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TAX TRAINING NOTES

Monthly tax training

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1 Cases

1.1 SDRQ – recoupment of capital losses

Facts

SDRQ was a member of a group of companies that had interests in an engineering company (**Company A)** and a property investment company (**Company B**).

Mr P is a key director of this group of companies with considerable experience in property development as well as qualifications and experience in engineering.

Mr P established Company A on 17 July 1981 to provide consulting engineering services. Mr P has been a director of Company A since 24 July 1981. The shares in this company were held by Mr P and his family before a transfer of the shares to SDRQ.

Mr P established Company B on 29 December 1981 as a property investment company. Mr P has been a director of Company B since 22 January 1982. The shares in this company were held by Mr P and his wife before a transfer of the shares to SDRQ.

Company A provided a variety of services such as identifying properties for purchase, obtaining development approvals, arranging leasing and management for both SDRQ and Company B. In January 1989, the only customers that Company A had were SDRQ and Company B. These services were mainly performed by Mr P and he did not charge SDRQ and Company B for his services, and any charges that were made were not at arm's length rates. The fees charged by Company A were at heavily discounted rates when viewed in conjunction with the Rawlinson's guide on what the going market rate for the fees was. Mr P made this tactical decision so Company B and SDRQ were able to generate more profit.

No evidence of management or a fixed term agreements between Company A and Company B and SDRQ were able to be produced. Any fees exchanged for Company A's services were not formalised and there were no written agreements of any fee structures.

SDRQ and Company B did not own any premises, plant or equipment and did not hire any employees.

Company A employed Mr P on or about 1 January 1989 as a managing director of Company A.

On 7 October 1988 Mr and Mrs P purchased a home using more than $5,000,000 lent to them by SDRQ. Concerned that a FBT liability could arise from this borrowed sum, Mr P sought to repay the full amount to SDRQ to minimise the exposure. On 31 January 1989, SDRQ acquired 100% of the shares in Company A and Company B from Mr P and members of his family for $3,000,000 per company.

The Commissioner submitted that Mr P determined the share transfer price for Company A and Company B for the main purpose of eliminating the $5,000,000 loan and eliminating the FBT liability. No documents could be produced of the discussions or calculations used to arrive at the sum. Mr P and Mr R (the tax agent) produced a spreadsheet and two letters to detail the price of the Company A shares however these documents were contradictory and inconsistent with the evidence that Mr P provided in the proceedings.

SDRQ believed that a decline in the Sydney property prices and a financier taking action against a loan facility led to Company A and Company B encountering financial difficulties. Company A had a history of net operating losses from the income years of 1982 until 1989 (with the exception of minor net operating profits in 1983 and 1987). Company A also had a history of negative net assets, amounting to $40,712.63 in the year ended 30 June 1988.

On 20 May 1991, SDRQ transferred the shares in Company A to Mr P for a nominal amount. As a result, SDRQ recorded a capital loss of $2,999,895 in the 1991 tax year (**1991 Loss**).

On 29 July 1991, SDRQ transferred the shares in Company B to Company C for a nominal amount. As a result, SDRQ recorded a capital loss of $2,999,998 (**1992 Loss**). Company C was the trustee of a discretionary trust of which Mr P and his family were beneficiaries.

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SDRQ carried forward 1991 Loss and 1992 Loss. These losses were set off against capital gains made by SDRQ in the year ended 30 June 2011, resulting in SDRQ having no net capital gains for that year.

On 15 April 2015 the Commissioner amended the assessment of SDRQ for the year ended 30 June 2011 increasing its taxable income by $4,366,652. The Commissioner did not accept that SDRQ had made the 1991 Loss and the 1992 Loss. The Commissioner was not satisfied that SDRQ's cost for the shares in Company A included the consideration paid to Mr P. At the time, section 160ZH(9) of the ITAA 1936 provided as follows:

> (*c) the consideration paid or given by the taxpayer in respect of the acquisition would, but for this paragraph, be greater or less than the market value of the asset at the time of the acquisition and the taxpayer and the person from whom the taxpayer acquired the asset were not dealing with each other at arm's length in connection with the acquisition of the asset, the taxpayer shall be deemed to have paid or given as consideration in respect of the acquisition of the asset an amount equal to the market value of the asset at the time of the acquisition.*

The Commissioner considered that Mr P and SDRQ were not acting at arm's length and the value of the shares in Company A when they were transferred to SDRQ on 31 January 1989 was less than the consideration provided by SDRQ.

The Commissioner also considered that the value of the shares in Company B was not nominal when they were transferred from SDRQ to Company C as trustee of a discretionary trust on 29 July 1991. Section 160ZD of the ITAA 1936 provided that, where parties are not dealing at arm's length on a transfer of a CGT asset, the consideration deemed to be received by a person is the market value of the asset at the time. As such, the Commissioner contended that he could not be satisfied that a capital loss had been made with respect to the shares in Company B.

The Commissioner imposed a shortfall penalty of 50% in the amount of $656,806 for SDRQ for making a false or misleading statement resulting from recklessness.

On 25 May 2015 SDRQ objected to the amended assessment and the penalty assessment. SDRQ accepted that it and Mr P were not acting arm's length when it acquired the shares from him but contended that the market value of the shares in Company A was equal to or greater than the consideration provided by SDRQ.

SDRQ accepted that it was not acting at arm's length with Company C at the time of the transfer of the shares in Company B to Company C but reiterated that the shares in Company B had nominal value and relied on the evidence of a valuer that the shares had nil value. Part of the reason for this was that Company B had given a guarantee of the debts of the all the companies in the group, including SDRQ. The group debts at that time (inclusive of selling costs and interest) were $50.3 million, with total assets of $31.9 million.

The Commissioner did not provide any valuation evidence on the value of the shares in Company B in 1991 but noted that a contingent liability for the guarantee was not disclosed in the financial statements of Company B. The Commissioner contended that it could not be accepted that such a guarantee had been given.

On 22 December 2015 the Commissioner disallowed SDRQ's objection to the amended assessment and on 1 April 2016 disallowed the objection to the penalty assessment.

SDRQ applied to the AAT for review of the objection decisions.

Issues

1. Whether, when SDRQ acquired Company A shares in 31 January 1989, the market value of Company A was at least $3 million.
2. Whether, when SDRQ disposed of Company B shares on 29 July 1991, the market value of Company B was nil.
3. Whether a 50% penalty for recklessness should have been imposed.

Decision

<u>Market Value of shares in Company A at 31 January 1989</u>

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The Tribunal noted that the test to determine the market value of the shares in Company A was what a willing purchaser would have paid a vendor not unwilling, but not anxious to sell in accordance with *Spencer v Commonwealth* (1907) 5 CLR 418.

The Tribunal noted that the only customers of Company A were SDRQ and Company B and there was no agreement between Company and the other companies as to the rates that Company A was permitted to charge for its services. The Tribunal also noted that Company A's business was wholly dependent upon Mr P providing the services.

The Tribunal considered it very unlikely that a purchaser would buy into a business that was so highly dependent upon a managing director and who had obvious conflicts of interest

Any evidence that Mr P had produced of how the price for Company A shares were decided upon was unclear. The evidence provided by Mr P and Mr R (the tax agent) were at best a reconstruction, instead of a clearly set out methodology detailing the calculations performed to ascertain the market price.

The Tribunal was not satisfied that the shares in Company A had a market value of $3,000,000 as at 31 January 1989.

Market value of shares in Company B at 29 July 1991

The Tribunal accepted that there was sufficient evidence that Company B had given the guarantee.

The Tribunal accepted that there was a real possibility that this guarantee would be called upon, which has the effect of rendering the Company B shares of no value to a hypothetical purchaser and, therefore, given the group's liabilities of $50.3m greatly exceeded its assets, and the financial position of Company B generally, the shares in Company B had nominal value as 29 July 1991

Accordingly, the Tribunal was satisfied that SDRQ was entitled to claim the 1992 Loss.

Penalty

The Tribunal noted that the penalty only applied to the extent of the claiming of the 1991 Loss on the shares in Company A.

The Tribunal noted that recklessness occurs when the conduct is beyond mere carelessness or inadvertence and includes conduct that displays indifference or disregard of the risks that a reasonable person in the same circumstances would foresee.

The Tribunal noted that, in circumstances where SDRQ was aware that it had acquired the shares in Company A other than from an arm's length dealing, it should have obtained an independent or expert valuation of the shares for the purpose establishing its costs base.

Further, SDRQ did not obtain professional taxation advice when it sold the shares in 1991 or when it claimed the capital loss in 2011.

The failure to obtain valuations at the time of acquisition of the shares in 1989 or obtain tax advice in 1991 when the shares were sold or 2011 when the loss was claimed amounted to recklessness.

TIP – it may be that there were concerns about FBT because until the decision in *J & G Knowles & Associates Pty Ltd v. Federal Commissioner of Taxation* (2000) 96 FCR 402 it was less clear when a benefit provided to someone who was an employee, but also controlled the entity providing the benefit, might be subject to FBT. In *Knowles,* benefits provided were not found to be 'in respect of' the employment of an employee.

Citation *SDRQ and Commissioner of Taxation* [2019] AATA 2003 (DP Molloy, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA//2019/2003.html

1.2 Homefront Nursing – payroll tax and contractors

Facts

Homefront Nursing Pty Ltd had two medical centres in Taree, New South Wales.

During the payroll tax years ended 30 June 2013 to 30 June 2016, Homefront Nursing engaged general practitioners (GPs) to perform medical services at the medical centres. A number of GPs conducted their activities through their own companies.

At the start of the engagement, the company and the GP would enter into an agreement, which provided that:

1. the company operated medical centres and had agreed with the GP to engage the GP for the provision of general practice medical services on behalf of the company at the medical centres;
2. the company was to provide the GP with administrative services, clerical and professional staff and facilities, and plant and equipment at the medical centres;
3. the GP was to be engaged as an independent contractor and be responsible for all insurances, taxes and other compliances;
4. the GP was to maintain a functioning provider number for Medicare purposes, and Local Medical Officer status with the Department of Veterans' Affairs;
5. the GP was to exercise its own professional judgment in relation to the provision of medical services;
6. the GP was required to provide the company with all such information and documents as the company may require, to keep and maintain all records required by law, which were agreed to be the property of the company;
7. the GP was prohibited from copying or removing the records from the medical centres;
8. the GP must use best endeavours to promote the interests and welfare of the company and the patients;
9. the GP was to be entitled to 4 week's unpaid leave of absence;
10. the GPs had minimum contracting hours to provide medical services; and
11. the agreement could be terminated by 4 weeks' notice.

The agreement provided that Homefront Nursing was to pay the GP 71.5% of gross earnings generated by the GP, calculated on a fortnightly basis, although for the first 13 weeks of the engagement, Homefront Nursing was to pay the GP a minimum fee of $3,600 per week, if 71.5% of gross earnings did not exceed $3,600.

The GP was to invoice Homefront Nursing with a tax invoice inclusive of GST.

The amount received by the GP for providing medical services can be categorised under three main types of receipts:

1. bulk billing receipts, where the patients assigned their Medicare and DVA payments to the GPs;
2. private billing, where patients paid for the medical service and recovered an 85% refund from Medibank or DVA themselves;
3. third party payments, where the fees in respect of patients requiring medico-legal reports are invoiced to a third party payer (presumably largely insurance companies), and the payment is collected by Homefront Nursing.

There was an arrangement between the GPs and Homefront Nursing in relation to the process by which bills were collected. Homefront Nursing handled claims by GPs on Medicare/DVA and directed Medicare and DVA to pay bulk billed amounts to a clearing account managed by Homefront Nursing. Fees from private patients or other sources of receipts were also held by the medical centres.

The money paid into the Homefront Nursing clearing account was identifiable as being generated by the relevant GP. Homefront Nursing would retain the agreed percentage for the provision of services, facilities and staff at the medical centre, and pay the agreed percentage to GPs, without any deductions for tax or superannuation. Those amounts paid to the GPs were reconciled by the company to the source of the fees received.

Homefront Nursing treated amounts received for medical services in its account as part of its income, and payments to ‘contractors’ as expenses in its accounts.

The Chief Commissioner of State Revenue assessed Homefront Nursing for payroll tax in respect of the payments to the GPs, on the basis that the contracts with the GPs were relevant contracts under section 32 of the *Payroll Tax Act 2007* (NSW).

Homefront Nursing argued that the 'relevant contracts' with the GPs were exempt under section 32(2)(b)(i) of the PTA. Section 32(2)(b)(i) of the PTA provides a contract is exempt if the services are not ordinarily required in the taxpayer's business and the contractor performs similar services for the public generally:

> *(2) However, a '**relevant contract**' does not include a contract of service or a contract under which a person (the '**designated person**') during a financial year in the course of a business carried on by the designated person:*
>
> *(b) is supplied with services for or in relation to the performance of work where:*
>
> *(i) those services are of a kind not ordinarily required by the designated person and are performed by a person who ordinarily performs services of that kind to the public generally…*

Homefront Nursing submitted as a company it does not require medical services at all and is incapable of receiving them.

The Chief Commissioner submitted that the exemption under section 32(2)(b)(i) is not applicable as the services supplied to Homefront Nursing are of a kind ordinarily required by it so that it can accommodate patients at its medical centres. The Chief Commissioner also relied on the decision in *Levitch v CCSR* [2014] NSWCATAD 215 to support the proposition that it is possible for the services referred to in the definition of 'relevant contract' to be supplied by both the putative 'employer' and 'employee'. That case concerned a firm of architects that engaged an architect/contractor to prepare plans. A submission that the contractor only had a relevant relationship with the end client was rejected. The contractor was found to have supplied services to the firm by serving the needs of its clients.

Homefront Nursing also submitted that it collected the medical fees on behalf of GPs.

In response, the Chief Commissioner contended that there was no relation of agency between Homefront Nursing and the GPs, and that the amounts paid to the GPs are paid or payable by an 'employer' for or in relation to the performance of work relating to a relevant contract and caught by section 35 of the PTA, regardless of its source.

Section 35 of the PTA provided:

> *(1) For the purposes of this Act, 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 during that financial year.*
>
> *(2) If an amount referred to in subsection (1) is included in a larger amount paid or payable by an employer under a relevant contract during a financial year, that part of the larger amount which is not attributable to the performance of work relating to the relevant contract ... is as determined by the Chief Commissioner...*

The Chief Commissioner sought to distinguish the case of *Optical Superstores Pty Ltd v CSR* [2018] VCAT 169. In *Optical Superstores*, the amounts paid to the optical centre for services provided by optometrists to clients were found to be held on trust for the optometrists due to the explicit trust language used in the agreement, and the manner in which the funds were treated even though they were not kept as separate trust monies.

In this case, Homefront Nursing indicated that it regarded the monies collected by it as subject to some sort of obligation, although the precise terms were not obvious.

Neither Homefront Nursing nor the Chief Commissioner made any submission about the source of the payments made to the GPs from the three categories referred to above.

Issues

1. Whether the contracts between Homefront Nursing and the Chief Commissioner are 'relevant contracts' under section 32 of the PTA?
2. Whether the payments to the GPs were 'wages' under section 35 of the PTA?

Decision

Relevant Contracts

The Senior Member held that the exemption under section 32(2)(b)(i) of the PTA did not apply.

Homefront Nursing conducted a business of providing a medical centre at which GP services are provided. It ordinarily required the services of GPs in order for it to carry on its business. Although the GPs could be regarded as ordinarily providing services to the public generally, section 32(2)(b)(i) also required that the services are of a kind not ordinarily required by Homefront Nursing.

Wages

The Senior Member considered that the issue was whether the amounts received by Homefront Nursing and paid on were received for its own account out of which it paid the GPs (which would be 'wages' under section 35 of the PTA), or whether it received those amounts on behalf of the GPs.

The Senior Member held that a distinction needed to be drawn between the different types of receipts, being bulk billing, private patients or third party billing.

In relation to Medicare and DVA payments, the Senior Member held that based on the relevant Act, the GPs had not assigned in law or equity their entitlements to Medicare or DVA benefits. This was notwithstanding the wording of the agreement and the accounting and tax treatment of the billing receipts.

The Senior Member considered the position different for the private billings and third party payments, and the Senior Member ordered the matter to be remitted to the Chief Commissioner for reassessment, so that the source of the payments could be further investigated by the Chief Commissioner.

Citation *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145 (SM Hamilton SC, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2019/145.html

1.3 Campbell – distributions from foreign trusts

Facts

The background circumstances in this case were not entirely clear from the reported decision, but it appears that a trust or trusts was set up in 1957 by persons that included the father of Sandra Campbell (the **Original Trust**). The Original Trust held land in Auckland, New Zealand either directly or through a company. The land had been purchased in 1925.

The shares in the company were sold on 7 February 2001. The Original Trust was wound up and the proceeds of sale were distributed to three trusts established for Sandra and her two siblings. Sandra's trust was the Sandra Campbell Trust, which was established on 9 May 2001.

The trustee of the Sandra Campbell Trust was always a foreign resident for Australian income tax purposes.

The Sandra Campbell Trust was originally settled by a $1,000 distribution from another trust.

The amounts received by the Sandra Campbell Trust were approximately $3,000,000.

In the years ended 30 June 2013 and 30 June 2014, Sandra received the following amounts from or on behalf of the trustee of the Sandra Campbell Trust:

Transaction date	Payer Name	Amount
12/12/2012	The Sandra Campbell Trust	$19,000
1/02/2013	The Sandra Campbell Trust	$9,500
8/03/2013	The Sandra Campbell Trust	$15,500
8/04/2013	The Sandra Campbell Trust	$17,390
8/05/2013	The Sandra Campbell Trust	$20,000
4/06/2013	NZ Funds Management Limited	$17,957
13/06/2013	Humphries Associates Limited Trust	$9,711
1/01/2014	Fortune Manning Lawyers	$102,012
21/03/2014	Fortune Manning Lawyers	$132,100
13/06/2014	Fortune Manning Lawyers	$120,000

The financial statements for the Sandra Campbell Family Trust for the 2013 and 2014 years indicated that it had accumulated income of $1.9million.

On 3 February 2016 the ATO wrote to Sandra stating that she needed to lodge her tax returns for the 2013 and 2014 years based on information available to the ATO from AUSTRAC.

The ATO received no response to this letter.

On 30 March 2016 the ATO again wrote to Sandra about her outstanding tax returns for 2013 and 2014 years. The ATO warned Sandra that if she did not lodge the tax returns before 4 May 2016, default assessments would be issued and she may be liable to an administrative penalty of 75% of the tax liability.

On 4 April 2016 Sandra's accountant, Mr Mel James, wrote to the ATO. The letter acknowledged receipt of the letters of 3 February and 30 March and noted that Mr James had been trying to get in touch with Sandra and had, after some effort been able to do so. The letter noted that the tax returns would be lodged as soon as possible.

On 20 May 2016 the ATO wrote again to Sandra noting that she still had not lodged her tax returns and advised that would be proceeding to issuing a default assessment and imposing a 75% penalty.

On 27 May 2016, the ATO issued default assessments to Sandra as follows:

1. year ended 30 June 2013 - taxable income of $109,057 and tax payable as $28,298.09; and
2. year ended 30 June 2014 - taxable income of $354,130 and tax payable as $132,905.50.

The ATO also issued Sandra with default assessment penalties of $23,801.25 and $108,175.50 for the 2013 and 2014 years respectively.

On 20 February 2017 Sandra lodged an objection to the default assessments and the penalties. It appears that Sandra contended that the distributions to her represented corpus of the Sandra Campbell Trust. This was because any distributions were potentially assessable to Sandra under section 99B of the ITAA 1936. Amounts that are corpus of the trust are generally not assessable under section 99B. Section 99B provides as follows:

> *Receipt of trust income not previously subject to tax*
>
> *(1) Where, at any time during a year of income, an amount, being property of a trust estate, is paid to, or applied for the benefit of, a beneficiary of the trust estate who was a resident at any time during the year of income, the assessable income of the beneficiary of the year of income shall, subject to subsection (2), include that amount.*
>
> *(2) The amount that, but for this subsection, would be included in the assessable income of a beneficiary of a trust estate under subsection (1) by reason that an amount, being property of the trust estate, was paid to, or applied for the benefit of, the beneficiary shall be reduced by so much (if any) of the amount, as represents:*
>
> > *(a) corpus of the trust estate (except to the extent to which it is attributable to amounts derived by the trust estate that, if they had been derived by a taxpayer being a resident,*

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> *would have been included in the assessable income of that taxpayer of a year of income);*
>
> *…*

On 15 January 2018 the ATO disallowed Sandra's objection. The ATO did not accept that the distributions to Sandra were corpus and considered that the default assessment penalties had been properly imposed.

On 22 May 2018 Sandra applied to the AAT for a review of the objection decision. No witness statements were given in support of Sandra's case in the Tribunal. Mr James gave a summary of what he understood to be the history of the source of the funds to pay the distributions.

In relation to the default assessment penalties, Mr James contended there were a number of circumstances which meant that the penalties should have been remitted, including the following:

1. that the Commissioner had stated in a house committee that default assessments are only issued where a taxpayer is not corresponding and Mr James had corresponded with the ATO of behalf of Sandra;
2. the completion of Sandra tax returns involved a difficult situation as they needed to find documents from 40 or 50 years ago;
3. Mr James had difficulty in getting in contact with Sandra;
4. the ATO had not corresponded again after Mr James' letter of 4 April 2016 and had simply proceeded to issue a default assessment;
5. he [Mr James] was undergoing cancer treatment at the time;
6. he [Mr James] had been verbally informed by an ATO officer that no default assessments would be issued for at least 7 weeks.

Issues

1. Whether the distributions were assessable to Sandra under section 99B of the ITAA 1936?
2. Whether the default assessment penalties were properly imposed?
3. Whether the default assessment penalties should have been remitted?

Decision

<u>Distributions assessable under section 99B?</u>

The Tribunal was not satisfied on the evidence supplied on behalf of Sandra that the distributions were corpus of the Sandra Campbell Trust. The summary provided by Mr James had no corroborating evidence.

<u>Were penalties correctly imposed?</u>

The Tribunal consider that, as Sandra had failed to give the Commissioner tax returns necessary to determine her tax liability for the 2013 and 2014 years, the 75% penalties had been correctly imposed.

<u>Should the penalties have been remitted in full or in part?</u>

The Tribunal considered the factors outlined in PS LA 2014/4 where remission, in full or in part, of a default assessment penalty may occur:

1. *an entity has a genuine, yet mistaken, belief that lodgment was not required as opposed to an indifference to, or a rejection of, their obligation* - the Tribunal noted that there was no evidence that Sandra had acted on advice in not lodging her returns and, as such, there was no evidence of any mistaken belief that she did not need to lodge her returns.
2. *an entity understood their obligation to lodge but circumstances beyond their control affected their ability to lodge* – the Tribunal considered that there was no evidence of circumstances affecting Sandra's ability to lodge her returns.
3. *the amount of penalty imposed by law causes an unjust result* – as there was no evidence that Sandra was no aware of her obligations, there was no explanation as to why Sandra had considered she had no

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assessable income and Sandra had not provided a witness statement or appeared before the Tribunal, the Tribunal considered that the penalty was not unjust.

4. *there were credits available to offset the amount of the tax-related liability payable* – not relevant to Sandra's circumstances.
5. *there was extraordinary cooperation during an examination* - not relevant to Sandra's circumstances.

TRAP – in order to be excluded from being assessable as corpus under section 99B, it also needs to be the case that the corpus amount not represent amounts that would have been taxable had they been derived by a resident. This means, to rely on the corpus exclusion, you need sufficient records to demonstrate the source of the corpus amount.

COMMENT – it is not clear when determining whether an amount represents corpus as to whether there should be a 'corpus first', 'corpus last', or 'slice' approach adopted.

Citation *Campbell and Commissioner of Taxation* [2019] AATA 2043 (Member D K Grigg, Brisbane)
w http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2019/2043.html

1.4 Moreton – R&D activities

Facts

In around 2006, Moreton Resources Limited commenced plans to develop an underground coal gasification (**UCG**) facility near Kingaroy in Queensland. The facility would include a gas processing plant and a 400 megawatt gas turbine power plant to produce electricity.

Before commencing construction on the plant Moreton undertook a pilot project to test the viability of using UCG technology to produce UCG synthesis gas (**syngas**) that would then be cleaned and stabilised for production of electricity using gas turbines.

The pilot project failed as in March 2010 the facility broke down after 5 days of operation and caused underground water contamination.

The EPA ordered the facility be shut down and USG was subsequently banned. Moreton continued to do work in relation to the pilot project in 2012 – 2014 and much of this work related to remediation of the site following the failure of the pilot project.

Moreton considered it was entitled to a tax offset for the pilot project activities in accordance with Division 355 of the ITAA 1997 as the activities constituted 'R&D activities'. 'R&D activities' is defined as 'core R&D activities' or 'supporting R&D activities'.

Core R&D activities is defined in section 355-25 as follows (emphasis added):

355-25 Core R&D activities

*(1) Core R&D activities are **experimental** activities:*

(a) whose outcome cannot be known or determined in advance on the basis of current knowledge, information or experience, but can only be determined by applying a systematic progression of work that:

(i) is based on principles of established science; and

(ii) proceeds from hypothesis to experiment, observation and evaluation, and leads to logical conclusions; and

(b) that are conducted for the purpose of generating new knowledge (including new knowledge in the form of new or improved materials, products, devices, processes or services).

(2) However, none of the following activities are core R&D activities:

…

(f) activities associated with complying with statutory requirements or standards, including one or more of the following:

(i) maintaining national standards;

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> (ii) *calibrating secondary standards;*
> (iii) *routine testing and analysis of materials, components, products, processes, soils, atmospheres and other things;*
>
> …

On 21 August 2015, Innovation Australia decided that Moreton's registered activities for the 2012 to 2014 years were not 'core R&D activities' or 'supporting R&D activities. The decision was confirmed, following internal review, on 21 December 2015.

Moreton applied to the AAT for review of the internal review decision.

On 10 September 2018, the AAT affirmed the internal review decision. The AAT found that many of Moreton's registered activities in relation to the pilot project in the 2012 to 2014 years were excluded from the definition of 'core R&D activities' as they were 'activities associated with complying with statutory requirements or standards'. In response to Moreton' submission that the activities were supporting R&D activities because they directly related 'core R&D activities' that were registered for the year ended 30 June 2010, the AAT concluded that the activities in the 2010 year were not 'core R&D activities' as the activities were simply 'testing the application of existing technology at a particular site and nothing more'.

Moreton appealed to the Full Federal Court.

Issue

Whether the AAT had erred in its construction of 'core R&D activities'?

Decision

The Full Court considered that the AAT had erred in considering that for activities to be 'R&D activities' the activities must be 'experimental' such that 'R&D activities' did not include activities having the purpose of generating new knowledge with respect to the application of an existing technology at a new site.

The Full Court held that the words 'experimental activities' in the lead in section of 355-25(1) of the ITAA 1997 have little work to do beyond the specifically listed activities in the section.

As the AAT had erred, the Full Court ordered that the decision be set aside and the matter be remitted back to the AAT.

Citation *Moreton Resources Limited v Innovation and Science Australia* [2019] FCAFC 120 (Davies, Moshinsky and Steward JJ, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC//2019/120.html

1.5 Fitzmaurice – disqualification as SMSF trustee

Facts

The Alisar Superannuation Fund was established on 26 May 2004 with Alisar Pty Ltd as trustee. Louise Fitzmaurice and her husband, Antony Bullock, are the only members of the fund. Louise and Antony are both directors of the trustee.

The fund's main asset is a parcel of land located in Dundee Beach, Northern Territory. In 2010, Louise and Antony built two small dwellings on the Dundee property.

On 24 January 2012 a storm caused significant damage to the Dundee property. Louise and Antony transferred money out of the fund into their personal bank accounts to pay different contractors for work carried out to repair the Dundee property.

On 6 November 2012 Louise and Antony's family home burnt down. In the fire, all records kept regarding the fund were lost, including invoices and receipts relating to the work carried out on the Dundee property. Emergency

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funds of $2,000 were paid by the insurer, followed by $9,750 for temporary accommodation. Monies were taken from the fund to pay for clothes, care for animals, secure accommodation and purchase two vehicles.

The ledger report for the fund showed amounts of $9,948, $9,920 and $2,304 being withdrawn on 11 December 2012, 11 December 2012 and 24 December 2012 respectively.

On 26 June 2013 Alisar Pty Ltd entered into a written lease agreement over the Dundee property with itself as trustee for the Canada Trust. Louise executed the agreement in her capacity director of the landlord and tenant. The lease agreement provided that the Canada Trust was entitled to use the premises for business operations including the installation of short term accommodation cabins for short term rentals, that any improvements made belonged to the Canada Trust and that the Canada Trust was responsible for insuring all stock, furnishings and plant and equipment.

Insurance payments for the fire were received in February 2013 and the fund was reimbursed for the expenses paid by it.

On 23 January 2015 the fund's accountant raised concerns about transfers which 'look personal.' The accountant also raised questions as to the lease agreement over the Dundee property, as the accountant could not find any rental income for 2012-2013 or 2013-2014 income years. Antony acknowledged in an email to the accountant that transfers had been made from the fund to their 'savings account and business cheque account' but that they were 'acutely aware that their superfund is not to be accessed.' Antony also stated that the lease over the Dundee property had ended, and that the last group to rent the property was in June 2013.

On 26 November 2015 the auditor of the fund lodged an auditor contravention report with the ATO for the 2012-2013 income year. The report listed the following contraventions:

1. that the trustee failed to collect rent from a related entity;
2. that the combined debit loan account balance was outstanding at 30 June 2014 in the amount of $2,068;
3. that the trustee failed to keep records of permanent works carried out on the Dundee property;
4. that the directors of the trustee caused $38,678 to be withdrawn from the fund over 19 transactions between 10 September 2010 and 24 January 2013. The directors say that this was for the construction of a shed, however there were no withdrawals recorded for site improvements;
5. there was no evidence of the market value of the Dundee property held by the fund.

After being selected for an audit, on 2 August 2016 the ATO issued a position paper to Louise advising her that the Commissioner was considering disqualifying her as a responsible officer for the trustee. The ATO identified the following contraventions:

1. lending money to a member, breaching the ‘sole purpose’ test (sections 65 and 62 of the SIS Act);
2. early release of benefits where the member did not satisfy the statutory test for financial hardship (section 31 of the SIS Act);
3. late lodgement and failure to lodge annual returns (section 35D of the SIS Act);
4. failure to make and maintain investments at arm’s length (section 109 of the SIS Act);
5. failing to keep an up-to-date market valuation of the major asset of the fund (section 35B of the SIS Act); and
6. record keeping failures (sections 35AE, 35B, 35C and 103-105 of the SIS Act).

On 2 September 2016 the Commissioner advised Louise she had been disqualified under section 126A(2) of the SIS Act.

On 28 August 2017 Louise lodged an application for review to the AAT and an application for an extension of time. The extension of time to make an application was granted.

Issues

1. Whether trustee had contravened the SIS Act, so that as result, Louise should be disqualified as a responsible office of a trustee of self-managed superannuation fund.
2. Whether she is a fit and proper person to be a director of a body corporate.

Decision

Contravention 1

The Tribunal considered two distinct periods of withdrawals, one being 'the September 2012 withdrawals' related to the storm damage to the Dundee property. The second being the 'post house fire withdrawals' from 6 November 2012 to 24 January 2013.

Regarding the September 2012 withdrawals, the Tribunal noted that the money of the fund was used to pay expenses rather than waiting for an insurance payout. The Tribunal held that this was an improper use of the money of the fund either by way of loan or a payment out in breach of the sole purpose test.

The Tribunal accepted the Commissioner's submission the fund was being maintained for purposes other than the provision of benefit to the members, therefore breaching section 62 of the SIS Act as the assets of the fund were being used to provide financial assistance for the members or associates of the member, being the Canada Trust.

The Tribunal also accepted the Commissioner's submissions that the withdrawals from 6 November 2012 to 24 January 2013 and the consequent repayment of funds in February 2013 constituted the provision of financial assistance to a member or an associate of a member. The Tribunal again held that the trustee was in breach of the sole purpose test.

Contravention 2

The Tribunal considered that regulation 6.01(5) of the SIS Regulations allows members early access to funds where they are experiencing severe financial hardship. The Tribunal noted that there was no evidence to demonstrate that Louise or Antony were suffering severe financial hardship. To establish severe financial hardship the member or members must be receiving Commonwealth income support payments for a continuous period of 26 weeks. This was not the case for Louise and Antony.

Accordingly, the trustee was in breach section 34 of the SIS Act. which requires that the trustee ensure the prescribed standards regarding payment of benefits are complied with at all times.

Contravention 3

Under section 35D(1) of the SIS Act the trustee ensure that the Commissioner is given a tax return. The trustee lodged tax returns for income yeas 2011, 2012, 2013 and 2014. The returns for years 2013 and 2014 were lodged late. The returns for years 2015, 2016, 2017 and 2018 have not been lodged.

The Tribunal held that the Trustee was in breach of section 35D(1) of the SIS Act.

Contravention 4

Regarding business dealings between the SMSF and the Canada Trust, the Tribunal held that there was insufficient evidence provided as to why the Canada Trust was not pursued for rental payments under the lease agreement. Mr Bullock gave evidence that the business operation at the Dundee property finished in June 2013, which is at odds with the fact that the lease agreement was witnessed by Mr Bullock on 26 June 2013.

The Tribunal held that at the very least, the Canada Trust failing to make rental payments to the fund constituted a benefit to the Canada Trust. The Tribunal also found that the lease agreement was an investment not entered into at arm's length, and therefore was in breach of section 109 of the SIS Act.

The Tribunal also held that the fund contravened section 65(1)(b) – the giving of financial assistance to a member or a relative of a member – by delaying recovery action for the debt recorded as a member loan in the ledger of the fund.

Contravention 5

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Regulation 8.02B states that for section 35B of the SIS Act for the 2012-2013 year when preparing accounts and statements as required by section 35(B)(1), an asset must be valued at its market value.

Antony gave evidence that a valuation of the Dundee property had not been obtained from a valuer, although estimations had been obtained from real estate agents. The Tribunal considered that this meant the trustee was in breach of s 35B of the SIS Act.

Contravention 6

The trustee had not provided any documentation regarding the 'emergency' purchases that were made after the house fire. No invoices or receipts were provided for the purchases of the two vehicles.

The Tribunal held that the trustee had failed to comply with the record keeping obligations of the fund.

Disqualification of Louise

In accordance with section 126A(2) of the Act, the Tribunal considered whether the nature, seriousness and number of contraventions provided grounds to disqualify Louise.

The Tribunal was understanding of the unfortunate circumstances experienced by Louise and Antony. However, the Tribunal considered that there was a 'fundamental misunderstanding' by Louise regarding her obligations as trustee. The Tribunal specifically noted the failure of Louise to recognise the obvious conflict arising from the lease to the Canada Trust. The Tribunal considered the number of contraventions, and the nature of such contraventions to be sufficiently serious even though they had no adverse financial impact on the fund.

The Tribunal emphasised that a trustee must have a proper understanding of the legal obligations involved with the maintenance of a superannuation fund. The Tribunal held that it was not convinced that Louise had sufficient understanding, skill or diligence to be a trustee of a self-managed superannuation fund. For this reason, the Tribunal disqualified Louise from acting as a responsible officer of a body corporate of a self-managed superannuation fund.

The Tribunal also accepted and upheld the Commissioner's submission that Ms Fitzmaurice is not a fit and proper person to be a responsible officer of a body corporate under section 126A(3) of the SIS Act.

Citation *Fitzmaurice and Commissioner of Taxation* [2019] AATA 2217 (DP Britten-Jones, Adelaide)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2019/2217.html

1.6 Sole Luna – foreign exchange losses

Facts

Mr Wade was born in Australia some time prior to 1979.

In 1998, while a non-resident, he transferred some assets he owned to the trustee of the PA Wade No.2 Settlement Trust, a trust established in Guernsey. Mr Wade was a named beneficiary of the Wade Trust.

The Wade Trust was first managed by an accounting firm on Guernsey and then, in 1999, it came to be managed by Phillip Evans of Moore Stephens Services SAM in Monaco. Port of Hercules Trustees Ltd was appointed as trustee.

From 2000, Mr Wade spent more time in Australia and it became his main home. Mr Wade became a tax resident of Australia in 2001.

Mr Wade used Davidsons Accountants and Business Consultants in Geelong as his Australian accounting firm. Davidson started lodging tax returns for Mr Wade from 2001.

The Wade Trust owned a company called Starburst Enterprises Limited, a BVI company. Starburst was also administered by Moore Stephens SAM. The Wade Trust also owned a Delaware incorporated company called Three Stars, Inc. and another BVI company called El Condor Ltd.

From 2002 to 2007 the Wade Trust made payments in foreign currencies to Starburst. The Wade Trust stated that these payments were loans. The Commissioner accepted that payments were made but not that they were loans.

The Wade Trust also contended that it made significant Australian dollar loans to Starburst by assigning to Starburst a loan owed to the Wade Trust by PA Wade Management Pty Limited as trustee of the Peter Wade Investment Trust in the amount of $21,000,000. There was a letter dated 13 December 2007 and board minutes of Port Of Hercules Trustees Limited dated 13 July 2004 evidencing this assignment and loan. The Commissioner did not accept that such a loan or assignment had been made.

Sometime in or before 2012 Mr Wade had set up an Australian company called Ralhum Pty Ltd, which was owned by the Peter Wade Investment Trust. Ralhum owned all of the shares in another Australian company, Muhlar Pty Ltd. Ralhum and Muhlar formed a tax consolidated group.

On 28 September 2012 the Wade Trust sold its shares in Starburst to Muhlar, in exchange for a share in Ralhum.

On 19 October 2012 Sole Luna Pty Ltd was appointed as the sole trustee of the Wade Trust. This was part of the process of bringing the assets of Wade Trust to Australia and making the Wade Trust an Australian resident trust.

On 18 March 2013 the Wade Trust and Starburst entered into a loan agreement. The loan agreement referred to loan amounts being advanced by the Wade Trust to Starburst up until 1 March 2013 and provided that interest was payable from 12 September 2013.

On 25 March 2013 Ralhum made an election to apply the TOFA regime to the tax consolidated group with effect from 1 July 2012. Electing into the TOFA regime had the effect of eliminating a taxable exchange gain which Starburst would otherwise have incurred had Starburst repaid its loan to the Wade Trust.

From this time, Starburst made repayments of the foreign currency denominated loan to the Wade Trust. The effect of the TOFA election was that Starburst did not have a taxable exchange gain upon making the repayments.

On 14 June 2013 Starburst and the Wade Trust entered into a Deed of Forgiveness under which the Wade Trust forgave the Australian dollar denominated loan, being an amount of $4,232,995.

The Wade Trust contended that Starburst had paid dividends to it in the years 30 June 2009 to 30 June 2013. The Commissioner only accepted that a dividend had been paid in the 2013 year of $4.5m.

Sole Luna provided the following as evidence of the character of the payments from 2002 to 2007 and that they were made in foreign currencies:

1. financial statements of the Wade Trust for the years ended 31 December 2000 and 2001 and then for the income years ended 30 June 2002 to 30 June 2006 that had been prepared by Moore Stephens;
2. financial statements of the Wade Trust and Starburst for the 18-month period ended 30 June 2003 and for the years ended 2004 to 2013 expressed in Australian dollars. The 2003 to 2008 statements were restated accounts prepared for the purposes of presentation to the ATO.

The Wade Trust had been subject to review by the ATO in 2004 to 2005 and in 2009 to 2010. The Commissioner had not raised any concerns over the loans to Starburst.

In its tax return for the year ended 30 June 2013, the Wade Trust claimed:

1. a deduction of $16,775,094 for a foreign exchange loss upon the repayment of those parts of the loan or loans expressed in foreign currencies in accordance with Division 775 of the ITAA 1997;
2. net capital loss of $4,182,991 arising from the forgiveness of the balance of the Australian dollar denominated loan owing by Starburst.

The Commissioner conducted an audit of the Wade Trust and on 1 June 2017 made a determination under Part IVA of the ITAA 1936 to cancel a tax benefit for the 2013 year, being a tax deduction in the sum of $13,159,489.

On 6 June 2017, the Commissioner issued a Notice of Assessment to Mr Wade in respect of the year ended 30 June 2016 increasing his assessable income on the basis that the trust taxable income that he shared in was higher that was disclosed on lodgement.

On 21 June 2017, the Commissioner issued a Notice of Assessment and a Shortfall Penalty Assessment to Sole Luna for the year ended 30 June 2013.

On 22 June 2017, the Commissioner issued a Notice of Assessment a Shortfall Penalty Assessment to Mr Wade for the year ended 30 June 2015 increasing his assessable income on the basis that the trust taxable income that he shared in was higher that was disclosed on lodgement.

The Commissioner did not accept the payments from the Wade Trust to Starburst were loans, noting that:

1. there was no written loan agreement until 2013;
2. no interest had been charged; and
3. there was no evidence that the loans were secured.

The Commissioner also contended that, to the extent the payments were a loan, it was a single loan, rather than a series of loans and that, as such, former Division 3B of the ITAA 1936 applied to the loan, being a loan entered into before 1 July 2003, and not Division 775 of the ITAA 1997. The difference between former Division 3B and Division 775 was that Division 3B required there to be a ‘loss’ whereas deductibility or income arise under Division 775 upon one of the prescribed ‘forex realisation events’ happening.

To the extent that Division 775 applied, which the Commissioner accepted meant that forex realisation event 2 happened upon repayment, the Commissioner contended that section 775-35(1) of the ITAA 1997 denied a deduction for any foreign exchange loss. That section provides as follows:

> *A forex realisation loss you make as a result of forex realisation event 1, 2 or 5 is disregarded to the extent that it is made in gaining or producing exempt income or nonassessable non-exempt income.*

The Commissioner contended that the only income expected to be earned by the Wade Trust as a result of the loan was the dividend income and that income was exempt income as foreign source income until the Wade Trust become an Australian tax resident in 2012.

The Commissioner also denied the capital loss for the forgiveness of the Australian denominated loan. The Commissioner did not accept there was a loan and was not satisfied that the Wade Trust had established the cost base of the loan or the capital proceeds on forgiveness.

Further, the Commissioner contended that, if there was a loan, it arose from the loan agreement entered into in 2013 and that the cost base of the right to be repaid the loan was the market value of the loan as at 2013. The Commissioner considered that the market value of the loan was nil because Starburst could not repay the loan.

Alternatively, the Commissioner considered that Part IVA could be applied to deny any tax benefit.

The Wade Trust objected to the assessments. In addition to the positions outlined above, the Wade Trust contended that the exchange loss on repayment of the loan was deductible under section 8-1 of the ITAA 1997.

The Commissioner disallowed the objection and the Wade Trust appealed to the Federal Court of Australia.

Issues

1. Whether the payments from the Wade Trust to Starburst from 2002 to 2007 were loans.
2. Whether the Wade Trust was entitled to deduct the foreign exchange losses on repayment of the loans under Division 775 of the ITAA 1997.
3. Alternatively, whether the foreign exchange losses were deductible under section 8-1 of the ITAA 1997.
4. Whether the Wade Trust was entitled to a capital loss for the forgiveness of the balance of the Australian denominated loan.
5. Whether Part IVA should be applied to deny any tax benefit.

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Decision

Were the payments loans?

Steward J considered that there was sufficient evidence in the form of the financial statements for him to be satisfied, on the balance of probabilities, that the payments were loans. Steward J rejected a submission by the Commissioner that the financial statements should not be admitted into evidence, either because:

1. they were not business records within the meaning of section 69 of the *Evidence Act 1995* (Cth) as there was insufficient evidence that the makers of the financial statements had personal knowledge of the facts asserted in the financial statements; or
2. that they should be excluded under section 135 of the *Evidence Act* as, due to irregularities in the financial statements, any probative value was outweighed by the danger that they were unfairly prejudicial to the Commissioner without the source documents from which they were prepared.

Was the foreign exchange loss deductible under Division 775?

Steward J considered that the foreign exchange loss was not deductible due to section 775-35(1) of the ITAA 1997.

Steward J noted that it was necessary to consider whether the dividend income was exempt income. Up until 13 September 2006 former section 23(r) of the ITAA 1936 expressly treated the dividend income as exempt income.

However, from 13 September 2006 the dividend income was simply not included in the Wade Trust's income under section 6-5(3) of the ITAA 1997. Exempt income was defined under section 6-20 of the ITAA 1997 as follows*:*

> ***Exempt income***
> *(1) An amount of ordinary income or statutory income is **exempt income** if it is made exempt from income tax by a provision of this Act or another Commonwealth law.*
> *(2) Ordinary income is also **exempt income** to the extent that this Act excludes it (expressly or by implication) from being assessable income.*
> *(3) By contrast, an amount of statutory income is **exempt income** only if it is made exempt from income tax by a provision of this Act outside this Division or another Commonwealth law.*
> *(4) If an amount of ordinary income or statutory income is non-assessable nonexempt income, it is not **exempt income**.*

Steward J considered that the dividends were ordinary income that was expressly or implied excluded from being assessable income. The dividend income was not statutory income under section 44 of the ITAA 1936 as the dividends were derived from foreign sources. Accordingly, the dividend income was exempt income.

General deductions

Steward J considered that the foreign exchange loss was not deductible under section 8-1 as:

1. there was no 'loss' as a result of the forex loss within the meaning of section 8-1 as the dealings were wholly in foreign currency consistent with the decision of the High Court in *Federal Commissioner of Taxation v Energy Resources of Australia Ltd* (1996) 185 CLR 66. There were no conversion events to cause a loss;
2. there was no nexus with gaining income, as whilst it might be said the loans were advanced to obtain dividend income, that dividend income was foreign sourced and not assessable; and
3. if it was a loss our outgoing, it was a loss or outgoing of capital.

Capital loss

Steward J did not accept the submission that the loan was only advanced in 2013. However, he accepted that the Wade Trust had insufficient evidence of the cost base of the loan, in circumstances where the Commissioner had not accepted that such a loan had been made. Steward J noted that:

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1. there was no direct evidence of what 'appropriate offsets' had taken place to create this loan;
2. no witness with knowledge of these offsets gave evidence about the loan;
3. there was no evidence of repayments by Starburst to the Wade Trust; and
4. the accounts of Starburst and the Wade Trust do not provide a sufficient breakdown of the amounts owing to evidence the Australian dollar denominated loan.

Part IVA

Steward J noted that there was no tax benefit for the reasons set out above so that Part IVA had no application.

Citation *Sole Luna Pty Ltd as Trustee for the PA Wade No 2 Settlement Trust v Commissioner of Taxation* [2019] FCA 1195 (Steward J, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/1195.html

2 Legislation

2.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Putting Members—Interests First) 2019	4/7				
Treasury Laws Amendment (2018 Superannuation Measures No. 1)	24/7				
Treasury Laws Amendment (2018 Measures No. 2) 2019	4/7				
Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) 2019	24/7	1/8	1/8		
Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019	4/7				
Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) 2019	4/7	31/7	1/8		

2.2 Phoenixing measures

The Government has re-introduced a Bill containing proposed measures to address "illegal phoenixing". The previous Bill that contained the measures lapsed due to the Federal election in May 2019.

The measures contained in the Bill include the following:

1. the introduction of offences for persons involved in creditor-defeating dispositions of company property;
2. providing liquidators and ASIC with power to recover assets disposed of in creditor-defeating dispositions;
3. prohibiting the backdating of director resignations and preventing directors from ceasing to be a director when this would leave the company with no directors;
4. bringing GST liabilities into the director penalty notice regime; and
5. expanding the circumstances where the Commissioner can retain refunds.

Creditor-defeating dispositions

The measures introduce criminal offences and civil penalties for:

1. company officers that fail to prevent the company from making creditor-defeating dispositions; and
2. other persons that facilitate a company making a creditor-defeating disposition.

A creditor-defeating disposition is a disposition of company property for less than its market value (or the best price reasonably obtainable) that has the effect of preventing, hindering or significantly delaying the property becoming available to meet the demands of the company's creditors in winding-up.

The criminal offence applies where the company or other person is reckless as to the result of their conduct. The civil penalties apply where a reasonable person would have known the disposition was a prohibited creditor-defeating disposition.

There are some defences available as follows:

1. the disposition was made under a deed of company arrangement or scheme of arrangement;
2. the disposition was made by the company liquidator; or
3. the disposition was made in connection with a course of action and the safe harbour applies to the defendant.

The safe harbour in section 588GA of the Corporations Act applies to a course of action that is reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator. The safe harbour will not apply:

1. where the company has not paid employee entitlements or is not complying with its tax reporting obligations; or
2. the person fails to substantially comply with their obligations to assist a liquidator, controller or administrator.

Someone relying on the safe harbour bears the evidential burden to establish that the safe harbour is made out.

There are additional defences to the civil penalty provisions being where the person:

1. had reasonable grounds to expect, and did expect, the company was solvent and would remain solvent despite making the disposition; there are limitations to this defence;
2. takes all reasonable steps to prevent the company making the creditor-defeating disposition or
3. for a director, if, for illness or some other good reason, the director did not take part in the management of the company at the relevant time.

The measures also provide that a creditor-defeating disposition is recoverable by a liquidator if made whilst the company is insolvent or as a result of which the company immediately becomes involves or enters into external administration within the following 12 months.

Resignations of directors

The measures provide that if a resignation of a director is purported to have occured more than 28 days before it is reported to ASIC, the resignation is treated as being effective on the date it was reported to ASIC.

An application can be made to ASIC or the Court to treat the resignation as effective from an earlier date. The Court can only make such an order if satisfied it is just and equitable to do so.

Applications to ASIC must be made within 56 days of the director's resignation. Application to Court can be made within 12 months or such further time allowed by the Court.

The measures also provide that a resignation or removal of a director is not effective if, following the resignation or removal, there will be no remaining directors of the company. However, where a new director is appointed on the same day, the resignation or removal will be treated as being effective.

Director penalty notices and GST

The legislation, when passed, will apply to tax periods commencing after assent and will allow the Commissioner to issue penalties in the amount of unpaid GST, WET and LCT. As well as making it possible for the Commissioner to make a director personally liable for a penalty in the amount of an unpaid indirect tax liability, the Commissioner is given the power to estimate liabilities. The new penalty regime contains a similar 'lockdown' rule as the current penalty regime. In relation to indirect tax, a director will only be able to escape personal liability for an amount where:

1. A company is placed into administration or liquidation within 3 months of the due date for the liability; or
2. An amount of indirect tax liability was reported within 3 months of the due date for the liability.

Reference *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019* w https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6325%22

2.3 Miscellaneous measures

The Government has introduced a Bill containing miscellaneous that were previously contained in Bills that lapsed due to the Federal election in May 2019.

The measures contained in the Bill include the following:

1. denying deductions for losses or outgoings incurred that relate to holding vacant land except for land:

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(a) used or held available for use by the entity in the course of carrying on a business in order to earn assessable income; or
(b) used or held available for use in carrying on a business by:
  (i) an affiliate, spouse or child of the taxpayer; or
  (ii) an entity that is connected with the taxpayer or of which the taxpayer is an affiliate;

2. extend to family trusts the anti-avoidance rule for closely held trusts that undertake circular trust distributions;
3. permitting the ATO disclose business tax debts to credit reporting organisations; and
4. preventing salary sacrificed contributions from being used to reduce an employer's superannuation guarantee obligations.

Vacant land measures

Under the measures a deduction is denied for loss or outgoing relating to holding land (including interest or any other borrowing costs to acquire the land) and at the earlier (referred to as the **critical time**) if:

1. at the time you incurred the loss or outgoing; or
2. if you have ceased to hold the land, at the time just before you ceased to hold the land,

there is no substantial and permanent structure in use or available for use on the land having a purpose that is independent of, and not incidental to, the purpose of any other structure or proposed structure.

However, you can still deduct the loss or outgoing to the extent that the land is in use, or available for use, in carrying on a business carried on by the taxpayer, an affiliate, spouse or child of the taxpayer or an entity connected with the taxpayer or of which the taxpayer is an affiliate.

The business must be carried on at the critical time unless,

1. the business ceases before the critical time; and
2. the loss or outgoing is otherwise deductible because of the use or availability for use of the land at an earlier time or during an earlier period; and
3. at that earlier time or during that earlier period the land was in use or available for use in carrying on that business,

in which case, it will be sufficient for the business to have been carried on at the earlier time or the end of the earlier period.

Significantly, the measures provide that you treat a building as not being a substantial and permanent structure if it is residential premises constructed, or substantially renovated, while you hold the land unless:

1. the residential premises are lawfully able to be occupied; and
2. the residential premises are:
   (a) leased, hired or licensed; or
   (b) available for lease, hire or licence.

The measures do not apply to companies, superannuation funds that are not SMSFs, managed investment trusts, public unit trusts or a unit trust or partnership if measures would not otherwise apply to each member of the trust or partnership.

The measures apply to losses or outgoings incurred on or after 1 July 2019 (whether the applicable land is acquired before, on or after 1 July 2019).

Reference *Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Bill 2019*
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6369

2.4 Superannuation Measures

A Bill, *Treasury Laws Amendment (2018 Superannuation Measures No. 1) 2019*, has been introduced in Commonwealth Parliament containing various superannuation measures that the Government previously sought to introduce before the Federal election in May 2019.

Employees with multiple employers

The Bill makes amendments to the *Superannuation Guarantee (Administration) Act 1992* (Cth) to allow employees with multiple employers to opt out of the superannuation guarantee regime in respect of an employer.

The Bill provides for the power for the Commissioner to issue an employer shortfall exemption certificate for an employee for a quarter where an application is made to the Commissioner and the person's employer, if all of the following conditions are, in the Commissioner's view, satisfied:

1. without the certificate, the person is likely to exceed their concessional contributions cap for the financial year;
2. after issuing the certificate, the employee will have at least one employer that would have an individual superannuation guarantee shortfall in relation to the employee if they did not make any contributions for the benefit of the employee; and
3. it is appropriate to issue the certificate in the circumstances.

The application for the exemption certificate can only be made by the employee.

The due date for lodging an application is 60 days before the first day of the quarter to which the application relates, although the Commissioner has the discretion to defer to due date.

The amendments apply in relation to quarters starting on or after 1 July 2018.

Non-arm's length income

The Bill re-introduces proposed changes to clarify the non-arm's length income provisions as follows:

1. where a superannuation entity incurs non-arm’s length expenses (this includes where no expense was incurred but might be expected to have been incurred if the transaction were on arm’s length terms) in gaining or producing assessable income, income is included in the entity’s non-arm’s length component;
2. where the right to income from a trust through a fixed entitlement is acquired on a non-arm’s length basis, the income is included in a superannuation entity’s non-arm’s length component (this was not clear under the existing law).

Example (from EM) – non-arm’s length expenses
An SMSF acquired a commercial property from a third party at its market value of $1,000,000 on 1 July 2015.

The SMSF derives rental income of $1,500 per week from the property ($78,000 per annum).

The SMSF financed the purchase of the property under limited recourse borrowing arrangements from a related party on terms consistent with section 67A of the SIS Act.

The limited recourse borrowing arrangements were entered into on terms that include no interest, no repayments until the end of the 25 year term and borrowing of the full purchase price of the commercial real property (i.e. 100 per cent gearing).

The SMSF was in a financial position to enter into limited recourse borrowing arrangements on commercial terms with an interest rate of approximately 5.8 per cent.

The SMSF has not incurred expenses that it might have been expected to incur in an arm’s length dealing in deriving the rental income. As such, the income that it derived from the non-arm’s length scheme is non-arm’s length income. The rental income of $78,000 (less deductions attributable to the income) therefore forms part of the SMSF’s non-arm’s length component and is taxed at the highest marginal rate. However, there will be no deduction for interest, which under the scheme was nil.

Non-arm’s length interest on borrowings to acquire an asset will result in any eventual capital gain on disposal of the rental property being treated as non-arm’s length income.

The amendments apply in relation to income derived in the year ended 30 June 2019 and later income years, regardless of whether the arrangement was entered into before 1 July 2018.

Limited recourse borrowing arrangements

The Bill introduces changes to the total superannuation balance test so that the total superannuation balance of a member of an SMSF is increased by the member's share of the outstanding balance of a limited recourse borrowing arrangement commenced after 1 July 2018 where:

1. the member has satisfied a condition of release with a nil cashing restriction; or
2. the limited recourse borrowing arrangements are between the fund and one of its associates.

The changes apply to borrowings arising under contracts entered into on or after 1 July 2018.

Reference *Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2019*
w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6368

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3 Rulings

3.1 Tax cost setting rules – churning measure

On 17 July 2019, the ATO finalised its guidance on the churning measure in section 716-440 of ITAA 1997. The Ruling was initially issued in draft form as LCR 2018/D3.

Generally, the measure is intended to prevent step ups in the tax cost of assets where a joining entity was acquired from a foreign-resident entity whose gain on the transfer was disregarded under Division 855 (where a non-resident is not required to pay record gains or losses on assets that are not taxable Australian Real Property (TARP) or indirect TARP interests).

The measures have the effect of switching off certain entry tax cost setting rules in circumstances where:

- a foreign resident entity ceases to hold membership interests within the test period in:
  - the joining entity; or
  - a higher level entity which holds membership interests in the joining entity directly or through one or more interposed entities and which becomes a member of the consolidated group at the same time;
- a capital gain or capital loss (if any) made by the foreign resident entity would be disregarded because of the operation of Division 855 of ITAA 1997; and
- there has been no change in the majority economic ownership of the joining entity throughout the test period.

The test period is the period starting 12 months before the joining time and ending immediately after the joining time.

The Ruling supplements the Explanatory Memorandum to the *Treasury Laws Amendment (Income Tax Consolidation Integrity) Bill 2018*, which contains a detailed outline of the measure, by providing practical examples on:

- the application of the measure generally
- the 'associate-inclusive' total participation interests requirements
- the relief for post-acquisition restructures within 12 months

There is a provision that ensures that the churning measure does not apply where it is reasonable to conclude that 50% or more of the participation interests in the joining entity have not been held by an entity (the control entity) and its associates throughout the test period. The provision is intended to cover situations where the ownership of a newly acquired joining entity is restructured within 12 months of it first becoming majority (50% or more) owned by an entity and its associates.

The Ruling also provides an obligatory warning on the potential application of the general anti-avoidance provisions of Part IVA in relation to artificial or contrived arrangements designed to exploit the 12-month test period.

The Ruling applies to an arrangement that commences on or after 7.30 pm AEST on 14 May 2013 in respect of an entity that becomes a subsidiary member of a consolidated group or multiple entry consolidated (MEC) group. However, the extension of the control test to cover participation interests of associates will only apply to an arrangement that commences on or from 15 February 2018.

ATO reference *Law Companion Ruling* LCR 2019/2
w https://www.ato.gov.au/law/view/document?docid=COG/LCR20192/NAT/ATO/00001

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4 Determinations

4.1 Debt deductions for thin capitalisation

The Commissioner has issued a Taxation Determination on meaning of 'debt deductions' for the purpose of the thin capitalisation provisions.

The ATO set out that the objective of the thin capitalisation provisions in Division 820 of the ITAA 1997 is to ensure that entities that are foreign controlled, or entities that control foreign entities or carry on a business through a foreign branch, do not allocate an excessive amount of debt to their Australian operations.

Under the thin capitalisation rules (for non-banks) all or part of each 'debt deduction' (broadly, interest and other costs of borrowing) of the entity for an income year is disallowed when the entity's 'adjusted average debt' exceeds its 'maximum allowable debt'. The adjusted average debt of an entity for an income year includes all of the debt interests of the entity on issue that give rise to 'debt deductions' of the entity for that or any other income year. The thin capitalisation rules only apply if a taxpayer's associate inclusive debt deductions for an income year are greater than $2 million.

The definition of 'debt deduction' includes any amount directly incurred in obtaining or maintaining the financial benefits received, or to be received, by the entity under the scheme giving rise to a debt interest. In TD 2019/12 the Commissioner states that he will interpret this limb of the definition of debt deduction broadly to include, without limitation, costs of tax advisory services giving rise to or in connection with the debt interest, establishment fees in relation to the debt interest, fees for restructuring a transaction that gives rise to a debt interest, legal costs of preparing documentation associated with a debt interest and any related stamp duties and regulatory filing fees, costs to maintain the right to draw down funds and any costs considered to be borrowing expenses under section 25-25 of the ITAA 1997 in relation to a debt interest.

Where the thin capitalisation rules apply to an entity, TD 2019/12 may result in the amount of an entity's 'adjusted average debt' being higher than it had previously considered it to be – as although interest may not be payable on a debt instrument, there could be advisor costs that are treated as debt deductions.

The interpretation of the definition of debt deduction in TD 2019/12 will also be relevant to calculating whether an entity exceeds the $2m threshold.

The Determination applies to income years commencing both before and after its date of issue.

ATO reference *Taxation Determination* TD 2019/12
w https://www.ato.gov.au/law/view/view.htm?docid=%22TXD%2FTD201912%2FNAT%2FATO%2F00001%22

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5 Private binding rulings

5.1 GST and sale of property

Facts

An entity owns a property and has entered into a contract for sale.

The property was rented to a third party for a number of years and GST was remitted in relation to the rent.

After the third party vacated the property it was provided to an associate that was registered for GST for no rent, however the associate paid outgoings such as rates and land tax. The total costs paid was less than $75,000.

It is not stated in the ruling request, but it appears that the entity had deregistered for GST.

Questions

1. Is the entity required to register for GST as a result of the property sale?
2. Is the sale of the property subject to GST?

Decision and reasons

The ATO determined that there was no need for the entity to be registered as the entity did not meet the turnover threshold of $75,000 or more.

While there are market value substitution rules in Division 72 of the GST Act in relation to supplies to associates, those rules do not apply where the associate is registered or required to be registered, unless the associate would not have been entitled to a full input tax credit. Although it is not in the background facts, it appears that the associate must have been entitled to full input tax credits.

The ATO then reason that the sale of the property will not cause the entity to be registered for GST as the sale of the property is the sale of a capital asset from a leasing enterprise carried on, and in working out your projected annual turnover you exclude sale proceeds from capital assets.

The ATO conclude that as the entity is not registered and is not required to be registered there will be no GST to be remitted on sale.

TIP – if a property had ceased to be rented, and a decision is made not to rent the property again, and then the choice was made to deregister as the entity was under the threshold, it should be possible to choose to deregister without the anti-avoidance provisions applying. This is because deregistration is a choice that can be made, and the anti-avoidance provisions do not apply to such choices. If you put yourself in a position to make such a choice however, the anti-avoidance provisions could apply.

TRAP – if your turnover drops because a tenant leaves, but you are still looking for a tenant, you may still be required to be registered as you would have projected annual turnover. If you can choose to deregister for GST purposes, there could be increasing adjustments to be accounted for.

ATO reference *1051514078891*
w https://www.ato.gov.au/law/view/document?docid=EV/1051514078891

5.2 Division 7A and forgiveness

Facts

A private company made a loan to a trust that was a shareholder or associate of a shareholder in the private company. A loan agreement complying with Division 7A was put in place.

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The trust then on-lent money to related trusts which used the money to cover costs of acquiring or holding properties.

Loan repayments were made for a period of time in line with the Division 7A requirements.

The properties that had been financed in part through the on-loaned amounts were acquired in mining areas, were performing badly, and were sold making significant losses.

Issue

If the debt is written off, can the 'undue hardship' provision in section 109G(4) of ITAA1936 operate to prevent there being a deemed dividend?

Decision and reasons

No.

Under section 109G(4) a deemed dividend is not taken to arise where:

1. A debt is forgiven because payment of the debt would cause undue hardship;
2. When the entity incurred the debt it had the capacity to pay the debt; and
3. The entity lost the ability to pay the debt as a result of circumstances beyond the entity's control.

The ATO set out that undue hardship is not defined and that it has not received judicial consideration in the context of Division 7A. The ATO cite *Re Wilson and Minister for Territories* (1985) 7 ALD 225, where undue hardship was considered to be hardship that is excessive in the circumstances and more than substantial hardship.

The ATO then note that trusts are not specifically identified as being able to benefit from 109G(4) but that for tax purposes an entity includes a trust, but that in testing whether there will be undue hardship, the test is whether the trustee, as trustee only, and not in its personal capacity, will suffer undue hardship.

The ATO then reason that as a trustee has a right of indemnity out of trust assets, in a situation where assets exceed liabilities a trustee could not suffer hardship.

They then set out however that where liabilities exceed assets, such that a trustee's personal assets might become exposed, the trustee might in their personal capacity suffer undue hardship, but would not suffer hardship in their capacity as trustee.

The ATO conclude that 109G(4) could not operate to prevent a dividend to a trustee, be it an individual or corporate trustee.

ATO reference *1051519939819*
w https://www.ato.gov.au/law/view/document?docid=EV/1051519939819

5.3 15-year retirement exemption and 'retirement'

Facts

A company operated for more than 15 years. Two directors that were appointed on incorporation each held 50% of the shares on issue.

The company sold its business, realised a capital gain, and wanted to apply the 15-year retirement exemption.

One of the directors was aged over 55 years old at the time of the sale.

Prior to the sale, the director was working in excess of 60 hours per week.

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As part of the sale, they are an employee director of the purchaser, have reduced management responsibilities, working 40 hour weeks and 9 day fortnights. The director is required to support the purchaser's growth over the 'next few years' but is likely to reduce to part time employment over the course of the phase out period. The phase out period is to be reviewed annually, but has a maximum number of years.

As an employee they will take longer holidays to use up their accumulated leave.

Issue

Is the director considered to be selling 'in connection with' their retirement as is required by the 15-year retirement exemption?

Decision and reasons

No.

Consistent with their website guidance the ATO set out that they consider that there would need to be at least a significant reduction in the number of hours the individual works or a significant change in the nature of their present activities to be regarded as a retirement. However, they state it is not necessary for there to be a permanent and everlasting retirement from the workforce.

The ATO consider that although a gradual reduction in the director's hours of work will occur incrementally over a period of up to an agreed number of years, the ATO considered that there will not be a significant reduction in the number of hours they will work over the period. The ATO state that the director will 'remain a leader in Company Y and is central to the strategic decisions which Company Y makes. We do not consider that there will be a significant change in the nature of their present activities for some time.'

They conclude that the sale is not considered to be 'in connection with the retirement' of the director.

ATO reference *1051527300988*
w https://www.ato.gov.au/law/view/document?docid=EV/1051527300988

5.4 Treatment of building plans not used

Facts

An entity owns several commercial properties in a shopping complex. They incur expenditure with a builder to draw up plans for an extension where the purpose of the extension was to increase the lease income from a current tenant.

Due to a decline in the retail sector and increased competition it is decided not to go ahead with the planned extension.

Issue

How should the expenditure be treated?

Decision and reasons

The ATO set out the in the ruling a series of questions that they answered as 'yes' or 'no' in relation to various treatments of the amounts.

The ATO set out that although the cost of the plans, if the capital works had been completed, could have been deducted under Division 43, as the works were never completed, the costs could not be deducted under Division 43.

The plans could not in the ATO view be depreciating assets, as the ATO did not consider they had a limited effective life. It is not clear why the ATO did not consider the copyright in the plans which would have led to them being depreciable assets.

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In relation to whether the expenditure was blackhole expenditure to be deducted over five years the ATO reasoned that it was not as, although it was capital expenditure, it could not be deducted under the blackhole provisions as the amount was included in the cost base of a CGT asset.

The ATO stated that the plans could not be CGT assets in their own right. The analysis is not clear, but they appear to equate the plans to being akin to information, knowledge or know-how, which are not considered to be CGT assets.

The ATO conclude that the costs form part of the fourth element of cost for the store to be extended as, at the time the plans were drawn up, the purpose or expected effect of the expenditure was to increase the asset's value.

ATO reference *1051526149714*
w https://www.ato.gov.au/law/view/document?docid=EV/1051526149714

5.5 Adopting a foreign income year

Facts

An Australian tax resident derives income from a foreign country. The foreign country's income year ends on 31 December and the person's accountant finds it difficult to get timely information to determine what income has been earned between 1 January and 30 June in order to prepare an Australian income tax return.

Issue

Will the Commissioner allow the person to prepare their Australian return to only include the income for the foreign income year ended before the Australian income year?

Decision and reasons

The ATO state that they will allow the return to be prepared on the desired basis.

The ATO quote from IT 2498 *Income Tax: foreign tax credit system: currency translation of foreign income: trading stock and depreciable plant: basis of returning foreign income: capital gains/losses* where, paragraph 39 states:

... individual taxpayers who are required to prepare foreign source income accounts on a basis other than a year ending 30 June and who can demonstrate difficulties in dissecting the income/expenses for the purposes of returning on a strict Australian income year basis in relation to a year of income, may be permitted to return the foreign source income in his or her Australian return for that year of income on the relevant foreign income year basis. ...

They then say '… as a result of regulatory and reporting requirements imposed by the relevant foreign tax authorities you face significant difficulty in obtaining information in relation to the foreign income within a suitable timeframe to include in your Australian tax return by your lodgment due date.'

They agree to the person only including the foreign financial year information in their Australian tax return so long as the difficulties continue. They do however note that income that can be readily returned on an Australian income year basis should continue to be accounted for in that way.

ATO reference *1051526470410*
w https://www.ato.gov.au/law/view/document?docid=EV/1051526470410

6 ATO and other materials

6.1 Capital allowances

The ATO has published guidance on the immediate deduction threshold of $100 for business expenditure that applies when a taxpayer is not using the simplified depreciation rules available to SBEs.

The guidance notes that, where the simplified depreciation rules are not being used, taxpayers can spend $100 or less to acquire a tangible asset in the course of carrying on a business and assume it is revenue in nature such that the expenditure is immediately deductible.

Not all items of expenditure can be claimed under the immediate deduction threshold. The ATO's guidance sets out when it is not available, such as when expenditure is incurred on:

- establishing a business or business venture or building-up a significant store or stockpile of assets.
- assets held by you under a lease, hire purchase or similar arrangement.
- assets acquired by you for lease or hire to (or that will otherwise be used by) another entity.
- assets included in an asset register you maintain in a manner consistent with reporting requirements under accepted Australian accounting standards.
- any asset that forms part of a collection of assets that is dealt with commercially as a collection (for example, by being sold and leased-back as a means of raising finance for the business).
- trading stock or spare parts.
- assets that are part of a composite asset where the total cost is more than $100.

w https://www.ato.gov.au/Business/Depreciation-and-capital-expenses-and-allowances/In-detail/Low-value-pools/Capital-allowances--low-cost-assets---threshold-rule-for-small-business/

6.2 Taxable payments annual report

The taxable payments annual report for the year ended 30 June 2019 is due to be lodged by 28 August 2019. For the 2019 year these measures applied to the building and construction and cleaning and courier service industries.

The road freight, security, investigation, surveillance and information technology (IT) industries come into the annual reporting system from 1 July 2019.

w https://www.ato.gov.au/Business/Business-bulletins-newsroom/Employer-information/Taxable-payments-annual-report-due-28-August/

6.3 Common GST errors

The ATO has published guidance on its website of common GST errors.

The common errors identified by the ATO include:

1. the failure by registered taxpayers to report the on-sale of an imported good and account for the GST where the on sale is a taxable supply;
2. non-resident suppliers charging GST where they install or assemble imported goods but do not import the goods into Australia;
3. taxpayer's incorrectly treating themselves as an 'exporter' and, therefore, not being subject to GST on the supply of goods.

w https://www.ato.gov.au/Business/GST/In-detail/Rules-for-specific-transactions/International-transactions/Common-GST-errors---importing-or-exporting/

6.4 Compensation for super funds from financial service providers

The ATO has published guidance materials on the implications of superannuation funds receiving compensation from financial institutions and insurance providers, noting that there are possible superannuation, income tax and GST consequences of receiving compensation.

The fact sheets apply to circumstances where the superannuation fund entered into an agreement with a financial services provider or insurance provider, paid the fees or premiums from fund assets, allocated the cost to the members, and:

- the financial service or advice was not provided
- the advice was deficient, or
- the insurance premiums for death or disability insurance cover were overcharged.

w https://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/APRA-resources/Fact-sheets/Compensation-received-by-super-funds-from-financial-institutions-and-insurance-providers/
w https://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/APRA-resources/Fact-sheets/Deficient-financial-advice/
w https://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/APRA-resources/Fact-sheets/Fees-where-no-service-provided/
w https://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/APRA-resources/Fact-sheets/Overcharged-insurance-premiums/

6.5 Changing business structures

The ATO has published guidance on the common errors it sees when taxpayers change business structures from a sole trader to a more complex structure. The errors include:

1. reporting income for the wrong entity.
2. claiming expenses incurred by another entity as business expenses.
3. personal use of business bank accounts.

The ATO sets outs some of the matters that clients should be reminded of when adopting new business structures, such as trusts or companies.

w https://www.ato.gov.au/Tax-professionals/Newsroom/Income-tax/Changing-business-structure/

6.6 Rental property owners toolkit

The ATO has noted in a recent publication in a recent review they identified that 9 out of 10 individual taxpayers with a rental property have made mistakes in their tax returns. This led them to publish a rental owners property 'toolkit' on their website.

The focus areas of the toolkit are on areas where mistakes are commonly made:

1. Claiming interest on a loan taken out to purchase a rental property;
2. Claiming borrowing expenses incurred when taking out a rental property loan;
3. Claiming repairs, maintenance and capital expenditure; and
4. Errors made when renting out a room, a unit or a whole house on an occasional basis through the sharing economy.

w https://www.ato.gov.au/Tax-professionals/Newsroom/Income-tax/Rental-property-owners-toolkit/

6.7 #TaxBoss – nailing your return

The ATO in a publication titled '#TaxBoss – How to nail your return' has outlined what they consider to be the top four mistakes to avoid when preparing a tax return:

1. lodging the tax return before all prefill data is available or failing to report all income;
2. wrongly claiming items as work related expenses. The ATO notes that the three golden rules for work related expenses are as follows:
    a. you have to have spent the money yourself and not been reimbursed
    b. the claim must be directly related to earning your income, and
    c. you must have a record to prove it.
3. Forgetting to keep receipts.
4. Claiming something the person never paid for.

w https://www.ato.gov.au/Media-centre/Media-releases/How-to-nail-your-return/