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TAX TRAINING NOTES

Monthly tax training

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About Brown Wright Stein

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

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

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

1 Cases

1.1 BPFN – NALI

Facts

BPFN is the corporate trustee of a self-managed superannuation fund. The members of the SMSF are Mr J, his wife and their two children. The SMSF is the sole unitholder of a unit trust, the JJUT.

In the years ended 30 June 2015, 2016 and 2017 the SMSF derived income from distributions from the JJUT.

ABC Pty Ltd is a corporate entity related to BPFN. Mr J was the sole director of ABC Pty Ltd at all relevant times. The sole shareholder of ABC Pty Ltd is BPFN.

DEF is a discretionary trust related to BPFN. Mr J and his wife are the primary beneficiaries of DEF. The trustee of DEF was X Finance Pty Ltd, of which Mr J and his son were the directors. The sole shareholder of X Finance Pty Ltd is a corporate entity, A Pty Ltd, a company of which Mr J was a director and 80% shareholder.

A series of loan agreements were entered into between JJUT, ABC and DEF. They can be summarised as follows:

- JJUT was the lender under a loan agreement with ABC Pty Ltd, the borrower;
- ABC was the lender under a loan agreement with DEF Pty Ltd, the borrower; and
- DEF would enter into loan agreements with third parties on arm's length terms.

It was intended that DEF would draw down on the loan facility with ABC, and ABC would draw down on the loan facility with JJUT. The loans from DEF to third parties charged interest at commercial rates. The loan agreement between JJUT and ABC, and ABC and DEF contained broadly the same terms, including:

1. the loan amount was all monies advanced by the lender or at the borrower's direction;
2. the facility was for a term of 15 years or otherwise as agreed or repayable on demand;
3. the purpose was to on-lend (for ABC to on lend to DEF, and for DEF to on lend to third parties); and
4. the interest rate would be charged at a rate that was no less than what was being charged to on lend.

In addition to the above, DEF granted ABC a charge over its assets (which was eventually registered on the PPSR), and Mr J provided a guarantee to ABC. The loan agreements entered into with DEF were secured by first or second ranked mortgages.

The structure of these arrangements was discussed between Mr J and his accountant Mr B. Mr J's solicitor Mr C drafted the documents, and was conscious that the transactions should be on arm's length terms.

As a result of this arrangement, JJUT would derive interest income and distribute that interest income to BPFN as trustee for the SMSF. BPFN as trustee for the SMSF reported this income as exempt current pension income (ECPI) in the years ended 30 June 2015, 30 June 2016 and 30 June 2017.

Following an audit carried out by the Commissioner, amended assessments were issued to the SMSF on the basis that the interest income was in fact non-arm's length income (NALI), including an assessment as to penalties and shortfall interest charges. BPFN as trustee for the SMSF objected to these assessments, and the Commissioner disallowed the objections.

BPFN as trustee for the SMSF applied to the AAT for a review of the Commissioner's objection decisions.

In the AAT, Mr J explained that the reasoning for having DEF Pty Ltd and ABC Pty Ltd interposed between JJUT and third party borrowers was so JJUT was not lending directly to borrowers. DEF Pty Ltd was to be the "front line person" that charged "proper fees" and ABC was there as a gatekeeper to keep an eye on DEF Pty Ltd. Mr B gave evidence that it was commonplace to have two intermediate entities interposed in private investment arrangements. Mr J also noted that the structure was determined for longevity, particularly if he were to step away from being personally involved. The AAT accepted the evidence of Mr J and Mr B.

BPFN submitted that the application of the NALI provisions to the present circumstances required a consideration of a hypothetical situation being on arm's length terms, which would be that JJUT made loans directly to third party borrowers. On this set of circumstances, JJUT would have derived more income than the existing arrangement. This submission was made on the basis that for section 295-550(5) to apply, in the relevant income years (the provision has since been amended under the non-arm's length expenditure changes) required that a SMSF derive more income through holding a fixed entitlement to the income of a trust as a result of a scheme, the parties to which were not dealing with each other at arm's length in relation to the scheme.

Issue

Whether section 295-550(5) of the ITAA 1997 applies to deem the interest income received by BPFN as trustee for the SMSF to be NALI?

Decision

The AAT determined that, while the arrangement was not on an arm's length basis, due to the typical nature of the on-lending structure, it could not be said that BPFN as trustee for the SMSF was deriving more income than it otherwise would have if the arrangements were on an arm's length basis. As a result of this, the relevant interest income derived by the SMSF during the years ended 30 June 2015, 30 June 2016 and 30 June 2017 was not NALI.

The AAT referred to section 295-550(5) of the ITAA 1997, noting that in order for income to be NALI, the entity must acquire the entitlement under a "scheme… the parties to which [are] not dealing with each other at arm's length". The AAT considered the entire arrangement between JJUT, ABC Pty Ltd, DEF Pty Ltd and the third parties to be the "scheme", noting that while DEF and the third parties were negotiating on arm's length basis, JJUT, ABC Pty Ltd and DEF Pty Ltd were not dealing on an arm's length basis. The AAT referred to comments made by Edmonds and Gordon JJ in the case of *Federal Commissioner of Taxation v AXA Asia Pacific Holdings Ltd*:

> *"Any assessment of whether parties were dealing at arm's length involves "an assessment [of] whether in respect of that dealing they dealt with each other as arm's length parties would normally do, so that the outcome of their dealing is a matter of real bargaining": Trustee for the Estate of the late AW Furse No 5 Will Trust v Federal Commissioner of Taxation (1991) 21 ATR 1123 at 1132 per Hill J. The reference in Furse 21 ATR 1123 to "real bargaining" is significant.*
>
> *It focuses on actual dealing between the parties… That is not surprising. It is the same mental process as that described by Griffith CJ in Spencer v The Commonwealth (1907) 5 CLR 418 at 432.*
>
> *The question of whether parties dealt with each other at arm's length in respect of a particular dealing is one of fact in each case: Granby v Federal Commissioner of Taxation [1995] FCA 1217; (1995) 129 ALR 503 at 507. What is required is that "parties to a transaction have acted severally and independently in forming their bargain": Granby [1995] FCA 1217; 129 ALR 503 at 507. Put another way, it requires consideration of how "unrelated parties, each acting in his or her own best interest, would carry out a particular transaction": Australian Trade Commission v WA Meat Exports Pty Ltd (1987) 75 ALR 287 at 291."*

The AAT determined that there was nothing that could be described as "real bargaining" as between JJUT, ABC Pty Ltd and DEF Pty Ltd. The agreements were based on Mr J's views about the market and what he considered to be fair and reasonable. The AAT noted that it has been said that in particular circumstances related parties may deal with each other at arm's length in relation to a transaction, however this was not the case here. There was no bargaining between the parties. Mr J controlled and directed each of the entities.

However, the AAT then had to consider section 295-550(5)(b) of the ITAA 1997 which requires that the amount of income received to be more than the entity might have been expected to derive if the parties had been dealing at arm's length. The AAT held that the arrangement did not result in the SMSF deriving more income that it would have otherwise derived.

The Commissioner's decisions were set aside.

COMMENT – the danger in related party arrangements is that too much income being derived can generate NALI, whereas too little income being derived can result in other compliance breaches.

The SMSF's investment in the unit trust would have been an in-house asset for the SMSF as the unit trust was a related trust and the conditions in regulation 13.22C of *the Superannuation Industry (Supervision) Regulations 1994* (Cth) were not satisfied as an asset of the unit trust was a loan to another entity.

Citation *BPFN and Commissioner of Taxation (Taxation)* [2023] AATA 2330 (Deputy President I R Molloy, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2330.html

1.2 Zhang – principal place of residence

Facts

In June 2000, Hui Fang Zhang and Qing Ping Zhang acquired a residential property in Sydney and lived in it until 26 March 2013.

On 26 March 2013, Hui Fang and Qing Ping moved out of their home with the intention of demolishing the existing house and constructing a larger house on the property.

Shortly after Hui Fang and Qing Ping moved out of the property, the existing dwelling was demolished. They moved into a rental property with their child until 9 September 2018, when they returned to the property to live in their newly built home.

On 26 March 2013, construction of the new dwelling commenced. From this time, there were a series of events which delayed construction of the new dwelling. This included 'stop work' orders issued by the Council, issues with the builder, and the withdrawal of the certification issued by the engineer as a result of building defects.

The construction of the new dwelling was completed by 9 September 2018.

The Chief Commissioner assessed the property for land tax for the 2018 land tax year. Hui Fang and Qing Ping objected to the assessment on the basis that the principal place of residence exemption applied under the deeming provisions in clause 6 or clause 8 of Schedule 1A of the *Land Tax Management Act 1956* (NSW).

In the event that the deeming provisions did not apply, Hui Fang and Qing Ping submitted that the exemption should still apply as delays in the construction of the new dwelling were beyond their control.

Clause 6 of Schedule 1A to the LTMA extends the principal place of residence exemption for a period of 4 years where the owner intends to occupy the land as his or her principal place of residence. This applies for the period of 4 years immediately following the year in which the owner acquires the land. Alternatively, this provision will apply for a period of 4 years following the date on which another person who was previously occupying the property for residential purposes, ceases to occupy the property.

Clause 8 of Schedule 1A of the LTMA, which is an absence rule, extends the principal place of residence exemption for a period of 4 years after an owner has ceased occupying the land after they have used the land as their principal place of residence for at least 6 months where they do own any other land that they use as their principal place of residence. Relevantly, if the land is incapable or becomes incapable of being used and occupied for a period exceeding 4 years, the principal place of residence will no longer be available.

The Chief Commissioner contended that clause 6 did not apply because it only applies to the 4 years after the date on which the owner acquires the property. The Chief Commissioner also contended that application of clause 8 ceased 4 years after the land became unable to be used and occupied as a residence.

Issues

1. Will the concession for unoccupied land intended to be the owner's principal place of residence applicable, under clause 6 of Schedule 1A of the LTMA, apply for the 2018 land tax year?
2. Will the concession for absences from former residence, under clause 8 of Schedule 1A of the LTMA, apply for the 2018 land tax year?
3. If clauses 6 or 8 in Schedule 1A to the LTMA do not apply, is the principal place of residence exemption still available because of events which occurred outside the owner's control?

Decision

Concession for unoccupied land intended to be the owner's principal place of residence

The NCAT was satisfied that the land owned by Hui Fang and Qing Ping was unoccupied as at 31 December 2017 and that they intended to occupy the land as their principal place of residence.

The NCAT considered that the concession under clause 6 will apply to the 4 year period, prior to the commencement of building works, commencing on the date where another person ceases to use and occupy the property as their principal place of residence. If no person other than the owner has occupied the property, the 4 year period for which the exemption applies commences from the date on which the land was purchased.

In these circumstances, the concession under clause 6 only applied to the 4 years immediately following the purchase of the land, being the 2001, 2002, 2003 and 2004 land tax years.

Accordingly, the concession in clause 6 did not apply to the 2018 land tax year.

Concession for absences from former residence

The NCAT considered that the concession under clause 8 will not apply where the land is incapable of occupation as a residence for a period of over 4 years.

The NCAT acknowledged that the other conditions in clause 8 were satisfied in these circumstances. Namely the fact that Hui Fang and Qing Ping had occupied the property for over 6 months prior to leaving the property and that they had not used or occupied other land as their principal place of residence.

However, following the demolition of the existing dwelling by 26 March 2013, the land was incapable of being used as a principal place of residence. The land remained this way until the new dwelling was constructed and capable of occupation. That is, until the new dwelling had been constructed to a reasonably habitable stage. The NCAT considered this to be the case on some date between 26 March 2013 and 9 September 2018, when Hui Fang and Qing Ping commenced living in the new dwelling.

The 4-year period from the date on which the property was demolished expired on 26 March 2017. The NCAT did not consider that the land was capable of occupation before this time. Accordingly, the concession under clause 8 of Schedule 1A did not apply.

Circumstances beyond the owners' control

As the concessions in clauses 6 and 8 did not apply, the NCAT considered whether the principal place of residence exemption should be available as the reasons for delay in the construction of the new dwelling were beyond the control of Hui Fang and Qing Ping.

The NCAT considered that the provisions of the LTMA not give the NCAT the power to apply the exemption in circumstances beyond those prescribed in the Act. Accordingly, as the conditions in the deeming provisions were not satisfied, the principal place of residence exemption was not available.

COMMENT – legislative amendments introduced to the LTMA with effect from 1 July 2023 provide the Chief Commissioner with the discretion to extend the 4 year time period in clause 6 for up to 2-years. There are certain conditions that must be satisfied for the discretion to be exercised including that the delay is due primarily to exceptional circumstances beyond the control of the taxpayer. The amendments apply to periods ending before 1 July 2023 only if the period ended on or after 31 December 2019. The amendments, if they applied here, would not have assisted Hui Fang and Qing Ping as they had purchased the property in 2000 and the construction was not completed within 6 years of that time. There is no similar discretion for the limitation on the absence rule in clause 8.

Citation *Zhang v Chief Commissioner of State Revenue* [2023] NSWCATAD 207 (Senior Member R J Perrignon, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/207.html

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1.3 Zhang – duty on cancelled agreements

Facts

On 11 December 2014, Yuyang Zhang entered into a contract to purchase a proposed strata lot in Sydney from Greenland (Sydney) Bathurst Street Development Pty Limited (**First Contract**). The strata lot was yet to be constructed.

On 30 June 2016, the Chief Commissioner issued a Duties Notice of Assessment in respect of the First Contract in the amount of $189,340.00 together with an amount of interest because Yuyang had not lodged the First Contract for stamping within the time required by the *Duties Act 1997* (NSW).

Yuyang paid the assessed duty and on 29 November 2016 the First Contract was stamped.

On 30 January 2019, Yuyang and Greenland entered into a Deed of Recission in respect of the First Contract which confirmed that all rights created by the First Contract were relinquished and all obligations were discharged.

On the same day a new contract was entered into for the purchase of the property by a trust company (**Second Contract**).

On 15 October 2021, the Second Contract was assessed for duties and a Duties Notice of Assessment was issued with respect to the Second Contract. On the same day, Yuyang's solicitor uploaded to eDuties a refund application for the duty paid in respect of the Contract. eDuties rejected the refund application.

On 10 November 2021, Yuyang's solicitor was informed that the refund application was lodged more than 5 years after the date of the initial assessment, and the Chief Commissioner could not refund the duty paid on the Contract under section 50 of the Duties Act (**Refund Decision**).

On 14 December 2021, Yuyang lodged an objection to the initial assessment and the Refund Decision. Yuyang also provided reasons as to why the Chief Commissioner should exercise his discretion under section 90(1) of the *Taxation Administration Act 1996* (NSW) to permit the objection to be lodged out of time.

The Chief Commissioner permitted the objection to be lodged out of time but disallowed the objection on 12 May 2022.

Yuyang applied for administrative review in the NCAT. Yuyang's application originally sought review of the Refund Decision, however, this was not pressed. Consistent with *Singh v Chief Commissioner of State Revenue* [2016] NSWCATAD 9 at [10]-[13], it is the assessment and not the decision on the objection which is the subject of the review.

Section 50 of the Duties Act relates to 'cancelled agreements'. Cancelled agreements are not liable to duty unless the Chief Commissioner is satisfied that sections 50(1)(a), 50(1)(b) or 50(1)(c) apply. Namely, the First Contract was not cancelled to give effect to a subsale, or Yuyang was a promoter of a named company proposed to be incorporated and the company is the purchaser of the dutiable property under the Second Contract, or Yuyang and the purchaser under the Second Contract were related persons when the First Contract was entered into.

Section 50(2) sets out when a refund application can be made to the Chief Commissioner and provides:

> *(2) If duty has been paid on an agreement that is not liable to duty under this Chapter because of this section, the Chief Commissioner must reassess and refund the duty if an application for a refund is made within—*
> *(a) 5 years of the initial assessment, or*
> *(b) 12 months after the agreement is cancelled,*
> *whichever is the later.*

Section 9 of the *Taxation Administration Act* 1996 (NSW) sets out when the Chief Commissioner can make a reassessment. Section 9(3) of the Taxation Administration Act provides that the Chief Commissioner may not make a reassessment of a tax liability more than 5 years after the initial assessment of liability unless one of the four matters listed in that subsection are present.

Part 10 of the Taxation Administration Act deals with objection and reviews, including the time period to lodge objections which is 60 days *"after the date of service of the notice of the assessment or the date on which the decision referred to in section 86(1)(b) is served on the taxpayer"* (section 89 of the Taxation Administration Act).

The Chief Commissioner accepted that the First Contract was a cancelled agreement but did not concede that one or more of sections 50(1)(a), 50(1)(b) or 50(1)(c) apply. Yuyang had understood that the Chief Commissioner accepted that one or more of these subsections was satisfied and, therefore, during the hearing did not lead direct evidence on these matters.

The Chief Commissioner also submitted that section 50 of the Duties Act operates to confine Yuyang as to the circumstances which are required to obtain a refund on a cancelled agreement. Section 50(2) has the effect of limiting by time when an application for a refund can be made. The Chief Commissioner stated that this was consistent with section 9 of the Taxation Administration Act which only allows the Respondent to make a reassessment of duty within 5 years.

The Chief Commissioner submitted that: *"Time limits are imposed to give the Revenue certainty and there is no provision, he says, in the Duties Act or the TAA which provides the Respondent with any discretion to extend the time limit imposed"* by section 50(2) of the Duties Act.

Issues

1. Is the First Contract a 'cancelled agreement' within the meaning of section 50 of the Duties Act and, if so, so sections 50(1)(a), 50(1)(b) or 50(1)(c) apply?
2. If so, does section 50(1) of the Duties Act operate to relieve Yuyang from liability to duty in respect of the cancelled agreement such that Yuyang could object against the assessment under section 86 of the Taxation Administration Act on the basis that it is excessive?

Decision

Issue 1

Based on the evidence before it, the NCAT was not satisfied that one or more of sections 50(1)(a), 50(1)(b) or 50(1)(c) applied in respect of the First Contract. As there was not sufficient evidence before the NCAT to determine the first issue, the NCAT concluded that Yuyang had not discharged his onus of proof.

Issue 2

Despite the decision in respect of Issue 1, the NCAT went on to consider Issue 1. The NCAT confirmed that it was *"subject to the same general constraints as the original decision maker and should ordinarily approach its task as though it were performing the relevant function of the original decision maker in accordance with the law as it applied to the decision maker at the time of the original decision"* (*Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16).

The NCAT stated that while it may take into account facts which were not before the Chief Commissioner at the time of the assessment, such as the Deed of Recission, the question to be determined is whether the Assessment was the correct and preferable decision at the time it was made. The question before the chief Commissioner at the time of the assessment was whether the First Contract was at that moment in time liable to duty.

The NCAT determined that, at the time of the assessment, the First Contract was liable to duty as it was an agreement for the sale or transfer of land. At the time of the assessment, that is 30 June 2016, the Deed of Recission had not been entered into and s 50(1) of the Duties Act did not apply. The NCAT stated that section 50(1) does not operate to render an assessment, which was correct at the time it was made, incorrect. Rather, section 50(2) of the Duties Act has been included to provide for a reassessment and refund mechanism where an assessment, which was validly made at the time, is later cancelled.

The time limits imposed by section 50(2) of the Duties Act are strict and Yuyang did not comply with the time limits.

The NCAT agreed with the Chief Commissioner and confirmed the assessment was the correct and preferable decision. The assessment was confirmed.

Citation *Zhang v Chief Commissioner of State Revenue* [2023] NSWCATAD 181
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2023/181.html

1.4 Artcam – company effectively holding shares in itself

Facts

The BF McLaren Family Trust is a discretionary trust that was established by deed dated 4 February 1978. The beneficiaries of the Trust include members of the family of the late Bruce McLaren. Bruce died on 17 July 2003 and his wife, Lorraine, died on 26 February 2016.

Structure

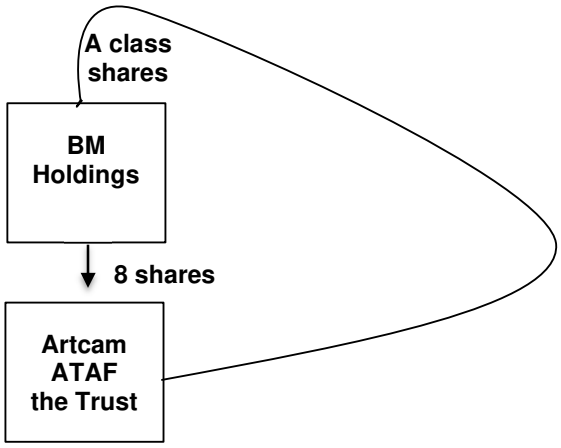
On 15 May 1984, Artcam Enterprises Pty Ltd (**Artcam**) was appointed as trustee of the Trust.

Artcam has nine ordinary shares on issue. Eight of the nine shares are held by Bruce F McLaren Holdings Pty Ltd (**BM Holdings**), a McLaren family company, and the remaining share is held by Campbell McLaren, Rodney Blackburn (Campbell's accountant) and David Coombes in their capacity as executors of Lorraine's estate.

Campbell, Rodney and Pamela were the directors of Artcam from 27 August 2012 until 18 October 2022, when Rodney resigned as director due to his poor health.

BM Holdings has three classes of shares on issue. Artcam holds all of the A class shares, being the only voting shares in BM Holdings.

The structure can be depicted as follows:



Disputes arose over various matters concerning the trust, including over unpaid present entitlement and alleged breaches of trust by the Artcam.

Amongst this dispute, Artcam sought that it be removed as trustee and replaced by the Hon. John Eric Middleton AM KC, with Mr Middleton being given the power to charge fees against the trust fund for his services.

An application to the Supreme Court of Victoria was made for this purpose.

Issue

Should Artcam be removed as trustee of the Trust and replaced by John?

Decision

Delany J noted that there were a number of reasons why Artcam should be replaced as trustee. Importantly, Delany J noted that Artcam holds all of the voting shares in BM Holdings was in contravention of section 259D of the *Corporations Act 2001* (Cth) (because of the holding of the shares, not because they were voting shares).

Section 259D of the Corporations Act prohibits a company from controlling an entity that holds shares in it. If such a structure arises, the company must cease to hold the shares or cease to control the entity within 12 months (or such longer time allowed by ASIC if an application for extension is made before the end of the 12 months). Any voting rights attached to the shares cannot be exercised while the company continues to control the entity. If, at the end of the 12 months (or extended period), the company still controls the entity and the entity still holds the shares, the company commits an offence for each day while that situation continues.

In accordance with subsection 259D(3) of the Corporations Act, the voting rights attaching to the shares in BM Holdings cannot be exercised while Artcam continues to control BM Holdings.

In considering whether Artcam should be replaced as trustee, Delany J considered that it was desirable to bring an end to the contravening conduct of Artcam and free up the ability of the Trust to deal with its shareholding in BM Holdings.

COMMENT – it appears that Artcam owned its shares as trustee, and there is an exception in section 259D for shares held as a trustee in certain instances. The exception was not considered in the judgement.

Citation *Artcam Enterprises Pty Ltd v Campbell McLaren & Ors* [2023] VSC 196 (Delany J, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/196.html

1.5 Appeal Update – Mourched

Anthony and George Mourched have been unsuccessful in their appeal to the Supreme Court of New South Wales against the decision in *Mourched v Chief Commissioner of State Revenue* [2022] NSWCATAP 362.

Anthony and George claimed an exemption under section 10(1)(u) of the *Land Tax Management Act 1956* (NSW) (**LTMA**) in respect of two parcels of land that they owned on the basis that the parcels of land were used solely for the provision of an education and care service. That section provides as follows:

> *10 Land exempted from tax*
>
> *(1) Except where otherwise expressly provided in this Act the following lands shall, subject to sections 10B, 10D, 10E and 10P, be exempted from taxation under this Act -*
>
> *(u) land that is used solely for the provision of an approved education and care service (within the meaning of the Children (Education and Care Services) National Law (NSW)), but only if -*
>
> *(i) the service is provided by an approved provider under that Law, and*
>
> ***(ii) the land is the place where children are educated or cared for by the service,***

A childcare centre was located one legal lot of land that was treated as two parcels of land by the Valuer-General. The childcare centre was located on one of the parcels (Parcel A) and a septic system used for the child care centre was located on the other parcel (Parcel B).

There was a fence separating Parcel A and Parcel B such that, while the septic system was on Parcel B, no other activities of the childcare centre were conducted on Parcel B.

There were some preparatory works conducted on Parcel B for the construction of a car park.

The Chief Commissioner had accepted that the exemption applied to Parcel A but not to Parcel B for two reasons. Firstly, while the septic system was located on Parcel B, Parcel B was not the place where children are educated or cared for by the approved education and care service as required by section 10(1)(u) of the LTMA. Secondly, even if it was, the sole use of Parcel B was not for the childcare centre given the preparatory works for the car park.

In the NCAT, Anthony and George had argued that the sole use of Parcel B was to provide the septic system for the childcare centre. In doing so, Anthony and George argued that the land should not be treated as two separate parcels even though the land had been treated as two separate valuation lots.

The NCAT rejected the proposition that the two parcels should be considered together for the purposes of construing the exemption. The NCAT considered that the two parcels should be treated separately and Anthony and George had failed to establish that on a balance of probabilities, Parcel B was used solely to educate or care for children by an approved provider. Merely providing services to assist an approved education or care service that was operated on a separate parcel of land was not sufficient for the exemption to apply. Further, the preparatory works for the carpark may constitute a use which meant the sole use was not a child care centre, and Anthony and George had not established on the evidence that such activities were not a use.

There were three issues on appeal and their resolution by the Supreme Court were as follows:

1. whether the land for land tax could be the legal lot and not determined by the parcels identified by the Valuer-General – the Supreme Court held that the parcel of land for land tax is the parcel identified by the Valuer-General and not the legal lot;
2. whether Parcel B is the place where children are educated or cared for by the approved education and care service such that the exemption in section 10(1)(u) of the LTMA is capable of being satisfied – the Supreme Court held that Parcel B was a place on which the childcare centre was conducted for the purpose of section 10(1)(u) of the LTMA and, accordingly, it was possible that the exemption would be satisfied if that was the sole use of the land; and
3. whether the preparatory activities were a use of Parcel B such that the sole use of Parcel B was not for the childcare centre – the Supreme Court held that this was not a question of law and, accordingly, could not be subject to an appeal. Further, it was open on the evidence for the NCAT to conclude that Anthony and George had not satisfied their onus that the preparatory activities for the carpark were not a use.

Citation *Mourched v Chief Commissioner of State Revenue* [2023] NSWSC 668 (Davies J, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/668.html

1.6 Appeal Update – Shell Energy Operations

The NSW Chief Commissioner of State Revenue filed a motion seeking that the Court re-open the appeal in *Chief Commissioner of State Revenue v Shell Energy Operations No 2 Pty Ltd* [2023] NSWCA 113 on the basis that judgment had not addressed an argument said to have been raised by the Chief Commissioner.

These proceedings concerned the duty payable upon the acquisition by Shell Energy Operations of all of the shares in a company, GSP, said to be a "landholder" for the purposes of Chapter 4 of the *Duties Act 1997* (NSW). The amount paid for the acquisition was over $160 million.

GSP had interests in items which formed part of three hydro-electric power stations in New South Wales. The focus of the dispute was whether those interests were interests in land, or alternatively interests in goods. If it was the former, then the acquisition of the shares would be dutiable. if it was the latter, then the interests were more properly characterised as property interests and not dutiable. The primary judge found that the interests held by GSP were not interests in land.

The acquisition occurred before the introduction of section 147A of the Duties Act, which now provides that "land" includes anything fixed to the land.

The Court of Appeal determined that the argument sought to be re-opened by the Chief Commissioner was not made by the Chief Commissioner during the appeal proceedings, and the Chief Commissioner had time during the appeal to develop their argument on this point. Therefore, the Court of Appeal dismissed the Chief Commissioner's application to re-open the Court's decision with costs.

COMMENT – section 147A of the Duties Act was introduced with effect from 24 June 2020, which has the effect of including "anything fixed to the land" as "land", even if the item is not a fixture at common law, for the purposes of landholder duty. Section 147A of the Duties Act has the effect of significantly expanding what could be land for the purposes of landholder duty. The Commissioner has issued a Practice Note (CPN 014) on the effect of section 147A, which states as follows:

Fixed to the land includes a physical thing:

a. fixed directly to the land itself; or
b. fixed to land the subject of a mining lease or mineral claim; or
c. fixed to another permanent structure (e.g. a building, power plant, warehouse or office tower); or
d. resting on the land on its own weight.

Citation *Chief Commissioner of State Revenue v Shell Energy Operations No 2 Pty Ltd (No 2)* [2023] NSWCA 169 (Kirk JA, Adamson JA and Griffiths AJA, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2023/169.html

1.7 Appeal Update – Hyder

The High Court has dismissed the application for special leave to appeal against the decision of the Full Court of the Federal Court of Australia in *Hyder v Commissioner of Taxation* [2023] FCAFC 29 with costs. In that case, multiple taxpayers were issued with alternative assessments in relation to the same income for the same income years. While the taxpayers were successful in establishing that the Commissioner's conduct in not deferring recovery of the assessments was oppressive, the Court refused to quash the assessments issued to the taxpayers.

Citation *Hyder & Ors v Commissioner of Taxation* [2023] HCASL 99 (Gordon and Jagot JJ)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCASL/2023/99.html

1.8 Other tax and superannuation related cases in period of 12 July 2023 to 10 August 2023

Citation	Date	Headnote	Link
Hedges v Commissioner of Taxation [2023] FCAFC 105	12 July 2023	TAXATION – appeal from decision of primary judge dismissing appeal from decision of Administrative Appeals Tribunal – where taxpayer is retired partner of a law firm – whether appellant was entitled to receive capital proceeds from disposal of interest in goodwill of partnership – whether appellant made a capital gain	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/105.html
Semmens and Commissioner of Taxation (Taxation) [2023] AATA 2060	14 July 2023	TAXATION – goods and services tax – input tax credits – four year rule to claim input tax credit – notification of entitlement to input tax credits – taxpayer's burden to prove assessment excessive or otherwise incorrect – decision under review affirmed	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2060.html
Hanson and Commissioner of Taxation (Taxation) [2023] AATA 2067	17 July 2023	TAXATION – administrative penalty – shortfall penalty – tax shortfall – taxpayer's burden to prove shortfall penalty assessment excessive or incorrect – whether discretion should be exercised to remit penalty – decision under review affirmed.	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2023/2067.html
Bblood Enterprises Pty Ltd v Commissioner of Taxation [2023] FCAFC 114	21 July 2023	PRACTICE AND PROCEDURE – costs – where two taxation proceedings were heard together at first instance and on appeal – where the Commissioner was successful in both proceedings at first instance – where the taxpayer appealed and was unsuccessful in the first appeal but successful in the second appeal on a procedural issue that occupied relatively little time – appropriate costs order – held: the Commissioner pay 20 per cent of the taxpayer's costs of the second appeal and the relevant proceeding at first instance	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2023/114.html

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2 Legislation

2.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2023 Measures No. 1) Bill 2023	16/02	09/03	09/03		
Treasury Laws Amendment (2023 Measures No. 3) Bill 2023	14/06	01/08	02/08		
Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023	14/06	01/08	02/08		
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023	22/06				

2.2 Amendments to correcting GST errors

On 13 July 2023 the draft Legislative Instrument *A New Tax System (Goods and Services Tax) (Correcting GST Errors) Determination 2023,* was released for consultation. The Determination is made under section 17-20(1) of the GST Act and outlines when an error from an earlier tax period may be corrected in a later tax period.

When an error may be corrected

In calculating the net amount for a tax period, an error from an earlier tax period may be corrected in a later period if:

1. the error relates to an amount of GST, an input tax credit or any adjustments under the Act;
2. the earlier tax period started on or after 1 July 2012;
3. a taxpayer lodges the GST return for the tax period within the period of review for the assessment of the net amount of the earlier tax period;
4. at the time of lodging the GST return for the tax period:
   (a) the error does not relate to a matter that is specified as being subject to a compliance activity, and was not made in working out the taxpayers net amount for an earlier tax period that is subject to compliance activity; or
   (b) if paragraph (i) does not apply, the Commissioner has notified the taxpayer in writing that the error can be corrected under this instrument;
5. the taxpayer has not corrected that error, to any extent, in working out the net amount for another tax period; and
6. where the error is a debit error, the conditions below must be met.

Conditions for correcting a debit error

In calculating the net amount for a tax period, a debit error made in an earlier tax period may be corrected if:

1. the error was not a result of recklessness as to the operation of a GST law or intentional disregard of a GST law;
2. the error is corrected in a GST return that is lodged within the debit error time limit that corresponds with the taxpayers current GST turnover specified in the table below; and
3. the net sum of the debit errors is less than the debit error value limit that corresponds with the taxpayers current GST turnover specified in the table below.

Current GST Turnover	Debit error time limit	Debit error value
Less than $20 million	18 months after the due date of the GST return for the tax period in which the error was made	$12,500

$20 million to less than $100 million	12 months after the due date of the GST return for the tax period in which the error was made	$25,000
$100 million to less than $500 million	12 months after the due date of the GST return for the tax period in which the error was made	$50,000
$500 million to less than $1 billion	12 months after the due date of the GST return for the tax period in which the error was made	$100,000
$1 billion and over	12 months after the due date of the GST return for the tax period in which the error was made	$560,000

For a GST group, the current GST turnover is calculated for the group by including supplies that the taxpayer and any other GST group members make in accordance with section 188-15(2) of the GST Act.

The *Goods and Services Tax: Correcting GST Errors Determination 2013* (Cth) (**2013 Determination**) is to be repealed under the Determination.

Th only proposed change under the draft Determination, as compared with the 2013 Determination, is to the debt error value limits in the table above. They have been increased under the draft Determination.

COMMENT – in practice 'fixing' an error in a later period is likely to be less costly, and will not incur an interest charge which would arise if an earlier period were amended to increase GST payable.

TIP – credit errors are not subject to dollar limits, only time limits. In the case of credit errors the time limit requires making the claim (by lodging a BAS) within four years from the time the original BAS that had the error in it was required to be given to the ATO.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI2023D13/00001

2.3 Correcting fuel tax errors

The ATO has published draft Legislative Instrument 2023/D14 *Fuel Tax (Correcting Fuel Tax Errors) Determination 2023* under subsection 60-10(1) of the *Fuel Tax Act 2006* (Cth). It is substantially the same as the GST instrument above.

The determination allows corrections to fuel tax errors made in an earlier tax period to be corrected in a later tax period, in specified circumstances.

A choice may be made by correcting the error amount in a fuel tax return lodged for a later tax period instead of requesting the Commissioner to amend the relevant assessment for the earlier tax period.

The determination does not apply to errors that were made in working out a net fuel amount for a tax period that started before 1 July 2012.

An error in working out the net fuel amount made in an earlier period may be corrected where:

- the error relates to an amount of fuel tax credit or an adjustment under the Fuel Tax Act;
- the fuel tax return for the tax period is lodged within the period of review for the assessment of the net fuel amount of the earlier tax period;
- at the time of lodging the fuel tax return for the tax period, the error does not relate to a matter or tax period which is subject to compliance activity;
- the error has not already been corrected in working out the net fuel amount for another tax period;
- where there is a debit error, additional threshold conditions are met; and
- the taxpayer is registered for GST.

The instrument will repeal *Fuel Tax: Correcting Fuel Tax Errors Determination 2013*.

The draft determination is open for consultation to 4 August 2023.

w https://www.ato.gov.au/law/view/document?docid=ops/li2023d14/00001

2.4 Thin capitalisation changes

On 22 June 2023, the Commonwealth Government introduced the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023*. The Bill amends the following:

1. the Corporations Act – to require Australian public companies (both listed and unlisted) to disclose information about their subsidiaries in their annual financial reports by way of a consolidated entity disclosure statement. These amendments will apply to annual financial reports prepared for financial years commencing on or after 1 July 2023; and
2. the ITAA 1936, ITAA 1997 and TAA 1953 – to amend the thin capitalisation rules to limit the amount of debt deductions that multinational entities can claim in an income year (discussed in more detail below). The intent behind the new thin capitalisation rules is to align with the OECD's earnings-based best practice model which allows an entity to deduct net interest expense up to a benchmark earnings ratio. These amendments will apply to financial years commencing on or after 1 July 2023.

New thin capitalisation rules

The Bill introduces the following:

1. a new 'general class investor' definition. The new definition consolidates the existing general classes of entities, namely 'outward investor (general)', 'inward investment vehicle (general)' and 'inward investor (general)';
2. new thin capitalisation earnings-based tests (discussed below); and
3. a special deduction for debt deductions that were disallowed under the fixed ratio test over the previous 15 years. The deduction will be available to general class investors, but only in certain circumstances. If the deduction applies, the entity will be allowed to claim debt deductions that have been previously disallowed within the past 15 years when they are sufficiently profitable in an income year if their fixed ratio earnings limit exceeds their net debt deductions in the income year.

Earnings-based tests

The new earnings-based tests may disallow all or part of a general class investor's debt deductions for an income year, based on the entity's earnings or profits. This is a change from the existing thin capitalisation rules which disallow an amount of an entity's debt deductions based on the quantum of debt held by the entity relative to its assets.

All entities which do not meet the definition of a general class investors (i.e., financial entities or ADIs) will continue to be subject to the existing thin capitalisation tests, with the exception of the arm's length debt test.

Entities can choose which earnings-based test to apply for all its debt deductions for an income year (though some restrictions apply). Once the choice has been made, it cannot be revoked.

The new earnings-based tests are as follows:

1. *Fixed ratio test*

   The fixed ratio test will be the default test. This test will disallow net debt deductions that exceed a specified proportion (30%) of an entity's tax EBITDA. An entity's tax EBITDA is calculated by adding back deductions for interest, decline in value of assets and capital works deductions.

   This test will replace the existing safe harbour debt test. Under the existing safe harbour debt test, debt deductions in excess of 60% of the average value of the entity's Australian assets are disallowed.

2. *Group ratio test*

The group ratio test is only available if the entity is a member of a relevant worldwide group. This test will disallow debt deductions to the extent that the entity's net debt deductions exceed the group ratio earnings limit for the income year.

The group ratio test will replace the existing worldwide gearing debt test for all general class investors. Under the existing worldwide gearing debt test, an entity's Australian operations may be geared up to 100% of the gearing of the worldwide group to which the Australian entity belongs.

3. *External third-party debt test*

The external third-party debt test will disallow all debt deductions which are not attributable to third party debt and that satisfy certain other conditions. The external third-party debt test operates effectively as a credit assessment test, in which an independent commercial lender determines the level and structure of debt finance it is prepared to provide an entity. As the debt finance is provided by an independent third party, it is assumed to satisfy arm's length conditions.

The external third-party debt test will replace the existing arm's length debt test for all entities previously subject to the arm's length debt test. Under the existing arm's length debt test, debt deductions are disallowed where the amount of the entity's debt exceeds the amount of debt that could have been borrowed by an independent party carrying on comparable operations as an Australian entity.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7057

2.5 New South Wales State tax amendments

On 1 August 2023, the *Revenue, Fines and Other Legislation Amendment Bill 2023* was introduced to NSW Parliament. The Bill proposes various amendments to the revenue legislation in New South Wales, including amendments to the Duties Act *1997* (NSW), the Land Tax Management Act *1956* (NSW) (**LTMA**), the *Payroll Tax Act 2007* (NSW) and Taxation Administration Act *1996* (NSW).

Duties Act

The proposed amendments to the Duties Act include the following:

1. amending section 12 to provide that an instrument lodged electronically under the *Electronic Conveyancing National Law* (NSW) that is not digitally signed is taken to have been first executed when the Chief Commissioner of State Revenue first receives information relating to the instrument;
2. amending section 25 to remove the time limit of 12 months within which dutiable transactions need to occur to be treated as a single transaction for aggregation purposes. In other words, dutiable transactions may be aggregated if they occur more than 12 months apart;
3. amending section 31 to provide that, if the Chief Commissioner assesses or reassesses the liability to duty resulting from a change in consideration under an agreement for the sale or transfer of dutiable property after the agreement is entered into, but before the property is transferred, the applicable rate of duty is the rate when the agreement was first executed;
4. amending section 55 to extend the duty concession for property vested in an apparent or real purchaser of dutiable property to the legal personal representative of an apparent or real purchaser; and
5. amending section 61 to clarify that the concessional duty provisions that apply to a person transferring or consolidating the person's superannuation apply only to the extent that the value of the dutiable property being transferred does not exceed the value of the person's superannuation entitlement and no consideration is given in relation to the transfer.

LTMA

The proposed amendments to the LTMA include the following:

1. amending section 10(1)(s) to provide that land used as a site for a school is exempt from land tax even if the land is not owned by the school;
2. amending section 62J to remove a redundant provision; and
3. amending Schedule 1A to incorporate gender neutral language.

Payroll Act

The proposed amendments to the Payroll Act include an amendment to insert a new section 74A to provide that an entity (the successor) and a former entity, including a corporation that is in administration, being wound up or deregistered constitute a group if the successor, often known as a phoenix operator or corporation, and the entities are or were sufficiently influenced by the same third party.

The proposed amendment will enable payroll tax of the former entity to be recovered from the successor.

The Chief Commissioner can determine a former entity and successor entity are not members of the same group is the Chief Commissioner is satisfied that the influence of the third party is not, or was not, intended to avoid tax or commercial obligations.

COMMENT – this change reflects a deep concern within Revenue NSW with arrangements where a company is placed in liquidation owing payroll tax and a new entity is established which commences to operate the business. There does not appear to be any requirement for the arrangement to be undertaken to avoid paying the payroll tax.

Taxation Administration Act

The proposed amendments to the Taxation Administration Act include the following:

1. amending section 9 to provides that the 5-year limit on reassessment of a person's tax liability does not apply if the reassessment is to give effect to a decision about an objection or review about any assessment, not only the initial assessment of the person's tax liability;
2. amending section 9(3)(b) to clarify that, if all relevant facts and circumstances were not disclosed to the Chief Commissioner at the time of an assessment, a reassessment may be made outside the 5-year limit without the Chief Commissioner having to assess the particular facts and circumstances;
3. increasing the penalties payable under the Taxation Administration Act for offences relating to taxpayer activities that impede a proper assessment of tax liabilities;
4. inserting a new section 17A to enable the Chief Commissioner to require a taxpayer to provide, or to obtain at the Chief Commissioner's own initiative or rely on, a valuation of property for the purposes of assessing the tax liability of the taxpayer. The Chief Commissioner may recover the costs of a valuation from the taxpayer in certain circumstances;
5. amending section 19 to enable a tax refund owed to a person to be offset against a fine owed by the person under the *Fines Act 1996*;
6. inserting a new section 58A which creates a new offence of tax evasion for which the maximum penalty is 500 penalty units or 2 years imprisonment, or both;
7. inserting a new section 85AA which creates new offences for knowingly or recklessly disclosing or using confidential tax information, or knowingly concealing or attempting to conceal the unlawful disclosure or use of confidential tax information. The maximum penalty for both offences is 10,090 penalty units ($1,109,900) for an individual or 50,450 penalty units ($5,549,500);
8. amending section 90 to provide that the Chief Commissioner may only allow an objection to an assessment or other decision to be lodged after the current 60-day period for up to 5 years after the assessment or decision;
9. amending section 106F to provide that the offence of promoting a tax avoidance scheme extends to promoting a scheme that may result in a group constituted under new section 74A the Payroll Tax Act (i.e. a phoenix operation); and
10. amending section 107 to give the Chief Commissioner a general power to determine how tax is paid to the Chief Commissioner, rather than specifying the methods of payment allowed.

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18471

2.6 Tasmanian State tax amendments

On 12 July 2023, the *Taxation and Miscellaneous Amendments Bill 2023 (11 of 2023)* (TAS) received royal assent.

The Bill amends the *Duties Act 2001* (TAS) to extend the duty exemption on the purchase of electric and hydrogen fuel cell vehicles to 31 December 2023. The vehicles must be new and the contract for purchase must have been entered into prior to 25 May 2023

The Bill amends the *First Home Owner Grant Act 2000* (TAS) to allow the grant of $30,000 for first home owners to continue through to 30 June 2024.

The amendments commence on 1 July 2023.

w https://www.parliament.tas.gov.au/bills/2023/taxation-and-miscellaneous-amendments-bill-2023

2.7 Miscellaneous Federal tax amendments

On 2 August 2023, the *Treasury Laws Amendment (2023 Law Improvement Package No 1) Bill 2023* was passed by the House of Representatives. It contains minor and technical amendments relating to tax and superannuation, and amendments to implement recommendations identified by the Australian Law Reform Commission to improve the navigability of the law.

The Bill includes an amendment to amend the GST Act and Schedule 1 to the TAA 1953 relating to the withholding of monies (for GST purposes) by purchasers of new residential premises and potential residential land during settlement, to ensure that the entity that is liable to pay GST on the relevant taxable supply would be entitled to the credit for the GST paid by the purchaser.

w https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId:r7046%20Recstruct:billhome

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3 Private binding rulings

3.1 Deduction for the repayment of the cost of training

Facts

A taxpayer worked for a company as a full-time employee.

The first month of work was paid full-time training.

The cost of training was paid for by the company and the taxpayer was paid their normal salary during the training period.

The only condition of employment was that the taxpayer had to work for a specific number of years with one of the company clients. The taxpayer's salary continued after the training finished.

The taxpayer did not work for the relevant time period and was required to pay back the company an amount calculated using the total training fee and the number of months worked.

The taxpayer paid the amount requested by the company.

Question

Is the taxpayer entitled to claim a deduction for the repayment of the cost of training provided by a former employer?

Ruling

The ATO ruled that the taxpayer is not entitled to claim a deduction.

The ATO confirmed that section 8-1 of the ITAA 1997 allows for a deduction for all losses and outgoings to the extent that they are incurred in gaining or producing assessable income, except where the outgoings are of a capital, private or domestic nature or relate to earning exempt income.

Generally, in cases where money has been repaid by a taxpayer to a former employer for breaching a contract the Board of Review have held that such monies are not allowable deductions.

The ATO referred to case *P20* (1963) 14 TBRD 97 where a surveyor entered into a bond with his employer on the condition that if the surveyor resigned within 5 years of receiving his qualification, he had to repay the bond. The surveyor resigned within 4 months of being qualified. The Board of Review stated that the expenditure (the repayment of the bond) flowed directly from the breach of covenant and was a consequence of the termination of employment by the surveyor. Even though the surveyor had gained new employment it could not be argued that the outgoing in question was incurred in the course of gaining or producing assessable income from the new employment.

The ATO concluded that the amount paid was a liability relating to the early termination of employment with the employer and is not incidental or relevant to the production of the taxpayer's assessable income as an employee.

COMMENT – this is not a case where the taxpayer is repaying an amount included in their assessable income, so that the earlier amount could be considered to be non-assessable non-exempt under section 59-20 of the ITAA 1997. The outcome would be similar for an employee leaving employment and taking clients, and being required to pay an amount to their ex-employer in relation to those clients.

ATO reference *Private Binding Ruling Authorisation No 1052127222344*
w https://www.ato.gov.au/law/view/document?docid=EV/1052127222344

3.2 Superannuation member benefit or death benefit

Facts

A fund member was over 65 years old at the date of their death.

The member held one superannuation account with their SMSF.

The member had no death benefit dependants.

The member lacked legal capacity. The member's brother was appointed as the administrator of the member's estate.

In 2022, the Administrator decided to fully commute the members account-based pension. The Administrator completed a withdrawal and account closure form and requested the benefits be paid to the member's bank account.

All forms were submitted by the Administrator to the superannuation fund before the member's death.

The member unexpectedly died.

The trustee of the member's superannuation fund paid the final withdrawal into the members personal bank account some 28 weeks after the member's death.

Question

Is the full commutation of the late members pension phase account to the amount of $X,XXX,XXX that was requested shortly before their death but was received around 28 weeks after their death, a superannuation member benefit or superannuation death benefit?

Ruling

The ATO ruled that the full commutation of the members pension phase account was a superannuation death benefit.

Subsection 307-5(1) of the ITAA 1997 provides that a superannuation benefit is either:

1. superannuation member benefit; and
2. superannuation death benefit.

Subsection 307-5(2) of the ITAA 1997 provides that superannuation member benefit is a payment made to a person because they are a member of the superannuation fund.

Subsection 307-5(4) of the ITAA 1997 provides that a superannuation death benefit is a payment to a person from a superannuation fund, after another person's death, because that other person was a member of the superannuation fund.

The ATO emphasised the importance of distinguishing whether the payment was a superannuation member benefit or a superannuation death benefit because the tax treatment varies depending on the payments classification.

Division 301 of the ITAA 1997 provides that if a member is 60 years or over when they receive a superannuation benefit, the benefit is non-assessable and non-exempt income, whether the benefit is a lump sum or income stream benefit.

Division 302, subdivision 302-C of the ITAA 1997 provides that where the recipient is not a death benefit dependent of the deceased member the benefit is split into a tax-free component and taxable component. The tax-free component is non-assessable and non-exempt income, but the taxable component is assessable income.

In some circumstances, a superannuation member benefit requested by the member before their death but paid after their death may be assessed as a member benefit rather than a death benefit. When the trustee of the superfund is assessing whether the payment is a member benefit or death benefit the trustee takes into consideration the following matters:

1. the terms of the request;
2. the trust deed and other governing rules of the superfund;
3. the trustees knowledge at that time the payment is made (is the trustee aware that the member has died);
4. the entity the payment is being made to;
5. the circumstances and timing of the payment;
6. whether the payment is being made consistent with the member's request.

The ATO concluded that the delay between the death of the member and the payment of the lump sum demonstrated that it formed part of the late member's estate administration and not a payment made by and at the request of the member. The ATO confirmed that the tax treatment in Division 302 (the death benefit provisions) of the ITAA 1997 should apply to the benefit.

TIP – it is clear that in some cases the ATO will accept that a payment made to a member who is dead will still be a member benefit.

ATO reference *Private Binding Ruling Authorisation No 1052123084697*
w https://www.ato.gov.au/law/view/document?docid=EV/1052123084697

3.3 Application of section 100A to unpaid present entitlement

Facts

The Z Trust was established with Y Pty Ltd as trustee, and Person A as settlor.

The beneficiaries of the Z Trust are Person B (the specified beneficiary), any child of Person B and any other person nominated by the trustee.

The Z Trust was established for the purpose of participating in the development of residential apartments. W Pty Ltd as trustee for the V Unit Trust owned the land.

The Z Trust acquired 49% of the issued shares in W Pty Ltd and was issued with units representing 49% of the total units issued in the V Unit Trust. The remaining shares and units are held by U Pty Ltd as trustee for the T Family Trust.

The Z Trust is part of a broader group, the S Group, established in Australia by the C family, Person B, her husband Person D and their adult child. The reasons Z Trust was established are varied including:

1. a desire to isolate the other assets and entities comprising S Group from the risks entailed with a property development project of the scale of the X development project; and
2. the desire to be free of the restrictions on dealings with third parties that other trusts associated with the S Group are subject to as a result of the making of Family Trust Elections.

A Senior Facility Agreement governing loans to be made by the Z Trust to the V Unit Trust provides that interest compounds periodically. The interest for an accrual period is capitalised and added to the outstanding loan balance with interest in subsequent accrual periods calculated on the principal amount plus capitalised interest. The reason why the interest is being capitalised is because no material revenue is expected to be earned from the X development project until 20YY following its completion and the sale of the units.

The Z Trust is funded by loans from the R Trust. The R Trust is a non-resident. It is intended that the Z Trust will repay its outstanding loans to the R Trust and UPEs owed to Person B upon refinancing of the Senior Facility Agreement before 30 June 20YY.

Interest accrues monthly and is capitalised on the loans to the V Unit Trust, and is included in the income of the Z Trust for the 20XX income year.

Y Pty Ltd as trustee for the Z Trust resolved that Person B be presently entitled to all of the income of the Z Trust. Person B's entitlement to the income of the Z Trust will remain unpaid until cash is available from the sale of the units, or refinancing of the loans, and is paid over by the trustee of the V Unit Trust

Until such time as the X development project becomes sufficiently cash-flow positive, or the loans are refinanced, interest on the loans made to the V Unit Trust will continue to be capitalised. The capitalised interest under the Senior Facility Agreement will continue to be recorded as income derived in the relevant year.

Person B, Person D and their adult daughter moved to the Country A in October 20ZZ. Person B is not subject to a legal disability.

Assumptions

Person B and Person D and their adult child were not residents of Australia for tax purposes in the relevant income years. They will not be residents of Australia for tax purposes for any of the income years this ruling applies to.

The Z Trust will repay its outstanding loans to the funding trust and the UPEs to Person B before 30 June 20YY.

There are no further steps in the arrangement, beyond those listed in the facts and circumstances, prior to the arrangement that would form part of the reimbursement agreement.

Question

Does section 100A apply with the result that the Trustee, Y Pty Ltd is liable to be assessed to tax on the net income of the Z Trust pursuant to section 99A?

Ruling

The ATO ruled that section 100A does not apply, as the proposed delay in paying the present entitlement would not be considered as entered into or carried out for a purpose of securing a reduction in liability to income tax in respect of a year of income for the Trustee or the beneficiaries or other parties.

The ATO set out that subject to the exception for an agreement entered into in the course of ordinary family or commercial dealing, section 100A applies in cases in which a beneficiary has become presently entitled to trust income where it has been agreed that another person will benefit, and that agreement is made by any of its parties with a purpose that some person will pay less or no income tax as a result. Unlike the general anti-avoidance provisions in Part IVA, section 100A does not require the making of a determination by the Commissioner; it is a self-executing provision.

The ATO noted that the following are required for section 100A to be applied:

1. there needs to be a relevant connection between all or part of a beneficiary's present entitlement, or all or part of the income paid to or applied for the beneficiary, and an agreement (that is a reimbursement agreement);
2. for an agreement to be a reimbursement agreement, it must provide for the payment of money (or transfer of property etc.) to one or more persons other than the beneficiary alone; and
3. for an agreement to be a reimbursement agreement, one or more of the parties to the agreement must have entered into it for a purpose of securing that a person would be liable to pay less tax in an income year than they otherwise would have liable to pay in respect of that income year (a tax reduction purpose).

In respect of these points, the ATO noted:

1. the arrangement in this case involved an agreement with a relevant connection to the beneficiary's present entitlement (to leave the interest income in the V Unit Trust and also leave Person B's entitlement to the income of the Z Trust unpaid until the development was sold);
2. the arrangement in this case meets the "benefits to another" requirement, that is, to leave the interest income in the V Unit Trust and also to leave Person B's present entitlement unpaid until a later date; and
3. it could not be said that the arrangement was entered into for a tax reduction purpose.

In relation to the tax reduction purpose the ATO set out:

1. the UPEs to Person B relating to interest income earned by the Z Trust remain unpaid only for a short time and only until such time as the X development project becomes sufficiently cash-flow positive or is refinanced. In the interim, interest on the loans made to the V Unit Trust will continue to be capitalised. Such capitalised interest will continue to be recorded as income derived in the relevant year;
2. the Z Trust will repay its outstanding loans to the funding trust and the UPEs to Person B before 30 June 20YY upon the development becoming cash-flow positive or refinancing of the Senior Facility Agreement;
3. the Senior Facility Agreement interest rates payable to the Z Trust are consistent with interest rates paid under third parting financing arrangements prior to refinancing under the Senior Facility Agreement; and
4. withholding tax is paid by the Z Trust in respect of the interest income in the year the UPEs are created.

ATO reference *Private Binding Ruling Authorisation No 1052123547268*
w https://www.ato.gov.au/law/view/document?docid=EV/1052123547268

3.4 GST and non-profits

Facts

The taxpayer is a not-for-profit association and is registered with an ABN.

The association is not registered for GST as it is below the GST turnover threshold, however, the association projects that its GST turnover threshold may exceed the not-for-profit GST registration threshold of $150,000 and will therefore be required to be registered for GST.

The ruling is made on the basis that the association is required to be registered for GST.

The activities of the association are manned, run and managed by unpaid volunteers from the associations' membership.

All funds received, net of expenses, are used to further the objectives of the association as per its constitution. No distribution of funds is allowed to individuals. All funds are retained (and used) for the benefit of the association.

The association is not registered as an endorsed charity or a gift deductible entity for GST concessions.

Members of the association make payments for the purchase of the goods and services provided by the association on a by-use basis.

Question

Will the association make a taxable supply under section 9-5 of the GST Act when it supplies alcoholic beverages at its bar and coffee beverages from an automatic coffee machine?

Ruling

The ATO ruled yes.

Section 9-40 of the GST Act states that 'you must pay the GST payable on any taxable supply that you make'.

Under section 9-5 of the GST Act, you make a taxable supply if:

1. you make a supply for consideration;
2. the supply is made in the course or furtherance of an enterprise that you carry on;
3. the supply is connected with the indirect tax zone (Australia); and
4. you are registered or required to be registered.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

The ATO focus in the ruling was in relation to whether an enterprise was being carried on. The ATO relied on Miscellaneous Taxation Ruling MT 2006/1 *The New Tax System: the meaning of entity carrying on an enterprise*

for the purposes of entitlement to an Australian Business Number which explains the Commissioner's view on when an entity is carrying on an enterprise.

Relevantly, MT 2006/1, provides:

> *Non-profit clubs and associations*
>
> *222. Non-profit clubs and associations are similar to mutual organisations in that their activities may involve trading activities (for example bar facilities of a sporting club) and provision of services to members (and perhaps non-members). The objective or outcome is not to derive profits for distribution but merely to cover expenditure and apply any surplus directly or indirectly, sooner or later, to the benefit of the membership as a whole.*
>
> *223. A non-profit club or association might, therefore, conduct activities that are in the form of a business. What is relevant is the nature of the businesslike activities of the organisation, rather than its non-profit status or who it trades with. However, activities may be taken to be an enterprise under one of the other paragraphs of section 9-20 of the GST Act. For example an organisation may be a charitable institution.*
>
> *Example 26 - activities of a club that amount to an enterprise*
>
> *224. A football club has 200 members, most of whom play for the club.*
>
> *225. Membership fees amount to $10,000 per annum. The club attempts to cover its expenditure by running a bar at its clubhouse and this has an annual turnover of $30,000 with a net profit of just over $8,000. The bar is staffed on a voluntary basis and, in addition to beer, wine and spirits, sells some finger food. The club maintains records of its income and expenditure.*
>
> *226. The club's activities are done in a businesslike manner.*
>
> *227. The club is entitled to an ABN on the basis that it is:*
>
> *- an unincorporated association of persons; and*
>
> *- carrying on an enterprise as the activities are done in the form of a business.*

The association supplies goods by way of providing alcohol and coffee beverages to recipients and in return it receives payments. Therefore, the association makes a supply for consideration. In addition, the supply of goods is made in the course or furtherance of the enterprise the association carries on, the supply of goods is connected with Australia, and the association is required to be registered for GST. The supply of coffee and alcohol drinks is not a supply that is input taxed or GST-free.

Accordingly, the association satisfies all the requirements for a taxable supply.

As the association will exceed the GST registration threshold and it is required to be registered, the supply of alcohol and coffee beverages is subject to GST.

TIP – while the ATO in this case stated that the supplies were not GST-free the position would differ if the association was an endorsed charity, or gift deductible entity. In those instances certain supplies made for less than full consideration are GST-free under section 38-250 of the GST Act.

ATO reference *Private Binding Ruling Authorisation No 1052124672539*
w https://www.ato.gov.au/law/view/document?docid=EV/1052124672539

3.5 Business of share trading

Facts

A taxpayer commenced buying shares within a personal bank account and with guidance from an education provider.

The gains made by the taxpayer were listed as assessable foreign income and the taxpayer treated each trade as a capital gains tax event.

The taxpayer created a family trust for the purpose of asset protection and is in the process of transferring assets held in the taxpayer's name to the trust. All funds held by the taxpayer were transferred into the trust structure. The taxpayer now trades using the trust.

During 2020, the taxpayer traded approximately 10 hours per week. Since mid-2021, the taxpayer has been trading approximately 15-20 hours per week.

The taxpayer buys shares on the US securities market and has a set of conditions which must be met before buying a stock. Namely, the taxpayer:

1. uses 'covered calls' and 'collared covered calls';
2. utilises "puts" to offset risks;
3. will hold shares if they have suffered a loss until the point in which they are able to make a profit. The taxpayer will not sell stock for a realized loss.

It appears the taxpayer only traded across 13 different shares.

The taxpayer also has a business plan which sets out their investment objectives.

The taxpayer has a subscription with a service provider who provides education and guidance on investing in the stock market. The taxpayer pays a membership fee. No tertiary qualification will be received by the taxpayer from using the service.

The taxpayer received recommendations on stock to buy from this service.

The taxpayer has not sought professional advice regarding share trading. No research has been conducted by the taxpayer outside of the material provided by the service. The taxpayer listens to podcasts and follows Facebook groups which discuss the topic of 'covered calls' solely for entertainment purposes.

Question

Is the taxpayer carrying on a business of share trading?

Ruling

The ATO ruled that the taxpayer was not carrying on a business of share trading and that the taxpayer was a share investor.

In determining whether an activity is the carrying on of a business, the ATO set out that the facts of each case must examined having regard to relevant indicators that have been established through case law. Taxation Ruling TR 97/11 *Income tax: am I carrying on a business of primary production* lists these general indicators. These general indicators are:

1. whether the activity has a significant commercial purpose or character;
2. whether the taxpayer has more than just an intention to engage in business;
3. whether the taxpayer has a purpose of profit as well as a prospect of profit from the activity;
4. whether there is repetition and regularity of the activity;
5. whether the activity is of the same kind and carried on in a similar manner to that of the ordinary trade;
6. whether the activity is organised in a businesslike manner;
7. the size or scale or permanency of the activity; and
8. whether the activity is better described as a hobby, a form of recreation or a sporting activity.

In coming to its decision, the ATO considered the following:

1. the taxpayer had a lack of commercial purpose due to the fact that they only traded in 13 different shares, had not sought expert advice and had not ‘attained any technical literature’ or training on how to carry on share trading;

2. there was no discernible pattern to the taxpayer's trading activities and the taxpayer made small amounts of buys and sells, and calls and puts;
3. the taxpayer conducted trades on a small scale, in line with investing. The figures also indicated that the taxpayer was trading in shares as a capital investment;
4. the transaction patterns were not carried on in a similar manner to other share trading businesses, for example, the taxpayer had a low turnover of shares and had low repetition and regularity of share activity;
5. the taxpayer did not display the sophistication that may be expected of a share trading business. The business plan was a set of goals with no plan in place of how the taxpayer intended to achieve them;
6. the transactions of the taxpayer were not a hobby, recreational or sporting activity as the taxpayer started the share trading activity with the intention to make a profit based on training from an education service provider.

COMMENT – the implications of the ATO are decision are that: a) any gains or losses will be capital gains or losses, b) the trading stock rules cannot be used to revalue the closing stock values, and c) the non-commercial loss rules will not apply to any losses from the trading activities.

ATO reference *Private Binding Ruling Authorisation No 1052117335754*
w https://www.ato.gov.au/law/view/document?docid=EV/1052117335754

3.6 Cryptocurrency trading

Facts

A taxpayer made a significant number of buy and sell transactions in the 2021-2022 financial year.

The taxpayer had multiple buy and sell transactions in each month which were regular and repetitive throughout the year.

The taxpayer followed a trading strategy with the intent of making short-term income and profit and also kept electronic records of the trades and analysis. The taxpayer also used crypto-currency software to keep records of their transactions and accounting records.

The taxpayer invested a substantial sum of capital to be able to trade and used a personal account in their name to deposit and withdraw funds.

The taxpayer provided the ATO with details of their income and losses, as well as the number of hours per week that the taxpayer spent on research and analysis. The taxpayer allocated a minimum number of hours at the same time each day to complete analysis, read market reviews and recommendations and to set up their watchlist. The taxpayer would also spend a specified number of hours each week conducting the trades.

The taxpayer used various internet sources and online charting to analyse potential trading set-ups and entry/exit methods.

The taxpayer had fulltime employment which was not related to the financial investing and cryptocurrency industry. The taxpayer did not have any qualifications, nor did they complete any training courses. However, the taxpayer did have subscriptions to obtain professional assistance from other traders within the industry and also improved their knowledge and skills in cryptocurrency through various online sources.

The taxpayer had a separate office set up in their home for the purpose of trading.

Question

Is the taxpayer a cryptocurrency trader for the 2021-2022 financial year for income tax purposes?

Ruling

The ATO ruled yes. Accordingly, the income of the taxpayer is assessable as ordinary income under section 6-5 of the ITAA 1997 and the losses of the taxpayer are deductible under section 8-1 of the ITAA 1997.

Determining whether a taxpayer is a cryptocurrency trader is the same as determining whether a taxpayer is carrying on a business for tax purposes. Accordingly, in reaching its decision, the ATO weighed the factors set out in *Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?* within the context of the taxpayer's individual circumstances.

In support of finding that the taxpayer is a cryptocurrency trader, the ATO noted that the taxpayer:

1. had an intention to engage in their activities, an intention of short-term income and profit and used a trading strategy to assist in the cryptocurrency trading decisions;
2. demonstrated repetition and routine in their trading activities; and
3. conducted their trades in a business-like manner as they had a dedicated office space, kept records of analysis and trades, had a trading strategy in place and had a variety in the cryptocurrency that they traded.

ATO reference *Private Binding Ruling Authorisation No 1052126535535*
w https://www.ato.gov.au/law/view/document?docid=EV/1052126535535

3.7 Employee v independent contractor

Facts

An entity engages guides on a regular basis as employees. When the entity requires specialty or additional guides, the entity engages contractor guides (**Contractor Guides**).

The Contractor Guides:

1. have their own ABNs;
2. have their own insurance;
3. can accept or refuse a 1 to 14 day job with the entity;
4. can replace themselves with another guide who has equal or higher qualifications than themselves (the ruling facts included an example of a guide who did this); and
5. work 1 to 3 days a month on average for the entity.

The entity expects the Contractor Guides to:

1. keep their First Aid, CPR, Blue Card and insurance current;
2. follow the itinerary as scheduled (with some flexibility as described in the daily schedule);
3. find a replacement guide to do the work of the Contractor Guide if the Contractor Guide commits to a trip with the entity and then cancels; and
4. send an invoice for services at the end of each trip.

Question

Are the Contractor Guides engaged by the entity employees within the ordinary or common law meaning for the purposes of subsection 12(1) of the SGAA?

Ruling

The ATO ruled that the Contractor Guides are independent contractors as a result of the totality of the relationship created by the contract with the entity. The contract indicates that the payer has certain control over when to perform a task the Contractor Guides have an unfettered right of delegation.

The ATO considered *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contacting Pty Ltd* [2022] HCA 1 which outlines various factors to be considered when determining whether a worker is a common law employee. In determining whether the Contractor Guides are common law employees, the totality of the relationship between the entity and the Contractor Guides was considered. The different factors considered are listed below.

Worker serving in business vs contractor providing services to a business

The ATO considered whether the Contractor Guides' work was so subordinate to the entity's business that they could be seen to have been performed as an employee of that business rather than as part of an independent enterprise.

The ATO concluded that the Contractor Guides were performing tasks as independent contractors providing a contract for services to the entity's business without explaining why they reached this conclusion.

Control

An employer is usually able to control how, where and/or when its employee performs their work.

The contract allowed for the Contractor Guides to choose how the intellectual property was delivered to the patrons (this appears to be a reference to the itinerary). If the Contractor Guides were unable to attend a tour they were booked to guide, the Contractor Guides had the right to delegate to another guide with equal or higher qualifications. This level of freedom indicated a contractual relationship.

Right to delegate

Pursuant to *Australian Mutual Provident Society v Chaplin and Anor* (1978) 18 ALR 385, an unlimited, unfettered power to delegate or subcontract to others to perform the work is usually an indication that the worker is not an employee.

It was shown that the Contractor Guides had an unfettered right to delegate, a right which had been exercised in the relevant period.

Remuneration for a specified result

Under a results-based contract, payment is often made for a negotiated fixed price on completion of the job, as opposed to an hourly rate.

The Contractor Guides were paid a fee for agreed services for a particular trip. While the amount determined was calculated from an hourly rate, payment was for an invoice issued by the Contractor Guide for the completed trip and therefore was considered to be for a result.

Tools and equipment

Generally, employees are provided with tools and equipment by the employer and independent contractors provide and use their won tools.

In this case, all tools and equipment were provided by the entity and returned at the end of each trip which leans towards the Contractor Guides being considered common law employees of the entity.

Goodwill and intellectual property

The contract was written to preclude the Contractor Guides from poaching customers from the entity which was noted as an example of an independent contractor relationship.

Level of risk borne by each party

Generally, employers are vicariously liable for negligence and injury caused by their employees. In contrast, a principal will not be liable for negligence or injury caused by an independent contractor.

The Contractor Guides were required to maintain their own insurance which is characteristic of an independent contractor relationship.

The ATO concluded that the Contractor Guides were independent contractors and not eligible for Superannuation Guarantee.

TRAP – it is not clear why the ruling did not consider whether the Contractor Guides were employees under the extended meaning of that term under the SGAA where a person will be an employee where the 'person works under a contract that is wholly or principally for the labour' of the person. It is possible that the right to delegate meant that, consistent with the finding that they were not employees, that the payments made to them were not for their labour.

ATO reference *Private Binding Ruling Authorisation No 1052111810272*
w https://www.ato.gov.au/law/view/document?docid=EV/1052111810272

3.8 Moving into main residence

Facts

In XX 20XX, a taxpayer was advised by their employer that they were required to relocate from Location A to Location B as part of their employment.

In XX 20XX, the taxpayer was advised by their employer that they were required to relocate from Location B to Location A as part of their employment.

The taxpayer subsequently entered a contract to purchase a Property.

On XX/XX/20XX, the taxpayer was advised that, due to a company restructure, the taxpayer was required to relocate from Location B to Location C (rather than Location A).

On XX/XX/20XX, settlement of the Property occurred, and the taxpayer commenced the process to lease the Property. The Property was subsequently leased.

On XX/XX/20XX, the tenants vacated the Property and the taxpayer commenced occupation of the Property.

On XX/XX/20XX, the taxpayer sold the Property.

Question

Is the taxpayer entitled to the full main residence exemption in section 118-110 of the ITAA 1997 on the sale of the Property?

Ruling

The ATO ruled 'No' as the taxpayer did not move into the Property 'when it was first practicable to do so' within the meaning of section 118-135 of the ITAA 1997 and the circumstances of temporary delays envisaged by the Explanatory Memorandum to the *Tax Law Improvement Bill (No.1) 1998*. Section 118-135 provides that if you move into a dwelling as soon as practicable then the dwelling is treated as your main residence from the time you acquire an ownership interest in it (typically at settlement).

The Explanatory Memorandum indicates that section 118-135 of the ITAA 1997 is intended to apply in situations where moving into the dwelling is temporarily delayed due to matters outside the person's control. For example, where there is a temporary delay in moving in because of illness or other reasonable cause. It is not extended to apply to the situation where the individual is unable to move into the dwelling because it is being rented out to tenants.

The ATO referred to the case of *Couch and Commissioner of Taxation* [2009] AATA 41 which determined that the extension of the main residence exemption will not apply in the situation where a taxpayer purchases a property with the intention of occupying it as their main residence but never actually occupies the property.

In the present case, the taxpayer purchased the Property with the intention of it being their main residence however the dwelling was rented to tenants for the entire time that the taxpayer did not live in the Property. This mere intention is not enough to qualify for the exception in section 118-135 of the ITAA 1997 and for the taxpayer to treat the dwelling as their main residence from when they acquired it.

The reasons for the taxpayer's extended delay in moving into the Property, in the ATO view, go beyond the temporary circumstances envisaged by the Explanatory Memorandum.

ATO reference *Private Binding Ruling Authorisation No 1052119902359*
w https://www.ato.gov.au/law/view/document?docid=EV/1052119902359

3.9 Legal v beneficial ownership

Facts

A taxpayer obtained finance from a bank on behalf of their parents to purchase a property. The Taxpayer's parents were unemployed at the time. The Taxpayer subsequently purchased a property on their parent's behalf.

The Taxpayer's parents contributed funds to be used for the settlement of the property such as transfer duty and real estate agent fees. The Taxpayer's parents paid all expenses in relation to the property since it was acquired.

The Taxpayer's parents occupied the property from around the date on which the property was purchased. The Taxpayer's mother moved into a rental property at a later point in time. The Taxpayer's father continued occupying the property until it was sold.

The property was sold and the Taxpayer's parents agreed to split the proceeds of sale between them.

From the date on which the property was purchased to the date on which it was sold, the property was never used to produce assessable income.

Question
Is the Taxpayer considered to be the beneficial owner of the property for CGT purposes?

Decision

No. The Taxpayer's parents were considered to be the beneficial owners of the property in accordance with two separate private binding rulings that were issued in respect of each parent.

COMMENT – the corresponding rulings for the parents confirm that the ATO consider that the parents are eligible for the main residence exemption – see for example PBR 1052120589033. It is not clear how merely having a beneficial ownership in the property leads to the main residence exemption applying to a beneficial owner.

ATO reference *Private Binding Ruling Authorisation No 1052127776370*
w https://www.ato.gov.au/law/view/document?docid=EV/1052127776370

3.10 Active asset test and subdivided property

Facts

A taxpayer acquired a property with their spouse more than 30 year ago.

The property was used in a business operated by the taxpayer and their spouse in partnership for over 7.5 years. During the time the partnership was in business, the property was solely used for business operations.

After the partnership business ceased, the property was subdivided into 2 lots.

The factory used in the business was located on what is now property A and was transferred to a related entity of the taxpayer.

Two buildings used in the carrying on of the business are located on what is now property B and were held by the taxpayer and their spouse until the spouse's death, after which time the taxpayer acquired the spouse's interest in Property B by way of survivorship.

Both property A and property B are being sold together as a single property, and the taxpayer intends to apply the small business concessions to the sale of property B only.

Question

Does property B satisfy the active asset test pursuant to section 152-35 of the ITAA 1997?

Ruling

The ATO ruled yes, as during the time that the partnership was operating a business, property B was part of a single parcel of land, and the single parcel of land was an active asset of the partnership for more than 7.5 years during the ownership period.

COMMENT – this ruling appears to ignore the fact that you do not 'inherit' the active asset period of a deceased person under Division 152 of ITAA 1997. While this is the case for property the subject to a marriage breakdown rollover (see section 152-45((2)), on death there is simply a 2 year period (or such further period as the Commissioner allows) timeframe to access the small business CGT concessions after the death of a person, if the deceased would have been eligible to apply those concessions had they disposed of the property just prior to their death.

ATO reference *Private Binding Ruling Authorisation Number 1052124043658*
https://www.ato.gov.au/law/view/document?docid=EV/1052124043658

3.11 Residential property v commercial residential property

Facts

The taxpayer has an ABN but is not currently registered for GST.

The taxpayer owns land comprising a dwelling which is the taxpayer's home, as well as two separate studios located on the property.

The taxpayer offers short-term accommodation from the two separate studios.

The studios are booked through online platforms including Booking.com, Airbnb and other booking agents. The taxpayer also maintains a personal website for advertising the studios and providing a booking portal. 99% of bookings are made through third-party booking services.

The taxpayer does not provide any meals, concierge, front desk, cleaning service, linen services, laundry services, or any other services to guests during their stay. The taxpayer provides clean linen and towels for use during a guest's stay.

The studios have kitchen facilities and appliances for guests to prepare meals. The taxpayer provides complimentary tea, coffee, milk, soft drink beverages and breakfast provisions of bread, condiments, muesli and fresh fruit.

The studios are cleaned by the taxpayer at the end of each occupancy. The taxpayer engages tradespersons as required to maintain and repair the studios.

Question

Is the taxpayer required to be registered for GST in relation to the supply of 'bed and breakfast' accommodation provided from two studios located on the taxpayer's premises?

Ruling

The ATO ruled no.

The supply of the bed and breakfast accommodation by the taxpayer the ATO considered to be an input taxed supply under section 40-35 of the GST Act.

Residential premises

The taxpayer is carrying on an enterprise of providing bed and breakfast accommodation in the studios located on the property. In determining whether the taxpayer is required to be registered for GST, input taxed supplies are not included when calculating current and projected turnovers.

Section 40-35(1)(a) of the GST Act provides a supply of residential premises by way of lease, hire or licence is input taxed if the supply is of residential premises, other than a supply of commercial residential premises or a supply of accommodation in commercial residential premises provided to an individual by an entity that owns or controls the commercial residential premises. A supply will be input taxed only to the extent that the premises are to be used predominantly for residential accommodation (regardless of the term of occupation).

Paragraph 9 of GSTR 2012/5 *Goods and Services Tax: residential premises* explains that the requirement in section 40-35 that premises be 'residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)' is to be interpreted as a single test that looks to the physical characteristics of the property to determine the premises suitability and capability for residential accommodation.

Paragraph 10 of GSTR 2012/5 provides that the test does not require an examination of the subjective intention of, or use by, any particular person. Premises that display physical characteristics evidencing their suitability and capability to provide residential accommodation are residential premises even if they are used for another purpose.

In the taxpayer's case, the studio accommodation has physical characteristics relevant to providing basic living facilities and are suitable and capable of being occupied for residential accommodation.

On this basis, the ATO considered the 'predominantly for residential accommodation' test at section 40-35(2)(a) is satisfied.

Commercial residential premises

In addition, the supply of the premises must not be characterised as commercial residential premises (section 40-35(1)(a) of the GST Act). Commercial residential premises are defined in section 195-1 of the GST Act, and relevantly includes a hotel, motel, inn, hostel or boarding house.

GSTR 2012/6 Goods and services tax: commercial residential premises provides the Commissioner's view on the characteristics of commercial residential premises. Paragraphs 49 and 50 of GSTR 2012/6 specifically considers whether a bed and breakfast will have the characteristics of commercial residential premises. In the example of a bed and breakfast that is commercial residential premises in GSTR 2012/6, the rooms are cleaned daily, linen is replaced, and guests are provided breakfast in a communal dining room. Here, the ATO considered the taxpayer's premises did not constitute commercial residential premises as it did not provide sufficient guest services ordinarily displayed in a hotel, motel, inn, hostel or boarding house.

GST Registration

The accommodation supplied by the taxpayer is considered input taxed under section 40-35 of the GST Act, and is disregarded when calculating the current and projected turnovers under Division 188.

As the taxpayer does not satisfy the requirements of section 23-5, the taxpayer is not required to be registered for GST.

ATO reference *Private Binding Ruling Authorisation No 1052126319066*
w https://www.ato.gov.au/law/view/document?docid=EV/1052126319066

3.12 Partnership and GST registration

Facts

The vendors are partners in the Partnership.

The Partnership has been registered for GST since 1 July 2000 and accounts for GST on a quarterly basis.

The vendors own Lot X and Lot Y (the **Properties**) as joint tenants.

Lot X was acquired in YYYY. It is several acres and comprises a house (constructed prior to 2000) which is used as the vendor's main residence, a shed and a market garden.

Lot Y was acquired in YYYY. It is several acres and the site was immediately transitioned into a market garden.

Since YYYY, the Vendors have operated a farming business through Entity B as trustee for the Entity B Family Trust (the **Family Trust**). The Family Trust has been registered for GST since XX YYYY.

The Family Trust continues to operate the business from both market gardens located on the Properties.

The Partnership has leased the Properties (other than the residence on Lot X) to the Family Trust. There is no formal, written lease agreement in place.

Service fees (comprising rates and taxes and farm improvement costs) are charged to the Family Trust. The total service fees per annum are generally less than $X.

The Vendors were approached by a Developer to sell the Properties.

The Partnership entered into a Deed of Call Option and Put Option dated XX YYYY (the **Deed**) with the Purchaser to grant Put and Call Options over the Properties.

The Deed attaches 3 possible sales contracts over Property 1A, Property 1B and Property 2 that are to be executed by the parties where the relevant put or call options are exercised. Property 1A is the Subdivided Lot Y and comprises part of Lot Y. Property 1B is the remainder of Lot Y and Property 2 is Lot X.

Under the Deed:

1. the Purchaser must pay the Vendors the Due Diligence Fee, being $X, and the Call Option Fees, being $X for Property 1A, $X for Property 1B and $X for Property 2 on the date of the Deed. These amounts were paid on XX YYYY. The GST amount on the Due Diligence Fee and the Call Option Fees (totalling $X) were paid on XX YYYY;
2. where the relevant options are exercised, the purchase price for Property 1A will be $X, the purchase price for Property 1B will be $X and the purchase price for Property 2 will be $X. The purchase price can be adjusted in accordance based on a survey of the Properties;
3. the Due Diligence Fee and the Call Option Fees are not refundable to the Purchaser, regardless of whether either of the options is exercised. Where the Deed is validly terminated due to the Vendor's default, the Vendor must repay the Due Diligence Fee and the Call Option Fees to the Purchaser;
4. if the Call Option is exercised, the Due Diligence Fee and the Call Option Fees forms part of the deposit and purchase price under each respective contract;
5. the Purchaser must pay the Vendors the Security Amount (at monthly intervals) as security for the performance by the Purchaser's obligations under the Deed and contracts for sale;
6. if the Call Option is exercised, the Security Amounts form part of the deposit and purchase price under each respective contract;
7. if the Call Option is not exercised, the Vendors must repay the Security Amounts to the Purchaser;
8. the Deed is subject to and conditional upon the Purchaser satisfying the Due Diligence Condition by the Due Diligence End Date. The Due Diligence End Date is defined as the date which is the later of:
   (a) x after the date of the Deed; and
   (b) if the Vendors have made the Private Ruling Application in accordance with clause x of the Deed and have given the Purchaser a copy of the Private Ruling Application in accordance with clause x, x Business Days after the Vendors serve the Purchaser with a copy of the Private Ruling.

The Properties are included as assets in the financial statements of the Partnership.

In the YYYY financial year, service fees of about $X were charged to the Family Trust. GST was paid by the Trust on the service fees and is remitted in the Partnership's BAS.

Neither partner in the Partnership has ever had an ABN, nor been registered for GST in their own individual capacities.

The Vendors (and therefore the Partnership) do not expect to earn any revenue other than the sales proceeds from the sale of the Properties.

Once the Purchaser has purchased the relevant Properties, it will develop the Properties into residential lots for sale. The Purchaser will not continue to operate the Properties as market gardens or take over the lease to the Family Trust. The Purchaser is currently registered for GST.

The vendors also own a residential investment property (which receives residential rent) and a share in a commercial unit (jointly owned with the Family Superannuation Fund [Super Fund]).

The rent and expenses on the commercial property are recognised in a separate partnership between the Vendors and the Super Fund, which has been registered for GST since XX YYYY.

Questions

1. Is the Partnership required to be registered for GST pursuant to section 23-5 of the GST Act with effect from XX YYYY?
2. Is the Partnership entitled to cancel its GST registration pursuant to section 25-55 of the GST Act with effect from XX YYYY?
3. Where the option to purchase any of the Properties is exercised and the Partnership cancels its GST registration prior to settlement of the Properties, will the sale of Property 1A, Property 1B and/or Property 2 (as applicable) be taxable supplies pursuant to section 9-5 of the GST Act?

Ruling

Question 1

The ATO ruled No.

Section 23-5 of the GST Act states that a person is required to be registered for GST if they are carrying on a enterprise and their GST turnover meets the registration turnover threshold of $75,000.

Carrying on an enterprise

In respect of whether the Partnership was carrying on an enterprise, the ATO concluded that it was, as the Properties were being leased to the Family Trust, with Service Fees being charged to the Family Trust.

The ATO also confirmed that section 195-1 states that the phrase 'carrying on' in the context of an enterprise includes 'doing anything in the course of the commencement or termination of the enterprise'. Therefore, the entering into the Call Option Agreement and the subsequent sale of the Properties will be in the course of the termination of the leasing enterprise.

GST supplies

The ATO identified the following three supplies made pursuant to the Deed:

1. the granting of the Call Options;
2. the granting or creation of the right to undertake a Due Diligence Investigations prior to entering into a contractual arrangement regarding the Properties; and
3. the subsequent supply of the Properties when the Call Option is exercised.

Turnover threshold

In determining whether you meet the required turnover threshold for GST purposes to be required to be registered, you meet the threshold (and so must be registered) if:

1. Your current GST turnover meets or exceeds the threshold and the Commissioner is not satisfied that you projected GST turnover is under the threshold; or
2. Your projected GST turnover meets or exceeds the threshold.

In respect of the GST turnover threshold, the ATO determined that the Partnership's current GST turnover, in respect of the supply of the Properties to the Family Trust, was below the threshold of $75,000. However, in applying the provisions of Division 188 (here projected annual turnover), the ATO considered the Partnership's GST turnover for the months of February YYYY and March YYYY.

In February YYYY, the ATO stated that the supplies made to the Purchaser, being the granting of the Call Options and the right to undertake Due Diligence Investigations, were made on 28 February YYYY, upon the execution of the Deed. Therefore, the **current** GST turnover includes the Due Diligence Fee and the Call Option Fees (together with the value of any other supplies made between the period 1 March YYYY and 28 February YYYY). This amount was at or above the turnover threshold of $75,000.

In March YYYY, the **current** GST turnover includes the value of any supplies you made in March YYYY together with the value of any other supplies you have made between the period 1 April YYYY and 28 February YYYY (which will include the Due Diligence Fee and the Call Option Fees). This amount is at or above the turnover threshold ($75,000).

The Partnership's **projected** GST turnover as calculated in March YYYY will include the value of any supplies made during the period 1 March YYYY to 29 February YYYY. In calculating the projected GST turnover, any supply likely to be made by way of the transfer of ownership of a capital asset is to be disregarded. The ATO ruled that the supply of the Properties will constitute the sale or transfer of ownership of a capital asset. The value of the Properties supplied to the Purchaser is disregarded in calculating the Partnership's projected GST turnover.

Further, a portion of Lot X was also used as a place of residence. Therefore, the supply of Lot X, to the extent Lot X is residential premises, is considered an input tax supply and a supply not made in connection with the leasing enterprise and therefore excluded from the calculations of both current GST turnover and projected GST turnover.

The ATO concluded that while the current GST turnover in March YYYY is at or above $75,000, the Partnership's projected GST turnover is below $75,000. The registration turnover threshold was not met, and the Partnership is not required to be registered as at March YYYY.

Question 2

The ATO ruled Yes.

As the ATO ruled in Question 1 that the Partnership is not required to be registered as from March YYYY. Therefore, the Partnership can apply in the approved form for cancellation of its GST registration.

Question 3

The ATO ruled No.

The ATO confirmed that where the Partnerships' GST registration is cancelled effective from on or after 1 March YYYY and prior to the date of settlement, the Partnership would neither be registered nor required to be registered for GST. Therefore, the supply of the Properties would not constitute a 'taxable supply' as defined in section 9-5 of the GST Act.

TIP – the GST anti-avoidance provisions should not operate to allow the Commissioner to cancel the tax benefit resulting from the deregistration, as deregistering for GST is a choice, and the anti-avoidance provisions do not operate if your GST-benefit results from a choice (see section 165-5(1)(b) of the GST Act). The anti-avoidance provisions can however apply where you create a state of affairs that allows you to make a choice.

ATO reference *Private Binding Ruling Authorisation No 1052117341212*
w https://www.ato.gov.au/law/view/document?docid=EV/1052117341212

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3.13 Granny flat arrangements – CGT

Facts

On XX/XX/20XX, Party A and Party B entered into a Permissive Occupancy Agreement (**POA**). At the time of the POA, Party A was above pension age. The relevant terms of the POA were:

1. Party B agrees to provide accommodation, food and clothing for the life of Party A;
2. the agreement, once signed, is binding on both parties;
3. Party A will pay $XX in consideration for the agreement and to cover the costs of Party A's housing and care for the whole of Party A's natural life.

On XX/XX/20XX, in accordance with the POA, Party B entered into a contract to purchase a dwelling for Party A and Party B to live in.

On XX/XX/20XX, Party A transferred $XX to Party B to be applied towards payment for the dwelling.

On XX/XX/20XX, settlement of the contract to purchase the dwelling occurred. The parties moved into the dwelling.

On XX/XX/20XX, the parties terminated the POA.

Questions

1. Does the POA create a granny flat interest for the purposes of section 137-10 of the ITAA 1997?
2. Did the arrangement set out in the POA give rise to a CGT event for the purposes of section 137-15 of the ITAA 1997?

Ruling

Question 1

Yes, a granny flat arrangement is a written agreement that gives an eligible person the right to occupy a property for life. A granny flat interest can be held in any type of property, provided it is a dwelling. This includes the owner's main residence or a separate property. The interest may be an interest in part of the property, or the whole of the property.

Question 2

No, CGT does not apply when a granny flat arrangement is created, varied or terminated. The exemption applies if the owners of the property are individuals, they have an eligible interest in the property and the owners and the individuals with the granny flat interest enter into a written binding arrangement and it is not commercial in nature.

TIP – for a granny flat interest not to have CGT consequences, amongst other things, the person who will benefit from making the payment needs to be 'eligible for a granny flat interest' which is defined to mean where a person:

- reached pension age (for social security purposes) at or before that time; or
- the individual:
  - needs, because of a disability, assistance to carry out most day-to-day activities; and
  - is likely to continue to need that assistance, because of that disability, for at least 12 months after that time.

ATO reference *Private Binding Ruling Authorisation No 1052126976781*
w https://www.ato.gov.au/law/view/document?docid=EV/1052126976781

3.14 ESIC bare trust arrangement

Facts

A company has been considered to be an early stage innovation company (**ESIC**) since incorporation until 30 June 20XX. A taxpayer was issued with shares in the company and claimed the ESIC tax offset available under section 360-25 of the ITAA 1997 for the income years ended 30 June 20XX and 30 June 20XX.

The taxpayer is one of many minority shareholders.

The company is seeking to transfer all shares held by minority shareholders into a separate bare trust for each shareholder. The transfer of minority shareholder shares will ensure the company is not required to alter its structure as per section 113 of the Corporations Act which stipulates that a proprietary company must have no more than 50 non-employee shareholders (broadly).

There will be a corporate trustee (nominee) for the bare trust. The arrangement is governed by the bare trust deed and a Nominee Agreement. The Nominee Agreement does not eliminate the trustee's rights of indemnity out of the trust's assets.

Question

Will the taxpayer retain the ability to apply modified CGT treatment under section 360-50 of the ITAA 1997 for shares held in the Company after they are transferred to a bare trust?

Ruling

The ATO ruled no. The trustee of the proposed bare trust has rights of indemnity out of trust assets (being the shares in the company). The taxpayer is therefore not absolutely entitled to the shares once the bare trust is created over them. The proposed transfer of the taxpayer's shares into a bare trust will result in CGT event E1 occurring. There is an exception contained at subsection 104-55(5) of the ITAA 1997 which states:

CGT event E1 does not happen if you are the sole beneficiary of the trust and:

(a) you are absolutely entitled to the asset as against the trustee (disregarding any legal disability); and

(b) the trust is not a unit trust.

In the present circumstances, the trust is not a unit trust. In addition to this, the taxpayer noted in the application that the arrangement will be structured such that the trustee will be the trustee of separate trusts for each of the minority shareholders. That is, the taxpayer will be the sole beneficiary of their bare trust.

The ATO does not consider that the taxpayer would be absolutely entitled to the assets of the trust as against the trustee. This is because the Nominee Agreement does not fully eliminate the trustee's right of indemnity from the trust assets. The ATO noted that the concept of absolute entitlement implies that the beneficiary has an immediate and unconditional right to the assets or income of the trust without any competing claims or rights. Therefore, when the trustee has a right to indemnity, there is a competing interest in the trust assets, and the beneficiary's entitlement becomes conditional upon the trustee's indemnity claim being satisfied. In this situation, the beneficiary's claim to the trust asset is not absolute.

Further, once the shares are transferred to the trustee as trustee for the bare trust, the taxpayer will no longer be the holder of the shares, and will therefore not satisfy the requirement that the entity claiming the modified CGT treatment has continuously held the shares since their issue (section 360-50(3), (4) and (5)).

The taxpayer will be entitled to modified CGT treatment under section 360-50 in relation to that CGT event E1 but will not retain the ability to utilised that modified CGT treatment again for the relevant parcel of shares.

COMMENT – the ATO draft ruling TR 2004/D25, which is in draft but is understood to be administratively, but not legally, binding on ATO staff, states in paragraph 18 that a right of indemnity will not prevent absolute entitlement. The draft ruling does in a headnote that the ATO are consulting with Treasury of the 'problem area' of the trustee's indemnity. The head note appears to have been in place since before 2008.

ATO reference *Private Binding Ruling Authorisation No 1052128807152*
w https://www.ato.gov.au/law/view/document?docid=EV/1052128807152#_ftn6

3.15 Repairs v improvements

Facts

A taxpayer has owned an investment property for an extended period of time. The property has been rented for the entirety of the ownership period. Flats are located on the property and are all connected.

Several years ago, there was a storm event in the area of the property. There was significant damage caused to the property. The rear retaining wall was damaged due to floods. This damage caused instability and therefore, a dangerous situation.

The wall was braced for several months while further reports were sought, and insurance claims made. A significant percentage of the damage to the wall was attributed to the flood event. The wall was fully replaced with similar material.

The taxpayer received an insurance payout in relation to the wall and it has been declared in the relevant tax return.

The entire roof has been replaced. The roof has been on the property for several decades. It was a flat clip-lock roof. The roof had been leaking and causing damage to the interior of the property. The original roof had no insulation and only intermittent areas of plastic sheeting protecting the interior from the exterior roof.

To comply with current building standards, the roof was replaced and re-pitched to ensure no interior condensation continued. The repair commenced several years ago and was completed a few months later.

Internally, due to water damage there were significant repairs required to all flats at the property. The work required was equally spread across all flats/units and they are almost identical in how they now look.

The plasterwork had significant water damage which needed full replacing. This meant that the rooms that had this damage and mould needed the electricity to be re-wired, and where applicable re-plumbed and re-painted.

Some bathrooms had serious mould issues behind the laminated panel lining which caused it to be loose. The baths and vanities were required to be removed to fix these issues and the plumbing was brought up to standard. The rangehoods and lighting were in various stages of repair and required replacement.

Questions

1. Is the replacement of the retaining wall a repair and therefore an immediate deduction?
2. Is the replacement of the clip lock roof a repair and therefore an immediate deduction?
3. Is the plastering and painting carried out on the internal rooms a repair and therefore an immediate deduction?
4. Is the electrical, plumbing and tiling work considered capital works?
5. Is the replacement of the rangehood, stove, toilets, blinds, air conditioning units and vanity units considered the replacement of depreciating assets?

Ruling

Section 25-10 of the ITAA 1997 allows a deduction for the cost of repairs to premises used for income producing purposes. However section 25-10(3) does not allow a deduction for repairs where the expenditure is of a capital nature. 'Repair' is not defined in tax legislation, and therefore takes its ordinary meaning. In *W Thomas & Co v. FC of Taxation* (1965) 115 CLR 58 it was held that a 'repair' involves a restoration of a thing to a condition it formerly had without changing its character. The significance is on the restoration of efficiency in function, rather than the exact repetition of form or material.

Taxation Ruling TR 97/23 Income tax: deductions for repairs delas with the issue of deductions for repairs. The ruling provides that expenditure for repairs to property is of a capital nature where the extent of the work carried

out represents a renewal or reconstruction of the entirety, or the works result in a greater efficiency of function in the property, therefore representing an 'improvement' rather than a 'repair'.

Taxation Ruling TR 97/23 states:

1. works can fairly be described as 'repairs' if they are done to make good damage or deterioration that has occurred by ordinary wear and tear, by accidental or deliberate damage or by the operation of natural causes (whether expected or unexpected) during the passage of time;
2. to repair property improves to some extent the condition it was in immediately before repair. A minor and incidental degree of improvement, addition or alteration may be done to property and still be a repair. If the work amounts to a substantial improvement, addition or alteration, it is not a repair and is not deductible under section 25-10.

An 'entirety' is defined as something 'separately identifiable as a principal item of capital equipment' (*Lindsay v. Federal Commissioner of Taxation* (1960) 106 CLR 377 at 385).

TR 97/23 also provides that a property is more likely to be an entirety, as distinct from a subsidiary part, if:

1. the property is separately identifiable as a principal item of capital equipment; or
2. the thing or structure is an integral part, but only a part, of entire premises and is capable of providing a useful function without regard to any other part of the premises; or
3. the thing or structure is a separate and distinct item of plant in itself from the thing or structure which it serves; or
4. the thing or structure is a 'unit of property' as that expression is used in the depreciation deduction provisions of the income tax law.

Division 43 of the ITAA 1997 provides for deductions for capital expenditure incurred in the construction of buildings and other capital works used to produce assessable income.

Section 40-25 of the ITAA 1997 allows a deduction for the decline in value of a depreciating asset that you hold. A depreciating asset is an asset that can reasonably be expected to decline in value over time it is used (section 40-30 of ITAA 1997). Depreciating assets are those items that can be described as plant, which do not form part of the premises. Examples of assets that deductions for decline in value can be applied to include timber flooring, carpets, curtains, appliances like a washing machine or fridge and furniture.

Where a depreciating asset costs less than $300, you are able to claim an immediate deduction rather than depreciate the asset over its effective life if you are not in business (and subject to rules about sets an identical or substantially identical items).

Question 1

No, these expenses are relation to an improvement.

The ATO considered that the original retaining wall was investigated by an insurance assessor, who made a recommendation for the wall to be replaced in full. Therefore, the replacement of the wall goes beyond restoring the property to its original state. In this case, the whole of the retaining wall was to be replaced. These changes represented both a renewal or reconstruction of an entirety, and an improvement to a fixed capital asset. This asset therefore would be written off as a capital improvement.

The ATO noted that the taxpayer considered the replacement would be a repair, consistent with example 5 in TR 97/23 where the replacement of electricity poles and wires, in full, with underground cables, was considered a repaid. The ATO do not explain why the example differs from the position here.

Question 2

Yes, these expenses are deductible as repairs.

Paragraph 40 of TR 97/23 specifically states that a roof is only part of a building and does not constitute an 'entirety'. The building itself is the 'entirety'. As such, a replacement of a roof would not generally represent a renewal or a reconstruction of an entirety (as a house would be classed as the entirety).

The ATO do not address the functional improvements made by pitching the roof.

Question 3

Yes, these expenses are deductible as repairs.

Plastering and painting the interior of the building is considered to be a repair and an immediate deduction for these associated expenses are allowable.

Question 4

Yes, these expenses are deductible as repairs.

The electrical, plumbing and tiling works the ATO considered to be capital works and an immediate deduction is not allowable. The taxpayer may claim a capital works deduction. No reasoning was given.

Question 5

Yes, these expenses are deductible as repairs.

The rangehood, stove, toilets, blinds, air conditioning units and vanity units are depreciating assets which have been replaced so they should be depreciated over time.

ATO reference *Private Binding Ruling Authorisation No 1052125709588*
w https://www.ato.gov.au/law/view/document?docid=EV/1052125709588

3.16 Subdivision of land and company title

Facts

The company was formed for the purpose of establishing a company title scheme under which holders of each class of shares in the company are given a right to occupy a designated part of the building constructed on the land owned by the company.

After 20 September 1985, the company purchased the property. The property was the only asset owned by the company.

There are two classes of shares issued in the company, A class and B class shares.

Entity 1 and 2 own the A class shares and Entity 3 and 4 own the B class shares. The shares give each entity the exclusive beneficial ownership in a particular part off the property.

The property contained dwellings on the land. The company applied and was granted development consent to demolish the pre-existing dwellings and construct a two-storey attached dual occupancy with garage. The building has no common property.

When registration of the subdivision occurs, the company will transfer the respective lots to the individual shareholders in accordance with their entitlements as the holders of their respective shares. These are the same entities that have held their rights to occupy a particular lot/unit in the building before the subdivision.

No proceeds were received for the demolition of the pre-existing dwelling.

No consideration is being paid for or received in relation to the transfer.

The shareholders will choose to exercise rollover relief provided for in section 124-190 of the ITAA 1997.

Questions

1. Will the subdivision of a property into separate Torrens titles be considered a CGT event in accordance with section 112-25 of the ITAA 1997?

2. Will the transfer of separate titles to shareholders be a CGT event and, if so, will the capital gain or loss be disregarded in accordance with section 118-42 of the ITAA 1997?
3. Will the transfer of the stratum unit title result in a deemed dividend under section 109C of the ITAA 1936?
4. Can the shareholders choose to apply the CGT roll-over relief outlined under section 124-190 of the ITAA 1997 on the transfer of the respective sub-divided property to the respective shareholders?

Ruling

Question 1

The ATO ruled No.

The subdivision of the property does not change the beneficial owner of the original or new asset, therefore in accordance with 112-25 of the ITAA 1997, no CGT event happens.

Question 2

The ATO ruled Yes.

Under section 118-42 of the ITAA 1997, the capital gain or loss made from transferring subdivided stratum units in a building is disregarded where the transfer of each unit is to the entity who had the right to occupy it prior to the subdivision.

Question 3

The ATO ruled No.

The ATO considered that the transfer of property is assessed under the CGT provisions and, therefore, included in assessable income rather than as a distribution profit from the company. Accordingly, the ATO concluded that the transfer of strata title will not result in a deemed dividend under section 109C of the ITAA 1936.

Question 4

The ATO ruled Yes.

The shareholders meet the requirements set out under section 124-190 of the ITAA 1997 to be able to choose to apply the CGT roll-over relief available under that provision.

ATO reference *Private Binding Ruling Authorisation No. 1052050926560*
w https://www.ato.gov.au/law/view/document?docid=EV/1052050926560

4 ATO and other materials

4.1 Treasury consultation on new individual residency framework

On 21 July 2023, the Treasury published a consultation paper on the new individual tax residency framework, first recommended by the Board of Taxation in its 2019 report *Individual Tax Residency Rules – a model for modernisation*. The framework was introduced by the former Government in the 2021-2022 Federal Budget.

Under the Board of Taxation's proposed individual residency model, the primary test would be a 'bright line' test – a person who is physically present in Australia for 183 days or more in any income year would be an Australian tax resident.

Where an individual was in Australia for less than 183 days in any income year, the individual would need to consider secondary tests under Step 2 that depended on a combination of physical presence and measurable, objective criteria.

The objective of the consultation is to seek feedback on the principles that underpin the framework of the proposed individual residency rules and to help to inform the Government's decision on whether to proceed with the individual tax residency framework, and to consider of the framework would produce appropriate outcomes in circumstances where the framework was developed prior to the COVID-19 pandemic.

The consultation paper is open for submissions up until 22 September 2023.

w https://treasury.gov.au/consultation/c2023-205344

4.2 Passenger movements data-matching program

On 14 July 2023, the ATO published a notice advising that the ATO will acquire passenger movement data from the Department of Home Affairs for 2023-24 through to 2025-26.

The data items include full name, date of birth, arrival date, departure date, passport information, and status types (such as visa status, residency, lawful, Australian citizen).

Data accessed will be electronically matched with certain sections of the ATO data holdings to identify taxpayers that can be provided with tailored information to help them meet their tax and superannuation obligations and to ensure compliance with tax laws.

TIP – if you want to access arrival and departure information for you (or your client with their consent) an application for this information can be made online at https://immi.homeaffairs.gov.au/entering-and-leaving-australia/request-movement-records/apply

This data is useful if assessing whether you or a client has been in Australia for 183 days or more.

w https://www.legislation.gov.au/Details/C2023G00816

4.3 Motor vehicle registries data-matching program

By a gazetted notice published on 18 July 2023, the ATO notified that it will acquire motor vehicle registry data from state and territory motor vehicle registry authorities for 2022-23 through to 2024-25.

The data items include:

1. identification details (names, addresses, phone numbers, date of birth for individuals, ABNs, ACNs, licenced dealer, fleet manager, leasing body); and
2. transaction details (date of transaction, sale price of vehicle, market value of the vehicle, vehicle's garage address, type of intended vehicle use, vehicle make and model, vehicle body types, vehicle manufacture year, engine capacity and cylinders, tare weight, gross weight, vehicle identification number, registration number, transaction receipt number, stamp duty exemptions, reason for stamp duty exemption, dealer's licence number).

The ATO estimates that records relating to approximately 1.5 million individuals will be obtained each financial year.

The data will be matched to assist the ATO to, among other things, identify relevant cases for administrative action, determine a tax compliance risk profile of taxpayers buying, selling, or acquiring motor vehicles.

COMMENT – the ATO data matching program can be expected to identify the purchase or sale of expensive vehicles where there is little demonstrable taxable income in an individual or entity's tax returns.

w https://www.legislation.gov.au/Details/C2023G00832

4.4 Decision Impact Statement – Gold Bullion

On 17 September 2023, the Commissioner of Taxation issued a decision impact statement in relation to the case of *Commissioner of Taxation v Complete Success Solutions Pty Ltd ATF Complete Success Solutions Trus*t [2023] FCAFC 19.

The case concerned the entitlement of Complete Success Solutions Trust to claim input tax credits for two GST periods, being:

1. the period from 1 August 2016 to 30 November 2016 (**First Period**), where the Complete Success Solutions Trust claimed to carry on an enterprise of acquiring scrap gold, and refining it into gold bullion for sale to dealers of precious metals;
2. the period from 1 December 2016 to 31 January 2017 (**Second Period**), where the Complete Success Solutions Trust claimed to have made GST-free export sales of scrap gold, and to be entitled to input tax credits for its acquisition of that scrap gold.

In each period, an entity in the supply chain, Manila Exchange, had made taxable supplies of adulterated gold but not remitted GST, obtaining a tax benefit. That gold had ultimately been acquired by the Complete Success Solutions Trust and used to make GST-free supplies.

In each period the Commissioner disallowed input tax credits on a number of bases, including that the anti-avoidance provisions in Division 165 of the GST Act, applied to cancel the tax benefit they obtained by claiming input tax credits.

In the AAT, the tribunal decided that in relation to the First Period, the Complete Success Solutions Trust made taxable supplies and was entitled to input tax credits on its acquisition of scrap gold. For the Second Period, the Complete Success Solutions Trust made GST-free exports and was and was entitled to input tax credits on its acquisition of scrap gold.

The AAT held that the anti-avoidance provisions did not apply as no entity had a dominant purpose of securing the entitlement of the Complete Success Solutions Trust to obtain the input tax credits.

On appeal to the Full Court, the Full Federal Court observed that when considering the application of Division 165, the section should be construed in the same manner as section 177D of Part IVA, namely that decisions regarding dominant purpose are an objective matter of fact. Furthermore, Division 165 requires the decision maker to consider the dominant purpose of each participant in the scheme, and whether the principal effect of the scheme or *part of the scheme* was that the Complete Success Solutions Trust would directly or indirectly gain a benefit from the scheme.

The Full Court noted that when considering the dominant purpose of the scheme, the Tribunal erred in only considering the scheme as a whole, rather than "parts of" the scheme, and by failing to consider the dominant purpose of all entities involved in the scheme.

The Full Court allowed the Commissioner's appeal and remitted the matter back to the AAT.

The Commissioner considers the Full Federal Court's decision supports the proposition that the absence of the avoider's knowledge about or wilful blindness to the actions of parties involved in entering into or carrying out the scheme as a whole, or various parts of it, does not prevent Division 165 from applying. Further, Division 165 will

operate to cancel the avoider's benefit where the relevant matters in section 165-15 demonstrate that any one or more of the scheme participants, or a part of the scheme, had the dominant purpose or the principal effect of the avoider obtaining that GST benefit.

COMMENT – at a high level, the effect of the decision in this case could be that if someone in a supply chain avoids paying GST, the Commissioner can rectify the position by making a determination against someone else in the supply chain, even in the absence of their knowledge of the avoidance.

Decision Impact Statement, *Commissioner of Taxation v Complete Success Solutions Pty Ltd ATF Complete Success Solutions Trust* [2023] FCAFC 19
w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/NSD1089of2021/00001

4.5 Media Release – New Victorian homes to go electric from 2024

The Victorian Government has announced a number of new measures to phase out gas in new homes built in Victoria.

From 1 January 2024, planning permits for new homes and residential subdivisions will only allow connections to all-electric networks. These changes will extend to new public and social housing delivered by Homes Victoria.

To assist with the transition, the Victorian Government has announced measures including that it will:

1. invest $10 million in a new Residential Electrification Grants program, which will allow grants to be made available to volume home builders, developers and others to provide bulk rebates for solar panels, solar hot water and heat pumps to new home buyers up front;
2. offer $1,400 solar panel rebates and interest free loans of $8,800 for household batteries; and
3. offer Victorian Energy Upgrades (VEU) gas to electric rebates to upgrade heating and cooling and hot water heaters.

These decisions follow the 2022 reform that removed the requirements for gas connections for new Victorian homes.

w https://www.lilydambrosio.com.au/media-releases/new-victorian-homes-to-go-all-electric-from-2024/

4.6 ATO Corporate Plan

The ATO has released their 2023-24 corporate plan.

The purpose of the corporate plan is to contribute to the economic and social well-being of Australians by fostering willing participation in the tax, superannuation, and registry systems.

The strategic objectives for the corporate plan are as follows:

1. to build community confidence by sustainably reducing the tax gap and providing assurance across the tax, superannuation, and registry systems;
2. design for better tax, superannuation, and registry systems to make it easy to comply and hard not to;
3. client experience and interactions are well designed, tailored, fair and transparent;
4. work with others to deliver efficient and effective tax, superannuation, and registry systems;
5. provide a high-performing workforce with a focus on integrity, the right culture, capability and tools to deliver the best client and staff experience;
6. use data, information and insights to deliver value for clients and inform decision-making;
7. deliver reliable technology and digital services and contemporary client experience; and
8. strive for operational excellence.

The corporate plan focuses on the following eight key areas to enhance the integrity of the tax, superannuation, and registry systems. The eight key areas are:

1. improve small business tax performance;
2. manage cybersecurity;

3. address collectable debt;
4. protecting the system and clients against fraud;
5. multinational tax performance;
6. modernising business registry services;
7. superannuation guarantee integrity; and
8. continue to invest in data and digital.

In relation to superannuation guarantee integrity the ATO state that their key deliverables are to:

1. create a transparent view of employee's superannuation guarantee for all funds and all employers in once place;
2. improve nudges to support employers to self-correct issues and keep track of their obligations;
3. focus on employer and superannuation fund reporting timeliness, completeness and accuracy; and
4. include new measurements of superannuation guarantee charge raised, collected and distributed in an annual report.

ATO Corporate Plan 2023-24
w https://www.ato.gov.au/About-ATO/About/Corporate-plan/

4.7 Media Release – Response to the PwC Tax Leaks

On 6 August 2023, the Federal Government has announced reforms to target tax advisor misconduct and restore public confidence in the Australian tax system following the PwC tax leaks scandal.

These reforms cover three priority areas:

1. strengthening the integrity of the tax system;
2. increasing the powers of regulators; and
3. strengthening regulatory arrangements to ensure they are fit for purpose.

The actions proposed by the Government under each priority area is summarised in the table below:

Key Priority Area	Action
Strengthening the integrity of the tax system	1. Increase maximum penalties for advisers and firms who promote tax exploitation schemes from $7.8 million to over $780 million; 2. Expand tax promoter penalty laws so they're easier for the ATO to apply to advisers and firms who promote tax avoidance; and 3. Increase the time limit for the ATO to bring Federal Court proceedings on promoter penalties from four years to six years after the conduct occurred.
Increasing the power of regulators	1. Remove limitations in the tax secrecy laws that were a barrier to regulators acting in response to PwC's breach of confidence; 2. Enable the ATO and Tax Practitioners Board to refer ethical misconduct by advisers (including but not limited to confidentiality breaches) to professional associations for disciplinary action; 3. Protect whistleblowers when they provide the Tax Practitioners Board with evidence of tax agent misconduct; 4. Give the Tax Practitioners Board more time – up to 24 months – to complete complex investigations; and 5. Improve the Tax Practitioners Board's public register of practitioners, so that people have more transparency over agent and firm misconduct.
Strengthening regulatory arrangements	1. Implement remaining recommendations from the independent review of the Tax Practitioners Board, including strengthening the range of sanctions available to the Tax Practitioners Board; 2. A Treasury review of the promoter penalty laws to ensure they address the types of promoter activity prevalent today, including

	schemes that are bespoke, complex, and/or operate across jurisdictional boundaries; 3. A Treasury review of emerging fraud and threats to clamp down on systemic abuse of our tax system perpetrated by tax agents and other bad actors; 4. A Treasury and Attorney-General's Department joint review of the use of legal professional privilege in Commonwealth investigations, with options for Government to respond to concerns that some claims of privilege are being used to obstruct or frustrate investigations; 5. A Treasury examination of the regulation of consulting, accounting and auditing firms to consider whether reforms are needed. This work will require collaboration with states and territories, given cross-jurisdictional regulation of partnerships, as well as engagement with ongoing Parliamentary committee inquiries; 6. A Treasury review of the compulsory information gathering powers of the ATO to ensure it has the right tools to perform its role effectively and enable it to assist law enforcement agencies to investigate serious criminal offences perpetrated against the tax and superannuation systems; 7. A Treasury review of the secrecy provisions that apply to the ATO and Tax Practitioner Board to consider whether there are further circumstances in which it is in the broad public interest for information obtained by these regulators to be shared with other regulatory agencies; 8. A Department of Finance review into the use of confidentiality arrangements across all Government agencies to ensure they are fit for purpose, legally binding and enforceable. The review will also identify opportunities to strengthen the management of conflicts of interest in contracts; and 9. A Department of Finance review to explore options to increase the transparency and visibility of where Commonwealth contracts have been terminated for material breach.

w https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/government-taking-decisive-action-response-pwc-tax-leaks