The Tax Institute

Tax Update

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About Brown Wright Stein

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

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

Contents

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

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 2.1 Uber	Hammerschlag CJ in Eq in the Supreme Court of New South Wales has found that payments made by Uber Australia to Uber drivers are not "for or in relation to the performance" as the payments were made pursuant to a contractual obligation to account to the drivers and, accordingly the payments were not taxable wages under section 35 of the *Payroll Tax Act 2007* (NSW). The decision potentially has implications for health care practice arrangements.	Page 7
Item 7.1 Personal services business and Part IVA	The ATO has issued a Practical Compliance Guidelines which explains when the ATO will be more likely to have cause to apply compliance resources to consider the potential application of Part IVA of the ITAA 1936 to an alienation arrangement where personal services income (PSI) of an individual is derived through a personal services entity (PSE) that is conducting a personal services business (PSB).	Page 59
Item 7.8 Merchant	The ATO has issued a Decision Impact Statement in relation to the decision of Thawley J in *Merchant and Commissioner of Taxation* [2024] AATA 1102, which concerned whether a director of a SMSF should be disqualified from acting as a director or trustee of self-managed superannuation funds.	Page 64
Item 7.10 NSW payroll tax and medical centres	On 23 August 2024, Revenue NSW issued a new Commissioner's Practice Note to explain the amendments made to the *Payroll Tax Act 2007* (NSW) to provide relief to general practitioner where certain conditions are met. The Practice Note provides Revenue NSW's explanation of how the relief operates, in particular the approach to determine if the bulk billing thresholds are satisfied.	Page 65
Items 8.1 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), including a broadening of the transitional arrangements and further expected changes following industry consultation.	Page 70

2. Cases

2.1 Uber Australia – payroll tax and relevant contracts

Facts

Uber is a rideshare system which connects riders with drivers through Uber's software applications, the 'Driver App' and 'Rider App'. A driver may be an individual operating on his or her own, or a person working for a person carrying on the business of providing transport services (**Partner**).

If a rider (a passenger) makes a trip request through the Rider App, it is passed on to a driver via the Driver App. A driver can accept, ignore or reject a request. If the driver ignores or rejects it, it is presented to another available driver. If a driver accepts the request, the driver is given the rider's name and location, and the rider is shown the driver's location, estimated time of arrival, the driver's first name, vehicle model and registration number. Before the driver gets to the pickup location, either party can cancel the trip.

Riders input their destination in the Rider App when requesting a trip. The driver is only given the destination once he or she picks up the rider and commences the trip. The driver is not given the estimated or actual fare or provided with the actual pickup location or the rider's intended destination.

At a journey's end, the rider automatically pays the fare electronically. The amount of the fare is a function of time and distance plus a base fare (subject to a minimum fare). Uber has a support team which can reduce the fare where, for example, the driver took an inefficient route. Uber retains an absolute discretion as to the amount ultimately charged and unilaterally to adjust the fare payable for a particular trip. However, this rarely occurs.

Uber deducts its service fee from the rider's payment and pays the balance to the driver. The service fee is calculated by reference to the time and distance component of the fare (generally 20-25% of the fare). In 2017, booking fees were introduced. Drivers pass on these to riders. Uber emails a rider a receipt with the Uber logo.

Both riders and drivers can be blocked from using the Rider App and driver App respectively, whether they have breached Uber's community guidelines. Drivers can receive a referral fee for introducing new drivers.

Different forms of written contracts governed the relationship between Uber and the drivers or Partners (**Driver Contracts**). Relevantly, the following are clauses in almost all the Driver Contracts:

1. acknowledgment that Uber does not provide transportation services and is not a transportation carrier, but that its business is to provide access to its lead generation services rendered via the apps in consideration for a service fee;
2. acknowledgement that in providing services to riders, the driver or partner has a legal and business relationship with the rider and not Uber;
3. provide that the driver is entitled to charge the rider a fare for each completed trip and that Uber is appointed as a limited payment collection agent for the driver or otherwise will collect the fare from riders for and on behalf of the driver (clauses 8.1 and 9.1);
4. Uber will determine the fare calculation but allows the driver to charge fares lower than those calculated by Uber;
5. Uber will remit to the driver the fare less any applicable service fee charged by Uber; and
6. Uber is permitted to unilaterally to adjust the amount paid in respect of a particular fare.

The following clauses were contained in the contracts between Uber and the riders:

1. Uber will facilitate the rider's payment of the applicable charges on behalf of the third-party provider as the provider's limited payment collection agent, and that payment in that matter shall be considered the same as payment made directly by the rider to the third-party provider;
2. Uber has the right to establish, remove or revise charges for any or all services obtained through the use of the services in Uber's sole discretion;
3. contain confirmation by the rider that use of the services may result in charges to the rider for the services they receive from a third-party provider (clause 4);
4. Uber will facilitate the rider's payment of the applicable charges on behalf of the third-party provider as the provider's limited payment collection agent, and that payment in that matter shall be considered the same as payment made directly by the rider to the third-party provider (clause 4); and
5. Uber has the right to establish, remove or revise charges for any or all services obtained through the use of the services in Uber's sole discretion (clause 4).

The Chief Commissioner of State Revenue in NSW assessed Uber to payroll tax on the basis that the majority of amounts collected on behalf of drivers by Uber from riders and remitted to the drivers was taken to be wages, as amounts paid or payable for or in relation to the performance of work relating to a relevant contract. The Chief Commissioner issued six payroll tax assessments to Uber totalling $81,515,923 for the 2015 to 2020 financial years (**Assessments**).

On 24 April 2021, Uber objected to the Assessments. The Chief Commissioner disallowed the objection. Uber applied to the Supreme Court of New South Wales for a review of the Chief Commissioner's decision disallowing its objection to the Assessments.

The *Payroll Tax Act 2007* (NSW) (**PTA**) imposes payroll tax on all taxable wages paid or payable by an employer. Taxable wages are those paid or payable by an employer for or in relation to services performed by an employee wholly in this jurisdiction.

The relevant contract provisions in Division 7 of the PTA expand the scope of the liability to pay payroll tax by capturing payments made by a person who, during a financial year, supplies services to another person under a contract (relevant contract) under which the first person (designated person) has supplied to the designated person the services of persons for or in relation to the performance of work.

Under section 31 of the PTA, a 'contract' includes an agreement, arrangement or undertaking, whether formal or informal and whether express or implied. Section 32(2) of the PTA lists exclusions to the relevant contract provisions. Section 32(2B) of the PTA provides that the exclusions do not apply to a contract under which any additional services or work of a kind not covered by any relevant exclusions are supplied or performed under the contract.

Under section 35(1) of the PTA, amounts paid or payable by an employer during a financial year for or in relation to the performance of work relating to a relevant contract are taken to be wages paid or payable.

Uber contended that:

1. its contracts with drivers are not relevant contracts under section 32(1)(b) of the PTA because "transportation services" were provided by drivers, not to Uber but to riders and were not provided under the contract between the drivers and Uber, but the contract between the drivers and the rider;
2. its arrangements with drivers and Partners are excluded from the definition of relevant contract under one or more of the exclusions in section 32(2) of the PTA. Namely, the drivers provided their services for less than 90 days in a financial year, the work was ancillary to the use of goods (i.e. a vehicle), and some drivers were registered taxis or hire cars making them persons who ordinarily perform services of that kind (i.e. driving services) to the public generally; and
3. Section 35(1) of the PTA only applies only to payments in the character of remuneration for work performed. Uber stated that the only work done by the drivers is driving and the rider, not Uber, paid for

the driving. Therefore, amounts paid by Uber to drivers were not paid for or in relation to the performance of work under that contract, and thus are not taken under section 35(1) of the PTA to be wages paid or payable by Uber.

The Chief Commissioner contended (amongst other matters) that:

1. under section 32(2B) of the PTA, the exclusions do not apply because under the contracts between Uber and drivers or Partners, additional services or work of a kind not covered by any of the relevant exclusions are supplied or performed; and
2. there was a direct relationship between the payments made by Uber and the performance of work by drivers under the Driver Contracts because Uber paid drivers for the work they performed that was permitted and regulated by the Contracts. Therefore, amounts paid by Uber to drivers were paid for or in relation to the performance of work under that contract, and t taken under section 35(1) of the PTA to be wages paid or payable by Uber.

Issues

1. Are the Driver Contracts relevant contracts under section 32(1)(b) of the PTA?
2. Are any of the arrangements with the drivers or Partners excluded from the relevant contract provisions under one or more of the exclusions in section 32(2) of the PTA?
3. Are amounts paid or payable by Uber taken to be wages paid or payable under section 35(1) of the PTA?

Decision

Are the contracts 'relevant contracts'?

The Court stated that the answer to whether the Driver Contracts were relevant contracts depended on the following two questions being answered in the affirmative:

1. was Uber supplied with services of persons for or in relation to the performance of work?
2. were those services supplied to Uber under a contract?

The Court identified that the Chief Commissioner had adopted a 'trichotomy analysis' of the services, identifying the services of driving, rating and referring which were services of persons 'for or in relation to the performance of work' within sections 32(1)(b) and 35(1) of the PTA. The Court suggested that the trichotomy analysis may be artificial and that the activities of the drivers should be seen more holistically. The Chief Commissioner did not embrace this holistic approach and Uber opposed it. Therefore, the Court adopted this trichotomy analysis and held that driving, rating and referring were all services.

The next issue is whether the services were supplied 'for or in relation to the performance of work'. The Court held that driving is undertaken in relation to the performance of work. Therefore, the rating and referring alone is "sufficiently connected" to the driving to make the rating and referring “in relation to” work.

The Court then considered whether the services were suppled to Uber under a contract. The Court had regard to High Court authority and the test being one which required the contract to be the source of the obligation.

The Court stated that the Driver Contracts gave the drivers and Partners the right to use the Driver App, whether they choose to drive or not. The right to use the Driver App, and all the entitlements and benefits stemming from its use, including the opportunity to drive, or to decline to drive, for gain, have their source in the Driver Contracts. Therefore, the services of driving, rating and referring were supplied under the Driver Contract.

The Court concluded that the Driver Contracts were relevant contracts under section 32(1)(b) of the PTA.

Do any exclusions apply?

In respect of the exclusion in section 32(2)(a) of the PTA that the services supplied by a driver to Uber must be ancillary to the use of the vehicle, the Court stated as follows:

1. driving and using a vehicle cannot be separated, and therefore cannot be described as a service ancillary to the use of the vehicle;
2. rating a rider after they have been driven in a vehicle is a service ancillary to the use of that vehicle as the driver cannot rate a rider if they have not used a vehicle; and
3. referring a driver is not ancillary to the use of a vehicle as the referred person may never drive.

Therefore, in respect of the exclusion in section 32(2)(a) of the PTA, the Court stated ,as the driving and referring are not ancillary, that section 32(2B) of the PTA is enlivened to disentitle Uber from the benefit of the exclusion. The Court noted that, if a holistic analysis is undertaken (rather than the trichotomy analysis of the services), then all the services identified would have been viewed compendiously with everything else the driver does, and section 32(2B) of the PTA may not have applied because there would be no additional services.

In respect of the exclusion in section 32(2)(b)(iii) of the PTA, that the services provided by the driver were supplied for 90 days or less in a financial year, the Court did not accept Uber's argument that one day equates to 7.6 hours. The Court was not satisfied that Uber had established the exclusion in section 32(2)(b)(iii) of the PTA applied.

In respect of the exclusion in section 32(2)(b)(iv) of the PTA that the services were provided to the public generally, the Court stated that Uber did not lead evidence as to the frequency of taxi or hire car driving by those drivers, to enable the Court to conclude that they ordinarily engaged in that activity. Therefore, Uber had not established that the exclusion in section 32(2)(b)(iv) of the PTA applied.

Are the amounts paid by Uber to drivers taxable wages?

The Court stated that section 35(1) of the PTA Section 35(1) requires identification of a connection between the payments made by Uber the subject of the Assessments, and work done by drivers under the Driver Contracts so as to make the payments 'for or in relation to' that work.

While the Court accepted that the meaning of the words “in relation to” are very wide, the Court stated they must still be construed in the context in which they are to be found, and having regard to various rules of construction which Parliament intended to be used to ascertain the meaning of its legislation. One principle referred to by the Court is that the meaning of a word can be gathered from its associated words, and that the linking of words indicates that they should be understood in the same sense.

The Court stated that the words 'in relation to' have wider meaning than 'for', and to be 'in relation to' the work, the *"payment does not have to have the character of remuneration (not least of all because the person receiving the money does not have to be the person who does the work)/ But some form of reciprocity or ascertainable calibration between the money paid and the work done is required. Not just any relationship of any kind whatsoever will suffice".*

The Court made an observation that in the Second Reading Speech, when Division 7 was introduced, it was said that it was introduced *“to deal with the practice of using contractors who provide services on a similar basis to ordinary employees but who are regarded at law as independent contractors”*, as a basis to avoid charges and taxes such as payroll tax. The Court stated that there was no suggestion in this case that the Uber system was structured to avoid payroll tax.

The Court then considered the characterisation of the nature of the payments made by Uber in the context of the contracts. The Court had specific regard to clauses 8.1 and 9.1 of the Driver Contracts and clause 4 of the Rider Contract (see above).

The Court concluded that it was not Uber who paid the driver, but the rider who pays the driver. The Court held that Uber was a mere "payment collection agent". The Driver Contract provides that the riders' payments are considered the same as payment made directly by the rider to the driver or partner.

While the Court acknowledged that there is some form of relationship between Uber's payment and the work which the driver performed because if the driver had not driven, Uber would receive no payment. However, ultimately the Court held that this was not a relationship which can be described as being 'in relation to' the work in the context of section 35(1) of the PTA.

Critically, the Court stated:

> *"There is no element of reciprocity or calibration between the driver and Uber or the rider and Uber with respect to the money paid by the rider. Those elements exist only between the driver and the rider. The payment here is made pursuant to an obligation to account, and no more.*
>
> *What the rider pays the driver is for or in relation to the work done by the driver. What Uber pays the driver is in relation to the payment Uber has received, not in relation to the work itself".*

Therefore, the payments made by Uber did not fall within section 35(1) of the PTA and were not taken to be wages. The Assessments were revoked.

COMMENT – This decision is very likely to be appealed by the Chief Commissioner. The interpretation of section 35(1) of the PTA in this decision is likely to have implications to medical practices and allied health centres, and mortgage brokers, in respect whether they are caught under the relevant contract provisions in the PTA.

Citation *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124 (Hammerschlag CJ in Eq, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1124.html

2.2 Gregg – director penalty notices (DPNs)

Facts

Bradley Gregg is a former director of the company JR Serra Proprietary Limited.

From 9 February 2018, Bradley was the sole director and shareholder of JR Serra. By early 2019, it appears he had come to the view that the company was not a viable business. Bradley obtained legal advice as to the winding down of the company's affairs and providing advice as to how JR Serra could permissibly cease trading.

At the time of seeking that advice in early 2019, he was aware that JR Serra had no liabilities owed to trade creditors and believed, according to advice from the company's accountants, that JR Serra was up to date with its superannuation obligations.

Bradley was aware that in around early 2019 the company owed an amount to the ATO, but he was unsure of the exact amount. Bradley's asked his accountants to resolve this and had expected to receive appropriate advice as to how to move forward in this respect. Bradley did not hear again from the accountants and "got on with his life". During this time his marriage broke down and he was finding alternative work

The last set of financial statements prepared for the company were in relation to the 2017 financial year. These financial statements showed a deficiency of approximately $27,000 when all assets and liabilities were considered.

JR Serra was deregistered on 26 February 2020.

Bradley received two director penalty notices from the ATO dated 1 August 2024 which he received in the mail on 5 August 2024.

The first director penalty notice was in respect of superannuation and guarantee charge amounts for the company. The second director penalty notice was in respect of PAYG withholding amounts.

Bradley applied to the Supreme Court of Western Australia to reinstate the company so that it could be placed immediately into liquidation. Under section 269-30 of the TAA, a director can avoid personal liability for a company's debts under a non-lockdown director penalty notice if the company is placed into voluntary administration, restructuring, or liquidation within 21 days of the director penalty notice being issued.

Section 601AH(2) of the *Corporations Act 2001* (Cth) allows an aggrieved person, such as a former director or creditor, to apply for reinstatement of the company. The court must then determine whether reinstatement is appropriate in the circumstances.

The form seeking the deregistration of the company by ASIC was put before the Court. The form erroneously stated that the company had no outstanding liabilities. At the very least, to Bradley's knowledge, there was still PAYG tax outstanding. In any event, the company was deregistered, and it appears that Bradley gave no further thought to the company and to the ATO until receiving the two director penalty notices.

Evidence was submitted to demonstrate that the relevant court documents had been provided to the ATO, and the Commissioner did not oppose, nor wish to be heard in the matter.

Issue

Is the Court satisfied that it is just for the Company's registration be reinstated?

Decision

The Court was satisfied that Bradley, as a former director, was a person aggrieved and therefore had standing within section 601AH(2) of the Corporations Act to bring the order.

The Court determined to consider the question as to whether it was just to reinstate the company, by taking into account not just the reinstatement, but the application which is sought immediately after the reinstatement which is putting the company into liquidation.

The Court determined that it was just to reinstate JR Serra.

The Court considered the urgency of the application, driven by the penalty notice, and found that reinstatement was necessary to allow the company to enter liquidation under Division 269 of the TAA, which would address Bradley's liability.

The Court considered that the 2017 financial statements, showing liabilities exceeding assets, demonstrated that the company was insolvent at the end of 2017. There was no evidence submitted to suggest that the company's financial position improved between 2017 and deregistration.

Importantly, the ATO did not oppose the application, which reassured the Court that reinstatement would not adversely impact revenue collection. The Court determined that the ATO had due notice of the proceedings and had decided not to oppose the application.

The Court noted that with respect to ASIC, in an application such as this, the position of the ATO was more significant when considering whether to exercise the discretion to make the orders sought by Bradley.

Drawing on similar cases such as *Re Dreampoint Pty Ltd* [2024] WASC 125 and *Perrin v Australian Securities and Investments Commission* [2024] WASC 38, the Court concluded that reinstating the company to place it into liquidation was just, given the circumstances. Consequently, the Court granted the orders sought, reinstating the JR Serra and allowing it to be liquidated.

COMMENT – Over the last 18 months, there has been a number of cases where the ATO has issued DPNs in relation to companies that have previously been de-registered. There appears to be an increased willingness of the ATO to consider the compliance of companies that have been deregistered.

Citation *Gregg v Australian Securities and Investments Commission* [2024] WASC 314 (Howard J, Western Australia)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2024/314.html

2.3 Bootlis – penalties for recklessness not remitted

Facts

On 29 July 2020, Lisa Bootlis lodged her income tax return for the year ended 30 June 2020 through her tax agent.

On 9 August 2021, Lisa lodged her income tax return for the year ended 30 June 2021, again through her tax agent.

On 15 September 2022, Lisa lodged amended income tax returns for the years ended 30 June 2020 and 30 June 2021 using the ATO online portal. She claimed deductions under “Other deductions” related to a non-existent family trust (TRUST 0009 1480), without consulting her tax agent.

On 16 November 2022, the Commissioner notified Lisa of an audit of her amended returns and requested documentation and an explanation for her claims.

On 21 November 2022, Lisa wrote to the Commissioner asserting that income tax was voluntary, requesting a refund of all tax paid in the last 10 to 20 years, and disputing the existence of the Australian Taxation Office and the legality of all taxation laws.

On 4 January 2023, following the audit, the Commissioner determined that Lisa was not entitled to the claimed deductions and had made false or misleading statements in her amended tax returns. The Commissioner imposed a 50% penalty on the shortfall amount for both years.

On 10 January 2023, the Commissioner issued Notices of Assessment for the shortfall penalties. For the year ending 30 June 2020, the shortfall was $17,608, and the penalty was $8,804. For the year ending 30 June 2021, the shortfall was $12,833, and the penalty was $6,417.

On 15 January 2023, Lisa objected to the penalties, claiming that the amended returns were submitted in an attempt to reclaim tax based on the alleged creation of a family trust and citing financial difficulties due to the COVID-19 pandemic.

On 25 May 2023, the Commissioner disallowed Lisa's objection in full.

Lisa applied to the AAT for review of the objection decision.

Lisa admitted her mistake but argued that the Commissioner should have realised it before processing the amendment requests.

Issue

Should the penalties be remitted?

Decision

The AAT found that Lisa did not provide any valid justification for the penalties to be remitted. Her arguments, such as financial difficulties, reliance on advice from others, or the fact that no refunds were paid, were not considered sufficient grounds for remission. The AAT emphasised that the penalty regime aims to promote consistent and equitable treatment, and remission without a justifiable reason would compromise this objective.

The AAT also agreed with the Commissioner that Lisa's conduct in lodging amended returns without consulting her tax agent, claiming deductions for a non-existent family trust, and attempting to drastically reduce her taxable income was reckless. Her actions demonstrated a high level of carelessness, which supported the imposition of penalties at the rate specified by law.

Furthermore, the AAT noted that while the Commissioner had the discretion to remit penalties, there was no reason to exercise that discretion in Lisa's favour. Issues such as financial hardship or incapacity to pay the penalties, which Lisa raised, are typically dealt with through payment arrangements or other means, rather than through the remission of penalties. Consequently, the AAT upheld the Commissioner's decision not to remit the administrative penalties.

Citation *Bootlis and Commissioner of Taxation (Taxation)* [2024] AATA 2723 (Deputy President Ian Hanger AM KC, Brisbane)
w https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2723.html

2.4 Holloway – deed rectification

Facts

Alexander Holloway and his partner Gabrielle Conn intended to purchase farming land from Alexander's grand uncle's deceased estate and sought advice from a Launceston solicitor.

The Launceston solicitor advised Alexander and Gabrielle that the purchase might qualify for the intergenerational rural transfer exemption under section 225 of the *Duties Act 2001* (TAS), and that they would qualify for the exemption if they purchased the land either in their personal names or via a trust of which they were the sole beneficiaries.

Alexander and Gabrielle instructed their solicitor to establish a new trust with the two of them as sole named beneficiaries, with the intention that the trust qualified for the exemption.

On 25 August 2022, the Hollandia Family Trust was created with the solicitor as the settlor. The trustees of the Trust were Alexander and Gabrielle.

Due to sickness and a backlog of work, the solicitor prepared the trust deed creating the Hollandia Family Trust without amending the template deed and did not limit the class of beneficiaries to Alexander and Gabrielle only.

On 13 October 2022, the Hollandia Family Trust purchased the farmland for $6.7 million and the transfer was sent off for stamping and registration.

On 18 November 2022, the State Revenue Office assessed duty on the transfer in the sum of $269,685.

On 13 February 2023, Alexander, Gabrielle and the solicitor entered into a deed of rectification.

The solicitor lodged an objection to the assessment of duty relying on that deed of rectification, but the State Revenue Office took the view that the deed of rectification was not binding on the Commissioner for State Revenue. The deed of rectification itself was also defective in some respects. While the deed of rectification made some amendments, it failed to sufficiently limit the beneficiaries in a way that would ensure compliance with section 225. The deed of rectification allowed for the possibility of unnamed beneficiaries being added and did not restrict beneficiaries to those who were relatives of the transferor, as required under the Duties Act to qualify for the exemption.

Alexander and Gabrielle commenced proceedings in the Supreme Court of Tasmania to rectify the trust deed to allow the purchase of the farmland to qualify under the intergenerational rural transfer exemption. They also sought a declaration that the deed of rectification was of no effect.

In the proceedings, Alexander, Gabrielle and the solicitor gave evidence of the factual circumstances leading to the execution of the trust deed on 25 August 2022. This included contemporaneous emails, written correspondence and file notes, which corroborated their version of events.

The Commissioner for State Revenue was named as the only defendant in the proceedings. The Commissioner filed a submitting appearance did not participate in these proceedings as a contradictor.

Issue

Should the Hollandia Family Trust Deed dated 25 August 2022 be rectified?

Decision

The Supreme Court considered it appropriate that only the Commissioner for State Revenue was named as the defendant, as the potential beneficiaries under a discretionary trust do not have any interest in the trust property.

The Supreme Court noted that case of *Michael Hayes Family Trust v Commissioner of Taxation* [2019] FCA 426 and a Full Court Appeal from that decision, which set out the following principles:

1. rectification is an equitable remedy that is available where there is a mistaken expression of the true intention of the maker or makers of a document. In the case of a trust deed the mistake must be on the part of the settlor;
2. rectification is generally not available where the mistake is only as to the legal effect of the document. However, it is no bar to rectification that the rectification is sought to avoid stamp duty or that a fiscal benefit will result from the order;
3. it is no bar to an order for rectification that the parties have previously entered into a deed of rectification in an attempt to record the true state of affairs;
4. it is no bar to rectification that the mistake was due to negligence; and
5. what is required is convincing proof justifying the making of an order permitting the correction of a mistake in the relevant document.

The Supreme Court accepted the evidence was convincing proof that the trust deed did not reflect of intention of the settlor or the intention of Alexander and Gabrielle. The Court ordered that the trust deed dated 25 August 2022 be rectified by amending its terms to align with the intentions of the parties and declared that the deed of rectification is of no effect.

Citation *Holloway v Commissioner of State Revenue* [2024] TASSC 45 (Blow CJ, Hobart)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASSC/2024/45.html

2.5 Staley – removal of appointor by the trustee

Facts

Mr Hill and his wife had two daughters, Kerin Staley and Paula Porter.

On 19 February 2002, the Hill Family Trust, a discretionary trust, was established. The trustee, as named in the deed, was Hill Family Holdings Pty Ltd ACN 099 638 105. Mr Hill and his wife were the original directors and shareholders of the trustee. Mr Hill was also the initial appointor and primary beneficiary of the trust. The identity of the appointor is specified in the second schedule of the trust deed.

On 18 December 2009, Mr Hill died. On the terms of the trust deed, Mr Hill's executors, Kerin and Paula, became the appointors of the trust. At that time, Mrs Hill became the sole director and shareholder of Hill Family Holdings.

On 30 October 2013, Mrs Hill, on behalf of Hill Family Holdings, made an oral declaration under clause 23.01 of the trust deed, removing Kerin, her husband Dennis and their children, grandchildren and great-grandchildren as beneficiaries of the Hill Family Trust. Mrs Hill also appointed Paula as a director of Hill Family Holdings.

On 22 July 2019, Paula appointed her daughter, Brodie, as a director of Hill Family Holdings. Paula died later that year, and upon her death, Kerin became the sole appointor of the trust.

On 29 December 2022, Mrs Hill died.

On 28 March 2024, Hill Family Holdings executed a deed of variation which purported to amend the terms of the trust deed. Hill Family Holdings:

1. inserted new clause 22.04, as follows "… The Trustee may in its absolute discretion remove Kerin Anne Staley as the Appointor, provided that the Trustee nominates a person (other than the Trustee) to become the replacement Appointor."; and
2. immediately following the variation, in accordance with its power in clause 22.04 of the trust deed, removed Kerin as the appointor of the trust and appointed the "New Appointor" as the appointor of the trust in her place. The New Appointor, though not defined or named in the background or operative provisions of the deed of variation, was identified as William (Martin) Porter, Paula's widowed husband, in the section titled "Details of Parties" at the start of the document.

Clause 14 of the trust deed concerns the power of amendment and variation of beneficiaries. Relevantly, clause 14.01 provides as follows:

> *The Trustee may revoke, add to, release, delete, or vary all or any of the trusts, powers or provisions declared or included in this Deed or any trusts, powers or provisions declared by or included in any revocation, addition, release, deletion or variation made to this Deed and may at the same time declare or include any new or other trusts, powers or provisions concerning the Fund PROVIDED THAT the Trustee must not exercise its powers under this clause so as to confer upon the Settlor any beneficial interests in any part of the Fund nor in the income from the Fund or in any way which infringes the law against perpetuities.*

Clause 14 of the trust deed does not require the trustee to obtain prior consent from the appointor before exercising the powers in clause 14.

Kerin was not told about the attempts to remove her as the appointor of the trust. Kerin only became aware of the deed after requesting information about Mrs Hill's estate. At that time, Kerin also became aware that she, her husband and her descendants had been removed as beneficiaries of the Hill Family Trust.

On 19 June 2024, Kerin executed a deed of removal and appointment of trustee which purported to replace Hill Family Holdings with Staley Management Pty Ltd ACN 678 146 202. About a week later, Kerin was informed by the solicitors for Hill Family Holdings that she was no longer the appointor of the trust due to the deed of variation.

Kerin argued that the deed of variation purporting to remove her as appointor was invalid. The argument was on the basis that clause 14.01 should be construed narrowly and the execution of the deed of variation was a breach of the trustee's duty to act honestly and in good faith. Kerin submitted that clause 14.01 is confined to amendment and variations of beneficiaries and does not confer a power to amend the schedules to the trust deed. Kerin submitted that the Appointor's role was a critical and entrenched element of the Trust Deed, and the power to vary the Trust did not include changing the identity of the Appointor. She asserted that altering the Appointor would effectively destroy the substratum of the Trust and undermine its structure.

Hill Family Holdings submitted that clause 14.01 should be construed widely. In support of a wide construction of the trust deed, clause 12.05 provides that "[a]ll powers set out in this Deed shall be construed as widely as possible".

On 30 June 2024, Hill Family Holdings Pty Ltd determined to vest the trust.

Issue

Did the power to vary the terms of the trust deed includes a power to change the identity of the appointor or amend the terms of the trust deed to allow that to happen?

Decision

Muir J found that the power of variation under clause 14.01 of the trust deed should be construed widely as, consistent with the ordinary meaning of the language of the clause, the trustee has the power to amend or vary the 'provisions' in the deed, which refers to any clause of the trust deed. A wide interpretation was also consistent with the language of clause 12.05 of the trust deed. In respect argument that the power to amend did not extend to the schedules to the trust deed, her Honour noted that firstly, the deed of variation did not seek to amend or vary the schedule, and secondly, the schedules were incorporated and formed part of the provisions of the trust deed.

Muir J did not accept that the role of appointor was a fundamental feature of this trust, the Trust Deed was drafted with the flexibility to manage changes over time, and there was no express provision in the Trust Deed that limited the Trustee's power to amend the Appointor.

Muir J found no evidence of dishonesty, bad faith, or fraud by Hill Family Holdings in executing the Deed of Variation. Her Honour noted that the Trustee acted upon legal advice and with the intention of resolving the invalidity of an earlier deed poll. The court also observed that the Trustee intended to vest the Trust, further countering any suggestion of self-interest or entrenchment.

The Court rejected Kerin's claim that the Deed of Variation was invalid and held that her Deed of Removal and Appointment (replacing the Trustee with Staley Management) was invalid.

Citation *Staley v Hill Family Holdings Pty Ltd* [2024] QSC 176 (Muir J, Brisbane) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2024/176.html

2.6 TSK QLD Pty Ltd – asset stripping scheme

Facts

TSK QLD Pty Ltd carried on a recruitment and labour hire business for the mining and energy sectors. It had significant financial turnover of over $80 million in the 2019 and 2020 income years but fell into a dire financial position by early 2021.

In February 2021, Savas Papadopoulos, the director of TSK, approached Benjamin Whitehouse, an external accountant adviser who held himself out as specialising in 'restructuring'.

Benjamin orchestrated a scheme to strip assets from TSK. During 2021, approximately $10.3 million was diverted from TSK through a sale agreement and debt collection scheme. The scheme purported to:

1. transfer TSK's business and receivables of $11.99 million, which was valued at nil, to Torquejobs Pty Ltd, a company controlled by TSK's CEO Ciano Lopez; and
2. cause TSK to appoint Benjamin's corporate entities, to collect debt on behalf of TSK.

As part of the scheme, payments flowed from TSK to Savas, TSK's senior management and their corporate entities. Almost $1.3 million flowed into the accounts controlled by him and his companies, and he and his companies retained about $431,000 of that amount.

In January 2022 a voluntary administrator was appointed for TSK. In March 2022 the creditors resolved that TSK should be wound up and appointed Anthony Connelly and William Harris as liquidators.

The liquidators commenced proceedings against Savas, Ciano and their corporate entities, as well as Benjamin and his corporate entities, for damages under section 588M(2) and section 1317H of the Corporations Act. The losses arising from the scheme were estimated to be approximately $8.85 million.

Section 558M(2) allows a liquidator to recover compensation for loss resulting from insolvent trading. Section 1317H allows the court to order a person to compensate a corporation or for damages suffered by the company resulting from a contravention of a corporation/scheme civil penalty provision by that person.

After the trial date, Savas filed a debtor's petition and neither he nor his corporate entity appeared at the trial. Default judgment was entered against Savas and his related company.

The liquidators reached settlement with Ciano and his corporate entities. Under what was known as the Torequjobs settlement deed, payments were to be made to the liquidators through to 2029.

Benjamin and his companies, Innovant Consulting and Rekover Pty Ltd were the only parties to appear. At the trial, Benjamin did not adduce any evidence and effectively conceded liability. But he contended he and his corporate entities should only be liable for $431,000, being the amount retained by Whitehouse and his companies.

One of the key issues which remained in dispute was a payment of $2.016 million from TSK to Torquejobs. Between 25 October 2021 and 2 November 2021, Scottish Pacific Finance made payments to TSK representing debts which it had collected on TSK’s behalf. $2.016 million of these payments were made to Torquejobs. Benjamin claimed he had no knowledge of or involvement in these transactions and should not be liable for them.

Another issue was the actual value of employee entitlements assumed by Torquejobs under the sale agreement. Benjamin claimed that they were worth $2.2 million. An expert appointed by the liquidator disputed the existence of long service leave and sick leave entitlement and found that the correct value of the employee entitlement should be $1.202 million.

Bemjamin also submitted any orders the court may make against him should be, in the interests of justice, stayed until the parties to the Torequejobs settlement deed defaulted on the payments.

Issues

1. Should Benjamin be liable for the $2.016 million payment?
2. What was the value of the employee's entitlement?
3. Could the liquidators immediately recover the $2.016 million from Benjamin and his corporate entities?

Decision

The Federal Court held that Benjamin was liable for the $2.016 million payment.

The Federal Court considered that it was clear from evidence that Benjamin devised a scheme where all the cash of TSK would be paid to Torquejobs under the sale agreement. Further, Benjamin's knowledge of the essential facts and his role in designing the scheme made him responsible for the payments, even if he was not directly involved in the mechanics of the transactions.

The Federal Court preferred the unchallenged independent expert's valuation of the employees' entitlements in TSK and valued the employee's entitlement to be $1.202 million.

The Federal Court held that the fact that the Torquejobs settlement deeds were in existence did not mean that the liquidators should be denied the opportunity of immediate recovery from Benjamin and his corporate entities. Therefore, judgment was entered into against Benjamin and his corporate entities for the full amount of damages. The Federal Court also determined that there was no sufficient evidence that immediate enforcement of the judgment would cause “irremediable harm” or “serious injury” to Benjamin and declined to issue any stay on the enforcement of the judgment.

COMMENT – since February 2020 liquidators and ASIC have had the ability take action in relation to ‘creditor defeating dispositions’, broadly disposals of company property that prevent, hinder or significantly delay that property from becoming available for the benefit of creditors in the winding up of the company. On top of being able to seek order for the return of property or the proper payment for it, criminal proceedings can be brought against someone (i.e. an advisor) for ‘procuring, inciting, inducing or encouraging ‘ the creditor defeating disposition.

Citation *Connelly (liquidator) v Papadopoulos, in the matter of TSK QLD Pty Ltd (in liq)* [2024] FCA 888 (Downes J, Queensland)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/888.html

2.7 Absolute Vision Technologies Pty Ltd – trust property

Facts

Absolute Vision Technologies Pty Ltd (**AVT**) provides IT services and cloud-based solutions, employing staff in Australia and using overseas contractors

From 2007 to 2017, AVT also acted as the trustee of the AVT Fund, a self-managed superannuation fund benefiting. Sandeep Srivastava and his former wife, Natalia Kruppa-Srivastava. During this period, AVT used money from the AVT Fund to purchase a property known as Suite 901, which was held on trust for the AVT Fund.

On 30 March 2017, AVT retired as the trustee of the AVT Fund, and AVT ST Pty Ltd was appointed as the new trustee. However, AVT did not transfer Suite 901 to AVT ST, despite the obligation to do so under the trust documents.

From 1 November 2014 to 31 October 2019, AVT leased Suite 901 to itself, creating a conflict of interest, as Suite 901 was intended to be held in trust for the AVT Fund, rather than used for the benefit of AVT.

On 17 May 2024, prior to AVT entering voluntary administration, Sandeep (through AVT) entered into contracts to sell Suite 901 and three other properties to a third-party purchaser. The sale was handled by a real estate agent and advertised on the open market.

On 31 May 2024, Jeffrey Shute was appointed as the voluntary administrator of AVT. He reviewed the company's books and records and continued to operate AVT's business during the administration.

On 27 June 2024, Jeffrey swore an affidavit detailing his appointment, the circumstances surrounding the sale of Suite 901, and the failure of AVT to transfer the property to AVT ST after AVT's retirement as trustee.

On 28 June 2024, Jeffrey and AVT applied to the Supreme Court of NSW for judicial advice under section 63 of the *Trustee Act 1925* (NSW) regarding the sale of Suite 901 and other matters related to the trust. He notified what he considered 'interested parties' of the proceedings, ASIC, APRA and the ATO. Each chose not to be involved in the proceedings. Natalia confirmed her support for the relief sought by Jeffrey, except on the issue of costs.

On 25 July 2024, AVT entered into a Deed of Company Arrangement (DOCA), approved by its creditors, which returned control of the company to Sandeep. Jeffrey, now the deed administrator, swore and filed a second affidavit addressing the DOCA and discussions about settling the sale of Suite 901.

A memorandum of opinion was obtained by Jeffrey from Aiden Gandar of Counsel.

In the advice provided, Counsel outlined a trustee's ability under section 63 of the *Trustee Act 1925* (NSW) to apply to the Court for an opinion, advice or direction regarding trust property or the interpretation of trust instruments. Counsel made reference to various precedents, including Black J in *Re Montpac Pty Ltd (in liq) and Global Network Link Pty Ltd (in liq)* (2020) 149 ACSR 138; [2020] NSWSC 1237, to support the position that the section "authorises a Court to give advice or a direction to resolve legitimate doubts held by a trustee as to the proper course of action".

Evidence produced demonstrated that:

1. the registered proprietor on title for Suite 901 was AVT Pty Ltd;
2. the sale contract was signed by Sandeep and Natalia as directors of AVT Pty Ltd as trustee of the AVT Fund; and
3. the purchase price was funded my monies provided by the AVT Fund (not AVT Pty Ltd).

Issues

1. Did AVT Pty Ltd hold Suite 901 on trust for the AVT Fund?
2. Was AVT Pty Ltd bound to transfer the property, Suite 901, to AVT ST Pty Ltd as trustee for the AVT Fund?
3. Was AVT Pty Ltd justified in completing the contract for sale of Suite 901?
4. Was AVT required to account to AVT ST as trustee for the AVT Fund for the proceeds of that sale?

Decision

Did AVT Pty Ltd hold Suite 901 on trust for the AVT Fund?

Black J was satisfied that the balance of the evidence demonstrated that Suite 901 was held by AVT Pty Ltd as trustee of the AVT Fund, until it retired as trustee of the AVT Fund, and is now held as bare trustee, pending the transfer of Suite 901 to AVT ST Pty Ltd as trustee of the AVT Fund, or its sale.

Was AVT Pty Ltd bound to transfer the property, Suite 901, to AVT ST Pty Ltd as trustee for the AVT Fund?

Black J found that both the trust deed for the AVT Fund and the Change of Trustee Deed required AVT Pty Ltd to transfer the assets of the AVT Fund, including Suite 901, to AVT ST Pty Ltd when AVT Pty Ltd retired as trustee.

Additionally, relevant sections of the *Trustee Act 1925* (NSW) support this obligation. Given that AVT Pty Ltd held Suite 901 in trust for the AVT Fund, AVT Pty Ltd is bound to transfer the property to AVT ST Pty Ltd as the new trustee, subject to another direction sought by the Jeffrey as administrator.

WAS AVT Pty Ltd justified in completing the contract for sale of Suite 901?

Black J noted that this question addresses a potential breach of trust. The advice provided by Aiden Gandar acknowledges that the sale would breach the trust, as AVT Pty Ltd failed to transfer Suite 901 to AVT ST Pty Ltd and the sale was not authorised by the trust instrument. However, the sale was conducted through a proper public process, and the price achieved was at market value, with no indication of underpayment.

Additionally, the beneficiaries of the AVT Fund, Sandeep and Natalia, had given informed consent to the sale. If AVT failed to complete the sale, it may face legal claims for specific performance or damages from the purchaser, which would not be in the best interest of the beneficiaries or creditors.

Black J was satisfied that despite the breach of trust, the sale benefits the AVT Fund and its beneficiaries, and a failure to complete the sale could lead to significant legal and financial issues. Thus, the direction for completing the sale was warranted.

Was AVT required to account to AVT ST as trustee for the AVT Fund for the proceeds of that sale?

Black J advised that AVT Pty Ltd was bound to account to AVT ST Pty Ltd as trustee for the AVT Fund for the proceeds of sale of Suite 901. While AVT Pty Ltd may have breached the *Superannuation Industry (Supervision) Act* by selling Suite 901, and AVT ST Pty Ltd may have also violated certain superannuation obligations, no regulatory bodies, including the Commissioner, APRA, or ASIC, have participated in the proceedings or raised any penalties against AVT ST Pty Ltd.

Since there is no claim or dispute over the proceeds, Black J found no reason to pay the funds into Court. Therefore, AVT Pty Ltd is justified in distributing the net sale proceeds to AVT ST Pty Ltd as trustee for the AVT Fund. However, this does not prevent future regulatory action against AVT ST Pty Ltd.

COMMENT – The Court acknowledged that AVT had likely breached the SIS Act by failing to transfer Suite 901 to AVT ST Pty Ltd upon its retirement as trustee of the AVT Fund in 2017. AVT was prohibited from acting as a trustee of a superannuation entity after it entered external administration, as it had become a disqualified person under section 120(2)(c) of the SIS Act.

The Court also recognised that AVT ST Pty Ltd, as the new trustee of the AVT Fund, may have breached certain provisions of the SIS Act, particularly in relation to Covenants relating to superannuation entities (under Part 6 of the SIS Act), in-house asset rules (under Part 8), the sole purpose test (under section 62), and the requirement that investments be made and maintained on an arm's length basis (under section 109).

Citation *In the matter of Absolute Vision Technologies Pty Ltd (subject to deed of company administration)* [2024] NSWSC 1010 (Black J, Sydney)
w https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1010.html

2.8 Darghaw – penalty tax and interest

Facts

The following entities operated hospitality businesses in the periods stated:

1. Caves Coastal & Bungalows as trustee for Bijoma North Operation Unit Trust (January 2023-July 2023);
2. Oscars Hotel Pty Ltd as trustee for the Discretionary Trust (July 2020-July 2023);
3. Oscars No. 1 Pty Ltd as trustee for Oscars No. 1 Trust (July 2021-May 2023);
4. Darghaw Pty Ltd (July 2020-July 2023);
5. Darghaw 2 Pty Ltd (December 2020-July 2023);
6. Darghaw 3 Pty Ltd (July 2020-July 2023);
7. Darghaw 4 Pty Ltd (July 2020-July 2023),

(collectively, the **Entities**).

The COVID-19 pandemic affected the Entities' businesses in various ways, including that during periods of mandatory lockdown the businesses did not operate. These lockdowns ran from 23 March 2020 to 1 June 2020 and 26 June 2021 to 11 October 2021.

During the lockdown periods, staff were required to work from home, including staff administering the payment of payroll tax. At the start of the pandemic, the businesses did not have the information technology systems in place to allow staff to work from home. Their head office teams, including payroll tax and finance teams, had difficulty collaborating and accessing key accounting and payroll systems.

Outside the mandatory lockdown periods, the Entities found it difficult to retain staff. The Entities lost 100% of their former payroll staff during the pandemic as well as 14 total staff members (70%) across their finance, accounts payable and payroll teams.

The entities received JobKeeper and JobSaver payments. There was confusion around passing these payments to staff and whether they attracted payroll tax in New South Wales, at a time when the Entities had lost their experienced payroll team.

During the periods between July 2020 and July 2023, payroll tax continued to be paid but there were incidences of non-payment and underpayment of payroll tax. The liability for the underpaid and unpaid payroll tax was not in dispute. Notices of assessment were sent by post to the street addresses known to the Chief Commissioner for each Entity.

There were some dealings between the Chief Commissioner of State Revenue and the Entities addressing non-payment and late payment at the end of 2020, in mid-2021 and at various times in 2022. These dealings occurred by email or telephone. No responses were received by the Chief Commissioner addressing the specific revenue debts until early 2023.

On 16 January 2023, the Chief Commissioner sent an email to the Entities providing an account summary for each of the Entities. On 9 February 2023, the Entities sent an email to the Chief Commissioner attaching a payroll tax debt spreadsheet with comments on payments having been made. This was the first time that the Entities responded to the Chief Commissioner's correspondence dealing with the relevant tax defaults in a comprehensive way.

Further correspondence was exchanged, and on 1 September 2023, one of the Entities wrote to the Chief Commissioner requesting a remission of interest and penalty tax imposed for the period December 2020 to July 2023. On 11 September 2023, the Chief Commissioner refused to remit the interest and penalty tax.

On 25 September 2023, each of the Entities lodged an objection to the decision of the Chief Commissioner to refuse the requests for the remission of interest and penalty tax. On 23 October 2023, the Chief Commissioner disallowed the objections.

The Entities had various complaints against the Chief Commissioner, including that all communication came by post to an office which was not staffed during lockdown, and they had difficulties using the Chief Commissioner's portal and understanding the system.

Assessments of interest and penalty tax were made against the Entities totalling $678,951. The Entities applied to the NCAT for a review of the Chief Commissioner's assessments.

Issue

Had interest and penalty tax been correctly assessed by the Chief Commissioner?

Decision

Market rate of interest

The Chief Commissioner imposed both the market rate and premium rate of interest.

In respect of the market rate of interest, the NCAT referred to *Chief Commissioner of State Revenue v Incise Technologies Pty Ltd & Anor* (RD) [2004] NSWADTAP 19 which described the rationale for the market rate of interest being intended to compensate the Chief Commissioner for not having the tax paid on time. The market rate of interest is waived only in rare circumstances and where there was fault on part of the Chief Commissioner or if the circumstances of non-payment were beyond the control of the taxpayer.

The NCAT did not agree with the Entities that the tax default arose due to circumstances beyond their control. The NCAT found that most of the tax default occurred in 2021 (not 2020). Further, the Entities provided no evidence as to any steps they took to have mail redirected or collected from their offices during the lockdown or to notify the Chief Commissioner that they elect to receive electronic communications.

The NCAT found that the evidence showed that the reason for the Entities' tax defaults was not the pandemic but their failure to maintain adequate systems, including IT systems and the staffing necessary to discharge their payroll tax obligations. No steps were taken to rectify the staff shortages. These were factors within the Entities' control.

The NCAT did not consider that the difficulties experienced in using the Chief Commissioner's portal and understanding the system was a fault of the Chief Commissioner. The NCAT found that the responsibility for discharging payroll tax obligations, including calculating and returning the tax, lay with the Entities, who had the necessary information. The Entities' issues with the portal did not justify a remission of interest, as there was no evidence that the Chief Commissioner's system was unable to receive payments, nor did the Entities take steps to address their mail receipt issues during the lockdown periods. The NCAT found no error by the Chief Commissioner in sending correspondence by post.

The NCAT confirmed that the market rate should rarely be waived because to do so would be to devalue the amount of tax payable. The NCAT concluded that the non-payment and underpayment of payroll tax did not arise because of matters outside the control of the Entities or due to the fault of the Chief Commissioner. The NCAT found that there were no grounds for remission of interest at the market rate.

Premium rate of interest

The NCAT confirmed that the premium rate of interest is penal in nature. The NCAT referred to the case of *Golden Age and Hannas the Rocks Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 249 and confirmed that the taking reasonable care is a relevant consideration in determining whether or not interest at the premium rate should be assessed.

The NCAT did not consider that the disruptions occurring in 2020 adequately explained the tax defaults that mostly occurred at a later time. It was also unclear how the claimed delays on the part of the Chief Commissioner contributed to the tax defaults where the Entities were responsible for calculating and returning the payroll tax due.

Further, the NCAT found that there was no plan to collect mail during the pandemic, there was a failure to ensure the payroll system and staff were able to accurately lodge the returns, and there was a lack of responsiveness to the Chief Commissioner until February 2023. There was no evidence of professional advice taken or recourse to the published information provided by the Chief Commissioner. As a result, the NCAT could not find reasonable care was taken by the Entities. There were no grounds for the remission of the premium rate of interest.

Penalty tax

The Chief Commissioner has a broad discretion to remit penalty tax under section 33 of the *Taxation Administration Act 1997* (NSW). However, the NCAT stated that, despite the broad and unfettered discretion allowed under section 33, limits on its exercise may arise in that that discretion cannot be exercised in a way that defeats the fundamental legislative objectives of the penalty scheme.

Referring to Ward J in *Bayton Cleaning Co Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 657, the discretion should not be exercised where there has been a finding that reasonable care has not been taken and in the absence of some special circumstance to warrant the exercise of the discretion.

The NCAT held that the absence of reasonable care on the part of the Entities, though not determinative, remained a relevant and persuasive factor. The NCAT placed weight on the fact that there were delays by the Entities in responding to the Chief Commissioner. The NCAT held that there were no grounds for the remission of penalty tax.

The Chief Commissioner's assessments were confirmed.

Citation *Darghaw Pty Ltd & Ors v Chief Commissioner of State Revenue* [2024] NSWCATAD 257 (Senior Member EA MacIntyre, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/257.html

2.9 Wilkinson – sub-sale provisions

Facts

Shane Wilkinson is an experienced property developer who owns and operates a group of entities known as the 'Pace Development Group'. Pace Development Group Pty Ltd (**PDG Co**) is the development entity within the group.

In July 2014, Shane executed a Contract of Sale of Real Estate to acquire the property situated at 73-77 Wellington Street, Collingwood for a purchase price of $9,680,000 (inclusive of GST). The purchaser was listed as Shane ‘and/or Nominee’. In accordance with clause 18 of the contract, the purchaser "… may nominate a

substitute or additional purchaser, but the named purchaser remains personally liable for the due performance of all the purchaser's obligations under this contract".

In November 2014, PDG Co lodged an application for a planning permit in respect of the property with Yarra City Council.

In May 2015, Shane, consistent with his business model, nominated a 'special purpose vehicle' to be the transferee of the property, being 73-77 Wellington Street Pty Ltd (**WS Co**) in its capacity as trustee of the 73-77 Wellington Street Unit Trust.

In June 2015, the transfer of the property to WS Co was executed. Shane, on behalf of WS Co, signed and submitted Duties Form 6A – *Transactions treated as sub-sales of land statutory declaration,* indicating that there had been a 'subsequent transaction' under the sub-sale provisions, but that no land development had occurred between the contract date and transfer date. WS Co paid transfer duty of $532,400.

In July 2015, PDG Co lodged an application with VCAT seeking review of the deemed refusal of the planning permit as no decision had been made by Yarra City Council. The deemed refusal of the original planning permit application was affirmed by VCAT.

Between November 2015 - July 2016, the new planning permit application submitted by PDG Co was approved by Yarra City Council.

Between January 2017 and May 2018, 76 individual lots were sold to third party purchasers. The sale proceeds totalled around $49 million and the PD Group's profit from the development was around $3 to $4 million.

On 22 August 2019, Shane received a letter from an officer of the Victorian State Revenue Office indicating that he had been selected for investigation and requesting certain information from him.

On 10 October 2019, the Commissioner assessed Shane as liable to pay duty of $532,400, together with penalty tax of $106,480 and interest of $42,045. In making the assessment, the Commissioner formed the view that Shane was subject to duty under Part 4A of the *Duties Act 2000* (Vic), which deals with sub-sales of land.

Section 32I of the Duties Act, which sets out the circumstances in which the sub-sale provisions are triggered in cases involving land development. The term 'land development' is defined in the Duties Act to include "applying for or obtaining a permit under the Planning and Environment Act 1987 in relation to the use or development of the land". Section 32I(1) of the Duties Act provides that:

1. a person (the vendor) enters a contract (the sale contract) to sell or transfer the property to another person (the first purchaser),
2. a person other than the first purchaser obtains the right to have the property transferred, on completion of the sale contract, to that person,
3. after the sale contract is entered, but before it is settled, land development occurs in relation to the property; and
4. the vendor transfers the property to the other person.

Section 32I(2)(a) of the Duties Act provides that it is immaterial whether a subsequent purchaser obtains a transfer right "by way of an assignment, nomination, novation or otherwise".

On 9 December 2019, Shane objected to the assessment. Shane then filed an amended objection on 18 April 2020.

On 6 June 2022, the Commissioner disallowed the objection in full.

On 19 July 2022, Shane requested the Commissioner refer the matter to VCAT for review.

Shane argued that his nomination of WS Co, a special purpose vehicle, as the transferee of the property did not trigger the sub-sale provisions. He claimed that WS Co did not acquire any legal right to have the property transferred from the vendor. According to Shane, under most nomination clauses, the nominee does not acquire such rights, and in this case, WS Co was merely a nominee without any direct legal right against the vendor. As a result, he argued that the sub-sale provisions should not apply.

Shane also emphasised that the provisions were designed to prevent commercial on-sales and changes in beneficial ownership, which were not present in his case. He contended that there was no on-sale or commercial arrangement involved in the nomination of WS Co and no profit or economic benefit was realised from this nomination. Shane observed that WS Co was simply a related entity within his family's group of companies and argued that the transaction was not of the kind that should attract additional duty.

Additionally, Shane claimed that the nomination of WS Co was the result of an inadvertent error. He explained that his usual business practice within the Pace Development Group was to establish special purpose vehicles before undertaking land development, but in this instance, an internal procedural mistake occurred. This oversight, according to Shane, did not reflect an intent to avoid duty.

In the event that the duty assessment was confirmed, Shane argued that the penalty tax and interest should be waived or reduced. He maintained that he had acted with reasonable care in managing his tax liabilities, relying on his standard business practices, qualified professionals, and internal procedures. He asserted that any penalty should be reduced to nil, given the circumstances of the error and his reasonable conduct throughout the process.

Issues

1. Did Shane's nomination of WS Co as purchaser trigger the sub-sale provisions?
2. Should penalty tax be remitted?

Decision

Application of sub-sale provisions

Senior Member Tang found that when Shane nominated WS Co to take the transfer of the property in accordance with GC 18 of the contract, WS Co obtained the 'right' to have the property transferred to it on completion of the contract. Senior Member Tang considered Parliament's inclusion of reference to both a nomination and a novation in section 32I(2) of the Duties Act and treating the form of the arrangement as 'immaterial', Parliament intended a broad conception of the rights to which the provision applies. As the nomination of WS Co took place after the original planning permit application, it followed that the sub-sale provisions were engaged.

Penalties

Senior Member Tang allowed a partial remission of the penalty tax primarily due to several mitigating factors surrounding Shane's conduct and the circumstances of the error. Although Senior Member Tang found that Shane had not taken reasonable care in managing his duty liabilities, the Senior Member acknowledged that the error was inadvertent and not an intentional attempt to evade taxes. Senior Member Tang noted that the imposition of the Sub-Sale Provisions and the associated duty already represented a significant financial consequence, reducing the profit Shane's group made from the property development by a substantial margin.

Furthermore, Senior Member Tang took into account the fact that Shane had voluntarily disclosed the error during the Commissioner's investigation, which typically results in a reduction of penalty tax. It recognised that while the disclosure came after the investigation had begun, it still demonstrated a degree of cooperation with the authorities. Additionally, Senior Member Tang was mindful of the remedial steps Shane had taken since the

error occurred, including engaging a General Counsel and implementing more robust internal procedures to prevent future mistakes.

Given these factors, Senior Member Tang concluded that while a penalty was warranted, it was appropriate to reduce the penalty tax from the default rate of 20% to 12.5%, resulting in a partial remission of part of the penalty tax by $39,930. However, Senior Member Tang did not remit the full penalty, as he found that Shane had not exercised sufficient care when completing the statutory declarations required under the Duties Act, particularly with respect to the Form 6A, which had been incorrectly filled out.

COMMENT – The concept of a 'sub-sale' exists in NSW duties law in relation to cancelled agreements, but the term is undefined. If duty is paid on an agreement, and the agreement is then cancelled before a transfer occurs, the agreement is not subject to duty if the Chief Commissioner is satisfied the agreement was not cancelled to give effect to a sub-sale (there are two other exceptions). To get a refund an application must be made within the later of 5 years after the initial assessment or 12 months of the agreement being cancelled. There is guidance on the sub-sale provisions in DUT 011.

Citation *Wilkinson v Commissioner of State Revenue (Review and Regulation)* [2024] VCAT 807 (Senior Member R Tang, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2024/807.html

2.10 Appeal Update – Imbree

Paul Imbree sought leave to appeal against a decision of the NCAT in *Imbree v Chief Commissioner of State Revenue* [2024] NSWCATAD 22 (see our March 2024 Tax Training Notes). The NCAT held that the concession in section 55 of the *Duties Act 1997* (NSW) only applies to declarations of trusts and transfers of dutiable property. Therefore, section 55 of the Duties Act could not apply to a Deed of Transfer as it was an 'agreement for transfer' and not a 'transfer'.

The NCAT Appeal Panel refused leave to appeal and dismissed the appeal. The NCAT Appeal Panel agreed with the NCAT at first instance and stated that there is an express distinction in section 55 of the Duties Act between a transfer and a declaration of trust. Therefore, the Deed was not a transfer, nor was it treated 'as if' it was a transfer, for the purposes of section 55 of the Duties Act.

WARNING – there are a number of concessions that on their face only apply to a transfer of property and not an agreement to transfer in scenarios where there may be an agreement to transfer before the transfer occurs. This decision reinforces the need to exercise extreme caution with any transactions involving real property or other dutiable property.

Citation *Imbree v Chief Commissioner of State Revenue* [2024] NSWCATAP 158 (Deputy President Seiden SC DCJ and Senior Member PH Molony, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAP/2024/158.html

2.11 Appeal Update – Diamond Creek

Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd (**Diamond Creek**) sought leave to appeal to the Court of Appeal against the decision of the VCAT in *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2023] VCAT 634 (see our July 2023 Tax Training Notes).

The VCAT held that the acquisitions of the shares in Diamond Creek by various investors on 2 July 2014 were an 'associated transaction' as the acquisitions together 'form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions' giving rise to a liability to pay landholder duty.

The Court of Appeal granted leave to appeal but dismissed the appeal. The Court of Appeal held that the VCAT was correct to find that the investors bound themselves to a constitution and thereby joined in a single 'development project' with an entrenched management structure even though the acquirers did not know each other.

Citation *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue* [2024] VSCA 175 (Kennedy, Macaulay and Lyons JJA, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2024/175.html

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

Citation	Date	Headnote	Link
Zhu v Chief Commissioner of State Revenue [2024] NSWCATAD 231	12 August 2024	TAXES AND DUTIES — Dutiable transactions — Exemptions — Transfer of residential land between married couples — s 104B of the Duties Act 1997 (NSW) — Liability to duty confirmed — Not used as the principal place of residence of the married couple because applicant and his wife had not lived there	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/231.html
Ziolkowski and Commissioner of Taxation (Taxation) [2024] AATA 2857	13 August 2024	PRACTICE AND PROCEDURE – where applicant repeatedly failed to comply with the Tribunal's directions – application for review dismissed.	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/2857.html
Tax Practitioners Board v Van Dyke [2024] FCA 899	14 August 2024	TAXATION – Civil penalties – admitted contraventions of s 50-5(1) of the Tax Agent Services Act 2009 (Cth) – providing tax agent services while not a registered tax agent – respondent conscious of wrongdoing – respondent continuing to breach the Act after receipt of cease-and-desist letter outlining initial contraventions had been detected – need for specific and general deterrence – course of conduct principle in the assessment of pecuniary penalties – bankruptcy of respondent considered – grant of declaratory injunctive relief – imposition of pecuniary penalty	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/899.html
Sar v Chief Commissioner of State Revenue [2024] NSWCATAD 246	22 August 2024	TAXES AND DUTIES – surcharge purchaser duty – Duties Act 1997 (NSW), Chapter 2A - foreign person – principal place of residence exemption Duties Act 1997 (NSW), Chapter 2A Part 4, s 104ZKA (4) – whether the applicant's 'use and occupation' of the residential land as his principal place of residence	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/246.html

Citation	Date	Headnote	Link
		commenced from the time his wife and family took possession of the residential land	
Pamplin v Irwin [2024] NSWCA 213	28 August 2024	EQUITY – trusts – estoppel – siblings transferred assets to parent – ongoing businesses operated by trustee of discretionary trust – parent the sole director and shareholder of trustee – siblings found to be shadow directors of trustee – whether primary judge erred in finding that assets held by parent on trust for siblings – whether primary judge erred in finding that trustee estopped from distributions with less than 50% to one sibling – whether breach of non-fettering principle – trustee made determinations in favour of one sibling's spouse – whether primary judge erred in finding that distributions not paid and were owing – whether unpaid distributions should attract interest – whether credit should be given for tax paid	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2024/213.html
FSX v Chief Commissioner of State Revenue [2024] NSWCATAP 169	29 August 2024	TAXES AND DUTIES - Land tax – Construction and application of cl 6(2)(c) of Sch 1A to the Land Tax Management Act 1956 (NSW) – Requirement that "intended use and occupation" of land be lawful as part of claim for principal place of residence exemption	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAP/2024/169.html
Bupa HI Pty Ltd v Chief Commissioner of State Revenue [2024] NSWSC 1105	29 August 2024	TAXES AND DUTIES — Administration — Assessment — Health Insurance Levies Act 1982 (NSW) – Whether the taxpayer had discharged its onus of proving the amount of "exempt contributors" for the purpose of calculating the amount of the levy	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/1105.html
Topcubasi v Chief Commissioner of State Revenue [2024] NSWCATAD 258	2 September 2024	STATE TAXES – surcharge purchaser duty – tax default - interest - market rate - premium rate - penalties - remission - discretion – circumstances beyond control of taxpayer –reasonable care	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/258.html
Thompson v Chief Commissioner of State Revenue [2024] NSWCATAD 266	5 September 2024	TAXES AND DUTIES – land tax – tax defaults – interest – remission of interest	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/266.html

3. Federal Legislation

3.1 Progress of legislation

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

3.2 Changes to FRCGW and self-amendment periods for small and medium businesses

On 12 September 2024, the Treasury Laws Amendment (2024 Tax and Other Measures No. 1) Bill 2024 was introduced into parliament. The Bill proposes to implement the following measures:

1. increase the Foreign Resident CGT withholding rate from 12.5% to 15%;
2. remove the threshold of $750,000 and require Foreign Resident CGT withholding to apply to all real property transactions where a clearance certificate has not been obtained;
3. allow employers to make a standing Single Touch Payroll declaration and authorisation to their agent which would be valid for multiple Single Touch Payroll lodgements;
4. extend the period for the Commissioner to amend a tax assessment for small or medium businesses from 2 years to 4 years, where the taxpayer has requested such an amendment; and
5. allowing the Commissioner a discretionary power to retain a tax refund amount for up to 90 days from when refunds are payable to encourage the taxpayer valid Australian financial institution details, where previously the Commissioner would have been required to refund the amount by cheque.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7241

3.3 Disclosure of information to Operation Protego Integrity Taskforce

On 16 August 2024, the *Taxation Administration Amendment (Disclosure of Information to Operation Protego Integrity Taskforce) Regulations 2024* were made. The Regulations allow the ATO to share information with the

Operation Protego Integrity Taskforce. The Taskforce takes investigative or disciplinary action against Commonwealth employees suspected of engaging in misconduct in respect of GST fraud investigated by the ATO in Operation Protego.

w https://www.legislation.gov.au/F2024L01018/asmade/text

3.4 Transfer Balance Account value for certain superannuation income streams

On 17 August 2024, the *Income Tax Assessment Amendment (Transfer Balance Account Value for Certain Superannuation Income Streams) Regulations 2024* (Cth) commenced. The regulations prescribe rules for dealing with certain superannuation income streams for the purpose of the transfer balance account provisions in Division 294 of the ITAA 1997. The regulations prescribe a special value for transfer balance account reporting purposes and provide for a transfer balance debit to arise when these superannuation income streams cease and the cessation does not otherwise result in a transfer balance debit.

The regulations apply to certain non-lifetime permanent incapacity pensions that scheme trustees had not reported as a superannuation income stream because they did not meet relevant legislative criteria prior to the Commonwealth Government's legislative response to the decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (*Douglas*). The regulations apply where the scheme trustee has not reported to the Commissioner for transfer balance cap purposes prior to the commencement of these regulations. These pensions have subsequently been prescribed as capped defined benefit income streams and are superannuation income streams as a result of the Commonwealth Government's legislative response to the decision in *Douglas*.

The regulations also provide that the special value for these superannuation income streams is worked out using one of two methodologies. The methodology is whichever gives the lesser amount of annual entitlement multiplied by 16, or annual entitlement multiplied by the term remaining if the income stream has a fixed term.

w https://www.legislation.gov.au/F2024L01023/asmade/text

3.5 Adding Superannuation to Paid Parental Leave Amendment

On 7 March 2024, the Government announced that it will pay superannuation on Government-funded Paid Parental Leave from 1 July 2025.

On 22 August 2024, the *Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Bill* 2024 was introduced to the Parliament to give effect to the announcement.

Once passed, eligible Paid Parental Leave recipients will receive the Paid Parental Leave Superannuation Contribution as a lump sum payment after the end of each financial year, which comprises of a superannuation component and an interest component to reflect the payment being made annually instead of periodically.

w https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId%3Ar7233%20Recstruct%3Abillhome

3.6 Excise (Concessional Spirits – Class of Persons) Determination 2024

On 21 August 2024, the ATO issued draft *Excise (Concessional Spirits – Class of Persons) Determination 2024.*

While alcohol broadly is subject to excise, certain spirits are duty-free because they are used for purposes other than alcoholic beverage and fuel manufacturing. Limits on the quantity of spirit that can be obtained without specific approval have been introduced in this instrument to mitigate against the risk of concessional spirits being improperly used (such as in the manufacture of alcoholic beverages or as a fuel).

The draft Determination proposes to amend the quantity of spirit that the following classes of person can use in a calendar year for an industrial, manufacturing, scientific, medical, veterinary or educational purpose without attracting a rate of duty:

Class of Persons	**Maximum quantity of spirit**
Health care practitioners	200 litres
Veterinary practitioners	200 litres
Medical institutions	1,000 litres
Government related entities	1,000 litres
Education institutions	1,000 litres

It is intended that the instrument will commence on 1 July 2025.

ATO reference *LI 2024/D8*
w https://www.ato.gov.au/law/view/document?docid=OPS/LI2024D8/00001

4. State Legislation

4.1 SA Budget measures Bill passes house

On 28 August 2024 the *Statutes Amendment (Budget Measures) Bill 2024* was received into Legislative Council. The bill proposes to amend the *First Homes and Housing Construction Grants Act 2000*, the *Mining Act 1971*, the *National Electricity (South Australia) Act 1996,* the *Payroll Tax Act 2009*, the *Stamp Duties Act 1923* and the *Mining Regulations 2020*.

Payroll Tax Act

The amendments to the *Payroll Tax Act 2009* empower the regulations to declare a percentage of bulk billed services paid or payable to general practitioners for the provision of medical services to be exempt wages for the purposes of payroll tax. Bulk billed services is defined as, in relation to a medical service provided by a general practitioner:

> *(a) a medical service where—*
> *(i) a medicare benefit is payable to a person in relation to the medical service; and*
> *(ii) under an agreement entered into under section 20A of the Health Insurance Act 1973 of the Commonwealth—*
> *(A) the person assigns to the general practitioner by whom the medical service is provided the person's right to the payment of the medicare benefit; and*
> *(B) the general practitioner accepts the assignment in full payment of the general practitioner's fee for the medical service provided; or*
> *(b) a medical service of a kind prescribed by the regulations for the purposes of this paragraph…*

The bill also defines general practitioner, medical service, medicare benefit and designated medical practice.

Importantly, the proposed amendment allows the regulation to give retrospective effect to treat bulk billed services in previous years as exempt wages.

Stamp Duties Act

The proposed amendments to the Stamp Duties Act prescribe circumstances in which relief from duty for the purchase of certain new homes and land can be obtained.

For contracts entered into before 6 June 2024:

1. for new homes where the market value of the home (and the land on which the home is built) is less than $650,000, no duty is payable;
2. for new homes where the market value of the home (and the land on which the home is built) is more than $650,000 but less than $700,000, reduced duty is payable;
3. for vacant land where the market value of the land is less than $400,000, no duty is payable;
4. for vacant land where the market value of the land is more than $400,000 but less than $450,000, reduced duty is payable.

For contracts entered into after 6 June 2024, no duty is payable.

w
https://www.legislation.sa.gov.au/lz?path=/b/current/statutes%20amendment%20(budget%20measures)%20bill%202024

4.2 Tas Bill to halve transfer duty on new apartments now law

The *Taxation Legislation (Miscellaneous Amendments) Bill 2024* received assent as Act No 22 of 2024 on 30 August 2024.

The legislation proposes to:

1. implement the First Home Buyer Duty Exemption;
2. extend the Pensioner Downsizing Duty Concession;
3. extend the three-year land tax exemption for all newly built housing that is made available for long term rental;
4. extend the one-year land tax exemption for short term visitor accommodation converted to long term rental;
5. raise the land tax tax-free threshold by $25,000 from $99,999 to $124,999; and
6. extend the payroll tax rebate scheme for apprentices, trainees and youth employees.

The *Taxation Legislation (Miscellaneous Amendments) Bill 2024* introduces the remaining election commitment outlined in the Government's 100 Days Plan, the 50 per cent duty concession to buyers of a new apartment or unit off-plan or under construction valued at up to $750,000. The duty concession will be in place for two years to 30 June 2026.

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

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

4.3 Expanded first home duty concessions in WA now law

On 21 August 2024, the *Duties Amendment (First Home Owner Concessions) Bill 2024* received assent as Act No 27 of 2024.

Under the Act, established, first home buyers purchasing newly constructed or substantially renovated homes on or after 9 May 2024 will pay:

1. no transfer duty on homes valued up to $450,000, a total saving of $15,390. The threshold was previously $430,000; and
2. for properties valued between $450,001 and $600,000, the duty payable will be assessed at a new concessional rate of $15.01 per $100 or part of $100 above $450,000. The threshold was previously $430,001 and $530,000.

w https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=368C1B9F15657E6048258B1D0030ABFE

4.4 Meaning of 'Metropolitan Sydney' for NSW payroll tax purposes

On 30 August 2024, *Payroll Tax Regulation 2024* (NSW) was made. The Regulation defines 'Metropolitan Sydney' for the purposes of the *Payroll Tax Act 2007* (NSW). The meaning of 'Metropolitan Sydney' is relevant

for assessing the payroll tax rebate on wages to general practitioner contractors paid by medical centres who meet the required bulk billing thresholds.

Metropolitan Sydney is defined to mean the area comprising land that, for the whole financial year, is in a suburb or locality in the Greater Sydney Region, other than the suburbs and localities set out in the table set out in the Regulations. The 'Greater Sydney Region' is defined in the *Interpretation Act 1987* (NSW).

w https://legislation.nsw.gov.au/view/pdf/asmade/sl-2024-443

5. Rulings

5.1 GST-free sunscreen products

On 14 August 2024, the ATO published draft *Goods and Services Tax Determination GSTD 2024/D2* which outlines when a sunscreen product qualifies as GST-free. Once finalised, it will replace 2 product classification issues listed in the Pharmaceutical Health Forum – issues register, GSTII PH5 and GSTII PH6.

Under section 38-47(1) of *A New Tax System (Goods and Services Tax) Act 1999*, goods can be GST-free if they are declared by the Health Minister as such.

The Health Minster sets out in *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2022* that goods will be GST-free if they are goods of a kind:

1. that are specified in Schedule 1 of the Health Goods Determination; and
2. required, or in a class of goods required, to be included in the Australian Register of Therapeutic Goods.

Item 5 of Schedule 1 of the Health Goods Determination provides that sunscreen preparations for dermal application are GST-free if they:

1. have a Sun Protection Factor (SPF) of 15 or more; and
2. are marketed principally as sunscreen.

In the draft determination, the Commissioner considers that the definition of 'Of a Kind' refers to products that share key attributes with a specific category or class. For sunscreens, the Commissioner considers that that attributes include:

1. Sunscreen Preparation: products applied to the skin to protect against UV radiation, which could be available in various forms like creams or sprays;
2. SPF Requirement: Must be SPF 15 or higher to;
3. ARTG Inclusion: Must be listed or registered in the Australian Register of Therapeutic Goods with 'AUST L' or 'AUST R' identification numbers; and
4. Marketing: Must be marketed primarily for sun protection. Multi-use products or those marketed for other purposes may not qualify.

In determining whether a product is of a kind marketed principally for use as sunscreen, the Commissioner considers that the must be marketed 'mainly, chiefly, predominantly or preponderantly' for use as sunscreen. Where the market of a product includes more than one use, the marketing of the use as sunscreen must be main, chief or predominant. The Commissioner will have regard to labelling and packaging, promotion and advertising, and product placement.

The Commissioner gave examples where a 'moisturising sunscreen' is primarily identified as a sunscreen with a supplementary moisturising benefit. However, 'SPF moisturiser' or 'moisturiser with SPF' may be a factor indicating the reverse. Where products are described as multi-functional such as '2-in-1' or '3-in-1', are indicative of products with multiple equal uses and no main, chief or predominant marketed use. Descriptions such as BB cream, CC cream, foundation and insect repellent would suggest the product is not marketed principally for use as sunscreen.

The draft determination is open for comments until 13 September 2024.

ATO Reference *GSTD 2024/D2*
w https://www.ato.gov.au/law/view/document?docid=DGD/GSTD2024D2/NAT/ATO/00001

5.2 Withdrawal of GST Industry Issues advice on sunscreen

On 13 August 2024, the ATO published a withdrawal notice for GSTII PH5 and GSTII PH6 effective from 14 August 2024, they are being replaced by GSTD 2024/D2: *Goods and services tax: supplies of sunscreen*.

w https://www.ato.gov.au/law/view/document?docid=GII/GSTIIPH5/NAT/ATO/00001
w https://www.ato.gov.au/law/view/document?docid=GII/GSTIIPH5/NAT/ATO/00001&PiT=20240813000001

6. Private Binding Rulings

6.1 Vacant land exceptional circumstances

Facts

On XX 20XX, the taxpayer acquired an apartment.

In 20XX, the apartment was leased.

On XX XX 20XX, the State Government deemed the building containing the apartment to be uninhabitable due to structural defects. The taxpayer was forced to terminate the lease entered in 20XX. The building remains uninhabitable to this day. No rental income was derived from the time the building was deemed uninhabitable.

From the date the apartment was deemed uninhabitable, the taxpayer has incurred interest on its mortgage and body corporate administrative fees or levies.

The taxpayer has also received financial assistance from the State Government which was offered to eligible owners of apartments in the building.

A condition of the financial assistance is that, in the event that the taxpayer receives proceeds related to the loss of rent (as a result of legal proceedings, an insurance claim or by settlement agreement), the taxpayer must reimburse the State Government.

Questions

1. Will the Commissioner extend the exceptional circumstances exemption relating to vacant land and allow the taxpayer to continue to deduct rental property expenses for your apartment?
2. Are the financial assistance amounts received from the State Government treated as a reduction to the cost base of the apartment?
3. If the answer to question 2 is no, are the financial assistance amounts received from the State Government treated as assessable income?

Ruling

Question 1

The ATO ruled yes.

Subsection 26-102(1) of the ITAA 1997 limits the deduction on the amounts relating to holding land if at that time of incurring the loss or outgoing there is no substantial and permanent structure in use or available for use on the land. Subsection 26-102(6) of the ITAA 1997 allows an exception where structures have been affected by natural disasters or other exceptional circumstances. The ATO confirmed that there must have been a substantial and permanent structure on the land prior to the time that the exceptional circumstance occurred.

The ATO was of the view that the taxpayer's circumstances were exceptional and therefore the taxpayer can deduct the losses or outgoings incurred in holding the apartment pursuant to section 8-1 of the ITAA 1997.

The ATO confirmed that the principal component of the loan was not deductible. In respect of the body corporate fees, the deductibility of body corporate fees will depend on the purpose to which the fees are being applied. The ATO confirmed that individual owners can claim the deduction if the body corporate is raising the money for a deductible purpose pursuant to section 8-1 of the ITAA 1997. As a general rule, the ATO stated that deductible purposes are administrative fees.

Question 2

The ATO ruled no.

The ATO confirmed that any compensation that is received by an owner in order to compensate them for their lost rental income, takes on the character of that lost rental income. Therefore, the financial assistance amounts received from the State Government are not treated as a reduction to the cost base of the apartment and are instead considered to be rental or income in nature.

Question 3

The ATO ruled yes.

As stated in response to Question 2, any compensation that is received by an owner in order to compensate them for their lost rental income, takes on the character of that lost rental income.

In relation to the requirement to reimburse the government, if the taxpayer receives compensation from another source, the ATO states that money that must be contractually or legally repaid in a later income year, when an obligation to pay arises, is not considered assessable income in accordance with section 59-30 of the ITAA 1997. This is the case even if no obligation to repay existed at the time the money was received. A payment covered by section 59-30 of the ITAA 1997 is one that must and is repaid and cannot be deducted.

Under section 170(10AA) of the ITAA 1936, a taxpayer has an unlimited amendment period to amend their tax return if the amendment is in relation to a payment covered by section 59-30 of the ITAA 1997.

TIP – the ATO in its ruling TR 2023/3 on the Vacant Land measures considers that while interest on a loan to acquire land on which there is no substantial and permanent structure present (capable of lawful occupation if residential) is not deductible, interest on a construction loan will be deductible based on ordinary principles – that is, without regard to the Vacant Land measures.

ATO reference *Private Binding Ruling Authorisation No. 1052253573958*
w https://www.ato.gov.au/law/view/document?docid=EV/1052253573958

6.2 Legal and beneficial ownership of a property

Facts

A taxpayer purchased the property from their relative in 20XX.

No money changed hands and the taxpayer's relative continued to live in the property and maintain the property as though it was still their home.

There was no document or signed agreement between the taxpayer and their relative at the time which outlined the arrangement and ownership details.

There was no trust arrangement in place at the time when the title was transferred into the taxpayer's name.

The taxpayer obtained the property at the time to allow the taxpayer to have enough equity to borrow funds for their own benefit.

On the XX of XX 20XX the property was transferred back to the taxpayer's relative's name.

No money changed hands when the taxpayer transferred the title back to the taxpayer's relative's name.

Stamp duty was paid twice, once in 20XX and again in 20XX.

The capital gain has been included in the taxpayer's 20XX tax return with the 50% discount applied with the asset being held greater than 12 months.

Question

Did CGT Event A1 happen when the taxpayer transferred the title of the property to their relative?

Ruling

The ATO ruled yes.

Under section 104-10 of the ITAA 1997, CGT event A1 happens if a taxpayer disposes of a CGT asset. The disposal of a CGT asset takes place if a change of ownership occurs from the taxpayer to another entity, whether because of some act or event or by operation of law. A change in legal ownership that does not result in a change in beneficial ownership does not trigger CGT event A1.

The ATO considers that there are limited circumstances where the legal and equitable interests in an asset are not the same. There must be sufficient evidence to establish that the equitable interest is different from the legal title.

The ATO state that a person's legal interest in a property is determined by the legal title to that property under the property law legislation in the State or Territory in which the property is situated.

The ATO further state that where it is asserted that the beneficial ownership and legal ownership of a property are not the same, there must be evidence to show that the legal owner holds the property in trust for the beneficial owner. Relevant evidence includes information that evidences the intentions of the parties at the time the property was purchased or transferred from one legal owner to another, and evidence of contributions made by the parties towards the purchase price.

The ATO referred to Taxation Ruling *TR 93/32 Income tax: rental property - division of net income or loss between co-owners* (TR 93/32) which contains guidance on situations where the equitable interest in a property may not follow the legal title so that rental income does not need to be split in accordance with the legal ownership of the proeprty.

The ATO referred to paragraphs 38 to 41 in TR 93/32 where it is stated that if the equitable interest does not follow the legal title, there is some basis for the profit/loss to be distributed on the equitable and not the legal basis. That ruling states, in part:

> *We consider that there are extremely limited circumstances where the legal and equitable interests are not the same and that there is sufficient evidence to establish that the equitable interest is different from the legal title. We will assume where taxpayers are related, e.g., husband and wife, that the equitable right is exactly the same as the legal title.*

The ATO concluded that as there was no evidence to suggest that the taxpayer would only hold the legal title to the property and that the relative would retain the beneficial interest, the taxpayer did not establish that the legal and beneficial interests were different. Therefore, CGT event A1 occurred for the taxpayer.

COMMENT – the correct question to ask here should have been whether section 106-50 (about a beneficiary being absolutely entitled as against the trustee) applied so that the transaction would be treated as the relative transferring the property to themselves.

The ATO also discussed the presumption of advancement in the ruling, which can apply to treat a transfer of property from a parent to child, or husband to wife (but not wife to husband), as a gift, rather than creating a trust. It is not clear how it was relevant to this ruling unless the 'relative' was a parent.

ATO reference *Private Binding Ruling Authorisation No. 1052270192253*
w https://www.ato.gov.au/law/view/document?docid=EV/1052270192253

6.3 Deceased estates and beneficial ownership of a property

Facts

The taxpayer's parent signed a contract to purchase a property A. The purchase price was $XXX,XXX with a scheduled settlement date on XX/XX/20XX.

The taxpayer's parent was the sole owner of property B at the time the contract was signed to purchase property A. The taxpayer's parent intended to sell property B to finance the purchase of property A.

The taxpayer's parent required short term finance (a bridging loan) for the purchase of property A when the settlement for the sale of property B would be after the settlement on property A.

The taxpayer also made a loan to their parent to put towards the purchase of property A. The loan was recognised in the parent's Will.

In 20XX, the taxpayer instructed their solicitors that property A was to be purchased solely in the taxpayer's parent's name.

The application to the bank for the bridging loan was solely in the taxpayer's parent's name.

The taxpayer agreed to be named on the bridging loan with their parent to secure the necessary finance to purchase property A as their parent could not secure a loan on their own.

On XX/XX/20XX the taxpayer and their parent were offered a loan amount of $XXX,XXX from the bank for the purchase of property A.

On XX/XX/20XX, the taxpayer was made aware that, as a condition of providing the loan, the bank was insisting that the taxpayer be registered on the title of property A with the taxpayer's parent as tenants in common in equal shares.

On XX/XX/20XX, in an email to the solicitor, the taxpayer expressed concerns that their parent would be distraught if the settlement on property A on XX/XX/20XX did not go through. The taxpayer reiterated that, although it was against the taxpayer's wishes, that the taxpayer's name needs to be included on the title, with their parent, to ensure the finance could be approved for the purchase of property A in time for the settlement.

Settlement occurred on XX/XX/20XX with both the taxpayer and their parent's names on the title as tenants in common with an equal share.

On XX/XX/20XX, the taxpayer sent a letter to the solicitor handling the purchase of property A. The taxpayer expressed that it was against the taxpayer's and their parent's wishes that the taxpayer's name be included on the title. The taxpayer asked how to remove their name from the title.

The taxpayer did not engage another solicitor to pursue the title issue further in 20XX due to additional time and cost that would be incurred, and the taxpayer was reluctant to concern their parent with the legal matters, taking in consideration their age and health.

At the time, the taxpayer feared their parent's life expectancy would be short, but turned out it was considerably longer.

The taxpayer considered legal action against the current solicitor but elected not to do so.

The sale of property B settled on XX/XX/20XX and the bridging loan was discharged from the proceeds.

In XX/XX/20XX, the taxpayer sought advice from another legal firm after the lessening of Covid-19 restrictions.

A Declaration of Trust was prepared and signed by both the taxpayer and their parent, which acknowledged that the taxpayer had no legal interest or entitlement in property A. The inclusion of the taxpayer on the title was to secure finance as their parent was on a pension and would not be approved as the only applicant.

The Declaration of Trust noted that the parent, as the beneficiary of the trust, paid for all outgoings associated with property A including utilities, maintenance, mortgage repayments and insurances.

The Declaration of Trust also noted that as trustee, the taxpayer, shall continue to hold their half share of the property for benefit of their parent. In the event of the sale of the property, the taxpayer's half interest will benefit the deceased or their estate. Prior to any sale, the taxpayer agreed to transfer and have any documents passed over to their parent as the sole proprietor of the property.

The Declaration of Trust included that a clause would be added to the taxpayer's Will stating that, if their parent survives the taxpayer, the taxpayer's half share of property A would be passed to their parent.

An email from the solicitor on XX/XX/20XX, also confirmed that the application of the Declaration of Trust and the provision in the taxpayer's Will would result in a substantial saving in stamp duty.

The taxpayer provided their Will, which includes provision that in the event that the taxpayer predeceases their parent, the taxpayer's share in property A as tenants in common, equal shares with their parent, will pass to their parent.

The Will of the taxpayer's parent dated XX/XX/20XX, includes a provision that the taxpayer and their sibling shall be tenants in common with equal shares in the residue of their parent's estate.

The taxpayer recalls their parent had a prior Will dated after 20XX which had different amounts provided for children. The taxpayer is unsure where this prior Will is located.

The taxpayer incurred land tax of $XXX in the 20XX year for property A.

The taxpayer's parent passed away on XX/XX/20XX.

The taxpayer and their sibling are joint executors of their parent's estate.

Probate was granted to the taxpayer and their sibling on XX/XX/20XX.

A contract for the sale of property A was signed on XX/XX/20XX. The vendors are listed as the taxpayer as vendor, and the taxpayer and their sibling as joint executors for their parents' ownership interest.

Property A settlement date occurred on XX/XX/20XX which resulted in a capital gain.

Questions

1. Did CGT event A1 occur when the taxpayer disposed of their interest in the property?
2. Did CGT event A1 occur when the trustees for the deceased estate disposed of their interest in the property?

Ruling

Did CGT event A1 occur when the taxpayer disposed of the property?

The ATO ruled no. The ATO noted that in considering the disposal of a property, the most important element in the application of CGT provisions is ownership. It must be determined who is the legal owner of the asset. The

Commissioner was satisfied that a CGT A1 event did not occur when the taxpayer disposed of their 50% interest in property A.

Did CGT event A1 occur when the trustees for the deceased estate disposed of their interest in the property?

The ATO ruled yes.

Based on the facts, the Commissioner accepted that, although the taxpayer and their parent were legal owners of property A, it was intended that the taxpayer only help with securing the finance for purchasing the property and have no beneficial ownership. The taxpayer made several attempts to not be added to the title and made it clear at all times during the purchase process that the taxpayer did not wish to be on the title. Although the taxpayer incurred land tax for their legal interest in property A due to their name being on the title, the taxpayer had stated that the taxpayer believed this was an unavoidable consequence of being included on the title.

Although the Declaration of Trust and the taxpayer's Will are non-contemporaneous, they were considered relevant as they were consistent with the contemporaneous correspondence provided regarding the taxpayer's intentions.

The Declaration of Trust stipulated that if property A was to be sold, the taxpayer's interest would be transferred over to their parent as sole owner, and their parent would be the beneficiary of the taxpayer's share.

The taxpayer's Will included provisions to pass their ownership interest in property A to their parent should the taxpayer predecease her, therefore becoming part of their deceased estate. The taxpayer's solicitor had indicated there would be a substantial saving in stamp duty.

Under section 102-20 of the ITAA 1997, the Commissioner was satisfied that the taxpayer did not make a capital gain because of an A1 event occurring on a CGT asset in which the taxpayer had a 50% legal interest. As the facts the taxpayer provided show that although the taxpayer's name was on the title for property A their actions show this was only for the full benefit of their parent when acquiring the asset.

The trustees for the deceased estate are liable for CGT on the capital gain received for the 100% interest in property A.

Under section 118-195 of the ITAA 1997, the trustees for the deceased estate must disregard the capital gains made from the CGT event that happened in relation to the dwelling as this was the deceased's main residence before the deceased died, it was not used to produce assessable income and the disposal of the dwelling occurred within two years after the deceased's passing.

ATO reference *Private Binding Ruling Authorisation No. 1052274488647*
w https://www.ato.gov.au/law/view/document?docid=EV/1052274488647

6.4 Active asset and use for rent

Facts

The taxpayer acquired a property on XX September 20XX. The property is approximately XXX square meters in size. There are two buildings (industrial sheds) on the property with a total lettable area of 768m^2.

Building 1

Building 1 has a floor area of approximately XX square meters, with XX square meters of mezzanine area, being 77.5% of the total lettable area of the property.

Building 1 was used exclusively as the business premises for Entity 1 from XX September 20XX to X April 20XX.

The taxpayer owned 75% of the shares in Entity 1 at all times, with the remaining 25% of the shares being owned by the taxpayer's spouse.

Entity 1 is taken to have been connected with the taxpayer as outlined in section 328-125 of the ITAA1997 when it occupied the property.

Entity 1 ceased business in April 20XX and the company was deregistered in February 20XX.

Building 1 was leased to unrelated parties from X April 20XX to the date of sale of the Property in early 20XX.

Building 2

Building 2 has a floor area of approximately XX square metres with XX square metres of mezzanine area, being 22.5% of the total lettable area of the property.

Building 2 has been used exclusively as the business premises Entity 2 at all times from September 20XX to the date of sale of the property in early 20XX.

Entity 2 continued to occupy Building 2 up to the date of the sale and vacated after the sale of the Property.

Entity 2 used Building 2 as the office for its building and construction business. Building 2 was also used by Entity 2 for the storage of equipment and materials used in its business, and occasionally for preparatory works associated with the building and construction business.

The taxpayer owned 100% of the shares in Entity 2.

Entity 2 was taken to have been connected with the taxpayer as outlined in section 328-125 of the ITAA1997 when it occupied the Property.

Sale of the property

The property was sold and a capital gain was realised.

Entity 2 conducted a business in the 20XX financial year with an annual turnover of $XXX,XXX.

The taxpayer operates a holiday rental business in partnership with their spouse. This partnership's annual turnover for the 20XX income year was $XXX,XXX.

The taxpayer is not an affiliate of or connected to any other entities.

Question

1. Does the taxpayer satisfy the requirements of subsection 152-10(1A) of ITAA 1997 (the passively held assets provision)?
2. Does the property satisfy the active asset test as outlined in section 152-35 of the ITAA 1997?

Ruling

Does the taxpayer satisfy the requirements of subsection 152-10(1A) of the ITAA 1997?

The ATO ruled yes.

An entity is a CGT small business entity in an income year if:

1. the entity carries on business in the income year; and

2. the aggregated turnover of the entity was less than $2 million.

Section 152-10 of the ITAA1997 allows for a capital gain that you make to be reduced or disregarded under this Division if the following conditions are satisfied for the gain:

1. a CGT event happens in relation to a CGT asset of yours in an income year;
2. the event would (apart from this Division) have resulted in the gain;
3. at least one of the following applies:
   (a) you are a CGT small business entity for the income year;
   (b) you satisfy the maximum net asset value test (see section 152-15);
   (c) you are a partner in a partnership that is a CGT small business entity for the income year and the CGT asset is an interest in an asset of the partnership;
   (d) the conditions mentioned in subsection (1A) or (1B) are satisfied in relation to the CGT asset in the income year; and
4. the CGT asset satisfies the active asset test.

In order to satisfy section 152-10(1)(c)(iv) of the ITAA 1997, conditions in subsection 152-10(1A) or (1B) must be satisfied.

> *(1A) The conditions in this subsection are satisfied in relation to the CGT asset in the income year if:*
> *(a) your affiliate, or an entity that is connected with you, is a CGT small business entity for the income year; and*
> *(b) you do not carry on a business in the income year (other than in partnership); and*
> *(c) if you carry on a business in partnership--the CGT asset is not an interest in an asset of the partnership; and*
> *(d) in any case--the CGT small business entity referred to in paragraph (a) is the entity that, at a time in the income year, carries on the business (as referred to in subparagraph 152- 40(1)(a)(ii) or (iii) or paragraph 152-40(1)(b)) in relation to the CGT asset.*

Subsection 152-10(1A)(a) of the ITAA1997 requires that an affiliate, or a connected entity, is a CGT small business entity for the income year.

Under subsection 328-125(1) of the ITAA 1997, an entity is connected with another entity if either entity controls the other entity, or if both entities are controlled by the same third entity in a manner described in the section. Control may be direct or indirect.

Subsection 328-125(2) of the ITAA 1997 sets out what constitutes the direct control of an entity other than a discretionary trust. For companies, paragraph 328-125(2)(b) provides that Entity A also controls Entity B that is a company if Entity A, its affiliates, or Entity A together with its affiliates own, or have the right to acquire the ownership of, equity interests in the company that carry between them the right to exercise, or control the exercise of, at least 40% of the voting power in the company.

It is accepted that Entity 2 is connected with the taxpayer as they own 100% of the shares in that company. It is also accepted to have been a small business that traded during the 20XX year with an annual turnover of $XXX,XXX. The taxpayer was a partner in a partnership, the turnover of that partnership during the 20XX income year was $XXX,XXX. The taxpayer was not connected to any other entities and as such the aggregated turnover of all connected entities was less than $X million. The property is not an interest of that partnership.

Based on these circumstances, the taxpayer satisfies the requirements outlined in subsection 152-10(1A) of the ITAA 1997, in relation to the sale of the property during the 20XX income year.

The property was acquired on XX September 20XX. The CGT event took place on XX January 20XX, the ownership period considered under section 152-35 of the ITAA 1997 is approximately 8 years and 4 months.

Does the property satisfy the active asset test as outlined in section 152-35 of the ITAA 1997?

The ATO ruled yes.

The active asset test is outlined in section 152-35 of the ITAA 1997.

A CGT asset satisfies the active asset test if:

1. you have owned the asset for 15 years or less and the asset was an active asset of yours for a total of at least half of the period specified in subsection (2); or
2. you have owned the asset for more than 15 years and the asset was an active asset of yours for a total of at least 7 ½ years during the period specified in subsection (2).

A CGT asset is an active asset at a time if, at that time you own the asset and it is used, or held ready for use, in the course of carrying on a business that is carried on by you, your affiliate or another entity that is connected with you (paragraph 152-40(1)(a) of the ITAA 1997).

However, an asset whose main use is to derive rent cannot be an active asset (unless that main use was only temporary) (paragraph 152-40(4)(e) of the ITAA 1997). That is, even if the asset is used in a business, it will not be an active asset if its main use in that business is to derive rent.

If an asset is used partly for business and partly to derive rent at any given time, it is a question of fact dependent on all the circumstances as to whether the main use of the asset at that time is to derive rent. No one single factor is necessarily determinative, and consideration is given to a range of factors such as:

the comparative areas of use of the property (between deriving rent and other uses), and
the comparative levels of income derived from the different uses of the property.

As the property was owned for less than 15 years, the active asset test will be satisfied if the property was an active asset for more than half of the ownership period. Additionally, as specified at subsection 152-40(4) of the ITAA1997, an asset is not an active asset at a particular time if its main use is to derive rent.

Under subsection 152-40(4A), when determining the main use of an asset, any use by a connected entity is deemed to be used by the owner of the asset. That is, if the use of the property by Entity 2 and Entity 1 in operating the businesses is deemed to be the taxpayer's business use of the property.

As both buildings on the property were used exclusively by Entity 2 and Entity 1 from the date of acquisition on XX September 20XX until X April 20XX; a period of approximately 2 years and 7 months. Entity 2 and Entity 1 were connected with the taxpayer during this period. Thus, it is accepted that 100% of the use of the property was in the business conducted by connected entities.

From X April 20XX to XX January 20XX (approximately 5 years and 9 months), the property has been used as follows:

Building 1 has been leased to unrelated parties; and
Building 2 has been used exclusively by Entity 2 in operating its business.

It is accepted that Entity 2's use of the property during this period satisfies the requirements of section 152-40 of the ITAA 1997; the property was used by Entity 2 in carrying on its business.

Despite the fact that Building 1, represented 77.5% of the total lettable area and was rented to unrelated parties, the properties main use is taken to have been the use by Entity 2 as the business income generated over entirety of the rental period by Entity 2 is $X,XXX,XXX, much greater than the rental income generated of $XXX,XXX. In all but one of the years of income data provided, the business income generated by Entity 2 exceeded the rent received from letting building 1. On an income basis, it is considered the main use of the

property was not to derive rent and so the rental exclusion in paragraph 152-40(4)(e) of the ITAA 1997 does not apply.

As the property was an active asset for at least 6 years and 7 months of the total ownership period, it is taken to satisfy the active asset test outlined in section 152-35 of the ITAA 1997.

ATO reference *Private Binding Ruling Authorisation No. 1052267236491*
w https://www.ato.gov.au/law/view/document?docid=EV/1052267236491

6.5 Similar business test for company losses

Facts

Company A was incorporated in Australia on XX XX 20XX and is wholly owned by Company 1, a non-resident company. On XX XX 202X, Company 1 was fully acquired by another non-resident company, Company 2.

Prior to and following the acquisition, Company A's sole business activity involved the resale of a product and provision of certain services to a specific customer base. There has been no change in its business activities, product function, or business name, nor has the company conducted any operations outside of Australia. Company A retained the same business assets, including its goodwill and the right to resell the product to its customers, throughout this period.

Before the Acquisition, Company A advertised its product on a website controlled by a related party, which changed to another related party's website after the Acquisition. Prior to the Acquisition, Company A employed its own staff, but since the Acquisition, it has used employees of another related party. Additionally, Company A had a certain number of directors before the Acquisition, and this number changed as a direct result of the Acquisition.

Company A had a specific number of customers prior to the Acquisition. Following the Acquisition, the customer base remained the same, but the number of customers increased due to natural business growth.

In the 202X income year, Company A incurred tax losses, which it plans to utilise in the 202X to 202X income years. However, following the Acquisition, Company A failed the continuity of ownership test (COT) under section 165-12 of the ITAA 1997 and could not apply the special alternative under section 165-215. It was also ineligible to apply the modified tests in Subdivision 166-A, as it was neither a widely held nor an eligible Division 166 company.

Company A did not engage in any new business activities or transactions prior to the Acquisition that differed from its previous operations.

Question

Will Company A satisfy the business continuity test under section 165-211 of the ITAA 1997 in order to utilise its tax loss?

Ruling

The ATO ruled yes.

To be eligible to utilise a tax loss, a company must satisfy the requirements under section 165-10 of the Income Tax Assessment Act 1997 (ITAA 1997). The company must either pass the continuity of ownership test (COT) in section 165-12 or meet the business continuity test under section 165-13. The business continuity test is further defined under Subdivision 165-E, where the company must meet either the "same business test" or the "similar business test".

In this case, Company A failed the COT and was ineligible to apply the special alternative under section 165-215. Consequently, Company A can only deduct its tax losses if it satisfies the business continuity test in section 165-13. This test requires the company to continue carrying on a business that is similar to the business it operated immediately before the ownership change (referred to as the "test time"). Factors such as the use of assets, business operations, and the identity of the business must be taken into account.

Company A met the similar business test under section 165-211 of the ITAA 1997 because, following the change in ownership, it continued to carry on a business that was sufficiently similar to the one it had operated before the ownership change. The company retained and continued to use the same types of assets, including goodwill, in its operations both before and after the acquisition, and these assets were used to generate assessable income throughout both periods. The activities and operations from which Company A derived its income remained unchanged; it continued the resale of a product and provision of specific services to its established customer base without introducing or discontinuing any products or services.

The business identity of Company A remained consistent, as it maintained the same business name and did not expand its activities outside Australia. Any changes in its business resulted naturally from the development or commercialisation of its existing products and services, rather than any fundamental change in its operations. Furthermore, Company A did not start any new business activities or engage in transactions it had not previously entered into for the purpose of meeting the similar business test. Based on these considerations, it was concluded that the company's current business was sufficiently similar to its former business, enabling it to meet the requirements of the similar business test and utilise its tax losses.

ATO reference *Private Binding Ruling Authorisation No. 1052277194968*
w https://www.ato.gov.au/law/view/document?docid=EV/1052277194968

6.6 Housing fringe benefit

Facts

An Employer owns a cemetery and employs a caretaker to maintain the grounds of the cemetery.

The caretaker resides in a dwelling located inside the cemetery's grounds. The caretaker pays rent at a rate that is at a discount to the market value of other comparable dwellings in the area. This is to take into account the location and associated conditions adversely impacting the liveability of the accommodation.

There is a lease in place which grants the caretaker the right to use the accommodation but only when the accommodation is the caretaker's usual place of residence. The caretaker does not reside in any other dwelling.

Questions

1. Will the provision by the Employer of accommodation to the caretaker constitute a 'housing fringe benefit' as defined in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*?
2. If the answer to Question 1 is 'Yes', for the purposes of calculating the taxable value of the housing fringe benefit under section 26 of the FBTAA, can the taxable value be discounted on the basis that the market rental value of the unit of accommodation is adversely affected by the location of the accommodation?

Ruling

Question 1

The ATO ruled Yes.

Subsection 136(1) of the FBTAA defines a 'housing fringe benefit' to mean a 'fringe benefit' that is a 'housing benefit'.

The ATO ruled that the provision by the Employer of the dwelling to the caretaker constitutes a 'fringe benefit' as defined in subsection 136(1) of the FBTAA on the basis that:

1. the provision of the right to occupy the dwelling on cemetery grounds with rent paid at a rate that is at a discount to the market value of other comparable dwellings in the area fell within the definition of a 'benefit' in subsection 136(1) of the FBTAA;
2. the benefit is provided to the caretaker who is an employee of the Employer;
3. the right to use the dwelling on cemetery grounds is provided to the caretaker by the their employer; and
4. the caretaker has been provided with accommodation which allows the caretaker to conduct their employment duties - that is, to maintain the grounds of the cemetery.

The ATO pointed out that a 'housing benefit' is defined in subsection 136(1) of the FBTAA as meaning a 'benefit' referred to in section 25 of the FBTAA. Under section 25 of the FBTAA, a subsistence during the whole or a part of a year of tax of a housing right granted by a person to another person shall be taken to constitute a 'benefit'. A 'housing right' is defined in subsection 136(1) of the FBTAA as a lease or licence being granted to a person to occupy or use a unit of accommodation as that person's current usual place of residence.

The ATO ruled that a 'housing benefit' is provided by the Employer to the caretaker on the basis that:

1. the type of dwelling on the cemetery's grounds falls within the definition of a 'unit of accommodation' as defined in subsection 136(1) of the FBTAA;
2. there is a lease in place which grants the caretaker the right to occupy or use the dwelling, and that lease subsists at a time when the dwelling is the caretaker's usual place of residence. Therefore, a 'housing right' is provided by the Employer to the caretaker; and
3. on the basis it is considered that a 'housing right' is provided by the Employer to the caretaker, the definition of a 'housing benefit' is also satisfied as per section 25 and subsection 136(1) of the FBTAA.

The ATO also ruled that the accommodation benefit provided by the Employer to the caretaker is not specifically excluded from the definition of a 'fringe benefit' in subsection 136(1) of the FBTAA.

Given the benefit provided to the caretaker is both a 'fringe benefit' and a 'housing benefit', the provision by the Employer of accommodation to the caretaker constitutes a 'housing fringe benefit' as defined in subsection 136(1) of the FBTAA.

Question 2

The ATO ruled Yes.

The ATO accepted that the location of the caretaker's accommodation on the cemetery's grounds would have a material effect on what might otherwise be the market rental value. Accordingly, the ATO considered that:

1. the accommodation provided to the caretaker should initially be valued according to principles described in *Miscellaneous Taxation Ruling 2025 Fringe Benefits Tax: Guidelines for Valuation of Housing Fringe Benefits* (**MT 2025**) by reference to comparable units of accommodation in the closest residential area, and
2. consistent with MT 2025, a discount of X% may then be applied to take into account the adverse factors particular to the accommodation provided to the caretaker.

ATO reference *Private Binding Ruling Authorisation No. 1052259931265*
w https://www.ato.gov.au/law/view/document?docid=EV/1052259931265

6.7 Residency of SMSF

Facts

The Fund is a self-managed superannuation fund (SMSF) established in Australia and all its assets are located in Australia. The Fund has a corporate trustee. The Member is a director of the corporate trustee.

The member is currently residing overseas for the purpose of receiving medical treatment and to be close to relatives.

A general power of attorney has been used to appoint a person in Australia to act as the member's attorney.

The member continues to operate their Australian bank account and draw their allocated pension from the Fund.

The ATO relied on the following assumptions. Firstly, that an enduring power of attorney will be used to appoint a person in Australia to act in the member's capacity as director of the corporate trustee. Secondly, that the control and management of the Fund will be undertaken by the person with the power of attorney for the period the member is outside of Australia. Finally, that the member will not make contributions to the Fund while they are outside Australia.

Question

Will the Fund satisfy the definition of an Australian superannuation fund under subsection 295-95(2) of the ITAA 1997?

Ruling

The ATO ruled yes, the SMSF will continue to be an Australian superannuation fund for the purposes of section 295-95 of the ITAA 1997 (and a complying superannuation fund for the purposes of section 42A of the SISA), so long as the central management and control test and the active member test are satisfied at all times during the Member's absence from Australia.

For a SMSF to receive the tax concessional rate of 15%, it must be a complying superannuation fund under section 42A of the *Superannuation Industry (Supervision) Act 1993* (**SISA**). To be a complying fund it must satisfy the residency test at all times during a year of income. To satisfy the residency test, a fund must meet the definition of an 'Australian superannuation fund' in accordance with subsection 295-95(2) of the ITAA 1997.

Section 295-95(2) of the ITAA 1997 provides that a superannuation fund is an Australian superannuation fund at a time, and for the income year in which that time occurs, if:

1. the fund was established in Australia, or any asset of the fund is situated in Australia at that time; and
2. at that time, the central management and control of the fund is ordinarily in Australia; and
3. at that time, either the fund had no active member, or at least 50% of the following is attributable to superannuation interests held by active members who are Australian residents:
    (a) the total market value of the fund's assets attributable to superannuation interests held by active members; or
    (b) the sum of the amounts that would be payable to or in respect of active members if they voluntarily ceased to be members.

Each of these three tests must be met for an SMSF to be an Australian superannuation fund.

The Commissioner of Taxation has issued a Taxation Ruling TR 2008/9 titled - *Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the Income Tax Assessment Act 1997* (TR 2008/9)

which sets out the Commissioner's view on the interpretation of the definition of 'Australian superannuation fund'.

First test: Fund established in Australia or any asset of the fund is situated in Australia

The first test that an Australian superannuation fund must satisfy is that the fund was either established in Australia, or any asset of the fund is situated in Australia at the relevant time.

An SMSF will be established when the trust deed governing the operation of the fund is signed and executed and money or other property is transferred to the trustee of the fund as an initial contribution, to be held on trust for the beneficiaries (members) of the fund. An SMSF will be established in Australia if the initial contribution is paid to and accepted by the trustee of the fund in Australia.

The establishment of the fund requirement in paragraph 295-95(2)(a) of the ITAA 1997 is a once and for all requirement. That is, once it is determined that a fund was established in Australia, it will satisfy the first test at all relevant times. If it is determined that the fund was not established in Australia, then the alternative requirement in paragraph 295-95(2)(a), namely location of the assets of the fund, must be considered.

In this case, the Fund was established in Australia and all assets are located in Australia. Therefore, the first test under paragraph 295-95(2)(a) of the ITAA 1997 is satisfied.

Second test: Central Management and Control

The second test, and one of the key requirements that an SMSF must satisfy to be an Australian superannuation fund at a particular time, is that the central management and control of the fund is 'ordinarily' in Australia. Generally, the location of where important decisions is made is the location of the relevant management and control.

To determine the location of the central management and control of a superannuation fund at a point in time, it is necessary to consider what constitutes the central management and control of a fund and who it is that exercises the central management and control of a fund.

Paragraph 20 of TR 2008/9 states that:

> *'The [central management and control] of a superannuation fund involves a focus on the who, when and where of the strategic and high-level decision-making processes and activities of the fund. In the context of the operations of a superannuation fund, the strategic and high-level decision-making processes includes the performance of the following duties and activities:*
>
> 1. *formulating the investment strategy for the fund;*
> 2. *reviewing and updating or varying the fund's investment strategy as well as monitoring and reviewing the performance of the fund's investments;*
> 3. *if the fund has reserves - the formulation of a strategy for their prudential management; and*
> 4. *determining how the assets of the fund are to be used to fund member benefits.'*

Establishing who is exercising the central management and control of the fund is a question of fact to be determined by reference to the circumstances of each case. While it is the trustee of the fund who has the legal responsibility or duty to exercise the central management and control of a superannuation fund, the mere duty to exercise central management and control does not, of itself, constitute central management and control. The trustee is required to actually perform the high-level duties and activities of the fund to be exercising the central management and control.

The trustees may seek external advice relating to the performance of their high-level duties and activities. Where they make the actual high-level decision to act on this advice, it is considered that they are exercising the central management and control of the fund.

However, there may be situations where a person other than the trustee is exercising the central management and control of the fund. If a person other than the trustee of the fund independently and without any influence from the trustee performs those duties and activities that constitute the central management and control of the fund, that person is exercising the central management and control of the fund.

Location of the central management and control

The location of the central management and control of the fund is determined by where the high level and strategic decisions of the fund are made and where the high-level duties and activities are in fact performed (regardless of where the persons exercising the central management and control of the fund actually reside).

There must be some element of continuity or permanence if the central management and control of the fund is to be regarded as being 'ordinarily' in Australia. If the central management and control of the fund is being temporarily exercised outside Australia, this will not prevent the central management and control of the fund being 'ordinarily' in Australia at a particular time.

Paragraph 32 of TR 2008/9 states that while the central management and control of a fund can be outside Australia for a period greater than 2 years, the period of absence of the central management and control must still be temporary. Furthermore, if the central management and control of the fund is not temporarily outside Australia, it will not be 'ordinarily' in Australia at a time even if the period of absence of the central management and control is 2 years or less.

Whether an absence is temporary must be determined objectively by reference to all the relevant facts and circumstances at the time the absence was occurring.

All members are required to be trustees of an SMSF or a director of the fund's corporate trustee to meet the definition of an SMSF under section 17A of the SISA. Under subparagraph 17A(3)(b)(ii) of the SISA a legal personal representative who holds an enduring power of attorney granted by a member may be a trustee of the SMSF, or a director of the corporate trustee of the SMSF, in place of the member without causing the fund to fail to satisfy the definition of an SMSF.

A person who holds an enduring power of attorney for a member qualifies as a legal personal representative.

Power of attorney

The Commissioner of Taxation has issued a *Self Managed Superannuation Fund Ruling SMSFR 2010/2,* which sets out the Commissioner's view on the operation of subparagraph 17A(3)(b)(ii) of the SISA.

In order to comply with subparagraph 17A(3)(b)(ii) of the SISA, the legal personal representative must be appointed as a trustee of the SMSF, or a director of the corporate trustee of the SMSF. The member must cease to be a trustee of the SMSF or a director of the corporate trustee except where the legal personal representative is appointed as an alternate director.

Where an overseas member wants to appoint an alternative person to be their legal personal representative (and director of corporate trustee) then they can grant a new enduring power of attorney to the person of choice and revoke the former. Each state and territory in Australia has its own laws governing powers of attorney.

Based on the statements provided, so long as the Member validly appoints an enduring power of attorney, who exercises the central management and control of the Fund such that the central management and control is ordinarily in Australia, the Fund will satisfy the central management and control test.

There is nothing to stop a validly appointed power of attorney from sharing the Fund's financial records with the Member while they are outside of Australia, provided the Member is not using this information to make the high level and strategic decisions of the Fund.

As the Fund assets are legally owned by the corporate trustee and the power of attorney will be acting on behalf of the Member in their capacity as director of the Trustee, there is no need to change the legal title of the Fund assets.

Third test: Active member test

The third test that must be satisfied for an SMSF to be an Australian superannuation fund at a particular time is the 'active member' test.

The fund must have no active members or have active members who are Australian residents and who hold at least 50% of:

1. the total market value of your fund's assets attributable to super interests, or
2. the sum of the amounts that would be payable to active members if they decided to leave the fund.

However, under subsection 295-95(3) of the ITAA 1997, a member is not an active member if contributions have been made to the fund on their behalf and:

1. they are not a resident of Australia;
2. they have ceased to be a contributor, and
3. the contributions made on their behalf, after they ceased to be an Australian resident, were made for the time they were an Australian resident.

If all members of an SMSF are non-residents of Australia and a member makes a contribution to the fund, then the test will be failed as there are no Australian resident active members holding a superannuation interest in the fund.

Based on the statements provided, the Member will not make contributions to the Fund while they are outside Australia, and no contributions will be made on their behalf. So long as that is the case, they will not be active members and the 'active member' test will be satisfied.

WARNING – it is important that when a person is going overseas, where the person has a SMSF, consideration is given to whether someone should be appointed under a power of attorney to act on the person's behalf as a trustee or director of a corporate trustee to prevent the fund from becoming a non-resident and losing its complying status. Loss of compliance status can see the fund's assets and income be taxed at 47%. It is also important that contributions are not made while a member may be a non-resident of Australia as a result of the 'Active member test' set out above.

ATO reference *Private Binding Ruling Authorisation No. 1052263188063*
w https://www.ato.gov.au/law/view/document?docid=EV/1052263188063

6.8 Deduction for personal super contribution denied

Facts

The taxpayer made a personal superannuation contribution of $XXX for the XXX income year. This contribution was received by the taxpayer's super fund on XXX.

The super fund reported on XXX that the account number XXX was in a retirement phase for the period starting XXX. Later, when the taxpayer attempted to claim a tax deduction, the super fund acknowledged that it had inadvertently reported the account as being in a retirement phase. On XXX, the super fund provided an annual report for XXX, stating that this account was in an accumulation phase.

The Transfer Balance Account report indicates that the taxpayer commenced an income stream from XXX. The taxpayer subsequently submitted a Notice of Intent (NOI) to the super fund to claim a tax deduction of $XXX for the XXX income year. The ATO received a query from the taxpayer's tax agent, relating to the taxpayer's intention to claim a Personal Superannuation Contribution Deduction.

During discussions with the tax agent, the tax agent queried whether the super fund could accept the Notice of Intent, given that the taxpayer had started a retirement phase account. The ATO requested the taxpayer to contact the super fund, as the ATO could not amend the super fund's report and advised that a Personal Superannuation Contribution Deduction could not be claimed if the taxpayer had commenced an income stream.

On XXX, the ATO received an email from the super fund, stating that it had inadvertently reported the account as a retirement account and asking whether the commencement of the pension account could be unwound. In a further email received on XXX, the super fund referenced a previous ATO ruling in similar cases where the ATO had allowed the super fund to unwind the commencement of the retirement account.

The taxpayer submitted a private ruling application. The ATO sent an email to the taxpayer's tax agent to obtain the authorisation number of the previous private ruling referenced by the super fund. The ATO contacted the tax agent, and the tax agent advised that they would follow up with the super fund. The ATO sent another email to the tax agent, advising that the required information was requested by a specified date.

During a telephone conversation with the taxpayer's tax agent, the ATO advised that it would proceed based on the available information if the super fund failed to provide the requested information by the specified date.

Question

Can the taxpayer claim a tax deduction under Subdivision 290-C of the ITAA 1997 for a personal contribution made during the XXX income year?

Ruling

The ATO ruled no.

To claim a deduction for personal contributions made to a superannuation fund under Subdivision 290-C of the ITAA 1997, several conditions must be met

Complying superannuation fund

The personal contributions must be made to a complying superannuation fund in the income year in which the contribution was made, as per section 290-155 of the ITAA 1997. The fund must not be a Commonwealth public sector scheme with a defined benefit interest, a fund that would exclude the contribution from assessable income, or a fund of a prescribed kind in the regulations.

Age-related condition

Under subsection 290-165(1) of the ITAA 1997, if the person is under 18 years of age at the end of the income year, the contributions must derive from income related to carrying on a business or employment-related activities. For those over 75, contributions must be made within 28 days of the end of the month in which the person turns 75.

Contribution must not be a downsizer contribution or under FHSSS

Contributions cannot be downsizer contributions covered under section 292-102 of the ITAA 1997, as stated in section 290-167. Under section 290-168 of the ITAA 1997, the contributions must not be part of a re-contribution under the First Home Super Saver Scheme, notified to the Commissioner under section 313-50.

Notice of Intent to Deduct Contributions

Under section 290-170, a valid notice of intent to claim a deduction must be submitted to the superannuation fund. This notice must meet certain validity conditions, including:

1. the person must still be a member of the fund,
2. the fund must hold the contribution, and
3. no income stream should have begun based on the contribution.

The notice must be given before lodging the income tax return for the year or by the end of the following income year, whichever is earlier, and the superannuation fund must acknowledge receipt of this notice.

The ATO concluded that the deduction for the personal superannuation contribution was not available. This was because the taxpayer had already commenced an income stream during the relevant income year, which invalidated the notice of intent to claim a deduction under section 290-170 of the ITAA 1997. One of the key requirements for a valid notice of intent is that the superannuation fund must still hold the contribution and not have begun paying a superannuation income stream based on that contribution. Since an income stream had already started, the conditions for claiming the deduction were not satisfied.

The Commissioner has no discretion to allow a deduction for a superannuation contribution where the income stream has been started.

TRAP – in matters involving industry superannuation funds, it is often necessary to have the fund correct any reporting obligation with the ATO before engaging with the ATO. Without this the ATO, anecdotally, will often state that it has no discretion.

ATO reference *Private Binding Ruling Authorisation No. 5010103428722* w https://www.ato.gov.au/law/view/document?docid=EV/5010103428722

6.9 Fixed trust not a unit trust

Facts

A Trust has a single beneficiary who has a vested indefeasible interest in both the income and capital of the Trust.

The Trust does not have any unit holders. It has not issued and does not intend to issue any units to any entity.

Division 6C of the ITAA 1936 relates to the taxation of income of certain public trading trusts.

Section 102R of the ITAA 1936 outlines a number of preconditions that need to be met in order for a trust to meet the definition of a public trading trust. One of the requirements is that the trust is a 'unit trust'.

Question

Is the trust a unit trust for the purposes of Division 6C of the ITAA 1936?

Ruling

The ATO ruled no.

'Unit trust' is not defined in the tax legislation. Division 6C of the ITAA 1936 provides definitions for the terms 'unit' and 'unit holder' in section 102M, but only in relation to a 'prescribed trust estate.'

In ATO Interpretative Decision ATO ID 2010/57, the Commissioner took the view that a unit trust is one where beneficial ownership is divided into units, and these units are held by beneficiaries with fractional interests in the trust property.

The ATO also referred to relevant secondary materials, including Robert I. Pritchard, Chapter 18 'Unincorporated Joint Ventures', *The Law of Public Company Finance*, ed Austin and Vann, The Law Book Company Ltd 1986, p 397, which states:

> *(ii) A unit trust is a variation of the ordinary trust. Its distinguishing feature is that the beneficial interest in the trust property is divided into units which may be independently dealt with by the holders.*

The trust under consideration in this Ruling had only one beneficiary with a vested and indefeasible interest in the trust's income and capital. Since there were no unitholders and no division of ownership into fractional units, the trust could not be classified as a unit trust. Instead, it was characterised as a fixed trust, meaning it did not meet the definition of a unit trust for the purposes of Division 6C.

TIP – a fixed trust without units is a structure relevant to tax-exempt entities wanting to carry on businesses, but not through their tax exempt entity (usually for asset protection reasons) but that do not want those structures to be subject to taxation as corporates under the public trading trust rules in Division 6C of ITAA 1936.

ATO reference *Private Binding Ruling Authorisation No. 1052260008033*
w https://www.ato.gov.au/law/view/document?docid=EV/1052260008033

6.10 Main residence exemption

Facts

The Taxpayer and their spouse own a property in a country area. The Taxpayer and their spouse acquired the country property in 20XX, which is XX acres in size. They did not move into the country property immediately after purchasing it. The Taxpayer also owns another property in a city, which they purchased as their home many years before acquiring the country property. The city property has never been put on the market for sale since its acquisition.

The Taxpayer did not move furniture from the city property to the country property but instead purchased new furniture for the country property, which is fully furnished. The Taxpayer has some personal belongings at the country property as needed. They did not move into the country property as their permanent residence due to the state of repairs and renovations required to make it habitable. Since purchasing the country property, the Taxpayer has commenced several repairs and maintenance activities.

The Taxpayer's spouse resides at the city property as their main residence and stays there to be closer to their adult child, who requires support. The adult child lives in their own residence. From the date of acquiring the country property, the Taxpayer and their spouse have stayed there intermittently due to the extensive renovations required.

The Taxpayer retired approximately X years ago and intended to use the country property for primary production purposes to generate additional income alongside their superannuation. To prepare the land for primary production, the Taxpayer bought large machinery and has stayed at the country property more regularly from XXXX to the present, working to prepare it for primary production. The Taxpayer worked X-hour days at the country property for at least a week at a time before returning to the city property to rest and spend time with their spouse and adult child. The Taxpayer’s spouse occasionally stays at the country property when not supporting their adult child.

Approximately X years ago, the Taxpayer returned to work on a casual basis to earn money to restore the country property. Depending on the work site's location, the Taxpayer stays either at the country property or hotels for country work, or the city property for metro work. Equipment repairs are conducted at the city property due to its closer proximity to parts suppliers.

To date, the Taxpayer has not generated any income from the country property. Initially, the Taxpayer's mail was delivered via the local post office, but this has since been changed to digital delivery via a laptop. The country property is serviced by electricity, a phone line, LPG gas bottles, and water via water tanks. The Taxpayer's electoral and licence addresses are registered at the city property.

The Taxpayer has informed the local police in the country region that they are based there but frequently travel to the metro region for family matters and occasional work, citing the lack of internet, phone service, and prompt mail delivery in the country region as reasons for this arrangement.

The Taxpayer intends to sell the country property during the 20XX-XX income year. During the same period, they plan to stay at the country property full-time for a total of X months to continue renovations and repairs in preparation for the sale. The Taxpayer also intends to continue travelling between the country property and the city property to assist their adult child and spouse, who has become ill, and for work purposes.

Question

Is the taxpayer entitled to claim the main residence exemption when the country property is sold?

Ruling

The ATO determined that the Taxpayer was not eligible to claim the main residence exemption because the country property did not meet the criteria for being considered the Taxpayer's main residence.

Under section 118-110 of the ITAA 1997, for a property to qualify as a main residence, the ATO considered that the taxpayer must live in the dwelling with their family, have personal belongings in it, use it as the address for mail delivery, have it listed as their address on the electoral roll, and have utilities such as gas and power connected.

In the Taxpayer’s circumstances, these criteria were not met. The Taxpayer and their spouse did not move into the country property immediately after acquiring it, nor did they use it as their main residence. Instead, they stayed at the country property intermittently, primarily depending on work locations and the need for renovations. Throughout this period, the city property remained the primary residence for both the Taxpayer and their spouse. Although the country property was furnished and equipped with utilities, the Taxpayer did not make a complete transition from the city property, which continued to serve as their main residence. Key indicators such as the address on the electoral roll and mail delivery were still linked to the city property.

While the Taxpayer had the intention to move to the country property permanently and use it for primary production, this intention did not materialise due to financial constraints. The intention alone, without actual and consistent occupancy, does not satisfy the requirements for a main residence exemption.

The ATO concluded that the Taxpayer did not establish the country property as their main residence because their primary residence remained at the city property. The intermittent stays at the country property, which were driven by work and repair activities, were not sufficient to establish it as a main residence under the law. Sections 118-110 and 118-150 of the ITAA 1997 require that a property must become the main residence "as soon as practicable" after acquisition and must remain the main residence continuously for the full exemption to apply. These conditions were not met because the Taxpayer continued to maintain their main residence at the city property throughout the ownership of the country property.

As a result, the ATO determined that the Taxpayer could not apply the main residence exemption since the ATO interpreted statutory requirements were not fulfilled. Therefore, when the Taxpayer disposes of the country property, any capital gain or loss cannot be disregarded using the main residence exemption.

However, as the Taxpayer will have owned the country property for more than twelve months when it is disposed of, they may still be eligible to apply the individual discount method to reduce the capital gain, as provided by section 115-25 of the ITAA 1997.

WARNING – if spouses have different main residences they can, broadly, either choose one of the homes as the main residence for both of them for the period or each nominate one of the different homes as their individual main residence for the period. If different homes are nominated, there may be a reduced exemption.

ATO reference *Private Binding Ruling Authorisation No. 11052270634405*
w https://www.ato.gov.au/law/view/document?docid=EV/1052270634405

7. ATO and other materials

7.1 Personal Services Businesses and Part IVA

The ATO has released draft *Practical Compliance Guideline PCG 2024/D2* which explains when the ATO will be more likely to have cause to apply compliance resources to consider the potential application of Part IVA of the ITAA 1936 to an alienation arrangement where personal services income (PSI) of an individual is derived through a personal services entity (PSE) that is conducting a personal services business (PSB). If the entity is a PSB that means that the alienation of personal services income provisions have no application but there remains a risk Part IVA could be applied.

The ATO refers to its long-held view that having a PSB will not prevent Part IVA from applying. The ATO state that existing guidance and judicial decisions have made clear that Part IVA can apply to alienation arrangements involving income splitting and retention of profits where the dominant purpose of entering into the scheme was to obtain a tax benefit.

The ATO acknowledges that the PSI rules have narrowed the scope of Part IVA applying to alienation arrangements, as when the PSI rules apply, no tax benefit arises.

The ATO has identified a non-exhaustive list of indicators of risk. Low risk indicators include:

1. the net PSI is distributed to the individual whose personal efforts or skills generated the income and taxed at their marginal rate;
2. the remuneration received by the individual is substantially commensurate with the value of their personal services;
3. remuneration (for example, salary or wages) is paid to an associate (or a service trust or company) for bona fide services related to the earning of the PSI if that amount is reasonable for the services provided by them;
4. there is a timing difference between the earning of the PSI and the distribution of net PSI to the individual for reasons outside the control of the individual and PSB or where the delay can be explained by circumstances not attributable to tax. This creates only a temporary deferral of tax to a following income year;
5. the PSB makes a superannuation contribution on behalf of the individual, who is an employee of the PSB, for the purpose of providing a superannuation benefit;
6. there is a temporary retention of profits to acquire an asset for a clear commercial purpose.

The following indicators are considered to be indicative of a high-risk arrangement:

1. the net PSI is distributed to another entity so that it is taxed at an overall lower rate than if the individual had received the income directly;
2. the remuneration received by the individual is less than commensurate with the value of their personal services;
3. the PSB does not distribute any income to the individual who provided the actual services;
4. the net PSI (or a part thereof) is split with an associate of the individual, thereby reducing the overall income tax liability;
5. remuneration is paid to an associate (or a service trust) that is not commensurate with the skills exercised or services provided by the associate;
6. the net PSI (or a part thereof) is retained in the PSB. In most cases, the retained funds are subsequently made available to the individual for their personal use (for example, via a complying Division 7A loan), however, the mere fact that PSI is retained is a sufficiently higher-risk indicator.

The ATO acknowledged that the degree to which PSI has been diverted away from the individual is a relevant factor in considering the application of Part IVA, and whether the dominant purpose of the taxpayer entering into the arrangement is to obtain a tax benefit. One of the examples included is where the PSI derived is $400,000 and there is $20,000 retained in the entity concerned. The ATO say of this point:

> *although Part IVA could still apply, we would be less likely to have cause to apply compliance resources to pursuing Part IVA based on the relative materiality of income retained in the lower-taxed entity. In this example, the taxpayer would be provided with education regarding their compliance obligations and should expect monitoring to ensure future compliance.*

There are 13 examples in the draft PCG, with most being able to be immediately understood from their headings. A brief explanation of some of the more interesting examples is included below.

- Low-risk examples
    - Example 1 – interposed trust, no inappropriate diversion or retention of income
        i. All PSI paid out to principal, mix of salary and trust distribution
    - Example 2 – interposed company, no inappropriate diversion or retention of income
        i. All PSI paid out to principal, mix of salary and director's fee
    - Example 3 – interposed trust, multiple test individuals, no inappropriate diversion or retention of income
        i. 3 individuals, 2 PSBs, 1 PSE, all PSI paid out
    - Example 4 – interposed company, temporary deferral of tax
        i. PSI not cleared out because of illness of principal
    - Example 5 – interposed company, superannuation benefit for individual
        i. Salary sacrifice of $80,000 PSI
    - Example 6 – interposed company, retention of profits for commercial purpose
        i. Retains $7,000 to acquire computer, spends $5,000, pays out $2,000 as bonus to principal
- High-risk examples
    - Example 7 – interposed trust, income splitting arrangement
        i. PSI split between principal, spouse and children
    - Example 8 – interposed company, retention of profits arrangement
        i. $400,000 PSI earned, $20,000 paid as salary, balance retained and lent out under Division 7A loan agreement
    - Example 9 – interposed company, retention of profit without commercial purpose
        i. $350,000 - $400,000 in PSI earned, $80,000 paid to principal not commensurate with work done, retained amount used to acquire equipment ($12,000), retention not explicable by need to acquire equipment
    - Example 10 – interposed trust, diversion of income to controlled entity with carry forward losses
    - Example 11 – interposed company, remuneration to associate not commensurate with services provided
    - Example 12 – interposed trust, income splitting to family members, remuneration not commensurate with services provided
    - Example 13 – interposed company with historical losses, retention of profits without commercial purpose
        i. Company conducting 2 activities, one PSI and one sale of goods, loss on sale of goods offset against PSI

The ATO sets out the importance of companies or trusts that an individual may use to divert PSI preparing and maintaining good records that document and explain all transactions and decisions.

The draft guidance is open for comment until 11 October 2024.

COMMENT – the guidance on retaining profits to acquire assets necessary for use in the business is welcomed. No such clear guidance had previously been offered.

The ATO notes that it is common to consider that if the PSI rules have no application because an entity is a PSB, that Part IVA cannot apply, but this is not the case.

ATO reference *Practical Compliance Guideline PCG 2024/D2 Personal services businesses and Part IVA of the Income Tax Assessment Act 1936*
w https://www.ato.gov.au/law/view/document?docid=DPC/PCG2024D2/NAT/ATO/00001

7.2 Changes to promoter penalty laws

Promoter penalty laws aim to prevent and penalise the promotion of unlawful tax schemes. Recent legislative changes, effective from 1 July 2024, have significantly increased the maximum penalties the Federal Court can apply to corporate entities and Significant Global Entities from $7.8 million to $780 million. The time limit for the ATO to bring Federal Court actions has been extended from 4 to 6 years.

The scope of the laws has been expanded to:

1. change the requirement that a promoter (or associate) receive consideration to the promoter (or associate) receiving a benefit, which can include benefits received that are less obvious, intangible, disguised and non-quantifiable;
2. extend the meaning of a tax exploitation scheme to include a scheme that has a principal purpose of obtaining a scheme benefit, and to which the multinational anti-avoidance law or diverted profits tax provisions apply; and
3. extend the scope of promoter penalty laws to apply to all ATO rulings rather than only product rulings.

To report an unlawful tax scheme, individuals can confidentially tip-off the ATO through their website, app, or the hotline. If already involved in such a scheme, individuals are encouraged to contact the ATO to correct their position and reduce penalties.

The ATO refers to Law Administration Practice Statement PS LA 2021/1 Application of the promoter penalty laws for further details about how the ATO will approach the application of these provisions.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/changes-to-promoter-penalty-laws

7.3 ATO views on application of promoter penalty laws

The Practice Statement *PS LA 2021/1 Application of promoter penalty laws* was recently updated by the ATO. The update included adding a new indicator of promoter behaviour relating to early access to superannuation, being where a promoter claims that the scheme conforms with a public, private or oral ruling.

Further updates were made to reflect legislative amendments to Division 290 made by the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024*.

ATO reference *PS LA 2021/1 Application of the promoter penalty laws*
w https://www.ato.gov.au/law/view/document?docid=PSR/PS20211/NAT/ATO/00001

7.4 Deputy Commissioner speech Key Developments in tax administration in Australia

Deputy Commissioner Rebecca Saint delivered a speech at the PacRim Conference regarding key developments in tax administration in Australia. The speech focused on four main themes: understanding the Australian tax environment and the ATO's Tax Avoidance Taskforce, a specific issues update, transparency, and advisor-related matters.

The Deputy Commissioner described Australia's cultural and political landscape as having an emphasis on fairness and integrity, which flows into significant public and political interest in the tax contributions of large businesses. Corporate tax is a substantial part of government revenue, and Deputy Commissioner Saint noted that Australia is vigilant about international tax settings, particularly concerning profit shifting.

Deputy Commissioner Saint noted that the ATO has been actively addressing tax avoidance through the Tax Avoidance Taskforce, which has significantly improved tax compliance among large businesses. The ATO has also been focusing on transparency and has introduced measures to enhance public confidence in the tax system.

Deputy Commissioner Saint identified some specific areas of concerns for the ATO including taxation of intangible assets, the Diverted Profits Tax (DPT) targeting profit-shifting, and emerging tax issues related to data centres. It was also noted that the ATO is preparing to implement the Pillar Two global tax reform measures.

Deputy Commissioner Saint noted that the ATO acknowledges the critical role of advisors in the tax system and referred to various initiatives implemented by the Commissioner to ensure ethical practices among advisors. These include the Large Market Advisor Principles and the Legal Professional Privilege (LPP) protocol. The ATO continues to work with international and domestic bodies to maintain high standards and address tax avoidance.

Deputy Commissioner Saint ultimately concluded that Australia has been a global leader in fighting multinational tax avoidance, with significant improvements in tax compliance among large businesses, although noted that further efforts are ongoing.

w https://www.ato.gov.au/media-centre/key-developments-in-tax-administration-in-australia

7.5 Australian Taxation Office strategic direction statement and corporate plan 2024–25

On 13 August 2024, the ATO published a strategic direction statement and its 2024-2025 corporate plan. The plan provides coverage of the functions of the ATO, the TPB and the ACNC.

The role of the ATO is to contribute to the economic and social wellbeing of Australians by fostering willing participation in the tax, superannuation, and registry systems. The key activities of the ATO are as follows:

1. collect the right amount of tax in accordance with the law in the most efficient way for government and the taxpayer;
2. deliver on government commitments, implement programs and provide assurance to drive improved tax, superannuation and registry system performance;
3. client experience and interactions are well designed, tailored, fair, transparent and designed to make it easy to comply and hard not to;
4. work with and through others to deliver efficient and effective tax, superannuation and registry systems;
5. use data, information, and insights to deliver value for clients and inform decision-making across everything the ATO does; and
6. technology and digital services deliver a reliable and contemporary client experience.

The key activity of the TPB is to provide support to tax practitioners, strengthen the regulation of tax practitioners to increase confidence in the integrity of the tax profession and tax system and address tax practitioner risk and compliance behaviour.

The key activity of the ACNC is to maintain a free and accurate register of Australian Charities (the Charity Register).

w https://www.ato.gov.au/about-ato/managing-the-tax-and-super-system/strategic-direction
w https://www.ato.gov.au/about-ato/managing-the-tax-and-super-system/strategic-direction/corporate-plan

7.6 Employees guide for work expenses

On 21 August 2024, the ATO updated its guide for employees on how to determine if a work expense is deductible and what records need to be kept to substantiate work expenses. In particular, the guide has been updated to incorporate:

1. the electric vehicle home charging rate outlined in PCG 2024/2 *Electric vehicle home charging rate – calculating electricity costs when a vehicle is charged at an employee's or individuals home*;
2. TR 2024/3 *Income tax: deductibility of self-education expenses incurred by an individual*; and
3. the changes made to PCG 2023/1 *Claiming a deduction for additional running expenses incurred while working from home – ATO compliance approach*.

w https://www.ato.gov.au/law/view/document?docid=SAV/EGWE/00001

7.7 Decision Impact Statement – Konebada

On 21 August 2024, the ATO issued the Decision Impact Statement in relation to *Konebada Pty Ltd as trustee for the William Lewski Family Trust v Commissioner of Taxation* [2024] FCAFC 42.

In this case, Konebada Pty Ltd, as trustee for the William Lewski Family Trust, alleged that it paid legal service invoices on behalf of beneficiaries of the Lewski Family Trust through litigation funding agreements. The ATO denied Konebada's claim for input tax credits on the basis that Konebada was merely a third-party payer and made no creditable acquisitions. In the alternative, the ATO contended the Konebada did not make the acquisitions in carrying on a relevant enterprise.

The case decided on whether Konebada made creditable acquisitions while carrying on an enterprise, and whether input tax credits could be claimed.

In the Federal Court, it was determined that Konebada had made an acquisition, being legal services for beneficiaries, but had not done so while carrying on an enterprise. In the Full Federal Court, the appeal on the enterprise issue was dismissed. It followed that Konebada was not entitled to input tax credits.

The ATO considers that input tax credits are not claimable in this case and in similar situations, as the legal services were not acquired in the course of carrying on an enterprise. The ATO noted that whether a litigation funder makes an acquisition and can claim input tax credits depends on the specific facts of each case.

The ATO does not believe this case broadens existing principles established in *Commissioner of Taxation v Secretary to the Department of Transport (Victoria)* [2010] FCAFC 84 related to tripartite arrangements. The ATO intends to seek further judicial guidance on the scope and application of the *Department of Transport* principles to litigation funding arrangements and tripartite arrangements in future cases.

The Decision Impact Statement is opened for comments until 20 September 2024.

ATO reference Decision Impact Statement *Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation*

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/VID253of2023/00001

7.8 Decision Impact Statement – Merchant

The ATO has released its Decision Impact Statement in respect of the judgment of *Merchant and Commissioner of Taxation* [2024] AATA 1102. In *Merchant*, the AAT concluded that there were serious contraventions of sections 34(1), 62(1) and 65(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth). However, the AAT held that a risk of future non-compliance by Gordon Merchant was unlikely due to the following:

1. the AAT agreed with the Commissioner that Gordon was a fit and proper person;
2. Gordon had given undertakings to the AAT which were accepted as appropriate and reasonable, and mitigated the risk of future non-compliance;
3. although the AAT formed the view that the breaches of the SISA were serious, they all arose from a single course of conduct. This was not a case of multiple breaches by Gordon on multiple occasions;
4. the AAT did not place significant weight on protecting the investing public against the risk of re-offending. The AAT noted that Gordon was only ever likely to be a director of the trustee of his own superannuation fund and did not believe that he required protecting from himself. Where he did, Gordon's compliance with his undertakings would offer sufficient protection; and
5. the circumstance that the offending transaction was one put forward by EY, which had acted both in the capacity of the Merchant Group's tax agent and also was the Fund's auditor, was a significant mitigating factor. EY had put forward the arrangement without raising an issue from a superannuation compliance perspective. The AAT accepted that Gordon would have fairly thought that the transaction was lawful from a superannuation compliance perspective.

The AAT set aside the Commissioner's decision to disqualify Gordon under section 126A(2) of the SISA.

The ATO has stated that the "holistic consideration" by the AAT of all of those particular facts is consistent with the Commissioner's approach as outlined in Law Administration Practice Statement PS LA 2006/17 *Self-managed superannuation funds – disqualification of individuals to prohibit them from acting as a trustee of a self-managed superannuation fund.*

Therefore, the decision of the AAT that Gordon was unlikely to be a future compliance risk and setting aside the disqualification of Gordon, was in the ATO's view, reasonably available to the AAT on the facts before it.

The ATO confirmed that each case will be considered on its own individual circumstances. In doing so, the ATO accepts that mistakes can be made by trustees in the management of a fund's affairs, but what is important is that the trustee demonstrates a willingness to comply with their obligations.

As each case is to be decided on its facts, the ATO stated that the decision in Merchant "has limited broader application beyond the 'peculiar circumstances of this case'".

COMMENT – In *Coronica v Commissioner of Taxation* [2024] AATA 2592 (see our August 2024 Tax Training Notes), the AAT recently agreed that the *Merchant* decision did not establish a wider principle beyond the circumstances of the case. Each case will be considered on its own facts.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/2020-6932/00001

7.9 GST status of major food and beverage product lines

On 28 August 2024, the ATO issued an Addendum to Goods and Services Tax Industry Issue Detailed Food List to align the Issue with GSTD 2004/1 Goods and services tax: supplies of combination food, and updates and corrects entries in the Issue.

Items descriptions was updated to exclude combination foods with one or more taxable foods, and water with additives from, being GST-free.

New items were added which include breakfast products (ID 1849), Cordon Bleu (ID 1850) and Patties (ID 1851).

The Addendum applies to tax periods both before and after the date or issue.

ATO reference *Addendum - Details of the GST status of major food and beverage product lines*
w https://www.ato.gov.au/law/view/document?docid=GII/GSTIIFL1/NAT/ATO/00001

7.10 NSW Payroll Tax relief for medical centres

On 23 August 2024, Revenue NSW issued a new practice note, *Commissioner's Practice Note CPN 036 - Relief to Medical Centres*, to explain new amendments made to the *Payroll Tax Act 2007* (NSW) as a result of an announcement made in the NSW State Government Budget 2024-25.

The NSW State Government Budget 2024-25 announced that relief from payroll tax will be provided to medical centres who engage general practitioner contractors. The relief will be in the form of:

1. an exemption for any unpaid payroll tax that was payable on wages paid or payable to relevant general practitioner prior to 4 September 2024; and
2. a rebate for payroll tax on wages paid or payable to general practitioner contractors on or after 4 September 2024 when certain conditions are met.

Exemption for unpaid payroll tax

Clause 10D of Schedule 2 of the Payroll Tax Act provides that relevant general practitioner wages paid or payable before 4 September 2024 are exempt unless payroll tax has already been paid on those wages before that date.

Where payroll tax has not been paid in respect of relevant general practitioner wages paid or payable prior to 4 September 2024, an exemption applies and the employer is not required to declare those payments as wages for payroll tax purposes.

However, where an employer has already paid payroll tax in respect of relevant general practitioner wages paid or payable prior to 4 September 2024, that employer is not entitled to a refund of that tax.

Revenue NSW provides examples to illustrate when paid or payable general practitioner wages are exempt from payroll tax.

Rebate for payroll tax

An employer is entitled to a rebate of payroll tax paid or payable for relevant general practitioner wages if the wages are paid or payable on or after 4 September 2024.

For the purposes of the rebate, for wages to be relevant general practitioner wages, a relevant proportion of all the general practitioner services provided by general practitioners through the medical centre in the relevant

financial year must be provided under a bulk billing arrangement. The "relevant proportion" is at least 80% for a medical centre in Metropolitan Sydney, otherwise it is 70%.

For the purpose of determining the relevant proportion, the employer must consider the total number of general practitioner services that are bulk billed as a proportion of the total number of general practitioner services that are provided at the medical centre.

The amount of the rebate for a financial year is the difference between:

1. the payroll tax payable for the financial year when the relevant general practitioner wages are included; and
2. the payroll tax that would be payable for the financial year when the relevant general practitioner wages are not included.

Revenue NSW provides examples in the practice notes to illustrate when an employer is entitled to a rebate of payroll tax paid or payable for relevant general practitioner wages.

Revenue NSW also provides guidance in relation to what records should be maintained to enable Revenue NSW to calculate the amount of the rebate:

1. the number of general practitioner services bulk-billed and the number of general practitioner services that have out of pocket expenses if you are a mixed billing practice;
2. the locations where general practitioner services are provided if you operate more than one medical centre;
3. how you have pro-rated for any general practitioners engaged under a relevant contract if the general practitioner works at more than one medical centre location;
4. the relevant general practitioner wages for the financial year;
5. the payroll tax payable for the financial year when the relevant general practitioner wages are included; and
6. the payroll tax that would be payable for the financial year if the relevant general practitioner wages are not included.

w https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/commissioners-practice-note-relief-to-medical-centres

7.11 Minimum interest to be held by person to claim principal place of residence exemption

On 30 August 2024, Revenue NSW updated ruling number LT 082 to reflect the changes to the *Land Tax Management Act 1956* (NSW) that introduced a requirement for individuals, who use and occupy land as their principal place of residence (**PPR**), to own a minimum 25% of the property, either individually or jointly, to claim the PPR exemption.

Transitional rules will allow existing landowners, who are eligible to claim the PPR exemption prior to 1 February 2024 and own less than 25% in the property, to continue claiming the exemption in the 2024 and 2025 years. However, those owners will be required to meet the minimum ownership requirement to continue claiming the PPR exemption in 2026 and later years.

w https://www.revenue.nsw.gov.au/news-media-releases/revenue-ruling-the-principal-place-of-residence-exemption

7.12 VIC abolition of business insurance duty

The State Revenue Office Victoria has issued draft revenue ruling DA-068 on the abolition of duty on business insurance. The SRO intends to progressively reduce duty on business insurance over a 10-year period from 1 July 2024.

Division 1 of Part 2 of Chapter 8 of the *Duties Act 2000* charges duty on the amount of premium paid in relation to a contract of insurance that effects general insurance, including business insurance. The Prudential Standard issued by APRA lists examples of kinds of insurance that fall under each class of business.

The rate of duty will decrease by 1% each financial year from 1 July 2024 until it is fully abolished for contracts effected or renewed on or after 1 July 2033.

Comments on the draft ruling are required to be submitted by 5pm on 25 September 2024.

w https://www.sro.vic.gov.au/abolition-duty-business-insurance

7.13 Rental property data matching

On 2 September 2024, the ATO noted that its data matching capabilities are increasing in relation to rental properties.

Software providers must now report rent and expenses for residential rental properties managed by property managers. This data, combined with information from banks, landlord insurers, rental bond authorities, and sharing economy providers, offers insight into common mistakes made by investment property owners.

Common mistakes identified by the ATO include:

1. reporting net rent (after expenses) and then incorrectly claiming expenses again;
2. omitting properties from tax returns;
3. only one owner reporting a property, even when multiple stakeholders are required to report;
4. failing to report rental income from properties purchased with tenants, even if the new owner plans to move in; and
5. incorrectly claiming capital works or depreciating assets as repairs and maintenance.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/rental-property-data-matching

7.14 Data matching programs - lifestyle assets, officeholder data, property management

Lifestyle assets

The ATO will acquire lifestyle assets data from insurance providers for 2023-24 through to 2025-26. Insurance policy data will be collected for the following classes of assets where the asset value is equal to or exceeds the nominated thresholds:

1. caravans and motorhomes – minimum asset value threshold of $65,000;
2. motor vehicles – minimum asset value threshold of $65,000;
3. thoroughbred horses – minimum asset value threshold of $65,000;
4. fine art – minimum asset value threshold of $100,000 per item;

5. marine vessels – minimum asset value threshold $100,000; and
6. aircraft – minimum asset value threshold $150,000.

The data collected will include client identification details and policy details. The data will be acquired to improve profiling risk for taxpayers and provide a holistic view of taxpayers' assets and accumulated wealth.

Officeholder data

The ATO will acquire officeholder data from the Australian Securities and Investments Commission, the Office of the Registrar of Indigenous Corporations, the Australian Charities and Not-for-profits Commission, and the Australian Business Registry Service for 2023–24 through to 2026–27. The ATO estimates that records relating to more than 11 million individuals will be obtained.

Property management data

The ATO will acquire property management data from property management software companies for 2018–19 through to 2025–26. The ATO estimates that records relating to approximately 2.3 million individuals will be obtained each financial year.

The data items include:

1. property owner identification details (names, addresses, phone numbers, dates of birth, email addresses, business name and ABNs);
2. property details (property address, date property first available for rent, property manager name and contact details, property manager ABN, property manager licence number, property owner or landlord bank details);
3. property transaction details (period start and end dates, transaction type, description and amounts, ingoings and outgoings, and rental property account balance).

w https://www.legislation.gov.au/C2024G00493/asmade/text
w https://www.legislation.gov.au/C2024G00495/asmade/text
w https://www.legislation.gov.au/C2024G00490/asmade/text

7.15 On ATO radar for Next 5,000 groups

The ATO has outlined key priorities for the Next 5,000 private groups program for the 2024–25 financial year.

The Next 5,000 private groups tax performance program is a fundamental part of the ATO's strategy for managing Australia's wealthiest privately owned entities. The ATO is setting clear expectations for these groups as taxpayers.

The Next 5,000 going forward

The ATO has stated that they will continue to conduct streamlined assurance reviews for groups with intricate structures and perform risk reviews for the remaining groups.

Importance of Record Keeping and Tax Management

The ATO states that proper documentation and procedures are crucial for avoiding substantial costs. The ATO gives an example of one Next 5,000 group which failed to provide a clear source of funds loaned to related entities due to inadequate record keeping. A review of bank statements uncovered unreported funds, resulting in a tax liability exceeding $27 million, plus additional advisor costs.

Insights from ATO Findings Report

The ATO publishes an annual finding report for the Next 5,000 program which offers insights into common pitfalls and strategies for avoiding these issues. The report is based on data from assurance and risk reviews and serves as a guide for identifying and addressing prevalent issues.

w https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/on-our-radar-for-next-5000-groups

7.16 How to report if your social club is not income tax exempt

The ATO has made it clear that being a not-for-profit organisation does not automatically qualify the not-for-profit organisation for income tax exemption. Social clubs or associations typically do not meet the criteria for exemption unless they are:

1. a registered charity with the Australian Charities and Not-for-profit Commission; or
2. one of the eight categories eligible for self-assessment of exemption as specified in Division 50 of the ITAA 1997.

If a social club or association's primary purpose is to provide social and recreational facilities or activities for members to pursue shared interests, it is considered taxable. If a social club or association is taxable, the social club or association is required to file an income tax return annually or submit a non-lodgment advice.

If a social club is not income tax exempt and it has received a letter from the ATO requesting the lodgment of a NFP self-review return, the return must be submitted by 31 March 2025 to confirm its taxable status.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/how-to-report-if-your-social-club-is-not-income-tax-exempt

7.17 Reporting when you're unsure if you have charitable purposes

On 6 September 2024, the ATO published guidance on its website for not-for-profits not registered with the Australian Charities and Not-for-profit Commission that are unsure about whether it has a charitable purpose.

If an NFP is unsure about its tax status and is now considering if it needs to register with the ACNC as a charity, the NFP can take the following steps to lodge the NFP self-review return:

1. select 'yes' or 'unsure' to the question - 'Does the organisation have any charitable purposes?'; and
2. submit the NFP self-review return with an 'income tax exempt' outcome. The ATO may contact the NFP to offer support guidance to establish its tax status.

The ATO website further provides that a charitable NFP can choose not to register with the ACNC as a charity, however it would not be eligible to self-assess its income tax exemption. This NFP would be a taxable NFP and may be required to lodge an annual income tax return or notify the ATO of a non-lodgment advice.

w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/reporting-when-youre-unsure-if-you-have-charitable-purposes

8. Tax Professionals

8.1 Changes to transitional rule for code changes determination

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

The original start date for compliance with these obligations was 1 August 2024. Following feedback from the tax professional's industry, the Determination has been amended.

Under the new section 100, the obligations no longer apply from 1 August 2024 but from one of two later dates, depending on the size of the practitioner's firm as of 31 July 2024.

For practitioners with 100 or fewer employees, obligations take effect from 1 July 2025. This includes individual practitioners, companies, partnerships, and employees or members of those entities.

For other practitioners, obligations apply from 1 January 2025. Newly registered practitioners follow the same timeline based on firm size or start date. If a practitioner changes firms, their transitional period adjusts according to their new firm.

Additionally, the amendment clarifies that obligations the obligations in relation to false and misleading statements apply to statements made on or after the relevant transition period ends.

In relation to the obligations to notify clients of matters relevant to engaging a tax agent, Item 2 modifies the timeframe for reporting pre-1 August 2024 events to 30 days after the end of the relevant transitional period, rather than 90 days after 1 August 2024, if the matter still remains relevant at that time.

Finally, the implementation of the changes to the transitional rule does not include the previously announced requirement for the agent to be taking genuine steps towards compliance for the deferral to apply (see our August 2024 Tax Training Notes).

w https://www.legislation.gov.au/F2024L01118/asmade/text

8.2 Motion to disallow code changes determination defeated

On 10 September 2024, the Senate voted on a motion to disallow *Tax Agent Services (Code of Professional Conduct) Determination 2024*. The disallowance motion was introduced by Senator Dean Smith on 14 August 2024.

The motion was defeated with the Senate divided 31 votes in favour and 31 votes opposed. If this motion had passed the now deferred 1 August 2024 changes would not have come into effect.

w https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/28063/&sid=0000

8.3 TPB webinar on whistleblowing and confidentiality obligations

On 24 July 2024, the TPB hosted a webinar about the obligations to report potential misconduct by other tax practitioners, obligations of confidentiality when making such disclosures, situations which qualify for whistleblower protection, and other options for reporting concerns.

On 16 August 2024, the TPB updated its website with links to the webinar recording, webinar slides and relevant hyperlinks. The TPB has also compiled answers to the following questions which were raised during the webinar:

1. How are the new whistleblowing laws different from the old ones?
2. If a new potential client approaches me and, on review of their tax returns and financial documents, they do not appear to be following the law, would I be covered by the whistleblower protections if I reported this to the ATO?

   The answer here is no, as there is no existing relationship. The person would need to be a client to obtain whistleblower protection.

3. Who can be an eligible whistleblower?
4. How do I qualify for whistleblowing protection?
5. If I'm not an eligible whistleblower, can I still qualify for protection as an individual if I make a disclosure?
6. Can someone seek information about the person who complained about them through the *Freedom of Information Act 1982*?
7. What is the process to make a disclosure to you?
8. Who can I make a disclosure to?
9. Why are disclosures made to the TPB prior to 1 July 2024 not covered by whistleblower protection?
10. How do things work within a practice when an employee of a client discloses to their tax practitioner? Is the practitioner allowed to speak to other employees involved in doing the work for that client?
11. I'm a tax agent and my client ignores my advice to act lawfully and instructs me to stop work. The client then engages a new tax agent. What can I do to inform the new tax agent?

    The answer here is: '*You cannot disclose any information relating to the client's affairs to the new tax agent without the client's permission or a legal duty to do so. It will be for the new tax agent to ascertain whether the deductions claimed are lawful. You are, however, able to advise the ATO of this matter if you consider that the information may assist the Commissioner of Taxation to perform their functions or duties under a taxation law in relation to the client, noting that you had a previous relationship with the client and you are eligible for whistleblower protections. This will not contravene the Code, in particular Code item 6 which relates to confidentiality of information relating to a client's affairs.*'

w https://www.tpb.gov.au/whistleblowing-and-confidentiality
w https://www.youtube.com/watch?v=RTPDGPEIgD0

8.4 TPB fact sheet updates for increased penalty unit value

The TPB has updated the following four fact sheets to reflect the increased Commonwealth penalty unit which came into effect on 1 July 2024:

1. TPB(I) 36/2021 Supervisory arrangements under the Tax Agent Services Act 2009;
2. TPB(I) 38/2023 What is a BAS service?
3. TPB(I) 39/2023 What is a tax agent service?
4. TPB(I) 40/2023 What is a fee or other reward?

Penalty units are used calculate fines under Commonwealth laws, by multiplying the value of one penalty unit by the number of penalty units prescribed by the offence. The Commonwealth penalty unit increased by 5.4% from $313 to $330 for offences committed from 1 July 2024. The amount will continue to be indexed every three years in line with the CPI as per the pre-existing schedule.

Relevantly for these fact sheets, the penalty for a person other than a registered agent providing a tax agent service or BAS service for a fee or other reward is 250 penalty units (now $82,500) for an individual or 1,250 penalty units (now $412,500) for a body corporate.

w https://www.tpb.gov.au/tpbi-362021-supervisory-arrangements-under-tax-agent-services-act-2009
w https://www.tpb.gov.au/tpbi-382023-what-bas-service
w https://www.tpb.gov.au/tpbi-392023-what-tax-agent-service
w https://www.tpb.gov.au/tpbi-402023-what-fee-or-other-reward

8.5 ATO tips for protecting your clients and practice from scheme promoters

The ATO has published a webpage containing tips for managing risks of promoter penalties and for protecting clients and practices from scheme promoters.

The ATO encourages tax professionals who identify potential unlawful tax and superannuation schemes to notify the ATO. Assisting clients who are involved in unlawful schemes to contact the ATO can help resolve issues collaboratively. Early reporting of such schemes can prevent others from facing significant penalties and help eliminate promoters of unlawful schemes from the profession.

Protecting your practice

The ATO states that tax professionals should be vigilant in protecting their practices from involvement in suspect schemes. The ATO recommends:

1. undertaking due diligence when acquiring a business and carefully reviewing the tax planning practices and processes to ensure their legality;
2. ensuring employees' attitudes towards risk are in line with the services provided; and
3. maintaining strong governance, including oversight of tax advice services and careful scrutiny of marketing materials.

For those providing tax and superannuation planning advice, it is vital to assess the level of risk that will be accepted and have robust processes in place to avoid breaching promoter penalty laws inadvertently. The ATO reminds tax professionals to be cautious with the schemes they recommend and states that they should:

1. identify when an arrangement may be an unlawful tax or superannuation scheme;
2. be aware of the risks involved in facilitating such a scheme; and
3. ensure a reasonably arguable position for any tax advice provided, based on accurate facts and thorough legal analysis.

Promoter penalty laws can apply to arrangements with only one client, not just widely marketed schemes.

Managing client relationships and risks

Clients seeking high-risk tax arrangements can increase a practice's exposure to promoter penalty risks. Tax professionals should consider distancing themselves from clients who persistently pursue high-risk or unlawful schemes, especially when these clients refuse to heed professional advice.

If clients ask about schemes or structures aimed at minimising tax, tax professionals should educate them about the differences between legitimate tax planning and abusive tax avoidance schemes. Clients should also be made aware of the potential risks, including penalties, interest, and the loss of retirement savings if they become involved in unlawful schemes.

In relation to superannuation specifically, the ATO recommends that tax agents should advise their clients that:

1. it is the client's responsibility to take reasonable care in complying with their tax and super obligations;
2. if involved in an unlawful tax or super scheme, the client may be liable for the tax they avoided, plus penalties and interest;
3. if involved in a super scheme, the client may risk losing some or all of their retirement savings; and
4. a professional registered tax agent has a responsibility to exclude any false or misleading claims from their return.

Encouraging clients to make a voluntary disclosure to the ATO can help mitigate potential penalties and reduce the risks associated with involvement in unlawful tax or superannuation schemes.

w https://www.ato.gov.au/about-ato/tax-avoidance/understanding-tax-schemes/tax-professionals-protecting-your-clients-and-practice

8.6 Approved SMSF auditor checklist for ATO audits of SMSF auditors

The ATO has published a detailed checklist of the main issues the ATO looks for when auditing or reviewing a self-managed super fund (SMSF) auditor.

This includes audit processes and documentation and completion of the SMSF independent auditor's report (IAR) (NAT 11466-07.2019).

The checklist includes several tables, which contain references to the requirements imposed on SMSF auditors by relevant accounting standards, audit standards and obligations under the *Superannuation Industry (Supervision) Act 1993* and Superannuation Industry (Supervision) Regulations 1994.

w https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/in-detail/smsf-resources/approved-smsf-auditor-checklist

8.7 Debt deduction creation rules and private groups

The ATO has published new information on its website to help tax professionals understand how the Debt Deduction Creation Rules (**DDCR**) may affect private group clients. The rules took effect on 1 July 2024. The rules are part of the Thin Capitalisation provisions. The DDCR applies to multinational businesses (that is, businesses operating in Australia and at least one other jurisdiction), including private businesses and privately owned groups.

The DDCR apply to disallow debt deductions that arise from related party debt created in connection with certain acquisitions, payments or distributions from associate entities.

Private group clients should be aware of the following:

1. the DDCR apply to entities, together with their associated entities, that have more that $2 million of debt deductions for an income year;
2. these rules may affect private groups that hold a controlling interest in an offshore entity, regardless of the offshore entity’s size or turnover;

3. the 90% Australian assets threshold exemption does not exempt entities from the DDCR;
4. the DDCR can apply to entirely domestic arrangements;
5. complying Division 7A loans are not excluded from the operation of DDCR.

The DDCR will impact all lodgments from 1 July 2024 onwards, as well as any relevant arrangements carried over from previous income years.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/debt-deduction-creation-rules-and-private-groups
w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/debt-deduction-creation-rules-and-division-7a