fund and to pay remuneration to Mr Heesh.

Steven contended that, when NSWTG became the legal personal representative of Gail, it should have been appointed as trustee of the Fund under Rule 2.9(a). He argued that both Gainer and NSWTG failed to comply with this rule, and Gainer Co remained trustee in breach of the rules of the Fund. Rule 2.5(b) mandated that the trustee should be removed if its appointment risked the Fund's compliance under superannuation laws. Since Gainer continued as trustee despite this, Steven asserted that the Court should not grant advice to a trustee acting in breach of its duties. Steven also questioned the validity of advice given by a trustee involved in a conflict of interest and pointed to issues of non-compliance that were not sufficiently addressed by Gainer Co and the NSWTG.

Steven also contended that the death benefit should be paid wholly to him as a dependent should be prioritised over the estate of the member, including for taxation reasons. Steven also contended that the Gainer Co should be required to provide reasons for its decision.

Issue

Should the Court give the judicial advice sought by Ganier Co?

Decision

The Court noted that it had a broad jurisdiction to provide judicial advice to trustees, as stipulated by section 63 of the *Trustee Act 1925* (NSW). This allows a trustee to seek guidance on managing the trust and interpreting trust documents. The Court emphasised that the advice mechanism aims to protect the trust's interests and safeguard trustees acting in good faith. Even in cases where a breach of trust has occurred, the Court can provide advice, provided the breach was honest and reasonable, and where judicial advice could prevent future disputes.

The Court recognised the SIS Act compliance issues but suggested that judicial advice was necessary to address these complications and allow the trustee to move forward. The Court considered that Steven's arguments that the Court should give no advice unpersuasive.

The Court stated that the best interest of the trust estate required a resolution, and while the appointment of NSWTG as a trustee might resolve the compliance issue, Gainer Co had taken steps to regularise the situation.

As for the death benefit, the Court noted that the determination of the payment of a death benefit is a matter with the discretion of the trustee. In reviewing a decision of the trustee, the question is whether the decision was made in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred: *Karger v Paul* [1984] VR 161 at 163-164; *Telstra Super Pty Ltd v Flegeltaub* [2000] VSCA 180.

The Court noted that its role is not to assess the fairness or reasonableness of the trustee's decision, although if the trustee's discretion is so extreme and without any justification that it is described as 'grotesquely unreasonable', this may be evidence that the discretion was not properly exercised: *Wareham v Marsella* (2020) [2020] VSCA 92; *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142.

The Court noted that neither legislation nor case law provides a general rule that gives priority to a dependent over the estate as it depends on the circumstances.

The Court held that that Gainer Co was not required to give reason and that there was evidence it had given due consideration including obtaining legal advice to understand and comply with its obligations and the terms of the trust deed in exercising its discretion, contacting eligible recipients and seeking full information about their circumstances.

The Court did not accept Steven's allegations that Gainer Co lacked independence.

The Court agreed that defending the trustee removal proceedings was justified, particularly as Steven had not yet advanced the case and conduct of Gainer Co remained unchallenged.

The Court considered that certain services Mr Heesh performed, especially those falling under his professional qualifications, could be paid under the exception in section 17B(2) of the SIS Act. However, remuneration for his work as a director would risk non-compliance with SIS Act. Despite this, the Court considered that, as the payment to Mr Heesh has been disclosed to the ATO and the ATO had agreed to refrain from making the Fund a non-complying fund, and given that it was in the interests of the Fund for Mr Heesh to complete his duties, it would not be appropriate to delineate between those duties that relate to Mr Heesh's professional background and those that relate his office as director. Accordingly, the Court considered that the trustee could be justified in paying Mr Heesh from the Fund. In making this decision, the Court noted that the policy reason for the prohibition on paying fees to directors of self-managed superannuation funds, was to prevent members from improperly accessing their benefits and that was not the case here.

The Court advised that the trustee could be indemnified from the Fund’s assets for the costs incurred in managing the Fund and resolving its compliance issues, as long as these steps aligned with the trustee’s duties and responsibilities.

The Court held that Gainer Co acted reasonably and in good faith in managing the Fund, addressing compliance issues, and exercising discretion in distributing the death benefit. Therefore, it was appropriate to grant judicial advice, allowing the trustee to proceed with its duties.

Citation *In the matter of Gainer Associates Pty Limited* [2024] NSWSC 1138 (Rees J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1138.html

2.6 Appeal update – MJH Trading Trust

The High Court has refused leave for the taxpayers to appeal the decision in *Commissioner of Taxation v Michael John Hayes Trading Pty Ltd as trustee of the MJH Trading Trust* [2024] FCAFC 80 (see our July 2024 Tax Training Notes).

The Full Federal Court held that the AAT had erred in its construction of section 207-155 of the ITAA when concluding that an arrangement was not a dividend stripping arrangement. The Full Federal Court remitted the matter to the AAT for redetermination.

Citation *Michael John Hayes Trading Pty Ltd ATF MJH Trading Trust & Ors v FC of T* [2024] HCASL 268
w https://www.hcourt.gov.au/assets/registry/special-leave-results/2024/10-10-24_Results.pdf

2.7 Other tax and super related cases in period of 11 Sept 2024 to 10 Oct 2024

Citation	Date	Headnote	Link
WTBW and Commissioner of Taxation (Taxation) [2024] AATA 3268	11 September 2024	INCOME TAX – DIVISION 293 TAX – whether an election is required for excess concessional contributions for an income year to be increased by the unused concessional contributions cap from earlier years or the increase applies by force of the statute – held no election required and taxpayer cannot elect that an amount carried forward not be applied – decision affirmed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3268.html
Feng v Chief Commissioner of State Revenue [2024] NSWCATAD 273	11 September 2024	TAXES AND DUTIES – Land tax – Surcharge land tax – Foreign person – Liability TAXES AND DUTIES – Land tax – Surcharge land tax – Exemptions – Principal place of residence	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/273.html
Conomos v Commissioner of State Revenue [2024] QCAT 372	13 September 2024	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – review of decision to refuse payment of HomeBuilder Grant where an application for a HomeBuilder grant has been made to the Commissioner pursuant to provisions of the First Homeowner Grant and Other Home Owner Grants Act 2000 (Qld), whether Mr Conomos was entitled to the HomeBuilder Grant, whether satisfied the residency condition, whether good reason to exempt applicant from the residence requirements.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2024/372.html
Wan v Chief Commissioner of State Revenue [2024] NSWCATAD 278	18 September 2024	TAXES AND DUTIES- taxation administration -reassessment of tax liability of taxpayer – remission of market rate of interest – remission of premium	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/278.htm

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Citation	Date	Headnote	Link
		rate of interest	l
Ashton v Commissioner of State Revenue [2024] QCAT 394	20 September 2024	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – review of decision to refuse payment of Home Builder Grant – where home owner entered into an eligible transaction with first builder – first builder became insolvent – home owner entered into an eligible transaction in all respects with second builder except that second builder was not licensed as at date of first eligible transaction - where grant refused by Commissioner	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2024/394.html
Youssef v Commissioner of Taxation (Appeal) [2024] FCA 1154	4 October 2024	INCOME TAX – where substantial deposits not included in applicants' tax returns – where Commissioner assessed deposits as income – where applicants said deposits were referable to gambling and sought to prove maximum taxable income from other sources – whether onus of proof satisfied under s 14ZZK of the Taxation Administration Act 1953 (Cth)	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/1154.html
TMWW and Commissioner of Taxation (Taxation) [2024] AATA 3552	8 October 2024	PRACTICE AND PROCEDURE – TAXATION REVIEW – SUMMONS – where the applicant claimed deductions for interest related to the acquisition of units in unit trusts – where the applicant requested the issue of a summons to give evidence and produce documents relating to Product Rulings issued by the Commissioner of Taxation – where applicant maintained Commissioner had a duty to treat taxpayers in the same circumstances the same – evidence not relevant to Tribunal's task – summons refused	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3552.html
Kilgour and Commissioner of Taxation (Taxation) [2024] AATA 3562	9 October 2024	PRACTICE AND PROCEDURE – whether applications for review of administrative penalties and shortfall interest charges should be held in abeyance pending decision of Full Federal Court concerning associated appeals against primary tax assessments – held matters to be held in abeyance	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/3562.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	9/10			
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11	9/10			
Taxation (Multinational—Global and Domestic Minimum Tax) 2024	4/7	22/8			
Taxation (Multinational—Global and Domestic Minimum Tax) Imposition 2024	4/7	22/8			
Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) 2024	4/7	22/8			
Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024	12/9	10/10			
Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Bill 2024	22/08	12/09	16/09	19/09	01/10

3.2 Denial of deductions for GIC or SIC

Treasury has released exposure draft legislation to introduce provisions to deny deductions for general interest charge and shortfall interest charge from 1 July 2025.

w https://treasury.gov.au/consultation/c2024-573157

3.3 Luxury car tax - draft legislation released

Treasury has released exposure draft legislation to amend the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) around fuel efficient vehicles. The draft amendments:

1. tighten the definition of a fuel-efficient vehicle; and
2. align the indexation rate for LCT thresholds.

Under the LCT Act, fuel efficient vehicles have a luxury car threshold of $91,387 whereas the threshold for other cars is $80,567.

The current law prescribes that a fuel-efficient car has a fuel consumption not exceeding 7 litres per 100km. It is proposed to amend this so that for a car to be a fuel-efficient car it must have a fuel consumption not exceeding 3.5 litres per 100km.

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Currently, the indexation rate for the fuel-efficient threshold has not been the same as the indexation rate for the general rate. The proposed amendments will ensure that the same indexation rate is used.

w https://treasury.gov.au/consultation/c2024-575553

3.4 Administrative Review Tribunal Miscellaneous Measures Bill

The *Administrative Review Tribunal (Miscellaneous Measures) Bill 2024* has passed the House of Representatives. The Bill proposes to amend the *Administrative Review Tribunal Act 2024* which established the Administrative Review Tribunal.

The Bill proposes various amendments to the ART Act, including:

1. amendments to exclude the period between 24 December and 14 January from the calculation of the 28-day period from which a party can appeal a decision of the Tribunal to the Federal Court of Australia;
2. practice directions can extend the timeframe to provide documents;
3. standing to continue proceedings where the original applicant had died, become bankrupt, is wound up, ceases to exist, or becomes subject to any form of liquidation administration;
4. clarifying the meaning of question of law; and
5. the Attorney-General can delegate the power to authorise the payment of costs or grant legal or financial assistance to officers in the department.

w
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId%3Ar7237%20Recstruct%3Abillhome

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4. Rulings

4.1 Deductibility of financial advice fees for individuals not carrying on a business

The ATO has finalised its ruling (*Taxation Determination* TD 2024/7) on the deductibility of financial advice fees. The draft ruling (TR 2023/D4) was reported on in our February 2024 Tax Training Notes.

The finalised ruling is substantially in the same form as the draft ruling. However, the key additions including the following:

1. the fees for a new advisor to undertake a review of the investments and make recommendations are outgoings that are capital or capital in nature, and hence not deductible. In contrast, seeking advice on an regular and ongoing basis from an existing advisor, including on the appropriateness of the mix of investments, would be deductible; and
2. fees for advice on income protection insurance will be deductible where the respective premiums for the policy are deductible;
3. fees for other insurance policies, such as life, total and permanent disability or trauma insurance, as not deductible as they are outgoings that are capital or capital in nature

ATO Reference *Taxation Determination* TD 2024/7
w https://www.ato.gov.au/law/view/document?docid=TXD/TD20247/NAT/ATO/00001

4.2 Updated meaning of 'school' for DGR purposes

The ATO has published an addendum to *Taxation Ruling* TR 2013/2 regarding the Deductible Gift Recipient (DGR) status of school and college building funds. Where a school or college building fund has DGR status, gifts or donations over $2 to that fund are generally tax deductible for the donor.

TR 2013/2 sets out the Commissioner's views on the ordinary meaning of the term 'school' for the purposes of the DGR endorsement category under Item 2.1.10 in s 30-25(1) of ITAA 1997.

The Ruling has been updated to reflect the ordinary meaning of 'school' and to ensure that the meaning of school is consistent with the decision in *The Buddhist Society of Western Australia Inc v Commissioner of Taxation (No 2)* [2021] FCA 1363 (see our November 2021 Tax Training Notes).

The following paragraphs have been added:

> *12A. While an essential element of the school is to provide education, the education provided does not require formal examination or testing, or the granting of formal awards of certificates of completion. Schools are not limited to those focused on academic pursuits and includes (but is not limited to) recreational, technical, arts and agricultural schools.*
>
> *12B. The following factors are not required but can help demonstrate there is a school:*
> *• a set curriculum;*
> *• instruction or training provided by suitably qualified persons;*
> *• the enrolment of students;*
> *• some form of assessment and correction;*
> *• the creation of a qualification or status which is recognised outside of the organisation.*

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(footnotes omitted)

In relation to the required use of a building, the following new paragraph has been added:

16A. To be a school for the purposes of Item 2.1.10, the building must be used as a school by either:
• a government;
• a public authority;
• a society or association which is carried on otherwise than for the purposes of profit or gain to the individual members of the society or association

The ruling has been updated at several points to clarify that the relevant factors for consideration include:

1. the overall purpose (or purposes) for which the building has been established and maintained;
2. the importance of each of the activities carried out to that purpose;
3. any connection that the non-school use has towards the school use; and
4. the extent the school use and non-school use have contributed to that purpose

A new paragraph has been inserted that states as follows:

30A. The following factors are not determinative, but may indicate that a building is used as a school building:
• the amount of time the building is put to school use relative to the amount of time it is put to non-school use;
• the number of people involved in the school use of the building relative to the number involved in its non-school use;
• the physical area of the building put to school use relative to the physical area put to non-school use;
• the extent to which the building has been adapted or modified in order to accommodate its school or non-school use.

The examples have been updated and further detail has been added to each example to explain why the organisation does or does not qualify as a school.

The addendum to TR 2013/2 applies retrospectively. The ATO previously published a decision impact statement on *The Buddhist Society of Western Australia Inc v Commissioner of Taxation (No 2)* [2021] FCA 1363 (see our June 2023 Tax Training Notes) indicating it would update TR 2013/2 and relevant website guidance.

ATO Reference *Taxation Ruling* TR 2013/2A1
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20132A1/NAT/ATO/00001

4.3 Queensland - guidance on duty concessions for homes

The Queensland Revenue Office has issued the following guidance on duty concessions for homes:

1. Public Ruling DA085.1.8 Concession for homes and first homes – occupancy requirements: this ruling clarifies the Commissioner's interpretation of the *Duties Act 2001* (Qld) in relation to 'transfer date', 'occupation date' (in particular what is meant by the term 'principal place of residence') and the circumstances in which a reassessment will be issued;
2. Public Ruling DA000.18.1 Concessions for homes and AFAD exemption for specified foreign retirees – disposal and partial renting: this ruling sets out the terms of an administrative arrangement that allows for the benefit of the following concessions and exemption to be kept even though the recipient does not satisfy one of their requirements:

(a) a transfer duty concession for a home, first home or vacant land on which a first home is to be constructed (the home concessions); and

(b) an additional foreign acquirer duty (AFAD) exemption for specified foreign retirees (the AFAD exemption);

3. Public Direction DA000.1.2 Reassessment of transfer duty – home concessions – where not all taxpayers comply with the conditions: this practice direction is to explain the Commissioner's practice in identifying the taxpayer to whom a reassessment under sections 153 or154 of the Duties Act is issued where all the following apply

   (a) a number of taxpayers have purchased residential land or vacant land;

   (b) an assessment of transfer duty has been made based on at least one taxpayer receiving a concession under Chapter 2, Part 9 of the Duties Act;

   (c) that assessment has been paid;

   (d) at least one of the taxpayers who received a concession failed to satisfy the occupancy requirements; and

   (e) the reassessment was required under s.153 or s.154 of the Duties Act.

QRO Reference *Public Ruling DA085.1.8*, *Public Ruling DA000.18.1* and *Public Direction DA000.1.2*
w https://qro.qld.gov.au/resource/pd-da000-1/
w https://qro.qld.gov.au/resource/da000-18/
w https://qro.qld.gov.au/resource/da085-1/

4.4 Victoria – updates to ruling on "associated transaction" for landholder duty

On 8 October 2024, the Victorian Office of State Revenue published an updated ruling DA-057v2 regarding the meaning of "associated transaction" for the purposes of the landholder provisions.

The "associated transactions" rule, as defined under section 3(1) of the *Duties Act 2000*, applies to situations where multiple people acquire interests in a landholder either by acting "in concert" or through acquisitions that form, give effect to, or arise from one or a series of arrangements. Acquisitions are considered associated transactions if there is a coordinated or unified purpose, even if the individuals are not related or if they act independently. This rule applies when interests are aggregated for determining duty liability, and the Commissioner has no discretion to separate the interests once they meet the definition.

If the associated transactions rule applies, the interests acquired by different individuals are aggregated to determine whether a relevant acquisition has been made in a landholder. This aggregation can trigger a duty liability on the total value of the interests acquired, even if each individual interest alone would not meet the threshold.

The individuals involved in the acquisitions could be jointly liable for this duty, and the Commissioner cannot disaggregate the interests once the rule is applied. This is intended to ensure that people cannot avoid duty by structuring acquisitions through separate but coordinated transactions.

The updated ruling replaces DA-057 with minor updates to reflect the Court of Appeal's decision and reasoning in *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue* [2024] VSCA 175 and to clarify the Commissioner's public float concession in light of comments made in the VCAT decision at first instance.

In particular, the updated ruling clarifies that the focus of the phrase "substantially one arrangement, one transaction or one series of transactions" is on the relationship between the acquisitions and not on the parties to the acquisitions. It is not necessary that the parties be associated persons or that they be personally

acquainted, although such circumstances may be relevant when determining whether the transactions are associated.

TIP – The Commissioner has introduced a voluntary disclosure program and amnesty from penalty tax for landholders who may have taken a different view of the "associated transaction" rule in relation to previous capital raisings. See item 6.20 of these notes for more details.

w https://www.sro.vic.gov.au/legislation/landholder-provisions-meaning-associated-transaction

5. Private rulings

Taxpayers cannot rely on private rulings obtained by other taxpayers. Private rulings are not binding on the Commissioner in relation to taxpayers other than the rulee(s) and provide no protection (including from any underpaid tax, penalty, or interest). Additionally, private rulings are not an authority for the purposes of establishing a reasonably arguable position for taxpayers to apply to their own circumstances. For more information on the status of edited versions of private advice and the reasons the ATO publishes them, refer to PS LA 2008/4.

5.1 Main residence exemption – not one dwelling

Facts

The taxpayers, Individual A and Individual B, jointly own a residential property, with ownership shared in respective proportions of X% each. The property serves as their main residence and is shared with their four children. Three of the children currently live at the property, including one child, referred to as Child A, who has a physical disability and is unable to care for themselves.

Proposed demolition and construction

To plan for the future care of Child A, including arrangements for after their death, the taxpayers propose demolishing their existing house and constructing dual occupancy accommodation on the site. This will result in two separate dwellings, Property A and Property B. The dual occupancy will maintain the same ownership proportions between Individual A and Individual B and will be governed by a strata subdivision allowing for future separate ownership.

The properties will be physically connected by a common central wall, but there will be no internal access between them. Each dwelling will have its own street entry, accessible by remote control, with main door access managed by keypads that may share the same code.

Upon completion, Property A will be occupied by the taxpayers and their children, other than Child A, while Property B will be occupied by Child A. In the event that Child A's health deteriorates, Property B may also house one or more of the taxpayers' other children. Both properties are intended solely for private and domestic use, with the taxpayers assuming responsibility for all daily running costs (such as food, utilities, and maintenance) for both dwellings. No financial contributions will be made by other family members.

Use of Property A and Property B

In Property A, the main living area will primarily be used by the taxpayers, with the living/dining room serving all family members. The master bedroom will be occupied by the taxpayers, and meals for the family, excluding Child A, will be prepared there. Property B will be designated as the residence for Child A, with a kitchen primarily for their use. The bathroom in Property B will be specifically constructed to meet Child A's needs, and an elevator will be installed to facilitate movement between floors.

Potential sale of Property A and/or Property B

If Child A is unable to develop the skills necessary for independent living and requires relocation to specially adapted supported accommodation or back to Property A with the taxpayers, the taxpayers may consider selling one or both properties.

Questions

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1. Will Properties A and B be one 'dwelling' for the purposes of section 118-115 of the ITAA 1997?
2. Can the capital gain made on the disposal of Property A and B be disregarded using the main residence exemption in section 118-110?

Ruling

Will Properties A and B be one 'dwelling' for the purposes of section 118-115?

The ATO determined that Properties A and B will not constitute a single 'dwelling' under section 118-115 of the ITAA 1997. According to subsection 118-115(1), a 'dwelling' encompasses a unit of accommodation that is a building or part of a building and is mainly used for residential purposes, as well as any land immediately under it. While the term 'dwelling' is not explicitly defined in the legislation, case law and guidance from the ATO confirm that it generally means a place of residence or abode.

Taxation Determination TD 1999/69 establishes that more than one unit of accommodation can be considered a single dwelling if they are used together as one place of residence. Relevant factors in determining whether multiple units function as one dwelling include whether they are used together for sleeping and daily living, their proximity, connectivity, capability of being sold separately, integration of daily activities, and shared use or costs.

Based on the facts provided, Properties A and B will not meet the requirements to be considered a single 'dwelling' as they are intended to serve different occupants and functions. Therefore, each property will be treated as a separate dwelling for the purposes of section 118-115.

Will the main residence exemption apply to Property A and Property B?

The ATO concluded that any capital gain or loss made on the disposal of Property A can be disregarded if it is the main residence of the taxpayers and no other property is treated as their main residence. However, the capital gain or loss on the disposal of Property B cannot be disregarded under section 118-110.

Under section 118-110, a capital gain or loss from a CGT event relating to a dwelling may be disregarded if certain conditions are met, including that the dwelling is the taxpayer's main residence throughout their ownership period. For Property A, provided it is occupied as the main residence by the taxpayers, any capital gain or loss on its disposal will be disregarded.

However, Property B does not meet the criteria to be treated as the main residence of the taxpayers, as they do not intend to occupy it; it will be occupied by Child A. As a result, Property B does not satisfy the requirements of subsection 118-110(1) and will not be exempt from capital gains tax. Therefore, any capital gain or loss from the disposal of Property B will be assessable.

ATO Reference *Private Binding Ruling Authorisation No. 1052286423943*
w https://www.ato.gov.au/law/view/document?docid=EV/1052286423943

5.2 Main residence exemption – one dwelling

Facts

A property comprises a downstairs unit and an upstairs unit, currently held under separate titles. The land on which the property stands was initially purchased on DD MM 20YY by the taxpayer's late spouse (Person A) as the sole owner, with a pre-existing building. Between the purchase date and 20YY, Person A leased out this building.

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In 20YY, the original building was demolished, and construction began to build the current residential premises. This construction was completed in 20YY. The property was divided into two units, both accessible through a shared foyer entrance, connected by a lift and internal stairwell.

Following the completion of the initial construction, the taxpayer and Person A moved into the downstairs unit, which became their main residence, as the upstairs unit required additional work before it could be habitable. The upstairs unit's issue was resolved in early 20YY. Shortly after, the property was subdivided into two titles: one for each unit. On DD MM 20YY, Person A transferred partial interest in the downstairs unit to the taxpayer.

The property was designed for the taxpayer and Person A to reside in the downstairs unit, with the upstairs unit intended for use in conjunction with it. The upstairs unit was furnished as a standalone apartment to accommodate family and guests, providing a degree of independence. Due to its use as a self-contained apartment, the taxpayer believed subdivision was necessary.

The upstairs unit has exclusively served personal purposes, being utilised for family and guests during visits. These visitors often shared meals and used the home theatre and entertainment areas of the downstairs unit with the taxpayer. No rent was charged to guests staying in the upstairs unit, which was also used for storage of personal items.

The design of the downstairs unit catered to entertainment needs, considering the availability of the upstairs unit for storage and guest usage.

On DD MM 20YY, Person A died. At that time:

1. the taxpayer and Person A were residing in the downstairs unit as their primary residence, while using the upstairs unit in conjunction with it;
2. Person A was neither a foreign resident nor an excluded foreign resident; and
3. Person A's interest in both units was transferred to the taxpayer.

Since Person A's death, the taxpayer has continued to use the downstairs unit as their main residence, utilising the upstairs unit in conjunction with it. Neither the upstairs nor the downstairs unit has ever been used to generate assessable income during the entire ownership period by either the taxpayer or Person A. The taxpayer has remained an Australian resident for taxation purposes throughout this period.

Although the units are on separate titles and could theoretically be sold separately, this would require significant alterations to the property, such as modifying the internal stairwell and making changes to the downstairs unit to replace storage space no longer available from the upstairs unit.

Assumptions are made that:

1. the taxpayer will continue using the upstairs unit in its current manner until the point of sale, without producing assessable income;
2. the taxpayer will remain an Australian resident for taxation purposes until the property is sold;
3. no alterations will be made to the property to enable separate sales of the units; and
4. should the property be sold without consolidating the titles, both units will be sold to a single purchaser.

Questions

1. If the taxpayer sells the downstairs unit and upstairs unit at the same time, will the taxpayer be able to claim the full main residence exemption under Subdivision 118-B of the ITAA 1997?
2. If the taxpayer consolidates the titles of the downstairs unit and upstairs unit and then sells the property, will the taxpayer be able to claim the full main residence exemption under Subdivision 118-B of the ITAA 1997?

Ruling

The ATO determined that the taxpayer is eligible to claim the full main residence exemption under Subdivision 118-B of the ITAA 1997 upon the sale of the property, regardless of whether the units are sold separately or after consolidating the titles.

If the taxpayer sells both the downstairs and upstairs units at the same time, the ATO concluded that the full main residence exemption is available. This determination is based on the nature of the taxpayer's usage of the units and the interpretation of the term "dwelling" as outlined in Taxation Determination TD 1999/69. The Commissioner is satisfied that the two units, although on separate titles, have been used together as a single dwelling. Therefore, the property as a whole qualifies for the full main residence exemption.

Additionally, if the taxpayer consolidates the titles of the downstairs and upstairs units before selling the property, the ATO determined that this consolidation does not trigger CGT event, according to subsection 112-25(4) of the ITAA 1997. The exemption still applies because the usage of the property as a single dwelling remains unchanged. Consequently, the full main residence exemption is available on the sale of the property in this scenario as well.

ATO Reference *Private Binding Ruling Authorisation No. 1052286890635*
w https://www.ato.gov.au/law/view/document?docid=EV/1052286890635

5.3 Property acquired in sale of going concern used as residence

Facts

The taxpayer is registered for GST and is carrying on a farming enterprise.

The taxpayer entered into a contract to purchase a property, which is currently subject to a commercial lease. The settlement is anticipated in [Month] [Year].

The vendor is also registered for GST, and the sale of the property is treated as a GST-free sale of a going concern. The property contains a commercial building, and the taxpayer intends to end the commercial lease and convert the building into a single residential dwelling for use as their principal place of residence.

Following the settlement, the taxpayer will continue to operate the leasing enterprise for a period before converting the property into a private dwelling. No input taxed supplies, such as residential rent, will be made from the premises once the taxpayer takes ownership.

Question

Will the conversion of a premises that was acquired as part of a business that was a going concern into a private residence result in an increasing adjustment in accordance with Division 135 of the GST Act?

Ruling

The ATO ruled no.

The ATO decided that no GST adjustment is required in this situation because of how the property is used after its purchase. Since the taxpayer will continue to operate the leasing business, making taxable supplies through the commercial lease, no GST adjustment arises at the time of acquisition.

Under section 135-5 of the GST Act, a taxpayer must make an "increasing adjustment" to their GST if they buy a property as part of a GST-free "going concern" (an active business) and then intend to make supplies that are neither taxable nor GST-free (e.g., residential rent). However, in this case, because the taxpayer will continue

to lease the property commercially (a taxable supply), section 135-5 does not apply, as there are no supplies that are neither taxable nor GST-free.

Section 135-10 covers changes in how a purchased "going concern" is used after acquisition. If the nature of supplies made through the enterprise changes (from taxable to non-taxable, for example), this section requires a review of GST treatment. Division 129, which section 135-10 works alongside, provides the mechanism for calculating any necessary adjustments. Essentially, it compares the taxpayer's intended use of the property at the time of acquisition with the actual use over time.

In this case, the taxpayer's original intention was to continue the commercial leasing business (a fully creditable use under section 11-15). This is confirmed by the fact that, during the period between the acquisition and the end of the lease, all supplies made are taxable supplies. Since both the intended use and actual use are 0% non-taxable or non-GST-free, there is no GST adjustment required.

Finally, section 130-5 generally creates an adjustment when an asset is acquired for a business use (a "creditable purpose") and is later applied solely for private or domestic purposes. However, because the property was originally sold as a GST-free going concern (not a standard taxable supply), section 130-5 does not trigger an adjustment when the property is eventually converted into a private residence.

In summary, the taxpayer's continued leasing of the property as a commercial enterprise means no GST adjustments are necessary, either under section 135-5 (due to the ongoing taxable use) or section 130-5 (because the property was not initially supplied as a taxable supply).

ATO Reference *Private Binding Ruling Authorisation No. 1052290783232*
w https://www.ato.gov.au/law/view/document?docid=EV/1052290783232

5.4 GST on in-specie distribution to beneficiary

Facts

The taxpayer is registered for GST in their capacity as a trustee for a trust and carries on an enterprise of leasing commercial property. Individual A is a beneficiary of the trust. The taxpayer acquired a property which contained residential premises at the time of acquisition. The property was leased to an unrelated party.

The taxpayer decided to demolish the original residential premises, subdivide the property into two lots, and construct two new residential premises (one on each lot). A planning permit for the construction of two dwellings on the property was issued.

The taxpayer's intention at the time of development and subdivision was to sell one lot (Lot 1) and retain the other (Lot 2). The taxpayer intends to transfer Lot 2 as an *in specie* distribution to the beneficiary, with no consideration provided by the beneficiary for the transfer.

Construction of the two new dwellings was completed, and the taxpayer incurred development costs amounting to $X in relation to Lot 2. The taxpayer has claimed input tax credits for the subdivision and development of both Lot 1 and Lot 2.

Following the development of the property, Lot 1 was sold, and Lot 2 has been occupied by the beneficiary as their primary residence since construction was completed. The estimated market value of Lot 2 at the time of the proposed *in specie* distribution is expected to exceed $Y.

Question

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Is the taxpayer making a taxable supply under section 9-5 of the GST Act when making an *in specie* distribution of real property to a beneficiary?

Ruling

The ATO ruled yes.

The ATO determined that the *in specie* distribution of Lot 2 to the beneficiary constitutes a taxable supply under section 9-5 of the GST Act.

Supply in the course or furtherance of an enterprise

According to section 9-5, a supply is a taxable supply if it meets certain criteria: it is made for consideration, in the course or furtherance of an enterprise, connected with Australia, and made by a registered or required to be registered entity. Since Lot 2 is located in Australia and the taxpayer is registered for GST, paragraphs 9-5(c) and 9-5(d) are satisfied.

The transfer of Lot 2 as an *in specie* distribution meets the requirement of being in the course or furtherance of an enterprise carried on by the taxpayer as trustee for the trust. Under subsection 9-20(1), leasing or licensing property on a continuous basis is considered an enterprise. Here, the beneficiary resides in Lot 2 as a primary residence under a tenancy-at-will, which constitutes a licence to occupy and therefore meets the enterprise definition.

The ATO referred to GST Determination GSTD 2009/1, which states that a supply made in the course or furtherance of an enterprise encompasses all supplies connected with the enterprise, regardless of the method of transfer, including *in specie* distributions. Therefore, the distribution of Lot 2 is considered a supply in the course or furtherance of the taxpayer's enterprise.

Consideration and associated entities

Typically, a supply must be for consideration to be a taxable supply. However, Division 72 of the GST Act covers supplies made to associates for no consideration. Since the beneficiary is an associate of the trust and is not registered or required to be registered for GST, the lack of consideration does not prevent the *in specie* distribution from being a taxable supply under section 9-5.

Input taxed supplies and the status of Lot 2

Subsection 40-65(1) states that the sale of residential premises is generally input taxed unless the premises qualify as "new residential premises." Lot 2 was built to replace demolished premises and is classified as "new residential premises" under paragraph 40-75(1)(c) of the GST Act.

A residential premises would cease to be considered "new" if it has only been used for making input taxed supplies for a continuous period of at least 5 years. Lot 2, however, has been used by the beneficiary as their primary residence, which is considered a private purpose of the trust, not an input taxed supply. Since the premises have not been used solely for making input taxed supplies for 5 years, Lot 2 retains its status as "new residential premises."

As Lot 2 is classified as new residential premises and the supply to the beneficiary by way of an *in specie* distribution is not input taxed, it qualifies as a taxable supply under section 9-5 of the GST Act.

ATO Reference *Private Binding Ruling Authorisation No. 1052255123032*
w https://www.ato.gov.au/law/view/document?docid=EV/1052255123032

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5.5 GST and new therapy

Facts

The taxpayer is registered for goods and services tax (GST). The taxpayer is introducing a new therapy aimed at improving the breathing and stamina of patients and athletes. This therapy is globally recognised; however, it remains a new treatment in Australia, and no Medicare benefit is currently payable for it.

As the first treatment centre in Australia, the taxpayer sought Medicare recognition and coverage for the new therapy. The taxpayer aims to provide the therapy as a GST-free service but, in the interim, while the application process is ongoing, they will treat their supply of it as a taxable supply.

Section 38-7 of the GST Act provides that a supply of a medical service is GST-free. The term medical service is defined in section 195-1 to mean:

1. a service for which Medicare benefit is payable under Part II of the *Health Insurance Act 1973*; or
2. any other service supplied by or on behalf of a medical practitioner or approved pathology practitioner that is generally accepted in the medical profession as being necessary for the appropriate treatment of the recipient of the supply.

Subsection 38-10(1) of the GST Act provides that a supply of health services is GST-free if:

1. it is a service of a kind specified in the table in this subsection or of a kind specified in the regulations; and
2. the supplier is a recognised professional in relation to the supply of services of that kind; and
3. the supply would generally be accepted, in the profession associated with supplying services of that kind, as being necessary for the appropriate treatment of the recipient of the supply.

All three requirements in subsection 38-10(1) must be satisfied for a supply of health services to be GST-free under this subsection.

The taxpayer advised that it is challenging to determine whether the supply of the new therapy is generally accepted as appropriate treatment for a patient, as they are the first and only centre offering it in Australia.

The taxpayer is scheduling appointments with medical and other health professionals to inform them of the therapy's availability. It is expected that these professionals will refer patients to the taxpayer, even though there are no written agreements or compensation arrangements in place for such referrals. The taxpayer will communicate with these professionals regarding the progress of the patients, who are also expected to update their own medical practitioners and health professionals on their progress.

All patients will require referrals from their respective medical or health practitioners. The taxpayer will bill the patients directly, and payment for the therapy, which may take up to 35 sessions to complete, will be made by the patients themselves.

Question

Is the supply GST-free?

Ruling

The ATO ruled no.

The ATO determined that the supply did not meet the requirements in section 38-7 because it failed to qualify under either limb of the "medical service" definition. No Medicare benefit is payable for the new therapy, so it does not meet the first limb. The second limb requires that the service be provided by or on behalf of a medical

practitioner and be generally accepted in the medical profession as necessary for appropriate treatment. The taxpayer's supply did not meet these criteria, as the therapy is not provided by or under the supervision of a medical practitioner, and it is not generally accepted in Australia due to its novelty. Section 38-10 was also not satisfied because the new therapy is not generally accepted in the relevant health profession. Consequently, the supply is not GST-free under either section 38-7 or 38-10 and is therefore a taxable supply under section 9-5.

ATO Reference *Private Binding Ruling Authorisation No. 1052280401452*
w https://www.ato.gov.au/law/view/document?docid=EV/1052280401452

5.6 Settlement sum and employee termination payment

Facts

The taxpayer was employed by the Employer during the relevant period. The taxpayer participated in the Share Plan and became entitled to options for the Employer. Under the Share Plan, the taxpayer was granted options.

During the taxpayer's employment, the options vested and became 'outstanding options'. The taxpayer entered into a Termination Deed with the Employer, which included the termination of their employment. The Termination Deed provided that, upon termination of employment, the Employer agreed to 'buy back' a percentage of the taxpayer's vested options for a cash payment, in accordance with the rules of the Share Plan.

On the specified date, the taxpayer's employment with the Employer ended as per the terms of the Termination Deed. Under the terms of the deed, the taxpayer was required to observe post-employment restraints and restrictions, including obligations related to confidentiality and non-competition with the Employer.

Following the termination of employment, a dispute arose between the taxpayer and the Employer, leading both parties to engage legal representation. To resolve the dispute, the parties entered into a Deed of Release.

The recitals of the Deed of Release outlined the positions defended by each party in the dispute. Without admission of liability, the parties agreed to settle all claims arising out of or related to the employment, the contract, the termination, the Termination Deed, the Share Plan, and the dispute, on the terms provided.

A clause in the Deed of Release stated that the taxpayer released the Employer and other related parties from all claims the taxpayer had or might have in connection with the Employer's equity, the employment, the contract, the termination, the Termination Deed, the Share Plan, the forfeiture, or the dispute, except any claim related to the enforcement of the deed. The taxpayer also covenanted not to commence or continue any claims related to these matters.

In consideration for providing certain releases to the Employer, the taxpayer was paid a specified amount. This included a release in relation to the cancellation of all options under the Share Plan, including the 'further X% options' that were subject to 'buy back' and the 'balance of the options' that the taxpayer had intended to retain.

The taxpayer received the payment in accordance with the Deed of Release.

Questions

1. Is the payment made to the taxpayer pursuant to the Deed of Release an employment termination payment (ETP) under section 82-130 of the ITAA 1997?
2. Will any capital gains that potentially arise from the receipt of the payment be reduced to nil under section 118-20 of the ITAA 1997?

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Ruling

Employment Termination Payment (ETP)

The ATO determined that the payment made to the taxpayer under the Deed of Release qualifies as an employment termination payment (**ETP**) under section 82-130 of the ITAA 1997. To determine whether the payment was an ETP, the ATO applied the criteria under subsection 82-130(1). The payment was deemed to have been made "in consequence of" the termination of employment, as established by case law and Taxation Ruling TR 2003/13, which states that there must be a causal connection between the termination and the payment. Despite the dispute and subsequent execution of the Deed of Release, The ATO found that the settlement payment was connected to the termination because the dispute itself was about the conditions of the employment ending, meeting the criteria for an ETP.

Normally, for a payment to qualify as an ETP, it must be received within 12 months of the employment ending. However, subsection 82-130(5) allows exceptions if the delay was due to a reasonable cause, such as a legal dispute. In this case, the payment was made more than 12 months after the taxpayer's employment ended, but the ATO found this delay reasonable because legal action began within the 12-month window. This legal action, and the eventual settlement (Deed of Release), allowed the payment to qualify as an ETP even though it was delayed.

Additionally, the payment was not one of the types of payments specifically excluded under section 82-135 of the ITAA 1997, meaning it qualified as an ETP under section 82-130.

Capital Gains Treatment

The ATO determined that a CGT event occurred when the taxpayer's right to receive a payment under the Deed of Release was discharged, causing CGT event C2 under paragraph 104-25(1)(b) of the ITAA 1997. However, section 118-20 of the ITAA 1997 reduces any capital gain to the extent that the amount is already included in the taxpayer's assessable income. Since the payment was included as an ETP in the taxpayer's assessable income, section 118-22 requires that any capital gain made from the CGT event be reduced to zero.

Therefore, any capital gains arising from the receipt of the payment were reduced to nil under section 118-20 of the ITAA 1997.

COMMENT – the approach by the ATO in this ruling appears to be contrary to the decision in *Sladden* (see Item 1.1 of these notes). *Sladden* is consistent with prior case law authority.

ATO Reference *Private Binding Ruling Authorisation No. 1052285833258*
w https://www.ato.gov.au/law/view/document?docid=EV/1052285833258

5.7 Income of content creator

Facts

The taxpayer creates and uploads videos on their YouTube channel, which was initially commenced as a hobby. The taxpayer indicated that their motive for operating the channel was to generate income by building an online following. Efforts were made to grow the channel in various ways, ultimately finding success in producing content that reviews products.

The taxpayer maintains an official website linked to the YouTube channel and has entered into arrangements with Google AdSense, the Amazon Associates Program, and other affiliate programs to monetise the YouTube

content. Under the Google AdSense agreement, Google inserts advertisements into the taxpayer's YouTube videos, with income received based on the number of views.

Through the Amazon Associates Program, the taxpayer includes links in the video descriptions directing viewers to Amazon listings of reviewed products, earning a commission on sales made through these links. Similarly, under agreements with other affiliate programs, the taxpayer includes links in video descriptions that lead to product pages, and commissions are earned on any resulting sales.

The taxpayer also operates an Amazon storefront as part of the Amazon Influencer Program, described as an extension of the Amazon Associates Program, which features product-related content from influencers to assist customers in researching and discovering products. The taxpayer uploads review videos of Amazon products to the Amazon website and receives a commission if a viewer watches 30 seconds or more of the review video and subsequently purchases the product.

Additionally, the taxpayer is occasionally engaged directly by product makers to create videos or content. The income from these services is treated as professional services and is not considered part of the taxpayer's monetisation activities under the other agreements. Income under these monetisation arrangements is typically paid on a monthly basis and varies in amount each month.

Questions

1. Are the amounts received by the taxpayer from Google AdSense assessable as ordinary income under section 6-5 of the ITAA 1997?
2. Are the amounts received by the taxpayer from Amazon and other affiliates assessable as ordinary income under section 6-5 of the ITAA 1997?
3. Is the income received from Google AdSense, Amazon, and other affiliates to be considered income derived from property and not personal services of the creator under section 6-5 of the ITAA 1997?

Ruling

<u>Ordinary income</u>

The ATO determined that the taxpayer’s income from Google AdSense, Amazon Associates Program, and other affiliate programs is considered assessable as ordinary income under section 6-5 of the ITAA 1997. The taxpayer's YouTube channel generates advertising revenue from Google AdSense based on the number of views, and commission revenue from Amazon and other affiliates when viewers purchase products through links in the video descriptions. The taxpayer also receives commissions through the Amazon Influencer Program when viewers watch review videos and proceed to purchase products. These payments are expected and possess elements of recurrence and regularity, being paid monthly. The ATO concluded that the taxpayer is receiving income from their activities as a content creator, which is considered ordinary income assessable in the year it is derived.

<u>Personal Services Income</u>

In relation to Personal Services Income (PSI), the ATO referred to *Taxation Ruling* TR 2022/3, which outlines that PSI is mainly a reward for an individual's personal effort or skills unless generated from the supply of goods, use of income-producing assets, or through a business structure. Despite the taxpayer’s personal effort in producing the videos, the income primarily arises from the ownership of the videos and their availability for viewing on YouTube and Amazon platforms. The income is derived from the taxpayer's contractual rights under agreements with Google AdSense, Amazon, and other affiliates, which allow advertisements to be placed within the videos and commissions to be paid when viewers complete purchases through affiliate links.

The ATO reasoned that this income is not directly related to the taxpayer’s personal skills or efforts but instead results from ownership of the videos as income-producing assets used for advertising purposes. As a result,

the taxpayer's YouTube channel is considered an income-producing asset, and the income derived from the channel is considered to be derived from property, rather than personal services. Therefore, the income received from advertising placed within the videos on YouTube is not mainly a reward for the taxpayer's personal efforts or skills and is not classified as PSI under section 84-5 of the ITAA 1997.

ATO Reference *Private Binding Ruling Authorisation No. 1052279366488*
w https://www.ato.gov.au/law/view/document?docid=EV/1052279366488

5.8 Home electricity expenses

Facts

The taxpayer has been operating a caretaker service under the National Disability Insurance Scheme (**NDIS**) through their Australian Business Number (**ABN**). The taxpayer's client resides in a care facility, and their unit does not contain a kitchen. Due to specific dietary requirements for vegetarian meals, which the care facility is unable to provide satisfactorily, the client has engaged the taxpayer to prepare vegetarian meals.

The taxpayer is a party to a service agreement under the NDIS, which includes the following terms:

1. the agreement names the taxpayer as the service provider and the client as the NDIS participant;
2. the agreement is consistent with the rules and objectives of the NDIS, aiming to provide participants with more choices, assist in achieving their goals, and encourage community participation;
3. the services to be provided include shopping, preparation, and cooking of vegetarian meals at the taxpayer's home, packaging the meals, and delivering them to the client at their care facility;
4. the meals will be delivered several times per week;
5. the agreed cost between the participant and the taxpayer is based on a weekday hourly rate;
6. the taxpayer is required to issue invoices and statements for the support provided; and
7. payment for services will be made by electronic transfer from the Plan Management Provider within seven days of receiving the invoice.

Since commencing this activity, the taxpayer has been preparing the required number of vegetarian meals each week in their own home for the NDIS participant. This activity constitutes a new income stream, separate from the taxpayer's existing caretaking services. None of the other caretaking services involve the use of the taxpayer's home electricity.

The taxpayer intends to rely on electricity bills, appliance measurements, and business-related usage records to calculate a deduction for electricity costs incurred in providing the meal preparation service.

Question

Is the taxpayer entitled to claim a portion of electricity costs as a deduction in accordance with section 8-1 of the ITAA 1997?

Ruling

The ATO ruled yes.

Under section 8-1 of the ITAA 1997, the taxpayer is entitled to claim a deduction for a portion of their electricity costs that are directly related to the preparation of meals for their client under the NDIS service agreement. This is because these expenses are incurred in producing assessable income as part of the taxpayer's caretaking services.

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The ATO reasoned that, although the taxpayer does not operate their business from home and their home is not considered a "place of business," the meal preparation at home is recognised as part of the income-producing activities. Therefore, the taxpayer can claim a deduction for the additional electricity costs associated with meal preparation, separate from private or domestic electricity use.

To calculate the deductible portion, the taxpayer should use the methodology outlined in *Taxation Ruling* TR 93/30, specifically paragraph 24, which provides a formula to determine the cost of electricity based on the appliance's power consumption, cost per unit of power, and the hours used for income-producing purposes.

The taxpayer must maintain records, including:

1. the actual hours spent on meal preparation activities at home or a representative 4-week diary showing a pattern of use;
2. evidence of the additional electricity costs incurred, such as bills and receipts;
3. power consumption details for each appliance used, which can be sourced from manufacturer information, energy rating labels, or online searches; and
4. documentation of how the deductible amount was calculated.

The ATO also advised that the calculation of the deduction should focus on the additional expenses incurred due to the income-producing activity, which is consistent with TR 93/30 regarding running expenses associated with home-based work.

TIP – for more information about the ATO's approach to verifying running expenses for home-based work, see *PS LA 2001/6 Verification Approaches for Home Office Running Expenses and Electronic Device Expenses* and *PCG 2023/1 Deduction for additional running expenses working from home*.

ATO Reference *Private Binding Ruling Authorisation No. 1052264339082*
w https://www.ato.gov.au/law/view/document?docid=EV/1052264339082

5.9 Bonus paid in cryptocurrency

Facts

The taxpayer is an Australian resident for tax purposes.

During the relevant period, the taxpayer worked remotely from Australia for a foreign employer.

The taxpayer received crypto assets from the employer, which were transferred into a digital wallet owned by the taxpayer.

The taxpayer received these crypto assets in addition to their normal salary and wages, as recognition for their talent and services to the organisation.

The terms and conditions related to the payment of the crypto assets included the following:

1. the employer was remitting the crypto assets as an 'incentive';
2. the crypto assets were to be locked for a period of XX months; and
3. any incentive payments, benefits, or other special bonuses, regardless of their nature and even if paid repeatedly, always represented voluntary benefits without acknowledging any legal obligation of the employer to make such payments.

Questions

1. Are the crypto assets received by the taxpayer from their employer included in the taxpayer's assessable income?
2. Is the acquisition date of the crypto assets the date they were transferred to the taxpayer's digital wallet by the employer?

Ruling

Assessable income

Under section 6-5 of the ITAA 1997, the assessable income of an Australian resident taxpayer includes all income derived from any source during the income year. In simpler terms, this means any payments or benefits you receive from employment or services, whether in Australia or overseas, are usually considered part of your taxable income.

Taxation Determination TD 2017/26 clarifies that if an employee receives benefits (whether in cash or something of equivalent value) for their services, these benefits are considered "ordinary income." In this case, the taxpayer received crypto assets from their employer as an incentive for their work, in addition to their normal salary. Given the nature of the payment, the value of these crypto assets is treated as remuneration, and therefore as ordinary income, under section 6-5 of the ITAA 1997.

Section 15-2 of the ITAA 1997 states that all allowances, gratuities, benefits, and bonuses related to employment are part of assessable income. However, if a payment is already considered ordinary income under section 6-5, it will not be reassessed under section 15-2.

How crypto assets are treated for tax purposes

Crypto assets are considered property for tax purposes and are treated as CGT assets, according to subsection 108-5(1) of the ITAA 1997. This classification means that they are not treated as money but as an asset, which has specific tax consequences.

Taxation Determination TD 2014/28 discusses how crypto assets like bitcoin are taxed when provided by an employer. It states that since crypto assets are property and not cash, they are considered "non-cash benefits." This classification means they are excluded from the usual Pay As You Go (PAYG) withholding requirements which apply to regular wages. Consequently, these assets do not count as "salary or wages" under subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (Cth), but are instead regarded as a "property fringe benefit."

Section 23L(1) of the ITAA 1936 provides that income derived from fringe benefits is not assessable and is not exempt income for the taxpayer. In practical terms, this means the taxpayer does not include the value of the crypto assets in their assessable income. However, the employer is liable to pay Fringe Benefits Tax (FBT) on the value of these crypto assets provided to the employee, regardless of whether the employer is Australian or foreign.

Acquisition date of crypto assets

According to section 109-5 of the ITAA 1997, the acquisition date of a CGT asset is the time the individual becomes its owner. In this situation, the taxpayer received crypto assets in a digital wallet they owned. Even though the assets were "locked" for a period, the taxpayer was still the legal owner from the time of transfer. Therefore, the acquisition date of the crypto assets is the date they were transferred to the taxpayer's digital wallet by the employer.

ATO Reference *Private Binding Ruling Authorisation No. 1052280883089*
w https://www.ato.gov.au/law/view/document?docid=EV/1052280883089

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5.10 Personal use asset

Facts

The taxpayer purchased a boat shed.

The property was never used for income-producing purposes. It lacks essential amenities, having no power, running water, gas connection, water tank, solar panels, aerials, or bathroom facilities. Furthermore, the property was not utilised as a hobby farm, house, flat, unit, or vacant land.

The taxpayer used the property for private enjoyment as permitted by the local council, which included not residing on the property overnight.

In XXXX, the property was destroyed by fire as a result of malicious acts, and subsequent investigations failed to identify the perpetrators. Due to its secluded location, the boat shed was deemed uninsurable by all but one insurance provider.

The taxpayer incurred other costs, such as rates payable to the local council. According to local council requirements, the taxpayer was mandated to rebuild a new boat shed within XXX years to retain the licence, with a possibility of extending this limit with the consent of the relevant government department.

The taxpayer constructed the new boat shed on Crown land in the capacity of a caretaker and licence holder on behalf of the relevant government department. The rebuilt boat shed cost less than $10,000.

The local council prohibited any changes to the original structure, and a planning permit was duly obtained and approved. An inspection letter was provided, confirming that the new boat shed was a mirror image of the original structure and was constructed under the close supervision of the local council. No improvements were made to the property.

On XX/XX/20XX, the new boat shed was sold for $XX, and the sale included the transfer of licence rights to the new owners of the property. A valuation of the licence needs to be conducted for capital gains tax determination upon the disposal of the second boat shed.

Question

Will the capital gain on disposal of the new boat shed be disregarded under subsection 108-20(3) of ITAA12997 as a personal use asset purchased under $10,000?

Ruling

Under the CGT provisions, a capital gain or loss arises when a CGT event occurs to a CGT asset, which includes real estate acquired after 20 September 1985. A capital gain is realised when the proceeds from the sale of the CGT asset exceed the cost base, while a capital loss occurs when the reduced cost base is greater than the sale proceeds.

However, capital gains from the disposal of personal use assets are disregarded if the asset was acquired for less than $10,000 (subsection 118-10(30) ITAA 1997). A personal use asset is a CGT asset kept mainly for personal use or enjoyment. Specifically, under subsection 108-20(2), personal use assets are categorised as assets used mainly for personal use, certain options and rights, and certain debts.

Importantly, certain assets, such as land or buildings, are specifically excluded from being classified as personal use assets under subsection 108-20(3) of the ITAA 1997. This classification depends on how the taxpayer or their associates use the asset. In this case, the boat shed is a building, which is explicitly excluded from being a personal use asset.

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The Department of Environment, Land, Water and Planning (DELWP) clarifies that Crown land, owned by the government, is administered through licences issued by DELWP on behalf of the Minister for Energy, Environment and Climate Change. These licences grant rights to perform certain activities but do not provide exclusive possession, and can be cancelled if the conditions are not met. The relevant local council's policy on boatsheds and bathing boxes specifies that these structures are for private, non-commercial use and must be free-standing, relocatable, and used mainly for storing beach items, changing, and shelter.

In this case, the taxpayer transferred the licence upon the disposal of the boat shed. Section 108-20(3) of the ITAA 1997 excludes licences and contractual rights from being personal use assets.

Therefore, the capital gain on disposal of the property is not exempt from CGT under section 118-10 of the ITAA 1997.

TRAP – As articulated in the ATO's answer, capital gains and losses from personal use assets with a first element cost base of $10,000 or less are disregarded. However, where a personal use asset has a first element cost base of more than $10,000, only capital losses are disregarded under section 108-20 of the ITAA 1997. Capital gains must still be reported.

COMMENT – The ruling decision states "Section 108-20(3) of the ITAA 1997, excludes certain assets from meeting the criteria of personal use asset for CGT purposes. This includes licences and contractual rights." Section 108-20(3) actually says "*A personal use asset does not include land, a *stratum unit or a building or structure that is taken to be a separate *CGT asset because of Subdivision 108-D*" and does not refer to licences or contractual rights.

ATO Reference *Private Binding Ruling Authorisation No. 1052275758566*
w https://www.ato.gov.au/law/view/document?docid=EV/1052275758566

5.11 Superannuation death benefit

Facts

In June 20XX, the deceased passed away.

The deceased was a member of a complying superannuation fund.

At the time of passing, the deceased had a spouse. The spouse was the sole beneficiary of the deceased's estate.

In February 20XX, the spouse passed away.

The deceased's superannuation policy had not been paid to the spouse before the spouse passed away.

The superannuation fund required the executor of the spouse's estate to apply for a grant of probate for the deceased's estate before it would release the deceased's funds.

The executor of the spouse's estate applied for the grant of probate.

In February 20XX, the balance of the superannuation policy with the fund for the deceased was paid to the deceased's estate.

The balance of the superannuation policy is to be paid to the spouse's estate.

The final beneficiaries of the deceased's spouse are not death benefit dependants of the deceased.

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Question

Will the payment of a superannuation death benefit of the deceased to the trustee of the spouse's deceased estate be treated as being paid to a death benefits dependant under subsection 302-10(2) of the ITAA 1997?

Ruling

The ATO ruled no.

A death benefits dependant of a person who has died is, pursuant to subsection 302-195(1) of the ITAA 1997, the deceased person's spouse or former spouse, the deceased person's child (aged less than 18), any other person with whom the deceased person had an interdependency relationship, or any other person who was a dependant of the deceased person just before he or she died.

While the spouse of the deceased was a death benefits dependant, the concessional tax treatment under subsection 302-10(2) of the ITAA 1997 requires the death benefit to be received or expected to be received by a death benefit dependant.

The ATO considered, in this case, that it would be reasonable to conclude the deceased's spouse has not benefited, nor can they be expected to benefit, from the deceased's superannuation death benefit, as the spouse passed away before it was paid.

ATO Reference *Private Binding Ruling Authorisation No. 1052273158502*
w https://www.ato.gov.au/law/view/document?docid=EV/1052273158502

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6. ATO and other materials

6.1 Restructures and the debt deduction creation rules

On 9 October 2024, the ATO published draft *Practical Compliance Guideline* PCG 2024/D3 regarding the ATO's compliance approach to restructures and the new thin capitalisation and debt deduction creation rules.

New thin capitalisation rules and the debt deduction creation rules, now part of Division 820 of the ITAA 1997 were introduced by the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Act 2024* (Cth).

The threshold for the thin capitalisation rules to apply is based on the level of an entity's debt deductions. Specifically, the thin capitalisation rules apply to general class investors and financial entities that are not authorised deposit-taking institutions (ADIs) if their debt deductions exceed $2 million AUD in an income year. If an entity's debt deductions are below the $2 million AUD threshold, the thin capitalisation rules do not apply.

Thin Capitalisation Rules

The new thin capitalisation rules comprise three tests under Subdivision 820-AA that limit the amount of debt deductions that general class investors can claim in an income year. These tests include:

1. Fixed Ratio Test – a default test that disallows debt deductions if they exceed 30% of the entity's tax EBITDA;
2. Group Ratio Test – allows for an alternative method where the ratio of net interest expense and EBITDA is based on the worldwide group's financials; and
3. Third Party Debt Test – limits debt deductions to third-party debts, excluding related party debt from allowable deductions.

Disallowed debt deductions under the Fixed Ratio Test can be carried forward for 15 years if the Fixed Ratio Test continues to apply. However, switching to the Group Ratio Test or Third Party Debt Test in future years nullifies any unused debt deductions from prior years.

Debt Deduction Creation Rules

The debt deduction creation rules, found in Subdivision 820-EAA, restrict deductions arising from certain related-party arrangements. The rules apply in two main scenarios:

1. **Acquisition Case** – deductions may be disallowed if a CGT asset or obligation is acquired from an associate pair, with limited exceptions (e.g., membership interests or depreciating assets).
2. **Payment or Distribution Case** – deductions may also be denied if debt funds payments or distributions (e.g., dividends, royalties) to an associate pair.

An 'associate pair' refers to two entities that are considered associates of each other under the relevant tax rules. An entity is an associate pair of another entity if either or both of the following conditions are met:

1. the entity is an associate of the other entity; and/or
2. the other entity is an associate of the first entity.

Both types of arrangements are subject to a compliance framework, with higher scrutiny for those that involve indirect acquisitions or payments through interposed entities.

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The debt deduction creation rules apply to arrangements entered into before 1 July 2024 where debt deductions continue to arise from the historical arrangements and new arrangements entered into on or after 1 July 2024.

Risk Assessment Framework

The ATO has issued a risk assessment framework, categorising restructuring efforts as low, medium, or high risk. If a restructure is classified as high risk (red zone), it may be subject to an intensive review, whereas low-risk restructures (green zone) will generally only require self-assessment verification. The highest risk restructures are those that appear to circumvent the intent of the rules, such as replacing related-party debt with third-party debt without genuine commercial reasons.

Examples

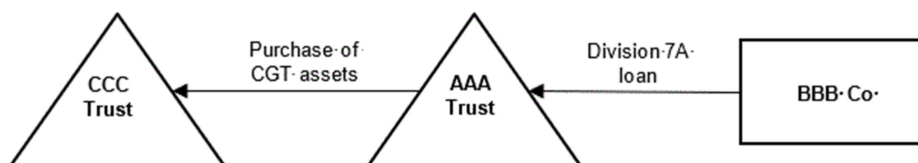
The draft guideline provides examples to help taxpayers and tax professionals understand how the debt deduction creation rules apply in practice. These examples are included in Schedules 1 and 2 of the draft guideline, illustrating scenarios where the debt deduction creation rules may need to be considered and how certain types of restructures may be classified as low or high risk under the risk assessment framework.

Schedule 1 to the draft guideline contains examples of when the debt deduction creation rules may need to be considered. Some examples include:

- **Example 2 – Funding capital expenditure with related-party debt**: In this example, the debt deduction creation rules do not apply to debt incurred to fund capital expenditure during the development of a gold mine, as it is not used to fund dividends or payments to related entities.

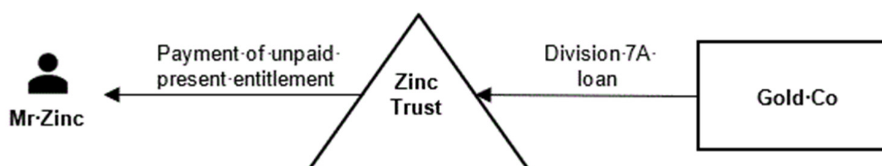
- **Example 3 – Funding dividends and working capital with related-party debt**: In this example, the debt deduction creation rules apply to the extent that debt funds are used to pay dividends to a related entity, highlighting a case where debt deductions are likely to be scrutinised.

- **Example 9** – **Funding operations and assets through Division 7A loan:** AAA Trust, a general class investor, acquires a CGT asset from CCC Trust, both of which are part of a privately owned group that includes BBB Co. AAA Trust does not have enough working capital to both purchase the asset and fund its operations, so it enters into a Division 7A loan agreement with BBB Co. The loan covers the CGT asset's purchase price, and the trustee of AAA Trust agrees to make annual repayments with interest at the benchmark rate. The ATO will likely apply compliance resources to determine the correct application



  of the debt deduction creation rules to the deductions arising from this arrangement.

- **Example 10** – **Division 7A loan funding distribution by a trustee:** A discretionary trust that is a general class investor funds the payment of an unpaid present entitlement (UPE) to its beneficiary by borrowing from a related entity under a Division 7A loan agreement. The trust must apply the debt deduction creation rules to the debt deductions, and the ATO may investigate the arrangement.



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Schedule 2 to the draft guideline provides examples of restructures in response to the debt deduction creation rules and categorises them as low or high risk.

Some examples of restructures the ATO considers to be low risk include:

- **Example 12 – Repaying debt interest**: A company eliminates debt deductions disallowed by the debt deduction creation rules by repaying related-party debt from retained earnings, classifying it as a low-risk restructure.

- **Example 14 – Disposing of foreign assets**: The liquidation of a dormant foreign subsidiary by an Australian company is a low-risk restructure, as it reduces potential debt deductions without contrivance.

- **Example 16 – Repaying debt interest**: A company repays related-party debt used to fund dividends, reducing debt deductions, which is considered a low-risk action.

Some examples of restructures the ATO considers to be high risk include:

- **Example 18 – Arrangement to change the character of costs incurred**: A company attempts to alter the character of debt costs through a factoring arrangement to avoid the debt deduction creation rules . This is flagged as a high-risk restructure because it may not reflect the true nature of the arrangement.

- **Example 19 – Replacing related-party debt with third-party debt**: In this example, the company replaces related-party debt with third-party debt, which is classified as high risk, as it may simply be a scheme to "dump" debt into Australia.

The draft guideline is open for comments until 8 November 2024. Once the guideline is finalised, it will apply to restructures entered into on or after 22 June 2023.

TRAP – Complying Division 7A loans are not excluded from the operation of the debt deduction creation rules. Where the conditions of the debt deduction creation rules are met, they will operate to disallow a deduction for interest paid or payable under a complying Division 7A loan where that loan has been used to acquire or fund a relevant related party arrangement.

ATO Reference *Practical Compliance Guideline* PCG 2024/D3
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2024D3/NAT/ATO/00001

6.2 Treasury consultation on promoter penalty crackdown

On 4 October 2024, Treasury issued a consultation paper to seek public feedback on the effectiveness and adequacy of the tax promoter penalty laws. These laws are designed to deter and penalise the promotion of tax avoidance and evasion schemes, which are often referred to as 'tax exploitation schemes'. The consultation aims to gather views on whether these laws operate as intended, remain fit for purpose, and are capable of protecting the community against emerging forms of tax misconduct.

Over the years, changes in technology and the growing use of social media have enabled new types of tax-related schemes. Emerging behaviours include promoting tax schemes through social media, encouraging non-lodgement of tax returns or non-payment of tax debts, and spreading such schemes across jurisdictions. Additionally, there has been an increase in the promotion of fraudulent claims and schemes designed to avoid anti-avoidance rules in the law. Treasury is also reviewing whether current laws adequately cover lower-level promoter behaviour and reflect the current landscape of tax misconduct.

The consultation paper explains that taxpayers often engage the help of tax practitioners (such as tax agents or BAS agents) to manage their tax affairs. However, tax intermediaries—a broader term—includes other entities like unregistered advisers, lawyers, digital service providers, and insolvency practitioners. The consultation focuses on whether the tax promoter penalty laws apply appropriately to all these intermediaries and whether they effectively deter schemes aimed at exploiting tax laws.

The ATO is responsible for enforcing these laws and penalising those who promote tax exploitation schemes. If an entity is found to be in breach of the tax promoter penalty laws, the ATO can bring a case before the Federal Court, which determines the contravention and imposes penalties. The Tax Practitioners Board (**TPB**), an independent body, regulates the conduct of tax practitioners to ensure ethical and professional standards, although it is part of the ATO's overall programme structure.

The consultation paper raises questions on several aspects of the promoter penalty laws, including:

1. whether the laws are effective in deterring the promotion of tax exploitation schemes;
2. whether the laws can prevent schemes before taxpayers become involved;
3. whether the current definitions of 'promotion' and 'promoters' appropriately cover all misconduct; and
4. whether the 'mere advice' exception, which excludes advice-giving from the definition of promotion, is clearly understood and applied correctly in practice.

The Treasury is also considering whether the current structure of the tax promoter penalty laws, which operate as a civil penalty regime, is the most effective method for deterrence. It is seeking views on potential reforms, such as expanding the laws to capture more types of misconduct and making the penalties more timely and effective. Additionally, the consultation asks whether there is a need to review the six-year time limit for the ATO to take action against promoters of tax exploitation schemes.

The tax promoter penalty laws were originally introduced to address mass-marketed tax exploitation schemes prevalent in the 1990s. However, since then, schemes have become more sophisticated and targeted, often tailored to specific taxpayers and involving multiple parties across jurisdictions. There is concern that some of these schemes are not captured by the current laws or are difficult to address due to the limitations in the law's scope and the time required for investigations.

Treasury's paper encourages feedback on whether the current roles of the ATO and TPB are appropriate, if additional comparable frameworks exist to address similar types of misconduct, and whether it is suitable to apply multiple sanctions for the same misconduct given the risks to the integrity of the tax system.

Consultation is open until 1 November 2024.

w https://treasury.gov.au/consultation/c2024-568214

6.3 Practice statement on workplace giving programs withdrawn

The ATO has withdrawn its practice statement explaining what evidence is required to support gifts made via workplace giving programs. A workplace giving program is an employer arrangement by which employers forward an employee's gift to a Deductible Gift Recipient (DGR).

w https://www.ato.gov.au/law/view/document?docid=PSR/PS200215/NAT/ATO/00001

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6.4 Division 7A and statute-barred loans

The ATO has reviewed *Practice Statement Law Administration* PS LA 2006/2 regarding the Commissioner's approach to applying Division 7A to statute barred loans. The content has been reviewed for technical accuracy and no changes have been made, other than to update for style and accessibility.

PS LA 2006/2 confirms that ATO has decided not to pursue compliance action on private company and trustee loans made before the enactment of Division 7A of the ITAA 1936 that become statute-barred. These loans, which were made before 4 December 1997, will not be deemed dividends solely because they are statute-barred, and they will not trigger anti-avoidance rules under Part IVA, nor be subject to amendments for fraud or evasion.

This approach acknowledges the complexities in the interaction between Division 7A and varying state and territory limitation laws. The ATO notes that these complexities create challenges for taxpayers, who may be unaware of how statute-barred loans impact their tax affairs. The legal differences across jurisdictions and uncertainty about how limitation laws revive debts contribute to inconsistent outcomes and compliance difficulties.

Taxpayers with statute-barred loans face potential inequity due to limitations on the amendment period, which would impact only certain loans close to the enactment of Division 7A. Further, these issues arose during a period of significant tax law changes, imposing high compliance costs. Therefore, the ATO’s stance is to administer the law sensibly, focusing on practical compliance without enforcing deemed dividends from pre-1997 statute-barred loans.

Taxpayers who have been assessed on deemed dividends due to statute-barred loans may object and request a waiver in appropriate cases.

COMMENT – loans made *after* 4 December 1997 that have become statute-barred will generally give rise to a deemed dividend on the date that they become statute-barred under section 109F(3) of the ITAA 1936. If a loan that has become statute-barred is later removed from the accounts, the removal of the debt from the accounts will not give rise to a second deemed dividend under section 109G(3).

ATO Reference *Practice Statement Law Administration* PS LA 2006/2
w https://www.ato.gov.au/law/view/document?docid=PSR/GA20062/NAT/ATO/00001

6.5 Payday super – policy design details released

The Assistant Treasurer has issued a media release stating that as of 1 July 2026, the Federal Government will require employers to pay superannuation at the same time as salary and wages.

The Federal Government also announced further policies that aim to incentivise compliance and ensure employees are compensated for any delays in receiving their super. These include:

1. an updated super guarantee charge framework will ensure employees are fully compensated for any delay in receiving their super, incentivise employers to catch-up on any missed payments quickly, and increase the severity of consequences for employers that deliberately or repeatedly do the wrong thing;
2. businesses will become liable for the updated superannuation guarantee charge if super contributions are not received by their employees’ superannuation fund within seven days of payday. This allows time for payment processing to occur, as well as for action to be taken against those employers that are not meeting their obligations;

3. revised choice of fund rules will make it easier for employees to nominate their existing super fund when they start a new job, reducing unintended duplicate accounts and giving employers more timely and accurate details.

w https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/payday-superannuation-design-details-ensure-super-paid

6.6 Denying deductions for ATO interest charges

The Commonwealth Government is consulting on the measure it announced, as part of the 2023–24 Mid-Year Economic and Fiscal Outlook, to deny deductions for general interest charges and shortfall interest charges incurred on or after 1 July 2025. The measure is not yet law.

The consultation process is open until 16 October 2024.

w https://treasury.gov.au/consultation/c2024-573157
w https://www.ato.gov.au/about-ato/new-legislation/in-detail/businesses/deny-deductions-for-ato-interest-charges

6.7 Legacy retirement product conversions and reserves

The Treasury has commenced a public consultation on the exposure draft of the *Treasury Laws Amendment (Self-managed superannuation funds—legacy retirement product conversions and reserves) Regulations 2024*.

Legacy superannuation products, such as lifetime, life-expectancy, and market-linked income streams, are created to provide retirees with a guaranteed income over a long period. When these products were initially set up, a portion of the capital is placed in reserve to cover potential future liabilities. However, these reserves often became trapped within the superannuation system due to strict contribution cap rules, limiting how much of the reserve could be allocated to members.

The draft regulations will apply to legacy lifetime, life expectancy and market-linked superannuation income stream products that commenced prior to 20 September 2007, or were commenced as a result of a conversion of an earlier legacy product that commenced prior to that date.

The draft regulations will:

1. allow the full commutation of certain market-linked pensions, annuities and income stream products if the commutation occurs during the 5-year grace period beginning on the day the regulations commences;
2. allow trustees to allocate reserves to members without breaching concessional or non-concessional contribution caps, provided certain conditions are met.

The Treasury is accepting responses to this consultation up until 8 October 2024.

w https://treasury.gov.au/consultation/c2024-566198

6.8 Guidance on First Home Super Saver Scheme refreshed

The ATO has updated its guidance on the First Home Super Saver Scheme (**FHSS Scheme**) in light of amendments introduced by the *Treasury Laws Amendment (2023 Measures No 3) Act 2023* (Cth) to the ITAA

1936 and the *Taxation Administrations Act 1953* (Cth). The Amending Act came into effect from 15 September 2024.

Broadly, the FHSS Scheme allows an individual taxpayer to make voluntary contributions into their superannuation and then later withdraw those contributions and associated earnings for the purpose of purchasing or constructing their first home.

The key changes under the amendments include:

1. allowing individuals to withdraw or amend their FHSS Scheme;
2. allowing the Commissioner to return any FHSS Scheme amounts to superannuation funds, provided the amount has not yet been released to the individual;
3. clarifying that FHSS Scheme amounts returned by the Commissioner to superannuation funds are treated as funds' non-assessable non-exempt (NANE) income and do not count towards the individuals' contribution caps; and
4. allowing individuals to have up to 90 days (previously 14 days) to request a release authority after entering into a contract to purchase or construct a home.

The Amending Act has also made amendments in relation to eligibility for the FHSS Scheme.

The ATO updated its guidance on the operation of the FHSS Scheme in the recently released *Taxation Ruling TR 2024/4: First home super saver scheme* and *Guidance Note GN 2024/1: First home super saver scheme*. The ATO also withdrew its previous guidance on the FHSS Scheme under *Law Companion Ruling LCR 2018/5: First home super saver scheme* and *Guidance Note GN 2018/1: First home super saver scheme*.

In particular, TR 2024/4 provides the Commissioner's updated guidance on the eligibility for the FHSS Scheme, what are eligible contributions, and a number of examples of how different eligible contributions may ultimately be released under the FHSS Scheme. TR 2024 also elaborates on when the Commissioner can return FHSS amounts to a superannuation fund and what the obligations of the taxpayer are following a release request under the FHSS Scheme.

GN 2024/1 also provides technical information on contributions that are eligible for release under the FHSS Scheme and eligibility of the taxpayer for the FHSS Scheme. GN 2024/1 provides guidance on how to request a FHSS determination, how to request a release from the taxpayer's superannuation fund and the taxation implication of using the FHSS Scheme.

Both TR 2024/4 and GN 2024/1 provide guidance on how the transitional rules work under the Amending Act.

w https://www.ato.gov.au/law/view/document?docid=TXR/TR20244/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=cog/lcr20185/nat/ato/00001
w https://www.ato.gov.au/law/view/document?docid=GDN/GDN20241/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=GDN/GDN20181/NAT/ATO/00001

6.9 Changed ATO response to sovereign citizen correspondence

The ATO has changed its approach to addressing correspondence from taxpayers claiming that the entire tax system is invalid or that the tax system does not apply to that taxpayer for a particular reason.

Previously, *Practice Statement Law Administration* PS LA 2004/10 (**PS LA 2004/10**) stated that such correspondence was to be escalated to the 'Constitutional Correspondence' team.

PS LA 2004/10 has been updated to state:

We will not respond to correspondence where taxpayers claim tax laws are invalid or do not apply. Given that many claims of this type have been rejected by the Courts, we do not consider it an appropriate use of ATO resources to do so.

PS LA 2004/10 has also been updated for minor grammatical and terminology changes.

ATO Reference *Practice Statement Law Administration* PS LA 2004/10
w https://www.ato.gov.au/law/view/document?docid=PSR/PS200410/NAT/ATO/00001

6.10 Super guarantee charge practice statement updated

Practice Statement Law Administration (General Administration) PS LA 2007/1 has been updated in line with current ATO style and accessibility requirements and has been checked for technical accuracy and currency.

PS LA 2007/1 outlines situations in which it may not be necessary to assess an employer for superannuation guarantee charge if there is evidence that an employer has done what they could reasonably be expected to have done to comply with the law by the due date.

ATO reference *PS LA 2007/1*
w https://www.ato.gov.au/law/view/document?docid=PSR/GA20071/NAT/ATO/00001

6.11 Reminder for SMSFs to lodge their annual return

On 18 September 2024, the ATO published a reminder for SMSFs that had assets, such as superannuation contributions or other investments as of 30 June 2024, to lodge an annual return for the 2023-2024 financial year.

A SMSF will have a lodgment due date of 31 October 2024 if the fund:

1. is new and the annual return is being prepared by the fund itself; or
2. has previously lodged the prior year annual return late.

In some cases, lodgment may still be required by 31 October 2024, even the fund has appointed a tax agent.

The ATO previously published instructions on its website for SMSFs completing their annual return for the 2023-2024 financial year: https://www.ato.gov.au/forms-and-instructions/self-managed-superannuation-fund-annual-return-2024-instructions.

If the fund holds no assets, a 'return not necessary' request should be made, or the fund's registration should be cancelled.

Failure to lodge an annual return on time can result in the SMSF's compliance status being removed on Super Fund Lookup, which may impact rollovers and employer contributions to the fund.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/reminder-to-lodge-your-sar-by-31-october

6.12 Valuing fund assets for SMSFs

On 18 September 2024, the ATO published a reminder to SMSF trustees of their responsibility to provide objective and supportable evidence to their SMSF auditor for the valuation of the fund's assets as part of the

annual audit prior to lodgment of their annual return. Failure to provide such evidence could result in potential late lodgment of the annual return or a contravention if mistakes have been made.

The ATO previously published the following guide to help SMSF trustees when valuing assets for superannuation purposes: https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/in-detail/smsf-resources/valuation-guidelines-for-self-managed-super-funds.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/valuing-fund-assets-for-smsfs

6.13 Reminder for SMSFs to lodge October quarterly TBARs

On 18 September 2024, the ATO published a reminder for SMSFs that had certain events affect their members' transfer balance account during the quarter to report the event using the TBAR within 28 days after the end of the quarter.

TBAR lodgments for the October quarter are due by 28 October 2024. A TBAR is required even if the member's total superannuation balance is less than $1 million. A TBAR is not required if no transfer balance account events occurred during the quarter.

Failure to lodge a TBAR on time may affect the member's transfer balance account.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/october-quarterly-tbar-lodgment-reminder

6.14 SMSF quarterly statistical report June 2024

On 27 September 2024, the ATO released the SMSF quarterly statistical report for June 2024. The highlights of the report include the following:

1. there are 625,609 SMSFs with 1,152,792 members;
2. 53% of SMSF members are male, 47% of SMSF members are female, and 85% of SMSF members are 45 years or older;
3. the total estimated assets of SMSFs are $990.4 billion; and
4. the top asset types held by SMSFs, by value, are listed shares (representing 28% of total estimated assets) and cash and term deposits (representing 16% of total estimated assets).

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/smsf-newsroom/highlights---smsf-quarterly-statistical-report-june-2024

6.15 Enhancing GST assurance for the Top 100 and Top 1,000

On 23 September 2024, the ATO announced it is introducing an annual GST return for the Top 100 and Top 1,000 public and multinational business taxpayers that have received a GST assurance review.

The ATO will trial the new return through a pilot program in the next six months, which will involve a select group of taxpayers to test the clarity and functionality of the return questions. The remaining taxpayers will be

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required to lodge the return from the 2024–25 financial year, with the due date depending on the taxpayer's financial year. The first lodgments for early balancers will be due on 21 August 2025.

The ATO will provide additional guidance, including details on lodgment and completion instructions, on the ATO website soon.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/enhancing-gst-assurance-for-the-top-100-and-top-1000

6.16 Top 1,000 income tax and GST assurance programs

The ATO has published its 2024 findings report on the Top 1,000 income tax and GST assurance programs.

The Top 1,000 combined assurance program is part of the ATO's Tax Avoidance Taskforce, aimed at ensuring large public and multinational groups, and APRA-regulated superannuation funds are paying the correct amount of income tax and GST. This report provides observations from reviews conducted up to June 2024, comparing findings to previous years and highlighting trends in tax compliance and governance among the Top 1,000 taxpayers.

According to the report, the ATO has conducted 1,525 assurance reviews on 1,183 taxpayers, focusing on income tax and GST compliance for large taxpayers.

For income tax, 24% of taxpayers reached high assurance in their last review, with 86% achieving high or medium assurance. A notable 9% were escalated for further review or audit, down from 12% since the program's start. The ATO has assured $79.1 billion in income tax since 2016.

For GST, 37% of taxpayers have reached high assurance that they paid the correct amount, and 96% have attained high or medium assurance.

Improvements in governance are noted, with 50% achieving a high or medium assurance rating for risk management. However, 40% of taxpayers made voluntary disclosures upon review notification, which the ATO considers suggestive that regular self-reviews are not standard practice. Only 2% of GST issues required further ATO action.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/in-detail/findings-report-top-1000-income-tax-and-gst-assurance-programs

6.17 R&D tax incentive transparency report

On 3 October 2024, the ATO published its first R&D tax incentive transparency report in relation to the 2021-22 income year.

The report consists of two parts. Part 1 is the "Report of Data about Research and Development Tax Incentive Entities," providing information about companies claiming the R&D tax incentive for the 2021–22 income year. Part 2, the "Research and Development Tax Incentive Transparency Report," explains and interprets the data.

Key insights from the 2021–22 data include:

1. $11.2 billion in R&D expenditure was claimed by 11,545 companies;
2. small businesses made up 48% of claimants, while public and multinational businesses led in investment with $4.9 billion;

3. the professional, scientific, and technical services industry had the highest number of claims, representing 43% of the total; and
4. Australian-owned companies accounted for 97.8% of the population for the 2021-22 year, with 11,286 reporting R&D expenditure.

This report highlights the continued strong engagement with the R&D tax incentive program, particularly by small businesses, and aims to increase transparency and compliance.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/incentives-and-concessions/research-and-development-tax-incentive-and-concessions/research-and-development-tax-incentive/r-d-tax-transparency-reports/r-d-tax-incentive-transparency-report-2021-22

6.18 Acquisitions and disposals of 'no goodwill' practices

The ATO has released new website guidance in relation to its administrative treatment of provisions of tax law relating to the acquisition and disposal of interests in ‘no goodwill’ professional partnerships, trusts and incorporated practices.

Generally, where there is a 'no goodwill' professional practice, a practitioner would enter the practice without paying an amount that reflects the practice's existing goodwill. Further, upon the practitioner's exit of the 'no goodwill' professional practice, the practitioner will not be entitled to an amount that reflects the practice's existing goodwill.

The provisions in the tax law that potentially apply to a 'no goodwill' professional practice relate to capital gains tax (CGT), employee share schemes (ESS) and off-market buy-backs.

The ATO sets out its administrative treatment of the various tax issues in the following table:

Tax issue	Provisions	Applicable treatment
CGT: Calculation of cost bases and reduced cost bases of the practice interest	Section 112-20, ITAA 1997	The market value of the practice interest at the time of acquisition is treated as being equal to the amount the taxpayer pays (including nil) in respect of the acquisition.
ESS: Calculation of a discount (if any) on the issue of shares in an incorporated practice	Section 83A-20, ITAA 1997	The market value of the practice interest at the time of acquisition is treated as being equal to the amount the taxpayer pays (including nil) in respect of the acquisition.
CGT: Calculation of the capital proceeds in respect of a CGT event happening to a practice interest	Section 116-30, ITAA 1997	The market value of the practice interest at the time of disposal is treated as being equal to the amount the taxpayer receives (including nil) in respect of the disposal.
Off-market buy-backs: Calculation of consideration in respect of an off-market share	Subsection 159GZZZQ(2), ITAA 1936	The market value of the practice interest at the time of disposal is treated as being equal to the amount the taxpayer receives

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buy-back of shares in an incorporated practice		(including nil) in respect of the disposal.

The website guidance also provide a number of examples.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/income-and-deductions-for-business/in-detail/professional-firms/acquisitions-and-disposals-of-interests-in-no-goodwill-professional-practices

6.19 NSW – payroll tax bulk billing support initiative

Revenue NSW has issued a guidance on the bulk billing support initiative for the treatment of contractor payments to general practitioners in medical centres, include payroll tax relief and rebate eligibility.

From 4 September 2024, medical centres making payments to contractor GPs can claim a rebate on payroll tax for these contractors only, provided they meet specific bulk billing thresholds:

1. Metropolitan Sydney: At least 80% of GP services of the medical centre are bulk billed; and
2. Other areas: At least 70% of GP services of the medical centre are bulk billed.

Revenue NSW provides the following flowchart to assist with the bulk billing initiative:

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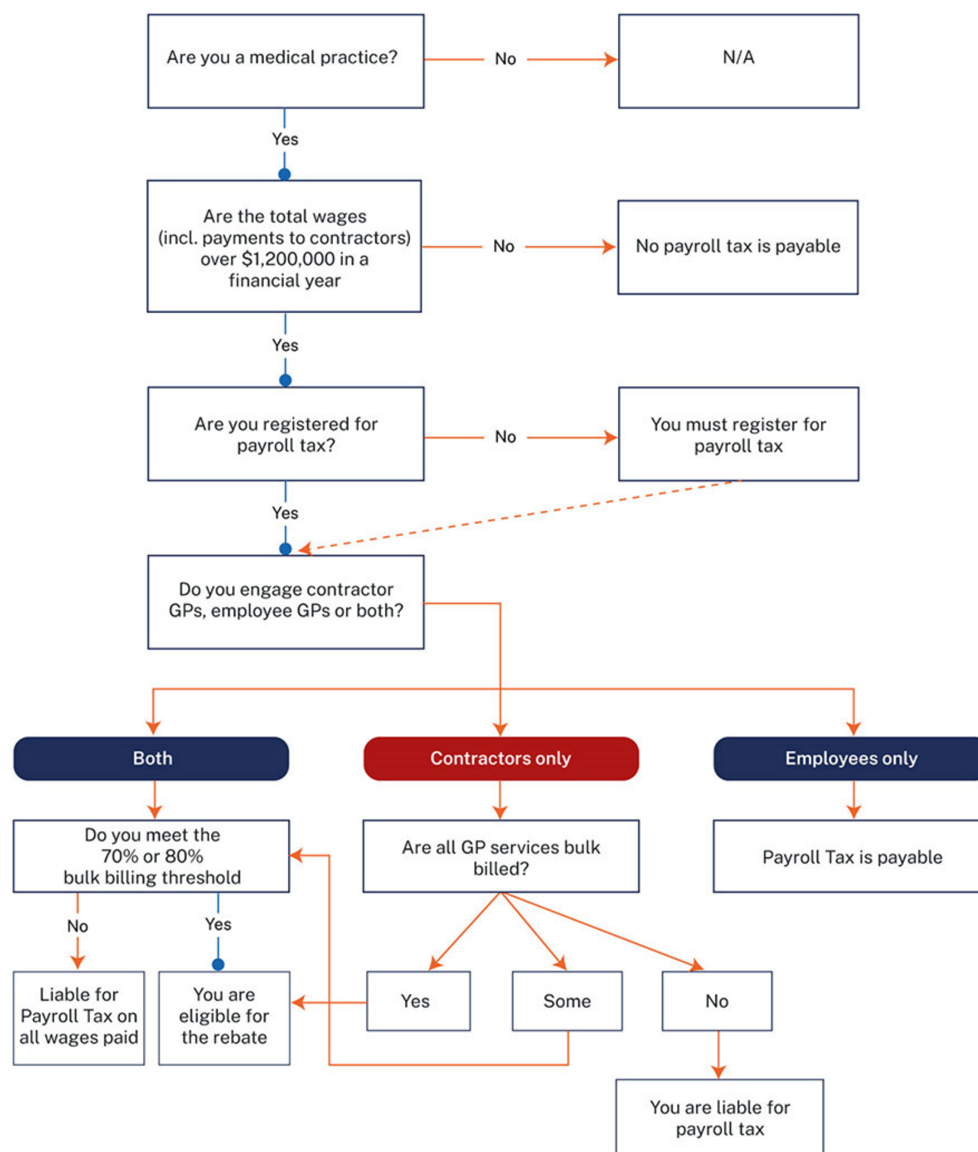

A list of frequently asked questions will also be available on the website to guide taxpayers through these changes.

w https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/payroll-tax/industry-specific-guidance/medical-services/bulk-billing-support-initiative#heading4

6.20 Queensland – payroll tax amnesty for dentists

On 30 September 2024, the Deputy Premier, Treasurer and Minister for Trade and Investment in Queensland approved an administrative arrangement setting out the basis on which a temporary payroll tax amnesty to eligible dental clinics will be administered.

If the amnesty applies, an eligible dental clinic is not required to pay payroll tax on payments made to contracted dentists for the period up to 30 June 2025 and the earlier of the following:

1. 1 July 2018; or
2. if a designated dental clinic was, or is currently, subject to audit activity, the earliest financial year that the audit activity relates to.

To be eligible for the amnesty, the dental clinic must be a 'designated dental clinic'. A designated dental clinic' for payroll tax purposes is an employer that conducts a medical centre business (see Public Ruling PTA Q000.6) and one of the following applies:

1. meets the criteria for registration under section 52 of the Payroll Tax Act 1971 but is not registered for payroll tax in Queensland and makes payments to contracted dentists;
2. is registered for payroll tax in Queensland but is not declaring its payments to contracted dentists for payroll tax;
3. is or was subject to audit activity (that has not been finalised) in relation to its payments to contracted dentists;
4. has been assessed on payments to contracted dentists as a result of audit activity.

In addition, the dental clinic is required to:

1. make a voluntary disclosure by 30 June 2025 if it is not registered for payroll tax and register for payroll tax; and
2. comply with its ongoing payroll tax obligations after the making the voluntary disclosure, including from 1 July 2025.

If the dental clinic does not meet these eligibility requirements, it will not be eligible for the amnesty. Where a dental clinic is a member of a group for payroll tax purposes, each group member that applies for the amnesty must separately satisfy the eligibility requirements.

The Commissioner's decision that a dental clinic is not eligible for the amnesty is a non-reviewable decision.

The amnesty is limited to payments made to contracted dentists. For the purposes of the amnesty, a dentist is registered as a dentist with the Dental Board of Australia. The amnesty is not available for payments to contracted dentists where an exemption applies or for payments to dentists who are common law employees.

If the dental clinic has already paid payroll tax in relation to payments to contracted dentists during the amnesty period as a result of audit activity, a reassessment of payroll tax will be made to exclude those payments and a refund paid.

w https://www.treasury.qld.gov.au/resource/administrative-arrangement-amnesty-dentists/
w https://www.treasury.qld.gov.au/resource/guidelines-amnesty-dentists/

6.21 Victoria –voluntary disclosures about capital raisings

The Victorian Court of Appeal's decision in *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue* [2024] VSCA 175 has reinforced the application of duty on capital raisings under the "associated transaction" provision in the *Duties Act 2000* (Vic). The case involved a property development project where shares were issued to 18 investors as part of a conditional capital raising. The Court upheld that, even though the investors were not acquainted, their acquisitions were interconnected and formed part of a single arrangement. The decision affirms the Commissioner's interpretation in Revenue Ruling DA-057v2, confirming that acquisitions made in a syndicated property investment may be subject to duty as "associated transactions."

Following the decision, the Commissioner has introduced a voluntary disclosure program for landholders who may have previously applied a different interpretation of the "associated transaction" rule to capital raisings.

The program runs until 31 March 2025, offering an amnesty on penalty tax for voluntarily disclosed liabilities from past capital raisings, with only market interest and a reduced 3% premium applied. After this period, the Commissioner will launch a compliance program and impose the full rates of penalty tax and interest on any identified liabilities.

Landholders are encouraged to review their past capital raisings in light of the Court's decision and Revenue Ruling DA-057v2. Voluntary disclosures can be made by submitting a landholder acquisition statement or a cover letter with supporting documents to the State Revenue Office. The program provides an opportunity to mitigate penalties before compliance actions begin.

w https://www.sro.vic.gov.au/news/voluntary-disclosures-following-oliver-hume-decision

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7. Tax Professionals

7.1 Amendments to Tax Practitioner Code of Conduct Determination

From 25 September 2024 to 2 October 2024, the Government sought feedback on draft amendments to the Tax Agent Services (Code of Professional Conduct) Determination 2024 (**Determination**) and updated explanatory materials. On 8 October 2024 the measures were introduced by Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2), a determination issued by Assistant Treasurer and Minister for Financial Services.

The Determination introduced eight new obligations for registered tax and BAS agents (see our July 2024 Tax Training Notes). The new obligations currently come into effect from January 2025 for larger firms and July 2025 for smaller firms (see item 6.2 of these notes).

The amendments, on which consultation was conducted, seek to clarify and refine the obligations of tax practitioners, particularly in relation to handling false or misleading statements and keeping clients informed of relevant matters.

False or misleading statements

The original version of Section 15 in the Determination required tax practitioners to ensure that any statements they made, prepared, or permitted others to make were not incorrect, materially false, or misleading. This applied both to statements made on behalf of clients and those made for the practitioner's own affairs.

If a tax practitioner became aware that a statement previously made was incorrect or misleading, the original section required them to take corrective action or ask the client to do so. If the client refused, the original section required the tax agent to report the client to the relevant authority.

The amended section redesigns this obligation, specifying different actions depending on whether the false statement was made for a client or the practitioner's own affairs. In relation to the practitioner's own affairs, the practitioner is required to have the statement corrected.

Under the new Section 15, where a tax agent becomes aware that a statement they prepared for a client was materially false or misleading (no longer including merely incorrect statements), they must, broadly:

1. advise the client about all of the following:
   (a) that the statement should be corrected;
   (b) the possible consequences of not taking action to correct the statement; and
   (c) the tax agent's responsibilities under the taxation laws (including the *Tax Agent Services Act 2009* (Cth) (**TASA**) and Code of Professional Conduct) relating to false or misleading statements, and what steps the tax agent may be required to take in order to fulfil those responsibilities;
2. if, after a reasonable period of time following the steps mentioned in item 1, the tax agent is not reasonably satisfied that the client has corrected the statement or otherwise adequately explained the basis for the statement, they must withdraw from the client engagement if the false or misleading statement is due to recklessness regarding the operation of a tax law, or intentional disregard of a tax law; and
3. if, after a reasonable period of time following the step mentioned in item 2, notify the relevant regulatory authority of the conduct of a client only where the tax agent has reasonable grounds to believe that the client's actions or inactions have caused, are causing, or are likely to cause substantial harm to public interests, including investors, creditors, employees, or the public.

A note in the amended Determination states:

In determining whether a client's actions have caused, are causing, or may still cause, substantial harm to the interests of others (including investors, creditors, employees, or the public), regard is expected to be had to all relevant matters, including:

(a) whether the client's actions have resulted, are resulting, or may result, in serious adverse consequences to others in either financial or non-financial terms; and
(b) your client's obligations under the taxation laws, and your obligations under the taxation laws (including your obligations under the Act (particularly, the Code of Professional Conduct)); and
(c) the appropriateness and timeliness of your client's response to your advice that the statement should be corrected (including any information that would lead you to conclude that your client lacks integrity); and
(d) the urgency of the situation.

The explanatory statement to the amending Determination notes that innocent or genuine errors or mistakes of taxpayers or practitioners are not intended to be captured by the new obligation.

The amended Determination also clarifies that the requirement to notify the relevant authority does not apply where doing so would pose a reasonable risk to the practitioner's personal safety, or the safety of a member of their family or staff, or to the extent that such action would be unlawful under another law of the Commonwealth, or of a state or territory, for example, disclosure limitations under the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 which prevent tipping off a client when such a disclosure could prejudice an active investigation.

The obligations relating to clients who fail to correct false or misleading statements is intended to align with ethical standards issued by the Accounting Professional & Ethical Standards Board (APESB).

Keeping clients informed

The original version of Section 45 in the Determination required tax practitioners to keep their clients informed of relevant matters, but the obligations were outlined in more general terms than in the amendments. While the original section focused on ensuring clients received essential information, the changes now provide more detailed guidance on what must be disclosed and when.

Obligation to inform clients

Under the original version, tax practitioners were required to advise their clients of any relevant information that may affect their decisions regarding tax services. This included providing sufficient details to enable clients to make informed decisions about whether to engage or continue to engage the practitioner. However, the original provisions did not list specific types of information that must be disclosed, leaving it to the practitioner's discretion to determine what was considered relevant.

The amendments now provide an exhaustive list of particular events and circumstances that must be disclosed to clients. These include breaches of the TASA, bankruptcy or administration, convictions for fraud or dishonesty, and any penalties or sanctions related to tax evasion or avoidance schemes. The list does not include an obligation to disclose ongoing investigations where no penalty or sanction has been issued.

Scope of disclosures

While the original version of Section 45 generally required practitioners to keep clients informed, it did not specify the scope of disclosures as comprehensively as the amendments. The changes extend the disclosure obligation to not only the practitioner but also their affiliated partnerships or companies, particularly if those affiliations have experienced significant events, such as financial difficulties or legal sanctions, that could influence a client's decision to continue engaging their services.

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Other amendments

In addition to the major changes to Sections 15 and 45, the Determination includes refinements to sections 20, 25, 30, and 40 to remove ambiguity and improve the clarity of the obligations. Transitional provisions ensure that practitioners do not need to disclose events occurring before July 2022, and provide sufficient time for tax practitioners to understand and comply with the new obligations before they take full effect.

These changes are now in effect, subject to the transitional period for firms to comply (see item 6.2 of these notes).

Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024
w https://www.legislation.gov.au/F2024L01276/asmade/text
w https://treasury.gov.au/consultation/c2024-576122

7.2 Changes to transitional rule for code changes determination

On 6 September 2024, the Assistant Treasurer and Minister for Financial Services issued a further determination to defer the commencement of the Tax Agent Services (Code of Professional Conduct) Determination 2024.

The Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 1) Determination 2024 introduces transitional arrangements for compliance with new professional and ethical obligations under the Code of Professional Conduct. Tax practitioners are given additional time to implement these new obligations based on the size of their firm. Practitioners with 100 or fewer employees must comply by 1 July 2025, while larger firms must comply by 1 January 2025.

Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 1) Determination 2024
w https://www.legislation.gov.au/F2024L01118/asmade/text

7.3 What your practice needs to do before 31 October

The ATO has published a reminder that all taxpayers operating on a standard year with one or more prior year tax returns overdue as at 30 June 2024 must lodge their 2024 tax return by 31 October 2024.

The ATO reminds practices to add new income tax clients to their client lists by 31 October to ensure the clients receive the practice's lodgment program due dates.

New clients can be added to an agent or practitioner's client list using online services for agents.

If an agent or practitioner lodges a client's overdue prior year tax return by 31 October, the client's 2024 tax return will receive the tax agent's lodgment program due date.

The ATO notes that it can take up to 3 weeks for due dates to update in the ATO system after overdue tax returns are lodged or new clients are added to a client list. It is not necessary to request lodgment deferrals in the meantime.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/what-your-practice-needs-to-do-before-31-october

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7.4 Troubleshooting guide for agents Client-to-agent linking

The ATO has updated its website guidance on common scenarios where agents may need help with the client-to-agent linking process and provides links to where agents can find support for themselves and their clients.

w https://www.ato.gov.au/tax-and-super-professionals/digital-services/in-detail/troubleshooting-guide-for-agents-client-to-agent-linking

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